

Science, Service, Stewardship



National Environmental Policy Act (NEPA) Primer

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October 27, 2016

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Training Goals

- Understand NEPA as a decision-making tool for Council actions
- Understand NEPA context and process
- Learn about key NEPA guidance



What is NEPA?

- NEPA is a ‘procedural statute’
- Contains action-forcing procedures to ensure that Federal agencies take environmental factors into account
- It serves as an umbrella process for addressing *many* laws and executive orders (Magnuson-Stevens Act, Endangered Species Act, etc)
- Applies only to Federal actions (includes actions funded, assisted, regulated, conducted, approved, permitted by a Federal agency)



What is NEPA, really?

- NEPA is a public planning process to make informed decisions
- Federal agencies must consider and publicly disclose the potential environmental impacts of Federal actions.
- Assumes that good information will lead to better decisions
- merely prohibits uninformed – rather than unwise – agency action



How do we know what we need to do?

NEPA Requirements

- NEPA Statute
- Council on Environmental Quality (CEQ) Regulations (40 CFR Parts 1500-1508 & “40 Questions”)
- CEQ Guidance (climate change, cumulative effects)
- NOAA Administrative Order 216-6
- Judicial interpretations (case law)



How do we comply with NEPA?

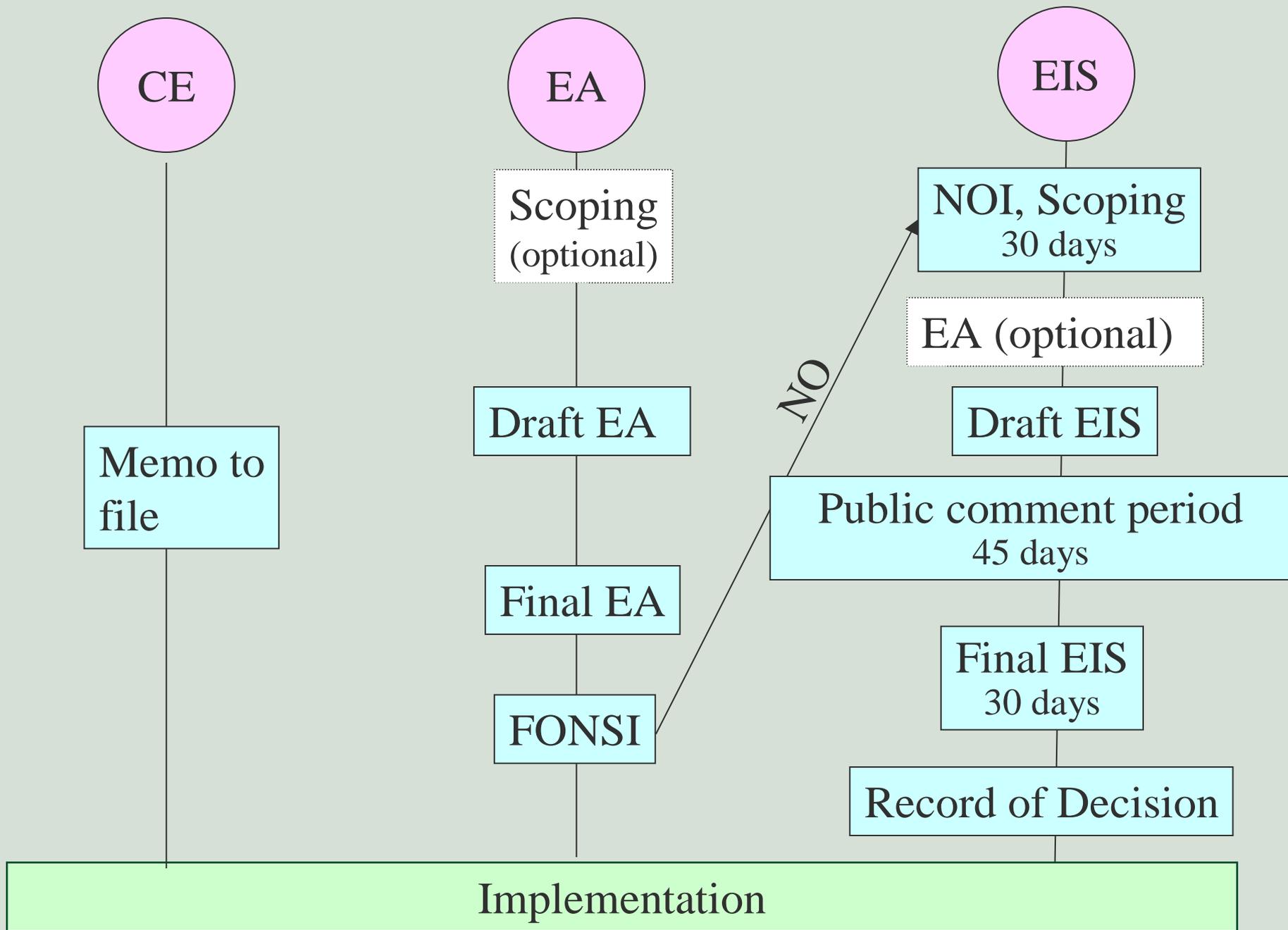
Basic procedure/steps:

