



**NOAA  
FISHERIES**

**SF3**

# The National Environmental Policy Act (NEPA) and the Fishery Management Process

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Council Member Training  
Nov. 16, 2023

# Key Learning Objectives

Objectives are for you to be able to:



- Explain why we care about NEPA.
- Explain the requirements for EISs.
- State when an EA/FONSI is appropriate.
- Describe NEPA's effect on the MSA process.
- Locate guidance.
- Identify Issues Affected by recent law and regulatory changes

# Agenda

## Background: Why are we here?

- History.
- Why Do We Care?
- Litigation.

## Overview of NEPA.

- Purpose, Requirements, EIS, Shortcuts and Efficiencies, Significance.

## Effect on MSA Timing and Process

- Timelines.
- Guidance.

## Statutory and Regulatory Changes

## Debrief: Did we Achieve Objectives?

# History Lesson

## Where did NEPA come from?

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

## Why do we have it?

## Who's in charge here? (CEQ)

*SEC. 2. The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.*

More information available at: [https://ceq.doe.gov/laws-regulations/nepa\\_legislative\\_history.html](https://ceq.doe.gov/laws-regulations/nepa_legislative_history.html)

# Why Care about NEPA?

Please write down 1 or 2 reasons why you, as a Council Member, should know about NEPA.

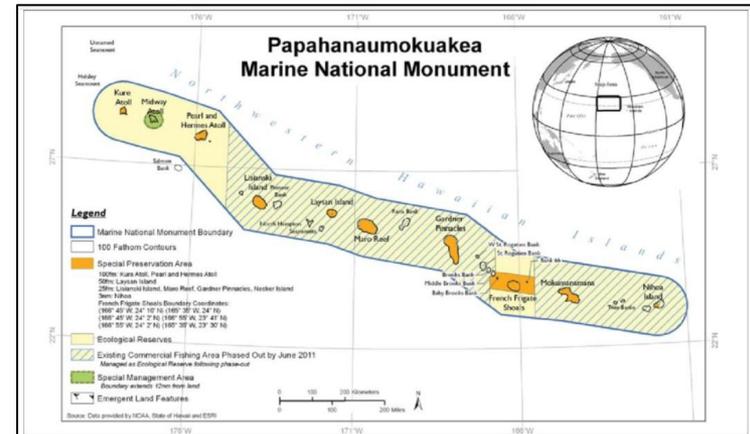
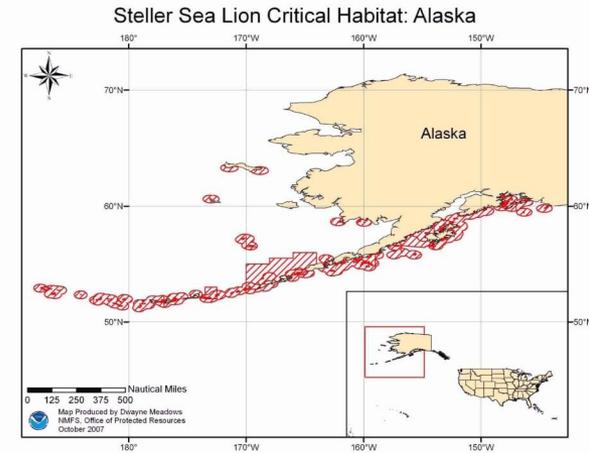
# Why Care about NEPA - Some Reasons

