

Guidance Related to the Purpose and Need Section of an EIS



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ABSTRACT



This guidance is related to the preparation of the “purpose and need” section, often Chapter 1, in an EIS. This section is a stage-setter and should be strongly connected to the identification and evaluation of alternatives, including the proposed action (preferred alternative). This section was inferred in NEPA itself and specified in the Council on Environmental Quality’s (CEQ) 1979 NEPA regulations. The steps associated with classic decision theory can serve as a conceptual framework for developing an appropriate purpose and need. For example, recognize a problem (i.e., need or opportunity), identify goals (i.e., purposes or objectives) to be achieved in addressing the problem, delineate appropriate alternatives, evaluate the alternatives in relation to specified criteria (e.g., achievement of purposes), select the preferred alternative, and conduct follow-on evaluations of the effectiveness of the selection. The section should be prepared early-on either directly by or under the direction of the manager for the project team. The preparer(s) should systematically review the needs-related information, and identify the purpose(s) based on both information reviews and input via intraagency coordination and external scoping inputs. Consideration also should be given to effective means for communicating the needs and purposes. Finally, the body of case law is typically associated with the broadness or narrowness of the resultant range of reasonable alternatives subject to comparative evaluations. The case law emphasizes the importance of a carefully developed purpose and need section – the needs should be succinctly stated and the purposes (i.e., goals or objectives) should be articulated such that measurable (quantitative or qualitative) criteria could be utilized in the evaluation of reasonable alternatives. Accordingly, the key conclusions of this guidance are: (1) Early and careful attention should be given to the description of existing needs to be addressed and to the delineation of the purposes to be accomplished by selecting and implementing a preferred alternative; (2) The needs and purposes should be utilized when potential alternatives are being identified, subjected to early screening, and then comparatively evaluated; and (3) The purpose and need section should be periodically reviewed and accordingly revised throughout the EIS preparation process.



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Introduction



This internal guidance has been prepared as an aid for NOAA Fisheries Service in their planning and preparation of the “purpose and need” section of an environmental impact statement (EIS) or environmental assessment (EA). Arguably, because it is a stage-setter and strongly connected to the identification and evaluation of alternatives, the purpose and need section may be the most important feature of EISs or EAs. Because of the traditional limited attention given to this critical section, many misconceptions have arisen. Common misconceptions include:

Misconception about Purpose and Need	Truth about Purpose and Need
<ul style="list-style-type: none">• Purpose and need is expressed as one concept	<ul style="list-style-type: none">• Both the need and the purpose of the action should be articulated individually
<ul style="list-style-type: none">• Purpose and need is related to the purpose of the EIS or EA	<ul style="list-style-type: none">• The need and purpose are related to the action
<ul style="list-style-type: none">• Purpose and need requires a long explanation of the history of the fishery and associated issues	<ul style="list-style-type: none">• Purpose and need should be concise, based on scientific information, and focused on the decisions to be made

To address these misconceptions, this guidance is structured into five sections. The first provides a regulatory perspective on the purpose and need requirements in the NEPA process, while the second delineates decision model thinking as a basis for identifying needs followed by the specification of purposes. The third section contains practical suggestions for preparing the purpose and need section and relevant information from case law is included in the fourth section. The fifth section contains the summary and conclusions of this guidance. This is followed by the selected references and two supporting appendices.

Purpose and Need Requirements in the NEPA Process



The National Environmental Policy Act (NEPA) did not include the phrase purpose and need, however the concept is inferred in two of the five listed topics to be addressed in an EIS. Specifically, Section 102, Part C (i) indicates that the “environmental impacts of the


proposed action” should be addressed (U.S. Congress 1970). The phrase “proposed action” suggests that an identified need(s) is to be met via a proposed policy, plan, program, project, or permit. For fisheries management, such needs could relate to reducing over-fishing conditions for target species, minimizing by-catch of non-target species, or establishing allocation programs in permitted fisheries.

Section 102, Part C (iii) says that “alternatives to the proposed action” should also be described. Accordingly, and again by inference, alternatives as well as the proposed action are related to an identified need(s) and the objectives (i.e., goals or purposes) to be accomplished. The evaluation of alternatives should be based on identified comparative criteria. Such criteria could include the extent to which each evaluated alternative (including the proposed action) complies with stated purpose(s) developed from identified needs.

In 1973, the CEQ issued guidelines for the preparation of EISs. The topics to be addressed were expanded to eight (including five from NEPA). One new topic called for “a description of the proposed action, a statement of its purposes, and a description of the affected environment” (Council on Environmental Quality, 1973). This new topic also infers an identified need(s), and specifically introduces the phrase “statement of purposes.”

The 1973 CEQ guidelines also expanded on the requirement to address alternatives to the proposed action. The terminology was refined from NEPA to focus on “reasonable alternative actions.” Of particular relevance is the following (Council on Environmental Quality, 1973): “In each case, the analysis should be sufficiently detailed to reveal the agency’s comparative evaluation of the environmental benefits, costs, and risks of the proposed action and each reasonable alternative.” This sentence strongly suggests that all alternatives, including the proposed action, be compared relative to identified decision criteria or factors. Such criteria or factors could incorporate compliance with the purpose(s) of the proposed action, reductions in identified needs in the study area, mitigation or restoration of environmental impacts, minimization of costs for implementation, ease of enforceability, etc.

The CEQ’s regulations for implementing NEPA went into affect on July 1, 1979. Regarding the content of EISs, Section 1502.13 specifically indicates that the “Purpose and Need for the Proposed Action”



should be described (Council on Environmental Quality, 1999). This topic is typically addressed in Chapter 1 or another early chapter in the EIS. Frequently used titles for Chapter 1 include either “Introduction,” or “Purpose and Need for Proposed Action,” or “Need for and Purpose of the (Proposed) Action,” or “Purpose of and Need for Action.” The content of Section 1502.13 was briefly described as follows (Council on Environmental Quality, 1999): “The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.” It is of interest to note that the above quote uses the term “underlying,” thus suggesting the inclusion of foundational information related to the need(s) being addressed, and the basic goals or objectives (purposes) of the alternatives subject to evaluation. However, the CEQ regulations did not define any of the key terms in Section 1502.13 (underlying, purpose and need). Further the CEQ’s regulations typically do not distinguish between “purpose” and “need” and the terms are used both together and separately (U.S. Department of Energy, 2004).

