

Ocean Impacts of Proposed Changes to NEPA

Analysis prepared for Ocean Defense Initiative by Lois Schiffer¹, former U.S. Assistant Attorney General for the Environment and Natural Resources Division of the U.S. Department of Justice and former General Counsel for the National Oceanic and Atmospheric Administration

On January 10, 2020, the Trump administration [proposed revisions](#) to regulations that guide the implementation of the *National Environmental Policy Act* (NEPA)—the law that requires the federal government to consider the environmental impacts of its decisions and provides opportunity for public input in that review process.²

The proposed rules, if adopted, would impact the ocean in at least two ways. First, they would make it easier for projects to go forward that can and will damage the marine environment and harm marine mammals and endangered species. Second, by excluding the need to assess climate impacts during the NEPA review of federal projects and ignore greenhouse gas emissions, the rules would likely lead to more emissions at a time when dramatic reduction is needed. As scientists from around the world have noted, the most important action we can take for the ocean right now is to reduce greenhouse gas emissions so the world remains below 1.5C of warming.

Below are a number of examples of federal actions and projects related to the ocean with analysis of how they are treated under the present NEPA regulations and how they could be treated under the proposed revised regulations. These examples illustrate how implementation of the proposed NEPA revisions could lead to serious adverse effects on the ocean environment.

Of note, the problems described here are based on the regulations as proposed. It is possible that the regulations may be modified before adoption. Further, if the regulations are adopted (either as proposed or in a modified form), it is almost certain they will be challenged in court.³

¹ Lois Schiffer has had extensive experience with NEPA for over forty years. As Chief of the General Litigation Section in the Land and Natural Resources Division at the U.S. Department of Justice (1978-1981) and as Assistant Attorney General for that Division (renamed Environment and Natural Resources Division)(1993-2001), she was responsible for work with a wide range of federal agencies on hundreds of NEPA cases. As General Counsel at the National Capital Planning Commission (2005-2010), she advised that federal agency on the effective use of NEPA to inform its decisions. As General Counsel at NOAA (2010-2017), she advised the agency on NEPA in a range of contexts, and helped revise NOAA's NEPA guidance and NEPA program. She has taught the principles of NEPA to myriad students as an Adjunct Professor of Environmental Law at Georgetown University Law Center for 30 years. She has spoken and written about NEPA for many years.

² 85 Fed. Reg. 1684 (January 10, 2020). Link here: <https://www.federalregister.gov/documents/2020/01/10/2019-28106/update-to-the-regulations-implementing-the-procedural-provisions-of-the-national-environmental>.

³ The regulations would most likely be challenged for failing to comply with the statute; as a change in regulations for which adequate reasons are not given (see *Motor Vehicle Manufacturers Assn. v. State Farm*, 463 U.S. 29 (1983)); or as arbitrary and capricious. Some of those suits may well succeed and require revision of the regulations as adopted.

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Background

In analyzing the proposed regulations, it is useful to keep NEPA purposes and approaches in mind. NEPA leads to better agency decisions because it:

- informs the decision-maker;
- provides for orderly agency decision-making (for example alternatives are considered at one time rather than seriatim);
- requires the agency to consider effects of the action on the environment, including social and economic environment; and
- involves the public in agency decision-making.

These approaches benefit both the agencies and members of the public. It is important to point out the detriment to agencies and the public if, under the proposed regulations, decision-making becomes less informed and more disordered, this method for public involvement is foreclosed, and the purposes of NEPA for future generations are ignored.

NEPA is a useful tool for the agencies, but much of that usefulness would be undermined by these proposed regulatory changes. Under current NEPA regulations, agencies may use NEPA as a helpful tool even if not required to do so. The current Council on Environmental Quality (CEQ) regulations at Sec. 1501.3(b) provide that agencies may prepare an environmental assessment at any time in order to assist agency planning and decision-making; and Sec. 1501.3(a) provides that an assessment is not necessary if the agency has decided to prepare an environmental impact statement (EIS). For example, the agency may do an EIS even if it is not certain about major impacts or may do an Environmental Assessment (EA) even if a categorical exclusion applies. This “when-in-doubt do an environmental review” approach is discouraged by some of the provisions in the proposed regulation (e.g. the requirement that agency procedures may not generally go beyond these proposed regulations; the requirement for listing costs of the EIS; the provision for using more categorical exclusions including those from other agencies and unjustified by the experience of the using agency; and time and page limits).

Methodology

This analysis uses primarily examples drawn from actual cases that evaluated or applied NEPA where ocean resources would be affected. In addition, the proposed revisions to the NEPA regulations are indeed extensive. In the interests of clarity and brevity, this analysis focuses on several of the more significant changes and does not undertake an exhaustive analysis of all changes.

