



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
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OFFICE OF THE GENERAL COUNSEL
ENVIRONMENTAL REVIEW AND COORDINATION SECTION

MEMORANDUM FOR: National Environmental Policy Act (NEPA) Practitioners

FROM: NOAA NEPA Coordinator

SUBJECT: Guidance on NEPA functional equivalence and substitute procedures and documents

DATE: November 23, 2020

I. INTRODUCTION

The revised regulations published by the Council on Environmental Quality (CEQ), effective September 14, 2020, focus largely on improving the efficiency of the environmental review process under the National Environmental Policy Act (NEPA). CEQ determined that efficiencies could be gained by avoiding duplication of process and analysis in environmental reviews. To achieve this goal, CEQ included in the 2020 regulations mandates and authorities for agencies to adopt procedures that avoid duplicating analyses or processes under a separate legal mandate (*i.e.*, statute or Executive Order).

- A. *Functional equivalence*: Agencies are authorized (but not required) to determine that an alternate statutory process serves the same purposes as NEPA and is thus its “functional equivalent.” Where an agency makes a functional equivalence determination, NEPA, as a threshold matter, does not apply as long as the action is reviewed under the alternate statutory scheme.
- B. *General substitution of one or more CEQ procedures*: In a separate provision, CEQ requires agencies to combine environmental and other agency documents. That provision also authorizes agencies to identify procedures or documents under other statutes or Executive Orders that satisfy one or more CEQ procedure(s) and to comply with those alternate procedures in lieu of the CEQ procedures. Unlike “functional equivalence,” NEPA remains applicable to the action and the agency must comply with all remaining CEQ procedures not otherwise satisfied as it conducts its environmental review.
- C. *Substitution of one or more CEQ procedures specific to rulemaking*: A third related provision, authorizes, but does not require, agencies to identify documents or procedures in proposals for rulemaking or promulgating regulations that satisfy one or more CEQ procedures. The agency may substitute the specified document or procedure for the corresponding requirements in the CEQ regulations and avoid carrying out duplicative procedures or documentation.



Collectively, the foregoing procedures authorize NOAA to review and assess the broad spectrum of statutes, regulations and Executive Orders that apply to its programs and activities across Line Offices (LO), Program Offices (PO), and Staff Offices (SO) to determine whether there is a basis for determining that an alternate process is functionally equivalent to NEPA or satisfies one or more CEQ procedures. That assessment will determine the extent to which they need to be addressed in the revisions to NOAA's NEPA procedures and/or the NEPA procedures of LOs, SOs and POs. For clarity, this interim guidance establishes that:

- (i) up-front determinations governing functional equivalence and general substitute procedures will be made in revisions to NOAA's NEPA procedures or those of LOs, SOs and POs (collectively NOAA NEPA procedures);
- (ii) up-front determinations of functional equivalence and substitute procedures proposed for inclusion in an LO, SO or PO NEPA procedures must go through prior coordination with the NOAA NEPA Coordinator;
- (iii) case-by-case functional equivalence determinations will not be made by NOAA or any LO, PO or SO;
- (iv) case-by-case substitute procedure determinations for proposals to publish rules or promulgate regulations must be coordinated with the NOAA NEPA coordinator prior to consultation with CEQ;
- (v) all NOAA's NEPA procedures must be developed in consultation with CEQ; released for public review and comment; and ultimately approved by CEQ for conformance with NEPA and the CEQ regulations 40 CFR 1507.3(b). That process will only be initiated after coordination with the NOAA NEPA Coordinator.

When this guidance refers to consultation or coordination with CEQ, it is intended to be within the context of development and approval of the revised NOAA NEPA procedures or the use of the substitute procedures authority related to proposals for regulations. 40 CFR 1506.9.



