

Improving the U.S. Coast Guard's Scoping & Public Involvement Processes

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Issue:

The United States Coast Guard (USCG) is a maritime, military agency within the Department of Homeland Security which by law has eleven required missions and its three core missions are Maritime Safety, Maritime Security and Maritime Stewardship¹. As a lead federal agency the USCG is subject to the National Environmental Policy Act (NEPA)² and the Council on Environmental Quality's (CEQ) regulations³. The NEPA and CEQ regulations prescribe very detailed instructions to ensure compliance using an Environmental Impact Statement (EIS)⁴. The detailed instructions include certain requirements for conducting public scoping; the public being a key element in the NEPA process. However, in most cases, USCG actions do not require an EIS and therefore public involvement is rarely used during the agency's NEPA process⁵.

In most cases, during the USCG NEPA process the use of Environmental Assessments (EA) and Categorical Exclusions (CE) are determined to be the most appropriate NEPA documentation for their projects. Neither the CEQ regulations nor any USCG regulations require any public involvement during the NEPA process when using the EA or CE. CEQ regulations require the mitigated Finding of No Significant Impact (FONSI)⁶ be made available to the public but that is after the decision making process is complete. The public is not normally afforded any opportunity to review or provide comments prior to final decisions being made on proposed projects to be completed by the USCG using EAs and CEs. While there are no violations of the law, this is not within the spirit of NEPA. The spirit of NEPA is a shared decision making process with the federal agency and the public.

This paper will examine the intent of the NEPA and CEQ regulations in regards to public involvement process. Secondly, it will discuss the current USCG NEPA implementing policy and finally it provides two recommendations to improve public's involvement within the USCG's NEPA program.

NEPA, CEQ and USCG Requirements for Public Involvement:

NEPA & CEQ Requirements & Intent

The first part of the NEPA implementing regulations is the “Purpose” and within part (a)⁷ it states that “NEPA is our basic national charter for protection of the environment, it establishes policy, sets goals, provides means for carrying out the policy, contains action-forcing provisions to make sure federal agencies act according the letter and spirit of the Act, and bolster what they must do to comply with the procedures of the Act”. In addition to part (a), part (b)⁸ directs federal agencies to ensure that environmental information is available to the public and citizens before decisions are made and before actions are taken. Spirit is mentioned again in Sec. 1500.3⁹ Mandate, “The provisions of the Act and of these regulations must be read together as a whole in order to comply with the spirit and letter of the law. Spirit is specifically mentioned in the Purpose and Mandate parts of the NEPA which demonstrates CEQ’s intended emphasis on the spirit of NEPA. It is important to understand this intended emphasis of spirit to not only comply with the law but meet the intention of the law as well.

Section 1500.6¹⁰ takes spirit one step further in stating that “each agency shall interpret the provisions of the Act as a supplement to its existing authority and as a mandate to view traditional policies and missions in the light of the Act’s national environmental objectives”. The agencies have a responsibility to not only comply with the spirit of the NEPA but to also review their own policies and procedures and ensure they are in full compliance with the purposes and provisions of the NEPA. It is also here in Section 1500.6¹¹ that “to the fullest extent possible” is referred to from the NEPA. In Section 102¹², the NEPA states that Congress authorizes and directs federal agencies to comply with the NEPA to the fullest extent possible. The fullest extent could be viewed as somewhat vague, however, it is clear that Congress intended for agencies to use and implement CEQ regulations and the NEPA with the spirit of the law in mind while drafting their own regulations.

CEQ regulations have provided the guidance in determining whether to prepare an EIS or an EA in Sec 1501.4¹³. If an agency does determine that an EIS is the correct NEPA documentation

then they will have to ensure all of the requirements of an EIS, to include public involvement, are met. If during their own NEPA procedures an agency determines that an EA is the correct NEPA documentation then there are no statutory CEQ or NEPA requirements for public involvement. The one exception that remains is that 1501.4 (e) (1) & (2)¹⁴ states “The agency shall make the EA’s FONSI available to the public as specified in Sec. 1506.6” if an EIS is not prepared, and also make the FONSI available for public review 30 days prior agency’s action if it is precedent setting or if it is closely similar to, one which normally requires the preparation of an environmental impact statement. In this case the public is never involved in the decision making and will only see the end result. This situation does not meet the true intent of NEPA nor does it meet the spirit.