Analysis

The following are examples of potential detriment to the ocean environment if the proposed regulations are applied as written and not successfully challenged.

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A. Seismic blasting to map the ocean floor for oil and gas exploration may harm species.⁴

Seismic blasting is used to map oil and gas reserves on the ocean floor for oil and gas development. The Department of the Interior (DOI) issues permits for such testing accompanied by an incidental harassment authorization issued by the National Oceanic and Atmospheric Administration (NOAA) under the *Marine Mammal Protection Act*. Such testing, particularly if conducted without regard to when or where species may be present, may adversely affect marine species, including fish, whales, and sea turtles, across a wide geographic range. Evaluation of proposed seismic blasting under NEPA enables the agency to determine the risks to species and to provide appropriate conditions if the blasting is to go forward.

When the Trump administration lifted the moratorium on oil and gas development in waters off the East Coast, companies sought permits for seismic blasting. NOAA issued the necessary authorizations (though the final Bureau of Ocean Energy Management permits have not been issued), and in late 2018 ten conservation groups and a number of east coast states sued to block that testing until, among other things, an adequate analysis of the proposed activity under NEPA had been completed. In this instance, the parties argue that the endangered North Atlantic right whale and other species may be affected adversely by seismic blasting. Such disruption may cause adverse effects for the species, as well as for the people who depend on those species for their livelihoods—fishermen, tour companies, whale watchers, and other components of coastal economies.

As noted in an article about the lawsuit:

“But seismic testing threatens the recovery of marine mammals and the health of fish and shellfish. And oil drilling, with the possibility of leaks and spills, brings additional threats.”⁵

The ongoing lawsuit underscores the importance of effective evaluation of seismic blasting effects to determine how to protect species.⁶ This lawsuit and the importance of protection for species from seismic blasting is set forth in more detail in this article:

<https://scelp.org/projects/view/126>.

Under current regulations:

1. **Scope:** Under current regulations, an EIS would be required to evaluate the effects of all five seismic authorizations because the cumulative actions of each authorization individually and collectively will have a significant impact, an endangered species is involved, and there is controversy over the science related to impacts. (At issue in the lawsuit is the fact that NOAA did not prepare an EIS, and instead prepared only an EA that only considered no action and the preferred alternative--blasting.) Further, seismic

⁴ Example drawn from [South Carolina Coastal Conservation League v. Ross](#), filed by states and environmental groups in late 2018 (still pending in court). Complaint filed in court is here: https://www.southernenvironment.org/uploads/words_docs/Seismic_challenge_12.2018_final.pdf.

⁵ <https://www.njconservation.org/new-jersey-moves-to-block-seismic-blasting/>

⁶ In early 2020, the State of South Carolina joined the lawsuit. <https://abcnews4.com/news/lowcountry-and-state-politics/south-carolina-joins-lawsuit-fighting-seismic-offshore-drilling-tests>. Also in early 2020, the Court ordered the Department of Commerce to provide documents related to the decision.

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blasting at five sites is a major federal action significantly affecting the human environment and requires an EA or an EIS. Definitions at 1508.18 (major federal action); 1508.27 (significantly); 1508.25 (Scope, includes connected and cumulative actions).

2. **Cumulative and indirect impacts analysis:** The five authorizations to allow seismic blasting are connected and would have cumulative impacts on marine species, including an endangered species. Under current NEPA regulations, analysis of those cumulative effects, as well as direct effects to the environment and indirect effects of producing more oil and gas, is required. That information may well affect whether requirements for issuance of an incidental harassment authorization are met. For example, the actions here will be cumulative to a number of tests using seismic blasts already being done by the Navy that NOAA has authorized.
3. **Impacts more distant in space or time:** Impacts that the action may cause but are not closely connected in space or time, such as impairments to species that show up only after a number of years, are direct or indirect impacts that would need to be evaluated.
4. **Climate change:** Under present law as developed by courts, climate change must be evaluated in the NEPA analysis. This would include the effects on species due to climate change combined with seismic blasting, and the potential indirect effects that would result from the climate change impacts caused by more oil and gas development.
5. **Alternatives:** A reasonable range of alternatives must be considered, and no alternative is precluded from analysis because of technical or economic infeasibility. Because requirements help drive technology, analysis of alternatives that rely on developing or future technology is important.
6. **Bias / Conflict of interest:** Current regulations require that the EIS be prepared by the agency, not by the permit applicant.

