

Harnessing NEPA to Manage Cumulative Impacts in the Ocean

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SEMINAR SUMMARY

Human uses of the ocean are critical to coastal communities and the U.S. economy. With these benefits, however, also come costs. Directly and indirectly, human activities can negatively impact ocean and coastal resources, leading to degraded water quality, hypoxia, resource depletion, and more. It is therefore important to actively manage these cumulative ocean impacts. The National Environmental Policy Act (NEPA) is a key federal environmental assessment law that requires agencies to consider potential environmental impacts, including cumulative impacts, of a proposed federal action and to evaluate feasible alternatives. As ocean uses grow, the need to understand and mitigate cumulative impacts will be increasingly important for the long-term health and sustainability of ocean resources and the communities and economies that depend on them. This seminar brought together experts to discuss methods for improving cumulative environmental impacts analysis and utilizing NEPA to enhance ecosystem-based, adaptive management of human activities in the ocean.

Speakers

- **Lois Schiffer**, General Counsel, National Oceanic and Atmospheric Administration, Department of Commerce
- **Monica B. Goldberg**, National Policy Deputy Director Oceans, Environmental Defense Fund
- **Peter J. Schaumberg**, Principal, Beveridge & Diamond, PC

Moderator

- **Jordan Diamond**, Deputy Director, Ocean Program, Environmental Law Institute

Ms. Schiffer began her remarks by reviewing the statutory provisions of NEPA that are relevant to cumulative impact reviews. Although the term “cumulative impacts” does not appear in the text of NEPA, section 102(2)(h) requires all federal agencies to initiate and utilize ecological information in making agency planning decisions. The majority of the legal support for consideration of cumulative effects is found in regulations issued by the Council of Environmental Quality (CEQ) to implement NEPA. Those regulations are at 40 C.F.R. Part 1500. Section 1507.8 defines cumulative impacts and instructs

agencies to consider them when completing an Environmental Assessment (EA) and/or Environmental Impact Statement (EIS) for a proposed agency action.

Ms. Schiffer concentrated her remarks on how NEPA is currently being used by NOAA to look at cumulative impacts. CEQ's regulatory guidance thoroughly outlines what agencies should look at, and Ms. Schiffer noted that the level of review they describe is probably more detailed than most agencies actually undertake. In addition, NOAA has two sources of guidance on considering cumulative effects: *NOAA Recommendations and Tips*, a brief document that generally discusses the need to consider cumulative effects, and the National Marine Fisheries Service's (NMFS) 2006 regulations. The latter require consideration of repeated effects, stressors from single sources that interact with other factors and cause additional effects, additive effects (such as the combined effects of a planned energy development project and a planned fishery project), and synergistic effects (effects of multiple sources that impact resources in interactive ways).

Ms. Schiffer questioned whether it mattered if cumulative effects were considered at the individual project level or at a programmatic level. She explained that an effective cumulative effects review for a single proposed agency action will take into account the fact that the action will likely be repeated. She emphasized that the most important thing is not what vehicle is used for a cumulative effects analysis, but rather that the scope and scale of review are properly defined in the analysis, to ensure that the proper level of detail is available to the decision-maker. As a matter of law, NEPA requires that cumulative effects review be completed and does not limit that consideration to programmatic reviews.

Ms. Schiffer then highlighted some specific examples of cumulative effects review in actions at NOAA. She noted that the depth of review varies in different contexts and that all relevant planning documents are available on NOAA's website.

- NOAA completed a cumulative effects analysis for the issuance of incidental harassment authorizations pursuant to the Marine Mammal Protection Act for certain Navy sonar activities. While evaluating the potential impacts of sonar activities, NOAA reviewed a range of possibly overlapping circumstances such as climate change, vessel traffic, oil and gas development, subsistence hunting, and other seismic survey activities. NOAA concluded that the authorizations would not add to existing cumulative effects, especially with the implementation of mitigation and monitoring measures.
- The U.S. Navy's EIS for its Atlantic fleet's active sonar training includes a thorough cumulative impacts review that looks at potential effects on a variety of animals, production of marine debris, impacts on water quality, and effects of acoustics.
- NOAA prepared an EIS during its review of Illinois's coastal zone management plan that contains some consideration of cumulative effects.
- An environmental review of a proposed management plan for the Olympic National Marine Sanctuary briefly looked at noise pollution, invasive species, vessel operations, trampling, and vessel discharges.

- NMFS included consideration of cumulative impacts in the environmental reviews accompanying development and implementation of several fisheries management agreements and plans, including an international tuna agreement and the fishery management plan for the Arctic.

Ms. Goldberg focused her remarks on the importance of cumulative effects analyses, and what can be done to improve them. The NEPA requirement for federal agencies to include public comment and encourage public participation in federal decision-making, interagency consultation requirements, and the programmatic EIS are all potentially helpful tools for encouraging more in-depth cumulative effect reviews.

