



BILLING CODE: 7565-01

NATIONAL INDIAN GAMING COMMISSION

Protocol for Categorical Exclusions Supplementing the Council on Environmental Quality Regulations Implementing the Procedural Provisions of the National Environmental Policy Act for Certain National Indian Gaming Commission Actions and Activities

AGENCY: The National Indian Gaming Commission.

ACTION: Notice of final action.

SUMMARY: The National Indian Gaming Commission (NIGC or “the Commission”) is amending its protocol for categorical exclusions under the National Environmental Policy Act of 1969 (NEPA), as amended, Executive Order 11514, as amended, and Council on Environmental Quality (CEQ) regulations for implementing the procedural provisions of NEPA for certain NIGC actions.

DATES: The NIGC will implement this protocol immediately upon publication.

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SUPPLEMENTARY INFORMATION:

I. Background

On December 4, 2009, the Commission published a draft NEPA manual in the Federal Register (74 FR 63765). The purpose of the manual was to establish the Commission's NEPA-related policies and procedures and to integrate environmental considerations into the Commission's decision-making processes. The draft manual identified one type of major federal action performed under the Indian Gaming Regulatory Act (IGRA) that triggered NEPA review, specifically, the approval of contracts for the management of Indian gaming facilities pursuant to 25 U.S.C. 2711. In addition to identifying major federal actions applicable to the Commission, the draft manual also established the Commission's NEPA-related roles and responsibilities and created a framework for the preparation of NEPA documentation appropriate for each level of environmental review. The draft manual also identified three categories of actions taken by the NIGC that are categorically excluded from further NEPA review. Categorical exclusions (CATEX) are actions that do not normally require preparation of an Environmental Assessment (EA) or Environmental Impact Statement (EIS), absent extraordinary circumstances.

On May 22, 2012, after reviewing the comments submitted on the draft NEPA manual, the Commission published a Protocol for Categorical Exclusions Supplementing the Council on Environmental Quality Regulations Implementing the Procedural Provisions of the National Environmental Policy Act for Certain National Indian Gaming Commissions Actions and Activities (77 FR 30315) and requested comments by June 30, 2012. This publication formally adopted two of the three categorical exclusions listed in the draft NEPA manual.

In 2015, after evaluating its past environmental reviews for management contract approvals and the comments received on the 2009 draft NEPA manual, the Commission decided

to revisit its policies and procedures for implementing NEPA. To obtain updated views from the regulated community, the Commission held several consultation sessions over a two-year period with tribal nations and solicited comments regarding the scope and extent of its NEPA responsibilities. Following consultation, the Commission evaluated the newly submitted comments in conjunction with those received in response to the 2009 draft manual and decided to amend the 2012 Protocol to include a third CATEX for Management Contract and Agreement Review Activities. This CATEX will apply to certain management contract approvals that are not associated with an application to take land into trust and do not provide for construction or expansion of existing structures. In identifying this category of actions, the NIGC relied on its past experience, several environmental professionals' opinions and comparisons with other Federal agency actions that are categorically excluded.

COMMENTS

On January 11, 2017, the Commission published a notice of proposed action and request for comments on the amended protocol in the Federal Register (82 FR 3352). In response, it received only one comment. The commenter requested that the Native American Graves Protection and Repatriation Act (NAGPRA) 25 U.S.C. 3001-3013 be included within the list of examples of environmental laws with which parties seeking to apply the categorical exclusion must comply. The Commission agrees and updated the language accordingly.

The same commenter also questioned how the Commission would interpret the term "known" with respect to the extraordinary circumstances involving "known cultural or archaeological resources." Given the potential for confusion regarding this term, the Commission eliminated the term and, instead, references the Archaeological Resources Protection Act

(ARPA) 16 U.S.C. 470aa-470mm, and NAGPRA. The Commission believes that referencing the particular statutes sufficiently demonstrates its intent to abide by the objective, legal definitions and processes set forth therein.

After considering the comments, the Commission hereby adopts the amended protocol set forth below for determining whether a categorical exclusion applies to particular action as well as the categories of actions the Commission has determined are eligible for categorical exclusions.

A copy of this **Federal Register** publication, as well as the administrative record for the newly established categorical exclusion, is available at <http://www.nigc.gov>. A copy of the **Federal Register** publication is available at <http://www.regulations.gov>.

TRIBAL CONSULTATION

The National Indian Gaming Commission is committed to fulfilling its tribal consultation obligations—whether directed by statute or administrative action such as Executive Order (EO) 13175 (Consultation and Coordination with Indian Tribal Governments)—by adhering to the consultation framework described in its Consultation Policy published July 15, 2013. Pursuant to the Order, the Commission engaged in extensive consultation on this topic.