Under the proposed regulations:

1. **Scope:** The proposed regulations would change the definition of “major federal action” so that non-federal projects (projects conducted by private permit applicants such as the applicants seeking to conduct seismic blasting in the Atlantic) with minimal federal funding or minimal federal involvement where the agency cannot control the outcome of the project--sometimes called a small federal handle--will not require an EIS. Therefore, it could eliminate the requirement for EA or EIS altogether with respect to seismic blasting authorizations.
2. **Cumulative and indirect impacts analysis:** NOAA would no longer be required to look at seismic blasting permitted in one area in the context of blasting in other or nearby areas despite the potential aggregated effects on species. Nor would analysis of the combined effects of this blasting with other projects in the area or more broadly be required.
3. **Impacts more distant in space or time:** Under the proposed regulations, impacts to be studied are to be proximate in space and time. Thus, impacts that do not occur for a

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number of years or occur at a distance and may not be “proximately caused” by the action need not be studied. Since species as well as human effects may not be known for some time, this provision limits important assessments.

4. **Climate change:** Such analysis would no longer be required. Because the point of seismic testing is to enable oil and gas development in the oceans, this omission is serious. For example, if a projection of the need for oil and gas a number of years out because of efforts to regulate climate change shows lowered demand, that affects the economic/conservation balance. That balance cannot be effectively made without climate change analysis.
5. **Alternatives:** Alternatives would be limited—some may not be considered. Under the proposed rules, an alternative must consider the goals of the third-party applicant. Thus, an alternative that is more difficult for the oil and gas company may be precluded even if it is more environmentally protective of the species. Further, under the proposed rules alternatives must be technically and economically feasible. For example, to consider an alternative of not blasting during breeding season, the agency must undertake an assessment of the oil company’s economics (or in another context like the Arctic, propose only alternatives the oil company could meet, such as testing at certain seasons even if that conflicted with species needs). Most important, one of the ways to evaluate an alternative is to assess its technical and economic feasibility—that is an evaluation factor, not a selection criterion.
6. **Bias / Conflict of interest:** Under the proposed rules, the oil and gas developer/permit applicant would be permitted to undertake the review, creating attendant bias (conflict of interest).
7. **Page and time limits:** The rule would impose page limits and the amount of time that can be spent on an analysis. While page limits that lead to more effective analysis are good, page limits that constrain use of effective scientific reporting, alternatives, or evaluation of important information limits usefulness of the environmental review and public input. Here it could lead to multiple state-by-state reviews instead of a composite that would better reflect cumulative impacts. Finally, arbitrary time limits do not consider the fact that scientific study of species to determine effects of the action may require, for example, a breeding season evaluation that may not be completed during the specified time. *(NOTE: The problems associated with the arbitrary page and time limits found in the proposed rules would apply to any NEPA analysis described here.)*

Summary

The change in regulations could eliminate the need for environmental review of seismic blasting authorizations. In cases where a review was conducted, it would seriously constrain the information to be developed and made available to the public and the decision-makers, including the information related to cumulative effects as well as the potential impacts of climate change. The limited information could easily change the decision about whether authorizations for seismic blasting are granted. Without cumulative effects information, for example, blasts may seem acceptable for marine mammals whereas an analysis that considers the cumulative effects of seismic blasts and other environmental impacts would come to a different conclusion.

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B. Plans for offshore oil and gas development may be less protective of the environment.

Under the *Outer Continental Shelf Lands Act* (OCSLA), DOI is required to develop plans for offshore oil and gas leasing every five years.⁷ Those plans require an EIS that may then be used as the basis for tiering analysis later in the leasing process. DOI has suspended the five-year plans currently under development, in part, because of a court ruling related to an onshore leasing plan that found the EA to inform the issuance of leases must analyze climate change impacts, including those impacts that would result from the oil and gas produced by leases issued under the plan. *WildEarth Guardians v Zinke*, 368 F. Supp. 3d 41 (D.D.C. 2019). In addition to the political risks of moving ahead with a five-year leasing plan in an election year, many speculate the Department seeks to reverse that ruling before it moves ahead with the current offshore plans, no doubt concerned that similar analyses would be required.⁸

The Congressional Research Service (CRS) has written a helpful analysis of the five-year planning process that incorporates NEPA.⁹ That report notes that OCSLA requires: “In preparing each program, DOI must balance national interests in energy supply and environmental protection. [footnote omitted].” Evaluation of proposed five-year plans for offshore oil and gas leasing would change significantly if the proposed regulations are adopted.

