

# NEPA COMPLIANCE IN FISHERIES MANAGEMENT: THE PROGRAMMATIC SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT ON ALASKAN GROUND FISH FISHERIES AND IMPLICATIONS FOR NEPA REFORM

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*Increasing calls for NEPA “streamlining” have spurred debates over NEPA reform, including programmatic analyses and tiering. This Article provides a detailed case study of NOAA Fisheries’ programmatic supplemental environmental impact statement on the Alaskan groundfish fishery to illustrate the challenges and opportunities inherent in developing a major programmatic NEPA document under extant legal requirements and regulatory guidance. The author suggests that agencies are capable of improving NEPA implementation within the current framework, but that there may be a role for new regulatory guidance aimed at clarifying areas of legal uncertainty.*

## I. INTRODUCTION

There has been a “quiet revolution” at many federal agencies regarding the use of broad-based National Environment Policy Act (“NEPA”)<sup>1</sup> assessments.<sup>2</sup> Programmatic Environmental Impact Statements (“PEIS”), which are used to evaluate broad policies, plans, and programs,<sup>3</sup> have tremendous potential to increase administrative efficiency without sacrificing quality. A well-crafted PEIS facilitates agency planning and provides an effective analytical foundation for subsequent project-specific NEPA documents, a process known as “tiering.”<sup>4</sup> They have been championed as “valuable decisionmaking [sic] tools” that “can reduce or eliminate redundant and duplicative analyses and effectively address cumulative effects.”<sup>5</sup>

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<sup>1</sup> National Environmental Policy Act of 1969 (“NEPA”) §§ 101–209, 42 U.S.C. §§ 4321–4346(b) (2005).

<sup>2</sup> Jon C. Cooper, *Broad Programmatic, Policy and Planning Assessments under the National Environmental Policy Act and Similar Devices: A Quiet Revolution in an Approach to Environmental Considerations*, 11 PACE ENVTL. L. REV. 89, 95 (1993).

<sup>3</sup> See 40 C.F.R. §§ 1502.4(b)–(c), 1508.25 (2005); see also *infra* notes 39–44 and accompanying text.

<sup>4</sup> See *infra* note 74 and accompanying text.

<sup>5</sup> NEPA TASK FORCE, COUNCIL ON ENVIRONMENTAL QUALITY (“CEQ”), THE NEPA TASK FORCE REPORT TO THE COUNCIL ON ENVIRONMENTAL QUALITY: MODERNIZING NEPA IMPLEMENTATION 35 (2003), available at <http://ceq.eh.doe.gov/ntf/report/finalreport.pdf> [hereinafter TASK FORCE REPORT].

Nevertheless, NEPA reform proposals are on the rise,<sup>6</sup> and the PEIS process has not escaped scrutiny. Recently, the NEPA Task Force established by the Council on Environmental Quality (“CEQ”) reported that PEISs “are not meeting agency and stakeholder needs” and “are not being fully used for their intended purpose.”<sup>7</sup> Despite the small number of PEISs prepared each year relative to other NEPA documents,<sup>8</sup> their size, scope, and potential utility have moved programmatic analyses closer to the top of the NEPA reform agenda.<sup>9</sup> Legal guidance for programmatic analyses and tiering is sparse, and many questions remain unresolved and up for debate.<sup>10</sup> This raises an important question: Does the current regulatory framework allow agencies to effectively utilize programmatic analyses, or should new guidance be considered?<sup>11</sup>

This Article explores these issues by examining the PEIS process in the context of a highly controversial and litigious federal action: authorization of the Alaska groundfish fisheries. In *Greenpeace v. National Marine Fisheries Service*,<sup>12</sup> the U.S. District Court for the Western District of Washington held that the National Oceanic and Atmospheric Administration (“NOAA”) Fisheries’ Supplemental Environmental Impact Statement (“SEIS”) on Total Allowable Catch<sup>13</sup> specifications for the Alaskan

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<sup>6</sup> See Bradley C. Karkkainen, *Whither NEPA?*, 12 N.Y.U. ENVTL. L.J. 333, 336 (2004) [hereinafter Karkkainen, *Whither NEPA?*] (stating that NEPA is at a “crossroads” for the first time in a generation). For more on the NEPA reform debate, see, for example, Dinah Bear, *Some Modest Suggestions for Improving the National Environmental Policy Act*, 43 NAT. RESOURCES J. 931, 932 (2003); Sharon Buccino, *NEPA Under Assault: Congressional and Administrative Proposals Would Weaken Environmental Review and Public Participation*, 12 N.Y.U. ENVTL. L.J. 50 (2003); James L. Connaughton, *Modernizing the National Environmental Policy Act: Back to the Future*, 12 N.Y.U. ENVTL. L.J. 1 (2003); Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government’s Environmental Performance*, 102 COLUM. L. REV. 903 (2002) [hereinafter Karkkainen, *Towards a Smarter NEPA*]; William H. Rodgers, Jr., & Rachael Paschal Osborn, Editorial, *Strengthen Right to Healthy Environment*, SEATTLE POST-INTELLIGENCER, Apr. 28, 2005, at B7.

<sup>7</sup> NEPA, TASK FORCE REPORT, *supra* note 5, at 35–36.

<sup>8</sup> Currently, the vast majority of federal actions are evaluated using an Environmental Assessment/Finding of No Significant Impact (“EA/FONSI”). Approximately 500 Environmental Impact Statements (“EIS”) are prepared annually, typically for large, controversial federal actions. Almost one-quarter of these can be classified as PEISs (prepared for policies, plans, and programs). See RONALD E. BASS ET AL., *THE NEPA BOOK: A STEP-BY-STEP GUIDE ON HOW TO COMPLY WITH THE NATIONAL ENVIRONMENTAL POLICY ACT* 85–86 (2001). The actual number is difficult to determine, as some EISs are programmatic in nature although not expressly labeled as such. THE CLARK GROUP, PUBLIC AND EXPERTS’ REVIEW OF THE NATIONAL ENVIRONMENTAL POLICY ACT TASK FORCE REPORT, MODERNIZING NEPA IMPLEMENTATION, TO THE CHAIRMAN OF THE COUNCIL ON ENVIRONMENTAL QUALITY 10, available at [http://ceq.eh.doe.gov/ntf/CEQ\\_Draft\\_Final\\_Roundtable\\_Report.pdf](http://ceq.eh.doe.gov/ntf/CEQ_Draft_Final_Roundtable_Report.pdf) (last visited Apr. 25, 2006) [hereinafter ROUNDTABLE REPORT].

<sup>9</sup> See *infra* notes 96–97 and accompanying text.

<sup>10</sup> Cooper, *supra* note 2, at 94–95; see also *infra* notes 37–38 and accompanying text.

<sup>11</sup> See, e.g., James T. B. Tripp & Nathan G. Alley, *Streamlining NEPA’s Environmental Review Process: Suggestions for Agency Reform*, 12 N.Y.U. ENVTL. L.J. 74 (2003).

<sup>12</sup> *Greenpeace v. National Marine Fisheries Serv.* 55 F. Supp. 2d 1248 (W.D. Wash. 1999).

<sup>13</sup> “Total allowable catch is the total regulated catch from a stock in a given time period, usually a year.” Northeast Fisheries Science Center, Fisheries Technical Terms, [http://www.nefsc.noaa.gov/techniques/tech\\_terms.html](http://www.nefsc.noaa.gov/techniques/tech_terms.html) (last visited Apr. 25, 2006).

groundfish fisheries<sup>14</sup> failed to comply with NEPA because it was too narrow and did not analyze the cumulative effects of the relevant Fishery Management Plans (“FMP”) in their entirety. Instead, the court ordered NOAA Fisheries to prepare a broad Programmatic Supplemental Environmental Impact Statement (“PSEIS”) “analyzing the environmental impacts of the FMPs as a whole on the North Pacific ecosystem.”<sup>15</sup> Five years later, NOAA Fisheries published its final PSEIS<sup>16</sup> to comply with the court’s order and inform Alaska groundfish fishery management decisions for years to come. This programmatic supplemental NEPA analysis, the first of its kind for NOAA Fisheries,<sup>17</sup> illustrates the challenges and opportunities inherent in developing a PEIS under court order and within the extant regulatory framework. This Article does not evaluate the legal fitness of the PSEIS itself; rather, it uses the PSEIS process as an example to raise important issues that are broadly relevant to agencies grappling with complex and controversial issues in programmatic analysis and tiering.

The Article begins by reviewing the legal and policy context in which the PSEIS arose. Part II reviews key aspects of the current legal framework governing programmatic NEPA analyses and tiering and summarizes findings and recommendations on PEIS reform in the NEPA Task Force Report. Part III provides a brief overview of the NEPA process in federal fisheries management as background for Part IV, the case study, which presents an inside-the-agency look at NOAA Fisheries’ PSEIS drafting process. Part V analyzes the case study in light of the NEPA Task Force Report’s recommendations for reforming the PEIS process. The Article concludes that agencies are capable of improving NEPA implementation within the current legal framework, but that there may be a limited role for new regulatory guidance aimed at clarifying legal uncertainty regarding the functions and roles of programmatic analyses and tiering.

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<sup>14</sup> NMFS, NOAA ALASKA REGION, GROUND FISH TOTAL ALLOWABLE CATCH SPECIFICATIONS AND PROHIBITED SPECIES CATCH LIMITS UNDER THE AUTHORITY OF THE FISHERY MANAGEMENT PLANS FOR THE GROUND FISH FISHERY OF THE BERING SEA AND ALEUTIAN ISLANDS AREA AND GROUND FISH OF THE GULF OF ALASKA: FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT (Dec. 1998) (on file with the Harvard Environmental Law Review).

<sup>15</sup> *Greenpeace*, 55 F. Supp. 2d at 1276.

<sup>16</sup> NMFS ALASKA REGION, NOAA, ALASKA GROUND FISH FISHERIES FINAL PROGRAMMATIC SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT (2004), available at <http://www.fakr.noaa.gov/sustainablefisheries/seis/final062004/COVER.pdf>.

<sup>17</sup> Memorandum from Steven Pennoyer, Adm’r, NOAA Fisheries Alaska Region, to Andrew A. Rosenberg, NOAA Deputy Adm’r for Fisheries (Oct. 25, 1999) (“This programmatic SEIS will be the *first* of its type for NMFS and NOAA.”) (on file with the Harvard Environmental Law Review).

## II. LEGAL FRAMEWORK FOR PROGRAMMATIC ANALYSES AND TIERING

## A. NEPA Overview

An Environmental Impact Statement (“EIS”) must be prepared for “major federal actions significantly affecting the quality of the human environment.”<sup>18</sup> The NEPA process typically begins with the preparation of an environmental assessment (“EA”), which provides “sufficient evidence and analysis for determining whether” the proposed action meets this standard.<sup>19</sup> If the agency determines that the action does not significantly affect the environment, it issues a Finding of No Significant Impact (“FONSI”) explaining its reasoning.<sup>20</sup> Otherwise, it must prepare an EIS.<sup>21</sup>

The EIS process is governed by NEPA, CEQ regulations and guidance, and each agency’s individual NEPA compliance procedures.<sup>22</sup> The lead agency publishes a Notice of Intent (“NOI”)<sup>23</sup> in the Federal Register describing the proposed action and inviting interested parties to help determine the scope of the EIS.<sup>24</sup> Next, the agency develops a Draft EIS (“DEIS”)<sup>25</sup> which is circulated for comment.<sup>26</sup> The agency then issues its Final EIS (“FEIS”),<sup>27</sup> chooses an alternative, and issues a Record of Decision (“ROD”) concisely explaining its reasoning.<sup>28</sup>

Environmental analysis does not necessarily end with the production of a legally compliant EIS. The agency must prepare an SEIS if “[t]here are significant new circumstances or information relevant to the environmental concerns that bear on the proposed action or its impacts.”<sup>29</sup> Although the mere passage of time does not automatically trigger the need for an SEIS, agencies are advised to reexamine the original EIS every five years to determine whether an SEIS is needed.<sup>30</sup> An SEIS focuses only on the

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<sup>18</sup> 42 U.S.C. § 4332(2)(c) (2005).

<sup>19</sup> 40 C.F.R. § 1508.9 (2005). It is not necessary to prepare an EA if the agency decides to proceed directly to preparing an EIS. *Id.* § 1501.3(a).

<sup>20</sup> *Id.* §§ 1501.4(e), 1508.13.

<sup>21</sup> *See id.* §§ 1501.3–4.

<sup>22</sup> CEQ regulations and guidance are available at [http://ceq.eh.doe.gov/nepa/regs/ceq/toc\\_ceq.htm](http://ceq.eh.doe.gov/nepa/regs/ceq/toc_ceq.htm). For further information on the NEPA process, see BASS ET AL., *supra* note 8, at 13–14.

<sup>23</sup> 40 C.F.R. § 1508.22 (2005).

<sup>24</sup> *Id.* § 1501.7.

<sup>25</sup> *Id.* § 1502.9.

<sup>26</sup> *Id.* § 1503.1.

<sup>27</sup> *Id.* § 1503.4; Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,034–35 (Mar. 23, 1981), *as amended*, 51 Fed. Reg. 15,618 (Apr. 25, 1986) (withdrawing guidance in Question 20 on requirement of a worst-case analysis).

<sup>28</sup> 40 C.F.R. § 1505.2 (2005).

<sup>29</sup> *Id.* § 1502.9(c)(1).

<sup>30</sup> Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations, 46 Fed. Reg. at 18,036.

portions of the EIS that require updating; the agency need not repeat the scoping process or reiterate all of the information in the original EIS.<sup>31</sup>

Despite NEPA's remarkably progressive substantive policy goals,<sup>32</sup> the U.S. Supreme Court has declared that the statute is "essentially procedural"<sup>33</sup> and "does not mandate particular results."<sup>34</sup> Provided that the agency takes a "hard look" at the alternatives and diligently adheres to the required NEPA procedures, courts will uphold the EIS unless it is arbitrary, capricious, or an abuse of discretion.<sup>35</sup> Nevertheless, NEPA often exerts a substantive impact on agency decision-making through improved planning, transparency, public participation, and litigation pressure.<sup>36</sup>

### *B. What Makes the PEIS Process Unique?*

A PEIS is essentially a subspecies of EIS, thus the legal framework governing EIS production generally also applies to programmatic analysis and tiering. However, broad-based assessments introduce unique opportunities and challenges that set them apart from typical narrowly defined project-level NEPA documents. Nevertheless, very little specialized regulatory guidance exists regarding programmatic analysis and tiering. NEPA itself does not expressly define programmatic analyses or tiering, and CEQ regulations and guidance discuss these topics only briefly and in very general terms. Courts have played a significant role in fleshing out these concepts over time, but major unresolved questions remain.<sup>37</sup> Given this dearth of regulatory guidance, agencies have developed individual approaches to programmatic analysis and tiering.<sup>38</sup> This situation has both benefits and drawbacks. Each agency ostensibly retains considerable flexibility to shape and utilize the PEIS process according to its unique circumstances, but may find its decisions difficult to justify in the event of a legal challenge. The following sections summarize key factors that can make the PEIS process much more challenging than that required for a typical EIS.

