

# National Environmental Policy Act & Habitat Conservation Plans

## IPAA Strategic Planning Conference

Ellen Mille, Principal  
ICF

February 14, 2017



# Key Points



- Why is NEPA required?
- How is the NEPA public review process different or the same as for an HCP?
- How does the NEPA process and timeline compare to an HCP?
- What are some unique issues doing NEPA for an HCP?
- What are tips for success in the NEPA process for an HCP?

# NEPA: Background

- Passed in 1969
- Requires federal agencies to examine environmental impacts of their actions and provide for public participation
- Federal policy from Council on Environmental Quality (CEQ)
- Analytical process, not planning
- Supports decision-making process



# NEPA:

## Relationship to Section 10 (a)(1)(B)

- Multidisciplinary
- Permit issuance is a Federal action subject to NEPA: Issuance of an Incidental Take Permit
- NEPA document belongs to the Federal action agency
  - Analyzes alternatives' effects to the human environment, not just covered species
- HCP document belongs to the applicant
  - Addresses effects on covered species, not the human environment
  - Supports incidental take permit application

# NEPA vs. HCP Process

Issue	NEPA Process	HCP Process
Value public involvement?	Yes	Yes
Public review required?	Yes	Yes
Public scoping required?	Yes, for EIS	No
Address direct, indirect, cumulative impacts?	Yes	Yes
Types of impacts addressed	Effects to human environment	Take and impacts of take
Responsibility for content	Service(s)	Applicant(s)
Responsibility to fund	Applicant(s)	Applicant(s)
Decision Document	Finding of No Significant Impact (FONSI) or Record of Decision (ROD)	ESA Findings and recommendations

# Types of NEPA Review for HCPs

## CatEx-Low Effect HCPs

- A NEPA Categorical Exclusion can be used for actions which do not individually or cumulatively have a significant effect on the human environment
- Neither an EA nor an EIS is required
- Must complete Low-effect HCP Screening Form and Environmental Action Statement

## EAs

- Required when:
  - Project not eligible for categorical exclusion
  - Effects not likely to be significant
  - Unclear if effects would be insignificant
- Decision document:
  - Finding of No Significant Impact (FONSI)

## EISs

- Required when:
  - Project is a Federal action that is likely to result in significant effects to the quality of the human environment or in some cases if anticipated to be controversial not eligible for categorical exclusion
  - Typically done without first doing an EA
  - Objective and science-based
- Decision document:
  - Notice of Intent (NOI) to prepare an EIS

# NEPA Public Review Process for HCP EAs or EISs

## Environmental Assessment

- Scoping
  - Meetings (optional)
  - FR Notice of Intent to prepare EA
  - 30 days for public scoping
- Public review of draft HCP and draft EA
- FR Notice of Availability of:
  - receipt of permit application
  - draft HCP
  - draft EA
- 30-day public comment period on draft documents (minimum)

## Environmental Impact Statement

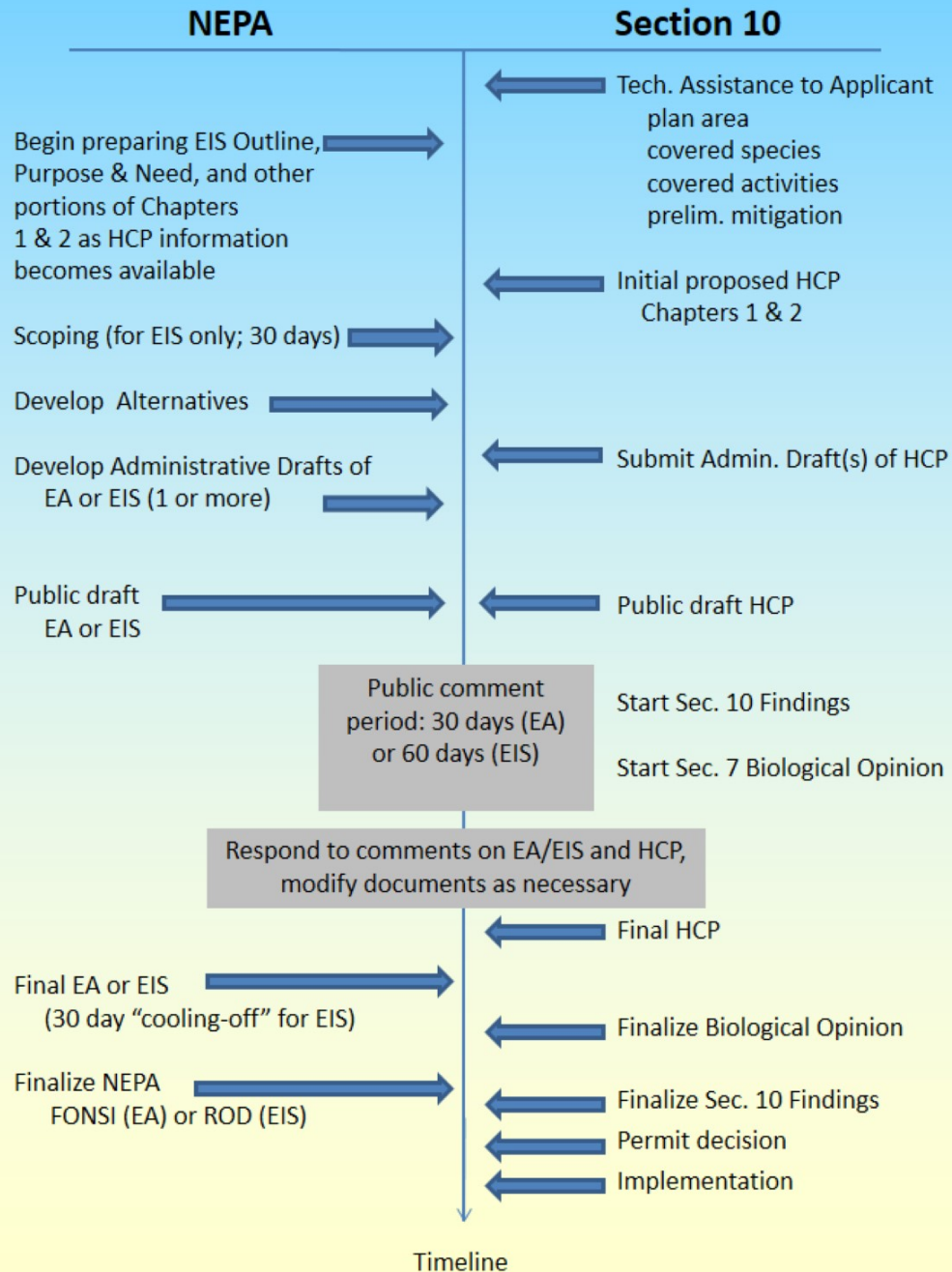
- Scoping
  - Meetings
  - FR Notice of Intent to prepare EIS
  - 30 days for public scoping (sometimes longer)
- Public review of draft HCP and draft EIS
- FR Notice of Availability of:
  - receipt of permit application
  - draft HCP
  - draft EIS (60-day comment period, min)
- File draft and final EIS with EPA