Good  
Decision-Making

Public  
Involvement

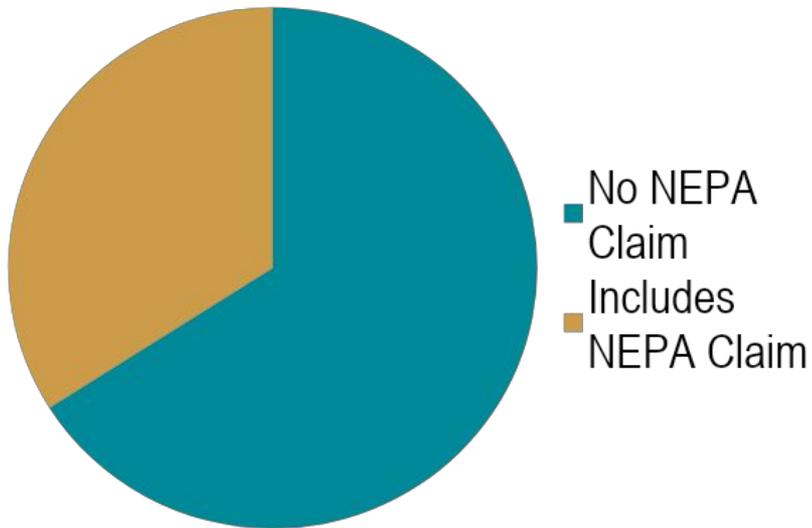
Timely Approval  
of MSA actions

Disapproval; Litigation Loss  
-Remands  
-Closures

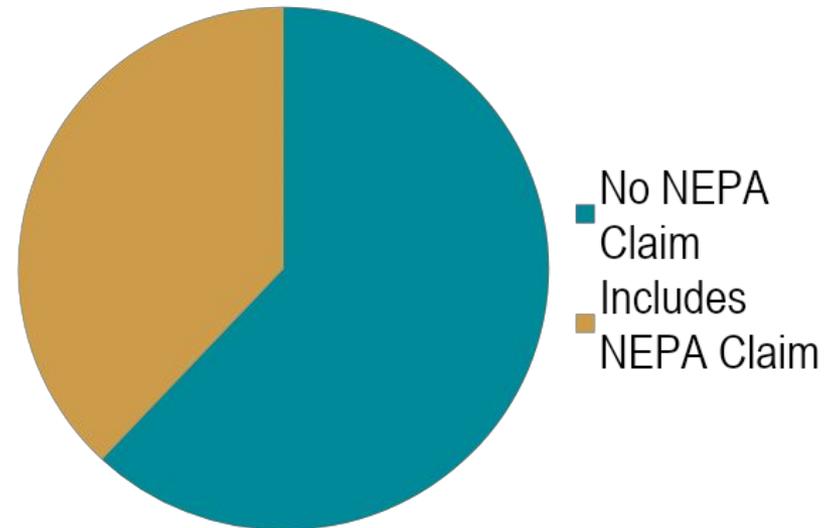


# MSA/NEPA Litigation Facts

**2008-2018: 34% of MSA  
Lawsuits included NEPA  
Claims**

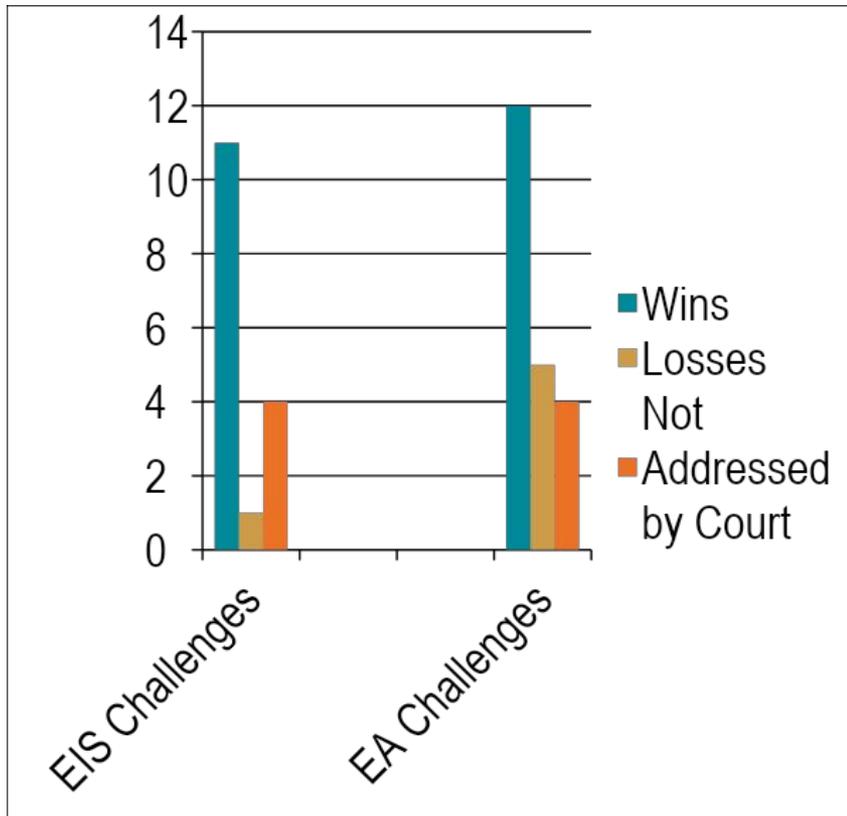


**2011-2021: 38% of MSA  
Lawsuits included NEPA  
Claims**

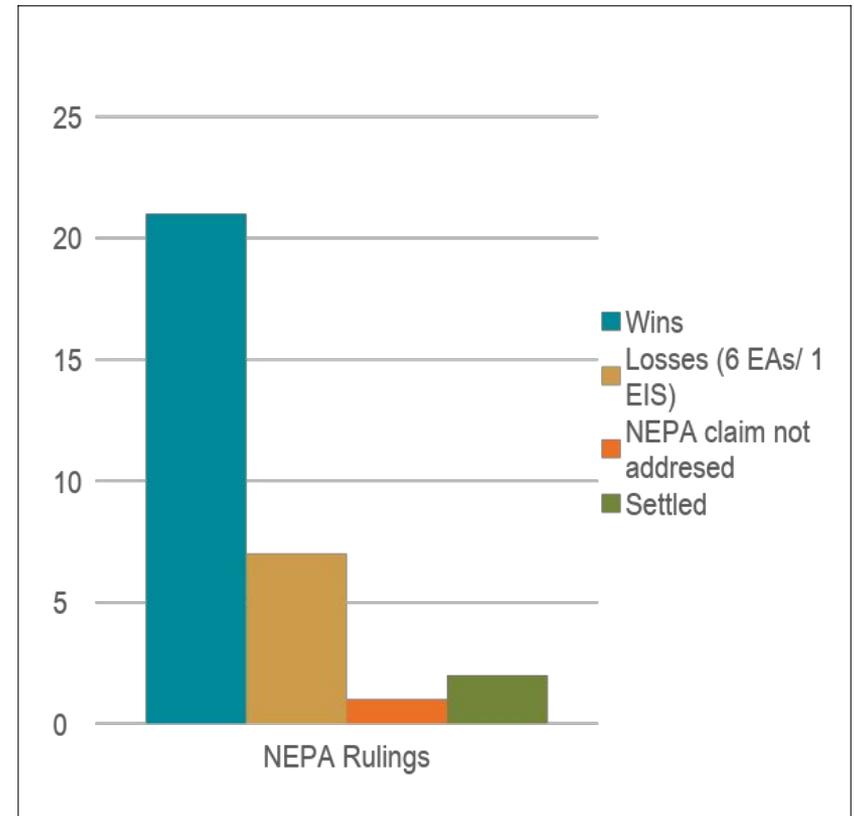


# MSA/NEPA Wins/Losses

2008-2018



2011-2021



# NEPA: What is it?

It's the  
“National Environmental Policy Act”

# NEPA: It's Stated Purpose

The purposes of this chapter are:

To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality. ~ 42 U.S.C. 4321

# NEPA: It's Stated Requirement (original)

Include in every recommendation... for major Federal actions significantly affecting the quality of the human environment, a detailed statement on —

- environmental impact of the proposed action,
- adverse environmental effects which cannot be avoided,
- of alternatives to the proposed action, the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources...