The “Other Requirements of NEPA”, part 1506.6, does specifically address certain aspects of public involvement; however it does not specifically provide timelines or state exactly which NEPA documents. In regards to NEPA documents, Sec 1506.6 (b)¹⁶ states “Agencies shall provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected”. This Section does not specify whether this public involvement is in regards to EISs or EAs. It can easily be assumed that CEQ meant for all NEPA documents include public involvement. This section does not require any type of solicitation, Notice of Intent (NOI), public meetings, public scoping nor comment period but it does state to make the documents available. This includes the FONSI but is not limited to just the FONSI.

In addition, Sec. 1506.6(c)¹⁷ addresses holding public hearings, meetings whenever appropriate as optional unless there is a statutory requirement such as the EIS process. But it is part (d)¹⁸ that stands out in this section and screams “intent and spirit of the NEPA”. Here the simple requirement reads “Solicit appropriate information from the public”. Although this small, quickly read statement can pass by in a flash, it could be interpreted as agencies have a regulatory requirement to reach out to the public even when utilizing an EA or CE. Whether in the spirit of the NEPA or the intent of CEQ regulations, an argument could be made that public solicitation for comments regarding an agency action are required. It is not crystal clear, however if you are reading the regulations with the intent and spirit of NEPA then a question

should be asked; how do you solicit appropriate information from the public if you don't reach out to the public?