REGULATORY FLEXIBILITY ACT

This Protocol will not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* Indian tribes are not considered to be small entities for the purposes of the Regulatory Flexibility Act.

SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT

This Protocol is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This Protocol does not have an annual effect on the economy of \$100 million or more. This rule will not cause a major increase in costs or prices for consumers, individual industries, Federal, state or local government agencies or geographic regions, and does not have a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

UNFUNDED MANDATES REFORM ACT

The Commission, as an independent regulatory agency within the Department of the Interior, is exempt from compliance with the Unfunded Mandates Reform Act. 2 U.S.C. 1502(1); 2 U.S.C. 658(1).

TAKINGS

In accordance with Executive Order 12630, the Commission has determined that this Protocol does not have significant takings implications. A takings implication assessment is not required.

CIVIL JUSTICE REFORM

In accordance with Executive Order 12988, the Office of General Counsel has determined that the Protocol does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Executive Order.

NATIONAL ENVIRONMENTAL POLICY ACT

This Protocol supplements CEQ regulations and provides guidance to NIGC employees regarding procedural requirements for the application of NEPA provisions to certain NIGC actions. The CEQ does not direct agencies to prepare a NEPA analysis or document before establishing agency procedures for implementing NEPA.

For the reasons set out in the preamble, the National Indian Gaming Commission establishes the following Protocol:

Protocol for Categorical Exclusions (CATEX) of Certain Actions

The use of a CATEX can only be applied to an action if all of the following criteria are met:

1. The responsible NIGC official must determine that the entirety of the NIGC action is encompassed by one of the listed CATEXs.
2. The responsible NIGC official must determine that the action has not been segmented in order for the NIGC action to meet the definition of an action that can qualify for a CATEX. Segmentation occurs when an action is broken into smaller parts in an effort to avoid properly documenting impacts associated with the complete action. Segmentation also occurs when the NIGC action is too narrowly defined and the potential impacts are minimized in order to avoid a higher level of NEPA documentation. Connected and cumulative actions must be considered (*See* 40 C.F.R. §1508.25).
3. The responsible NIGC official must determine if the NIGC action will involve any extraordinary circumstances that would prevent the use of a categorical exclusion.

Categorical Exclusions

The NIGC, based on past experience with similar actions, has determined that the following types of actions are categorically excluded and do not require the preparation of an EA or EIS because they will not individually or cumulatively result in a significant impact on the human environment. These types of federal actions meet the criteria established in 40 C.F.R. §1508.4.

CATEGORY 1 - Administrative and Routine Office Activities:

- A. Normal personnel, fiscal, and administrative activities involving personnel (recruiting, hiring, detailing, processing, paying, supervising and records keeping).
- B. Preparation of administrative or personnel-related studies, reports, or investigations.
- C. Routine procurement of goods and services to support operations and infrastructure, including routine utility services and contracts, conducted in accordance with applicable procurement regulations, executive orders, and policies (e.g. Executive Order 13101).
- D. Normal administrative office functions (record keeping; inspecting, examining, and auditing papers, books, and records; processing correspondence; developing and approving budgets; setting fee payments; responding to request for information).
- E. Routine activities and operations conducted on or in an existing structure that are within the scope and compatibility of the present functional use of the building, will not result in a substantial increase in waste discharge to the environment, will not result in substantially different waste discharges from current or previous activities, and will not result in emissions that exceed established permit limits, if any. In these cases, a Record of Environmental Consideration (REC), documentation is required.
- F. NIGC training in classrooms, meeting rooms, gaming facilities, or via the internet.

CATEGORY 2 - Regulation, Monitoring and Oversight of Indian Gaming Activities:

- A. Promulgation or publication of regulations, procedures, manuals, and guidance documents.
- B. Support of compliance and enforcement functions by conducting compliance training for tribal gaming regulators and managers in classrooms, meeting rooms, gaming facilities, or via the internet.
- C. Preparing and issuing subpoenas, holding hearings, and taking depositions for informational gathering purposes, not associated with administrative enforcement actions.

CATEGORY 3 – Management Contract and Agreement Review Activities:

- A. Approval or disapproval of management contracts, management contract amendments and collateral agreements that meet the following criteria: (1) are not associated with an application to take land into trust; (2) does not provide for construction or expansion of existing facilities; (3) ensures compliance with all federal, state, local and tribal environmental laws (e.g. Clean Air Act, Clean Water Act, Endangered Species Act, National Historic Preservation Act, Native American Graves Protection and Repatriation Act, etc.), regulations, and permit requirements; and (4) ensures adequate provision of utilities, law enforcement, fire protection, and other emergency service coverage without effects on neighboring areas. In these cases, a Record of Environmental Consideration (REC), documentation is required.
- B. Conducting background investigations in connection with a management contract or management contract amendment.

