

5.1 Criteria.

- A. Council on Environmental Quality (CEQ) referrals are a formal, third party arbitration process initiated when two or more executive departments of the Federal government come to a total impasse on a major national environmental issue. It is CEQ's policy that referrals reflect an agency's careful determination that a proposed action raises significant and environmental issues of national importance that may be precedent-setting. Determinations of the kinds of proposals that are appropriate for referral will be based on meeting one or more of CEQ's six criteria:
 - (1) possible violation of national environmental standards or policy,
 - (2) severity,
 - (3) geographical scope,
 - (4) duration,
 - (5) importance as precedents, and
 - (6) availability of environmentally preferable alternatives.
- B. CEQ referrals are only made after all other concerted attempts at resolution have been made and failed. The nature of CEQ's treatment of a referral is not only commensurate with the significance of the proposed action and its impacts, but with the quality of agency-to-agency attempts at resolution. Procedural agreements, if they exist, with other agencies for resolution of issues (such as memoranda of agreements or consultations) must be utilized first.
- C. Action agencies generally allow an extension of the 25-day referral period to permit use of the interagency resolution procedures. The Fish and Wildlife Service (Service) can request extensions at the Regional and/or Washington level. However, if an extension cannot be agreed to, the referral must be completed in the time frame specified in 40 CFR 1504.3(b).
- D. When the Service seeks to refer an agency's action to CEQ, the Service must first convince the Department of the Interior (DOI) that the referral is needed to solve the fish and wildlife problem. Ultimately, it is the Secretary who refers the project to CEQ. However, the Service is expected to prepare the referral documents and conduct the briefings within DOI and at CEQ.
- E. The agency's action, not the environmental impact statement (EIS), is referred to CEQ. Also, whether the agency's EIS is adequate or not adequate has no particular bearing on the decision to refer. The Service may seek to refer a project when the following conditions occur:
 - (1) the action is environmentally unacceptable,
 - (2) the action raises significant and major environmental issues of national importance, and
 - (3) when reasonable, implement able alternatives (including no action) to the proposed action exist.

5.2 Procedures.

- A. Service offices proposing referral of an agency's actions to CEQ must comply with the following.
 - (1) CEQ NEPA regulations (40 CFR 1504).
 - (2) DOI NEPA procedures (516 DM 7.5).
 - (3) DOI Environmental Review Memorandum ER 77-2, September 7, 1977.
- B. Tentative decisions on the Service's intent to recommend referral should be made as early as possible to allow resolution of the issues. Formal notification of the possibility of referral normally occurs in the Department's comments on the draft EIS to the lead agency.
- C. Service Regional offices proposing "may refer to CEQ" language in Service comments on draft EISs must advise the Assistant Director - Ecological Services in accordance with 505 FW 1.6. The Assistant Director - Ecological Services will advise the Department's Office of Environmental Policy and Compliance (OEPQ and the lead agency's Washington Office'. The purpose of advance notification is to facilitate resolution of the issues to avoid referral.
- D. Every effort must be made at the field, Regional, and Washington Office levels to resolve fish and wildlife concerns during planning stages of the proposal before elevating the referral issue to the next level in the chain-of-command. All attempts to resolve the problem with the lead agency must be fully documented.
- E. Field and Regional Office personnel must be available to come to the Washington Office on short notice to work with Washington Service and Departmental personnel as the referral is being developed for acceptance by the Secretary and DOI.
- F. Field installations are responsible for tracking release of a final EIS for a project that may be referred, and shall request advance copies direct from the lead agency. This is an important requirement. By waiting until the final EIS is received through official channels, the 25-calendar day countdown could be too close or passed.
- G. The 25-day countdown commences with the Environmental Protection Agency's (EPA) publication of the notice of availability of the final EIS in the Federal Register. In addition, the Division of Habitat Conservation (DHQ will notify the Regional Office by phone as soon as the final EIS is received through OEPC channels.
- H. Not later than five calendar days after the notice of availability of the final EIS has been published by EPA in the Federal Register, the Regional Office will notify the Assistant Director - Ecological Services and DHC by telephone as to whether or not they will recommend referral on an action previously identified as potentially referable. DHC shall immediately notify OEPC and appropriate Service Washington Office entities.
- I. Not later than ten calendar days after the notice of availability of the final EIS,

the Regional Director shall provide the following referral package to the Assistant Director - Ecological Services:

- (1) transmittal memorandum signed by the Regional Director;
 - (2) draft referral letter to the Federal agency being referred to CEQ; draft
 - (3) referral letter to CEQ;
 - (4) supporting statement [refer to 40 CFR 1504.3(2)]; and
 - (5) chronology of steps taken to resolve issues (to avoid referral), including a list of all meetings with the affected parties, showing coordination with affected parties in attempting to resolve the issues (copies of pertinent letters and memoranda, including comments on environmental documents, should be attached).
- J. The referral letter and/or supporting statement must address the six referral criteria (or as many as apply) outlined in 40 CFR 1504.3(c)(2). The Service NEPA Reference Handbook contains samples of the abovementioned items of the **referral package**.
- K. The referral package should be sent by overnight express mail or other "fast" method of communications to the Washington Office. The package should include the computer disk for revisions.
- L. Immediately upon receipt of the materials, DHC, will coordinate the referral with other affected Service Washington Office entities (e.g., Endangered Species, Fisheries, Refuges, Environmental Contaminants), other affected bureaus in the Department, and any other Federal departments.
- M. The Assistant Director - Ecological Services will make recommendations to the Director.
- N. Service field and Regional Office personnel will likely be directly involved in briefing the Director and the Office of the Secretary (if the matter is referred to the Department).
- O. Upon the Director's acceptance of the referral, approval from the Assistant Secretary for Fish and Wildlife and Parks will be sought.
- P. If the Service Washington Office or DOI decision is not to refer, the Regional Director will be informed by the Director, as soon as possible, outlining why the referral was not made.
- Q. When DOI concurs in the recommendation to refer a proposed action, the Secretary then signs letters to CEQ and to the lead agency, as outlined in 40 CFR 1504.3(c). The letter to CEQ and a copy of the letter to the lead agency must be delivered not later than the 25th calendar day after EPA's notice of availability of the final EIS in the Federal Register.
- R. Negotiations should be underway between the Service/DOI and the Federal agency prior to and during the 25-day period. After delivery of the referral letters to CEQ and the lead Federal action agency, higher level negotiations then commence between the referring and lead agencies and CEQ.

5.3 CEQ Actions.

- A. Usually within one month, CEQ will hold a hearing among the affected

agencies. Within one to three months following the hearing, a written decision will be rendered by letter from-CEQ to the two agencies.

- B. CEQ may take a variety of interim measures between the first hearing and their final decision in writing. These measures could include more meetings between the agencies to get more facts, field trips, or public meetings in the affected area. In extremely unusual situations, they may elevate the issue to the President. Exhibit I is a chart showing the chronology of the CEQ referral process.

5.4 Referral of Federal Energy Regulatory Commission (FERC) Activities.

Although FERC contends that referral of its trial-type proceedings may not necessarily conflict with FERC's obligation to provide a fair hearing, FERC states that it reserves the right not to participate in a CEQ referral. On potential CEQ referrals, DOI may or may not agree with FERC. In any event, the decision to refer a FERC activity to CEQ is up to the referring agency. Resolution of disputes could involve CEQ. FERC's NEPA procedures (52 FR 47897, December 17, 1987, and 18 CFR 380) provide additional guidance on resolving conflicts on FERC matters.

Exhibit 1 is available from the Division of Habitat Conservation (703) 358-2183.

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