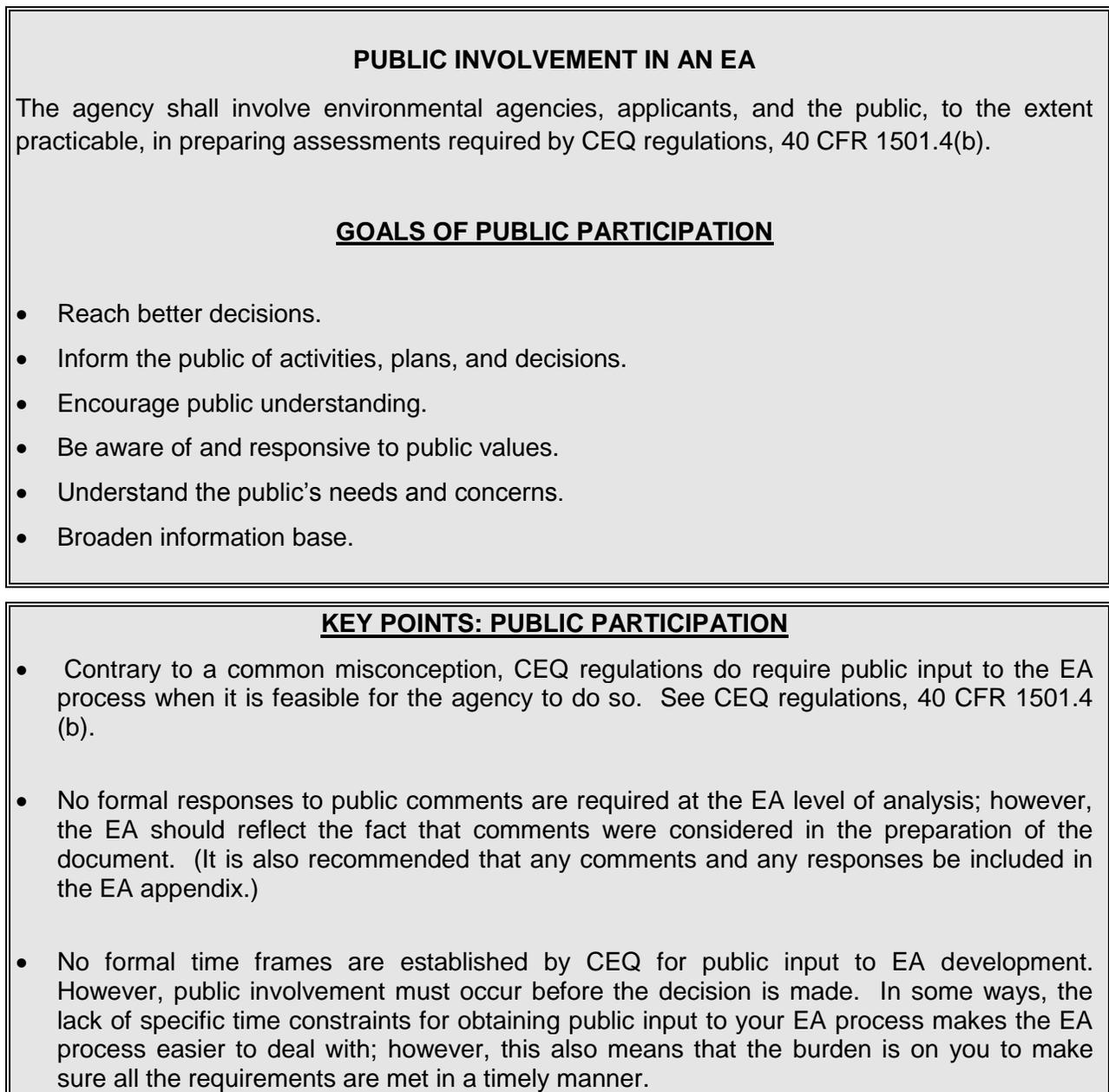
USCG NEPA Requirements & Intent

As required by the NEPA and CEQ regulations, the USCG developed its own NEPA implementing procedures as a Commandant Instruction Manual, the "National Environmental Policy Act implementing Procedures and Policy for Considering Environmental Impacts (CG NEPA MANUAL)"¹⁹. This manual is intended to supplement the NEPA and CEQ regulations and does not contradict them in any manner. The CG NEPA Manual provides the primary guidance, establishes policy and assigns responsibilities for NEPA compliance. The CG NEPA Manual applies to all USCG actions such as but not limited to shore facilities management planning proposals, Master Plans, maintenance, demolition, construction, training operations, procurement, real property and many other actions²⁰. In this manual, the framework for completing the NEPA process is laid out for using a CE, EA and EIS. This manual does not require any additional public involvement for the EA process or use of approved CEs than the NEPA or CEQ regulations. It mirrors the regulations with all regards to public involvement.

In addition to the CG NEPA Manual, the USCG also released a Commandant Publication, Tools for Decision-Making: Environmental Considerations²¹. This publication provides guidance to the USCG however it is not policy. This publication is a handbook for business managers, planners, responsible officials and NEPA practitioners. It does a great job at addressing expectations of the USCG NEPA process and the desired outcomes of environmental planning. Immediately following the Forward and within the Executive summary the handbook states "Public participation is an invaluable tool in Federal government decision-making processes"²². Here the manual, within the second paragraph points out just how important it is to incorporate public participation.

The handbook begins with an introduction to the NEPA and concurs with the CEQ regulations by stating one of the primary purposes of the NEPA is to make information available to public officials and citizens before agency decisions are made²³. The handbook makes several points about the benefits of public involvement and suggests when to use the public. Specifically, it states that money and time can be saved by ensuring early involvement of the public. Several

times the handbook states that public involvement is “essential” and “a necessary step in achieving success”, it also uses words like “strongly advises” and “encourages” when referring to whether to involve the public²⁴. Below is a figure from the handbook that includes “Goals of Public Participation” and “Key Points: Public Participation” which plainly state the importance of public involvement.



