



CEQ to Federal Agencies: Update Your Categorical Exclusions - But Does It Mean More Litigation?

12.06.2010

Today the Council on Environmental Quality ("CEQ") issued final guidance ("Guidance") on using categorical exclusions ("CEs") under the National Environmental Policy Act ("NEPA"). CEs are a category of federal actions for which no environmental assessment ("EA") or environmental impact statement ("EIS") is required because the actions "do not individually or cumulatively have a significant effect on the human environment...." CEQ NEPA Regulations, 40 C.F.R. 1508.4, 1507.3.

The Guidance covers (1) the establishment and revision of categories of CEs and (2) the application of these categories to individual proposed actions. The Guidance differs from previous CEQ guidance in that it identifies recommended procedures and evidentiary standards in considerably more detail. The Guidance, which does not apply to exclusions established by statute, correctly states it is not establishing new legal requirements. However, the content and tenor of the Guidance may open the door for environmental plaintiffs to ask the courts for new and more restrictive interpretations of those requirements.

With respect to establishing new categories of CEs, or revising existing ones, the Guidance suggests that all federal agencies engage in detailed fact finding, including a review of its own and other agencies' experiences to determine if a CE category is appropriate under NEPA. Public comment is suggested and the agency's decision is to be documented in an administrative record for each CE category. The Guidance then notes that the agency's decisions can be challenged in court under the Administrative Procedure Act. Recognizing that agencies have already established CE categories under prior guidances, the new Guidance provides that agencies should review their existing CE categories as soon as possible and at least every seven years. This may be no small task for agencies such as the Federal Highway Administration that annually issue thousands of individual project CEs under existing CE categories. Under the new Guidance,

the process by which CE categories may be created could be such that agencies will find it very difficult to actually establish such categories.

In that regard, the Guidance provides examples of the types of categories that might qualify for a CE. The illustrative examples in the Guidance are payroll processing, data collection, conducting surveys, installing electronic security systems, purchasing "small" amounts of office supplies, routine personnel actions, and contracting for office-related services. Of course, these agency actions also serve as examples of the extent to which CEQ believes NEPA applies to federal actions since the Guidance states "[c]ategorical exclusions are not exemptions or waivers of NEPA; they are simply one type of NEPA review" for activities covered by NEPA.

Once a CE category is established, the question becomes whether a particular proposed action falls within that category. Although existing NEPA regulations require federal agencies to determine if a particular proposed action falls within a CE category, the new Guidance suggests that agencies will have a higher evidentiary burden. The new Guidance requires that federal agencies "ensure" the proposed action fits within the CE category. The level of evidence needed to meet an "ensure" standard could limit the use of categorical exclusions via agency policy or court decisions. In that regard, it should be noted that this "ensure" standard is coupled with (1) yet another "ensure" standard requiring that agencies "ensure" the quality, objectivity, utility, and integrity of any information used to decide that a categorical exclusion can substitute for an EA or EIS, and (2) Executive Order 13547 that requires federal agencies to employ the precautionary principle in making environmental decisions such as whether an EA or an EIS is required.

Again, the Guidance provides that federal agencies should document through an administrative record that a particular proposed action fits within a CE category. This administrative record may be part of the record for the action or it may be a record specially developed to explain the agency decision regarding the categorical exclusion. The Guidance again notes that an agency decision that an action is categorically excluded from NEPA can be challenged in court under the Administrative Procedure Act.

As with the establishment of CE categories, the Guidance provides that it may be appropriate for the agency to seek public comment when deciding whether a specific activity falls within a CE category. However, in what may be a departure from current judicial precedents, the preamble to the Federal Register notice announcing the Guidance states that environmental effects "perceived" by the public are a factor in determining if public comment is necessary. In other words, opposition to a proposed action may become a basis for deciding whether a categorical exclusion, an EA, or an EIS is appropriate. Heretofore, courts have said public opposition to a project does not constitute a basis for requiring an EA or an EIS. For a "controversy" to justify an EA or an EIS that controversy must be a scientific dispute as to the project's merits. The Guidance, however, suggests the possibility that the existence of "not in my backyard" syndrome may now become a basis for requiring an EA or an EIS.

Finally, the Guidance suggests federal agencies should monitor the environmental impacts of activities proceeding under a categorical exclusion. The purpose is to determine if the environmental impacts are indeed minor and, therefore, whether similar categorical exclusions should be approved in the future.

The Guidance on categorical exclusions is one of three guidance documents CEQ is developing "to modernize and reinvigorate" NEPA. The other two guidances were published in draft form on February 18, 2010 (Council on Environmental Quality Proposes Important New NEPA Guidance Regarding Analysis of Greenhouse Gas Emissions and Mitigation of Environmental Impacts, February 22, 2010). One addresses

when and how federal agencies should consider greenhouse gas emissions and climate change in their proposed actions. The other addresses monitoring the implementation of commitments made in EAs and EISs regarding environmental mitigation.