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<sup>31</sup> BASS ET AL., *supra* note 8, at 85.

<sup>32</sup> *See generally* 42 U.S.C. § 4331 (2005).

<sup>33</sup> *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 558 (1978).

<sup>34</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

<sup>35</sup> *See Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 377–78 (1989); 5 U.S.C. § 706(2)(A) (2005).

<sup>36</sup> *See Stark Ackerman, Observations on the Transformation of the Forest Service: The Effects of the National Environmental Policy Act on U.S. Forest Service Decision Making*, 20 ENVTL. L. 703 (1990) (asserting that NEPA implementation has fundamentally altered the agency's decision process); BASS ET AL., *supra* note 8, at 181.

<sup>37</sup> Cooper, *supra* note 2, at 94–95.

<sup>38</sup> *Id.* at 114.

### 1. Definition/When To Prepare

The decision to prepare a programmatic EIS is largely driven by the nature of the proposed action. CEQ regulations implicitly provide for three different types of EISs: project-specific, programmatic, and legislative.<sup>39</sup> Whereas a project-specific EIS is prepared for a discrete, specific activity (such as a construction project), a programmatic EIS is prepared for broad federal actions (such as policies, plans, or programs).<sup>40</sup> Programmatic analysis may also be appropriate “when similar actions, viewed with other reasonably foreseeable or proposed agency actions, share common timing or geography.”<sup>41</sup> This area-wide or overview EIS provides a means of analyzing a proposal that encompasses a linked set of actions in the same general location, or activities that share relevant similarities such as common timing, impacts, alternatives, implementation methods, or subject matter.<sup>42</sup> In addition, actions which are connected, cumulative, or similar should be analyzed in the same EIS.<sup>43</sup> Whether a particular set of proposals should be considered in a single programmatic EIS requires a fact-based inquiry into the nature of the projects and the extent of their interconnection.<sup>44</sup>

With a few notable exceptions,<sup>45</sup> courts typically defer to an agency’s decision whether or not to prepare a PEIS, ensuring only that the agency has taken the requisite “hard look.”<sup>46</sup> Nevertheless, many agencies choose to conduct a programmatic analysis even when it may not be legally required. Thanks to its general policy-level focus, the PEIS is thought to be a particularly useful means of strategically integrating environmental considerations at an early stage in the agency policy and planning process.<sup>47</sup> It is also an opportunity for agency officials to take a comprehensive top-down view of a proposed policy.<sup>48</sup> Some agencies, however, remain reluctant to embrace the PEIS approach, citing concerns about cost, delay, and inefficiency.<sup>49</sup>

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<sup>39</sup> BASS ET AL., *supra* note 8, at 43–44; 40 C.F.R. §§ 1508.18, 1506.8 (2005).

<sup>40</sup> BASS ET AL., *supra* note 8, at 43–44.

<sup>41</sup> Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,033 (Mar. 23, 1981).

<sup>42</sup> 40 C.F.R. § 1502.4(c) (2005).

<sup>43</sup> *Id.* § 1508.25.

<sup>44</sup> *See, e.g.*, Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985) (construction of road and timber sales are “inextricably intertwined” actions mandating a single EIS); Found. on Econ. Trends v. Lyng, 817 F.2d 882 (D.C. Cir. 1987) (animal research projects too diverse and discrete to require programmatic EIS); Scientists’ Inst. for Pub. Info. v. Atomic Energy Comm’n, 481 F.2d 1079 (D.C. Cir. 1973) (PEIS required on breeder reactor program).

<sup>45</sup> Greenpeace v. Nat’l Marine Fisheries Serv., 55 F. Supp. 2d 1248 (W.D. Wash. 1999); *see infra* notes 184–203 and accompanying text.

<sup>46</sup> Cooper, *supra* note 2, at 103 (citing Kleppe v. Sierra Club, 427 U.S. 390 (1976)).

<sup>47</sup> *See* BASS ET AL., *supra* note 8, at 63.

<sup>48</sup> Cooper, *supra* note 2, at 116.

<sup>49</sup> *Id.* at 117.

## 2. Scoping

The scope of an EIS consists of “the range of actions, alternatives, and impacts to be considered.”<sup>50</sup> Compared with project-level NEPA documents, PEISs usually encompass a broader geographic area, focus on cumulative impacts and policy-level alternatives, and “tend to be more generic and conceptual.”<sup>51</sup> The “broadly defined and structurally limitless” nature of the PEIS can make the scoping process quite challenging.<sup>52</sup> This problem is particularly acute in the case of large, complex Resource Management Plans (“RMP”), where the proposed action has a “cascading effect” that changes the impact of other management plan actions, making it possible to generate hundreds of potential impacts based on various combinations of actions.<sup>53</sup> Moreover, because programmatic assessments of comprehensive RMPs analyze fundamental policy choices that will govern management decisions for years to come, the stakes are often quite high. Resource management and allocation decisions are scientifically informed policy judgments, and as such, they involve contentious political choices.<sup>54</sup> The battle begins at the politically volatile scoping stage, where stakeholders with conflicting priorities have their first shot at influencing the breadth and depth of the analysis.

## 3. Defining the Alternatives

Key to scoping is the perilous business of defining the alternatives in a programmatic analysis. The analysis of alternatives is the “heart” of an EIS, intended to “sharply defin[e] the issues and provid[e] a clear basis for choice among options.”<sup>55</sup> An EIS must “[r]igorously explore and objectively evaluate all reasonable alternatives,” devoting “substantial treatment to each alternative . . . so that reviewers may evaluate their comparative merits.”<sup>56</sup> Programmatic assessments “cross the line from purely technical/scientific assessments of the environmental impacts of a program to ones that consider many other dimensions,”<sup>57</sup> including controversial policy choices. Thus, the challenge is not merely defining the number or scope of alternatives, but also how to frame a set of broad policy choices

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<sup>50</sup> 40 C.F.R. § 1508.25 (2005).

<sup>51</sup> BASS ET AL., *supra* note 8, at 64.

<sup>52</sup> Memorandum from Craig R. O'Connor, Acting Gen. Counsel, to William T. Hogarth, Assistant Adm'r for Fisheries (Dec. 11, 2001), *available at* [http://www.nepa.noaa.gov/progr\\_GC\\_guidance.pdf](http://www.nepa.noaa.gov/progr_GC_guidance.pdf) [hereinafter PEIS Guidance Memo].

<sup>53</sup> See NAT'L ACAD. OF PUB. ADMIN., COURTS, CONGRESS, AND CONSTITUENCIES: MANAGING FISHERIES BY DEFAULT 49 (2002), *available at* [http://www.napawash.org/Pubs/NMFS\\_July\\_2002.pdf?OpenDocument](http://www.napawash.org/Pubs/NMFS_July_2002.pdf?OpenDocument) [hereinafter NAPA].

<sup>54</sup> See Cooper, *supra* note 2, at 121; Ackerman, *supra* note 36, at 721–22 (discussing the political dimensions of forest management decisions).

<sup>55</sup> 40 C.F.R. § 1502.14 (2005).

<sup>56</sup> *Id.*

<sup>57</sup> Cooper, *supra* note 2, at 120.

in an objective, analytically meaningful way. In the PEIS context, agencies should carefully define the statement of purpose and need, since it is used to determine the reasonable range of alternatives.<sup>58</sup> A broad statement of purpose and need may be appropriate for a PEIS, yet it necessitates a wider range of alternatives and may make it harder for the agency to justify excluding certain alternatives.<sup>59</sup>

There is no bright-line rule for the number of alternatives that must be addressed in an EIS. At a bare minimum, the agency must analyze two alternatives: the no action alternative (generally embodying the status quo) and one other reasonable alternative.<sup>60</sup> Courts apply a “rule of reason” in evaluating whether the number and range of alternatives is adequate under NEPA.<sup>61</sup> The rule of reason governs which alternatives to discuss, as well as the extent to which they must be analyzed.<sup>62</sup> CEQ acknowledges that certain proposals could theoretically spawn an infinite number of alternatives; thus the agency need only discuss a “reasonable number of examples, covering the *full spectrum* of alternatives.”<sup>63</sup>

#### 4. Cumulative Impacts Analysis

All EISs must analyze direct, indirect, and cumulative impacts.<sup>64</sup> Cumulative impact “results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency . . . or person undertakes such other actions.”<sup>65</sup> This definition encompasses “individually minor but collectively significant actions taking place over a period of time.”<sup>66</sup> Analyzing cumulative impacts is especially challenging “primarily because of the difficulty of defining the geographic (spatial) and time (temporal) boundaries.”<sup>67</sup> The analysis becomes cumbersome and unmanageable if the boundaries

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<sup>58</sup> BASS ET AL., *supra* note 8, at 94.

<sup>59</sup> *Id.*

<sup>60</sup> See *Communities, Inc. v. Busey*, 956 F.2d 619, 627 (6th Cir. 1992) (upholding EIS with only two alternatives, where the agency thoroughly explained its reasons for limiting NEPA analysis to those alternatives).

<sup>61</sup> *Natural Res. Def. Council v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988); see also *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026, 18,026–27 (Mar. 23, 1981).

<sup>62</sup> *Alaska v. Andrus*, 580 F.2d 465, 475 (D.C. Cir. 1978), *vacated in part as moot*, 439 U.S. 922 (1978).

<sup>63</sup> *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026 18,027 (Mar. 23, 1981) (emphasis in original).

<sup>64</sup> 40 C.F.R. § 1508.25(c) (2005).

<sup>65</sup> *Id.* § 1508.7.

<sup>66</sup> *Id.*

<sup>67</sup> CEQ, EXECUTIVE OFFICE OF THE PRESIDENT, CONSIDERING CUMULATIVE EFFECTS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT, at v (1997), available at <http://ceq.eh.doe.gov/nepa/ccenepa/exec.pdf>.

are drawn too broadly, yet it will be incomplete if they are drawn too narrowly.<sup>68</sup>

These challenges are particularly acute in the PEIS context. “The thesis underlying programmatic EISs is that a systematic program is likely to generate disparate yet related impacts” which are cumulative or synergistic in nature.<sup>69</sup> Because the PEIS typically provides a broad overview of a complex, multifaceted, interconnected program, the cumulative impacts analysis is particularly significant.<sup>70</sup> In a PEIS, the cumulative impacts analysis cannot merely summarize “relevant past projects” or provide “very broad and general statements devoid of specific, reasoned conclusions.”<sup>71</sup> It must be sufficiently detailed to help managers decide “whether, or how, to alter the program to lessen cumulative impacts.”<sup>72</sup> Because of the requirement to look both forward and backward in time when assessing cumulative impacts, it is also crucial that the PEIS adequately assess the environmental baseline.<sup>73</sup>

### 5. Tiering

Ideally, the PEIS should facilitate production of subsequent project-level EISs or EAs through the process of “tiering.”<sup>74</sup> Tiering is defined as:

[T]he coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared.<sup>75</sup>

This process “allows an agency to avoid duplication of paperwork through the incorporation by reference of the general discussions and relevant specific discussions from an [EIS] of broader scope into one of lesser scope or vice versa [sic].”<sup>76</sup> Thus, a quality PEIS can greatly enhance admin-

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<sup>68</sup> *Id.*

<sup>69</sup> *Nat'l Wildlife Fed'n v. Appalachian Reg'l Comm'n*, 677 F.2d 883, 888 (D.C. Cir. 1981).

<sup>70</sup> PEIS Guidance Memo, *supra* note 52, at 10.

<sup>71</sup> *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 809–11 (9th Cir. 1999) (rejecting an EIS containing cumulative impact statements “far too general and one-sided” to comply with NEPA).

<sup>72</sup> *Id.* at 810 (citing *City of Carmel-By-The-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1160 (9th Cir. 1997)) (internal quotation omitted).

<sup>73</sup> PEIS Guidance Memo, *supra* note 52, at 11.

<sup>74</sup> *BASS ET AL.*, *supra* note 8, at 64.

<sup>75</sup> 40 C.F.R. § 1508.28 (2005).

<sup>76</sup> Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act, 46 Fed. Reg. 18,026, 18,033 (Mar. 23, 1981); *see also* 40 C.F.R. § 1502.20 (2005).

istrative efficiency by serving as the foundation for many subsequent, narrowly focused tiered documents.

Yet these benefits will go unrealized if agencies do not carefully avoid tiering's potential pitfalls. Although courts have endorsed the tiering process, they do not tolerate attempts to use it as an improper shortcut to full NEPA compliance. First, the underlying PEIS must be adequate. Agencies cannot tier from a non-NEPA document,<sup>77</sup> a stale PEIS,<sup>78</sup> or a PEIS that fails to adequately address plans for subsequent site-specific projects.<sup>79</sup> This may be a problem where the agency has implemented an ongoing program for many years without a PEIS, relying on piecemeal NEPA documents which are later determined to have significant cumulative impacts.<sup>80</sup> Moreover, agencies must not attempt to tier one site-specific analysis to another site-specific analysis, as this amounts to impermissible piecemealing.<sup>81</sup>

Courts frown on attempts to use programmatic analyses and tiering as a "shell game" to avoid a comprehensive, detailed consideration of impacts by vaguely describing issues in the PEIS and then failing to address them adequately in the tiered document.<sup>82</sup> A broad PEIS is not a substitute for the detailed analysis required to implement site-specific projects.<sup>83</sup> Inadequacies in a tiered document cannot be cured by reference to the underlying PEIS.<sup>84</sup> A site-specific NEPA analysis will be required if there is a significant difference between the specific project and the conditions as analyzed in the underlying EIS.<sup>85</sup> However, agencies may defer a detailed analysis of cumulative effects in a PEIS if the site-specific projects are not yet approved.<sup>86</sup>

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<sup>77</sup> *Sierra Club v. Dombeck*, 161 F. Supp. 2d 1052, 1072 (D. Ariz. 2001); *Northcoast Env'tl. Ctr. v. Glickman*, 136 F.3d 660, 670 (9th Cir. 1998).