II. FUNCTIONAL EQUIVALENCE DETERMINATIONS

CEQ, relying on historic case law, has recognized, endorsed, and ultimately codified the doctrine of “functional equivalence.” In the preamble to its recent rule amending the regulations implementing NEPA, CEQ explained that a statutory process is considered to be “functionally equivalent” to NEPA if the process includes procedures providing for public participation and evaluation of environmental impacts sufficient to meet NEPA requirements (*i.e.*, serves the function of agency compliance with NEPA). 85 Fed. Reg. 43320, 43321 (July 16, 2020). When an alternate statutory process is determined in an agency’s NEPA procedures or on a case-by-case basis to be “functionally equivalent,” NEPA becomes inapplicable to actions carried out under that alternate statutory authority.¹

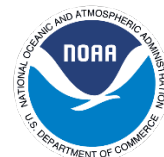
In the revised regulations, CEQ has codified the “functional equivalence” doctrine as a *threshold NEPA applicability determination* providing agencies with discretion to determine that actions and decisions carried out under an alternate statutory process do not require compliance with NEPA. The new procedure established by 40 CFR 1501.1(a)(6) provides:

“[i]n assessing whether NEPA applies or is otherwise fulfilled, Federal agencies should determine:

[w]hether the proposed action is an action for which another statute’s requirements serve the function of agency compliance with the [NEPA].”²

¹ The CEQ regulations have long called for agencies to integrate environmental review with agency planning and other environmental review and consultation requirements, and to prepare combined documents to the greatest extent practicable. Integration is encouraged early in agency planning and authorization processes to ensure the environmental effects of such actions are properly considered with the goal of avoiding delay and conflict in the process. Programs are required under the new regulations to integrate with other environmental review and consultation processes to the greatest extent practicable. An integrated document that satisfies both statutory mandates, NEPA and the corresponding statute pursuant to which a permitting, planning, management or regulatory decision is being made, is not considered a “functionally equivalent” process. As a threshold matter, NEPA applies, but efficiencies are gained through integration of the two processes.

²CEQ provides that an agency may make a threshold applicability determination under section 1501.1(a) such as a “functional equivalence” determination through amendment of its NEPA–implementing procedures or “on an individual basis, as appropriate.” 40 CFR 1501.1(b). Due to the nature of the findings discussed below that are required prior to determining that another statute’s requirements serve the function of agency compliance with NEPA, the NOAA NEPA coordinator has determined that it is not appropriate to make such determinations on an individual, case-by-case basis.



Determinations related to “functional equivalence” require some level of review and coordination with CEQ. The 2020 CEQ regulations specifically require consultation with CEQ when agencies propose “functional equivalence” determinations in their revised procedures 40 CFR 1507.3(b)(2). The regulations also direct agencies to consult with any other agencies for proposed determinations related to a statutory process for which they share responsibility for administration (*e.g.*, ESA). 1501.1(b)(2). Beyond these specific requirements, because all agencies must specify in their revised NEPA procedures those statutory processes for which they have made up-front “functional equivalence” determinations (40 CFR 1507.3(d)(6)), CEQ will thus have the ability to approve or disapprove such determinations when reviewing an agency’s proposed revised procedures. 40 CFR 1507.3(b)(1). Making functional equivalence determinations or establishing procedures for doing so is discretionary to the agency and thus not required by the CEQ regulations. Procedures for proposing, coordinating and approving such determinations, if appropriate, will be included in NOAA’s revised NEPA procedures.

III. IDENTIFYING AND RELYING ON SUBSTITUTE PROCEDURES OR DOCUMENTS

Similar to, *but separate from*, the “functional equivalence” codification, CEQ provides agencies with authority to identify procedures and documents prepared under other applicable statutes and Executive Orders that satisfy some or all of the requirements in the CEQ regulations. Agencies may identify and utilize such procedures and analyses, in accordance with the revised CEQ regulations, in lieu of the CEQ procedure(s). Unlike the “functional equivalence” doctrine, NEPA remains applicable to the proposed action, and the agency is relying on one or more alternate procedures to comply with NEPA and the CEQ regulations. In such circumstances, the remaining CEQ procedures, which have *not been substituted*, remain in effect and compliance with those procedures is required.

