



United States Department of the Interior

Office of the Secretary
Washington, D.C. 20240

JAN - 7 2013

PEP - ENVIRONMENTAL STATEMENT MEMORANDUM NO. ESM 13-4¹

To: Heads of Bureaus and Offices

From: Willie R. Taylor, Director
Office of Environmental Policy and Compliance

Subject: Use of Departmental Categorical Exclusion for Policies, Directives, Regulations, and Guidelines

This memorandum provides guidance for implementing the departmental categorical exclusion for policies, directives, regulations, and guidelines at [43 CFR 46.210\(i\)](#).²

Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.

This category describes a group of actions (the adoption of policies, directives, regulations, and guidelines) that meet either of the two conditions described. The conditions are set out in two independent clauses (note the semi-colon and “or”). Subject to extraordinary circumstances, the

¹ The guidance in this Environmental Statement Memorandum (ESM) is being issued under the authority provided to the Office of Environmental Policy and Compliance (OEPC) by 381 Departmental Manual (DM) 4.5B, to convey instructions and guidance through its Environmental Memoranda Series, and by 516 DM 3.2, which authorizes OEPC to provide advice and assistance to the Department on matters pertaining to environmental quality and for overseeing and coordinating the Department’s compliance with the National Environmental Policy Act (NEPA), the Council on Environmental Quality (CEQ) regulations, and 516 DM 1.21, which authorizes OEPC to provide further guidance concerning NEPA.

² This guidance confirms the Department’s interpretation of this categorical exclusion prior to 2004. As explained in the 2008 proposed rulemaking for the Department’s NEPA regulations, an unintended change was made to this categorical exclusion during a 2004 revision to the Department’s NEPA implementing procedures, formerly found at Part 516 of the Departmental Manual. The text which prior to 2004 described two categories of policies, directives, regulations and guidelines (“* * * that are of an administrative, financial, legal, technical, or procedural nature; or the environmental effects of which are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process * * *”), was replaced with a more restrictive category of policies, directives, regulations and guidelines (“* * * that are of an administrative, financial, legal, technical, or procedural nature and whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process * * *”). The proposed and final rule in 2008 corrected this inadvertent error. For a detailed discussion of this history, please see the January 2, 2008 Notice of Proposed Rulemaking (73 Fed. Reg 126, 130) and the October 15, 2008 Final Rule (73 Fed Reg. 61292, 61303-04).

adoption of a policy, directive, regulation, or guideline need only meet *one* of the two conditions for the categorical exclusion to apply. While it is possible for a proposed action to meet both conditions, it need not do so for the categorical exclusion to be applicable.

Subject to extraordinary circumstances, the adoption of a policy, directive, regulation, or guideline may be categorically excluded if the policy, directive, regulation, or guideline is of an administrative, financial, legal, technical, or procedural nature. There are no further qualifications on this condition.

Similarly, subject to extraordinary circumstances, the adoption of a policy, directive, regulation, or guideline may also be categorically excluded if its environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis *and* will later be subject to the National Environmental Policy Act (NEPA) process, either collectively or case-by-case.

The caveat “and will later be subject to the NEPA process, either collectively or case-by-case” is a qualification placed on the adoption of a policy, directive, regulation, or guideline whose effects are too broad, speculative, or conjectural to be meaningfully evaluated at the present time. This qualification further specifies that implementation of the policy, directive, regulation, or guideline must be expected to undergo a NEPA review at some later time. The future implementation of such a policy, directive, regulation, or guideline may be in the form of specific actions that are subject to the NEPA process and that do lend themselves to meaningful review. This NEPA review may take the form of preparation of an environmental assessment, an environmental impact statement, or reliance upon a categorical exclusion. The environmental assessment or environmental impact statement may be of an individual instance of implementation, or may be programmatic in character, covering several instances of implementation.

The action considered in the original application of the categorical exclusion is only the adoption of the policy, directive, regulation, or guideline, and not the future implementation of such policy, directive, regulation, or guideline. That is, if the facts of these potential future implementation actions are not known at the time of adoption of the policy, directive, regulation, or guideline, the effects of these future potential actions are not analyzed at the time of adoption of the policy, directive, regulation, or guideline because they are too broad, speculative, or conjectural to be meaningfully evaluated. Implementation of the policy, directive, regulation, or guideline is considered only at a later date and in the context of a specific proposed action to implement the policy, directive, regulation, or guideline. This caveat of implementation actions later subject to the NEPA process is *not* binding on the first condition (i.e., actions “that are of an administrative, financial, legal, technical, or procedural nature”).

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Additionally, nothing in this guidance is intended to affect the authority and responsibility of the United States Department of Justice with respect to the conduct of litigation on behalf of the United States.

This memorandum replaces ESM 11-4.