Under current regulations:

1. **Scope:** Currently, the development of a Programmatic EIS (PEIS) for a five-year plan requires analysis of the full range of environmental information necessary to inform the balance between energy needs and environmental protection. As the Summary to the CRS Report above states: “the PEIS examines the potential environmental impacts from oil and gas exploration and development on the outer continental shelf (OCS) and considers a reasonable range of alternatives to the proposed plan.”
2. **Tiering:** Under the current regulations, five-year plans are informed by Programmatic EISs (PEIS) because significant environmental impact is assumed, and specific leasing and sales are pegged to those PEISs.
3. **Cumulative and indirect impacts analysis:** Such analyses are currently required. For example, if oil and gas development impacts and wind development impacts occur in the same area, the cumulative affects on the environment and marine ecosystems provides useful information in evaluating conservation vs. energy development. Alternatively, the effects of oil and gas development combined with other impacts, such as fishery

⁷ 43 USC 1331 et seq.

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<https://insideclimatenews.org/news/22032019/arctic-anwr-oil-gas-drilling-legal-challenges-climate-impact-wyoming-nepa-ruling>. In the case the judge did not enjoin further work on the project. As of February 18, 2020 no appeal has been filed.

⁹ See Five-Year-Program for Offshore Oil and Gas Leasing: History and Program for 2017-2022 (updated August 23, 2019). <https://fas.org/sqp/crs/misc/R44504.pdf>.

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long-lines, may cumulatively have significant impact on marine mammals and would require analysis under the current regulations.

4. **Climate change:** Under present law as developed by courts, climate change must be evaluated in the NEPA analysis. This would include the effects on marine species due to climate change combined with oil and gas leasing, and the potential indirect effects that would result from the climate change impacts caused by more oil and gas development.
5. **Bias/Conflict of interest:** Current regulations require that the EIS be prepared by the agency, not by the permit applicant.
6. **Alternatives:** Under current regulations, a good range of reasonable alternatives must be assessed, without the threshold determining whether an alternative is technologically or economically feasible. This opens the process to a wider range of alternatives and encourages technological development.

Under the proposed regulations:

1. **Scope:** In the case of oil and gas leasing, the scope of the environmental review (balancing energy needs and conservation) is established by statute, so it is likely for now to remain unchanged. However, the proposed regulations permit greater use of what is known as a “functional equivalent” analysis (i.e., does a review of the five-year plan without NEPA provide sufficient environmental analysis to be a “functional equivalent” to an EA or EIS).¹⁰ In light of the long history of EIS preparation with five-year plans, use of the five-year plan as the functional equivalent may seem unlikely. However, when combined with the fact that the regulations allow the permit applicant to conduct the analysis, perhaps not. Under that approach effective environmental, social, and economic analysis could be lost.
2. **Cumulative and indirect impacts analysis:** Analysis of indirect and cumulative effects would no longer be required. So, for example, if a lease sale is proposed in the same area as other ocean uses, analysis of the cumulative effect of drilling and trawling for fish or laying a pipeline on the ocean ecosystem and species is not required. Similarly, indirect effects on fishermen’s jobs possibly lost because of impact on fishing caused by drilling need not be analyzed. Without that analysis, it is difficult to understand how the agency will make the statutorily required determination that the proposed leases balance energy security and conservation.
3. **Climate change:** Because the proposed regulations do not require the examination of climate change, analyses would not have to evaluate direct or downstream impacts that the leases may have on climate change. Nor would they have to analyze the effect climate change may have on the leases—when a drilling season may change in the Arctic, for example—or on marine species that may be in the area of the drilling. Further, as federal and state actions to address climate change affect demand for fossil fuels, this will in turn affect the need for oil and gas to assure energy security. Without these

¹⁰ The OCSLA specifically requires an analysis under NEPA; however, how that may be interpreted in light of the proposed regulations if they are adopted may be problematic.

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analyses, it is unclear how the agency will make the required statutory determinations that proposed leases balance energy security and conservation.

4. **Bias/Conflict of interest:** As would be the case with seismic authorizations, allowing the permit applicant to prepare the EA or EIS would allow for inherent bias in the results. Under the proposed regulations, the oil and gas industry could prepare the five-year plan EIS, with potential attendant bias of scientific information, alternatives, and selection of preferred alternatives.
5. **Alternatives:** A number of factors in the proposed regulations would limit alternatives to be considered. Specifically, only alternatives in control of the action agency (here DOI) are to be considered; only alternatives meeting the requirements of technological and economic feasibility are to be evaluated; and the agency must consider the goals of the applicant (unclear whether this includes the ultimate oil and gas leasing permit applicant) in selecting alternatives to analyze. This approach seems to reduce the likelihood that five-year plans will examine the alternative of withdrawing areas from leasing or drilling at times or with techniques that are more protective of ecosystems and species.