Section 1508.9(b) of the CEQ’s regulations indicates that EAs should address “the need for the proposal.” However, the term “purpose(s)” was not included. Despite this omission, there is nothing to preclude an EA from addressing the “need for and purpose of” the proposal and this is frequently done in Section 1 or Chapter 1 of EAs.

Pragmatic concerns that have resulted from the CEQ’s regulations are that purpose and need are often treated as “one word” (purposeandneed), and as noted above, no distinction is made between them. One result is no clear delineation of underlying needs, nor a clear description of the purpose(s). Both of these issues are important in identifying and evaluating alternatives.

Section 1502.14 is focused on the alternatives, including the proposed action (Council on Environmental Quality, 1999). Specifically, this section is to “rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.” Further, it is noted that the environmental impacts of the proposed action (preferred alternative) and other alternatives should be presented in comparative form, thus providing a clear basis for the choice of the preferred alternative. Inferred by the term “comparative form” is that all alternatives could be compared

relative to identified purposes (i.e., goals or objectives), environmental impacts, economic consequences, implementability, etc.

In 1981, the CEQ provided answers to 40 frequently asked questions related to their NEPA regulations (Council on Environmental Quality, 1981 and 1986). It is of interest to note that none of the “40 Questions” are specifically related to purpose and need; however, three questions related to alternatives infer that “purposes” should be considered in both identifying reasonable alternatives for analysis and in selecting the preferred alternative. For example, the answer to question 1(b) indicated that “a reasonable range of alternatives depends on the nature of the proposal and the facts in each case.” Regarding applicants for permits, the answer to question 2(a) indicated that “reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant.”

The answer to question 4(a) of the “40 Questions” relates to an agency’s identification of their “preferred alternative.” It is typically synonymous with the proposed action. Specifically, the “agency’s preferred alternative is the alternative which the agency believes would fulfill its statutory mission and responsibilities, giving consideration to economic, environmental, technical and other factors.” This definition infers that the agency should use compliance with the purpose(s) of the proposed action as a decision factor in the systematic comparison of alternatives.

Following the 1979 issuance of the CEQ’s NEPA regulations, and the 1981 “40 Questions,” further clarifications related to purpose and need were issued by CEQ. For example, in 1981, guidance related to the scoping process was released (Council on Environmental Quality, 1981). This guidance noted that both agency and public scoping can aid in the identification of issues (including various problems and needs), and in the delineation of potential reasonable alternatives. Guidance issued in 1983 further supported the use of inputs from the scoping process to identify needs and formulate purposes (Council on Environmental Quality, 1983). Further, the 1983 guidance indicated that in agency licensing and permitting situations, the applicants stated needs and purposes could be incorporated in the NEPA process.

Finally, a review of NOAA’s 1999 NEPA guidance

(NOAA Administrative Order 216-6) indicated that purpose and need was incorporated as per the CEQ's NEPA regulations (National Oceanic and Atmospheric Administration, 1999). No new insights or fisheries related information on purpose and need was included in NAO 216-6.

Delineating Purpose and Need Based on Decision Models



Numerous planning models based on classic decision theory have been proposed as a framework for responding to societal problems. While the specific terminology might vary, such models are generally characterized by several common steps accomplished in an interactive manner. The first step is to identify or recognize an existing or potential problem. The problem, sometimes referred to as a need or opportunity, is usually characterized by information collection and analysis. The second step typically involves the identification of one or more purposes (or goals or objectives) to be accomplished via addressing the problem. Such purposes could include compliance with one or more of the statutory missions of the sponsoring agency, as well as restoring or improving the condition of environmental resources. The third step includes the delineation of alternatives, to be considered singly or in combination, which are responsive to the identified needs and purposes. The fourth step routinely involves the evaluation of the alternatives in accordance with pre-defined criteria or factors such as their compliance with identified purposes, impacts, implementation costs and enforceability. The fifth step relates to the selection of one of the evaluated alternatives to become the proposed action (preferred alternative) which is responsive to the needs and purposes. Finally, some planning models include a sixth step related to follow-on evaluation of the effectiveness (or performance) of the implemented actions.

The “planning model” as described above has been used for several decades in both governmental and private sectors. For example, governmental agencies involved in the development of infrastructure projects (e.g., highways, waterways, dams, water and wastewater treatment systems and power plants), as well as resources management (e.g., land, forests, fisheries and pest control) utilize variations in the planning model to address identified needs. As a result, within a few years following the 1979 adoption of the CEQ's NEPA regulations, many agencies began to integrate their planning model with NEPA


Three key points from the above paragraph have relevance to addressing purpose and need in the NEPA process. They are:

- *Needs identification provides the basis for delineating the purposes to be accomplished.*
- *The alternatives to be evaluated should be based on the needs and purposes, and the systematic evaluation of such alternatives should include their compliance with the identified purposes.*
- *The delineation of needs and purposes should be based upon information gathering and careful analysis.*

compliance requirements, including those related to purposes and need, and compliance with agency planning mandates. Examples of such agencies include the Federal Highway Administration, U.S. Army Corps of Engineers, U.S. Department of Agriculture, and NOAA Fisheries Service (via FMPs) (Federal Highway Administration, 1990, Gribben and Kaleta, 2005; U. S. Army Corps of Engineers, 2000; U. S. Department of Agriculture, 2007; U. S. Environmental Protection Agency, 2005; and U. S. Congress, 1996).