- A. *Proposals to promulgate rules or regulations (40 CFR 1506.9)*: CEQ has established a new section, entitled “Proposals for regulations,” to address the analyses required for rulemakings and to promote efficiency and reduce duplication in the assessment of regulatory proposals. This new procedure authorizes agencies engaged in proposals for rules or regulations to determine that procedures required by an alternate statute or Executive Order pertaining to such proposals satisfy one or more provisions of the CEQ regulations. In consultation with CEQ, agencies may identify alternative procedures and analyses related to promulgating rules and regulations, and with CEQ’s confirmation elect to substitute the one or more CEQ requirement with the corresponding requirements from the alternate statute or Executive Order. Agencies are directed to “clearly identify how and which specific parts of the analyses serve the purpose of NEPA compliance, including which requirements in the CEQ regulations are satisfied.” 85 Fed. Reg. at 43,338. CEQ does not specify whether agencies should make these determinations in its NEPA procedures or on a proposal-by-proposal basis.



- B. *General authority for all proposed major federal actions (40 CFR 1507.3(c)(5))*: In addition, CEQ directs agencies to establish procedures “[r]equiring the combination of environmental documents with other agency documents.” This requirement goes beyond the current and prior requirements to integrate analyses prepared under NEPA with other analyses (40 CFR 1502.24 (a)) (2020); 40 CFR 1500.2(c)(1978), respectively) by providing general authority for agencies to “designate and rely on one or more procedures or documents under other statutes or Executive orders as satisfying some or all of the requirements in [the CEQ regulations], and substitute such procedures and documentation to reduce duplication.” Unlike the authority discussed in the preceding paragraph, this requirement is not limited to proposals for promulgating rules and regulations. This provision allows an agency to make determinations in agency NEPA procedures that documents prepared pursuant to a separate statutory authority or Executive Order will meet one or more of the procedures in the CEQ regulations. Once identified in agency NEPA procedures, practitioners can then substitute the alternate document or procedure for compliance with the specified CEQ procedure(s). Agencies must coordinate with CEQ to ensure that their procedures conform with NEPA and the CEQ regulations before they are finalized.

IV. NOAA’S FUNCTIONAL EQUIVALENCE AND SUBSTITUTION DETERMINATION OPTIONS

NOAA implements several statutory processes with corresponding permits, authorizations, regulations, and planning documents that may be reviewed for “functional equivalence” or substitution determinations. CEQ’s regulations provide NOAA discretion to choose the manner in which it makes those determinations:

- A. *Full functional equivalence determination*: NOAA may determine that a particular statutory process and resulting permit, authorization, rule, regulation, or management plan is “functionally equivalent” and the NEPA process will under normal circumstances³ not be required for such actions. Any up-front “functional equivalence” determination must be included in NOAA’s revisions to its agency NEPA procedures⁴ which involves public review and coordination with and the concurrence of CEQ. Where more than one Federal agency administers the statute (*e.g.*, the Endangered Species Act (ESA)) an agency proposing a functional

³ There may be circumstances under which an action is proposed that may not comport with the underlying basis supporting the upfront determination that the statutory process is functionally equivalent to NEPA. This guidance does not specify such circumstances as they would occur on a case-by-case basis based on the specific facts of proposed action and its attendant environmental review process.

⁴ Such a determination could be made through a specific LO action, so long as the LO coordinates with the NOAA NEPA Coordinator to ensure that the action goes through the necessary process required for “agency NEPA procedures” (*i.e.*, approval from CEQ and publication in the Federal Register). Such documents can be then considered a part of NOAA’s NEPA procedures, such as the MSA NEPA procedures contained in Appendix C of the Companion Manual to NAO 216-6A.



equivalence determination for the statute, must also consult with other Federal agencies for concurrence.

- B. *Substitution determination*: NOAA may make a determination that one or more procedures or documents in a statutory or Executive Order process can stand in place of one or more requirements in the CEQ regulations. “Substitution” determinations, for actions other than rulemakings, must be made through revisions to NOAA’s NEPA procedures which involves coordination with and concurrence of CEQ and public review. Provisions of CEQ regulations that are not duplicated remain effective.
- C. *Substitution determination specific to rulemaking*: while duplication determinations for rulemaking actions could be made through revisions to NOAA’s NEPA procedures, such determinations may also be made on a proposal-by-proposal basis. Provisions will be established in NOAA’s revised NEPA procedures for making such determinations. In the interim, such determinations will be made in coordination with the NOAA NEPA Coordinator. Consultation with CEQ is also required. Provisions of the CEQ regulations that are not duplicated remain effective.