*Figure 1*²⁵

The handbook refers to CEQ regulations when it states that public coordination efforts are required for an EIS but not for an EA²⁵ unless the project meets the criteria listed in 1501.4(e)(2)²⁶. While public participation is not specifically required for the EA or the use of a CE for that matter, outside input from public and any possible concerns from the public would be helpful in determining “significance” and any unknown environmental concerns. They could also lead to the discovery that an EA or CE is not appropriate or that mitigation measures are needed. But if an EIS is not required in the first place and the NEPA procedures for an EA or CE do not require public involvement there may never be moments where these issues are brought up or discussed. Similar to the NEPA and CEQ regulations, the USCG does not have any requirements to include public involvement during the use of CEs or EA in normal circumstances prior to the final decision being made. As stated previously, this is not in the spirit or intent of NEPA when it was written.

Recommendations to improve the USCG’s Public Involvement Process:

There are two recommended options that could improve the USCG’s public involvement during the NEPA process which could lead to better decision making. These options offer benefits to improve the program but may also cost money and add time to the planning process. These options include the creation of an online website for the public to view and changes to the CG NEPA policy. These recommendations are in no way implying that the current process is not in accordance with the NEPA and CEQ regulations. Rather, they are suggested as improvements to the current process to help make better informed decisions and meet the intent and spirit of NEPA.

CG NEPA Website

1. The first recommendation to better the public involvement during the USCG’s NEPA process is to create an online website available for the public to view. The online website may require an initial cost and maintenance contract unless it could be combined with currently operating USCG public available websites such as Homeport or USCG.mil. The website should be managed by Coast Guard Headquarters Environmental Management Branch who also oversees the USCG’s NEPA program. It could be considered a one stop shop place for the public to visit and see the USCG’s NEPA procedures, current and past

NEPA projects and provide comments. The website could include a USCG NEPA Homepage that could describe the USCG's NEPA commitment, why the page was developed, and list the USCG NEPA POLICY and any other references. In addition, sections or tabs could be added to the page that could be clicked on to open into their own page or folder. These tabs could include the following:

2. USCG CEs- Here the USCG could provide one list of approved CEs and CEs being drafted and pending approval to make available for the public to view. Included could be a blog section for the public to inquire about the CEs in general or specific questions.
3. USCG EAs – The EA home page would have past, present and draft EAs posted/uploaded from USCG units such as Civil Engineering Units, Districts and Sectors. This section would also include any FONSI's. This page could allow the public to search by unit, state or project name to find an EA. Each EA would have its own folder where additional documents could be uploaded and a point of contact could be added as an optional item. A blog section could be added to the bottom of the home page for EA questions also a blog within each EA's folder or page to allow commenting on each EA.
4. USCG EISs – The EIS home page would be similar to and contain some of the same information as the EA home page. It would include USCG FEISs, DEISs and Notice of Intents and each EIS page or folder would contain information such as public meetings and comment period and points of contact. A blog section could also be added for EIS's in general and one for each individual EIS to allow for official or unofficial comments about a project.
5. Success Stories – This page will list success stories where the USCG has worked with the public to make better informed decisions and more benefits were gained by working together.

The creation of this webpage and making it available to the public would benefit the USCG because for several reasons. First, it would show the USCG's commitment to NEPA, environmental protection and our communities. Second, it would provide an avenue for the public to provide comments and help with the decision making process for EA's and allow them to become more informed regarding our current projects. Lastly, the USCG would be leading

the way for other federal agencies to show that working with the public can be easy and rewarding by posting success stories. By developing a public accessible USCG NEPA page the USCG could also use this page as their primary method of distributing NEPA documents to the public. Notice could be given in the Federal Register making it public knowledge of the website and our intentions. This way a one stop shop for NEPA documents could be offered to the public. This one stop shop for NEPA documents on the web could actually save money for the USCG in the long run by minimizing certain aspects of public outreach being conducted today that haven't produced much success.

CG NEPA Manual Policy Changes

The second recommendation to improve the USCG's public involvement during the NEPA process is to change the USCG policy to require public involvement during the EA process. This would require a significant change to the USCG NEPA Manual which would require review and approval from USCG Environmental & Legal Headquarter offices, the Department of Homeland Security's Headquarters Environmental Branch and possibly CEQ. The proposed change to the USCG NEPA Manual would include the following requirements:

1. Requirement that formal scoping in accordance with Sec. 1501.7²⁸ be completed for all EAs prior to the Responsible Official's decision is made.