Summary

Under the proposed regulations, the analyses to be conducted and the information that is provided to the decision-maker are likely to be sufficiently incomplete that the statutory balancing requirement will be applied with a significant tilt toward more oil and gas development under less protective terms, rather than toward conservation in the energy/conservation balance. In addition, the real economic evaluation of oil and gas development over the longer term in light of climate change would be missing. The regulations will likely result in more leasing plans being approved that are less protective of the environment, less economically sensible, and more likely to exacerbate climate change.

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C. Pipeline projects may be less protective of the environment.

The Federal Energy Regulatory Commission (FERC) is the agency that grants permits for interstate pipelines under the *Natural Gas Act* as amended by the *Energy Policy Act of 2005*.¹¹ FERC regulation extends to offshore pipelines.¹² In that permitting, the relevant statute specifies the factors that must be taken into account. A sound NEPA analysis informs FERC's application of those factors.¹³ For gas pipelines, the NEPA analyses must look at the "whole of the pipeline."¹⁴

Under current regulations:

1. **Cumulative and indirect impacts analysis:** A court has found that NEPA requires an analysis of indirect effects that may result from the approval of a pipeline. In other words, the analysis must seek information about and examine upstream production and downstream consumption effects of gas transmission.¹⁵ Because FERC has authority to deny such pipeline certifications based on environmental factors, the information is essential to FERC's decision-making.
2. **Climate change:** Under current regulations, an examination of indirect effects and cumulative effects would be required to include an analysis of the effect of climate change that will result from the gas to be transmitted and burned. The current regulations would also require an analysis of the impacts that climate change might have on the pipeline (for example, would sea level rise risk the integrity of the pipeline).¹⁶
3. **Bias/Conflict of interest:** Currently, an EIS is required to be developed by the agency, and EAs are developed under the supervision and control of the agency.

Under the proposed regulations:

¹¹ See regarding NEPA and NGA the following:

<https://www.epa.gov/nepa/natural-gas-pipeline-guidance-national-environmental-policy-act-reviews>.

¹² For an interesting map of one company's offshore pipelines see

https://www.enbridge.com/~media/Enb/Documents/Factsheets/FS_Offshore_Pipelines_FINAL.pdf.

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<https://www.natlawreview.com/article/dc-circuit-says-nepa-requires-ferc-to-inquire-and-downstream-effects-pipeline>.

¹⁴ Because oil pipelines have no central permitting authority, courts have held that no "whole of the pipeline" analysis is required for those pipelines.

<https://www.pipelinelaw.com/2015/10/05/d-c-circuit-rules-that-nepa-does-not-require-whole-pipeline-review-for-oil-pipelines/>.

¹⁵ *Birckhead v. FERC*, (925 F. 3d 510 (D.C. Cir. 2019) petition for rehearing denied. Because plaintiffs had not raised concerns before the agency, the Court found it did not have jurisdiction to stop the project. See opinion at

http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2019/20190604_docket-18-1218_opinion.pdf

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<https://www.huntonnickelreportblog.com/2018/02/d-c-circuit-raises-the-stakes-nepa-defect-sufficient-to-halt-pipeline-operations/>.

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1. **Cumulative and indirect impacts analysis:** Such an analysis would not be required. In short, the effects on the environment, on users, and on climate change of producing additional natural gas need not be analyzed or assessed.
2. **Climate change:** A significant factor in evaluating the downstream effects of pipelines is the connection between natural gas use and greenhouse gas emissions. Under the proposed regulations, that analysis would not be required. Nor would an analysis of the potential climate change impacts on the project (such as sea level rise) be required.
3. **Bias/Conflict of interest:** The certification applicant (pipeline company) may prepare the EA or EIS, with attendant bias effects on alternatives development, identification of scientific studies and information, and selection of preferred alternative.

Summary

As a result of less rigorous environmental analyses and no information about climate change, decision-makers will have less information on which to base good decisions about pipelines and are more likely to take action that impairs ecosystems and the environment.

D. Protecting endangered marine species from fishing impacts will be more challenging.

The *Magnuson Stevens Act* (MSA) regulates federal fisheries management, and the *Endangered Species Act* requires protection of threatened and endangered species and their habitat. Together, they require that specifications for fishing in federal waters—Fishery Management Plans (FMPs) and fishing regulations issued to implement the plans—protect certain marine species.

As it works with Fishery Management Councils to develop FMPs and regulations for fishing under MSA, NOAA evaluates proposed actions under NEPA. For example, in the Pacific Ocean, lucrative high seas long-line and coastal driftnet fisheries for tuna and swordfish may entangle sea turtles. Several reports and studies have noted the value of effective NEPA evaluation in this context to enable agencies to adopt requirements that protect marine turtles and other species. Without a thorough and broad-based NEPA analysis, decision-making would become more fragmented and the species less protected.