~42 U.S.C. 4331(2)(C)

***Bottom Line: Think Before You Act***

# NEPA: It's Stated Requirement as Amended

\*Except where compliance would be inconsistent with other statutory requirements,

Include in every recommendation... for major Federal actions significantly affecting the quality of the human environment, a detailed statement on —

- **reasonably foreseeable** environmental impact of the proposed action,
- **reasonably foreseeable** adverse environmental effects which cannot be avoided,
- **reasonable range** of alternatives to the proposed action, **technologically and economically feasible, meet the purpose and need, analyze negative effects of not taking the action**
- the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources...

~42 U.S.C. 4331(2)(C)

***Bottom Line: Think Before You Act***

# NEPA: Trigger

- Major federal action
  - New statutory definition
  - Still most of what we do
- Significantly affecting
  - A lot of activity in CEQ rulemakings over past several years. Bottom line, consult NEPA coordinators.
- Quality of the human environment (40 CFR 1508.1(m), 1501.8(g))
  - Another area where regulatory re-writes are at play.

JORDAN'S CABEZON.

*Hemilepidotus Jordanii*, Bean. (p. 250.)

Drawing by H. I. Todd, from No. 2706, U. S. National Museum, collected at Hualak, Uaotahika Island, 1895, by Dr. T. H. Bean.

PLATE 74 B

# NEPA Compliance: Overview of Concepts

EIS: NEPA's default requirement

Content: Alternatives, Effects analysis

Procedure: Draft, Public Comment, Cooling off Period

UNLESS...

EA/FONSI: Available shortcut if record supports

CE: Categories pre-determined not significant

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**\*NEPA does NOT require a particular outcome\***

# EIS Requirements

## Documentation

The EIS - a detailed statement on environmental impacts and alternatives

## Process

Notice of Intent, DEIS, Public Comment, FEIS, Cooling off period, ROD

## Timing

\*Minimum time periods (90 days after publication of DEIS)

**Deadline to complete EIS process (2 years)**

# Documentation: EIS Contents

## 40 CFR § 1502.10

- Table of contents.
- Purpose and need.
- Alternatives.
- Affected environment.
- Environmental consequences.

**\*New requirement: Page Limits**

		<b>SPINY DOGFISH FISHERY MANAGEMENT PLAN</b> (Includes Final Environmental Impact Statement and Regulatory Impact Review)	
		February 1999	
		Mid-Atlantic Fishery Management Council and the New England Fishery Management Council in cooperation with the National Marine Fisheries Service	
		Draft adopted by Councils: 11 August (NEFMC) and 17 August (MAFMC) 1998 Final adopted by Councils: 27 January (NEFMC) and 3 February (MAFMC) 1999 Final approved by NOAA: 29 September 1999	
		 A Publication of the Mid-Atlantic Fishery Management Council pursuant to National Oceanic and Atmospheric Administration Award No. NA57FC002	
		17 March 1999	
2.3.1 Commercial Fisheries 2.3.2 Recreational Fisheries 2.3.3 Foreign Fishing Activities 2.3.4 Economic Characteristics 3.0 ENVIRONMENTAL IMPACT ANALYSIS 3.1 MANAGEMENT ALTERNATIVES 3.1.1 Preferred Management Measure 3.1.2 Alternatives to the Preferred Management Measure 3.1.3 The FMP Relative to Alternatives 3.1.4 Analysis of the Preferred Management Measure 4.0 REGULATORY IMPACT ANALYSIS 4.1 INTRODUCTION 4.2 PROBLEMS AND OBJECTIVES 4.3 METHODOLOGY AND FINDINGS 4.4 IMPACTS OF THE PREFERRED MANAGEMENT MEASURE 4.4.1 Summary of Impacts 4.4.2 Summary of Impacts 4.5 DETERMINATION OF SIGNIFICANT EFFECTS 4.6 REVIEW OF IMPACTS RELATIVE TO APPLICABLE LAWS AND POLICIES 4.6.1 Introduction 4.6.2 Determination of Significant Effects 4.6.3 Analysis of Economic Effects 5.0 OTHER APPLICABLE LAWS AND POLICIES 5.1 RELATION OF RECOMMENDED MANAGEMENT MEASURES TO APPLICABLE LAWS AND POLICIES 5.1.1 FMPs 5.1.2 Treaties or International Agreements 5.1.3 Federal Law and Policies	COVER SHEET EXECUTIVE SUMMARY TABLE OF CONTENTS 1.0 INTRODUCTION 1.1 PURPOSE AND NEED FOR THE PLAN 1.1.1 History of FMP Development 1.1.2 Problems for Resolution 1.1.3 Management Objectives 1.1.4 Management Unit 1.1.5 Management Strategy 1.2 PROPOSED AND ALTERNATIVE MANAGEMENT MEASURES 1.2.1 Proposed Management Measure 1.2.2 Alternatives to the Proposed Management Measure 2.0 DESCRIPTION OF THE AFFECTED ENVIRONMENT 2.1 DESCRIPTION OF THE SPINY DOGFISH FISHERY 2.1.1 Species Description 2.1.2 Abundance and Production 2.1.3 Ecological Relationships 2.1.4 Maximum Sustainable Yield 2.1.5 Probable Future Conditions 2.2 DESCRIPTION OF HABITAT 2.2.1 Inventory of Environmental Resources 2.2.2 Description and Identification of Environmental Resources 2.2.3 Fishing Activities 2.2.4 Options for Management 2.2.5 Identification of Non-Fishing Activities 2.2.6 Prey Species 2.2.7 Research and Information Needs 2.2.8 Review and Revision of EFH Components of the FMP 2.3 DESCRIPTION OF FISHING ACTIVITIES	47 92 92 94 95	7 7
17 March 1999	8		