OR

2. An alternative to formal scoping and/or public comment period could be making the Draft EA available to the public for a minimum of 30 days prior to the Responsible Official's decision for all EAs.

The change would ensure that the public has had a chance to review and possibly comment on the proposed action. Without this change, EAs will continue to be completed without reaching out to the community for assistance. Environmental concerns that may be missed due to no fault of the USCG because of a lack of extended and local knowledge will continue to happen without

public involvement. However, this change could eliminate this issue and provide the public the opportunity to contribute and improve USCG projects.

Summary and Conclusions

At the end of the day, the most important part of the NEPA process is the informed decision making. The responsible official and NEPA practitioners are encouraged by CEQ to include the public to ensure that informed decisions are being made. The best NEPA decisions are considered the ones with the least or minimal amount of adverse impacts. By including the public in the decision making process, responsible officials have taken the additional step to become informed regarding the possible public concerns with a project. The easiest and best decisions a responsible official can make is an informed decision.

The USCG conducts NEPA reviews as per the NEPA, CEQ regulations and agency policies. However, a majority of their NEPA reviews are completed using CEs and EAs and not EIS's. EIS's if used, would require specific public involvement, but are rarely used due to the nature of USCG projects. The public does not have the ability to comment or make suggestions to improve USCG projects or bring up environmental concerns that may be unknown to the decision makers. For this reason, the USCG's NEPA process is not in the spirit of NEPA. The idea that NEPA was supposed to bring about harmony between the federal government, public and the environment is for the most part, lost in this process. However, the recommendations to create a new USCG NEPA webpage and change the current USCG NEPA Manual would demonstrate the USCG's willingness to reach out to the community and meet the intent of NEPA. These changes could significantly improve the decision making of the USCG.

Endnotes:

¹U.S. Coast Guard Webpage: Missions. Retrieved from <http://www.uscg.mil/top/missions/>

² National Environmental Policy Act of 1970, Public Law 91-190, U.S.C. Code 4321-4347, Jan. 1, 1970, et seq.

³ NEPA Implementing Regulations, see 40 C.F.R. Parts 1500 to 1508.

⁴ 40 C.F.R. 1502

⁵ United States Coast Guard Commandant Instruction M16475.1D, National Environmental Policy Act Implementing Procedures and Policy for Considering Environmental Impacts, Nov. 29, 2000.

⁶ 40 C.F.R. 1501.4(e)

⁷ 40 C.F.R. 1500.1(a)

⁸ 40 C.F.R. 1500.1(b)

⁹ 40 C.F.R. 1500.3

¹⁰ 40 C.F.R. 1500.6

¹¹ *Id.*

¹² 42 USC § 4332

¹³ 40 C.F.R. 1501.4

¹⁴ 40 C.F.R. 1501.4(e)

¹⁵ 40 C.F.R. 1500.6

¹⁶ 40 C.F.R. 1506.6(b)(1)

¹⁷ 40 C.F.R. 1506.6(c)

¹⁸ 40 C.F.R. 1506.6(d)

¹⁹ United States Coast Guard Commandant Instruction M16475.1D, National Environmental Policy Act Implementing Procedures and Policy for Considering Environmental Impacts, Nov. 29, 2000.

²⁰ *Id.*

²¹ United States Coast Guard Commandant Publication P16475.6, Tools for Decision-Making: Environmental Considerations. n.d. Retrieved from: http://www.uscg.mil/hq/cg4/cg47/docs/NEPA_handbook.pdf

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ 40 C.F.R. 1501.4(e)(2)

²⁷ United States Coast Guard Commandant Publication P16475.6, Tools for Decision-Making: Environmental Considerations. Figure 1. n.d. Retrieved from: http://www.uscg.mil/hq/cg4/cg47/docs/NEPA_handbook.pdf

²⁸ 40 C.F.R. 1501.7