Ms. Goldberg highlighted five key challenges with cumulative effects analyses today. First, she noted that she has not yet seen a programmatic EIS with an effective cumulative effects review. She highlighted a 3,000-page EIS that was completed during litigation over the stellar sea lion. It was intended to provide a benchmark programmatic EIS for the region. Unfortunately it became, in many ways, simply an academic exercise rather than a substantive analysis. Finding the optimum depth for cumulative impacts analyses – how much is needed and what is enough – has proven to be a continuing obstacle. Second, she addressed the difficulties of leveraging cumulative effects considerations into action. She noted that NMFS has done a good job in describing cumulative effects in its EISs, but frequently the agency has no authority to take action to address these effects. For example, it is well-known that fertilizer runoff into the Mississippi river causes the dead zone in the Gulf of Mexico, and while NMFS is aware of this issue, the agency does not have authority to address it.

Third, Ms. Goldberg noted the difficulty in legally enforcing an EIS, due to the nature of judicial review of administrative actions. When the science accompanying a cumulative effects review leaves openings for interpretation, it becomes very difficult to enforce an EIS—it may be impossible to pinpoint the activities having the greatest adverse effects on an ecosystem with a level of scientific certainty that will meet the requirements for legal certainty. In addition, when an agency is faced with potentially conflicting statutory mandates, the more flexible procedural requirements of NEPA generally give way to more concrete statutory mandates. The fourth obstacle Ms. Goldberg identified was resource constraints, as it becomes increasingly difficult to justify broad reviews as federal resources diminish. Fifth, agency culture can also create a bar to meaningful cumulative effect review.

Ms. Goldberg concluded her remarks by noting that despite these challenges, NEPA and cumulative effects review can play an important role in protecting the oceans. The public can help educate agencies about ecosystem-based management and how using it will create better outcomes in a specific ecosystem. Perhaps the most effective way to use NEPA is to develop, and support with evidence, a reasonable alternative for the agency to consider that includes cumulative effects review. Another way to encourage cumulative effects review through NEPA is to develop independent science to present

during the NEPA process. In general, agencies want to look at cumulative effects and the public can be effective in helping to draw their attention and focus the review.

Mr. Schaumberg focused his remarks on cumulative impacts review in the context of offshore energy development and the Outer Continental Shelf Lands Act (OCSLA). OCSLA authorizes uses of the outer continental shelf, and requires the Department of the Interior's Bureau of Ocean Energy Management (BOEMRE), formerly the Minerals Management Service, to develop a five-year leasing program. The leasing program must consider impacts on the entire outer continental shelf, and balance competing interests for uses of the area. It is accompanied by a programmatic EIS that provides a high-level analysis of anticipated environmental impacts.

At present, the 2012–2017 five-year plan is in development. The draft EIS, which is available for public comment through January 9, 2012, looks at mining impacts, air quality, water quality, habitats, marine mammals, endangered species, impacts on marine sanctuaries, tourism, recreation, fishing and a host of additional issues. After the five-year leasing program is completed, lease sales will begin. Prior to a lease sale, 4–6 lease sites are identified and a more focused review is completed through a supplemental EIS. The next round of environmental reviews will need to look at the cumulative effects of the *Deepwater Horizon* oil spill. This is a significant challenge, as the full impacts of the spill are not yet fully known or understood.

Upon completion of the lease sale environmental reviews, the next step will be for the agency to prepare EAs looking at site-specific impacts. Finally, another environmental review is completed before drilling permits are issued. Mr. Schaumberg noted that among the challenges faced in this type of review are determining the correct geographical boundaries, range of potentially affected resources, and scope of cumulative effects.

Mr. Schaumberg also discussed the interaction of the five-year leasing program and the proposed framework for coastal and marine spatial planning (CMSP) that is supposed to be implemented by the National Ocean Council and yet-to-be-formed regional planning bodies. He noted that the new CMSP requirements may facilitate the cumulative effects review process on the outer continental shelf, as CMSP provides a public process for determining how coastal resources should be used to most benefit stakeholders. This is another way to express the policy goal associated with assessing and analyzing cumulative effects. While it is not yet clear what the legal impacts of CMSP will be in terms of litigation and enforceability, it is clear that the process has the potential to look closely at cumulative effects and should help facilitate cumulative effect review in other contexts in the future.

Question and Answer Period:

Will NEPA apply to approval of the coastal and marine spatial plan (CMS Plans) once they are developed?

Mr. Schaumberg responded that the answer to that is currently unclear, but presumably NEPA will come into play because the CMSP process will facilitate this type of cumulative effect review in the future.

Ms. Schiffer followed up by noting that part of the CMSP concept is that state and local participants will use the resulting plans as part of their decision-making processes. This should expand the consideration of cumulative effects beyond federal decision-making, which is what NEPA applies to, and should result in wider consideration of cumulative effects.