One characteristic of various agency responses is their inclusion of clarifying definitions for the words purpose and need. For example, the Animal and Plant Inspection Service (APHIS) within the U. S. Department of Agriculture has developed the following definitions and instructions (U.S. Department of Agriculture, 2007):

“Purpose is usually defined as an ‘objective’ or ‘goal,’ whereas need is defined as a ‘requirement.’ This implies that the purpose and need section of an EIS should explain briefly the requirement as well as the objective of a proposed action and alternatives . . . The CEQ intends that purpose and need statements be understandable, direct,



and concise. The concept is not clearly understood, has been subject to much interpretation, and has become an issue in the preparation of environmental documents. Opposing perspectives include using the purpose and need section of an EIS to present detailed information which justifies either the proposed action or the need to prepare an EIS, or providing such a brief statement of purpose and need that the actual need for action is obscured. Brevity is very important, but purpose and need statements must convey to the reader enough information so that the reader understands why the action is being proposed.”

Further, impact assessment professionals have also indicated that “needs” differ from “purposes” and that the former should precede the latter. For example, the need might be to address a continuing decline in the stock of a commercial fishery, while the purpose could be to utilize a balanced set of management measures related to reducing overfishing, thus enhancing the sustainability of the stock. Three examples will be used to illustrate such writings. First, a governmental NEPA attorney defined “need” as the “lack of something wanted or the presence of something unwanted” (Schmidt, 1993, p. 44). Accordingly, “need” represents an environmental problem which should be addressed, or an opportunity to improve an existing environmental condition. The definition of “purpose” suggests a goal or objective to be attained, given that there is an identified need. Further, based on these definitions it can be seen that the words “purpose” and “need” are not synonyms (Schmidt, 1993, p.44). Schmidt (1993, pp. 52-54) also listed the following reminders which can be useful for preparing the “purpose and need section” in an EIS:

- It involves an iterative process;
- Start early on its preparation;
- Needs are “nouns;”
- Satisfying needs can have alternatives, complying with purposes do not; and
- Purposes are adjectives which can also serve as “decision factors” in the comparative evaluation of alternatives.

The second example is from an environmental planner engaged in both training and NEPA documentation activities (Lee, 1997). “Need” is defined based on identifying and describing the underlying problem or deficiency (not the proposed action); facts and analyses supporting the problem or deficiency in the

particular location at the particular time; and the context or perspective of the mission (Lee, 1997, p.79). Further the underlying need articulates the reasons why the existing circumstances, at the existing location at a particular time, are inadequate or need to be changed. Purpose is defined “as the set of one or more measurable objectives that must be met to a degree that sufficiently fulfills the underlying need for action. An objective must be measurable, with time limits, in order to evaluate the effectiveness of alternatives during planning and to monitor the performance of the decision during implementation” (Lee, 1997, p.82). Finally, the planner suggested that the preparation of the description of the underlying need can be aided by the repeated consideration of the following series of questions (Lee, 1997, p.85):

- “Why?” For example: what is the basic problem or deficiency with the existing situation? Why is this a problem? Why do we need the proposed action? How does it relate to the agency mission or program? What facts support the need?
- “Why here?” For example: why is this problem or deficiency occurring here? Why is it occurring only here? Why not somewhere else? If it is occurring elsewhere, why are we addressing it only here? Where does “here” end and why?
- “Why now?” For example: Why does the problem need to be addressed now (urgency)? Why not earlier or later? What could happen if the problem were not addressed now? What has happened since it was not addressed earlier, and will happen if the situation is allowed to continue?

The third example is from a practicing NEPA attorney engaged in planning and preparing EISs (Bass, et al., 2001). The following observations are based on both the writers’ practical experience as well as the examination of case law (Bass, et al., 2001, pp. 89-90):

- A federal agency has the discretion to describe a proposed action’s purpose and need in any way that meets its statutory authority.
- “Need” refers to the underlying social need to which the agency is responding; “purpose” denotes the specific objectives of the proposed action.

- The lead agency’s proposed action could have multiple purposes and thus require the preparation of a more complex statement of purpose and need.

All three of the above writers also stress the importance of connecting the purpose and need section of the EIS to the delineation of alternatives and their subsequent evaluation. For example, Bass, et al. (2001, p.89) indicates that “The statement of purpose and need helps the lead agency select the range of alternatives to be evaluated in the EIS. An EIS needs to include only those alternatives that would achieve at least some of the federal agency’s objectives as set forth in the statement of purpose and need.” Schmidt (1993, p.45) indicates that... “The statement of underlying need defines the range of alternatives in an EIS. The statement of purposes defines the alternatives that are analyzed in the greatest detail. Alternatives that do not meet the underlying need can be eliminated from the EIS. . . Alternatives that meet the underlying need but do not meet other stated purposes must be present in the EIS but can be eliminated from detailed analysis. If an action meets the stated underlying need it is perhaps a ‘reasonable’ alternative, but if it does not also meet other stated purposes it is not as ‘reasonable’ as actions that meet both the stated needs and the stated purposes.”

Practical Suggestions for Preparing the Purpose and Need



It is assumed that the preparer of the purpose and need section of the EIS (usually Chapter 1) will be either the manager for the project team, or a team member from NOAA Fisheries Service, the Council professional staff, or a consulting firm. If a team member takes the lead, it is assumed that the project manager will review and appropriately modify the written material. Further, it is assumed that the Notice of Intent (NOI) for the EIS also will need to be prepared by a team member or the project manager.

Basic premises related to the planning and preparation of purpose and need section includes the following:

- It should be prepared early in the impact study, and feedback on its contents should be sought from project team members, Council staffs, regional subject matter experts, and General Counsel.

- The draft of the purpose and need section will evolve when the impact study is conducted. In fact, it should be considered as a work-in-progress until the draft EIS is released for agency and public review.
- The purpose and need section in the final EIS may need to be “fine-tuned” as a result of agency and public input.
- The NOI for the EIS will need to include a summary of available information on the needs to be addressed and brief information on the anticipated purpose(s) to be accomplished by the examined alternatives, including the proposed action.
- The Record of Decision (ROD) based upon the EIS, as well as other considerations, will need to briefly summarize the purpose and need section and to indicate how the reasonable alternatives were identified and evaluated.


Five practical suggestions are related to the preparation of the purpose and need section of an EA or EIS. They include:

- 1) The systematic review and organization of information related to underlying needs;
- 2) The identification of purpose(s) (goals or objectives) which are responsive to the needs;
- 3) The consideration of selected means for communicating information;
- 4) The preparation of a “strawman” version of the section; and
- 5) The recognition that refinements will be needed over the entire period associated with the preparation of the EIS.