# EIS Contents: Purpose and Need

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?

# EIS Contents: Alternatives

- EIS must “evaluate reasonable alternatives.”
- Reasonable means:
  - A “reasonable range”
  - Technologically and economically feasible
  - Meet purpose and need
  - Limit to a reasonable number
- Must include “no action” alternative

# EIS Process and Timing

## Process

- Notice of Intent
- DEIS
- Public Comment
- FEIS
- Cooling off period
- ROD
- (SEIS if necessary)

## Timing

\*Minimum time periods; start from EPA publication

- 45 day comment on DEIS
- 30 day cooling off period on FEIS
- No ROD earlier than 90 days after publication of DEIS

\*Maximum Time periods

- 1 year to complete EA
- 2 years to complete EIS

# EIS Activity: Purpose, Need, Alternatives

1. Review Case Summary: *Anglers Conservation Network v. Pritzker*  
(2 min.)
2. Go to break out group and discuss trigger questions. Assign Spokesperson to bring back key ideas. (5 min.)
  - i. What is your key take away from this decision?
  - ii. Do you agree or disagree with this decision?
3. Debrief with full class. (5 min.)

\*Note that there have been regulatory tweaks, and then statutory language added regarding alternatives. Interpretations are evolving.

# NEPA Shortcuts and Efficiencies: List

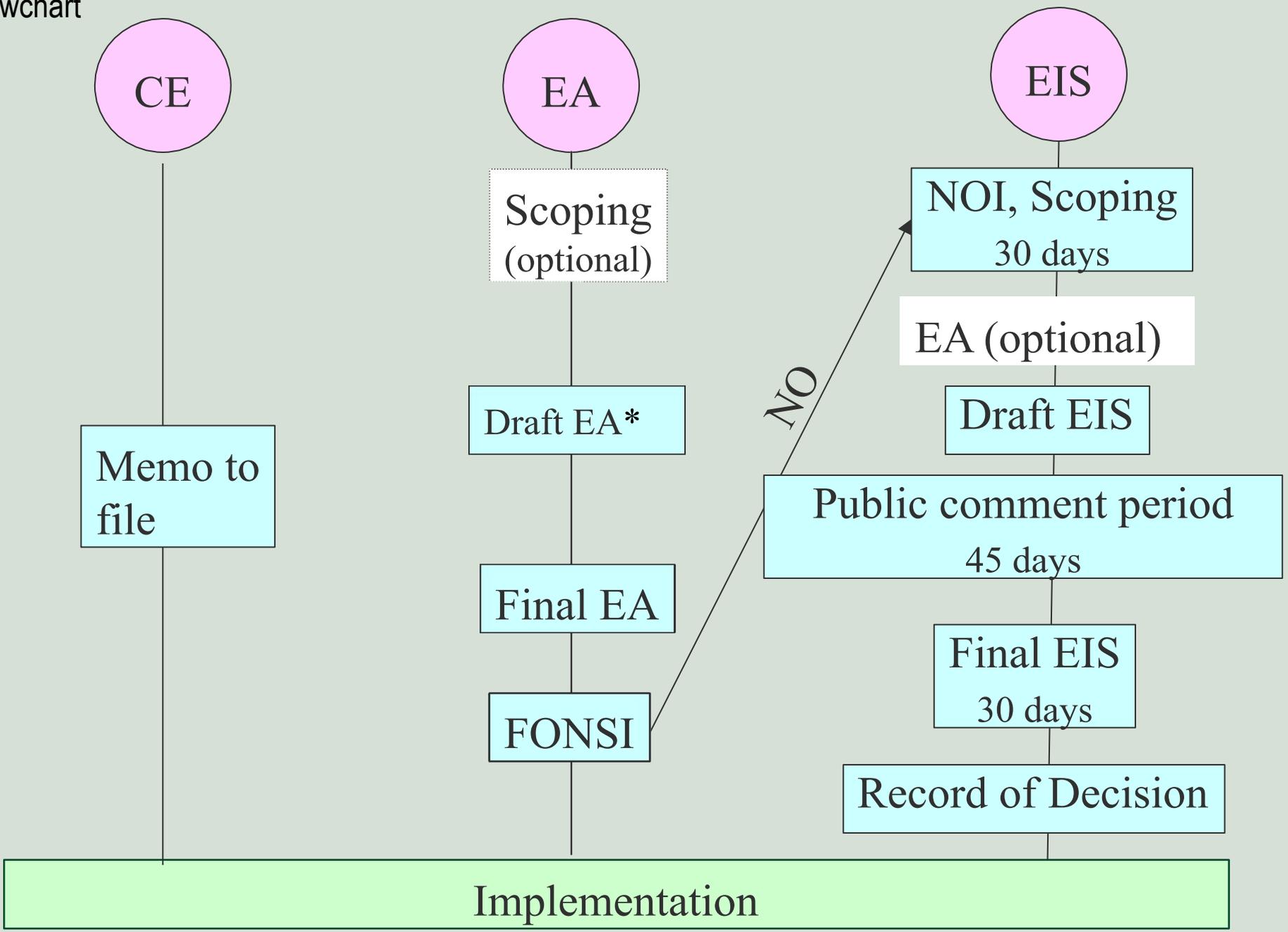
