

Science, Service, Stewardship



National Environmental Policy Act Training for the NPFMC

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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



How do we know what we need to do?

National Environmental Policy Act Requirements

- NEPA Statute
- Council on Environmental Quality (CEQ) Regulations (40 CFR Parts 1500-1508 & “40 Questions”)
- NOAA Administrative Order 216-6
- Judicial interpretations



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



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”
 - Robertson v. Methow Valley Citizens Council, 490 US 332, 350-351 (1989)



Why was NEPA Necessary?

- Environmental factors rarely considered
- Little public notification about projects
- Public comments fell on deaf ears
- No interagency coordination
- Decisions made “behind closed doors” with no explanations
- Limited opportunity for judicial enforcement



CEQ Regulations and "40 Questions"

- Clarified concepts and definitions from the statute
- CEQ regulations are not guidelines
- Applies to all Federal agencies
- Defines three levels of analysis:
 - CE, EA/FONSI, or EIS
- Answers to 40 questions provide further explanation and guidance for interpreting CEQ regulations



NOAA Administrative Order 216-6

- Key NOAA/NMFS guidance document
- Applies to all NMFS actions
- Includes specific CE categories
- Identifies actions that require an EIS
- Includes other special considerations



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)



How do we comply with NEPA?

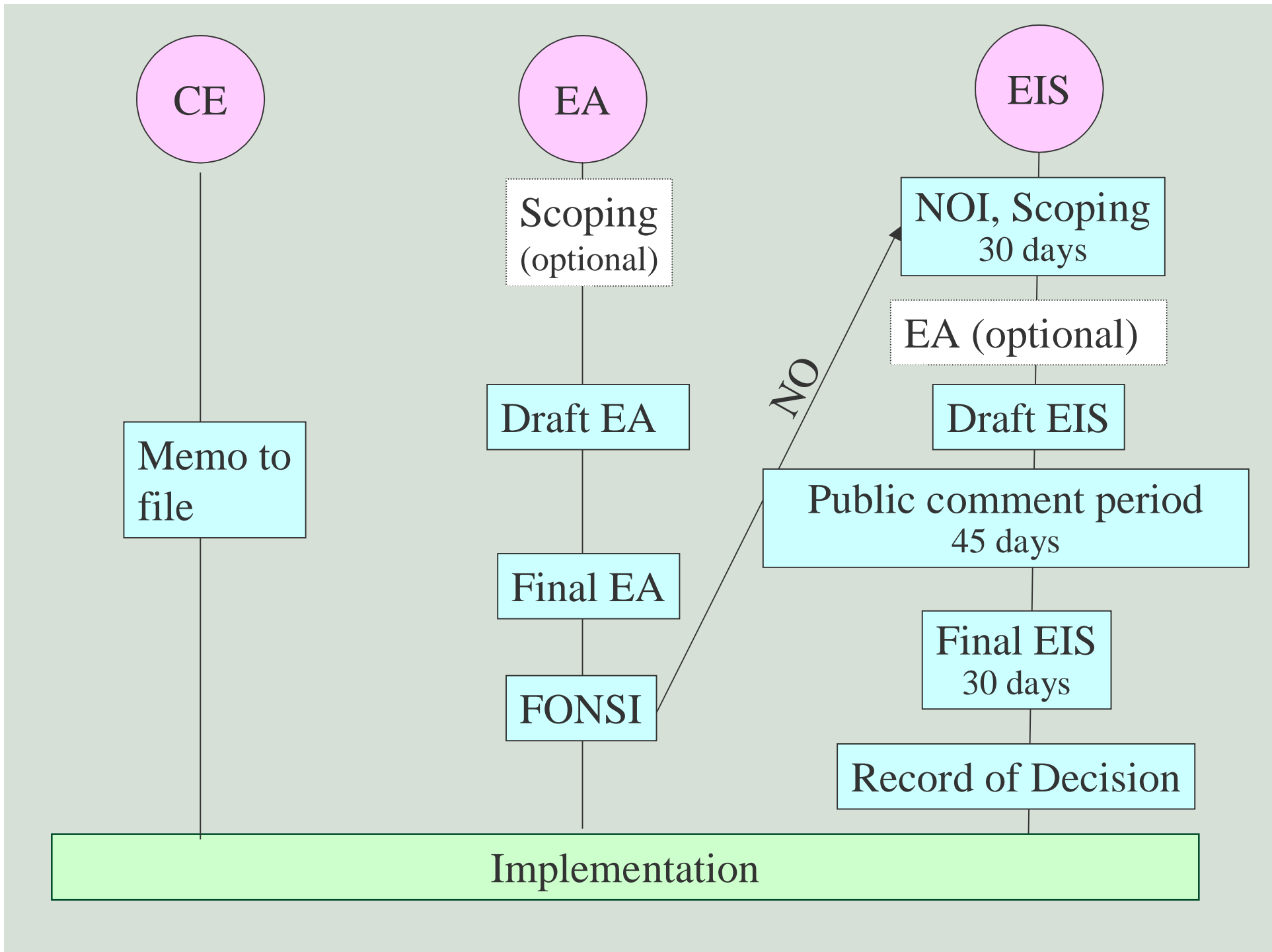
Basic procedure/steps:

- 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)
 - Do an EA and conclude an Environmental Impact Statement (EIS) is needed
 - EIS



NEPA Documents

- **Categorical exclusion** – 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. Contents identified – need, alternatives, impacts.