V. NOAA’S STANDARDS FOR MAKING FUNCTIONAL EQUIVALENCE OR SUBSTITUTION DETERMINATIONS

In order to utilize any of the foregoing options, NOAA must develop an adequate and sufficient administrative record to support a “functional equivalence” or “substitution” determination.

- A. *Standard for functional equivalence*: Up-front “functional equivalence” determinations must be made through amendment of NOAA’s NEPA procedures, which include any procedures that have been published for public comment and submitted to CEQ for review and approval. “Functional equivalence” determinations made in the revised NOAA NEPA procedures would be supported by the administrative record for those revisions, NEPA would thereafter not apply to proposed actions proceeding under statutory and regulatory frameworks for which such up-front determinations have been made and would instead proceeds solely under the functionally equivalent framework.

The 2020 CEQ regulations rely on case law as the authority for the “functional equivalence” threshold provision, which can also provide guidance to agencies in making internal determinations. Courts have fashioned a narrow “functional equivalence” exemption from NEPA when environmental evaluation and public participation procedures provided in agency regulatory legislation are equivalent to those provided by NEPA,⁵ though the precise boundaries of the “functional

⁵ This “functional equivalence” doctrine was established in cases considering Environmental Protection Agency (EPA) duties under the Clean Air Act. Congress subsequently exempted EPA actions under the Act from NEPA, but the Clean Air Act “functional equivalence” cases have provided guidelines the courts have generally applied. *Portland Cement Association v. Ruckelshaus* is the leading Clean Air Act case establishing a functional equivalence exemption. *Portland Cement* considered whether the EPA was entitled to a narrow exemption for New Source



equivalence” exemption remain unclear.⁶ Courts have generally focused on whether the statute is primarily concerned with examining environmental questions and whether the substantive and procedural standards under the statute ensure full and adequate consideration of environmental issues. Specifically, courts have considered whether the documentation and action the agency has taken under another statute “substantially compl[y]” with or are “substantial[ly] equivalent” to the requirements of section 102(2)(C) of NEPA given this section does not prescribe any particular framework or procedure. *State of Wyo. v. Hathaway*, 525 F.2d 66, 73 (10th Cir. 1975). Section 102(2)(C) requires a “detailed statement” that considers: (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. 42 U.S.C. 4332(2)(C). *See also Env'tl. Def. Fund, Inc. v. Env'tl. Prot. Agency*, 489 F.2d 1247, 1256 (D.C. Cir. 1973) (“The substantive standard established by the statute places great emphasis on the quality of man’s environment. Additionally, the procedural standards provide full opportunity for thorough consideration of the environmental issues, and for ample judicial review. In this particular case, lengthy hearings were held, during which public comment was solicited, and a wide scope of environmental aspects were considered. Thus the functional equivalent of a NEPA investigation was provided, for all of the five core NEPA issues were carefully considered: the environmental impact of the action, possible adverse environmental effects, possible alternatives, the relationship between long-and short-term uses and goals, and any irreversible commitments of resources—all received attention during the hearings and decision-making process. The law requires no more.”).

Thus, while NOAA need not find that a particular statutory and regulatory program actually duplicates the substance and procedures of NEPA and the 2020 CEQ regulations, NOAA must determine that the program achieves the purpose and

Performance Standards. The court held that the rule-making procedure for New Source Performance Standards struck a “workable balance” between the advantages and disadvantages of complying with NEPA, even though it did not provide all of the advantages of a “structured” NEPA determination. *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 386 (D.C. Cir. 1973) (finding that “[w]ithout the problems of a NEPA delay,” the rule making procedure provided an opportunity for comment by other agencies, the public and Congress, and good faith required EPA to disclose any adverse environmental impacts of its proposals, and judicial review would guard against the agency’s “disregard of environmental factors.”).

