



# The Association of State Wetland Managers, Inc.

“Dedicated to the Protection and Restoration of the Nation’s Wetlands”

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Dear Associate Director Boling,

The Association of State Wetland Managers (ASWM) provides the following **comments in response to the Advanced Notice of Proposed Rulemaking (ANPR) for an “Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act”** (docket: CEQ–2018–0001) published in the Federal Register on June 20, 2018 (83 Fed Reg 28591 et seq.).

Protection of the nation’s waters is of paramount concern not only to the federal agencies, but also to states and tribes, as well as local governmental organizations. The National Environmental Policy Act (NEPA) plays a critical role in helping states and tribes protect their aquatic resources. The important and unique role of states in the management of water resources and the water quality certification is clearly recognized in the Clean Water Act (CWA). In addition, through mechanisms such as NEPA, the states have a long history of successful cooperative federalism in carrying out wetland programs. We appreciate the opportunity to advise CEQ regarding ways to improve the NEPA process and to provide our recommendations. ASWM is pleased to see CEQ’s request for input, showing continued commitments to partnering with states and tribes.

*ASWM provides the following comments in response to CEQ’s request for input on the NEPA process and scope of NEPA review:*

## **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)**

Regarding Q 1 and Q 3 inquiry about the sufficiency of interagency coordination, ASWM believes that, overall, the current regulations have proven themselves to be largely effective and efficient over an extensive time period, and this success has led to the development of a stable set of federal agencies implementing policies, that now serve the American public and agency decision-makers very well.

Any changes made to the CEQ regulations should be carefully considered, as they would likely cause many years of disruption, while agencies take on the long process of revising their related NEPA implementing procedures and NEPA guidance handbooks. Furthermore, for states and tribes, a major revision of the CEQ regulations would undoubtedly further delay numerous NEPA processes (and their associated actions) while agencies revise their NEPA policies and guidance documents.

*However, ASWM does recommend two potential improvements to the NEPA process:*

**Recommendation 1: Inclusion of Pre-Clean Water Act §401 Certification Review as part of the NEPA Process**

While the current rule at 40 CFR 1501.6 encourages such coordination, *a key improvement would be to require a CWA §401 Water Quality Certification pre-review process concurrently with the NEPA process*, rather than a review process initiated after the NEPA process is complete. Section 401 certification is triggered by application for a permit or license and thus states are required to conduct their §401 Water Quality Certification process after the NEPA review has already been completed. A change to including a preliminary §401 certification review concurrent with the NEPA process would allow for: 1) early and upfront consideration of critical water quality considerations and their related conditioning by states related to the use of best practices, 2) suggested changes to avoid critical aquatic resources in the proposed project impact area, 3) upfront discussion and consideration of appropriate mitigation for any unavoidable impacts to these resources, and 4) a limit on reconsideration of the preliminary §401 certification to review any new information provided only during CWA permit review.

In keeping with the directive of Executive Order 13807 (which encourages agencies to make timely decisions with the goal of completing all federal environmental reviews and authorization decisions for major infrastructure projects within two years), including pre-§401 certification review concurrent with the NEPA process, would minimize any concerns about §401 certifications requiring revisiting or duplicating work completed during the NEPA process, unless new information was brought to light during the CWA permit process. Notably, a similar coordinated NEPA/§401 Permit Review process has been used effectively in review of FHWA projects for a number of years.

**Recommendation 2: Encourage Greater Participation by State and Tribal Agencies as Formal “Cooperating Agencies” in the NEPA Process**

ASWM recommends that in any new rule, federal agencies should be strongly encouraged to *solicit the early and active participation of any agency having special expertise with respect to any environmental issue relevant to the proposed project to become a “cooperating agency”* (40 CFR 1501.6). The status of serving as a cooperating agency allows states, tribes and others to be engaged in the NEPA process as a full partner, with access to information, meetings, conversations and decisions that are relevant to an efficient and effective §401 certification process. Engagement of relevant agencies as cooperating agencies will streamline the communications and planning elements that are critical to completing the §401 certification process.

In 1991, there was a federal initiative to integrate the requirements of NEPA and Section 404 of the Clean Water Act (CWA) with regard to the planning and implementation of transportation projects. This initiative was identified to address delays and conflicts that resulted from the implementation of sequential processes associated with NEPA, and then Section 404 of the CWA. In the mid-Atlantic region, an interagency task force was formed to review the existing processes and to develop an implementable integrated process. The Task Force was comprised of representatives of EPA Region III, FHWA Region 3, the Corps of Engineers (Philadelphia, Baltimore, Pittsburgh, and Norfolk Districts), U.S. Fish and Wildlife Service Region 5, National Marine Fisheries Service, and State Highway Administrations and resource agencies.