<sup>78</sup> *League of Wilderness Defenders v. Marquis-Brong*, 259 F. Supp. 2d 1115, 1122–23 (D. Or. 2003).

<sup>79</sup> *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 811 (9th Cir. 1999); *BASS ET AL.*, *supra* note 8, at 123.

<sup>80</sup> PEIS Guidance Memo, *supra* note 52, at 14.

<sup>81</sup> *City of Williams v. Dombeck*, 151 F. Supp. 2d 9, 19 n.9 (D.D.C. 2001).

<sup>82</sup> *But cf. Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 66–73 (2004) (endorsing, seemingly, an analogous "shell game" when it comes to defining "discrete agency action" and characterizing the scope of "major federal action").

<sup>83</sup> *City of Tenakee Springs v. Block*, 778 F.2d 1402, 1407 (9th Cir. 1985); *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998).

<sup>84</sup> *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 997–98 (9th Cir. 2004).

<sup>85</sup> *Ventling v. Bergland*, 479 F. Supp. 174, 180 (8th Cir. 1979).

<sup>86</sup> *Salmon River Concerned Citizens v. Robertson*, 798 F. Supp. 1434, 1440 (E.D. Cal. 1992).

### 6. Length and Detail

The level of detail in an EIS is directly related to the scope of the proposed action.<sup>87</sup> In the PEIS context, the critical inquiry is at what stage the project's site-specific impacts should be analyzed in detail.<sup>88</sup> Courts have held that it is preferable to defer the detailed analysis until "when a specific development action is to be taken, not at the programmatic level."<sup>89</sup> This threshold is reached when the agency proposes to make "irreversible and irretrievable commitments of resources" to a project at a particular site.<sup>90</sup> Given the broad yet general scope of the PEIS, this precedent indicates that the PEIS analysis should be comprehensive in breadth but not necessarily in detail. This standard does not relieve the agency of responsibility for providing a detailed analysis of site-specific impacts; rather, it suggests that these should be explored in subsequent tiered documents.

CEQ advises that an EIS should be "concise," "analytic rather than encyclopedic," and "no longer than absolutely necessary" based on potential environmental problems and project size.<sup>91</sup> Furthermore, EISs should be limited to 150 pages, or up to 300 pages "for proposals of unusual scope or complexity."<sup>92</sup> CEQ suggests that an EIS on a large, complex project should be doable in twelve months or less, yet acknowledges that programmatic analyses may take longer.<sup>93</sup>

### C. NEPA Task Force Report: Reforming Programmatic Analyses and Tiering

NEPA streamlining efforts received a boost in 2002 when CEQ chairman James L. Connaughton established the NEPA Task Force to "review current NEPA implementation and procedures to determine opportunities to improve and modernize the NEPA process."<sup>94</sup> The Task Force interviewed individuals from federal agencies, state and local governments, tribes, and interest groups, and reviewed public comments, literature, reports, and case studies.<sup>95</sup> It chose six aspects of NEPA implementation for detailed evaluation, one of which was programmatic analyses and tiering.<sup>96</sup>

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<sup>87</sup> *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982).

<sup>88</sup> *Id.*

<sup>89</sup> *Resources Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1306 (9th Cir. 1993).

<sup>90</sup> *Sierra Club v. Hathaway*, 579 F.2d 1162, 1168 (9th Cir. 1978) (citation omitted).

<sup>91</sup> 40 C.F.R. § 1502.2(a), (c) (2005).

<sup>92</sup> *Id.* § 1502.7.

<sup>93</sup> *See* Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act, 46 Fed. Reg. 18,026 (Mar. 23, 1981).

<sup>94</sup> TASK FORCE REPORT, *supra* note 5, at 2.

<sup>95</sup> *Id.*

<sup>96</sup> The other topics were: technology and information management security; federal and intergovernmental collaboration; adaptive management and monitoring; categorical exclusions; environmental assessments; and a catch-all category for additional areas of consid-

Several factors played into the determination that this topic warranted special attention. First, although few EISs are expressly identified as “programmatically” when filed with EPA, many are actually programmatic in nature but not designated as such. Second, focus groups convened by the NEPA Task Force prior to initiating the study confirmed the importance of programmatic analyses for various reasons, including their utility in addressing cumulative impacts and monitoring. Third, the Task Force was charged with finding ways to make the NEPA process more effective, efficient, and timely, and it viewed the programmatic analysis and tiering approach as an important means of furthering those goals.<sup>97</sup>

The NEPA Task Force Report, entitled “Modernizing NEPA Implementation,” was released in September 2003.<sup>98</sup> It contains wide-ranging recommendations for NEPA regulatory reform. In general, the Report found that some agencies are using programmatic analyses effectively,<sup>99</sup> while others are still struggling with the process.<sup>100</sup> It stated that “programmatic documents are not meeting agency and stakeholder needs” and that “a better understanding of how to provide an analysis in a programmatic NEPA document to support the broad decision being made and a strong commitment to tier site-specific analyses that will be subject to public review is needed.”<sup>101</sup> The Report specifically addressed five aspects of programmatic analyses: types, scope, content, longevity, and links to adaptive management. These are summarized below.

*Types of Programmatic Documents:* Agencies utilize the term “programmatic analysis” for a broad range of issues and uses, with differing definitions rooted in each agency’s mission or culture.<sup>102</sup> CEQ regulations presently allow programmatic analyses to be used in various ways. The Report loosely categorized the types of actions subject to programmatic analysis as (1) policy and/or strategy, (2) land use, and (3) program.<sup>103</sup> Al-

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eration. *Id.* These topics were chosen for their anticipated effectiveness in improving NEPA efficiency. Council on Environmental Quality, NEPA Task Force, Synopsis and Frequently Asked Questions and Answers (May 20, 2002), <http://ceq.eh.doe.gov/ntf/faqs.html> (on file with the Harvard Environmental Law Review).

<sup>97</sup> E-mail from Horst Greczmiel, Director of the NEPA Task Force, to author (May 16, 2005) (on file with the Harvard Environmental Law Review).

<sup>98</sup> TASK FORCE REPORT, *supra* note 5; *see also* Karkkainen, *Whither NEPA?*, *supra* note 6, at 352–58 (reviewing critically the Report’s recommendations on categorical exclusions, adaptive management, and information security); Connaughton, *supra* note 6, at 7–12 (offering a positive spin on the NEPA Task Force).

<sup>99</sup> For example, some agencies have been successful in using programmatic analyses to evaluate cumulative effects and address mitigation efforts on a regional level. TASK FORCE REPORT, *supra* note 5, at 35.

<sup>100</sup> Interestingly, respondents who indicated the most dissatisfaction with programmatic analyses offered two contrasting solutions to the problem: (1) “Focusing programmatic documents on outcomes and adaptive management principles, without additional NEPA analyses at the project level[;]” or (2) abandoning programmatic analyses and relying solely on project-level analyses. *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 36.

<sup>103</sup> “Policy and/or strategy” programmatic EISs are described as “[n]ational or regional

though the resulting documents are all nominally referred to as “programmatic,” the differences between the three categories may lead to divergent court decisions regarding the scope of alternatives and specificity of analysis. In addition, courts have not developed a test to determine the required level of specificity in PEISs.<sup>104</sup>

*Scope:* Agencies utilize broad-scale documents to define the scope of alternatives and environmental analyses in subsequent tiered documents. Thus, scoping issues must be resolved at the programmatic level. Critics charge that issues vaguely described at the programmatic level may never be adequately addressed in subsequent tiered documents, resulting in a “shell game” of when and where deferred issues will be addressed. This leads to confusion about the purpose, scope, and adequacy of the PEIS. Anticipating these problems, dissatisfied citizens may pressure agencies to ramp up the level of specificity in programmatic documents.<sup>105</sup>

*Content:* Programmatic NEPA documents should clearly state the significant issues and clarify the relationship between the programmatic document and subsequent tiered documents. However, there is little formal guidance for distinguishing the content requirements of a PEIS from that of a site-specific analysis. Adding to the confusion, the specificity of analysis often varies among agencies and among PEISs on different types of actions. Stakeholders often press for greater specificity in PEISs than agencies believe is necessary.<sup>106</sup> The PEIS process is more successful when agencies explain how actions will be addressed in tiered documents and how public input will be maintained.<sup>107</sup>

*Longevity:* There is a great deal of uncertainty regarding the useful life of a PEIS. Some feel that they quickly become outdated and should not be used for tiering after the environmental effects analysis has become stale. These critics argue that CEQ should establish a time limit for use of PEISs.<sup>108</sup> Most agencies oppose that approach, although they lack a formal process or time frame for periodic revision of their PEISs. Problems with maintaining document relevance have led some to conclude that PEISs are not cost-effective; however, supplemental EISs can be used to keep documents current, with entirely rewritten PEISs as appropriate.<sup>109</sup>

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integrated multiple program analyzes [sic] that establish program goals and objectives.” “Land use” PEISs are “[i]ntegrated planning analyses for a fixed geographical or landscape scope; might prescribe general standards and controls and procedures for project implementation.” “Program” PEISs are “[r]esource or program-specific focused planning analyzes [sic] that decide future priorities for development and scheduling and set controls for implementation of site-specific actions.” *Id.* at 37.

<sup>104</sup> TASK FORCE REPORT, *supra* note 5, at 32.

<sup>105</sup> *Id.* at 38.

<sup>106</sup> *Id.* at 40.

<sup>107</sup> *Id.* at 39.

<sup>108</sup> *Id.* at 40.

<sup>109</sup> TASK FORCE REPORT, *supra* note 5, at 40–41.

*Links to Adaptive Management:* Adaptive management is rarely incorporated fully at the PEIS level, and is not used consistently, although it has great potential to improve the PEIS process. The holistic approach of environmental management systems has a natural affinity with the broad approach of programmatic NEPA documents, as both involve a review of activities to identify and avoid significant environmental impacts.<sup>110</sup>

The Task Force recommended that CEQ convene a Federal Advisory Committee (“FAC”) or a CEQ chartered work group to assist in developing guidance to: (1) emphasize the importance of collaboration; (2) explain the relationship between the PEIS and future tiered documents, and how stakeholders will be involved; (3) emphasize that programmatic documents explain when, where, and how deferred issues will be addressed; and (4) develop criteria for agencies to use in deciding whether a PEIS has become outdated, as well as provide a general life expectancy for the different types of programmatic documents.<sup>111</sup> The Task Force also recommended an FAC to provide advice on (1) validating the different types of PEISs; (2) examining whether the different types of PEISs have similar scopes, ranges of alternatives, and specificity of analyses; (3) evaluating the depth and breadth of the analyses associated with the different types of PEISs; and (4) proposing guidance or regulatory changes to clearly define the uses, scope, range of issues, depth, and level of description required in these documents.<sup>112</sup>

Following publication of the NEPA Task Force Report in September 2003, CEQ convened four Regional Roundtables composed of experts from academia, business, industry, NGOs, and tribes, along with NEPA practitioners to seek opinions and advice regarding the recommendations.<sup>113</sup> The results were compiled in a Roundtable Report.<sup>114</sup> The Roundtable participants agreed that clarification on programmatic analyses is sorely needed, since there is a great deal of confusion about what a PEIS really is.<sup>115</sup> Participants valued PEISs for their ability to save money and resources through the tiering process and for their utility in addressing cumulative effects.<sup>116</sup> However, some expressed concern that the value of programmatic analyses is sharply undermined when they are used in a “shell game.”<sup>117</sup> These critics strongly endorsed the use of a “road map” approach to transparently explain how and when issues will be addressed.<sup>118</sup>

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<sup>110</sup> *Id.* at 41.

<sup>111</sup> *Id.* at 42.

<sup>112</sup> *Id.* at 42–43.

<sup>113</sup> NEPA Taskforce, CEQ Regional NEPA Roundtables, <http://ceq.eh.doe.gov/ntf/roundtables.html> (last modified Apr. 21, 2005) (on file with the Harvard Environmental Law Review).

<sup>114</sup> ROUNDTABLE REPORT, *supra* note 8, at 10.

<sup>115</sup> *Id.* at 10.

<sup>116</sup> *Id.* at 10–11.

<sup>117</sup> *Id.* at 11.

<sup>118</sup> *Id.*

Participants also advocated pilot projects to explore the broader use of programmatic analyses within and across agencies and ecosystems.<sup>119</sup> Although Roundtable participants agreed generally with the Report, they opposed the use of FACA committees, recommending instead that work groups develop demonstration projects and publish them as case studies.<sup>120</sup>

### III. THE NEPA PROCESS IN FEDERAL FISHERIES MANAGEMENT

#### A. Fisheries Management in the North Pacific

The Magnuson-Stevens Fishery Conservation and Management Act (“MSA”)<sup>121</sup> is the primary legislative authority for federal fisheries management in the Exclusive Economic Zone (“EEZ”) located between 3–200 nautical miles from the “coast baseline.”<sup>122</sup> Previous versions of this statute focused largely on eliminating foreign fishing and emphasizing efficient extraction and utilization of fishery resources.<sup>123</sup> Substantial amendments introduced by the Sustainable Fisheries Act of 1996<sup>124</sup> created new opportunities for ecosystem-based fisheries management and sparked a sharp increase in fisheries-related litigation.<sup>125</sup> The MSA now has ten national standards for fishery conservation and management, including preventing over-fishing while achieving optimum yield; considering efficiency; minimizing bycatch; using best available scientific information; and considering the needs of fishing communities.<sup>126</sup>

The MSA established eight regional fishery management councils designed to “bring regional expertise into management through planning, public participation, and advice to the [S]ecretary of [C]ommerce.”<sup>127</sup> Each fishery management council is tasked with developing FMPs, amendments, annual fishery specifications, and regulations for each fishery in the geographic area under its authority.<sup>128</sup>

FMPs are “detailed and comprehensive regulatory schemes”<sup>129</sup> for managing fisheries consistent with the ten national standards and other

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<sup>119</sup> ROUNDTABLE REPORT, *supra* note 8, at 11.

<sup>120</sup> *See id.* at 12–13.

<sup>121</sup> 16 U.S.C. §§ 1801–1802 (2005).

<sup>122</sup> *See id.* § 1802(11).

