

Congress of the United States
Washington, DC 20515

August 7, 2008

Vice Admiral Conrad C. Lautenbacher, Jr., U.S. Navy (Ret.)
Under Secretary for Oceans and Atmosphere and
Administrator, National Oceanic and Atmospheric Administration
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, DC 20230

Dear Vice Admiral Lautenbacher:

We are writing to express significant concerns with the proposed rule published by the National Marine Fisheries Service (NMFS) and the National Oceanic and Atmospheric Administration (NOAA) on May 14, 2008 to revise and update their procedures for complying with the National Environmental Policy Act (NEPA). We believe that, contrary to Congressional intent, this proposal does not comply with NEPA and the Council on Environmental Quality (CEQ) regulations intended to implement the law. Moreover, the proposal fails to ensure a thorough environmental review of the broader impact of proposed actions and thus threatens the health of ocean ecosystems that are critical for dolphins, seals, turtles, and other ocean wildlife. We urge you to revise the proposed rule to ensure that it complies with Congressional intent and the requirements for NEPA compliance set forth through CEQ regulations.

As you are aware, Section 304 of the Magnuson-Stevens Fishery Conservation and Management Act (MSA), as amended in 2006, directed the Secretary of Commerce to revise and update agency procedures for compliance with NEPA.¹ At the time that this provision was adopted, Congress made it clear in both report language and floor statements that these updated procedures must comply with both NEPA and the CEQ regulations. The Senate Report accompanying the legislation affirmed that point, specifically stating that “[t]he intent is not to exempt the Magnuson-Stevens Act from NEPA or any of its substantive environmental protections, including those in existing regulation.”²

Similarly, in a statement on the House floor, Congressman Rahall emphasized that this new provision in Section 304 was expressly designed to ensure full compliance with both NEPA and the CEQ regulations, stating:

¹ The Secretary of Commerce has delegated this responsibility to NOAA.

² Senate Report 109-229, April 4, 2006 at 8.

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“Notwithstanding efforts by this Congress to undermine the National Environmental Policy Act, H.R. 5946, as amended, requires full compliance with the law. The Secretary of Commerce is directed to update the procedures for complying with NEPA, but these new procedures will not supercede existing NEPA regulations and guidance issued by the Council on Environmental Quality.”³

In fact, CEQ regulations already require agencies to “adopt procedures to supplement” NEPA regulations, but those agency procedures must “confine themselves to implementing procedures.” Moreover, Federal agencies often go through the process of updating their implementing regulations or procedures for complying with NEPA. The 2006 amendments to the MSA simply set the process in motion.

Unfortunately, the revised procedures included in the proposed rule do not comply with this clearly-stated Congressional intention or with CEQ regulations. In fact, the preamble expressly acknowledges that NOAA is proposing to establish a new approach that would set up procedures that are different from those required under NEPA and the CEQ regulations. For example, instead of requiring the preparation of the familiar Environmental Impact Statement (EIS), the proposed regulations create a whole new type of document, the “Integrated Fishery Environmental Management Statement” (IFEMS) which is to be governed by different requirements than those applicable to an EIS with respect to such matters as timing of public comment and identification of alternatives.⁴ By creating a wholly new document and by abandoning the well-established rules governing EIS’s, the proposed rule invites, rather than discourages, litigation. This is exactly the opposite of what Congress intended.

Further, the proposed regulations contain numerous inconsistencies with the CEQ regulations. For example, NOAA proposes vesting the regional fishery management councils with the same degree of authority as the agency to define the scope and level of environmental analysis, an authority that the CEQ regulations vest with the lead federal agency (in this case, NOAA), not an advisory body such as the councils. Further the conflict of interest concerns raised by the multiple roles of the councils in the draft regulations are exacerbated by the provision that would allow the councils to be solely responsible for selection of a consultant to prepare the IFEMS, again, contrary to CEQ’s regulations. NOAA also proposes to reduce public comment periods in a manner inconsistent with the CEQ regulations and without the required approval of CEQ or the Environmental Protection Agency. In

³ Statement of Rep. Rahall, December 8, 2006, 152 Cong. Rec. E2243 (December 27, 2006 Extension of Remarks).

⁴ See 73 Fed. Reg. 28004.

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addition, the proposal makes it much harder for the public to effectively participate in the process. It would give the public less time to evaluate a proposal, limit their ability to participate in the scoping process, and preclude them from raising issues on a final document that they didn't raise on the draft, even though a final document may contain a new alternative that was not previously analyzed in the draft document proposed by the fishery management council. Finally, the proposal misinterprets the tiering process contained in the CEQ regulations.