- Is the action subject to NEPA?
- Which level of NEPA review/compliance applies?
 - Categorical Exclusion (CE)
 - Environmental Assessment (EA) and Finding of No Significant Impact (FONSI)
 - EA first then conduct an Environmental Impact Statement (EIS)
 - EIS and Record of Decision (ROD)



NEPA Documents

- **Categorical exclusion** – NMFS writes a memorandum to the record that documents that the action has no potential, cumulatively or individually, to significantly impact human environment.
- **Environmental Assessment** – Concise public document to analyze the environmental impacts, provides enough evidence to determine no significant impacts.
- **Environmental Impact Statement** – A detailed statement required by NEPA statute prepared for action that may/will significantly impact the quality of the human environment.





Integrating NEPA with the Magnuson-Stevens Act and other Federal Laws



Applicable Law

- NEPA serves as an UMBRELLA to demonstrate how we have complied with applicable laws and EOs that apply to our actions (i.e., MSA, MMPA, ESA, EO 12866, RFA)
- In some cases, it is the only documentation showing how we have complied



Basis for Integration

- NEPA documents are an appropriate place to determine compliance
- CEQ regs require that NEPA be integrated with other planning and environmental review procedures so that “all such procedures run **concurrently** rather than consecutively” (40 CFR 1500.2(c))



Magnuson-Stevens Act

- Establishes specific roles of NMFS and Fishery Management Councils
- NMFS policy directive on NEPA Compliance for Fishery Management Actions under the MSA (2013)



Magnuson-Stevens Act

- Similar to NEPA, MSA requires that FMPs consider—
 - Impacts to the managed stock
 - Impacts to other fishery resources
 - Impacts to other species
 - Economic impacts to industry
 - Impacts to communities
 - Impacts to habitat – EFH and consultations



EAs and EISs

- For fisheries actions, often prepared by the Council staff and NMFS
- NMFS, as the action agency, is ultimately responsible for the content (NMFS gets sued)
- Although NMFS is the action agency under NEPA, Councils typically determine—
 - proposed action
 - purpose and need
 - range of alternatives



Environmental Assessments



Looking Closer at the EA

- Majority of NEPA documentation
- Triggered by actions that have impacts (not CEs), but do not require an EIS. May be unclear if impacts are significant
- CEQ and case law dictate statutory requirements and specific elements included in an EA
- Analytic rather than encyclopedic
- A concise and brief document (in theory if not practice); *CEQ says 10-15 pages*
- *Structure similar to EIS per case law*



What is the job of an EA?