<sup>123</sup> *See* Marian Macpherson, *Integrating Ecosystem Management Approaches into Federal Fishery Management Through the Magnuson-Stevens Fishery Conservation and Management Act*, 6 OCEAN & COASTAL L.J. 1, 5–6 (2001).

<sup>124</sup> Pub. L. No. 104-297, 110 Stat. 3559 (1996).

<sup>125</sup> *See* Symposium, *You Win Some, You Lose Some: The Costs and Benefits of Litigation in Fishery Management, Panel Discussion*, 7 OCEAN & COASTAL L.J. 57, 59–74 (2001).

<sup>126</sup> 16 U.S.C. § 1851 (2005).

<sup>127</sup> THE H. JOHN HEINZ III CTR. FOR SCI., ECON. & THE ENV'T, *FISHING GROUNDS: DEFINING A NEW ERA FOR AMERICAN FISHERIES MANAGEMENT* 82 (2000).

<sup>128</sup> 16 U.S.C. § 1852(h).

<sup>129</sup> Marc Halpern, *Stellar Sea Lions: The Effects of Multi-Statute Administration on the Role of Science in Environmental Management*, 19 UCLA J. ENVTL. L. & POL'Y 449, 455

applicable laws. FMPs must contain measures which are “necessary and appropriate for the conservation and management of the fishery . . . .”<sup>130</sup> The FMP must also contain, among other things, a description of the fishery; the condition of the fishery, including maximum sustainable yield and optimum yield; and its likely effects on fishing communities.<sup>131</sup> FMPs serve as the basis for implementing regulations such as Total Allowable Catch (“TAC”) limits, gear specifications, temporal and spatial restrictions on fishing, and the allocation of TAC among the various subsections of the fishery.<sup>132</sup>

The North Pacific Fishery Management Council (“NPFMC”) manages fisheries in the Arctic Ocean, Bering Sea, and the Pacific Ocean seaward of Alaska—the largest area of any fishery management council. The NPFMC has eleven voting members. Seven are appointed by the Secretary of Commerce upon the recommendation of the governors of Alaska and Washington, while four are mandatory, including the Alaska regional administrator of NOAA Fisheries and the directors of the state fishery management agencies of Alaska, Washington, and Oregon.<sup>133</sup> There are also “four non-voting members representing the U.S. Coast Guard, U.S. Fish and Wildlife Service, the Pacific States Marine Fisheries Commission, and the U.S. Department of State.”<sup>134</sup> The NPFMC receives recommendations and advice from an Advisory Panel (“AP”) and a Scientific and Statistical Committee (“SSC”), the members of which are appointed annually by the Council.<sup>135</sup> The AP consists of members representing various aspects of Alaska’s fisheries, including the seafood processing industry, environmental interests, and commercial and recreational fisheries.<sup>136</sup> The SSC is made up of biologists, economists, and sociologists.<sup>137</sup> The NPFMC conducts public meetings and encourages interested persons to comment on the development of FMPs and associated matters.<sup>138</sup>

Although Congress granted considerable management authority to the regional councils, NOAA Fisheries (acting through the Secretary of Commerce) has the final say over the content of FMPs, and may reject them in whole or in part if they are deemed inconsistent with the MSA or any other applicable law.<sup>139</sup> NOAA Fisheries has five regional offices each

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(2001-2002).

<sup>130</sup> 16 U.S.C. § 1853(a)(1).

<sup>131</sup> *Id.*

<sup>132</sup> Halpern, *supra* note 129, at 455–56.

<sup>133</sup> 16 U.S.C. § 1852(a)(1)(G); *see also* NPFMC, Membership & Information, <http://www.fakr.noaa.gov/npfmc/membership.htm> (last visited Feb. 11, 2006) (on file with the Harvard Environmental Law Review).

<sup>134</sup> NPFMC, Membership & Information, *supra* note 133.

<sup>135</sup> *Id.*; *see also* 16 U.S.C. § 1852(g)(1), (2) (2005).

<sup>136</sup> NPFMC, Membership & Information, *supra* note 133.

<sup>137</sup> *Id.*

<sup>138</sup> 16 U.S.C. § 1852(h) (2005).

<sup>139</sup> *Id.* § 1854(a), (b).

with an administratively independent science center.<sup>140</sup> The agency is composed of three major operational offices: Sustainable Fisheries, which works with the Councils in developing FMPs; Protected Resources, which manages marine mammal protection and endangered species; and Habitat Conservation, which manages marine habitat protection.<sup>141</sup> NOAA Fisheries supports the production of FMPs by providing stock assessments, data collection, and socioeconomic and environmental analyses.<sup>142</sup>

### *B. The NEPA Implementation Process in Federal Fisheries Management*

FMPs are major federal actions subject to NEPA.<sup>143</sup> Because of the unique administrative structure of the federal fisheries management process, NOAA Fisheries and the Councils must interact closely in producing FMPs and the associated NEPA documents.

CEQ regulations authorize agencies to develop their own NEPA implementation procedures.<sup>144</sup> Accordingly, NOAA Administrative Order (“NAO”) 216-6 describes NOAA’s policies, requirements, and procedures for complying with NEPA and the CEQ implementing regulations.<sup>145</sup> NAO 216-6 establishes a chain of command for NEPA implementation, with a NEPA Coordinator at NOAA’s Office of Policy and Strategic Planning and a Responsible Program Manager (“RPM”) assigned to each NEPA project.<sup>146</sup> It sets forth general requirements for NEPA documents, NEPA streamlining, public participation, and integration of NEPA into NOAA’s decision-making process.<sup>147</sup> Although NAO 216-6 describes in detail the NEPA implementation process within NOAA Fisheries, it provides very little guidance regarding the role of the Councils in the NEPA process.<sup>148</sup>

In contrast, NOAA Fisheries’ “Operational Guidelines, Fishery Management Plan Process” describe in detail the legal requirements and procedures governing NOAA Fisheries’ interaction with the Councils in developing FMPs and associated NEPA analysis, although each Council

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<sup>140</sup> NAPA, *supra* note 53, at 7. NOAA Fisheries has recently added a sixth regional office and science center. NOAA Fisheries, Regions, <http://www.nmfs.noaa.gov/regional.htm> (last visited Apr. 25, 2006) (on file with the Harvard Environmental Law Review).

<sup>141</sup> NAPA, *supra* note 53, at 8.

<sup>142</sup> *Id.*

<sup>143</sup> *See, e.g.*, *Greenpeace v. Nat’l Marine Fisheries Serv.*, 55 F. Supp. 2d 1248, 1257 (W.D. Wash. 1999).

<sup>144</sup> 40 C.F.R. § 1507.3 (2005).

<sup>145</sup> NOAA, DEP’T OF COMMERCE, ADMINISTRATIVE ORDER 216-6, ENVIRONMENTAL REVIEW PROCEEDING IMPLEMENTING THE NATIONAL ENVIRONMENTAL POLICY ACT (May 20, 1999), available at [http://www.nepa.noaa.gov/NAO216\\_6\\_TOC.pdf](http://www.nepa.noaa.gov/NAO216_6_TOC.pdf); *see* JAMES P. WALSH ET AL., LEGAL ASSESSMENT OF THE COUNCIL’S ROLE UNDER THE MAGNUSON-STEVENS ACT, THE ENDANGERED SPECIES ACT, AND THE NATIONAL ENVIRONMENTAL POLICY ACT, REPORT TO THE NORTH PACIFIC FISHERY MANAGEMENT COUNCIL 33–34 (Sept. 2002), available at [http://www.fakr.noaa.gov/npfmc/misc\\_pub/Legal%20Assmt.110702.pdf](http://www.fakr.noaa.gov/npfmc/misc_pub/Legal%20Assmt.110702.pdf).

<sup>146</sup> *See generally* NOAA, *supra* note 145, § 2.

<sup>147</sup> *See generally id.* §§ 3–6.

<sup>148</sup> WALSH ET AL., *supra* note 145, at 33–35.

and region have slightly different ways of approaching analytical requirements.<sup>149</sup> The Operational Guidelines ascribe a major role to Councils in the NEPA process.<sup>150</sup> The Council initiates the scoping process and decides whether an EIS or EA should be prepared.<sup>151</sup> The Council also has primary responsibility for developing the NEPA document, including conducting public hearings and identifying a preferred alternative.<sup>152</sup> The draft document is reviewed by NOAA Fisheries and NOAA General Counsel<sup>153</sup> to insure that it complies with NEPA regulations and NAO 216-6; they may send it back to the Council with suggested modifications if necessary. NOAA Fisheries makes the final determination of NEPA compliance. In the event of a lawsuit, the proper named defendant is NOAA Fisheries or the Secretary of Commerce, not the Councils or their individual members.<sup>154</sup>

### C. Regulatory Streamlining at NOAA Fisheries

The unique administrative arrangement between NOAA Fisheries and the Councils provides strong regional participation while maintaining federal control and oversight. However, studies have documented significant administrative inefficiencies in this complex regulatory system.<sup>155</sup> The agency sometimes fails to meet mandated time frames due to multiple layers of review, inconsistent advice, organizational issues, and insufficient resources.<sup>156</sup> Moreover, analyzing proposed fishery management actions under the complex and sometimes contradictory statutory mandates of the MSA, NEPA, the Endangered Species Act ("ESA"), and other laws is a challenging task.<sup>157</sup>

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<sup>149</sup> NAT'L MARINE FISHERY SERV., OPERATIONAL GUIDELINES, FISHERY MANAGEMENT PROCESS (May 1, 1997), available at [http://www.nmfs.noaa.gov/sfa/domes\\_fish/guidelines.pdf](http://www.nmfs.noaa.gov/sfa/domes_fish/guidelines.pdf) [hereinafter OPERATIONAL GUIDELINES]. These guidelines have not been formalized as regulations or an administrative order, and do not carry the force of law. See NAPA, *supra* note 53, at 45. At the time of writing, NOAA Fisheries was in the process of revising the Guidelines, and was expected to circulate a draft for public comment soon. E-mail from Jon Pollard, NOAA General Counsel, Alaska Regional Office, to author (June 3, 2005) (on file with the Harvard Environmental Law Review).

<sup>150</sup> See OPERATIONAL GUIDELINES, *supra* note 149, at A-15 to -22.

<sup>151</sup> *Id.* at A-15 to -16.

<sup>152</sup> See *id.* This process applies to most but not all NEPA analyses in the Alaska region. At times the agency NOAA Fisheries may initiate scoping, or the Alaska Regional Office of NOAA Fisheries may assume primary responsibility for the NEPA analysis. Furthermore, the Council receives input from NOAA's Office of General Counsel and NOAA Fisheries regarding the decision to prepare an EA or EIS. See *id.* at A-8 to -9.

<sup>153</sup> *Id.* at A-9. NOAA General Counsel provides legal advice to NOAA Fisheries and the Councils on a wide variety of issues, including the legal sufficiency of FMPs and environmental analyses.

<sup>154</sup> The MSA does not contain any provisions allowing a Council to be sued. See WALSH ET AL., *supra* note 145, at 39 (citing 16 U.S.C. § 1855(f) (2005)).

<sup>155</sup> See, e.g., NAPA, *supra* note 53.

<sup>156</sup> *Id.* at 46-47.

<sup>157</sup> See, e.g., Halpern, *supra* note 129.

Accordingly, Congress directed NOAA Fisheries to develop a Regulatory Streamlining Project (“RSP”) to assess problems and outline planned actions.<sup>158</sup> The goal of the RSP is “to improve the efficiency and effectiveness of regulatory operations and decrease NOAA Fisheries’ vulnerability to litigation.”<sup>159</sup> The RSP seeks to meet this goal by: emphasizing the strategic role of NEPA as an analytical framework or “umbrella” that can be used to ensure environmental compliance consistent with all of the agency’s statutory mandates; “front-loading” the NEPA process through the early, active participation of key staff; hiring environmental policy coordinators; initiating ongoing NEPA training programs; and increasing administrative efficiency through other means.<sup>160</sup> NEPA compliance has become an operational objective of the agency, and forms a significant part of the RSP strategy for NEPA streamlining. NOAA Fisheries now employs NEPA specialists and has developed new operational procedures for NEPA compliance.<sup>161</sup>

Although it is still too soon to draw broad conclusions, there is some indication that NOAA Fisheries has undergone a shift in agency culture and that these changes may be exerting a positive impact on the quality of the agency’s NEPA analyses.<sup>162</sup> Prior to 1999, NOAA Fisheries prevailed in the great majority of NEPA lawsuits filed against it, but its win rate on NEPA claims dropped to one in three between 1999 and 2001.<sup>163</sup> However, from 2002 through mid-2005, the agency’s win rate on NEPA claims was back up to seventy-five percent.<sup>164</sup>

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<sup>158</sup> NAPA, *supra* note 53, at 47.

<sup>159</sup> Habitat Conservation Division, NEPA Coordinator, The Management Process: Regulatory Streamlining Project, from testimony of Dr. William T. Hogarth, Assistant Administrator for NOAA Fisheries, before the U.S. Senate Subcommittee on Oceans, Atmosphere and Fisheries, Washington, D.C., May 9, 2002, <http://sero.nmfs.noaa.gov/dhc/habitat/nep/rsphome.htm> (last visited Feb. 11, 2006) [hereinafter Hogarth Testimony] (on file with the Harvard Environmental Law Review); *see also* NAPA, *supra* note 53, at 46–48; WALSH ET AL., *supra* note 145, at 35–38.

<sup>160</sup> Hogarth Testimony, *supra* note 159.

<sup>161</sup> *See* NOAA, NOAA NEPA Handbook, Version 2 (Dec. 2005), available at [http://www.nepa.noaa.gov/NEPA\\_HANBOOK.pdf](http://www.nepa.noaa.gov/NEPA_HANBOOK.pdf).

<sup>162</sup> *See generally* Jerry McBeath, *Management of the Commons for Biodiversity: Lessons from the North Pacific*, 28(6) MARINE POLICY 523 (2004) (analyzing Steller sea lion management and NOAA Fisheries’ role in implementing the ESA and NEPA in Alaska fisheries).

<sup>163</sup> NAPA, *supra* note 53, at 30.