- EA/FONSI
- Tiering
- Incorporation by Reference
- NAPP (NEPA Advanced Planning Process)
- SIR (Supplemental Information Report)

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**\*ALL ARE RECORD-BASED\***

THE HOGFISH OR CAPITAINE.  
*Lachnolemus falcatus* (L.), C. & V. (p. 375.)  
Illustration by W. E. Tall

Flowchart



# Option to Start with an EA

A concise public document:

- Briefly provides basis for determining whether to prepare an EIS or a FONSI;
- Includes brief discussion of need, alternatives, and environmental impacts

# FONSI: How to Determine Significance

- Based on Facts in Record
- CEQ previously provided criteria that have been removed and/or re-organized.
- NMFS Guidance provided considerations in addition to CEQ's criteria.
- NOAA/NMFS developing new guidance for future determinations.
- Consult with GC and NEPA Coordinators.

# EA/FONSI Activity: Record-Based Determinations

Instructions:

1. Review Case Summary: *Greenpeace Foundation v. Minetta* **(2 min.)**
  
2. Go to break out group and discuss trigger questions. Assign Spokesperson to bring back key ideas. **(5 min.)**
  - i. What facts do you think contributed to the court's decision to close the lobster fishery?
  - ii. Do you agree or disagree with the Court's ruling?
  
