

Improving NEPA-related Scoping in the Council Process Draft Proposal

Introduction

After the Magnuson-Stevens Act, the National Environmental Policy Act (NEPA) has arguably become the most important federal mandate governing Council decision-making. Enacted in 1970, NEPA requires federal agencies (and by extension, the Council) to evaluate the environmental effects of their activities. The Act's mandate is procedural rather than substantive, and one of its most important provisions directs agencies to consider public concerns in their decision-making. The Council serves this function, since its processes are open to public comment; include input from state, tribal and federal agencies; and Council decisions are advisory to NMFS, the implementing agency. However, in recent years NMFS and the Council have faced legal challenges to their decisions, which have included allegations that the NEPA-related analyses supporting these decisions have been inadequate.

Despite extensive public input in the Council process, judicial decisions in favor of plaintiffs in a series of cases on the basis of NEPA violations suggests that more could be done to improve these NEPA-related practices. A broader cross-section of the affected public could be consulted, issues raised through public participation could be better documented, and the range of issues thus documented could be better connected to the environmental analyses supporting Council decisions. These improvements need not entail a substantial increase in administrative burden; indeed, they should stress efficiency. After all, NEPA documents are meant to be "analytic not encyclopedic." Better analysis can be achieved by focusing on issues of concern to the public and thus narrowing the scope of the analysis. This suggests that more attention be given to a key component in the NEPA process: scoping. Scoping is an "early and open process for determining the scope of issues to be addressed [in an environmental assessment or environmental impact statement] and for identifying the significant issues related to the proposed action" (40 CFR 1501.7).

A focused scoping process, with explicit methods, exercises, and procedures, could streamline decision-making by narrowing the scope of issue analyzed. Better documentation of the process would make analyses more defensible. A generalized scoping process is outlined below, which would for the most part use existing processes, but would make scoping more explicit and result in better documentation of the process. This is not a "one size fits all" process; a broad framework is proposed with the expectation that the specifics will be tailored to the circumstances surrounding each action that is to be scoped.

Proposal Identification - Process Design

As a first step, Council and NMFS staff identify new proposals that have emerged and make an initial assessment of the type of analysis required (CE, EA, EIS) and the extent of scoping required. A proposal can be defined as a proposed action at its earliest stage of development, which will ultimately result in a Council recommendation to NMFS to implement a regulation, approve an FMP amendment, or take some other action. Generally, this is at a stage before potential impacts have been identified, any substantive analysis has occurred, or alternatives developed. Proposal identification should be an explicit part of the Council-NMFS Regions follow-up call that occurs after each Council meeting. Proposals arising during the preceding Council meeting would be identified, discussed and documented during this conference call. For each proposal the following items would be discussed and documented:

- What is the nature of the proposal and what stage is it at?
- Has a decision schedule and/or timeline been identified?

- What type of NEPA analysis will be required? (At this stage it may not be possible to answer this question. But it should be possible to determine whether any type of NEPA analysis is required.)
- Who is likely to have primary responsibility for doing the analysis, preparing the documents and generally shepherding the decision through the process?
- What type of and how much scoping should occur?
- Should a scoping team (see below) be formed and if so, what would be its composition?

A similar conference call may also be needed a week or so before Council meetings if proposals arise in the interim between meetings that are likely to appear on the Council agenda for the first time at the next meeting, or are in the process of evolving from a consideration or "below the line" objective to an active proposal. A pre-meeting conference during which a scoping team is identified would allow that scoping team to have their initial meeting during the upcoming Council meeting.

Scoping Team Formation - Development of Scoping Document

Depending on the outcome of proposal identification, a scoping team may be formed for a particular proposal. (Scoping teams would not be used in all instances; they would be formed only for those actions sufficiently complex or controversial as to require an EIS or large EA.) To maximize their effectiveness team size should be kept small. An ideal size would be no more than five members, although this should be balanced against the need for appropriate representation. Depending on the nature of the proposal, team members would be drawn from:

- Council staff
- NMFS staff
- Council advisory bodies (including plan teams and SSC)
- Council members
- Advisory (e.g., EPA) and cooperating agencies (e.g., USFWS)

In addition, the Council and/or NMFS Region (NW or SW) NEPA Coordinators would be a part of every scoping team.

The role of scoping teams is flexible, depending on the nature of the action, team composition, and objectives of the Council and NMFS. Generally, their role would be confined to the scoping process; they would not be responsible for analysis and final document preparation. However, in some cases a scoping team could function more like an "interdisciplinary team," assuming total responsibility for scoping, analysis, document preparation and follow-up. (The U.S. Forest Service Decision Protocol Version 2.0 provides an example framework of a team-based approach and structured decision cycle that could be adapted to a broader role for scoping teams. The Decision Protocol is available at <http://www.fs.fed.us/forum/nepa/dp2roadmap.htm>.)