<sup>164</sup> *Wins: Oceana v. Evans*, No. Civ.A.04-0811, 2005 WL 55541 (D.D.C. Mar. 9, 2005); *Turtle Island Restoration Network v. U.S. Dept. of Commerce*, 351 F. Supp. 2d 1048 (D. Haw. 2005); *Common Sense Salmon Recovery v. Evans*, 329 F. Supp. 2d 96 (D.D.C. 2004); *Australians for Animals v. Evans*, 301 F. Supp. 2d 1114 (N.D. Cal. 2004); *Ocean Conservancy v. Evans*, No.8:03CV124T24EAJ, 2003 WL 23358201 (M.D. Fla. Dec. 17, 2003); *Natural Res. Def. Council v. NMFS*, 280 F. Supp. 2d 1007 (N.D. Cal. 2003); *Defenders of Wildlife v. Hogarth*, 330 F.3d 1358 (Fed. Cir. 2003); *Ocean Conservancy v. Evans*, 260 F. Supp. 2d 1162 (M.D. Fla. 2003).

*Losses: Anderson v. Evans*, 371 F.3d 475 (9th Cir. 2004); *Natural Res. Def. Council v. Evans*, 279 F. Supp. 2d 1129 (N.D. Cal. 2003); *Natural Res. Def. Council v. Evans*, 232 F. Supp. 2d 1003 (N.D. Cal. 2002); *Pac. Marine Conservation Council, Inc. v. Evans*, 200 F.

NOAA Fisheries' experience echoes that of the U.S. Forest Service, which (thanks in no small part to litigation pressure) has managed to integrate NEPA into its decision process despite ongoing challenges posed by cost, increasing complexity of analysis, strict deadlines, and controversial policy decisions.<sup>165</sup>

#### IV. CASE STUDY: ORIGINS AND DEVELOPMENT OF THE PSEIS

##### A. NEPA Compliance for the Alaskan Groundfish Fishery (1978–1998)

NOAA Fisheries produced the original EISs for the Gulf of Alaska (“GOA”) groundfish FMP and for the Bering Sea/Aleutian Islands (“BSAI”) crab FMP in 1978 and 1981, respectively.<sup>166</sup> The PEIS concept was still relatively new and undeveloped at that time,<sup>167</sup> so it is not surprising that these early EISs were not expressly labeled “programmatically.” Although they addressed various aspects of the GOA/BSAI fishing regime,<sup>168</sup> these relatively brief documents would likely “be considered grossly inadequate by today’s [NEPA] standards.”<sup>169</sup>

The next two decades brought significant cumulative changes to the physical, biological and economic environment within the GOA and BSAI.<sup>170</sup> Populations of some species of seals, birds, fish, and whales declined sharply, concurrent with major shifts in ocean conditions and changes in the fishing industry. Notably, the Alaskan population of the Steller sea lion was listed as a threatened species under the ESA in 1990.<sup>171</sup> NOAA Fisheries responded to these changes by promulgating dozens of FMP amendments supported primarily by EAs/FONSIs.<sup>172</sup> Starting in the early 1990s, some agency personnel expressed concern about NEPA compliance in light of the ever-increasing cumulative effects of these extensive changes.<sup>173</sup> However, the agency continued to rely on EAs/FONSIs until

Supp. 2d 1194 (N.D. Cal. 2002).

<sup>165</sup> NEPA has “fostered an interdisciplinary approach to forest management and decision making,” as well as expanding public participation efforts. NEPA has also encouraged the Forest Service to expand beyond a limited focus on forestry and to have a broad range of professionals who have improved the quality of NEPA analysis and decisions. Ackerman, *supra* note 36, at 708.

<sup>166</sup> Fishery Management Plan and Environmental Impact Statement for the Gulf of Alaska Groundfish Fishery During 1978 (Sept. 1977); Final EIS for the Groundfish of the Bering Sea and Aleutian Islands Area (Aug. 1981) (on file with the Harvard Environmental Law Review).

<sup>167</sup> See *supra* notes 36–37 and accompanying text.

<sup>168</sup> See *Greenpeace v. Nat’l Marine Fisheries Serv.* (“NMFS”), 55 F. Supp. 2d 1248, 1258 (W.D. Wash. 1999).

<sup>169</sup> *Id.* at 1271. Excluding the text of comments received and literature cited, the 1981 BSAI EIS was fifty-five pages long and the 1977 GOA EIS was fifteen pages long. *Id.*

<sup>170</sup> *Id.* at 1258.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> Interview with Steven Davis, GOA/BSAI Groundfish Fisheries PSEIS Project Manager, in Anchorage, Alaska (Feb. 7, 2005).

1997, when the western Steller sea lion population was upgraded to endangered status, prompting NOAA general counsel to strongly recommend that the agency prepare an SEIS.<sup>174</sup>

### B. Supplemental EIS (1998)

NOAA Fisheries issued an NOI to prepare an SEIS regarding the BSAI and GOA groundfisheries in 1997.<sup>175</sup> The NOI indicated that the SEIS would incorporate “[t]he amendments to the groundfish FMPs; the annual processes for determining the TAC specifications; and the public process in place for implementing new regulations, revising existing ones, and incorporating new information[,]” and also “analyz[e] the process by which annual TAC specifications and prohibited species catch limits are determined, together with the procedures for implementing changes to those processes.”<sup>176</sup>

Eighteen months later, in December 1998, NOAA Fisheries issued the final SEIS.<sup>177</sup> The agency apparently believed the SEIS was a programmatic NEPA document, even though it was not expressly labeled as such.<sup>178</sup> The SEIS contained detailed discussions of the extensive cumulative changes to the North Pacific Fisheries and the GOA/BSAI ecosystem.<sup>179</sup> However, it framed the alternatives in terms of a range of TAC levels.<sup>180</sup> The agency’s decision to focus on alternative TAC levels stemmed from its opinion that the specification of TAC was the critical precursor to any authorized fishery management regime. For example, if TAC were set at zero for a particular fishery, no fish would be caught, and there would be

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<sup>174</sup> E-mail from agency staff to Steven Davis, PSEIS Project Manager (Oct. 26, 1999) (on file with the Harvard Environmental Law Review) (“The lawyers wanted commitment that [NMFS Alaska] would do an SEIS, but didn’t express strong thoughts about how it was supposed to look.”).

<sup>175</sup> Groundfish Fisheries of the Bering Sea/Aleutian Islands Area and the Gulf of Alaska, 62 Fed. Reg. 15,151 (proposed Mar. 31, 1997) (to be codified at 50 C.F.R. pt. 679).

<sup>176</sup> Groundfish Fisheries of the Bering Sea/Aleutian Islands Area and the Gulf of Alaska, 62 Fed. Reg. at 15,152.

<sup>177</sup> NOAA Fisheries, Final Supplemental Environmental Impact Statement, Groundfish Total Allowable Catch Specifications and Prohibited Species Catch Limits Under the Authority of the Fishery Management Plans for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area and Groundfish of the Gulf of Alaska (Dec. 1998) [hereinafter NOAA SEIS] (on file with the Harvard Environmental Law Review).

<sup>178</sup> *Id.* at 2 (stating that “a programmatic SEIS was developed” to analyze a broad scope of actions and serve as a basis for tiering in the future).

<sup>179</sup> *Greenpeace v. NMFS*, 55 F. Supp. 2d 1248, 1258–59 (W.D. Wash. 1999).

<sup>180</sup> TAC specifications are determined annually based on scientific appraisals and fishery management principles. TACs are determined from estimates of Acceptable Biological Catch (“ABC”) that reflect the biological productivity of the stocks. NOAA SEIS, *supra* note 177, at 9. The four alternative TAC levels included (1) the status quo method of setting TAC levels annually for each species within the optimum yield (“OY”) range; (2) setting TAC at the lower end of the OY range; (3) setting TAC at the upper end of the OY range; and (4) no directed groundfishing. *Greenpeace*, 55 F. Supp. 2d at 1271.

no need to regulate gear, season, or location.<sup>181</sup> NOAA Fisheries believed that the alternative TAC levels analyzed in the SEIS reflected ecosystem management principles, while recognizing that knowledge and understanding of the GOA/BSAI ecosystems is incomplete.<sup>182</sup> The impacts of the alternative TAC specifications were viewed in terms of the target species, other species in the ecosystem, and those who utilize living marine resources.<sup>183</sup> Thus, in the agency's opinion, all specific fishery management measures flowed from the TAC, and this was the proper way to frame the alternatives.

*C. The Litigation: Greenpeace v. NMFS (1999)*

Greenpeace and other plaintiffs filed suit against NOAA Fisheries in April 1998, challenging the GOA and BSAI FMPs under the ESA and NEPA.<sup>184</sup> Representatives of the fishing industry intervened.<sup>185</sup> Plaintiffs argued that the scope of SEIS alternatives—a range of alternative TAC levels—was too narrow to adequately analyze the cumulative environmental impacts of GOA/BSAI groundfish fisheries in light of extensive FMP amendments and environmental changes since the prior EISs were issued.<sup>186</sup> NOAA Fisheries maintained that its focus on alternative TAC levels in the SEIS fulfilled its NEPA obligations.<sup>187</sup> Both parties filed motions for summary judgment on the adequacy of the SEIS. The court granted plaintiffs' motion on this issue, finding that nothing less than a broad PSEIS analyzing the FMPs as a whole was required to adequately address the "dramatic and significant changes" in the GOA/BSAI groundfish fisheries<sup>188</sup> and the cumulative impact of dozens of FMP amendments.<sup>189</sup> The court entered an order remanding the SEIS to NOAA Fisheries for action consistent with its opinion.<sup>190</sup>

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<sup>181</sup> Interview with Steven Davis, *supra* note 173.

<sup>182</sup> NOAA SEIS, *supra* note 177, at 10.

<sup>183</sup> *Id.*

<sup>184</sup> *Greenpeace v. NMFS*, 55 F. Supp. 2d 1248, 1253 (W.D. Wash. 1999). The ESA issues are analyzed in Halpern, *supra* note 129.

<sup>185</sup> *Greenpeace*, 55 F. Supp. 2d at 1253.

<sup>186</sup> *Id.* at 1259.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 1273.

<sup>189</sup> *Id.* at 1273–74.

<sup>190</sup> See Aug. 6, 1999 Remand Order ("NMFS shall prepare a comprehensive programmatic SEIS that defines the federal action under review as . . . all activities authorized and managed under the [FMPs] and all amendments thereto, and that addresses the conduct of the . . . groundfish fisheries and the FMPs as a whole. NMFS shall also evaluate the significant changes that have occurred in the GOA and BSAI groundfish fisheries, including the significant cumulative effects of environmental and management changes . . . since the 1979/1981 EISs; present a general picture of environmental effects rather than focus narrowly on one aspect, though not considering detailed alternatives for each and every aspect of the FMPs; and provide reasonable management alternatives, as well as analysis of their impacts, so as to sharply define the issues and provide a clear basis for choice among the options.").

First, the court agreed with the plaintiffs that the scope of the SEIS was too narrow. The federal action under review encompassed the FMPs as a whole, not merely the method used to set TAC levels. Thus, by narrowing the range of alternatives to TAC levels, the agency failed to “take a hard look” at the overall consequences on the fisheries.<sup>191</sup> The court noted that the NOI and the SEIS were ambiguous regarding the scope of the proposed action, with the weight of the language suggesting a broader scope.<sup>192</sup> As a matter of law, NEPA required a broad programmatic EIS to “fairly evaluate the dramatic and significant changes” to the GOA/BSAI fisheries.<sup>193</sup>

Second, the court agreed with the plaintiffs that NEPA’s cumulative effects provision required a programmatic analysis of the FMPs.<sup>194</sup> Cumulative impacts can result from “individually minor but collectively significant actions taking place over a period of time.”<sup>195</sup> For many years, NOAA Fisheries avoided the “significance” threshold by preparing an EA/FONSI for each FMP amendment, and now an SEIS was needed to address these cumulatively significant changes. Similarly, NOAA Fisheries could not piecemeal compose the required analysis by considering only the setting of TACs rather than the FMPs as a whole.<sup>196</sup> Accordingly, the PSEIS must “thoroughly analyze the cumulative effects of the FMPs.”<sup>197</sup>

Third, the court found that the range of alternatives in the SEIS was too narrow as it failed to “sharply [define] the issues and [provide] a clear basis for choice among options. . . .”<sup>198</sup> The focus on alternative TAC levels did not help managers decide whether to conduct the fisheries according to the status quo FMP or another, more beneficial alternative management regime. Notably, EPA’s final comments on the SEIS pointed out that it should have included comprehensive, programmatic alternatives that addressed the FMPs in their entirety and considered TAC levels outside of the status quo range.<sup>199</sup> The court refused to defer to NOAA Fisheries’ determination that the TAC alternatives yielded a “practical analysis” of the impacts of the fisheries because of the agency’s “total failure” to explain this assertion in the SEIS.<sup>200</sup>

Lastly, regarding the scope and detail required in the PSEIS, the court emphasized that “consideration of detailed alternatives with respect to each aspect of the plan” was not required; otherwise, the PSEIS “would be impossible to prepare and would merely be a vast series of site specific

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<sup>191</sup> *Greenpeace*, 55 F. Supp. 2d at 1272.

<sup>192</sup> *Id.* at 1273.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* (citing 40 C.F.R. § 1508.7 (2005)).

<sup>196</sup> *Greenpeace*, 55 F. Supp. 2d at 1274.

<sup>197</sup> *Id.* at 1273.

<sup>198</sup> *Id.* at 1274.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 1276.

analyses.”<sup>201</sup> Since the level of detail in an EIS is directly related to the scope of the proposed action, the court noted that “a high level of detail may be required even in a programmatic EIS” for a broad, multi-step project in its initial stages.<sup>202</sup> But here, a programmatic EIS was necessary because of significant cumulative amendments to the FMPs over the years, not because of new pending amendments. Therefore, the PSEIS should “present a more general picture of the environmental effects of the plans, rather than focusing narrowly on one aspect of them.”<sup>203</sup>

#### D. First Draft PSEIS (2001)

Drafting a broad, yet sufficiently detailed PSEIS in compliance with the court order presented a perplexing challenge for NOAA Fisheries, and the first attempt was not successful. The agency had never prepared a programmatic EIS before, and the *Greenpeace* judicial opinion and court order were subject to differing interpretations.<sup>204</sup> Agency staff was well aware that the PSEIS would receive more than the usual amount of public scrutiny and would set the standard for programmatic NEPA analysis for years to come.<sup>205</sup> The PSEIS would have to comply with the court order, be legally defensible and scientifically credible, serve as a tiering document for future NEPA analyses, and set the standard for future programmatic analyses.<sup>206</sup>

Moreover, unlike a typical project-specific EIS on a clearly defined proposed action, the Alaskan groundfish fisheries presented an ongoing activity conducted under constantly evolving FMPs. The PSEIS was required because of changing circumstances over time, and lacked a specific proposal to focus the analysis. The agency hoped to emulate a “perfect model” PSEIS prepared by another agency under similar circumstances, but was unable to find one that fit the PSEIS situation.<sup>207</sup> Thus, the PSEIS brought NOAA Fisheries into uncharted waters.<sup>208</sup> To meet this challenge, NOAA Fisheries assembled an interdisciplinary PSEIS project team of more than seventy individuals, including staff members from several departments within the agency and the NPFMC as well as outside consultants.<sup>209</sup>

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<sup>201</sup> *Id.*

<sup>202</sup> *Id.* (citing *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982)).

