

Referrals to the Council on Environmental Quality
Under Clean Air Act § 309

POLICY

EPA is authorized to refer to the Council on Environmental Quality (CEQ) matters related to EPA's duties and responsibilities contained in proposed regulations or legislation by other federal agencies, newly authorized Federal projects for construction, or any major federal actions subject to 102(2)(C) of National Environmental Policy Act (NEPA). See Clean Air Act (CAA) § 309. EPA uses its referral authority when the Administrator determines that a matter is unsatisfactory from the standpoint of public health, welfare, or environmental quality, and after exhausting every reasonable effort to resolve these issues at the agency level before referring the matter to CEQ. EPA's Section 309 referral authority is independent from any referral under NEPA.

CRITERIA FOR REFERRAL

The Office of Policy and Regulatory Management Associate Administrator (OPRM AA) or Regional Administrator's (RA) recommendation to the Administrator to make a determination of *"unsatisfactory from the standpoint of public health or welfare or environmental quality,"* should document that the proposed major Federal action satisfies the criteria for referral given in Table 1: Criteria for Potential Referral to CEQ.

Table 1: Criteria for Potential Referral to CEQ

Criteria for an Environmentally Unsatisfactory Finding for Proposed Major Federal Actions
The potential violation of an EPA public health, welfare, or environmental standard ¹ is substantive;
There are no applicable standards, but the severity, duration, disproportionality, or geographical scope of the impacts on public health, welfare or environmental quality associated with the proposed action warrant special attention; or
The potential public health, welfare, or environmental quality impacts resulting from the proposed action are of national importance ² based on the threat to public health, welfare or environmental resources or conflicts with environmental policies.

REFERRAL PROCEDURE

EPA will strive to deliver its referral package to CEQ no later than twenty-five (25) days after the date of EPA's Federal Register publication of the Notice of Availability (NOA) of the final Environmental Impact Statement (EIS) and in the case of an environmental assessment, no later than 25 days after the lead agency makes the documentation available.

¹ EPA's 309 authority is limited to the review and comment on the environmental impacts related to the duties and responsibilities of the Administrator. See Section 309(a) of CAA.

² "National importance" may include, but is not limited to, local or regional issues that are precedent setting, are conflicting with national policies, or are in areas that have been or are currently overburdened by environmental impacts, have a special designation such as protected habitat areas, or other national attention.

EPA has authority under CAA § 309 to refer proposed regulations and major Federal actions for which no EIS has been prepared. EPA will strive to submit any referrals made under this section to CEQ no later than five (5) days before the end of the comment period or, in any case, five (5) days before the final action takes place (e.g., prior to lead agency approval of a final regulation or signed FONSI).

REFERRAL PACKAGE DEVELOPMENT SEQUENCE

The following procedure outlines the referral package development. This procedure simultaneously allows EPA a final attempt to resolve concerns with the lead agency while developing the referral package. The key steps in this sequence are:

1. The lead reviewer and Environmental Review Coordinator identify the potential referral action early, in close coordination with the Federal Activities Division (FAD);
2. The RA (if a regional action) and OPRM AA concur and recommend the referral action to the Administrator;
3. EPA attempts to meet with the lead agency to address EPA's concerns; and
4. EPA prepares the referral package to preserve the referral option if discussions with the lead agency do not resolve EPA's concerns.

The following describes the procedures for developing a referral package. These procedures apply to both headquarters and regional recommendations for referrals. If the NEPA Compliance Branch (NCB) is leading the referral process, affected regions will be included at each step as warranted.

1. The lead reviewer will consult with the Regional Environmental Review Coordinator within five (5) days before the beginning of the final EIS review period to make a preliminary unsatisfactory finding. The lead reviewer's analysis will adhere to the criteria for referral in Table I. If the lead reviewer recommends a referral, the Regional Environmental Review Coordinator will notify the appropriate Federal Agency Liaison and proceed with development of the documents described below. Where NCB is the lead reviewing office, the assigned Federal Agency Liaison/lead reviewer will consult with the NCB Chief and FAD Director.
2. For regional actions, the Regional Environmental Review Coordinator will consult with the Federal Agency Liaison within ten (10) days from the start of the 25-day referral period to prepare and submit a briefing memorandum and interim response to the lead agency. The Regional Environmental Review Coordinator will submit these documents to the Regional Administrator and OPRM AA through FAD. Where NCB is the lead reviewing office, the NCB Chief will submit these documents to the OPRM AA through the FAD Director. EPA's interim response to the lead agency will state that EPA is considering a referral to CEQ. EPA's response will also request a meeting and deadline extension to facilitate possible resolution of EPA's concerns. The briefing memorandum will contain:
 - a. Brief description of the proposed action;
 - b. Reason the proposed major Federal action is unsatisfactory from the standpoint of public health or welfare or environmental quality;
 - c. Description of EPA's attempts to resolve differences with the lead agency;
 - d. Documented positions of other affected federal agencies, groups, and public officials;