Compliance with NEPA and CEQ regulations is not merely an administrative activity, it is critical to the health of our oceans. Because NEPA requires that a thorough environmental review precede any significant activities permitted in federal waters, it ensures that public officials make policy decisions about our oceans based on a thorough understanding of the environmental consequences. For too long, ocean fisheries management in this country has focused on single species impacts--failing to consider the wider impacts of fishing on non-target species, important habitats, or the prey of other species. A properly conducted NEPA analysis, however, will evaluate these impacts and provide managers with the information necessary to choose management alternatives that minimize environmental harm. In our view, your proposed NEPA regulations will significantly weaken environmental review of fishery management to the detriment of our oceans.

In summary, we ask that you make significant modifications to address our concerns before these regulations are finalized.

Sincerely,



MADELEINE Z. BORDALLO

Member of Congress



NICK J. RAHALL, II

Chairman



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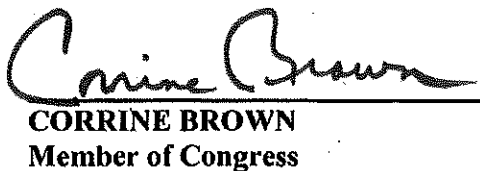
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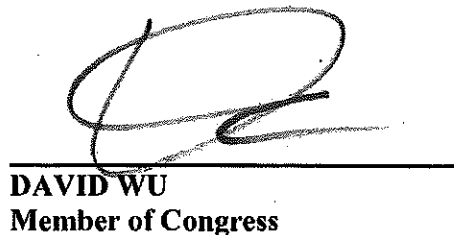
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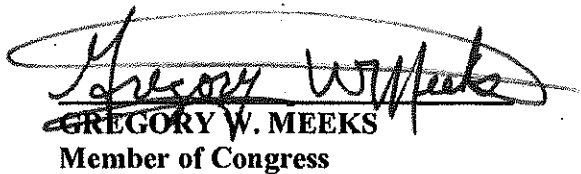
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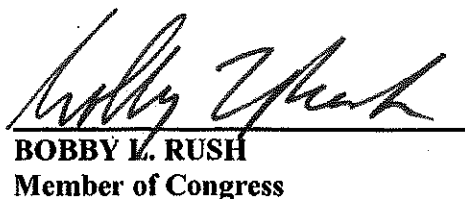

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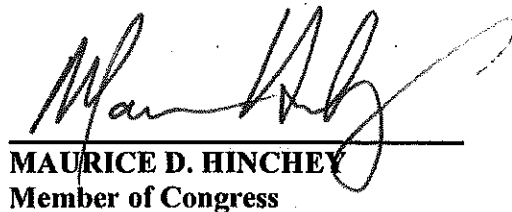

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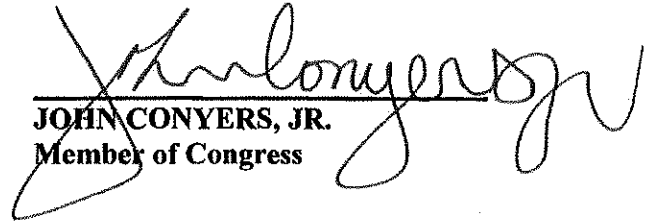

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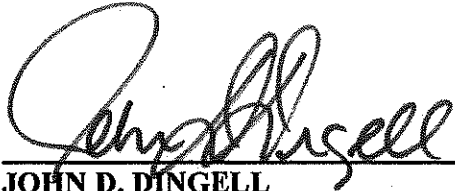

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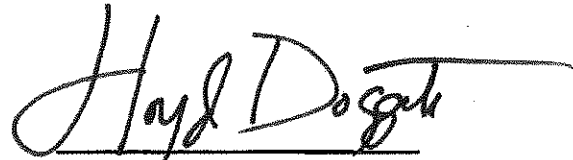
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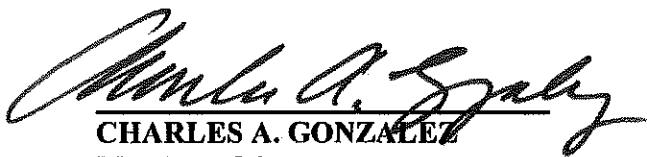
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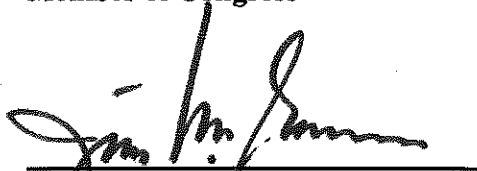

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