<sup>203</sup> *Id.*

<sup>204</sup> See e-mail from Steven Davis, PSEIS Project Manager, to agency staff (Oct. 29, 1999) (on file with the Harvard Environmental Law Review).

<sup>205</sup> *See id.*

<sup>206</sup> *See id.*

<sup>207</sup> E-mail from agency staff to Steven Davis, PSEIS Project Manager (Nov. 30, 1999) (on file with the Harvard Environmental Law Review).

<sup>208</sup> *Id.*

<sup>209</sup> See Transitional Memoranda, Alaska Groundfish Fisheries Programmatic Supplemental Environmental Impact Statement De-Brief Workshop, at 5 (Aug. 19–20, 2004) (on file with the Harvard Environmental Law Review).

An initial concern was how to properly draft the NOI. Because the court found that the 1998 SEIS failed to cover the broad scope of the 1997 NOI,<sup>210</sup> agency staff wanted to include a purpose and need statement and proposed alternatives in the new NOI that would dovetail with the final PSEIS and resulting ROD, but were unsure how to accomplish this without a specific federal action or proposal to focus the analysis and compare to the status quo FMPs.<sup>211</sup> The agency initially dealt with this dilemma by publishing two NOIs. The first NOI<sup>212</sup> announced in general terms NOAA Fisheries' intent to prepare a PSEIS in keeping with the *Greenpeace* remand order, and stated that a second NOI would be published to provide the public with alternatives to comment on.<sup>213</sup> The second NOI, issued a month later, offered "broad, thematic" draft alternatives based on the MSA's national standards for FMPs<sup>214</sup> and GOA/BSAI FMP goals and objectives.<sup>215</sup> The draft alternatives included an array of sub-alternatives organized around themes—who harvests what groundfish when, where, and how—to provide a conceptual framework for understanding how effectively the alternatives would accomplish the goals and objectives and what their environmental impacts would be.<sup>216</sup> The agency's intent was to offer draft alternatives for public comment while retaining the flexibility to amend them in response to input received during the scoping process.<sup>217</sup> To accomplish these objectives within agency resource constraints and provide adequate time for public comment, NOAA Fisheries notified the court it would have a draft PSEIS issued by October 2000 and an ROD issued no later than October 2001.<sup>218</sup> During this time, NOAA Fisheries was also engaged in settlement discussions with the *Greenpeace* plaintiffs, which ultimately proved unsuccessful.

Throughout the scoping process, NOAA Fisheries continued to struggle mightily with the task of defining alternatives in the absence of a proposed action. The framework of alternatives presented in the second NOI was widely considered to be unacceptable.<sup>219</sup> The environmental community criticized the draft alternatives as framed in the second NOI on the grounds that they were mere "permutations" of the status quo rather than

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<sup>210</sup> See *supra* notes 191–192 and accompanying text.

<sup>211</sup> E-mail from Steven Davis, *supra* note 204.

<sup>212</sup> 64 Fed. Reg. 53,305 (Oct. 1, 1999).

<sup>213</sup> E-mail from Steven Davis, *supra* note 204.

<sup>214</sup> 16 U.S.C. § 1851(a)(1)–(10) (2005).

<sup>215</sup> 64 Fed. Reg. 59,730 (Nov. 3, 1999).

<sup>216</sup> *Id.*

<sup>217</sup> E-mail from Steven Davis, *supra* note 204.

<sup>218</sup> Declaration of Steven Pennoyer, *Greenpeace v. NMFS*, 55 F. Supp. 2d 1248 (W.D. Wash. 1999).

<sup>219</sup> E-mail from Steven Davis, PSEIS Project Manager, to agency general counsel (Nov. 30, 1999) (on file with the Harvard Environmental Law Review). See also NMFS, NOAA, SCOPING SUMMARY REPORT: ALASKA GROUND FISH FISHERIES SEIS 16 (2000), available at <http://www.fakr.noaa.gov/sustainablefisheries/seis/scoping.pdf>.

true alternative management plans.<sup>220</sup> They wanted the PSEIS to address issues ecologically, in an integrated fashion; to deal with uncertainty in a more precautionary way; and to frame the alternatives as a suite of FMPs ranging from lesser to greater risk to the ecosystem.<sup>221</sup>

NOAA Fisheries issued its first draft PSEIS in January 2001.<sup>222</sup> The draft featured six alternatives: the status quo management framework embodied in the existing GOA/BSAI FMPs, and five alternative management frameworks, each organized around a different policy goal. These were (1) protecting marine mammals and seabirds, (2) protecting target groundfish species, (3) protecting nontarget and forage species, (4) protecting habitat, and (5) increasing socioeconomic benefits.<sup>223</sup> Aside from trying to comply with the court order and including reliable scientific data, the agency's approach to defining the scope of the first draft PSEIS was little more than "if in doubt, include it."<sup>224</sup> With the draft PSEIS weighing in at eight volumes and approximately 7000 pages,<sup>225</sup> agency staff was relatively confident that it complied with the court order,<sup>226</sup> although some professed lingering concerns about the document's substantial length and detail.<sup>227</sup>

However, during the 180-day extended comment period, NOAA Fisheries was deluged with more than 20,000 mostly critical public comments on the draft PSEIS. Many commenters charged that the single-focus alternatives failed to provide a meaningful choice for decision makers because NOAA Fisheries must balance numerous statutory objectives in

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<sup>220</sup> E-mail from Steven Davis, PSEIS Project Manager, to agency general counsel (Dec. 3, 1999) (on file with the Harvard Environmental Law Review). Some suggested that the plaintiffs, too, were having trouble defining programmatic alternatives in the absence of a proposed action. E-mail from Steven Davis to agency staff (undated reply to e-mail sent on Dec. 7, 1999) (on file with the Harvard Environmental Law Review).

<sup>221</sup> Notes of Meeting Regarding Scope of Programmatic SEIS (Jan. 7, 2000) (on file with the Harvard Environmental Law Review).

<sup>222</sup> See Alaska Groundfish Fisheries DRAFT Programmatic Supplemental Environmental Impact Statement (Jan. 2001), available at <http://www.fakr.noaa.gov/sustainablefisheries/seis/draft0101.htm>.

<sup>223</sup> *Id.*

<sup>224</sup> Interview with Steven Davis, *supra* note 173.

<sup>225</sup> Personal communication from Steven Davis, PSEIS Project Manager, to author (Oct. 5, 2005).

<sup>226</sup> The scope of the draft PSEIS was limited to the FMPs and FMP amendments, per the Order's definition of the federal action under review as "all activities . . . under the . . . FMPs and all amendments thereto." The draft PSEIS presented a general picture of the environmental consequences of each of its alternatives, including the various regimes under Alternative 2 which served as examples of potential FMP amendments. Each alternative regime represented management actions that were reasonable in the opinion of the SEIS project team. E-mail from Steven Davis, PSEIS Project Manager, to agency staff (Apr. 30, 2001) (on file with the Harvard Environmental Law Review).

<sup>227</sup> Some agency staff worried that the PSEIS was overly long and detailed, in contravention of CEQ guidance encouraging concise NEPA documents. See e-mail from Tamra Faris, NOAA staff, to Steven Davis, PSEIS Project Manager (Dec. 7, 2000) (on file with the Harvard Environmental Law Review) ("I am expecting that we will take a real beating for the length of the programmatic SEIS.").

managing fisheries rather than maximize one objective to the exclusion of all others.<sup>228</sup> The environmental plaintiffs also raised a number of other criticisms during discussions with the agency. They felt that the scope of the draft PSEIS was too narrow because it failed to evaluate the merits of continuing to manage fisheries under the MSA-mandated standards; they criticized the range and format of the policy alternatives; and they questioned the legitimacy of a multi-step NEPA compliance process, whereby the PSEIS would analyze broad policy alternatives, reserving analysis of specific FMP components for subsequent tiered documents.<sup>229</sup>

#### *E. Revised Draft PSEIS (2003)*

NOAA Fisheries realized that it had to go back to the drawing board. In response to public comments, plaintiffs' concerns, and new legal guidance from NOAA General Counsel,<sup>230</sup> the agency issued a new NOI indicating its plan to substantially revise the draft PSEIS to include additional analysis on environmental, economic, and cumulative impacts, restructure the alternatives with comprehensive, multiple components, and evaluate the proposed action more concisely.<sup>231</sup>

However, substantial legal uncertainties remained. The agency had already discovered that there is very little legal precedent for what constitutes an adequate range of alternatives in a PEIS and that PEISs produced in other contexts failed to yield a useful predefined template.<sup>232</sup> Thus, NOAA Fisheries looked to the *Greenpeace* court for guidance on selecting legally defensible alternatives, hoping that the court would provide further clarification of its ruling so that work on the revised draft PSEIS could proceed efficiently.<sup>233</sup> But the agency was dismayed to learn that such a request for an opinion on the feasibility of the draft PSEIS outside the context of litigation over a final, judicially reviewable agency action—here, an ROD based on the PSEIS—would amount to a request for an impermissible advisory opinion.<sup>234</sup>

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<sup>228</sup> Public comments also criticized NOAA Fisheries' failure to specify a preferred alternative. See Interview with Steven Davis, *supra* note 173.

<sup>229</sup> Memorandum from Steven Davis, PSEIS Project Manager, to agency administrators (May 12, 2001) (on file with the Harvard Environmental Law Review).

<sup>230</sup> See PEIS Guidance Memo, *supra* note 52.

<sup>231</sup> 66 Fed. Reg. 59,228 (Nov. 27, 2001); see also North Pacific Fishery Management Council Plenary Meeting Minutes C-8 (Dec. 5–10, 2001), available at <http://www.cdqdb.org/reading/npfmcminutes/npfmcplenaryminutes0112.pdf>.

<sup>232</sup> See Discussion Paper (Draft), Review of October 1, 2001 General Counsel Memo on PSEIS and Distillation of Key Decision Points (Oct. 17, 2001) (stating that NOAA Fisheries' review of other agencies' programmatic EISs "clearly demonstrate[d] that what has worked for some will not for fisheries."); *id.* at 2 (on file with the Harvard Environmental Law Review).

<sup>233</sup> Interview with Steven Davis, *supra* note 173.

<sup>234</sup> E-mail from NOAA General Counsel to Steven Davis, PSEIS Project Manager (Feb. 20, 2002) (on file with the Harvard Environmental Law Review).

A major recurring issue was the meaning of the term “action-forcing” in the PSEIS context. An EIS is “an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government.”<sup>235</sup> NOAA Fisheries and environmental organizations hotly debated whether PSEIS alternatives framed as broad policy frameworks could be “action-forcing” in that the resulting ROD would serve as the basis for future decision-making, or whether the alternatives and ROD must incorporate both policy and specific amendments instituting regulatory changes to the FMPs.<sup>236</sup> They also debated whether the scope of the PSEIS should be enlarged to include an evaluation of the merits of continuing to manage fisheries based on attainment of maximum sustainable yield and optimum yield, as mandated by the MSA.<sup>237</sup> This uncertainty reflected broader concerns regarding how to integrate the MSA with NEPA.<sup>238</sup> Although environmental organizations argued that the PSEIS alternatives should be framed as detailed, fully implementable FMPs rather than broad policy frameworks, NOAA Fisheries was hesitant to adopt this approach on the grounds that it would inappropriately obviate the Council’s authority under the MSA.<sup>239</sup> Thus, agency staff thought the PSEIS should be framed with alternative policy statements, one of which would ultimately be adopted in the ROD to guide future Council decisions, rather than as “drop-in” FMPs for direct implementation through NOAA Fisheries rulemaking.<sup>240</sup>

In February 2002, the Council adopted a range of eight policy alternatives and requested that NOAA Fisheries work to refine and improve them.<sup>241</sup> In April 2002, NOAA Fisheries recommended consolidating these into four policy alternatives, each with two “FMP-like” examples that would serve as “bookends” to an FMP framework for future management decisions.<sup>242</sup> This meant that the ROD would select a preferred alternative

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<sup>235</sup> 40 C.F.R. § 1502.1 (2005).

<sup>236</sup> E-mail message from Steven Davis, PSEIS Project Manager, to agency staff (Feb. 20, 2002) (on file with the Harvard Environmental Law Review); *see also* Discussion Paper, *supra* note 232.

<sup>237</sup> Memorandum from Steven Davis (May 12, 2001), *supra* note 229, at 2.

<sup>238</sup> *See* Discussion Paper, *supra* note 232, at 5; *see also* Memorandum, Section C: Programmatic Analysis and Tiering (July 2002) (on file with the Harvard Environmental Law Review) (“I recommend that the CEQ task force consider reviewing the current MSA decision-making process and provide recommendations on how both MSA and NEPA can be better integrated.”).

<sup>239</sup> *See* Discussion Paper, *supra* note 232 at 5 (“It appears to me that one part of the plaintiff’s strategy is to use this SEIS process as a primary vehicle for changing national policy and process [concerning the Councils’ management role under the MSA].”).

<sup>240</sup> *Id.*

<sup>241</sup> Alaskan Groundfish Fisheries SEIS Newsletter at 1 (Apr. 2002), *available at* <http://www.fakr.noaa.gov/sustainablefisheries/seis/news9.pdf> [hereinafter Newsletter] (The Council wanted NOAA Fisheries to make the alternatives “more specific and differentiable, to address problems of having specific tools mixed with the policy objectives, and to consolidate them if possible.”).