- **To explain -**
 - **What is the action?**
 - **Why are we doing it?**
 - **Are there other ways achieve the goals (alternatives)?**
- **Does an alternative have the potential to significantly impact the human environment?**
 - **What are the impacts?**
 - **Are those impacts significant?**
 - **Can we support the FONSI**
- **An EA/FONSI must include sufficient evidence to support not preparing an EIS.**
- **The most frequent NEPA litigation relates to the decision for an EA/FONSI rather than EIS.**



Required Contents of EA per the NAO 216-6

An EA must contain:

- Purpose and Need for the action
- Alternatives
- Discussion of environmental impacts of the proposed action and alternatives
- Sufficient evidence and analysis for determining whether to prepare a FONSI or an EIS
- Listing of agencies and persons consulted



Finding of No Significant Impact (FONSI)

- End result of EA with no significant impacts
- FONSI MUST link to analysis in EA with thorough, justified, thoughtful responses
- ESA Section 7 and EFH consultations must be completed before Final EA and FONSI are signed



Environmental Impact Statements



EIS

- A detailed statement used to inform decision-makers and the public of the effects of actions that may impact the quality of the human environment
- More process steps
- Three major documents
 - Draft EIS
 - Final EIS
 - Record of Decision



EIS

Draft EIS

- May identify a preliminary preferred alternative
- Filed with EPA, EPA publishes a Notice of Availability (NOA)
 - 45 days minimum public comment period
 - Public hearings may be conducted during review period (in conjunction with MSA process)

Final EIS

- Identifies the preferred alternative to implement
- Revised from DEIS in response to substantive comments
- EPA publishes NOA to begin 30 day “cooling off period”



Key parts of an EA or EIS



Purpose and Need for Action

- Critical first step in an EA or EIS
- Purpose and need should be informed thru the public process
- Answers key questions—
 - **WHAT is the problem?**
 - **WHY are we taking action?**
 - **WHAT are the objectives of the action (solution)?**
 - **WHAT are we trying to achieve?**
- Simple and concise



Why is the “Purpose and Need” Important?

- Sets the stage for the entire document
- Should be neither too broad nor too narrow
- **Helps define all of the alternatives considered**
- If an alternative does not meet the purpose and need it should not be analyzed but be included as “considered but eliminated”



Relationship between the P & N and Alternatives

- The purpose and need determines the range of alternatives
 - Cases lost when alternatives analyzed do not meet the purpose and need
 - Or, where alternatives that do meet the purpose and need were not analyzed

Iterative process...

- **Does the P & N yield a reasonable range of alternatives?**
- **Does the range of alternatives match the P & N?**



What is a reasonable range of alternatives?

- A reasonable alternative positively answers the following questions:
 - **Does the alternative meet the objectives and fulfill the underlying need for the action?**
 - **Is it technically and economically practical/feasible?**
 - **Does it make common sense?**
- A reasonable alternative may conflict with law, be outside the scope of what has been approved or funded, or is outside the legal jurisdiction of the lead Agency



“No Action” Alternative

- Required by CEQ regulations
- Contrast current conditions and future conditions in the absence of the proposed action
- Usually, the “status quo”



Why do we briefly describe the alternatives not analyzed?

- Alternatives found not to be feasible or reasonable should be presented briefly, along with the reasons why they were eliminated from further study
- Reasons for elimination might include
 - Failure to meet stated purpose and need
 - Cannot be technically or reasonably implemented
 - Greater cost or environmental impacts than other alternatives
- Demonstrates that we gave a “hard look” at the problem and potential solutions
- Documents the process, showing how the reasonable range of alternatives was ultimately selected



Affected Environment

- Describes affected resources with detail relative to the predicted impacts
- Descriptions no longer than is necessary to understand the effects of the alternatives
- Data and analyses commensurate with the importance of the impact, with less important material summarized, consolidated, or simply referenced



Key questions for affected environment

- Are the data and information **recent** (*up-to-date*)?
- Is the background information **relevant** to the action/alternatives/impacts?
- Does the background information provide the context necessary to understand the potential impacts?



Environmental Consequences (Impacts or Effects)

- **Direct Impacts** – caused by the action and occur at same time and place
- **Indirect Impacts** –
 - caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable
 - may include changes and related effects on air and water and other natural systems, including ecosystems



Environmental Impacts

- **Cumulative Impacts –**
 - impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.
 - Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.



Environmental impact sections should.....

