



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

June 24, 2026

DEPUTY ADMINISTRATOR

**MEMORANDUM**

**SUBJECT:** Clean Air Act Section 309 and National Environmental Policy Act Section 102(2)(C) Implementation

**FROM:** David Fotouhi

A handwritten signature in blue ink, appearing to read "David Fotouhi", is written over the printed name.

**TO:** General Counsel  
Assistant Administrators  
Chief of Staff  
Regional Administrators  
NEPA Managers

This memorandum<sup>[1]</sup> provides direction for the United States Environmental Protection Agency's reviews under Clean Air Act Section 309 and National Environmental Policy Act Section 102(2)(C) of all NEPA-related environmental documents developed by other federal agencies. The goal is to align reviews with EPA's statutory authority, enhancing project results and fostering effective coordination with other federal agencies. EPA is neither the final decision maker nor the lead agency in such contexts. Rather, CAA Section 309 requires EPA to "review and comment in writing on the environmental impact of any matter relating to duties and responsibilities granted pursuant to this chapter or other provisions of the authority of the Administrator" for certain federal agency actions. 42 U.S.C. § 7609(a). The scope of CAA Section 309 authority includes reviews of proposed federal agency actions, regulations, legislation and non-EIS actions which could have significant environmental impacts. Separately, Section 102(2)(C) of NEPA requires lead agencies to consult with and obtain the comments of any federal agency which has jurisdiction by law or special expertise. NEPA Section 102(2)(C) further requires such comments to be made available to the public upon request.<sup>[2]</sup> CAA Section 309 and NEPA Section 102(2)(C) are mutually reinforcing – linking EPA's statutory review role with NEPA's interagency consultation and public disclosure – and this memorandum outlines key principles and best practices for integrating and conducting coordinated, timely and effective reviews under both authorities.

The main goal of EPA's CAA Section 309 review is to promote timely and informed decision-making by federal agencies by leveraging EPA's environmental expertise to help other federal agencies identify and consider potential human health or environmental impacts from proposed projects. EPA has broad discretion to determine what environmental impacts, if any, are included in its comments. EPA also has

discretion not to comment on an action. Such comments regarding impacts should fully align with those duties and responsibilities imposed by the environmental statutes from which EPA's expertise and authority are derived. Ultimately, however, while "Congress wants EPA to participate when other federal agencies prepare environmental impact statements," it is the other federal agency and not EPA that bears "the ultimate statutory responsibility for actually preparing the environmental impact statement." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190 (D.C. Cir. 1991). Therefore, the other federal agency "does not have to follow EPA's comments slavishly – it just has to take them seriously." *Id.* The purpose of this document is to aid in developing high-quality comment letters to achieve consistency across headquarters and regions and to ensure adherence to CAA Section 309.

### **Engagement with Federal Agencies**

It is EPA's policy to participate early on in NEPA compliance efforts of other federal agencies to the fullest extent practicable to timely identify EPA's matters of concern with proposed agency actions and to assist in resolving these concerns at the earliest possible stage of project development.

For example, federal agencies may conduct scoping as part of their environmental review process. Scoping is a formal early coordination process to identify issues early and study them properly. Scoping generally involves identifying significant issues, eliminating non-significant issues from further study and determining the range of actions, alternatives and impacts to be considered in any NEPA-related environmental documents. To achieve these objectives, EPA will participate in scoping as much as possible. This potentially includes attending lead agency public scoping meetings and/or lead agency-sponsored interagency consultation meetings.

### **General Principles**

When writing CAA Section 309 comment letters, scoping documents, early administrative drafts, Environmental Assessments and all Environmental Impact Statements, drafters should keep in mind the following key principles: (1) be focused; (2) be succinct; and (3) be helpful. Comments should be focused on EPA's statutory duties, responsibilities and authorities. Comments should be succinct to the extent practicable to clearly convey the identified deficiencies in any NEPA-related environmental document. Comments should be helpful by identifying relevant statutory and regulatory requirements relevant to the proposed action.

### **Comments Should be Consistent with EPA's Applicable Authorities**

EPA is responsible for reviewing proposed federal projects for consistency with EPA's statutory authority and resulting areas of expertise clearly implicated by the proposed federal project, including but not limited to:

- Air quality under the Clean Air Act (42 U.S.C. §7401–7675);
- Water quality under the Clean Water Act (33 U.S.C. §1251-1389);
- Drinking water under the Safe Drinking Water Act (42 U.S.C. §300f–300j-27);
- The Comprehensive Environmental Response, Compensation, and Liability Act (commonly known as Superfund) (42 U.S.C. §9601-9675);
- Marine Protection, Research, and Sanctuaries Act (also known as the Ocean Dumping Act) (16 U.S.C. §1431–1445c-1 and 33 U.S.C. §1401-1445);
- The Resource Conservation and Recovery Act (42 U.S.C. §6901-6992k);
- The Toxic Substances Control Act (15 U.S.C. §2601-2629).

