



To: Memorandum to the Record

From: Kimberly Damon-Randall
Director, Office of Protected Resources

Subject: Environmental Assessment, Deviation from the Deadline
Requirement at Section 107(g)(1)(B) of the National
Environmental Policy Act (NEPA)

This memorandum documents the National Marine Fisheries Service's (NMFS') determination to deviate from the deadline requirement at Section 107(g)(1)(B) of NEPA, 42 U.S.C. § 4336a(g)(1)(B), as amended by the Fiscal Responsibility Act (FRA) of 2023, Pub. L. No. 118-5 (2023), for the environmental assessment (EA) for the *Proposed Application of Protective Regulations under Section 4(d) of the Endangered Species Act for the Threatened Banggai Cardinalfish* due to practical constraints. NMFS began preparation of the EA for the *Proposed Application of Protective Regulations under Section 4(d) of the Endangered Species Act for the Threatened Banggai Cardinalfish* on December 15, 2022, and cannot complete review within the statutory 1-year requirement for an EA. However, as explained below, in consideration of several factors described by the Council on Environmental Quality (CEQ), NMFS commits to completing the EA for this program by June 2025.

On June 3, 2023, President Biden signed into law the FRA, which amended several provisions of NEPA. Relevant here, the FRA modified Section 107(g) of NEPA and set new 2-year and 1-year statutory deadlines for EISs and EAs, respectively. However, in recognition of the challenges agencies would face in implementing these new requirements to ongoing NEPA reviews, CEQ has advised agencies to make a fact-specific evaluation to determine the appropriate approach that considers the statutory requirements.¹

Federal agencies are responsible for determining how the amendments apply to their ongoing NEPA reviews and should consider congressional intent to facilitate more efficient NEPA analysis when making this determination. Many of the provisions of the FRA codify best practices an agency may already include in its NEPA reviews, or ones an agency may integrate into an ongoing review with little or no disruption. Where implementation of a provision could lead to inefficiency in an ongoing NEPA review, agencies should engage in a fact-specific evaluation to determine the appropriate approach that considers the statutory requirements; the level of NEPA review (i.e., environmental impact statement, environmental

¹ CEQ, Amendments to NEPA from the Fiscal Responsibility Act of 2023, <https://ceq.doe.gov/laws-regulations/fra.html>.



assessment, or categorical exclusion); the stage at which the environmental review was at the time of the amendment; the expectations of any project proponents; additional resources that would be required to implement the provision; the extent of any disruption it could cause; and other legal considerations.

Here, NMFS began the NEPA review for *Proposed Application of Protective Regulations under Section 4(d) of the Endangered Species Act for the Threatened Banggai Cardinalfish* on December 15, 2022². The comment period on the proposed rule associated with this NEPA action, was extended from October 16, 2023, to December 15, 2023, in response to a request from Quality Marine. The comment period for the proposed rule (88 FR 55431, 08/15/2023) closed on December 15, 2023, during which 20,000 comments were received. The Office of Protected Resources (OPR) is currently reviewing these comments. The EA will be finalized once the comments are addressed and the final rule to promulgate protective regulations under ESA Section 4(d) is finalized. For these reasons, NMFS has determined that it is unable to conclude the EA process within the 1-year deadline requirement at Section 107(g)(1)(B) of NEPA. Therefore, OPR is extending the deadline for the EA to provide the additional time necessary to complete the rule and EA. However, understanding the congressional intent of the NEPA amendments to increase efficiencies in the review process and ensure agencies complete environmental review in a timely manner, NMFS is committed to completing the EA for this program by June 2025.

² The Office of Protected Resources submitted a “Report a Major Federal Action” form on the NOAA NEPA intranet on December 15, 2022, memorializing its determination that it needed to prepare an environmental assessment to promulgate protective regulations under ESA Section 4(d) for the Banggai cardinalfish.