Ideally, once formed the scoping team could have a face-to-face meeting to preliminarily scope issues, plan scoping meetings (see below), and develop scoping documents and public notices. During this preliminary meeting the scoping team would address the topics outlined above for the process design phase in greater detail. The meeting should result in the information necessary to produce a **scoping document**, a schedule of scoping meetings, and the necessary notices (*Federal Register*, Council website, NMFS-NWR/SWR websites, Council newsletter). The scoping document serves as background for scoping meeting participants, and would generally be more important for external (public) scoping. It should be a brief, non-technical document covering the following points:

- What is the proposed action? Why is it being proposed? Who is likely to be affected?
- What issues have NMFS, the Council, and/or the scoping team identified? What are the likely environmental and socioeconomic impacts of the proposed action?
- Have any alternatives been identified? If so, briefly describe them.

- When and where will scoping meetings occur?
- Is an EA or EIS planned? If known, what is the schedule for document production? (For example, when will the DEIS be completed and available for public comment ?)
- When and where will Council decision-making on the proposed action likely occur?
- When will the proposed action be implemented? What is its duration?

The scoping team would assign one or more members to prepare the information document. (If a scoping team is not formed, then the responsible staff member would prepare the scoping document.) It may be that the scoping document overlaps with, or is replaced by, public notices. In most cases existing methods of information dissemination, such as the Council website and newsletter should suffice for these public notices. If appropriate, the team could identify other venues, such as other organizations' newsletters or web sites, local newspapers, mailing lists, etc. Council activities also must be noticed in the Federal Register, and if an EIS is planned a notice of intent must be published. The scoping document should also provide the basis for these FR notices. It would also go in the Council meeting briefing book and/or be a reference for writing the situation summaries that go in the briefing book.

Scoping Meetings

Scoping will vary in extent and form depending on the proposed action. It can be characterized as internal/external and informal/formal. Internal scoping involves agency staff and those already substantially involved in the Council process (such as advisory bodies) while external scoping may be generally classified as involving "the public." Informal scoping ranges from meetings and discussion among agency staff to small-group meetings with the public, which allow a lot of give-and-take. Public hearings and public comment during Council meetings may be classified as formal scoping. There is less opportunity for discussion and development of ideas through exchange among participants.

The scoping team could identify one or more of the following scoping opportunities:

- Written comments. (If written comments are the only form of scoping that will occur it is unlikely that a scoping team would be formed, unless the team will be responsible for the whole decision cycle.)
- Internal scoping with NMFS divisions that may have information and oversight related to the action. For example, the Protected Resources Division could assist in identifying issues and providing information related to endangered species.
- Public hearings normally scheduled as part of the decision process (e.g., the salmon hearings).
- Scoping sessions with advisory bodies during their meetings.
- Solicitation of comments from state and federal government agencies, in cases where they are not adequately represented in the Council process.
- Public scoping sessions held during Council meeting week (but outside the Council agenda).
- Public scoping meetings held in affected communities.
- A scoping session as part of the Council agenda. Generally, this would involve Council discussion and public comment as with any other agenda item. It may be different from a topic agenda item to the degree that it focuses on environmental assessment topics such as identifying environmental impacts.

Individual scoping team members would be assigned to staff/lead specified scoping meetings so that the whole team would not attend every scoping meeting. By deploying individual team members this way extensive scoping could be carried out efficiently. One key to successful scoping meetings will be developing processes and techniques for conducting them. General guidance needs to be developed on effective

techniques, based on other agencies' experience. (CEQ Guidance on Scoping gives some general pointers on how to run a scoping meeting, for example.) Key staff should also receive training in meeting facilitation techniques. These techniques and skills will help ensure that scoping meetings generate focused, useful output.

Production of the Scoping Summary

After scoping meetings are over, the scoping team would prepare a written **scoping summary**. Preparation of the summary would be facilitated by a second meeting. This meeting would give the team a chance to discuss the results of the scoping meetings and translate them into the list of issues that will be evaluated in the environmental document. (If such a meeting is not feasible this task could be accomplished through email and teleconferences.) It also needs to provide the rationale for any issues and/or alternatives eliminated from detailed analysis.