Review of projects for environmental impacts under other EPA statutory authorities should be included, as applicable. It is not expected that EPA will review proposed federal projects for consistency with each of EPA's statutory authorities unless such statute is clearly implicated by the proposed federal project.

*See Appendix for common provisions of the above statutes.*

### **Specific to CAA 309 Letters**

Under Section 309 of the CAA, EPA is specifically required to *review and comment in writing on the environmental impacts* of certain federal agency actions, *determine whether such actions are unsatisfactory from the standpoint of public health or welfare or environmental quality*, and make its comments publicly available.<sup>[3]</sup>

A CAA Section 309 letter is prepared to help the lead agency improve the environmental analysis for a covered proposed federal agency action. Comments should be specific and concrete and avoid abstract questions of policy or any assertions of supervisory authority. Useful comments to the lead agency's EIS will identify missing analysis, inadequate support and inadequate assumptions or evaluation of impacts as defined by an environmental statute and should provide concrete and actionable guidance regarding any lack of adequate discussion or legal compliance with environmental statutes. Additionally, when commenting on material environmental impacts relevant to EPA's statutory authority and its resulting expertise, comment letters should clearly indicate when EPA's comments pertain to the adequacy of the analysis offered by the EIS as opposed to concerns about the proposed project's compliance with applicable environmental statutes managed by EPA. Furthermore, any EIS comment letter prepared under CAA section 309 should avoid overly broad expressions of preference for any policy or course of action not necessitated by EPA's relevant statutory authorities and should avoid expressing the need for additional analysis unrelated to environmental statute or hypothetical impacts which do not run afoul of applicable legal mandates.

### **Recommended CAA Section 309 Comment Letter Format**

Letters should be written in plain language, with detailed comments included in a referenced enclosure when necessary. Draft Environmental Impact Statement and Final Environmental Impact Statement comment letters with minimal or no concerns would not require detailed comments. They should be well organized with comments combined by category (e.g. purpose and need comments, alternatives comments, air comments, water comments).

For a Final EIS, focus comments on new, potentially significant impacts identified after publication of the Draft EIS. Coordinate with relevant EPA offices, as appropriate, to ensure that comments do not conflict with comments that EPA has or will be providing on the same project under other authorities. For example, comments should not conflict with comments EPA provided during any 404 permit application reviews, CWA 401(a)(2) determinations, during any permitting oversight/assistance (if applicable) or under any other authorities for the project.

## 1. Intro – Previous Engagement

- Should include references with citations to any other engagement EPA has had on this project.
- The cover letter for the DEIS comments should mention any earlier involvement of EPA in activities such as scoping or pre-draft comment letters and EPA's status as cooperating or participating agency, if applicable. Both DEIS and FEIS cover letters should acknowledge changes made by the lead agency in response to EPA's recommendations.
- Example language:
  - *EPA previously participated in scoping and public meetings held on X date, and X date, and provided scoping comments on X date. In addition, EPA provided comments on the draft EIS on X date. The letter on the draft EIS identified a significant impact to the water quality associated with the preferred alternative.*
  - *EPA provided comments to lead agency on the draft EIS on X date. EPA identified public health, welfare or environmental quality concerns [and/or deficiencies] in the analysis and recommended that they be addressed in the final EIS. EPA also participated in reviewing the Memorandum of Understanding, listed in Appendix D, between the lead agency, the XYZ Agency, EPA and the ABC agency.*

## 2. EPA's Authority to Comment

- Section 102(2)(C) of NEPA requires lead federal agencies to consult with and obtain the comments of any federal agency which has jurisdiction by law or special expertise. NEPA Section 102(2)(C) further requires such comments to be made available to the public upon request. These statutes should, at a minimum, be referenced in the letter and make clear that the purpose of the letter is to meet EPA's obligation under Section 309 of the CAA.
- Example language: *The U.S. Environmental Protection Agency has reviewed the draft Environmental Impact Statement for the XYZ Resource Management Plan (CEQ No. 12345678) pursuant to Section 309 of the Clean Air Act and the National Environmental Policy Act. The CAA Section 309 role is unique to EPA. It requires EPA to review and comment on the environmental impact of any proposed federal action subject to NEPA's EIS requirements and to make its comments public.*

## 3. Issues: EPA's Comments on Issues

- Must provide cited statutory authority and reasoning behind why it is being included (not addressed in lead agency EIS, for example).
- The primary audience for the CAA Section 309 review letter is the lead agency. The letter's focus should be on EPA's assessment of actual or potential project impacts, and it should offer practicable ways to address information gaps and to address adverse impacts based on the analyses in the EIS. When discussing the project's impacts, highlight links to EPA's expertise and statutory authority.