- e. Recommended strategy to resolve remaining issues; and
 - f. Recommended schedule to develop and submit the referral package by the referral deadline.
3. EPA may request a lead agency delay a decision so that EPA and the lead agency may resolve concerns to avoid a potential referral to CEQ. If the lead agency agrees, the Regional Environmental Review Coordinator or NCB Chief will immediately prepare a letter to the lead agency to document the agreement. The Regional Environmental Review Coordinator or NCB Chief will update the schedule and develop the potential referral package based on the anticipated date of the lead agency's decision. If the lead agency does not agree, the Regional Environmental Review Coordinator or NCB Chief will prepare its referral package based on the schedule approved by the OPRM AA.³
4. No later than ten (10) days before the referral deadline, the Federal Agency Liaison, and the region,⁴ in consultation with the NCB Chief, will prepare, and the FAD Director will submit the following to OPRM AA for consideration:
 - a. A short information memorandum for the Administrator describing potential referral and the status of unresolved issues;
 - b. A one (1) page "talking points" paper; and
 - c. An outline of a communication strategy (i.e., a desk statement) for notifying interested parties of EPA's action.
5. For regional actions, the regional senior manager or their designee will forward the final referral package to the FAD Director for OPRM AA approval and transmittal to the Administrator no later than seven (7) days before the referral deadline. Where NCB is the lead reviewing office, the NCB Chief will forward the final referral package to the FAD Director for OPRM AA approval and transmittal to the Administrator. The package should contain all letters and concurrences ready for the Administrator's signature. For regional led reviews, the Regional Administrator must give approval on regional referral packages prior to submittal to OPRM AA.
6. The FAD Director will ensure the referral package is in final form and support the OPRM AA's briefing for the Administrator.

CONTENT AND ORGANIZATION OF THE REFERRAL PACKAGES

The referral package should be organized in the following manner.

A. LEAD AGENCY REFERRAL PACKAGE

This package will contain:

1. A letter for the Administrator's signature addressed to the head of the lead agency informing the lead agency of EPA's unsatisfactory determination and intent to refer matter to CEQ. The letter should request the agency refrain from implementing the proposed major Federal action until CEQ acts on the matter.
2. Detailed comments supporting EPA's conclusion that the proposed major Federal action is unsatisfactory from the standpoint of public health or welfare or environmental quality. The detailed comments must articulate:

³ On a case-by-case basis, the OPRM AA may grant an extension to the referral deadline.

⁴ Where NCB is the leading reviewing office, the documents will be prepared by the Federal Agency Liaison/lead reviewer and the NCB Chief.

- a. Unsatisfactory impacts related to EPA’s duties and responsibilities (e.g., areas of jurisdiction or EPA expertise);
- b. Reasons EPA determined the proposed major Federal action is unsatisfactory from the standpoint of public health or welfare or environmental quality;
- c. The basis for the unsatisfactory determination/referral to include one or more of the following:
 - i. The potential violation of an EPA public health, welfare or environmental standard that is substantive;
 - ii. Where there are no applicable standards, but the severity, duration, disproportionality, or geographical scope of the impacts on public health, welfare, or environmental quality associated with the proposed action warrant special attention; or
 - iii. The potential public health, welfare, or environmental quality impacts resulting from the proposed action are of national importance⁵ based on the threat to public health, welfare, or environmental resources or conflicts with environmental policies.
- d. Identify any disputed material facts and incorporate (by reference if appropriate) agreed upon facts between EPA and the lead agency;
- e. Give EPA’s recommendations as to what alternatives, further study, or other course of action (including abandonment of the matter) are necessary to remedy the situation; and
- f. Review the steps taken by EPA to bring its concerns to the attention of the lead agency at the earliest possible time.

B. ADMINISTRATOR’S REFERRAL PACKAGE

The referral package for the Administrator will include the packages to be submitted to CEQ and the lead agency, as well as:

1. An action memorandum to the Administrator (not to exceed two (2) pages) outlining the proposed action, EPA’s concerns and recommendations, and positions of other affected federal agencies, public interest groups, and congressional delegations.
2. A communications strategy (i.e., a desk statement) for notifying stakeholders of the referral. This strategy will be coordinated with OPRM AA and the immediate office.

C. CEQ REFERRAL PACKAGE

The referral package to CEQ will consist of:

1. A letter for the Administrator’s signature to CEQ’s Chair setting forth the basis of EPA’s determination; and
2. The information provided to the lead agency as defined in Section 5.A. (Lead Agency Referral Package).

APPROVING AND DISTRIBUTING THE REFERRAL PACKAGE

⁵ “National importance” may include, but is not limited to, local or regional issues that are precedent setting, are conflicting with national policies, or are in areas that have been or are overburdened by environmental impacts, have a special designation such as protected habitat areas, or other national attention.

After the Administrator signs the referral letters to the lead agency and CEQ, the Environmental Review Coordinator, in coordination with the NCB Chief,⁶ will ensure follow-up distribution by sending the letters to the following.

1. Lead agency;
2. CEQ;
3. EPA Administrator;
4. OPRM AA;
5. EPA General Counsel;
6. EPA Headquarters Office of External Affairs;
7. Appropriate regional office;
8. Appropriate regional Office of External Affairs;
9. FAD Director;
10. NCB Chief within FAD;
11. EPA offices that served as associate reviewers; and,
12. Interested elected officials as appropriate, per Office of Congressional and Intergovernmental Relations (OCIR) discretion.

REPORTING AND RECORDS MANAGEMENT CONTROL

The Environmental Review Coordinator will retain the referral package, related correspondence, and documentation of deadline extensions in the official project file, in accordance with the appropriate EPA records management schedule. The Environmental Review Coordinator will enter deadline extensions into e-NEPA. Where NCB is the lead reviewing office, the Federal Agency Liaison and NCB Chief will retain the referral package in accordance with EPA records management schedule.

⁶ Where NCB is the lead reviewing office, the Federal Agency Liaison/lead reviewer will ensure follow-up distribution in coordination with the NCB Chief and FAD Director.