⁶ As the “functional equivalence” doctrine is applied most frequently to exempt activities by EPA from NEPA, the doctrine’s application to other federal agencies, particularly federal land management agencies, is less clear. For instance, the Ninth and Tenth Circuits have split on whether NEPA applies to the designation of critical habitat under the Endangered Species Act. *See, e.g., Douglas County v. Babbitt*, 48 F.3d 1495, 1503 (9th Cir. 1995), *cert. denied*, 516 U.S. 1042 (1996); *Catron County Bd. of Comm’rs v. United States Fish & Wildlife Serv.*, 75 F.3d 1429 (10th Cir. 1996).



policies of NEPA to be eligible for a “functional equivalence” determination. In particular, NOAA must find that a particular statutory and regulatory program:

- i. primarily involves management, conservation, permitting or authorization related to environmental resources (natural and cultural);
- ii. requires consideration of the core NEPA issues: effects of the proposal on the human environment, potential adverse effects, possible alternatives, the relationship between long-term and short-term uses and goals and any irreversible commitment of resources;⁷
- iii. provides for meaningful public participation in the decision making process;
- iv. ensures documentation of the foregoing consideration in a record presented to and evaluated by the decision maker before a final decision on the proposed action is made; and,
- v. requires documentation of the reasons for the final decision.

B. *Standard for “substitution” determinations:* Substitution determinations made pursuant to the general authority, 40 CFR 1507.3(c)(5), will be made in revisions to NOAA’s NEPA procedures. NOAA, or if appropriate, a LO or SO working in coordination with NOAA NEPA will develop a record documenting that a specific procedure or analysis mandated by an alternate specified statute, regulation(s) or Executive Order satisfies one or more specified CEQ procedures and that compliance with the alternate procedure in lieu of the CEQ procedure will create efficiency in the environmental review process.

C. *Standard for substitution determinations for proposals for regulations or rulemaking:* Similarly, substitution determinations specific to rulemaking proposals, 40 CFR 1506.9, could either be made up front through such revisions or on a case-by-case basis and must also be supported by a record demonstrating that the foregoing standard has been met.

NEPA decision makers proposing to make a case-by-case duplication determination for rulemaking will confer with the NOAA NEPA coordinator through the proper LO/SO/PO NEPA coordinator prior to making the determination to ensure the standard is properly met and documented. This must occur before the decision maker proceeds to consultation with CEQ. As noted above, all other relevant provisions of NEPA and the CEQ regulations will apply to actions determined to be subject to “substitute” measures. This determination only allows the substitution of the particular requirement identified.

⁷ Functional equivalence may be applied to any statutory process involving review of a major federal action which triggers NEPA review since the purpose of every level of NEPA review is to determine whether an EIS is required and to ensure that all relevant procedures in making that determination and ultimately preparing an EIS, if required, are followed.



VI. NEXT STEPS

The foregoing provisions will be implemented through revised NOAA NEPA procedures which could include modifications to NAO 216-6A and/or its Companion Manual; LO/SO/PO NEPA procedures; or a combination of both. To determine the proper approach, NOAA NEPA will initiate an assessment process in coordination with LOs/SOs and POs. That assessment should:

- A. Identify statutory and regulatory processes for which up-front “functional equivalence” determinations could be made; establish a framework for developing a sufficient record to support such determinations; and specify the appropriate agency NEPA procedures (*e.g.*, NAO 216-6A and CM; LO NEPA procedures) that should be modified to document the determinations;
- B. Propose up-front functional equivalence determinations and/or establish a process for doing so if such determinations cannot be made within a 12-month period;
- C. Identify agency documents that should be combined with NEPA documents and corresponding procedures and analyses which satisfy one or more CEQ procedures; establish a framework for developing a sufficient record to support duplication determinations; and specify the appropriate agency NEPA procedures (*e.g.*, NAO 216-6A and CM; LO NEPA procedures) that should be modified to document these determinations;
- D. Establish a process for appropriate agency officials to document and support determinations for specific proposals for rulemaking, that requirements under an alternate statute or Executive Order satisfies one or more CEQ procedures; and specify the appropriate agency NEPA procedures (*e.g.*, NAO 216-6A and CM; LO NEPA procedures) that should be modified to document the determinations; and,
- E. Propose an approach for coordinating all revisions to agency NEPA procedures with CEQ and, if appropriate, other Federal agencies with joint responsibility for implementation of a statutory process.