A Closer Look at the EA

- Majority of NEPA documentation.
- Triggered by actions that are not CEs, nor do they clearly require an EIS.
- May be unclear if impacts are significant.
- A concise and brief analysis 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?

- Analyze/evaluate the alternatives for a determination of impact significance (supporting the FONSI)
- Does an alternative have the potential to significantly impact the human environment?
 - **What are the impacts?**
 - **Are those impacts significant?**
- An EA/FONSI must include sufficient evidence and analysis to support whether or not an EIS is necessary
- 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:

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



Finding of No Significant Impact (FONSI)

- End result of EA with no significant impacts
- FONSI determines and documents that finding
- 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



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
- Three major documents
 - Draft EIS
 - Final EIS
 - Record of Decision



EIS

- For fisheries actions, often prepared by the Council and NMFS
- NMFS, as the action agency, is ultimately responsible for the content*
- CEQ and case law dictate statutory requirements and specific elements to be included
- Analytic rather than encyclopedic

* *we get sued*



Draft EIS

- May identify a preliminary preferred alternative
- Filed with EPA and circulated for public review for a minimum of 45 days
- Public hearings may be conducted during review period (in conjunction with MSA process)
- NOA published by EPA



Final EIS

- Identifies the preferred alternative to implement
- Revised from DEIS to take substantive comments into account (are summarized and responded to)
- Should be distributed to any group that submitted comments
- EPA publishes NOA to begin 30 day “cooling off/public review period”



Record of Decision

- Must be prepared and signed by Agency *before* decision is made to take action (40 CFR 1505.2)
- Contents defined at 40 CFR 1505.2
- Decision may come no sooner than 30 days after FEIS published or 90 days after DEIS published (40 CFR 1506.10(b))
- Must identify *both* environmentally preferred alternative and Agency preferred alternative
- Explains the rationale supporting the decision

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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?**
- Think 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 a defined 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 statement 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 statement 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
- Usually, the “status quo”
- Contrast current conditions and future conditions in the absence of the proposed action



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
- Demonstrates that we gave a “hard look” at the problem and 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
- In Alaska Region EAs and EISs, the affected environment information is organized by resource and in the same section as the impact analysis.



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 reasonable
- **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



No Action

- Must analyze impacts of the “No Action” alternative
- No Action ≠ no impact
- No Action is what is currently happening
- Relates back to P&N
 - What was the problem with no action that is going to be solved with the action alternatives?



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 data and analyses in the EA.
- Quantitative vs qualitative
 - Quantify whenever possible (with narrative!)
 - Qualitative assessments okay



Environmental impact sections should.....

- Connect the dots & avoid unsupported conclusions (i.e., the impact is not significant)
 - *“Rational connection between the facts found and the choice made”*
- Use plain language. It’s required by CEQ, the Courts, and it’s better for everyone
- Use tables, matrices, and checklists to help simplify and illustrate analysis and impacts



Environmental impact sections should.....

- Explain impacts of the No Action alternative; otherwise comparing to it is meaningless
- Indicate direction and magnitude of the impacts of each action alternative (compared to the No Action) for each resource
- Describe the effects versus simply saying that the “effects of Alternative 2 are greater than Alternative 1.” Describe:
 - ***What are the effects?***
 - ***Why are they expected to be greater or less?***



Cumulative Impacts Analysis

- Define the appropriate scale for the analysis (temporal, geographic)
- Understand that impacts may be beneficial or adverse
- Cumulative impacts are from the resource perspective, and **only for impacted resources**

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



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 vs. final procedures



Programmatic Analysis

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



Tiering

- Encouraged by CEQ
- Tiered analysis only needs to summarize issues, very specific (and the thought is, shorter)
- Uses incorporation by reference

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Integrating NEPA with the Magnuson-Stevens Act



Basis for Integration

- 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))
- NEPA documents are an appropriate place to determine compliance with applicable laws and EOs that apply to our actions (i.e., MSA, MMPA, ESA, EO 12866, RFA)



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



Magnuson-Stevens Act

- Specific roles of NMFS and Councils
- Although NMFS is the NEPA action agency, Councils typically* determine alternatives and (staff) conduct the supporting analysis
- NMFS policy directive on NEPA Compliance for Fishery Management Actions under the MSA (2013)

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Addressing Incomplete or Unavailable Information



Incomplete Information

- In complex, natural systems there will always be incomplete information or information that is not yet available to scientists or managers
- Not possible to find FONSI if the action has *effects on the human environment that are likely to be highly uncertain or involve unique or unknown risks.*



Incomplete Information

- **Focus on what we know!**
- It's not acceptable to say merely “we don't know.” There must be a categorization of the unknown info.
- CEQ regs 40 CFR 1502.22 state that the “agency shall always make clear that the information is lacking,” and:
 - (a) If the incomplete information ***relevant to reasonably foreseeable significant adverse impacts*** is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.



Public input

- 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, public comment happens with the comment period proposed rule or NOA for the FMP amendment
 - For and EIS, we usually have a separate comment period



NEPA Resources cheat sheet

- NEPA Guidance
 - <https://alaskafisheries.noaa.gov/fisheries/nepa-guidance>
 - Most everything – CEQ regs, NAO 216-6, NOAA policy
- 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>

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Questions?

Thank you!



Keep EAs short & focused on analysis

- A concise and brief analysis document (in theory if not practice)
- No encyclopedic information or excessive background information (per CEQ regs)
- Summarize and incorporate by reference
- No conclusory statements without support
- Explain how and why conclusions are reached, make rationale connections
- Compare the alternatives being considered