

IMPROVEMENTS IN MEETING NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) REQUIREMENTS FOR COUNCIL ACTION

Situation: 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. By the same token, citizen suits have been an important mechanism forcing agencies to follow NEPA-mandated procedures. In recent years National Marine Fisheries Service (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. Although the Council process accommodates substantial public participation, the success of plaintiffs in a series of these cases suggests that more could be done to improve these NEPA-related practices. 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). At its core, 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, the Council could better serve this function in a number of ways: 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. Better scoping can streamline the environmental analysis process, and by extension allow more informed decision-making. By eliminating issues that are not germane to the proposed action, the analysis can better evaluate potentially significant impacts. If scoping is a well-documented public process, this narrowed scope is also defensible to subsequent challenges since an inclusive process have been used to identify issues of concern to the public. In a similar way, a robust scoping process can ensure that reasonable range of alternatives has been identified for the analysis.

Council staff have considered procedural improvements that would help to ensure well-documented scoping occurs in the early stages of proposal development. The key feature of this procedural innovation would be the formation of "scoping teams," who would be responsible for conducting and documenting scoping from the outset. 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 Environmental Impact Statement (EIS) or large Environmental Assessment (EA). The process would begin by ensuring that proposals are formally identified at their earliest stage. Once identified, a scoping team would be formed to conduct scoping for that proposal; such teams would draw their membership from Council and NMFS staff, advisory bodies, the Council, and other agencies as appropriate. (Although seeking broad representation, these teams should be kept small to ensure their effectiveness; teams could be as small as two people and shouldn't be larger than five unless the issue warrants.) Scoping teams would engage in the following tasks:

- Prepare an scoping document describing the proposal and summarizing any issues and alternatives that have emerged from internal scoping. The scoping document would help inform the public and facilitate subsequent scoping opportunities.
- Conduct scoping meetings with agencies, during Council meetings, and with the public. Individual team members would conduct meetings with different groups to maximize coverage.
- Prepare a scoping summary listing the issues raised through scoping, any alternatives that have been put forward, and providing the rationale for the choice of issues analyzed in the subsequent EA or EIS. This scoping summary would form the basis for the subsequent EA or EIS.

A project tracking page could be added to the Council website, showing what proposals are in development, their stage of development, and allowing the public to download informational material related to the proposal.

In most cases the scoping team would hand off the results of its work, in the form of the scoping document, to Council or NMFS staff who will prepare the EA or EIS. However, the possibility is left open that scoping teams could be involved in all stages of the process, including analysis and document preparation.

Any new procedure, like the one outlined here, must have demonstrable benefits that outweigh any additional costs. Wherever possible direct costs, such as meetings of scoping teams, would be minimized by, for example, holding them during Council meeting week. Developing guidelines and materials to make scoping meetings effective, and providing training in meeting facilitation techniques to key staffers, would help ensure a better process; these represent another direct cost. There will also be some new indirect costs, in terms of the staff time involved. While this is a genuine concern, savings should be realized later in the process by explicitly linking issue identification to the analysis in the environmental document and, at any rate, the additional staff time costs would result in a higher-quality document.

This scoping process, involving scoping teams, could be implemented in June of this year on a trial basis, and used for one or a few proposals. Its efficacy would then be evaluated and, if appropriate, use of scoping teams would be expanded.

Council Action:

- 1. Discuss and comment on proposal to improve scoping.**

Reference Materials:

1. Scoping Proposal (Exhibit H.1, Attachment 1).

Agenda Order:

- a. Agendum Overview
- b. Reports and Comments of Advisory Bodies
- c. Public Comment
- e. Council Discussion

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