<sup>242</sup> *Id.* The agency believed that this approach was also supported by NAO 216-6, which defines a programmatic EIS as a policy-level analysis to be followed by more specific,

that could amend the FMP policy goals and objectives.<sup>243</sup> The agency felt that this approach properly “maintain[ed] flexibility in decision making by providing a range of policy goals and objectives from which to choose as the Council and [NOAA Fisheries] seek to satisfy [their MSA] obligations.”<sup>244</sup> The PSEIS alternatives would not attempt to address ongoing debates concerning the balance of management authority between the Councils and NOAA Fisheries or the merits of MSA-mandated management principles, as the agency felt that these issues ought to be addressed at the Congressional level following a national debate, not in the PSEIS.<sup>245</sup> However, agency staff remained wary that their decision to limit the PSEIS in this manner would ultimately be rejected by the court.<sup>246</sup>

NOAA Fisheries issued a new draft PSEIS in August 2003.<sup>247</sup> The alternatives were framed as four policy frameworks bounding the scope of the PSEIS. Each alternative reflected a balancing of different management tools based on varying levels of precaution. Alternative 1 would continue under the status quo “risk-averse management policy”; Alternative 2 would “adopt a more aggressive harvest management policy”; Alternative 3 would “adopt a more precautionary management policy”; and Alternative 4 would “adopt a highly precautionary management policy.”<sup>248</sup> Each alternative (except for the status quo) featured a pair of example FMPs as “bookends” to illustrate the potential range of implementing management measures.<sup>249</sup> The most extreme bookends consisted of the set of management policies that would result from the non-cautionary assumption that fishing at current levels would have no adverse impact on the GOA/BSAI and the set resulting from the highly precautionary assumption that groundfish fisheries should be discontinued unless shown to have no adverse environmental impacts. The two semi-precautionary alternatives that anchored the middle range of the PSEIS featured more moderate bookend FMPs. Within each policy alternative, NOAA Fisheries used case studies developed by the Alaska Fisheries Science Center and Council science staff to determine the range of impacts analyzed under NEPA. Once impacts were determined by bookends analysis, NOAA Fisheries could compare the impacts of each alternative to select a preferred policy alternative and issue an ROD.<sup>250</sup>

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regulatory actions and analyses. *See supra* notes 146–147 and accompanying text.

<sup>243</sup> *See* Newsletter, *supra* note 241, at 1.

<sup>244</sup> *Id.*

<sup>245</sup> *See* Discussion Paper, *supra* note 232, at 5.

<sup>246</sup> E-mail message from Steven Davis, PSEIS Project Manager, to agency staff (Feb. 20, 2002) (on file with the Harvard Environmental Law Review).

<sup>247</sup> NOAA Fisheries, Alaska Groundfish Fisheries Revised Draft PSEIS (Aug. 2003), available at <http://www.fakr.noaa.gov/sustainablefisheries/seis/draft0903.htm>.

<sup>248</sup> *See id.* at ES § 6.0.

<sup>249</sup> *Id.* at ES-12.

<sup>250</sup> Memorandum from Steven Davis, PSEIS Project Manager, to NPFMC (Apr. 9, 2002) (on file with the Harvard Environmental Law Review); *see also* Alaska Groundfish Fisheries, Supplemental Environmental Impact Statement, Project Newsletter No. 10 (June 2002), available at <http://www.fakr.noaa.gov/sustainablefisheries/seis/news10.pdf>.

NOAA Fisheries staff incorporated two other novel tools into the second draft PSEIS. First, the agency coined the phrase “conditionally significant impacts” to acknowledge and incorporate scientific uncertainty within the PSEIS environmental effects analysis. This indicated that an impact was assumed to be significant based on available scientific information and professional judgment, but more information would be necessary to reduce uncertainty about the degree or intensity of the effect.<sup>251</sup> Second, the agency developed a “pipeline planning horizon,” focusing analysis on the regulatory and FMP amendments likely to be promulgated within the next two years. In the PSEIS context, “pipeline” meant “all actions approved by the Council but not yet approved by the Secretary” as of the conclusion of the June 2002 NPFMC meeting.<sup>252</sup> Practically speaking, these actions would likely be approved and part of the FMP by the time the revised PSEIS draft was issued.<sup>253</sup> The two-year planning horizon was designed to foster a forward-looking cumulative effects analysis and a better characterization of the constantly evolving FMPs.<sup>254</sup>

NOAA Fisheries and the Council identified a Preliminary Preferred Alternative (“PPA”) in the Draft PSEIS, which was based on the policy goals and objectives described in Alternative 3, with refinements incorporated from Alternatives 1 and 4.<sup>255</sup> This “mix and match” PPA adopted a relatively precautionary approach, which will be implemented through community or rights-based management, ecosystem-based management principles that protect managed species from overfishing, and “increased habitat protection and bycatch constraints.”<sup>256</sup>

#### F. Final PSEIS and ROD (2004)

After a second public comment period, NOAA Fisheries issued its final PSEIS in June 2004,<sup>257</sup> followed by an ROD in August 2004.<sup>258</sup> At seven volumes and approximately 5000 pages, the final PSEIS was considerably shorter than the previous draft.<sup>259</sup> The final preferred alternative adopted by the ROD was essentially similar to the PPA identified in the

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<sup>251</sup> See NOAA Fisheries, *supra* note 247, at ch. 4.1-1 (June 2004), available at <http://www.fakr.noaa.gov/sustainablefisheries/seis/intro.htm>. NOAA Fisheries also utilized this analytical technique in the first draft PSEIS and the final PSEIS.

<sup>252</sup> E-mail message from Steven Davis, PSEIS Project Manager, to NOAA General Counsel (Apr. 8, 2002) (on file with the Harvard Environmental Law Review).

<sup>253</sup> *Id.*

<sup>254</sup> Interview with Steven Davis, *supra* note 173.

<sup>255</sup> See Revised Draft PSEIS, *supra* note 247, at ES 8.0.

<sup>256</sup> *Id.* at ES-50.

<sup>257</sup> See NOAA Fisheries, Alaska Groundfish Fisheries Final PSEIS (June 2004), available at <http://www.fakr.noaa.gov/sustainablefisheries/seis/intro.htm>.

<sup>258</sup> See NOAA Fisheries, Alaska Groundfish Fisheries ROD (Aug. 2004), available at <http://www.fakr.noaa.gov/Sustainablefisheries/seis/final062004/rod.pdf>.

<sup>259</sup> Personal communication from Steven Davis to author (Oct. 5, 2005), *supra* note 225.

revised Draft PSEIS.<sup>260</sup> NOAA Fisheries believes that this preferred alternative “reflects a conservative, precautionary approach to ecosystem-based fisheries management.”<sup>261</sup> However, the volume and substance of public comments indicate that many members of the public remain dissatisfied with the final PSEIS.<sup>262</sup> Many critics argued that the PPA adopted in the ROD is not sufficiently precautionary, does not adequately address uncertainty, and fails to incorporate ecosystem-based fisheries management.<sup>263</sup> Others argued that the cumulative effects analysis failed to adequately take past changes into account.<sup>264</sup> And many environmental groups maintained that the alternatives still failed to address the appropriate federal action and should have been framed as detailed, “drop-in” FMPs rather than as broad statements of policy.<sup>265</sup> Nevertheless, at the time of writing, the final PSEIS had not yet been challenged in court.

### G. EAs Tiered from the PSEIS (2004–2005)

At the time of writing, NOAA Fisheries had drafted seven EAs that reference the PSEIS in some fashion.<sup>266</sup> Only one of these documents, however, expressly states that it “tiers off of the PSEIS.”<sup>267</sup> The other EAs contain various statements suggesting that the agency incorporated or referenced the PSEIS in some fashion, but it is not clear whether or not this was meant to constitute tiering.<sup>268</sup> Thus, at this time it is not possible to state conclusively which of these EAs are actually tiered from the PSEIS, or which portions of the PSEIS they might be tiered from. This state of affairs is likely a manifestation of ongoing legal uncertainty within the agency regarding the definition of tiering and how to implement the tiering process. As long as this uncertainty remains, the agency will not be able to fully reap the potential benefits of programmatic NEPA analysis.

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<sup>260</sup> See NOAA Fisheries, Alaska Groundfish Fisheries Final PSEIS at ES-47 (June 2004), available at <http://www.fakr.noaa.gov/sustainablefisheries/seis/intro.htm>.

<sup>261</sup> *Id.*

<sup>262</sup> See generally *id.* at Appendix G—Comment Analysis Report.

<sup>263</sup> See *id.* at G-90 to -99.

<sup>264</sup> See *id.* at G-100 to -102.

<sup>265</sup> See *id.* at G-103 to -107; see also Alaska Oceans Program, Memorandum, Structural Flaws and Selected Failures of Analysis, available at <http://www.alaskaoceans.net/aboutus/PSEIS/OAcc.pdf> (June 2004).

<sup>266</sup> These EAs are available at <http://www.fakr.noaa.gov/index/analyses/analyses.asp> (last visited Apr. 29, 2006) (list on file with the Harvard Environmental Law Review).

<sup>267</sup> NOAA, Environmental Assessment/Final Regulatory Flexibility Analysis for the Harvest Specifications for the Years 2005–2006 Alaska Groundfish Fisheries Implemented Under the Authority of the BSAI and GOA Alaska Groundfish Fishery Management Plans (Feb. 2005), at 13, available at <http://www.fakr.noaa.gov/analyses/specs/eafirfa0205.pdf>.

<sup>268</sup> See, e.g., Draft EA/RIR/Initial Regulatory Flexibility Analysis of the BSAI Management Area for Amendment 79 to the FMP for Groundfish—Minimum Groundfish Retention Standard (IR/IU Trailing Amendment C) (May 2005), at 12, available at [http://www.fakr.noaa.gov/npfmc/analyses/Amendment79\\_SOC.pdf](http://www.fakr.noaa.gov/npfmc/analyses/Amendment79_SOC.pdf) (“This section [Affected Environment] draws on information in the [PSEIS].”).

Fortunately, NOAA Fisheries is currently developing agency guidance on this topic, which should assist in clarifying and standardizing the tiering process.

#### V. OBSERVATIONS ON THE PSEIS PROCESS AND IMPLICATIONS FOR NEPA REFORM

The final PSEIS could be considered a success in that it was completed within the average range for costs<sup>269</sup> and has not yet been challenged in court.<sup>270</sup> The PSEIS collects and analyzes a great deal of information about the GOA/BSAI ecosystem and the impacts of Alaskan groundfish fisheries, and serves as a useful reference document. Nevertheless, the road from the 1998 SEIS to the 2004 final PSEIS was rocky, expensive, and lengthy.<sup>271</sup> It took six years and three attempts to produce a document that could arguably survive “hard look” review by the federal judiciary, but the environmental community maintains serious reservations about the legal sufficiency of the PSEIS.<sup>272</sup> This raises some important questions. What were the key issues and challenges NOAA Fisheries encountered in the PSEIS process, and did the current regulatory regime offer sufficient flexibility and guidance to allow NOAA Fisheries to effectively address these challenges on its own? If not, could CEQ regulatory amendments play a role in improving the PEIS process?

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<sup>269</sup> See NAT'L ACAD. OF PUB. ADMIN., *MANAGING NEPA AT THE DEPARTMENT OF ENERGY* (July 1998), Part IV.C, available at [http://www.eh.doe.gov/nepa/process/napa\\_rep/napa\\_rep.html](http://www.eh.doe.gov/nepa/process/napa_rep/napa_rep.html) (stating that the average cost of producing a programmatic EIS at the Department of Energy is \$12.5 million). NOAA Fisheries' PSEIS cost less than \$10 million to produce. Interview with Steven Davis, *supra* note 173.

<sup>270</sup> The absence of a legal challenge to the PSEIS is not in and of itself a reliable indicator of the document's legal fitness. The decision whether to litigate is influenced by many factors, including political considerations. A new PSEIS lawsuit could, for example, inspire Congress to weaken or suspend NEPA in the federal fisheries management arena. See, e.g., Patti A. Goldman & Kristen L. Boyles, *Forsaking the Rule of Law: The 1995 Logging Without Laws Rider and Its Legacy*, 27 ENVTL. L. 1035 (1997) (arguing that Congress inappropriately responded to citizen suits by using budget riders to temporarily suspend environmental laws applicable to logging).

<sup>271</sup> See NAT'L ACAD. OF PUB. ADMIN., *supra* note 269, at Part III.A (stating that the median time to complete a programmatic EIS at DOE is seventeen months); U.S. Department of Transportation, Federal Highway Administration, *Evaluating the Performance of Environmental Streaming*, at Part 5.1, <http://www.environment.fhwa.dot.gov/strmlng/baseline/index.asp> (last visited Mar. 22, 2006) (stating that the median time to complete an EIS at FHWA has increased from 2.2 years in the 1950s to 5 years in the 1990s). FHWA is undertaking NEPA streamlining procedures in response to concerns over delays in implementing transportation projects. *Id.* at Summary.

<sup>272</sup> See, e.g., Alaska Oceans Program, *supra* note 265 (alleging that the PSEIS fails to satisfy the agency's NEPA obligation because it analyzes policy-level alternatives rather than alternative FMPs, it fails to comprehensively analyze the cumulative impacts of the FMPs, and it fails to analyze critical core assumptions that drive fisheries management decisions).

*A. Key Issues in the PSEIS Process**1. Legal Uncertainty and Lack of Useful Precedent in Scoping*

The crux of the PSEIS controversy revolved around scoping, particularly with respect to defining the alternatives. This is often a challenging task in the PEIS context,<sup>273</sup> but it is hard to imagine a more complex policy arena for this process to take place than federal fisheries management. First, NOAA Fisheries must work closely with the Councils and within a complicated multi-statutory legal and regulatory management regime.<sup>274</sup> Second, FMPs are a multifaceted collection of fishery management goals and tools, making it especially difficult to reduce the possible permutations into a coherent set of alternatives.<sup>275</sup> Third, scientific uncertainty regarding large ocean ecosystems remains very high, and the Councils must constantly adjust FMPs in response to new scientific information. Fourth, because the PSEIS was required by changing circumstances in an ongoing program, the agency had no previously established proposal with which to anchor and focus the analysis. Fifth, the PSEIS raised politically volatile questions about the intersection of the MSA and NEPA, the definition of ecosystem-based management,<sup>276</sup> and fundamental tenets of the U.S. fishery management process itself.