The Task Force goals were to (1) develop a cooperative process that merges the critical elements of NEPA and Section 404 processes; and (2) build consensus of all agencies involved. The overall goal was to ensure the timely, cost-effective development of needed, environmentally sensitive transportation projects.

After several years of work, the Task Force developed a document entitled *Integrated NEPA/404 Implementation Guide for Transportation Projects*. The NEPA/404 process contains the following formal concurrence points: (1) Project Purpose and Need; (2) Alternatives Retained for Detailed Study; (3) Selected Alternative; and (4) Minimization and Mitigation. Based on this framework, Maryland developed its own procedures for integrating the requirements of NEPA and Section 404 for transportation projects. Maryland's process, which includes §401 review as well as review under State authorities and a programmatic general permit from the U.S. Army Corps of Engineers, has been updated several times and continues to be implemented for major transportation projects.

### **Recommendation 3: Encourage Earlier Initiation of Discussion about Data Needs in the NEPA Process**

In speaking with states, ASWM has learned that one of the primary complaints received from applicants is about the delays in the review process created by incomplete data to fulfill regulatory requirements. When lead and cooperating agencies have the first opportunity to review the EIS or EA, they may identify a lack of important data that leads to additional requirements imposed on the applicant. The time required to collect the missing information is considered by the applicant to be a delay. To address this common concern, CEQ should either encourage or require the NEPA process to begin even earlier, so that before a project proponent submits something that requires NEPA review, that the lead and cooperating agencies have already met to determine what information needs to be collected and the application, when submitted, has all required data and analysis required. This is a critical element needed to ensure timely and efficient NEPA review. The example from the mid-Atlantic region, in effect since the early 1990's, is an example of how this early coordination can take place.

**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? (Q2)**

ASWM supports the current rule and its associated guidance that confirms that earlier studies can and should be used if they are still up to date. Thus, agencies should make use of any existing information relevant to the project or plan that is the subject of a forthcoming NEPA document. However, the respective lead agency has the responsibility to ensure that any information used is factual, up to date, and relevant for the proposal(s) under consideration. We recommend adding the minor clarification that an EIS or an Environmental Assessment (EA) that is five or more years old requires review and supplementation unless it is demonstrated otherwise, including an opportunity for the public to comment. This review is needed as changes may have occurred that are pertinent to decision making, such as residential development having brought more people into contact with the proposed project or recent changes in hydrology that may make the older analysis outdated.

## **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)**

ASWM discourages the adoption of set page limits. Such arbitrary page limits may restrict appropriate analysis required to identify potential water quality and other environmental impacts and determine appropriate requirements for avoidance and minimization efforts, as well as potential mitigation for truly unavoidable impacts. ASWM encourages CEQ to promote improvements in the quality of the analysis with clear descriptions in plain language rather than setting a limit on the length. Most importantly, quality analysis can lead to more meaningful public comment and improved agency decision making. ASWM believes that the guidance put forward in 40 CFR 1502.2(b) and 1500.4 is adequate to provide appropriate guidance to applicants. For example, the document states that "impacts shall be discussed in proportion to their significance. There shall be only brief discussion of other than significant issues."

### **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)**

Environmental interactions and project effects on the environment are very complex. Any of the possible effects of a project can be significant. Agencies, using their expertise, can determine what impacts are likely to be insignificant or significant. It would be inappropriate to try to determine this using a "one size fits all" process in the rule. 40 CFR 1500.4(f) already requires *"emphasizing the portions of the environmental impact statement that are useful to decision-makers and the public and reducing emphasis on background material."*

### **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)**

Currently, agencies are required to request comments from the public and affirmatively solicit comments from those persons or organizations that may be interested or affected. It is common for projects, especially those with substantial environmental impacts, to be revised to avoid and minimize those impacts when agencies receive and incorporate public comment. Therefore, CEQ

should continue to strongly encourage agencies to solicit and respond to public comment as part of the NEPA process.

Additionally, all relevant documents should be made electronically available for the public to review. In some cases, the EIS or EA may not include all the necessary information for an informed review, with important data or analysis found instead in supporting documents. Inclusion of these documents in the electronic information available to the public is necessary.

**Should any new definitions of key NEPA terms, such as those noted below, be added, and if so, which terms? (Q8).**

Definitions are critical to understanding and reaching agreement on planning and permitting decisions. ASWM strongly supports developing definitions of all new terms that are added to the rule.

**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)**

Environmental Assessments (EAs), which are prepared for projects thought to not have an overall significant effect on the human environment, often document actions that have considerable impacts, even if they don't quite meet the definition of significance as outlined in 40 CFR 1508.27. Therefore, the rule should require a reasonable disclosure and analysis of impacts in an EA, and also to require efforts to especially avoid impacts, as well as minimize and (if unavoidable) compensate for them.

