

Advance Notice of Proposed Rulemaking/Council on Environmental Quality Update to the National Environmental Policy Act Procedural Regulations



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

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The Association of State Wetland Managers, Inc. (“ASWM”) submitted August 17th comments to the Council on Environmental Quality (“CEQ”) addressing an Advanced Notice Of Proposed Rulemaking (“ANPR”) titled:

Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act

See Docket: CEQ-2018-0001 (83 Fed Reg 28591).

CEQ states it is soliciting ways to improve the National Environmental Policy Act (“NEPA”) process. Specifically, it is considering updating its implementing regulations for the procedural provisions of NEPA. If amended, such revisions would be only the second time CEQ has undertaken substantive changes in the past 40 years. The goal is stated to be a more efficient, timely, and effective NEPA process consistent with the NEPA stated in the statute.

NEPA requires federal agencies to include environmental values and issues in their decision-making processes. This federal mandate is accomplished by agency consideration of environmental impacts of proposed actions and reasonable alternatives to those actions. The statute requires federal agencies in certain instances to prepare a detailed EIS. However, the requirement to produce this document is only triggered in the event of a major federal action that will significantly affect the environment.

As opposed to an EIS, which is a much more detailed document, the EA provides sufficient evidence and analysis for determining whether a finding of no significant impact for an EIS should be prepared. Neither an EA nor an EIS need be prepared if a particular federal action falls within the scope of a NEPA categorical exclusion. Categorical exclusions are promulgated by the federal agencies and are described actions which have been determined to not involve significant environmental impacts.

NEPA differs from action enforcing environmental statutory programs such as the Clean Air Act or Clean Water Act. It does not impose substantive mandates. Instead, it is limited to requiring federal agencies to meet procedural requirements such as preparation of an EA or EIS in certain defined instances. As a result, NEPA does not require a certain alternative or meet a particular standard.

ASWM notes as a matter of introduction in its comments on the ANPR that NEPA “plays a critical role in helping states and tribes protect their aquatic resources.” It further notes that “mechanisms such as NEPA” have provided the states a “long history of successful cooperative federalism in carrying out wetland programs.”

Questions posed by ASWM include the following:

A) THE NEPA PROCESS

- Should CEQ’s NEPA regulations be revised to ensure that environmental reviews and authorization decisions involving multiple agencies are conducted in a manner that is concurrent, synchronized, timely, and efficient, and if so, how? (Q1) and Should CEQ’s NEPA regulations be revised to ensure optimal interagency coordination of environmental reviews and authorization decisions, and if so, how? (Q3)
- ASWM recommended the following potential improvements to the NEPA process:
- Recommendation 1: Inclusion of Pre-Clean Water Act §401 Certification Review as part of the NEPA Process
- Recommendation 2: Encourage Greater Participation by State and Tribal Agencies as Formal “Cooperating Agencies” in the NEPA Process
- Recommendation 3: Encourage Earlier Initiation of Discussion about Data Needs in the NEPA Process
- Should CEQ’s NEPA regulations be revised to make the NEPA process more efficient by better facilitating agency use of environmental studies, analysis, and decisions conducted in earlier Federal, State, tribal or local environmental reviews or authorization decisions, and if so, how?

B) THE SCOPE OF NEPA REVIEW

- Should the provisions in CEQ’s NEPA regulations that relate to the format and page length of NEPA documents and time limits for completion be revised, and if so, how? (Q4)
- Should CEQ’s NEPA regulations be revised to provide greater clarity to ensure NEPA documents better focus on significant issues that are relevant and useful to decision makers and the public, and if so, how? (Q5)
- Should the provisions in CEQ’s NEPA regulations relating to public involvement be revised to be more inclusive and efficient, and if so, how? (Q6)
- Should any new definitions of key NEPA terms, such as those noted below, be added, and if so, which terms? (Q8)
- Should the provisions in CEQ’s NEPA regulations relating to any of the types of documents listed below be revised, and if so, how? (Q9)
- Should the provisions in CEQ’s NEPA regulations relating to the timing of agency action be revised, and if so, how? (Q10)
- Should the provisions in CEQ’s NEPA regulations relating to the appropriate range of alternatives in NEPA reviews and which alternatives may be eliminated from detailed analysis be revised, and if so, how? (Q13)

C) COMMENTS ON REMAINING “GENERAL” QUESTIONS

- Are any provisions of the CEQ’s NEPA regulations currently obsolete? If so, please provide specific recommendations on whether they should be modified, rescinded, or replaced. (Q15)
- Which provisions of the CEQ’s NEPA regulations can be updated to reflect new technologies that can be used to make the process more efficient? (Q16)
- Are there ways in which the role of tribal governments in the NEPA process should be clarified in CEQ’s NEPA regulations, and if so, how? (Q18)
- Are there additional ways CEQ’s NEPA regulations related to mitigation should be revised, and if so, how? (Q20)

A copy of the [ASWM comments](#) can be downloaded here.