Review of Needs-Related Information



Basic information related to describing needs associated with any NOAA Fisheries Service action, such as developing a new fishery management plan (FMP), amending an existing FMP or implementing actions related to a recovery plan for endangered species, can be assembled from a variety of sources. Examples of such sources include stock assessments of target species or protected species, bycatch data for non-target species,



research findings related to effects of gear types on essential fish habitat, periodic requirements to establish and/or allocate total allowable catch levels, and requests for specific actions from the fishing industry or governmental commissions (e.g., the Marine Mammal Commission). Careful review of this information, coupled with discussions with others on the project team, or associated with various stakeholder groups, can provide an overview of historical, current and potential future needs.

Preparation of a description of the “needs” might entail a review and summarization of the statutory context for the needs. Further, historical and current information on the status of the stock should be compiled. Specific information on the impacts of various gear types or other stressors may need to be summarized. Finally, the need for a proposed action should be explained based on supporting data (e.g., a decline in the stock population of a target species, or forecasted increases in human stresses on protected species). In general, quantitative information can provide a more persuasive basis for establishing the need for a proposed action.

Identification of Purposes



A fundamental purpose related to fishery management actions could be to achieve compliance with key federal statutes. For example, the Magnuson-Stevens Fishery Conservation and Management Act (MSA), as amended, requires that new FMPs, and amendments to existing ones, be in compliance with the Act’s ten national standards. Examples of standards with particular relevance for the establishment of purposes (or goals or objectives) for proposed actions, and which could be expressed in a reworded format, focused on their substantive concepts, include (U. S. Congress, 1996, Sec. 301):

- National Standard 1 -- Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the U. S. fishing industry.
- National Standard 8 -- Conservation and management measures shall, consistent with the conservation requirements of this Act (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities in

order to provide for the sustained participation of such communities, and to the extent practicable, minimize adverse economic impacts on such communities.

- National Standard 9 -- Conservation and management measures shall, to the extent practicable, minimize by-catch and to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.

The goals or objectives for the “purpose” can include both broad elements related to statutory compliance and specific elements. Broad elements could encompass the reduction of historical overfishing of a target species, and the associated enhancement of a sustainable stock of the species. A specific element, for example, might relate to a 25% reduction in the bycatch of a non-target species.

A pragmatic approach may be to disaggregate the overall purpose (goal) of the proposed action into specific objectives or sub-purposes. If so, the specific objectives could be used to evaluate alternatives relative to their statutory compliance, impacts, etc. These evaluations could be used to eliminate early alternatives from detailed study, and to systematically compare the anticipated effects of the reasonable alternatives, thus forming the basis for the selection of the preferred alternative (proposed action).

The delineation of purposes is also related to the preparation of the ROD. For example, the term “purposes” is inferred in the contents requirements for a ROD. The specific term used in the description of a ROD is “relevant factors” (could also be called “decisions factors”). Specifically, Section 1505.2(b) of the CEQ’s NEPA regulations indicates that (Council on Environmental Quality, 1999):

“An agency may discuss preferences among alternatives based on relevant factors including economic and technical considerations and agency statutory missions. An agency shall identify and discuss all such factors including any essential considerations of national policy which were balanced by the agency in making its decision and state how those considerations entered into its decision.”

Schmidt (1993, pp.50-51) suggested that the purposes (goals or objectives) of a proposed action could serve as decision factors for comparing reasonable alternatives. Four reasons for connecting purposes and

decision factors include (Schmidt, 1993, pp.50-51):

- “First, it is inevitable that the factors used to compare the alternatives in the EIS will be the same factors used when selecting between the alternatives at the time of decision.
- Second, the ROD should be based on the record before the agency. In many agency proceedings, the EIS is the only record created prior to the decision, and so the EIS is the only place to put information that is relevant to the decision.
- Third, the public will have a chance to review and comment on the decision factors if they are disclosed in the EIS. This is full disclosure.
- Fourth, putting these factors into the EIS paves the way for those who follow to write the ROD.”

Consideration of Information Communication



In addition to the NEPA process requirements for addressing purpose and need, consideration also should be given to how this information can be communicated in an EA or EIS. To illustrate, it has been suggested that the first principle for preparing a quality NEPA document is to... “Tell the story of the project so that the reader can easily understand the purpose and the need for the project, how each alternative would meet the project goals, and the strengths and weaknesses associated with each alternative” (American Association of State Highway and Transportation Officials, et al., 2006, pp.4-5). Telling the story should provide a clear path of logic with a consistent theme or thread throughout the document. It should aid the reader in understanding how decisions were reached and will be reached, answering key questions and discussing relevant findings related to each alternative.

Photographs also could be used to communicate information. For example, the description of the need might be aided by the inclusion of photographs and their appropriate description. To illustrate, photographs could be used to illustrate bycatch, spatial crowding due to commercial and recreational vessels, effects on migratory birds or protected mammals, or coastal habitat changes due to alterations in local land uses. Such photographic presentations can be particularly useful for non-technical readers of EISs.

Recommendations from others also may aid in planning and writing the purpose and need section. For example, within an intraagency guidance document prepared by the U.S. Department of Energy (2004), three recommendations were included: (1) relate the statement of purpose and need to the broad requirement or goal for agency action – not to the need for a specific action; (2) do not include requirements in the description of purpose and need that unreasonably narrow or bias the range of reasonable alternatives; and (3) write the statement of purpose and need to identify the problem or opportunity to which the agency is responding and, in so doing, recognize that the statement will determine the range of reasonable alternatives. These three recommendations would also be applicable to other agencies, including NOAA Fisheries Service.

It also may be useful to the preparer of the purpose and need section to consider various review issues to be addressed by other agencies. For example, in a 2005 guidance document related to the review of EISs for FMPs, the U.S. Environmental Protection Agency indicated that the purpose and need should answer the following questions (U.S. Environmental Protection Agency, 2005, pp. 71-72):

- What is the basic concern or deficiency with the existing situation and why is this a problem?
- How does purpose and need relate to the agency’s mission and what facts support the need?
- Why is this problem occurring here and why is it important? If it is occurring somewhere else too, why is it being addressed only here? Where does “here” end and why?
- Why is the problem being addressed now?
- Is the statement of purpose and need clearly worded so that the decision to be made is understood?
- Does the statement of need provide a clear explanation of why there is a need for action?
- Does the statement of purpose and need lead to a reasonable range of alternatives?