The importance of effective NEPA analysis to inform agency decisions is detailed in a 2006 Report of the Western Pacific Fisheries Management Council.¹⁷ The report emphasizes the importance of taking into account social and economic effects of proposed alternatives, as well as a full range of action alternatives. In another report, by Pew Charitable Trusts, use of effective NEPA for species protection is also emphasized:

“NEPA provided a means to protect endangered marine turtles from bycatch on swordfish long-lines in the West Pacific. Following a full exploration of alternatives to protect sea turtles and albatrosses in a supplemental EIS, changes from “J” to circle hooks and

¹⁷http://www.wpcouncil.org/wp-content/uploads/2013/03/Turtle-Excellence_FINAL.pdf, (2006) at p. 42.

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modified bait techniques enabled the resumption of the swordfish fishery that had been closed by court injunction. Managers praised the collaboration of industry, government and environmental groups which produced the alternatives that incorporated protection for turtles and seabirds¹⁸.

In evaluating FMPs and regulations, NOAA uses both EAs and EISs, depending on the circumstances.

Under current regulations:

1. **Cumulative and indirect impacts analysis:** The effects on marine species and ecosystems of different types of fishing in the same fishery management area, even if regulated through different FMPs, must be addressed as cumulative impacts.
2. **Climate change:** Under present requirements, the agency must evaluate the effect of its plan on climate change and the effect of climate change on the marine species being analyzed. For example, if sea turtles or other marine species are at risk because of climate change, greater protections in the fishing process may be called for.
3. **Alternatives:** A reasonable range of alternatives must be developed and evaluated, including alternatives proposed by the public. For example, the “j-hooks” described in the report above is the type of alternative that scientists may develop and encourage but may not be identified by the fishers who are eventual permittees under FMPs. Similarly, alternatives may be identified by environmental groups, including timing of fishing or alternative methods or gear types.

Under the proposed regulations:

1. **Cumulative and indirect impacts analysis:** Because analysis of indirect and cumulative affects is not required, development of information about risks on turtles and other marine mammals that might be caused by two different fisheries, or by fishing, tourism, and foreseeable shipping together, would not be required.
2. **Climate change:** Scientific analysis clearly supports the concept that climate change is seriously affecting the ocean, and that changes in the ocean in turn affect the fish and wildlife that live there. The proposed regulations do not require analysis of the effect of the FMP or regulations on climate change, or the effect of climate change on elements of the plan. If marine mammals affected by the fishery are under threat from climate change, risks from methods of fishing, timing, or amounts of fish to be taken may have a differing or more serious effect on the mammals. Without this information and analysis, NOAA’s decision-making is less sound and likely more harmful to marine species.
3. **Alternatives:** The proposed regulations constrain alternatives in a number of ways. Of particular relevance here, alternatives must be technically and economically feasible—a set of information that may not be available to those who are not engaged in fishing, and

¹⁸ <https://georgewbush-whitehouse.archives.gov/omb/oira/0648/comments/487-8.pdf> at “Western Pacific Sea Turtles.”

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the requirement for which may limit new ideas and approaches. For example, restrictions on fishing during breeding season for marine mammals may be ecologically important but information about its cost may not be available to outside groups proposing alternatives. Similarly, fishing with different kinds of gear to avoid by-catch may be appropriate but have an economic impact known to the fishing industry, but not members of the public. Under the revised rules, it would be eliminated as an alternative to be evaluated.

Summary

Under the proposed regulations, significant information that would lead to informed decisions about conducting fishing in a manner that avoids or reduces by-catch and provides more protection to marine mammals and ecosystems now and into the future would not be available to NOAA, and likely will lead to decisions that do not effectively combine strong fisheries management with effective marine mammal protection.

E. Coastal Texas Ecosystem Protection and Restoration Would be Undermined.

Because the ocean interacts extensively with coasts, development of sound approaches to coastal protection and restoration is important. Under a provision of the *Water Resources Development Act of 2007*,¹⁹ the Corps of Engineers is required to develop a plan for restoration of the Texas Coast that has been assaulted by floods, hurricanes, and storms. The Report that the Corps issued in 2018 includes an EIS. The purpose of the plan, as specified, is:

“Sec. 4091. Coastal Texas Ecosystem Protection and Restoration, Texas. (a) In General. — The Secretary shall develop a comprehensive plan to determine the feasibility of carrying out projects for flood damage reduction, hurricane and storm damage reduction, and ER in the coastal areas of the State of Texas. (b) Scope. — The comprehensive plan shall provide for the protection, conservation, and restoration of wetlands, barrier islands, shorelines, and related lands and features that protect critical resources, habitat, and infrastructure from the impacts of coastal storms, hurricanes, erosion, and subsidence.

