



MEMORANDUM FOR THE RECORD

DATE : February 27, 2024

FROM: John Fiorentino, NEPA Coordinator
Office of Habitat Conservation

SUBJECT: Applicability of the Deadline Requirement at Section 107(g)(1)(B) of the National Environmental Policy Act

Purpose:

This memorandum documents the Office of Habitat Conservation's (OHC) determination to deviate from the deadline requirement at Section 107(g)(1)(B) of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4336a(g)(1)(B), as amended by the Fiscal Responsibility Act (FRA) of 2023, Pub. L. No. 118-5 (2023), for two Environmental Assessments (EAs; refer to table below) currently being prepared by the OHC Damage Assessment, Remediation, and Restoration Program (DARRP) due to practical constraints and the inefficiency it would cause to stop and restart these ongoing NEPA reviews. NOAA is the lead NEPA agency for both EAs.

The DARRP engages in Natural Resource Damage Assessment (NRDA) restoration planning processes pursuant to the Oil Pollution Act (OPA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Imposing time limits under NEPA to DARRP restoration planning actions may conflict with the NRDA regulatory requirements of OPA and CERCLA. The integrated nature of NRDA restoration plans (RP/EAs), and the OPA/CERCLA regulations that guide their development, can result in documents that may take longer to prepare than a typical stand-alone EA. Moreover, additional time beyond the 1-year requirement may be needed to complete these integrated RP/EAs due to trustee coordination in the completion of related resource injury assessments, case complexity, and potentially concurrent settlement negotiation, among other factors.

As such, the DARRP cannot complete these reviews within the statutory 1-year requirement for EAs. However, in consideration of several factors described by the Council on Environmental Quality, the DARRP commits to completing these EAs in a timely manner, and has established new deadlines that provide only so much additional time as is necessary to complete the environmental review.

Background:

On June 3, 2023, President Biden signed into law the FRA, which amended several provisions of NEPA. Relevant here, the FRA modified Section 107(g) of NEPA and set new 2-year and 1-year statutory deadlines for environmental impact statements and environmental assessments, respectively. However, in recognition of the challenges agencies would face in implementing these new requirements to ongoing NEPA reviews, the Council on Environmental Quality has

advised agencies to make a fact-specific evaluation to determine how the amendments apply to these reviews:

Federal agencies are responsible for determining how the amendments apply to ongoing NEPA reviews and should consider congressional intent in order to facilitate a more efficient NEPA analysis when making this determination. Where implementation of a provision impacted by the FRA amendments could lead to inefficiency in an ongoing NEPA review, NOAA NEPA practitioners should engage in a fact-specific evaluation to determine the appropriate approach that considers the statutory requirements; the level of NEPA review; the stage at which the environmental review was at the time of the amendment; the expectations of any project proponents; additional resources that would be required to implement the provision; the extent of any disruption that it could cause; and other legal considerations.¹

Rationale for not applying the FRA's new deadline requirement for EAs:

The DARRP has been conducting ongoing NEPA reviews for multiple EAs (see table below).

As part of the NRDA process, restoration plans are developed pursuant to 15 C.F.R. § 990.55 and 43 C.F.R. § 11.93 of the OPA and CERCLA NRDA regulations, respectively. The NRDA regulations provide a detailed process by which trustees evaluate and quantify potential injuries (injury assessment), and use that information to determine the need for and scale of restoration actions (restoration selection). Restoration actions undertaken by federal “trustee” agencies to restore natural resources or services under OPA, CERCLA, and other federal laws are subject to NEPA and the implementing regulations at 40 C.F.R. Parts 1500 through 1508. NEPA becomes applicable when federal trustee agencies propose to take restoration actions, which typically begins with the development of the draft restoration plan.