Preparation and Revision of a Draft Version



It is desirable to develop an early preliminary draft of the “need for” and “purpose of” the proposed action. This preliminary draft should be reviewed and revised by the lead agency and consultant staffs, along with cooperating agency personnel, working on the EIS. Further, if an interagency planning/review committee has been designated, they also should be requested to provide input. In addition, it would be desirable to periodically reexamine and update this information, particularly if the NEPA process extends over multiple months (Federal Highway Administration, 1990).

Case Law on Purpose and Need



Case law related to purpose and need is typically intertwined with the identification and evaluation of a range of reasonable alternatives. To illustrate the intertwined nature of these topics, both case law reviews and the results of four frequently cited appellate-level cases from the 1980s and 1990s are described here. Further, Appendix I contains summaries of eleven appellate-level cases since 2000; they further illustrate the principles in the four cases described here.

Case Law Reviews



In a cumulative review of case law related to alternatives, Mandelker (2002, p. 9-56) indicated that most courts have utilized a principle “that limits the alternatives that must be discussed to the purpose and need of the project proposed by the federal agency.” Further, over 30 cases based on this principle are listed (Mandelker, 2002, pp.9-56 and 9-57). The implications are that the proponent agency must systematically describe the needs being addressed, and must clearly delineate the purposes (objectives, goals, or missions) of the proposed action. If the “purpose and need” statement is too broad, difficulty will occur in limiting the formulation of a reasonable range of alternatives.

A related issue at the opposite end of the spectrum is associated with how narrowly an agency or an applicant for a governmental permit may define the project purposes. Implied is the possibility that an agency could so narrowly define the purpose(s) that only one alternative could be analyzed as “reasonable.” Accordingly, the courts have generally ruled against both a “narrowing approach” and an “expansive approach.” The following quotation from an appellate-level decision illustrates the concerns related to these extremes (Citizens Against Burlington, Inc., 1991):

Notable generalizations on the purpose and need from these rulings include:

- The purpose and need statement helps delineate a reasonable range of alternatives (reasonable alternatives should meet the both the purpose and need of the action).*
- Purpose and need statements should not be too broad as to limit the formulation of a reasonable range of alternatives.*
- Purpose and need statements should not be too narrow as to allow only one or an overly restrictive set of alternatives.*
- Clear narrow purpose and need statements have been more legally defensible than overly broad statements.*
- Third party applicants have been allowed a more narrow range of alternatives than agencies relative to the applicant’s primary objectives.*
- Discussion/evaluation of the No action alternative can be brief when it does not meet the purpose and need; however, it may need to address the status quo, as applicable.*
- Statutory objectives (purposes) of agencies may be used to limit consideration of alternatives.*
- Agencies can modify purpose and need from draft to the final EIS.*

“An agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency’s power would accomplish the goals of the agency’s action, and the EIS would become a foreordained formality. Nor may an agency frame its goals in terms so unreasonably broad that an infinite number of alternatives would accomplish these goals and the project would collapse under the weight of the possibilities.”

To support the importance of the purposes for the proposed action in relation to identifying “reasonable alternatives,” Lindley (1999, p.89) noted that the courts typically seem “to conclude that to be reasonable, the alternative must meet the goals of the proposed action.” Lindley supported this statement with brief information on five court decisions illustrating the importance of the purpose(s) (goals or objectives) statement.

Schmidt (1993, pp.46-49) also provided brief reviews of nine court cases wherein the purpose and need statements were evaluated in relation to the range of examined alternatives. The nine cases included eight at the appellate-level and one at the district-level. The plaintiffs were successful in only two of the nine cases. To conclude the reviews,

Schmidt (1993, p.49) made the following comments:

“When an agency defines the underlying need very narrowly, it wins. And when it defines the need very broadly (or not at all), it loses. It seems that a narrowly scoped EIS is easier to write and to defend than one that is broadly scoped. When an agency is careful in defining its underlying need, the agency can limit the range of alternatives to those that could reasonably meet the underlying need. This is another way of saying that an agency can safely eliminate those alternatives from an environmental document that do not meet the underlying need.”

On a related issue, Lindley (1999, pp.89-90) addressed the question, “Is the range of reasonable alternatives different for an agency-generated proposal than for a third-party applicant’s proposal?” To answer this question, Lindley referred to a case involving the USEPA’s issuance of a National Pollutant Discharge Elimination System (NPDES) permit

for an oil refinery and deep water terminal off the coast of Maine. The 1982 decision by the First Circuit indicated that the USEPA’s “decision to limit its study of alternative to those that would meet the applicant’s primary objectives was consistent with the rule of reason that must govern a court’s review of an EIS” (Lindley, 1999, p.90).

A final issue is related to the necessary detail for the “no action” alternative in the NEPA documentation process. In general, the discussion of the “no action” alternative can be brief. For example, Lindley (1999, p.94) indicated that in reviewing an EIS on a proposal for a major electrical transmission line, the Tenth Circuit Court upheld a brief discussion of the “no action” alternative because the “discussion implicitly explains that the agency rejected the no action alternative because it would not address the problem of major 345 KV line outages, and the related overloading of the 115 KV transmission system” (All Indian Pueblo Council, 1992).


Frequently Cited Appellate-Level Cases



Four appellate-level cases from the 1980s and 1990s have been frequently used by subsequent courts in addressing the relationship between “purpose and need” and the range of considered alternatives. For example, a landmark 1983 case involving the U.S. Department of Transportation (DOT) related to a DOT proposal to regulate the highway transportation of radioactive materials in New York City. The proposal was based on an underlying need for highway safety. The City sued because the EIS did not include the alternative of barging radioactive materials around New York. The Second Circuit ruled in favor of the DOT based on the following summary statement (City of New York, 1983):

“The scope of alternatives to be considered is a function of how narrowly or broadly one views the objective (purpose) of an agency’s proposed action. In this case, for example, if DOT’s objective is to improve the safety of highway transportation of radioactive materials, relevant alternatives might include a choice of routes, a choice of equipment, and a choice of driver qualifications. If DOT is concerned more broadly with all transportation of these materials, it might consider alternative modes of transportation.”