Isn't there an opportunity here for agencies to work together when they identify cumulative effects that are caused by activities regulated by other agencies?

Ms. Schiffer stated that there are plenty of examples of agency cooperation on cumulative effects analyses. There are many examples of agencies working together informally as well through the sharing of public comments, research, and other information.

Are agencies proactively working to increase cooperation in conducting cumulative effects reviews?

Ms. Schiffer responded affirmatively and provided as an example the Department of the Interior's review of water systems in the western United States. NOAA shares an interest in those resources, and the two agencies work closely together. Resource constraints are a challenge to this sort of cooperation. Unfortunately, all agencies face the challenge of doing more with less.

Mr. Schaumberg added that one way that reviews have moved forward within the Bureau of Land Management is through funding by project proponents. There has been no opportunity for private funding in offshore projects.

Ms. Goldberg concluded by noting that onshore industry is aware that NEPA review can be done more promptly if it is privately funded. This sort of mechanism is not yet in place offshore, and the lack of agency funding directly affects whether reviews move forward quickly and whether development can take place.

There are both positive and negative environmental effects from offshore wind development projects. Can applicants expect NEPA to consider both positive and negative cumulative effects?

Ms. Schiffer affirmed that NEPA requires the agency to look at both the positive and negative impacts of a proposed action. Renewable wind energy certainly has positive environmental effects but its siting may cause negative impacts. Ms. Goldberg added that this is an area where transparency and public

participation is helpful. Privately-funded science can be used to highlight positive effects. It is helpful to have public parties participate as advocates.

Can you discuss the tension between the Executive Order requiring expedited review of offshore energy projects and the requirement to look at cumulative effects under NEPA?

Ms. Schiffer responded that expedited review must be undertaken consistent with the law. The Executive Order is not about ignoring NEPA requirements; it is a priority-setting tool. The agency must look at the cumulative effects and must make review of these projects a priority. This requires agencies to think through their reviews thoughtfully and quickly. Ms. Goldberg added that some cumulative effects reviews are unfocused and result in lengthy reviews, but not very thoughtful ones. She stressed that agencies need to ask straightforward questions and be analytical, not voluminous, in their responses. Research must be integrated into the problem in a thoughtful and timely way.

Are there methods for agencies to cooperate more by sharing information, through formal or informal means?

Ms. Schiffer replied that NOAA has a large amount of information available to the public and to other agencies, including on its website. It does not have specific NEPA-based databases organizing this data for easier searching, which would certainly be a great way to make the information more usable, but would also require a large expenditure to develop. In general, federal agencies are forthcoming with information both to each other and to the public. Mr. Schaumberg affirmed that this is really a question of resources—it takes time, money, and effort to create that sort of database.

Ms. Goldberg followed by noting that this is one of the issues that has arisen in regard to CMSP, because the upfront costs of this sort of database would be huge but presumably it would decrease duplicative efforts and increase cooperation in a cost-saving way over time.

Cumulative effects analyses at the planning phase are usually less specific than analyses completed at the project phase. Is there a way to have more robust cumulative effects analysis at the planning phase?

Mr. Schiffer responded that, in general, the needs are different at the different phases but NOAA is always open to doing things better.

Ms. Goldberg noted that concerns have been expressed during the OCSLA leasing program planning process that cumulative effects analysis completed in the early planning phases does not always filter down to the more specific levels of review.

Mr. Schaumberg pointed to the Bureau of Land Management as an example. The agency manages huge land areas, but the related cumulative effects analyses are not tremendously difficult because it

manages the area itself. In the ocean, there are numerous agencies involved and the cumulative effects analysis is more difficult to follow through various levels of review and decision-making. This makes the transition between ecosystem-based management and cumulative effects analysis more difficult.

If multiple NEPA reviews are occurring at the same time, what projects and activities must be included? Are proposed activities included?

Ms. Schiffer explained that the legal standard requires reasonably foreseeable actions to be considered. If a proposed project is likely to be built, then it should be considered.

Can you discuss the challenge that arises when the planning process – by the nature of the questions asked – focuses an agency down a certain track and forecloses effective cumulative effect review?

Ms. Schiffer responded that there is an inherent tension in the NEPA review process, and the level of detail one reaches during planning review versus project review. The best way to address this is to take a hard look at the cumulative effects at the programmatic phase and gather the most useful information possible then. Ms. Goldberg added that NEPA regulations emphasize the importance of early cumulative effects analysis. The best practice is for cumulative effects review to be completed before concrete actions are taken.

What are your thoughts on NEPA and state law NEPA equivalents such as the California Environmental Quality Act or the Massachusetts Environmental Policy Act?

Mr. Schaumberg responded by noting that Rhode Island has taken the lead on CMSP and has looked at cumulative impacts on the outer continental shelf beyond the state's three-mile jurisdictional limit. He noted that while it is doubtful that the state has authority to regulate on the outer continental shelf, it is still studying the impacts.

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