Clean Air Act Section 309/National Environmental Policy Act: U.S. Environmental Protection Agency Memorandum Addressing Comment Letter Process

Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

06/25/2026

The United States Environmental Protection Agency ("EPA") issued a June 24th memorandum titled:

Clean Air Act Section 309 and National Environmental Policy Act Section 102(2)(C) Implementation ("Memorandum").

The Memorandum was transmitted from EPA Deputy Administrator David Fotouhi to the following agency personnel:

- General Counsel
- Assistant Administrators
- Chief of Staff
- Regional Administrators
- NEPA Managers

The Memorandum states that its objective is to provide:

… 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 stated goal is to align reviews with EPA's statutory authority, enhancing project results and fostering effective coordination with other federal agencies.

NEPA requires federal agencies to include values and issues in their decision-making processes. Its federal mandate is accomplished by agency consideration of environmental impacts of proposed actions and reasonable alternatives to those actions.

The statute requires federal agencies in certain circumstances to prepare a detailed Environmental Impact Statement ("EIS"). However, the requirement to prepare this document is only triggered in the event of a major federal action which will significantly affect the human environment.

NEPA differs from action enforcing environmental statutory programs such as the Clean Water Act and the Clean Air Act. It does not impose substantive mandates. Instead, it is limited to requiring federal agencies to meet procedural requirements such as preparation of the EIS and certain defined instances.

NEPA does not require a certain alternative or to meet a particular standard. Nevertheless, failure to adhere to applicable NEPA requirements can result in an action being enjoined until there is compliance.

Even if EPA is not the federal agency undertaking the action Section 309 of the Clean Air Act 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.

See 42 U.S.C. § 7609(a).

The scope of Section 309 of the Clean Air Act authority includes reviews of proposed federal agency actions, regulations, legislation and non-ElS actions which could have significant environmental impacts. Further, the Memorandum reiterates that 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. Section 102(2)(C) further requires such comments to be made available to the public upon request.

In introducing the Memorandum, EPA contends that previous administrations have misused this process, deploying unhelpful and expansive comment letters that went well beyond EPA's statutory authorities to stymie unfavored projects, causing confusion and costly delays. EPA states that the Memorandum will:

… restore its key advisory role in helping federal partners make timely, well-informed decisions that protect human health and the environment, enhance transparency, and bring sanity back to the process.

Topics addressed in the Memorandum include:

- Engagement with Federal Agencies
- General Principles
- Comments Should be Consistent with EPA's Applicable Authorities
- Specific to Clean Air Act 309 Letters (arguing that any comment letter 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
- Intro -Previous Engagement
- EPA's Authority to Comment
- Issues: EPA's Comments on Issues
- Recommendation on How to Address
- Contact Information
- Appendix: Common Provisions Addressed in CAA Section 309 Letters

A copy of the Memorandum can be found here.