NOAA Fisheries' first attempt to define the alternatives in the 1998 SEIS in terms of TAC levels can be seen as an attempt to circumvent these difficulties. Alternative TAC levels are easily defined, can be conveniently expressed numerically, and provide a well-defined organizing principle for the analysis; however, this format failed in practice to programmatically address the full sweep of FMP amendments. Similarly, the single-focus policy goal alternatives in the draft PSEIS were analytically convenient but insufficiently comprehensive. In the final PSEIS, NOAA Fisheries confronted these difficulties by defining the alternatives in terms of varying levels of precaution and omitting reconsideration of the MSA from the analysis—decisions that the environmental community continues to question.<sup>277</sup> Given the complexity and politics of the situation, some of these struggles were inevitable. However, legal uncertainties regarding the PEIS process also played a role. The agency repeatedly looked for guidance in the regulations, case law, and other agencies' NEPA documents, but these proved to be of limited usefulness in addressing key areas of uncertainty.

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<sup>273</sup> See *supra* notes 50–54 and accompanying text.

<sup>274</sup> See generally Halpern, *supra* note 129, at 454–74.

<sup>275</sup> *Id.*

<sup>276</sup> See Memorandum from Steven Davis, *supra* note 229.

<sup>277</sup> See *supra* notes 242–245 and accompanying text.

## 2. *Drawing the Line on Length and Detail*

At approximately 5000 pages, the PSEIS is a NEPA heavyweight, but it could have ended up considerably longer. When litigation pressure is high, agencies often feel compelled to produce longer and more detailed documents in an attempt to avoid or survive judicial review—a phenomenon known as “the kitchen sink approach” to NEPA compliance.<sup>278</sup> Despite CEQ regulations favoring concise documents, NEPA managers may quite rationally decide that the kitchen sink approach is safest: agencies are accused of being arbitrary and capricious for leaving information out, not for putting more in. Litigation pressure can be a positive motivator for institutional change, alerting reticent agencies that NEPA compliance must be taken seriously. A comprehensive, well-organized PEIS can be an extremely valuable planning tool, and agencies should not be permitted to short-change NEPA in the name of efficiency. But there are legitimate reasons to place reasonable limits on EIS length: cash-strapped agencies must do more with less, and bloated, overly technical, poorly organized documents are of limited utility to the public or managers.<sup>279</sup>

## 3. *The “Shell Game”*

Part of the debate surrounding how to define the alternatives was rooted in concerns about the relationship between the PSEIS and subsequent tiered documents. Environmentalists feared that NOAA Fisheries and the Council would not be adequately bound by the broad policy contours and bookend FMPs of the preferred alternative, which would theoretically allow the Council to authorize significantly less precautionary FMPs than the ROD might suggest. Moreover, NOAA Fisheries might avoid revealing and fully analyzing the detailed impacts of the FMPs in subsequent tiered EAs or EISs by arguing that such impacts were already addressed in the PSEIS. This possibility motivated concerned environmentalists to push for as much detail as possible in the PSEIS in order to restrict the Council’s discretion and to ensure that the impacts would be analyzed and exposed to public scrutiny. Environmentalists are likely to continue utilizing this tactic in the absence of new regulatory guidance or a dramatic increase in trust of the agency and the Council process. Environmental organizations will be watching closely to determine whether the Council does in fact adhere to the precautionary policies delineated in the preferred alternative. Although it is too early to draw sweeping conclusions, there are some early, encouraging signs.<sup>280</sup>

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<sup>278</sup> See Karkkainen, *Whither NEPA?*, *supra* note 6, at 345–46.

<sup>279</sup> See Karkkainen, *supra* note 6, *Towards a Smarter NEPA*, at 917–25 (describing common problems with EIS quality).

<sup>280</sup> See, e.g., NPFMC, Project Timing, <http://www.fakr.noaa.gov/npfmc/Tasking.htm> (last visited Feb. 11, 2006) (on file with the Harvard Environmental Law Review) (summa-

#### 4. *The PSEIS as a New Species of NEPA Document*

The PSEIS is a rather unique beast: the product of a union between a supplemental EIS and a programmatic EIS. This is significant because each type of document arises from different circumstances and is evaluated based on different criteria. A typical PEIS is triggered by a new proposed action. It is initiated in the early stages of planning, when broad-based policy decisions are still being made. Thus, it is a forward-looking analysis of a new proposal. In contrast, an SEIS supplements a pre-existing EIS on a federal action that is already well defined. It is triggered by the discovery of significant new circumstances or information bearing on an action that had been previously analyzed in an earlier EIS. Thus, it looks both forward (in analyzing new information) and backwards (by placing the new information in the context of the prior EIS). A PEIS should present a broad-based, conceptual, policy-level analysis,<sup>281</sup> whereas an SEIS focuses narrowly on the portions of the original EIS that need updating, without revisiting the scoping process.<sup>282</sup> PEISs and SEISs seem mutually exclusive, or at least difficult to reconcile. What, then, is a PSEIS? A document that is both broad in scope and rich in detail is likely to reach gigantic proportions. How can an agency reasonably rein in the size of a PSEIS while complying with the letter and spirit of NEPA? There are no judicial opinions directly on point. The *Greenpeace* court ordered NOAA Fisheries to produce a PSEIS without expressly examining how such a document might differ from a garden-variety PEIS, or explaining how to reconcile the broad scope of a PEIS with the narrow, detailed focus of an SEIS.<sup>283</sup> Further complicating matters is the fact that the original GOA/BSAI EISs were miniscule in comparison to current standards for NEPA programmatic documents. These early EISs were produced when the PEIS concept was new and undeveloped; thus, they offered little in the way of guidance for scope or detail of the PSEIS twenty years later. As first-generation programmatic EISs age and grow stale, this issue will crop up again.

#### *B. Looking at the NEPA Task Force Recommendations in Light of the PSEIS*

The current CEQ regulations leave the agencies a good deal of discretion. This allows agencies to adapt NEPA compliance strategies to their own individual situations. NOAA Fisheries rose to the challenge of respond-

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rising Council's updated groundfish management policy objectives, which closely follow the preferred alternative in the PSEIS); NPFMC, *Essential Fish Habitat*, NEWS & NOTES, Feb. 2005, at 1, available at <http://www.fakr.noaa.gov/npfmc/newsletters/NEWS205.pdf> (describing recent Council action to mitigate potential adverse impacts of groundfishery on essential fish habitat).

<sup>281</sup> See *supra* note 51 and accompanying text.

<sup>282</sup> See *supra* notes 29–31 and accompanying text.

<sup>283</sup> *Greenpeace v. NMFS*, 55 F. Supp. 2d 1248, 1271–78 (W.D. Wash. 1999).

ing to the *Greenpeace* court order by implementing new administrative and organizational strategies, including PSEIS team organization; strong leadership; frequent team meetings; extensive stakeholder involvement; frequent consultation with legal counsel; and careful attention to editing and document production.<sup>284</sup> The entire agency has also undertaken major renovations to its NEPA compliance strategy in connection with the congressionally mandated RSP.<sup>285</sup> This demonstrates that tremendous strides can be made through improved NEPA implementation.

Yet discretion is a double-edged sword. It can work well for the agency when the framework within which discretion is allowed is clear; however, it is subject to considerable risk when the boundaries for the exercise of discretion are unclear. Many tough challenges in the PSEIS process can be traced to the high degree of legal uncertainty surrounding programmatic analyses and tiering.<sup>286</sup> Even after NOAA Fisheries had thoroughly scrutinized the court order, regulations, and judicial precedent, questions remained on fundamental issues such as scope, alternatives, tiering, and the definition of a PSEIS. Case law and other agencies' PEISs were of little help because they were significantly distinguishable from the PSEIS scenario.<sup>287</sup> The dearth of legal guidance may have made it more difficult for the agency to rapidly establish a clear, defensible PSEIS compliance strategy. The process of muddling through brought many opportunities for agency learning, but also created delays. In this atmosphere of uncertainty, many reasonable legal interpretations are possible. Without further guidance, these issues will remain a matter of debate. CEQ regulations cannot, and should not, attempt to conclusively address every aspect of legal uncertainty in the PEIS process. Indeed, "[t]he genius of NEPA has been that it is an extremely flexible vehicle."<sup>288</sup> However, the PSEIS example suggests that CEQ guidance on programmatic analysis and tiering, if properly drafted so as not to stifle innovation and flexibility, could be very useful. The NEPA Task Force Report recommendations on programmatic analyses and tiering<sup>289</sup> are generally sound and supported by the PSEIS example. Unlike proposals that seek to "streamline" NEPA by pulling its teeth,<sup>290</sup> these recommendations have tremendous potential to truly improve the efficiency of the process by reducing legal uncertainty, acknowledging typical pitfalls, and providing suggestions for avoiding or ameliorating them. They apply to all agencies, although some will be particularly helpful in the fisheries management context.

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<sup>284</sup> See generally NAT'L MARINE FISHERIES SERV., ALASKA GROUND FISH FISHERIES PROGRAMMATIC SUPPLEMENTAL IMPACT STATEMENT DE-BRIEF WORKSHOP (Aug. 19–20, 2004) (on file with the Harvard Environmental Law Review).

<sup>285</sup> See *supra* notes 158–160 and accompanying text.

<sup>286</sup> See *supra* Parts II.B & II.C.

<sup>287</sup> See *supra* note 232 and accompanying text.

<sup>288</sup> Cooper, *supra* note 2, at 115.

<sup>289</sup> See *supra* notes 111–112 and accompanying text.

<sup>290</sup> See Buccino, *supra* note 6 and accompanying text.

The first and perhaps simplest step should be to amend the CEQ regulations to reflect and incorporate the basic principles of programmatic analysis and tiering developed over the years in judicial opinions. Case law on this topic has developed tremendously since the regulations were first promulgated in 1978. This would make NEPA compliance more straightforward by allowing agency personnel to consult the regulations directly, rather than reading, interpreting, and synthesizing dozens of judicial opinions just to get a handle on basic principles.

Second, the PSEIS example indicates that it is very important for CEQ to provide guidance validating the different types of PEISs and describing how the nature of the federal action should affect the analytical approach of the PEIS. As part of this, CEQ should acknowledge that the fisheries management context produces a discrete type of PEIS because of the unique circumstances of the NOAA Fisheries-Council management partnership and because FMPs include aspects of policies, plans, and site-specific details, and so do not fit neatly into any of the typical PEIS categories. Although CEQ regulations acknowledge that a programmatic approach may be warranted in a variety of situations, there is currently little or no guidance in this area. Some commentators maintain that the type of proposed action is of limited importance in determining the content of the resulting PEIS, even while acknowledging that improved guidance in this area could simplify the agency's task and improve consistency.<sup>291</sup> However, such guidance would have been very helpful in the PSEIS process, where NOAA Fisheries struggled to formulate and justify its scoping decisions.

Third, it is crucial for CEQ to provide guidance on how agencies can avoid the "shell game" by clearly explaining the relationship between the PEIS and subsequent tiered documents. The efficiency gains made possible by programmatic analyses and tiering will be obviated if agencies are forced to include excessive detail in a PEIS, so CEQ should reaffirm that the PEIS should be a broad-based policy level assessment. However, to allay ongoing concerns about the shell game, CEQ must also require that agencies clearly explain and justify at the outset of the PEIS process which issues will be discussed and which deferred to later tiered documents.<sup>292</sup> This will help to create an administrative record that will encourage agencies not to renege on their plan, and facilitate judicial review if they do. Over time, it may also increase public support for programmatic analyses and tiering.

Fourth, CEQ should address the question of how tightly the action agency must be bound by the alternative chosen in the ROD in order to satisfy NEPA's "action-forcing" requirement in the PEIS context. This is not an issue in the context of project-specific EISs, but policy-level programmatic analyses do give agencies more wiggle room with regard to specifics. In the PEIS context, this should be acceptable provided that the

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<sup>291</sup> Cooper, *supra* note 2, at 114–15.

<sup>292</sup> See *supra* note 82 and accompanying text.

document presents a well-reasoned policy choice accompanied by specific objectives, a timeline for implementation, and an explanation of how upcoming detailed decisions will be addressed and analyzed in future tiered documents.

Fifth, CEQ should provide guidance on the definition of a PSEIS, including how to integrate the broadness of a PEIS and the detail of an SEIS. One way to do this would be to specify that the need for supplementation based on new information does not obviate an agency's ability to draft broad, policy-level alternatives according to typical PEIS standards. Instead, the detailed updates required by the SEIS would appear in the updated sections on affected environment and cumulative impacts.

Sixth, CEQ should revisit its current guidance on length and specificity of PEISs. The current, non-mandatory limits are utterly ignored in practice. An agency daring to adhere to the suggested 300-page limit for complex projects would almost certainly be punished in court. We expect much more from NEPA analyses than we once did—agencies must not only thoroughly explain what they know, but also make lots of educated guesses about what they don't know. And a well-crafted PEIS has utility to the public and managers as a basic reference document for environmental baseline data. But the kitchen sink approach, if left unchecked, will inevitably result in ever-expanding NEPA documents, some of dubious quality, particularly when produced quickly under court-ordered deadlines. Strict page limits are not appropriate—PEIS length and detail should be allowed to vary with the nature of the project. CEQ should therefore consider issuing firmer qualitative guidance on length and detail for programmatic documents. This should emphasize that the length and detail of a PEIS should be commensurate with the broad, policy level nature of the analysis, with more details to follow in tiered documents.

Seventh, CEQ should offer more guidance on timelines for revising programmatic documents. Arguably, NOAA Fisheries should have known that twenty years was too long to wait to revisit its original EISs on the GOA/BSAI fisheries. However, CEQ guidance would make it easier for agencies to face (and plan for) the inevitable. Since the environmental conditions section of the PEIS is the section that will go stale first, it may be advisable to consider allowing agencies to revisit this section of the PEIS within a shorter timeframe, and to require comprehensive overhauls less frequently.

## VI. CONCLUSION

NOAA Fisheries' experience with the PSEIS suggests that agencies are quite capable of responding creatively to NEPA challenges within the existing institutional framework. Although litigation pressure can be a harsh taskmaster, it did inspire the agency to devote an unprecedented amount of attention to reforming its internal NEPA compliance procedures. The

PSEIS learning curve may have been steep and difficult to climb, but the resultant lessons, if institutionalized and not forgotten, can guide NOAA Fisheries' future NEPA compliance efforts. Still, significant legal uncertainty remains regarding programmatic analyses and tiering. The PSEIS process exhibited many of the problems noted in the NEPA Task Force Report. This suggests that there is a role for new CEQ guidance in this area. However, great care should be taken to avoid stifling agency innovation and flexibility by promulgating overly restrictive regulations. Whether one sees God or the devil in the details, programmatic analyses have great potential to fulfill NEPA's purpose without sacrificing it at the altar of administrative efficiency.