# NEPA: Who Prepares the Document

- NEPA document is the Service's responsibility (Action Agency)
- Typically, applicant funds consultant to prepare NEPA document on Service's behalf
- Service must oversee and provide direction to NEPA consultant
  - Consultant executes disclosure statement or MOU to ensure no conflict of interest and to acknowledge they are working for Service
- Can same consultant prepare HCP and NEPA document?
  - Typically no, unless large firm with separate teams and clear "firewall"



# NEPA/Sec. 10 Timing: The What and When



# Purpose and Need

## The purposes of the proposed action are to:

- Fulfill Service's section 10(a)(1)(B) conservation obligations and authority under the ESA.
- In doing so, comply with related environmental laws and regulations, Executive Orders, and agency directives and policies.

## The need for the Federal action is based on:

- The ESA directive to the Service to issue an incidental take permit to a non-Federal entity if that permit application and HCP satisfy all permit issuance criteria
- Ensuring Service's action is in compliance with the ESA, NEPA, and other applicable federal laws and regulations such as NHPA, BGEPA, MBTA, treaties, and others.

# Proposed Federal Action

- Service's issuance of incidental take permit - or in the case of a General Conservation Plan, it is the Service's approval of GCP
- Incidental take permit may authorize only a portion of a larger project
- The Service does not *authorize* the applicant's activities causing the incidental take, but the take resulting from the applicant's activities
- For Programmatic HCPs – the NEPA analysis should evaluate the environmental effects of the covered activities if there is a close causal relationship between the issuance of the ITP and the covered activities

# Alternatives

## General Guidelines

- Alternatives compare different ways to meet Purpose and Need
- Dismiss alternatives that fail to meet Purpose and Need of Proposed Action
- Alternatives should provide different ways to meet Purpose & Need and reduce environmental impacts
  - Include a reasonable range of alternatives
  - Dismiss alternatives that are very similar to Proposed Action

# Alternatives

## Alternatives for an EA

- An EA should include alternatives to the Proposed Action
  - No Action alternative
  - 1-2 Action alternatives
- EAs are intended by CEO to be and “concise document” and “brief” (10-15 pages!), so alternatives should be brief



## Alternatives for an EIS

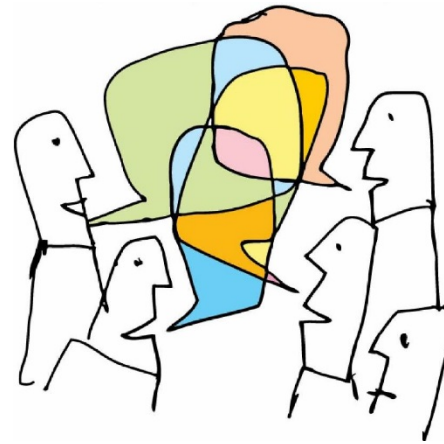
- EIS must evaluate a reasonable range of alternatives and justify selection
- Explain why certain alternatives are included and others were eliminated (“considered but rejected”)
- No-action alternative must be evaluated
- Rigorously evaluate and compare alternatives
- Identify environmentally preferable alternative

# Action Alternatives



- Different types of covered activities?
  - Less development, different locations, different types of activities
- Different permit area or plan area?
- Different permit term? (shorter)
- Different conservation strategy?
  - More or less conservation
  - More conservation – helps define “maximum practicable”
- Different permittees?

# Tips for Success



- Routine Communication between Service, Applicant, HCP contractor and NEPA contractor
- Have a solid HCP description to initiate NEPA scoping
- Have sound methods and approach for baseline conditions and quantifying impacts – early approval by Service
- Having sufficient Service staff available for project
- Strategy for messaging the uniqueness of HCPs and the NEPA process to the public (clarify common misunderstandings of HCPs and ITPs)

# Thank You!



## **Ellen Miille**

Principal

Denver, CO

NEPA

Ellen.Miille@icf.com | (303) 792-7831



---

This presentation is not intended as, nor is it a substitute for, legal advice. You should consult with legal counsel for advice specific to your circumstances. This presentation may be considered lawyer advertising under applicable laws regarding electronic communications.