3. Debrief with full class. **(5 min.)**

# NEPA's Effect on MSA Timeline and Process

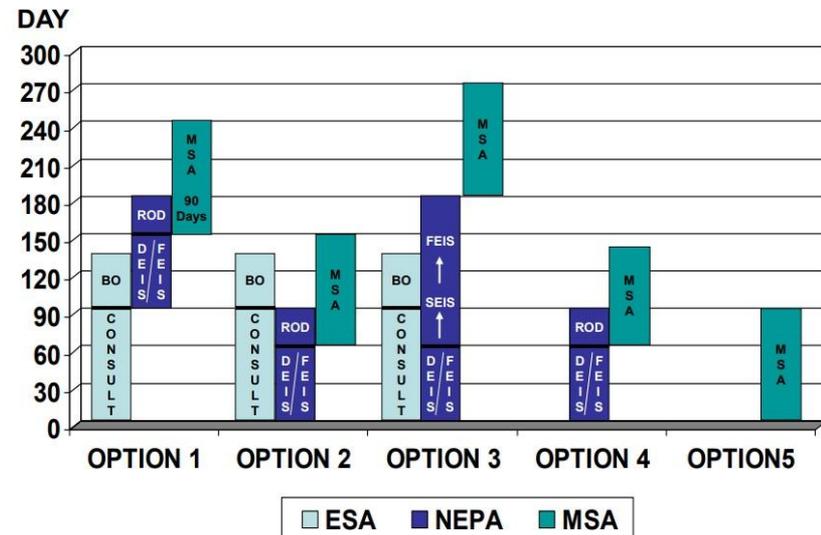
Since 2003 (Regulatory Streamlining Project):

- MSA/NEPA compatibility and challenges
- Frontloading/Cooperation/Teamwork
- Operational Guidelines
- Interdisciplinary Teams
- Regional Operating Agreements
- SUCCESS

Next Steps:

- Evolving Situation
- Will be developing new guidance
- CCC Subcommittee

Fishery Management Timeline Options



# List of Recent Changes

- Fiscal Responsibility Act of 2023 – amends NEPA statute
- Regulatory Changes
  - 2020 Rule
  - 2021 IFR
  - Phase I
  - Phase II



# Fiscal Responsibility Act: Key Changes

Amends NEPA by:

- Alternatives
  - Threshold Determination
  - Page Limits
  - Time Limits
- 
- Moves Regulatory Concepts into Statute with slight wording changes, including new statutory definitions
  - E-NEPA



# 2023 Proposed Rule

## Contents:

- Changes to Process and Content for EAs and EISs
- Deadlines and Schedules for EAs and EISs
- Page Limits
- Deadline for Agency Compliance
- Removes requirement for cost-estimate on cover page
- Additional guidance on using programmatic
- \*REMOVES Functional Equivalency and Exhaustion of Remedies provisions

# Test for Knowledge: Did we meet our objectives?

## 1. Why do we care about NEPA?

A: Good decision-making, public involvement, approvable FMPs, no litigation losses/fisheries closures

## 2. Name two key content requirements for EISs.

A: Purpose and Need, Alternatives, Affected Environment, Environmental Impacts Analysis

## 3. How many alternatives are enough?

A: No set number; reasonable range; must include “no action”

## 4. True or False: NEPA requires Councils to select the most environmentally protective alternative.

A: False. We must assess impacts, consider alternatives, and take public comment, unless EA/FONSI or CE.

## 5. Is lack of time to prepare an EIS valid grounds to use an EA instead?

A: No. FONSI is a “record-based” decision and depends on the facts supporting the determination.

## 6. Where can I find guidance on compliance with NEPA for MSA actions?

A: Interim and long-term revised guidance under development. For now, check with Regional GC and NEPA Coordinator.

# QUESTIONS?