Extraordinary Circumstances

Actions that can normally be categorically excluded may not qualify for a CATEX because an extraordinary circumstance exists (*See* 40 C.F.R. §1508.4). If the proposed action has one or more of the following conditions, extraordinary circumstances exist and the action cannot be categorically excluded:

- A. The proposed action/project would threaten a violation of applicable federal, state, local or tribal statutory, regulatory, or permit requirements with regard to public health and safety.
- B. The proposed action/project has effects on the environment that involve risks that are highly uncertain, unique, or are scientifically controversial.
- C. The proposed action/project violates one or more federal, tribal, state, or local environmental laws, regulations, permit requirements, or Executive Order.
- D. The proposed action/project has an adverse effect on a property or structure eligible for listing or listed on the National Register of Historical Places as determined by the Commission, the State Historic Preservation Officer, the Tribal Historic Preservation Officer, the Advisory Council on Historic Preservation, or a consulting party under 36 CFR 800. Adverse effects include the degradation, loss, or destruction of (1) scientific, cultural, or historical resources protected by the National Historic Preservation Act of 1966, as amended; (2) on World Heritage properties; or (3) other significant scientific, cultural, or historical resources.
- E. The proposed action/project has adverse effects on natural, ecological, or scenic resources of federal, tribal, state and/or local significance. These resources include: (1) resources protected by Coastal Zone Management Act (CZMA); (2) resources protected by the Fish and Wildlife Coordination Act; (3) prime, unique, tribal, state

or locally important farmlands; (4) cultural items or archaeological resources as defined by the Archaeological Resources Protection Act and/or Native American Graves Protection and Repatriation Act; (5) park lands; (6) federal or state listed wild or scenic rivers; and/or (7) other ecologically critical areas.

- F. The proposed action/project is related to other actions that may, when considered cumulatively, have significant adverse effects.
- G. The proposed action/project may adversely affect (1) a federal or state listed endangered, threatened, or candidate species; or (2) designated or proposed critical habitat under the Endangered Species Act (ESA).
- H. The proposed action/project has effects which will impact floodplains and/or wetlands on Federal property.
- I. The proposed action/project has effects that will cause a criteria pollutant listed under the Clean Air Act to exceed the threshold level of one or more of the National Ambient Air Quality Standards for the surrounding geographical area.
- J. The proposed action/project has effects that may cause disproportionately high adverse environmental or health impacts specific to children, minorities, or low-income populations.
- K. The proposed action/project is likely to have adverse effects on migratory bird populations.
- L. The proposed action/project has the potential to disturb hazardous substances, pollutants, contaminants, or CERCLA-excluded petroleum and natural gas products that preexist in the environment such that there would be uncontrolled or unpermitted releases.

- M. The proposed action/project has effects that are highly controversial on environmental grounds.

Categorical Exclusion Documentation

The purpose of categorical exclusions is to reduce paperwork and delay. The NIGC is not required to repeatedly document actions that qualify for a categorical exclusion and do not involve an extraordinary circumstance (*See* 40 C.F.R. §1500.4(p)). The NIGC will document its decision to treat a particular action as categorically excluded from further NEPA review, when the CATEX applied specifically requires the preparation of a REC. In those cases, a REC will include:

- A. A complete description of the proposed action/project;
- B. The CATEX relied upon, including a brief discussion of why there are no extraordinary circumstances;
- C. Supplemental documentation that supports the conclusions in the narrative.
Examples include exhibit(s) showing boundaries of historical or archeological site(s) previously identified near the proposed project, documentation from the U.S. Fish and Wildlife Service noting that no endangered species or habitat is present near the proposed project, evidence that the proposed project site is located outside any non- attainment area(s), etc. In some cases, a “no effect” determination from the State Historic Preservation Office or Tribal Historic Preservation Office may be required;
- D. The following statement: *I certify that, to the best of my knowledge, the information provided is the best available information and is accurate;*

- E. A signature from an environmental professional with a signature block that includes the professional's credentials.

Dated: July 14, 2017.

Jonodev O. Chaudhuri,

Chairman.

Kathryn Isom-Clause,

Vice Chair.

E. Sequoyah Simermeyer,

Commissioner.

[FR Doc. 2017-15498 Filed: 7/28/2017 8:45 am; Publication Date: 7/31/2017]