The DARRP combines NRDA (OPA or CERCLA) and NEPA analyses in its integrated RP/EAs, as recommended under NEPA regulations (40 C.F.R. § 1500.2(c)) and consistent with NRDA regulations (15 C.F.R. § 990.23). While integrating NRDA restoration planning and NEPA analysis provides various efficiencies, it is the NRDA regulatory requirements of OPA and CERCLA that typically drive the duration and complexity of the restoration plan; the NEPA analyses inform the restoration plan and selection of the preferred alternative. Due to the requirements for restoration planning and documentation in the NRDA regulations, development of a draft and final restoration plan may take place over the course of months, if not years. The duration depends on factors such as the nature and complexity of the OPA or CERCLA case, settlement negotiations, the scope and complexity of the injury assessment, the range of restoration alternatives, scaling of the alternatives, and the evaluation of the alternatives against established NRDA evaluation criteria. More practical factors may also affect the duration needed to complete the Final RP/EA—e.g., trustee capacity and availability of funds.

Further, because RP/EAs are integrated documents, they are much more comprehensive than a typical stand-alone NEPA document—primarily due to the NRDA requirements for restoration

¹ CEQ, Amendments to NEPA from the Fiscal Responsibility Act of 2023, <https://ceq.doe.gov/laws-regulations/fra.html>.

plans, which include a detailed description of the injury assessment and the identification and evaluation of a reasonable range of restoration alternatives (some DARRP restoration plans consider and evaluate dozens of alternatives). An additional challenge is the highly collaborative nature of NRDA restoration planning and document preparation, in which numerous state and federal agencies (and sometimes Tribes) act as “co-trustees” and jointly participate in the NRDA and NEPA process. This collaboration and consensus-based decision-making can sometimes affect NOAA’s ability to dictate the planning schedule and development of the Draft and Final RP/EA. This may contribute, in part, to restoration planning efforts and completion of Final RP/EAs that can often exceed the 1-year time limit for EAs.

More than a year has passed since NEPA review began for these proposed actions, rendering compliance with the 1-year deadline requirement at Section 107(g)(1)(B) of NEPA untenable. However, understanding the congressional intent of the NEPA amendments to increase efficiencies in the review process and ensure agencies complete environmental review in a timely manner, the DARRP remains committed to completing these EAs by the new completion dates provided in the table below.

While DARRP completion of NRDA restoration plans may exceed a 1-year time frame, the resulting restoration plans and integrated NEPA analyses remain thorough and informative documents essential to trustee decision-making. Such investment in complete analysis and integration of regulatory responsibilities results in informative and legally defensible analysis for NOAA, trustees, and the public.

The list of EAs currently under development by the DARRP that have exceeded the 1-year completion deadline are provided in the table below. The newly established estimated end dates are provided.

EA	Original Start Date	FRA Start Date ²	Estimated Completion Date	Justification for deviating from the FRA 1-year completion deadline
Restoration Plan and Environmental Assessment for the Pac Antares Oil Spill, New Orleans, Louisiana (NOAA NEPA Unique ID: 44084.773)	9/10/20	6/3/23	6/1/25	Settlement range determination still in development. NRDA injury assessment is ongoing and must be completed before the Trustees can approve a final settlement range and identify a range of proposed restoration alternatives for OPA evaluation and associated NEPA analyses.

² CEQ advises agencies to consider the date of the enactment of the Fiscal Responsibility Act (June 3, 2023) as the starting point for application of the statutory deadlines to environmental reviews that were ongoing on the date of enactment for purposes of the annual report to Congress required under Section 107(g).

Restoration Plan and Environmental Assessment for Bayou d'Inde, Calcasieu Parish, Louisiana (NOAA NEPA Unique ID: 44680.57)	4/29/22	6/3/23	9/1/24	Challenges in identifying viable restoration alternatives that would fully compensate the public for natural resource injuries and services, including ecological and recreational use. In addition, one of the proposed alternatives occurs in an "access-controlled" National Wildlife Refuge, which requires additional coordination with USFWS and compliance with applicable federal laws, permits, and policies. Another proposed alternative requires close coordination with the U.S. Army Corps of Engineers and additional negotiations with a wetland mitigation bank for the mitigation credit transaction and purchase.
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