**Should the provisions in CEQ's NEPA regulations relating to the timing of agency action be revised, and if so, how? (Q10)**

As already shared in our responses to Q1 and Q3 above, ASWM recommends that the timing of agency action be changed to include the concurrent Clean Water Act §401 Water Quality Certification pre-review process into the NEPA process, and prior to the issuance of a NEPA EIS or EA. This change would reduce the time required to issue subsequent permits and reduce the perception of duplicative processes. States and tribes strongly rely on and advocate for their state §401 certification processes to protect the integrity of their state water, and inclusion of a §401 certification review earlier in the process would allow for states to be engaged in initial planning decisions. The early concurrent §401 certification review could evaluate siting, practices selected, analysis of cumulative impacts and other considerations; avoiding the need to potentially require changes to these plans after the NEPA review has been completed, as might occur with a separate §401 certification permit review process. The other timing elements in the existing NEPA process, especially those dictating time from issuance/publication of EIS draft to making a decision are important and should not be revised.

**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)**

ASWM believes that the current direction around requiring agencies to “rigorously explore and objectively evaluate all reasonable alternatives” is extremely important and should be retained and the associated requirements for active solicitation of public comment, i.e. at a minimum retain section 1502.14(a).

### **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)**

ASWM believes that there are no provisions in the current CEQ’s NEPA regulations that are obsolete.

**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)**

ASWM encourages the use of information technology and electronic forms that improve efficiency and effectiveness of the application submission and elements of the NEPA review process that are supported broadly by electronic infrastructure at all levels. This includes the increased use of electronic information to share information useful in the public comment portions of the process.

**Are there additional ways CEQ’s NEPA regulations should be revised to promote coordination of environmental review and authorization decisions, such as combining NEPA analysis and other decision documents, and if so, how? (Q16) and Are there additional ways CEQ’s NEPA regulations should be revised to improve the efficiency and effectiveness of the implementation of NEPA, and if so, how? (Q17)**

While ASWM believes that the current rule does encourage coordination with other agencies and promotes the reduction of duplication, ASWM recommends that the timing of agency action be changed to encourage concurrent Clean Water Act §401 Water Quality Certification early review process into the NEPA process prior to the issuance of an EIS or EA (as stated above in response to Q1, Q3 and Q10 - see justifications for this recommended change above).

**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)**

ASWM encourages CEQ to continue to promote the participation of tribes and recommends that CEQ place more emphasis on encouraging both federally-recognized tribes and tribes that are only recognized by states to becoming “cooperating agencies” in the NEPA review process. This would be especially important if CEQ adopts ASWM’s recommendation to include §401 certification review within the NEPA process.

**Are there additional ways CEQ's NEPA regulations related to mitigation should be revised, and if so, how? (Q20)**

Requirements for mitigation force agencies to search for less damaging alternatives and/or to design federal actions and apply mitigation measures that reduce impacts. The current provisions on mitigation are needed and appropriate, and must be retained, while the strongest emphasis must remain on avoidance and minimization. ASWM strongly argues that any rule changes that do not reflect avoidance and minimization as strongest priorities should not be adopted. In cases where mitigation is the only option to compensate for unavoidable losses, mitigation should include rigorous monitoring and reporting requirements.

**CONCLUDING REMARKS**

In summary, ASWM believes that one important change to the NEPA would be the inclusion of a concurrent preliminary Clean Water Act §401 Water Quality Certification review into the NEPA process, rather than having it follow as a totally separate review process after the NEPA review process is completed. This would increase the likelihood of overall permitting process coordination (between NEPA and §401 Certification), transparency, timing and predictability. Revisitation of the preliminary §401 certification decision could be limited to consideration of new information that became available only during the CWA permit review process. The NEPA process works well as currently crafted and includes critical elements of analysis of alternatives and public comment that should not be reduced. Changes that weaken the role of NEPA in environmental review of proposed projects would have potentially deleterious effects on the environment, including aquatic resources, as well as human health and safety.

As always, ASWM appreciates the opportunity to review and provide input. While these comments have been prepared with input from the ASWM Board of Directors, they do not necessarily represent the individual views of all states and tribes; we therefore encourage your full consideration of the comments of individual states and tribes and other state associations.

We request and look forward to the opportunity to comment on any future proposals to revise the CEQ NEPA regulations.

Please do not hesitate to contact me should you wish to discuss these comments.

Sincerely,



Jeanne Christie, Executive Director  
Association of State Wetland Managers

Cc: ASWM Board of Directors