

Ensuring NEPA Compliance

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Role of the Council on Environmental Quality

- **Located in the Executive Office of the President to fulfill an advisory role to the President, an oversight role with regard to Federal agencies, and to facilitate interagency coordination.**
- **Responsible for promulgation and interpretation of NEPA regulations**
 - A. **Regulations entitled to “substantial deference.” – *Robertson*, 490 U.S. at 355 (1989).**
 - B. **Role set out in regulations:**
 1. **Review of agency NEPA procedures**
 2. **Designation of lead agency**
 3. **Alternative arrangements for supplemental EISs**
 4. **Alternative arrangements for emergencies**
 - C. **Dispute resolution – Referral process, 40 CFR Part 1504**



Referrals, 40 CFR Part 1504

Origins: Section 309 of the Clean Air Act, directing the Administrator of the EPA to review and comment publicly on the environmental impacts of Federal activities, including (but not limited to) actions for which EISs are prepared. If the Administrator determines that the matter is “unsatisfactory from the standpoint of public health or welfare or environmental quality,” he or she must refer the matter to CEQ.

Criteria for referral:

- Possible violation of national environmental standards or policies
- Severity
- Geographical scope
- Duration
- Importance as precedent
- Availability of environmentally preferable alternatives

The focus of the referral is on the underlying proposal, not the adequacy of NEPA documentation.



Outline of Referral Process

- **Referring agency must:**
 - **Provide a statement** with factual evidence supporting the conclusion that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality;
 - **Identify any existing environmental requirements** or policies which would be violated by the matter; identify material facts in controversy and agreed-upon facts;
 - **Present a finding** that the issue raised is of national importance because of the threat to national environmental resources or policies or for some other reason;
 - **Review steps taken** to try to resolve concerns at an earlier stage; and
 - **Offer recommendations** as to what mitigation alternative, further study, or other course of action (including abandonment of the matter) are necessary to remedy the situation.
- **The lead agency has 25 days to respond to the referring agency.**
- **If CEQ accepts the referral it has 60 days to take various actions.** (CEQ has rejected three referrals on grounds that the issues presented were not of national importance or that agency had not exhausted administrative remedies)



CEQ responds with one of seven actions:

1. Conclude that the process of referral and response has successfully resolved the problem.
2. Initiate discussions with the agencies with the objective of mediation with referring and lead agencies.
3. Hold public meetings or hearings to obtain additional views and information.
4. Determine that the issue is not one of national importance and request the referring and lead agencies to pursue their own decision processes.
5. Determine that the issues should be further negotiated by the referring and lead agencies and is not appropriate for CEQ consideration until one or more heads of agencies report to the CEQ that the agencies' disagreements are irreconcilable.
6. Publish its findings and recommendations (including where appropriate a finding that the submitted evidence does not support the position of an agency).
7. When appropriate, submit the referral and response together with the CEQ's recommendation to the President for action.

Past Referrals of Interagency Disagreements to CEQ :

The First: Shearon Harris Nuclear Power Plants Units 1-4, North Carolina
Lead Agency – AEC Referring Agency – EPA (1/10/74)

The Latest: Manteo Bay, North Carolina (Oregon Inlet Project)
Lead Agency – COE Referring Agency – NOAA (10/15/01)

Policy Coordination

- Resolving disputes related to role as environmental advisor to President. 42 U.S.C. § 4344(4).
- Assisting in “coordinating among the Federal departments and agencies those programs and activities which affect, protect, and improve environmental quality.” 42 U.S.C. § 4372(d)(5).
- Assisting the Federal departments and agencies in the development and interrelationship of environmental quality criteria and standards established through the Federal Government. 42 U.S.C. § 4372(d)(6).



NEPA Litigation Trends: Cases Filed

SELECTED AGENCIES	2001	2002	2003	2004	2005	2006	2007
FERC	0	0	0	2	4	2	2
Navy	2	3	0	2	1	1	1
NRC	0	0	1	2	0	3	0
DOI - BLM	20	18	15	19	12	21	7
- FWS	17	12	2	5	3	6	3
- BuRec	1	2	11	1	3	0	3
- NPS	7	4	1	4	4	0	2
- MMS	0	0	0	0	1	0	2
USDA - FS	40	40	66	76	50	30	40
- APHIS	2	0	3	3	3	2	1
DOC - NOAA	8	10	6	15	3	4	2
Army - COE	7	13	12	13	8	25	22
Army	0	0	2	1	1	0	0
DOT - FHWA	3	10	6	11	5	1	4
- FTA	13	7	2	0	2	0	2
- FAA	7	16	3	2	3	0	6
DOE	2	4	1	4	3	0	1
EPA	4	1	0	6	2	2	2
HUD	0	1	1	0	4	0	0
Air Force	2	0	0	0	0	0	0
TVA	0	1	0	0	1	0	1
NSF	0	0	0	0	1	0	0
FDA	0	0	0	0	0	0	1
TOTAL FROM ALL AGENCIES	138	146	140	166	120	98	105

Litigation Trends: Cases Filed



