




EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
WASHINGTON, D.C. 20503

May 12, 2010

MEMORANDUM FOR HEADS OF FEDERAL DEPARTMENTS AND AGENCIES

FROM: Nancy H. Sutley 
Chair

SUBJECT: Emergencies and the National Environmental Policy Act

With this Memorandum, the Council on Environmental Quality (CEQ) reiterates its previous guidance on the National Environmental Policy Act (NEPA) environmental review of proposed emergency response actions.^[1] This memorandum clarifies that the previous guidance remains applicable to current situations and provides guidance on required agency environmental review. Agencies should distribute this guidance to field offices developing and taking actions in response to emergencies along with the agency's relevant guidance on emergency actions and NEPA.

As agencies develop their response to situations involving immediate threats to human health or safety, or immediate threats to valuable natural resources, they must consider whether there is sufficient time to follow the procedures for environmental review established in the CEQ Regulations for Implementing the Procedural Provisions of NEPA,^[2] Section 102(2)(c) of NEPA, 42 U.S.C. § 4332,^[3] and agency NEPA implementing procedures and regulations.

Attachment 1 provides the agencies with a step-by-step process for determining the appropriate path forward for the NEPA environmental review of all actions proposed in response to an emergency situation, such as the ongoing Federal response to the oil spill in the Gulf of Mexico.

This memorandum does not establish new requirements. Additionally, CEQ's interpretation of NEPA is entitled to deference.^[4] The CEQ regulations dealing with emergency alternative arrangements, 40 C.F.R. § 1506.11 were established in 1978^[5] and have been successfully applied on several occasions.^[6]

Environmental Impact Statements:

The CEQ regulations, at 40 C.F.R. § 1506.11, provide for alternative arrangements for NEPA compliance in emergency situations when the agency proposal has the potential for significant environmental impacts and would require an Environmental Impact Statement.

^[1] Memorandum for Federal NEPA Contacts: Emergency Actions and NEPA, 8 September 2005 and attachments, available at http://ceq.hss.doe.gov/ceq_regulations/guidance.html.

^[2] Council on Environmental Quality, "Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act," 40 C.F.R. Parts 1500-1508 (Nov. 1978), available at http://ceq.hss.doe.gov/ceq_regulations/regulations.html.

^[4] *Andrus v. Sierra Club*, 442 U.S.347, 358 (1979).

^[5] 43 FR 55977, Nov. 29, 1978.

^[6] Synopsis of previous alternative arrangements is available at http://ceq.hss.doe.gov/nepa_information/alternative_arrangements.html. See *Valley Citizens for a Safe Environment v. Vest*, 22 E.L.R. 20335 (D.Mass. 1991); *Crosby v. Young*, 512 F.Supp. 1363, 1386 (E.D.Mich. 1981)

“Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with the Council about alternative arrangements. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review.”

Alternative arrangements are limited to “the actions necessary to control the immediate impacts of the emergency.” These alternative arrangements are developed, based on specific facts and circumstances, during the consultation with CEQ. The alternative arrangements developed by the action agency will address the actions necessary to respond immediately, the long-term disaster response and the recovery actions that remain subject to the regular NEPA process.

Alternative arrangements for compliance with NEPA under 40 C.F.R. § 1506.11 can be subject to judicial review. Alternative arrangements do not waive the requirement to comply with NEPA, but establish an alternative means for NEPA compliance. Alternative arrangements do not complete or alter other environmental requirements; however, engaging other resource and regulatory agencies about other environmental requirements during development and implementation of alternative arrangements can facilitate meeting other compliance requirements.

The factors to address when requesting and crafting alternative arrangements are described below. Once the alternative arrangements are developed, CEQ will provide documentation detailing the alternative arrangements and the considerations on which they are based.^[7]

Environmental Assessments:

When agencies are considering proposals with less than significant impacts or are uncertain about the significance of impacts, the agency can prepare a concise, focused Environmental Assessment. Attachment 2 of this memorandum provides guidance for preparing an EA.^[8] Some agency NEPA implementing procedures provide for alternative arrangements for preparing Environmental Assessments.^[9] Agencies must continue their efforts to notify and inform affected public, state, regional, Federal and tribal representatives of the Federal agency activities and proposed actions. Agencies must comply with the CEQ NEPA regulation requirements for content, interagency coordination and public involvement to the extent practicable.^[10]

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^[7] Synopsis of previous alternative arrangements is available at http://ceq.hss.doe.gov/nepa_information/alternative_arrangements.html.