In addition, the 1983 decision by the Second Circuit also indicated that compliance with an agency’s



statutory requirements also could be used in identifying an appropriate range of reasonable alternatives. Specifically, the following comments were included in the Court decision (City of New York, 1983):

“Statutory objectives provide a sensible compromise between unduly narrow objectives an agency might choose to identify to limit consideration of alternatives and hopelessly broad societal objectives that would unduly expand the range of relevant alternatives.”

In 1991, the Court of Appeals for the District of Columbia Circuit upheld a District Court decision and ruled in favor of the Federal Aviation Administration (FAA). At issue was the FAA’s approval of the Toledo, Ohio Port Authority’s plan for expanding the Toledo Airport to accommodate an expansion of Burlington Air Express. In its decision, the Court of Appeals upheld the applicant’s plan and the pertinent federal airlines statute, and also commented on necessary limits regarding an open-ended range of alternatives (Citizens Against Burlington, Inc.,...,1991).


The third case involved a proposal realignment of California State Highway 1 from the City of Carmel-by-the-Sea to nearby Hatton Canyon (City of Carmel-by-the-Sea, et al., 1997). Although the plaintiffs made several impact related claims, the relevant claim here was related to a change in the “purpose and need” statement between the draft EIS and the final EIS. Based on public inputs and related studies, the statement in the final EIS was more specific in that it identified an industry traffic category (Level of Service C) as a purpose (goal) for the project. The Ninth Circuit upheld this refinement of the “purpose and need” statement.

The final case involved a timber sale associated with the Tongass Land Management Plan (Forest Plan) in Alaska. The Ninth Circuit upheld the District Court decision and ruled in favor of the U. S. Forest Service relative to the adequacy of the EIS’s discussion of the need for, and purposes (objectives) of the proposed action. Further, based on its noncompliance with the “purposes” of the proposed action, the Ninth Circuit validated the elimination of the “no action” alternative from detailed study (Friends of the Southeast’s Future, et al.,...1998). Also, in a related plaintiff

challenge, the Ninth Circuit upheld the District Court’s holding that the USFS violated the National Forest Management Act by failing to make the proposed timber sale consistent with the procedural provisions of the Tongass Land Management Plan.



Summary and Conclusions

 The purpose and need section of an EIS is a stage-setter and should be strongly connected to the identification and evaluation of alternatives, including the proposed action (preferred alternative). The purpose and need section was inferred in NEPA itself and specified in the CEQ's 1979 NEPA regulations, although the regulations did not provide sufficient clarity. To provide a practical basis for clarity, the steps associated with classic decision theory can serve as a conceptual framework for developing an appropriate "purpose and need" section. The steps are: recognize a problem (need or opportunity), identify goals (purposes or objectives) to be achieved in addressing the problem, delineate appropriate alternatives, evaluate the alternatives in relation to specified criteria (e.g., achievement of purposes), select the preferred alternative, and conduct follow-on evaluations of the effectiveness of the selection.

The purpose and need section should be prepared early-on by the manager for the project team, or it should be assembled under the direction of the manager. The preparer(s) should systematically review the needs-related information, and identify the purpose(s) based on both information reviews and input via intraagency coordination and external scoping inputs. Consideration also should be given to effective means for communicating the needs and purposes. Examples of such means can include using a "tell the story" approach, answering posed questions, and including photographs related to the purpose and need topics within the EIS. Further, it should be recognized that the "purpose and need" section will need to be revised as the EIS is completed.

The body of case law related to purpose and need is typically associated with the broadness or narrowness of the resultant range of reasonable alternatives subject to comparative evaluations. The case law emphasizes the importance of a carefully developed purpose and need section – the needs should be succinctly stated and the purposes (goals or objectives) should be articulated such that measurable (quantitative or qualitative) criteria could be utilized in the evaluation of reasonable alternatives. The purposes could include compliance with agency statutory missions (e.g., compliance with MSA) as well as specific features such as reducing overfishing and recovery of protected species, etc.

Based upon the above, the following conclusions can be noted:


- Early and careful attention should be given to the description of existing needs to be addressed and to the delineation of the purposes to be accomplished by selecting and implementing a preferred alternative.
- The needs and purposes should be utilized when potential alternatives are being identified, subjected to early screening, and then comparatively evaluated.
- The purpose and need section should be periodically reviewed and accordingly revised throughout the EIS preparation process.



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APPENDIX I

Recent Case Law Related to Purpose and Need

During the preparation of this guidance, a search of Lexis-Nexis was conducted to identify how “purpose and need” was addressed in appellate-level court decisions since 2000. Plaintiffs’ claims typically related to an inadequate range of alternatives given the EIS’s description of “purpose and need,” or to the document’s lack of clarity in using noncompliance with “purpose and need” to eliminate some identified alternatives. Brief remarks on eleven reviewed cases presented in chronological order, are as follows:

- City of Bridgeton, et al., 2000--This Eighth Circuit case related to an EIS on the westward expansion of Lambert-St. Louis International Airport. The plaintiff’s petitions for review were denied and the Federal Aviation Administration’s EIS was upheld. Of interest is the FAA’s use of three-tiered approach based on the stated “purpose and need,” to screen potential alternatives. The Tier 1 analysis was based on fulfilling six basic operational goals (purposes) of the proposed federal action. Tier 2 analysis examined whether the remaining alternatives would meet constructability and benefit/cost goals. Finally, the Tier 3 screening was based on a broad range of identified economic, environmental and other operational factors and goals.
- Nicole Davis, et al., 2002—This Tenth Circuit case related to an EA on a highway project in three suburban cities in Salt Lake County, Utah. Central plaintiff concerns were associated with the “narrowness” of the “purpose and need” statement, thus limiting the range of examined alternatives; and the anticipated significant impacts which would require an EIS. The Tenth Circuit Court reversed the District Court decision and remanded the case to the Federal Highway Administration.
- Alliance for Legal Action, et al., 2003 – This Fourth Circuit case involved the Federal Aviation Administration’s decision to approve plans for expanding the Piedmont Triad International Airport (PTIA) near Greensboro, North Carolina. The decision was based on an expansion proposal from the PTIA Authority; the proposal itself was generated in response to a request from FedEx (to facilitate FedEx’s development of a hub airport in the general area). The plaintiff’s challenged FAA’s statement of “purpose and need” as being too narrow, thus leading FAA to consider an inadequate range of alternatives to the sponsor-proposed project. However, the plaintiff’s petition for review was denied by the Fourth Circuit Court. The FAA’s statement of purpose and need was upheld based on the PTIA Authority’s stated goals (purposes); FAA’s general mission; Congressional goals as reflected in federal aviation law (Part B – Airport Development and Noise – as contained in Subtitle VII of Title 49 in the United States Code); the expertise and discretion of FAA; and the provision of substantial evidence in the EIS related to the need for, and purposes of the action.
- Route 9 Opposition Legal Fund, et al., 2003 – This Fourth Circuit case related to a new 4.6 mile four-lane highway in Jefferson County, West Virginia. The EIS used the “purpose and needs” statement to screen a variety of alternatives; accordingly, several alternatives were eliminated from further analysis. The Fourth Circuit Court upheld the District Court’s decision in favor of the EIS prepared by the West Virginia Department of Transportation and the Federal Highway Administration. The Circuit Court’s decision stated that “. . . an alternative may be eliminated from further consideration if it does not meet the purpose and needs of the project.” In so doing, the Court referenced a Ninth Circuit decision from 1993 (Friends of the Southeast’s Future, et al., . . ., 1998), and a District of Columbia Circuit decision from 1991 (Citizens Against Burlington, Inc., . . ., 1991).
- Highway J Citizens Groups, . . ., 2003 – This Seventh Circuit case related to an EA prepared for a highway bridge project in Wisconsin. At the District Court level and among other requests, the plaintiff’s asked that the FHWA and Wisconsin Department of Transportation be enjoined from proceeding with the bridge project until the location and extent of a nearby arsenic and trichloroethylene ground water contamination plume was determined; further, they asked that FHWA be required to prepare an EIS. The plaintiff’s requests were denied by the District Court and that Court’s decision was affirmed by the Seventh Circuit. The Seventh Circuit Court decision noted that the EA identified three




purposes for the project – the primary one was to address safety considerations flowing from the layout of the roads and the close proximity of the railroads, another was to bring the existing facility into compliance with state Trunk Highway Standards, and a secondary one was to provide for future expansion of the roadways due to increasing traffic in the region. Further, based on the purposes, the Circuit Court ruled that a sufficient number of reasonable alternatives had been examined. In addition, it was determined that a “hard look” related to the consequences of the nearby plume had been accomplished and no EIS was required.

- Charlie Lee, et al., 2004 – This Tenth Circuit case involved NEPA challenges related to the U. S. Air Force’s plans to permit the German Air Force to station, for training purposes, 30 fighter aircraft at Holloman Air Force Base (New Mexico), in addition to the 12 already there. Among other claims, the plaintiffs indicated that the USAF failed to consider reasonable alternatives. The Tenth Circuit affirmed the District Court decision in favor of the USAF. In so doing, the Tenth Circuit noted that: (1) the USAF’s NEPA regulations define reasonable alternatives as those that address the underlying purpose and need (32 CFR 989.8(b)); and that (2) the current decision was in further support of the 1994 Agreement between the USAF and the German Defense Ministry to demonstrate continued U.S. commitment to NATO allies, (3) to capitalize on the substantial infrastructure investment by the German Air Force at Holloman, and (4) to provide a desert/mountainous terrain training location. Items (2) through (4) are analogous to identified purposes for the action.
- Westlands Water District, et al., 2004 – This Ninth Circuit case was related to water flow adjustments in the Trinity River (in California) to achieve restoration of both salmon and steelhead trout populations. The Ninth Circuit decision reversed the District Court’s conclusion that the scope of the U. S. Bureau of Reclamation’s EIS and the analyzed range of alternatives, was unreasonable. Plaintiffs had claimed that the “purpose and need” statement was unreasonably narrow because it focused only on the Trinity River and did not address the related Sacramento River Basin. Following careful review of this issue, the Ninth Circuit ruled that the “purpose

and need” statement had reasonably defined the objectives of the project and that the analyzed alternatives were reasonable.

- City of Sausalito, 2004 – This Ninth Circuit case related to a suit by the City of Sausalito, California, to enjoin the National Park Service from implementing its plans for the development and rehabilitation of Fort Baker, a former U.S. Army installation near Sausalito. The Ninth Circuit ruled that the City of Sausalito has standing to pursue its claims of impact concerns under several federal laws. However, only the claims under the Coastal Zone Management Act and Marine Mammal Protection Act were deemed to have merit. Of interest herein is the fact that the 1999 final EIS by the NPS identified three major needs to be addressed, five purposes of the proposed action and six specific objectives to be accomplished. Further, the alternatives which were analyzed met the “purpose and need” statement.
- Fuel Safe Washington, 2004 – This Tenth Circuit case relates to the Federal Energy Regulatory Commission’s permit to a private entity for the construction and use of a new natural gas pipeline and ancillary facilities in northwest Washington state. One central issue was whether “reasonable alternatives” had been analyzed by FERC. The Tenth Circuit’s decision noted that ... “in deciding whether an agency had adequately considered reasonable alternatives, courts look closely at the objectives identified in an EIS’s purpose and need statement”. The Circuit Court’s review of this topic concluded that the EIS adequately addressed reasonable route and system alternatives. For this reason and several other analyses of plaintiff’s claims, the Tenth Circuit denied the plaintiff’s petition for review.
- Ilio’ulaokalani Coalition, et al., 2006 – This Ninth Circuit case relates to the U. S. Army’s transformation plan for the state of Hawaii. At issue is both a nationwide Programmatic EIS (PEIS) used to select Hawaii and a site-specific SEIS related to transforming the 2nd Brigade, now stationed in Oahu, to a Stryker Brigade Combat Team. The plaintiff’s challenged both the PEIS and the SEIS on grounds that the Army failed to comply with NEPA’s public notice requirements and that both the PEIS and SEIS failed to consider reasonable alternatives.