- The Detailed Comments Enclosure should clearly state EPA’s comment followed by EPA’s recommendation to address the comment in alignment with applicable statutory authority.
- All CAA Section 309 review letters should begin by highlighting the most pressing concerns. The comment letter should prioritize major issues, particularly any potential violations of or conflicts with EPA statutory or regulatory requirements. Importantly, it should evaluate the adequacy of the information presented in the EIS to support the conclusions regarding potential significant impacts from the proposed project. For example:
  - The letter should articulate the reasoning behind EPA’s comments and recommendations, incorporating supporting details. This includes explaining the standards, policies, scientific studies, etc., that form the basis for the comments.

#### 4. Recommendation on How to Address

- If additional analysis is recommended, the letter should clearly describe why the additional information is important to inform the decision.
- If consideration of a new alternative is recommended, the letter should clearly explain why. This includes how the new alternative meets the project’s purpose and need, how it is reasonable and feasible and how it provides an opportunity to address project impacts.

#### 5. Contact Information

- All CAA Section 309 review cover letters should provide an EPA contact name, email address and phone number.

<sup>[1]</sup> The statements in this document are intended solely as guidance. This document is not intended, nor can it be relied upon, to create any rights enforceable by any party in litigation with the United States. EPA may decide to follow the guidance provided in this document or to act at variance with the guidance based on its analysis of the specific facts presented.

<sup>[2]</sup> National Environmental Policy Act § 102(2)(C), 42 U.S.C. § 4332(2)(C)

<sup>[3]</sup> Clean Air Act § 309, 42 U.S.C. § 7609

**Appendix: Common Provisions Addressed in CAA Section 309 Letters**

<b>Resource Area</b>	<b>Statutory Authority/Applicable Regulations</b>	<b>Issues to Address in NEPA document</b>
Air Quality	<u>CAA 109, 165, 173, 176</u> <u>42 U.S.C. 7409, 7470-7492;</u> <u>7506</u> <u>40 CFR Parts 40-42, 70,</u> <u>9393</u>	<p>Note: This is not an exhaustive list of provisions but includes some common cases reviewers often cite. Reviewers should expand their review to include all possible provisions of the statutes listed.</p> <p>All CAA provisions, including but not limited to, common elements (not exhaustive list)</p> <ul style="list-style-type: none"> <li>• Emissions of criteria pollutants</li> <li>• Hazardous air pollutants</li> <li>• Increment consumption for Prevention of Significant Deterioration classified areas</li> <li>• Mobile source emissions</li> <li>• Secondary pollutant formation</li> <li>• Compliance with State Implementation Plans in nonattainment and maintenance areas</li> </ul>
Water Resources – Wetlands and Surface Waters	<u>CWA 401, 402, 404</u> <u>33 U.S.C. 1341, 1342, 1344</u> <u>40 CFR Part 121-125</u> <u>33 CFR Parts 320-332</u>  <u>MPRSA 102</u> <u>33 U.S.C. 1401 et seq.</u> <u>40 CFR Part 220-230</u>	<ul style="list-style-type: none"> <li>• Acreage of wetlands/surface waters impacted</li> <li>• Type and source of fill material</li> <li>• Hydrologic alterations</li> <li>• Water quality impacts</li> <li>• Habitat conversions</li> <li>• Demonstration of the Least Environmentally Damaging Project Alternative (if USACE project)</li> <li>• Coordination with EPA and USACE on disposal of dredged material in ocean waters regulated under the Marine Protection Research and Sanctuaries Act</li> </ul>
Water Resources – Water Quality	<u>CWA 301, 303, 402</u> <u>U.S.C. 1311, 1313, 1342</u> <u>40 CFR Parts 122-125</u>	<ul style="list-style-type: none"> <li>• Discharges requiring NPDES permits</li> <li>• Compliance with water quality standards</li> <li>• Effects on 303(d) listed impaired waters</li> <li>• Contributions to Total Maximum Daily Load exceedances</li> </ul>
Groundwater/	<u>Safe Drinking Water Act</u> <u>1424(e)</u> <u>42 U.S.C. 300h-3(e)</u> <u>40 CFR Part 149</u>	<ul style="list-style-type: none"> <li>• Potential aquifer drawdown</li> <li>• Groundwater quality</li> <li>• Interference with supply wells and any sole source aquifers</li> <li>• Evaluate potential contamination pathways</li> </ul>
Hazardous Materials/ Contaminated Sites	<u>RCRA 3001-3027, 4001-4010, 9001-9010</u> <u>42 U.S.C 6921-6939g, 6941-6949a, 6991-6991i</u> <u>40 CFR 239 – 258 (RCRA Subtitle D)</u> <u>40 CFR 260 – 273 (RCRA Subtitle C)</u> <u>40 CFR 280 – 282 (RCRA Subtitle I)</u> <u>CERCLA 101-128</u> <u>42 U.S.C. 9601-9628</u> <u>40 CFR 300 et seq.</u>	<ul style="list-style-type: none"> <li>• Presence of contaminated soils/groundwater/surface water/sediments</li> <li>• Potential exposure pathways</li> <li>• Potential for accidental release and impacts of accidents</li> </ul>