The EIS (Plan) informs decisions on how to reduce the risk of coastal storm damage and restore the coast. The Plan addresses both structural and non-structural alternatives. While not specified in the legislation, these coasts are also affected by climate change. The combined Feasibility Study and EIS is set forth here (<https://www.courthousenews.com/wp-content/uploads/2018/10/CoastalTX.pdf>.) and has a detailed environmental analysis. A substantial range of alternatives are examined (see Plan and EIS summary, p. 4-30). The Plan specifies a preferred recommendation to prevent future damage and to restore the specified portion of the Texas coast for both environmental and economic purposes.

¹⁹ P.L.110-114 (Nov. 8, 2007), 121 Stat. 1041.

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Under current regulations:²⁰

1. **Scope:** The purpose and need is to fulfill the broad purposes of the statute to reduce flood and storm damage and to restore the Texas coast. The Plan uses an EIS because of the scale and clear environmental impacts of the types of projects examined. The point of this approach is to affect the environment by reducing risk and repairing damage.
2. **Cumulative and indirect impacts analysis:** The Plan looks extensively at direct, indirect, and cumulative impacts of the proposed alternatives and actions.
3. **Climate change:** The Plan examines throughout the effect of climate change on the environment that would be impacted by the Plan. It does not appear to examine the effect of the Plan on climate change, though that may be less relevant in this context.
4. **Alternatives:** The Plan examines a substantial range of alternatives including no action, structural approaches, and non-structural approaches, as well as how those two different approaches may overlap or sequence (non-structural approaches may be implemented more quickly and thus limit future damage while structural approaches, such as levees, are developed and implemented.)

Under the proposed regulations:

1. **Functional equivalence problem:** Under the proposed regulations, agencies can look for analysis under a statute that is the functional equivalent of NEPA. Here, where the Feasibility Study includes environmental analysis, there is a question whether the Corps of Engineers and its non-federal partner could simply skip a NEPA analysis (including the public process required by NEPA and the present regulations) in developing the Feasibility Study.
2. **Cumulative and indirect impacts analysis:** Throughout this EIS there is information about indirect and cumulative effects, yet under the proposed regulations that information would not be required.
3. **Climate change:** There would be no requirement to address climate change. An analysis for coastal risk reduction and restoration that did not take into account the effect of climate change on the coast would be far less informative to the decision-makers and could result in selection of projects that went under water as sea level rose due to climate change.
4. **Page limits and timeframes:** Under the proposed regulations, there are limits on pages and time for development of EISs, and while provision for combined documents such as this one that effectively puts information before the public and the decision-maker in one place is made in the proposed regulations, no page limit adjustment that would easily

²⁰ Note: This Plan and EIS were developed under existing regulations.

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allow or encourage such combinations is provided.²¹ This combined Feasibility Study/EIS is beyond the page limit in the proposed regulations at 442 pages, and with an extensive index of scientific studies. While a waiver is possible under the proposed regulations, and while analysis rather than page volume is helpful to decision-makers and the public, the message of the page limits and time limits is that effective development of important scientific information and analysis is less important than speed.

Summary

A thorough and thoughtful EIS that examines indirect and cumulative effects, climate change, a full range of alternatives, and is prepared by the action agency is most likely to lead to orderly consideration, effective and fair involvement of the public in analysis and information development, and in sound agency decision-making. The proposed regulations would substantially cut back on the availability to the agency of the information needed to make sound decisions about protecting and restoring coasts.

F. Coral Reef Conservation Would be Undermined.

Coral reefs all over the world—an essential component of ocean ecosystems—are seriously threatened by climate change and other impacts on coral health. For a number of years federal agencies have focused on how to avoid further destruction of coral reefs and steps to improve them. Over a number of years, agencies have identified and relied on NEPA, including the environmental reviews required by current regulations as an important tool in this process. The proposed regulation revisions would seriously upset these approaches.

Examples of federal agency approaches to coral reef conservation that rely on NEPA are:

- The U.S. Coral Reef Task Force identifies NEPA as a tool to its work on coral reef conservation.²²
- The EPA Handbook on Coral Reef Impacts (2016)²³, which emphasizes reliance on NEPA alternatives analysis, direct and indirect impacts analysis, and other NEPA analysis.²⁴
- Department of Defense Coral Reef Implementation Plan (2000), especially at pp. 18 and 44.²⁵

²¹ A composite Natural Resources Damage Assessment and EIS to inform decisions about restoration of the Gulf Coast after the BP *Deepwater Horizon* oil spill of 2010 is also an example of a combined programmatic evaluation and EIS that provided important information to the public and decision makers. An introduction and executive summary of the plan is here: https://www.gulfspillrestoration.noaa.gov/sites/default/files/wp-content/uploads/Front-Matter-and-Chapter-1_Introduction-and-Executive-Summary_508.pdf.

