

LAND USE & NATURAL RESOURCES

CLIENT ALERT

NOVEMBER 29, 2010

NEW GUIDANCE ISSUED ON CATEGORICAL EXCLUSIONS FOR STREAMLINED NEPA REVIEW

The Council on Environmental Quality (CEQ) recently issued new guidance on categorical exclusions for projects subject to the National Environmental Policy Act (NEPA). The guidance gives federal agencies – and project proponents regulated by federal agencies – much needed direction as to how an agency's decision to use a categorical exclusion should be supported in the administrative record and the extent to which a federal agency should involve the public when using a categorical exclusion.

NEPA generally requires environmental review of federal actions, which can include federal permitting decisions, the approval of federal funds, or other federal actions that apply to both federal and non-federal projects. This environmental review may take the form of a comprehensive and lengthy environmental impact statement (EIS) or a less detailed environmental assessment/finding of no significant impact (EA/FONSI). The CEQ's guidance states that another "type of NEPA review" is a categorical exclusion.

Categorical exclusions are categories of actions that do not have a significant effect on the environment and therefore do not require a further detailed environmental review. These categories are established by each federal agency and may include, for example, the construction of small structures or improvements that result in only minor changes to the environment (Fish and Wildlife Service) or the placement of a pipeline in certain right-of-way corridors (Bureau of Land Management). The purpose of categorical exclusions is to streamline the NEPA environmental review process by reducing paperwork and delay. If the agency determines that a categorical exclusion applies to a project, it does not need to prepare an EIS or an EA/FONSI to evaluate that project's environmental effects.

The CEQ's recent guidance provides direction on how an agency should document the application of a categorical exclusion for the agency's administrative record. That documentation should cite the categorical exclusion being used and show that the agency determined that: (1) the proposed action fits within the category of actions described in the categorical exclusion; and (2) there are no extraordinary circumstances that would preclude the proposed action from being categorically excluded. The guidance further explains: "The extent of the documentation should be tailored to the type of action involved, the potential for extraordinary circumstances and environmental effects, and any applicable requirements of other laws, regulations, and policies."

Although not discussed at length, the guidance provides some direction on when an agency should seek public engagement and disclosure when using categorical exclusions. Most agencies do not routinely notify the public when they use a categorical exclusion. The guidance explains that there are some circumstances where the agency should involve the public, such as when determining whether a proposal involves extraordinary circumstances or potentially significant impacts. Ultimately, though, the guidance leaves it up to the agency to decide those circumstances when the public should be engaged.

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The use of categorical exclusions is an important aspect of the NEPA process. Categorical exclusions can significantly reduce costs and delays typically associated with more robust NEPA documents, such as the EIS or the EA/FONSI. The CEQ's guidance acknowledges the value of streamlining this review process. But it also recognizes a federal agency's need to ensure a complete and well-supported administrative record. This is important because it bears on the defensibility of the agency's decision to use a categorical exclusion for its approval of an action or project.

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