^[8] Attachment 2 to this Memorandum which refreshes the guidance provided in attachment 2 to the Memorandum for Federal NEPA Contacts: Emergency Actions and NEPA, 8 September 2005 and attachments, available at http://ceq.hss.doe.gov/nepa/regs/Preparing_Focused_Concise_and_Timely_EAs.pdf

^[9] See Agency NEPA procedures, for example: <http://edocket.access.gpo.gov/2006/06-3078.htm> (DHS Directive at 6.1); http://www.fs.fed.us/emc/nepa/nepa_procedures/includes/fr_nepa_procedures_2008_07_24.pdf (USFS, 36 CFR 220.4(b)); <http://www.doi.gov/oepc/nrm.html> (DOI, 43 CFR 46.150).

^[10] 40 C.F.R. §§ 1501.4(b)&(e), 1506.6, 1508.9, and 1508.13 (these regulations address required content and public involvement for preparing Environmental Assessments and Findings of No Significant Impact.



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ATTACHMENT 1

EMERGENCY ACTIONS
Under the NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

In the case of an emergency:

1. **Do not delay** immediate actions necessary to secure lives and safety of citizens or to protect valuable resources. **Consult with CEQ as soon as feasible** – CEQ will contact agency Federal NEPA contacts in the event you are unable to reach them (see http://ceq.hss.doe.gov/nepa_contacts/federal.html).
2. Determine if NEPA is triggered, and the appropriate level of NEPA analysis:
 - a. Determine if the proposed action is being taken by a Federal agency (e.g., city or state action does not trigger NEPA; Federal decisions to fund city or state action do trigger NEPA) or is statutorily exempt from NEPA (certain FEMA response actions under the Stafford Act are exempt from NEPA, information is available at: <http://www.fema.gov/library/stafact.shtm>).
 - b. If the Federal agency proposed emergency response activity is not statutorily exempt from NEPA and the agency has a categorical exclusion (CE) that includes that type of activity, then apply the CE, unless there are extraordinary circumstances that indicate using the CE in this particular case is not appropriate. Agency NEPA personnel should be contacted regarding agency-specific definitions of actions that are “categorically excluded.”
 - c. If the Federal agency proposed emergency response activity is not statutorily exempt from NEPA and a categorical exclusion is not available, and the potential impacts of the proposed response activity are not expected to be “significant” environmental impacts, then an Environmental Assessment (EA) is appropriate. Prepare a focused, concise EA as described in attachment 2. Alternative arrangements as outlined at 40 C.F.R. §1506.11 do not apply because the environmental impacts are not expected to be significant. Agency NEPA personnel should be contacted regarding agency-specific definitions of “significant” actions.
 - d. If the proposed emergency response activity is not statutorily exempt from NEPA and is expected to have “significant” environmental impacts, the agency should determine whether it is covered by an existing NEPA analysis. (e.g., implementing pre-existing spill response plans).
 - e. If the proposed emergency response activity is not statutorily exempt from NEPA and is expected to have “significant” environmental impacts and is not already covered by an existing NEPA analysis, then the agency should consult with CEQ to determine whether “alternative arrangements” can take the place of an Environmental Impact Statement. Contact Horst Greczmiel, Associate Director, 202-395-0827 / 202-395-1502, Horst_Greczmiel@ceq.eop.gov; or Ted Boling, Senior Counsel, 202-395-3449, Edward_A.Boling@ceq.eop.gov, for alternative arrangements under 40 C.F.R. §1506.11.

Factors to address when requesting and crafting “alternative arrangements” include:

- nature and scope of the emergency;
- actions necessary to control the immediate impacts of the emergency;
- potential adverse effects of the proposed action;
- components of the NEPA process that can be followed and provide value to decision making (e.g., coordination with affected agencies and the public);
- duration of the emergency; and
- potential mitigation measures.