²² Website of US Coral Reef Task Force is here: <https://www.coralreef.gov/>. See Coral Reef Action Strategy, especially pp. 91-93: https://www.coris.noaa.gov/activities/actionstrategy/action_reef_final.pdf.

²³ <https://www.epa.gov/sites/production/files/2018-01/documents/uscrf-handbook-on-coral-reef-impacts.pdf>.

²⁴ See Handbook especially at pp. 44-46.

²⁵ <https://www.denix.osd.mil/nr/otherconservationtopics/coastalandoceanresources/coral-reefs/coral-reef-implementation-plan/>

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- The National Oceanic and Atmospheric Administration's Coral Reef Conservation Program has recently issued a draft Programmatic Environmental Impact Statement to inform implementation of its programs. NOAA notes in the *Federal Register*:²⁶

"NOAA has prepared a draft PEIS for coral reef conservation and restoration activities conducted by NOAA's Coral Reef Conservation Program (CRCP) throughout parts of the United States, including the South Atlantic Ocean, Gulf of Mexico, and Remote Pacific Islands, and priority international areas (*i.e.*, wider Caribbean, Coral Triangle, South Pacific, and Micronesia). The draft PEIS assesses the direct, indirect, and cumulative environmental impacts of NOAA's proposed action to continue funding and otherwise conducting coral reef conservation and restoration activities through the CRCP's existing programmatic framework and related procedures. The CRCP is implemented consistently with the requirements of the Coral Reef Conservation Act of 2000 (CRCA) and Executive Order 13089."

Under current regulations:

1. **NEPA as a tool:** Agencies are required and collaboratively recognize the need to develop sound scientific analysis to protect coral reefs, develop effective alternatives for proposed actions affecting coral reefs, and conduct analysis of a full range of impacts of actions. NEPA is a critical tool in this analysis.
2. **Best available and up to date science:** Federal manuals and policies acknowledge the importance of identifying good science when evaluating proposed projects and their potential impacts on coral. Legal challenges have sought to ensure that agencies use the best, up to date scientific information including numbers of corals and effect of dredging and sedimentation or other proposed activities during their analysis.
3. **Cumulative and indirect impacts analysis:** Under current law, the Corps or any agency permitting a project that may impact corals must examine effects on corals of the dredging, and also of sedimentation, ocean warming, ocean acidification, agricultural activity in the area and development.
4. **Climate change:** Coral reefs are significantly threatened by climate change, including ocean warming and acidification. Currently, analysis of any proposed actions in light of climate change is required and is essential to coral reef protection.

Under the proposed regulations:

1. **NEPA as a tool:** The proposed regulations would disrupt the settled and useful approach to coral reef protection recognized by multiple agencies and the public as described above. Manuals, guidance, and approaches to NEPA analysis taken throughout the government that rely on important components of present regulations would likely be modified and the protective value of the NEPA analysis would likely be diminished.

²⁶ Full Federal Register Notice at 84 FR 68146 (December 13, 2009).

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2. **Current and best available science:** Agencies would no longer be required to undertake new scientific or technical research, or to use the experiences from other projects to inform their analysis.
3. **Cumulative and indirect impacts analysis:** Analysis of the cumulative impacts that would result from a project would no longer be required, leading to decisions that are less protective of corals; analysis of impacts such as dredging affects considered cumulatively with other ocean changes, agriculture, and human development, would also not be required.
4. **Climate change:** Extensive scientific analysis has demonstrated the threats that climate change poses for coral reefs. Development of that information and analysis as alternatives are identified and assessed would not be required.
5. **Bias/Conflict of interest:** Like most other examples in this memo, the permit applicant would be permitted to undertake the EIS with the attendant effects on identification of scientific information, development of alternatives, and thoroughness of analysis.

Summary

NEPA analysis using the best and most current scientific information to inform decision-makers is a critical tool to protect these fragile ecosystems and species. Making permitting decisions without taking into account cumulative impacts or climate change and by allowing permit applicants to write their own EISs, the proposed regulations hasten decline rather than protection of coral reefs. Further, by specifying that further scientific studies for difficult decisions are not required, the regulations would permit decisions without the best science. Moreover, because federal agencies have relied on existing regulations in developing approaches to reef protection, major changes set forth in the proposed regulations will upset important and settled approaches agencies are taking for protection and conservation of coral reefs.