Central to the second challenge was the “narrowness” of the “purpose and need” statements in both the PEIS and SEIS. Of particular concern to the plaintiff’s was the limited number of alternatives in both documents. The Ninth Circuit indicated they did not see a problem with the “purpose and need” statement in the SEIS. However, “what is missing is the consideration of alternate ways to accomplish its stated mission.” Further, the Circuit Court also indicated that the PEIS was too limited in the range of examined alternatives (only the no action and one action alternative was examined). These findings further suggested a problem with tiering from the PEIS to the SEIS. As a result, the Ninth Circuit remanded the SEIS to the Army and specified the preparation of a supplemental SEIS which will include an analysis of alternative locations for the Stryker Brigade Combat Team.

- Pit River Tribe, et al., 2006 – This Ninth Circuit case relates to claims against the U. S. Bureau of Land Management regarding leases and approval of a geothermal plant to be built in the Medicine Lakes Highlands area in California. The Ninth Circuit decision reversed the District Court’s ruling for the defendants. A pivotal issue in this case related to the treatment of the “no action” alternative in the 1998 EIS upon which the plaintiff’s claims were directed. The 1998 EIS eliminated the “no action” alternative based on the fact that it would not meet the “purpose and need” of the proposed action. However, the “no action” alternative would need to include the extension of pertinent leases, because such leases are requisite to a geothermal plant. It thus seems that “no action” in this case does not mean to do nothing; rather, it means to maintain the “status quo” situation regarding leases.



APPENDIX II

Purpose and need is typically addressed in Chapter 1 of an EIS. Common titles of Chapter 1 could be “Purpose of and Need for Action,” or “Introduction: Purpose of and Need for Action.” To illustrate the potential contents of Chapter 1, three examples are briefly described. Reviews of these contents can be an aid in planning Chapter 1 for EISs related to NOAA Fisheries.

Generic Topical Contents

Although not uniformly prescriptive, the Shipley Group, Inc. (2003, pp.31-40) suggested the following seven topical sections for inclusion in Chapter 1 (these sections could also be used, as appropriate, in EISs prepared by NOAA Fisheries):

- Explain who wants to do what and where (using one or more maps) and when they want to do it;
- Summarize the need for the proposed action(s);
- List project objectives (the purpose) and give their sources;
- Identify any laws, regulations, or other EISs/EAs that influence the scope of this EIS/EA;
- Summarize the decision(s) to be made and their timing, and identify any other lead or cooperating agencies involved in this NEPA analysis;
- Summarize the scoping/public involvement process and profile major relevant issues. An issue is an effect (or a perceived effect, risk, or hazard) on physical, biological, social, or economic resources. As appropriate, identify issues considered but eliminated from further analysis;
- List Federal, state, or local permits, licenses, or other consultation requirements.

In summarizing the “need”, it was noted that it would be desirable to use facts and cite the reference sources. Further, it is important to recognize that not all stakeholders will necessarily agree with all stated needs (or purposes). In fact, perspectives on historical, current, and future environmental conditions can vary widely.


When summarizing the purpose(s), reference citations to the sources of the purposes (or goals or objectives) should be identified; e.g., a specific section of the MSA. If measurement or descriptive indicators have been identified, they should also be listed for the pertinent purpose(s). Further, the use of such indicators as decision criteria should also be specified.

EIS for Essential Fish Habitat

In 2001, NOAA Fisheries Service issued guidance for developing EISs for essential fish habitat (EFH) FMP amendments affected by a court order issued in 2000 (Hogarth, 2001). The EFH provisions of 22 FMPs were affected by the order. The guidance indicated that Chapter 1 (Purpose and Need for Action) should include the following information in numbered sections: specify the purpose and need for the action (Section 1.1); explain that the proposed action and thus the scope of the EIS, is the development of the mandatory EFH provisions of the affected FMPs pursuant to section 303(a)(7) of the Magnuson-Stevens Act (Section 1.2); explain any other EAs and EISs, court orders, etc. influencing the scope (Section 1.3); explain the decisions that must be made, the organizations (e.g., Councils) involved in the NEPA analysis, and the possibility that FMP revisions could result from the EIS (Section 1.4); summarize the scoping process and explain the significant issues such as EFH and HAPC designations, and minimizing the effects of fishing on EFH (Section 1.5); and preview the following chapters (Section 1.6). In addition, because the EISs encompassed several NOAA Fisheries Service Regions, the guidance indicated that the Office of Habitat Conservation would provide a draft generic “purpose and need” section (Section 1.1) which the specific Regions could adapt as appropriate.

Non Fisheries Example

An example of the contents within a “purpose and need” chapter for mountaintop mining and valley fill illustrates several generic topics which could be included in the initial chapter of any EIS. The example is from the draft EIS on mountaintop mining and valley fill in the Appalachian region; it was prepared by Region 3 of the USEPA (U.S. Environmental Protection Agency, 2003). The generic topics, which would also have applicability to NOAA Fisheries Service, included: (1) a synopsis of the issue being addressed (the problem statement); (2) a brief discussion of the authorities of various federal, state, and local governmental entities; (3) the key features



of the proposed action (establishment of an integrated surface coal mining regulatory program); (4) the purpose of the EIS as announced in the NOI; (5) the need for the proposed action as based upon interagency evaluations of current permitting practices as well as regulatory program requirements, issues raised in prior and current litigation, results of prior technical (scientific) studies, and identified information needs; and (6) concerns expressed by stakeholders during the scoping process. Additional topics in the “purpose and need” chapter included a summary description of the study area; a chronology of events, litigation, and studies leading to the current conditions and a summary of issues raised during the scoping process (including public meetings, meetings with citizen groups and meetings with coal mining industry groups).



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