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ATTACHMENT 2

**PREPARING FOCUSED, CONCISE AND TIMELY ENVIRONMENTAL
ASSESSMENTS**

In those situations where:

- there is no statutory exemption from NEPA requirements;
- there is no categorical exclusion is available, either because the agency has none that cover the activity or there are extraordinary circumstances;
- the proposed recovery/response actions are not covered in an existing NEPA analysis (EA or EIS); and
- the expected environmental impacts of the proposed recovery/response action is not considered to be significant,

a concise and focused Environmental Assessment can be prepared in a short time.

The following outline with notations addresses the core elements of an EA as found in 40 CFR 1508.9:

- the need for the proposal,
- alternatives as required by NEPA section 102(2)(E),
- the description of environmental impacts of agency proposed actions and the alternatives, and
- the list of agencies and persons consulted.

Need for the Proposal

The agency should briefly describe information that substantiates the need for the project; incorporate by reference information that is reasonably available to the public.

For example: This agency is preparing to erect a temporary emergency response facility to replace facilities disrupted or destroyed by the [*hurricane/flooding/contamination/etc.*] to facilitate rescue and/or relief efforts in an effort to [*minimize further death/adverse health conditions/restore communications/restore power*].

The agency should briefly describe the existing conditions and the projected future conditions of the area impacted by the project.

For example: The area(s) in which the temporary facility will be located or relocated is identified in the attached map. This area consists of [*add brief description of the environmental state of the area that will be affected by the location and operation of the facility, focusing on those areas that are potentially sensitive. The goal is to show that, for example refueling sites are not on top of aquifers, nesting areas, graves, sacred sites etc. These are examples to show the utility of and need to identify actual place-based environmental issues rather than compiling lists of environmental resources not at issue*].

Proposed Action and Alternatives

The agency should list and briefly describe its proposed action and any alternatives that meet the project purposes. The agency must use its discretion to ensure the number of reasonable alternatives is reasoned and not arbitrary or capricious. The alternatives should be focused by the need for the proposal. Agency alternatives must meet the need for the proposal.

For example: The need to use existing infrastructure necessary to support the facility is a reasoned basis for focusing on a discreet number of alternatives.

When there is consensus about the proposed action based on input from interested parties, the agency can consider the proposed action and proceed without consideration of additional alternatives. Otherwise, the agency must develop reasonable alternatives to meet project needs. (NEPA section 102(2)(E)).

Environmental Impacts of the Proposed Action and Alternatives

The agency should describe the environmental impacts of its proposed action and each alternative. The description should provide enough information to support a determination to either prepare an environmental impact statement or a finding of no significant impact.

The agency should focus on whether the action would “significantly” affect the quality of the human environment. The agency can use CEQ’s definition of “significantly,” 40 CFR 1508.27, as a general guide and, where applicable, cite to agency guidance, policies, monitoring and experience, including significance determinations documented in related or analogous NEPA decisions. Agency NEPA contacts and contacts at resource agencies can assist in this effort.

Tailor the length of your discussion to the complexity of the each issue. Focus on those human and natural environment issues where impacts are a concern. Telephone or email discussions with tribal, state and local governments and agencies, and other Federal agencies that operate in the area will help focus those issues.

The agency must discuss the impacts (direct, indirect and cumulative) of each alternative and may (1) discuss those impacts together in a comparative description; or (2) discuss each alternative separately. The agency should use the approach that will be most effective in the time available.

The agency may contrast the impacts of the proposed action and alternatives with the current condition and expected future condition in the absence of the project. This constitutes consideration of a no-action alternative as well as demonstrating the need for the project.

The agency should incorporate reference data, inventories, other information and analyses relied on. The use of hyperlinks in web-based documents is encouraged. This information must be reasonably available to the public.

For example: Include relevant existing programmatic agreements and generally accepted best management practices.

The agency should be clear and concise about its conclusions.

Agencies and Persons Consulted

List the agencies and persons consulted.

For example, include the people/offices/agencies that the agency coordinated with to ensure that the location of the project did not unintentionally cause an adverse impact. Also include information about individuals consulted to comply with substantive environmental requirements and regulations, for example: the Clean Water Act, the National Historic Preservation Act, and the Endangered Species Act (ESA). [Note that the ESA emergency provisions at 50 CFR 402.05 may be applicable to the proposed action.]