- **COMPARE** alternatives –
 - to provide the decision-maker and the public with a clear basis for choice among options
 - to help show how a decision is made
- Connect conclusions to the analyses in the EA.
- Quantitative vs qualitative
 - Quantify whenever possible (with narrative!)
 - Qualitative assessments okay



Environmental impact sections should.....

- Explain impacts of the No Action alternative
- Indicate direction and magnitude of the impacts of each action alternative (compared to the No Action) for each resource
- Describe the effects :
 - *What are the effects?*
 - *Why are they expected to be greater or less?*
 - *Why are they not significant?*



Environmental Consequences Cumulative Impacts

- Define the appropriate temporal and spatial/geographic scale for the analysis
- Understand that impacts may be beneficial or adverse
- Cumulative impacts are from the resource perspective

$$\begin{aligned} & \text{Proposed Action} + \text{Past Actions} + \\ & \text{Present Actions} + \text{Reasonably Foreseeable Future} \\ & \quad \text{Actions} \\ & = \text{Cumulative Effects} \end{aligned}$$



Climate Change

- When performing NEPA analyses, consider—
 1. the potential effects of proposed actions on climate change as indicated by assessing the estimated greenhouse gas emissions of the proposed action
 2. the effects of climate change on proposed actions and their environmental impacts.
- CEQ's 2016 *Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews*



Key Questions for Environmental Impacts

- Do I understand the impacts of each alternative on each resource?
- Can I compare the impacts across alternatives?
- Do I know if any of the impacts are significant?
- Can I pick a preferred alternative confident I understand its impacts on the human environment (no unintended consequences or surprises)?
- ***Is there a logical connection between the impacts and the purpose and need?***



How are EAs and EISs Different?

- Basic contents are the same in an EA and EIS
- If significant impacts are found, no FONSI
- An EIS has a few additional requirements, *but author does not need to prove that there are no significant impacts*
 - Index
 - Comment period, review, and distribution
 - Federal Register Notices
 - Specific draft and final procedures



Draft to Final EIS

- Notice of Availability (NOA) informing public that DEIS available for comment
- At least 45 day public comment period on DEIS, optional public hearings
- FEIS must respond to comments received on the DEIS (and document the responses)
- Once the EIS is final, NOA for FEIS published



Other Provisions of NEPA



Programmatic Analysis

- Prepared for major program, plan or policy (Programmatic EIS)
- Stepped approach to analysis
- Broad analysis that supports smaller scale, specific actions that are “tiered” off the programmatic EA or EIS



Tiering

- Encouraged by CEQ
- Tiered analysis only needs to summarize issues
- Focus is on specific issues with the new action
- Uses incorporation by reference



Public Involvement

- NEPA promotes public engagement in decision making

Many ways for the public to provide input into the EA or EIS

- During the Council process
 - scoping
 - document development
- During public comment period on the draft EA or EIS
 - For an EA, that happens with the proposed rule or NOA for the FMP amendment comment period
 - For and EIS, we usually have a separate comment period



Case Law

- Important element of NEPA practice – shapes the practice, procedure, documentation
- Standards of judicial review
 - Arbitrary and capricious
 - Hard look doctrine
 - Rule of reason
 - Substantive judicial review – hardly used since NEPA considered a procedural law (meaning it doesn't mandate decisions)



NEPA Resources

- Regional NEPA Coordinators!! We are here to help.

- NEPA Guidance on the web
 - NOAA - <http://www.nepa.noaa.gov/>
 - NMFS - http://www.nmfs.noaa.gov/sfa/laws_policies/msa/nepa.html
 - CEQ - <https://ceq.doe.gov/index.html>

- NMFS's policy directive 30-132 for NEPA Compliance for Fishery Management Actions under the MSA (2013)
 - <http://www.nmfs.noaa.gov/op/pds/documents/30/30-132.pdf>



NEPA Coordinators

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Take home message for new Council members

NEPA is your most powerful tool for making informed decision on how to manage your region's fishery resources.

The NEPA process –

- informs you of the impacts of your proposed action and how to best achieve your goals.
- explains and supports your decision for the public and NMFS (and court if litigation).
- ensures your decisions complies with applicable Federal law.