The scoping summary should form the basis for developing the environmental compliance document (EA, EIS). At the least, it would contain information found in the first chapter of the environmental compliance document: the proposed action, purpose and need, and summary of scoping. Depending on the extent of scoping, the summary may also present at least a preliminary list of alternatives, serving as the basis for the second chapter of the environmental compliance document. Finally, by detailing the list of issues to be analyzed in the environmental document, as revealed through scoping, the team may be able to outline the impact analysis comprising the fourth chapter of the environmental compliance document. At the least, the summary of impacts table usually included in the second chapter could be drafted, even if the cells are not filled in. Guidance recommends that the first two chapters of the environmental compliance document serve as an executive summary. The scoping summary could be in a similar format and thus aid in preparing the final document, much like a book or research proposal.

The scoping summary, perhaps in an appendix, should also summarize public comments made during scoping sessions, Council meetings and public hearings, as appropriate. Contracting to have relevant portions of the tapes of Council meetings, and any tapes made at other sessions, transcribed would facilitate this process. This information could also be used to track public opinion about issues.

The scoping summary would be disseminated through the usual channels (website, Council mailing list); in addition, participants in public scoping meetings should be sent a copy. If the scoping summary is equivalent to the first part of the of the environmental compliance document, a shorter (less than 10 pages) "summary of the summary" may need to be prepared for wide dissemination.

The Council should also maintain a schedule of proposed activities allowing the public and Council process participants to track the progress of various decisions. The USFS Umatilla National Forest website provides an example (<http://www.fs.fed.us/r6/uma/sopa/sopa.htm>). Scoping documents could be linked to such a schedule.

Handoff or Follow-on - Scoping Teams as Interdisciplinary Teams

The scoping summary forms a strong basis for further development of the environmental document. Once completed, the scoping team may disband with the scoping summary handed off to designated staff for further development and completion of the environmental document. As mentioned above, in some cases the scoping team could be responsible for supporting the whole decision cycle. Team members might be responsible for all tasks, including analysis and writing, or "farm out" specific components and then assemble a final product representing a combination of their efforts and those pieces they have commissioned others to complete.

"Chapters 1 and 2 (1: Purpose of and Need for Action and 2: Alternatives Including the Proposed Action) present managerial information to the decision-maker and any interested publics. These two chapters usually contain almost everything a decision-maker needs to know" (Larry H. Freeman and Sidney L. Jenson. 1998. How to Write Quality EISs and EAs. Second Edition. Woods Cross (UT): The Shipley Group, Inc. Page 2.)

In the early stages of development it would be advisable to follow a "handoff" model whereby scoping teams are only responsible through production of the scoping summary. Once this model has been successfully tested, an expanded role in the form of an interdisciplinary team could be tried out.

Proposal for Integrating Scoping Methods Into the Council Process

The Council and NMFS would begin implementing the scoping procedures outlined here at the follow-up conference call after the June 2003 Council meeting, if any new proposals are identified. The use of a scoping team would be tested on one or a few proposals to evaluate its efficacy. Whether or not any other proposal is identified in June (or September), a scoping team would be organized for the 2004-2005 groundfish specifications/management measures.

In support of scoping the following products would be developed/implemented during the test phase:

- Form to document proposals identified in pre- or post-Council meeting conference calls.
- Web page design for schedule of proposed activities on Council web site.
- More detailed documentation of the scoping process in the form of:
 - Guide for scoping teams on preparing the information document and public notices.
 - Guide for scoping teams on techniques for running a scoping meeting.
 - Guide for scoping teams on how to prepare a scoping summary.

Projected Costs and Evaluation

Implementation of a more explicit scoping process, including the use of scoping teams, entails some direct costs in terms of team meetings, the production of information documents and scoping summaries, additional training, development of guidance materials, and any additional staff time needed to coordinate the process. These costs should be more than compensated by resulting benefits. These benefits should include: effectively narrowing the range of issues analyzed in environmental compliance documents, ensuring that a reasonable range of alternatives are developed, a more defensible NEPA analysis in the event of litigation, and potentially more efficient, rapid development of environmental compliance documents (EAs/EISs).

As noted above, this approach should be used on a trial basis for one or two proposals. Once the Council recommendation/environmental compliance documents for these proposed actions are submitted, the efficacy of this scoping process should be formally evaluated. Evaluation criteria could include:

- Did the process add to staff workload? If so, why and by how much?
- In comparison to past actions of similar complexity, was it easier to develop the environmental compliance document as a result of scoping?
- How did participants (team members, Council, advisory bodies, the public) rate the process? Were their concerns more effectively addressed in the environmental compliance document?
- Did the process help improve the quality of the resulting environmental compliance document? (If an EIS, EPA comments and ratings could be used for this assessment.)
- What specific recommendations can be made for improving the process?

This evaluation should justify any added costs entailed in more explicit scoping. If it cannot, this approach should be rethought or abandoned.

