



USET

SOVEREIGNTY PROTECTION FUND

Nashville TN Office
711 Stewarts Ferry Pike, Ste. 100
Nashville TN 37214
P: (615) 872-7900
F: (615) 872-7417

Washington DC Office
400 North Capitol St., Ste. 585
Washington DC 20001
P: (202) 624-3550
F: (202) 393-5218

Submitted via email to:
bj.howerton@bia.gov

May 7, 2018

Dr. BJ Howerton, MBA
Branch Chief, Environmental and
Cultural Resources Management
Department of the Interior
12220 Sunrise Valley Drive
Reston, VA 20192

RE: Comments on proposed amendments to the BIA's list of categorical exclusions under the National Environmental Policy Act

Dear Dr. Howerton,

On behalf of United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we write to provide comment in response to the notice published in the Federal Register seeking comments on the list of categorical exclusions (CATEXs) under the National Environmental Policy Act (NEPA) for actions taken by the Bureau of Indian Affairs (BIA)¹. The notice requests comments on “whether to revise or delete any current CATEXs or to add any new CATEXs.”

USET SPF is an intertribal organization comprised of twenty-seven federally recognized Tribal Nations, ranging from Maine to Florida to Texas². USET SPF is dedicated to enhancing the development of federally recognized Tribal Nations, to improving the capabilities of Tribal governments, and assisting USET SPF Member Tribal Nations in dealing effectively with public policy issues and in serving the broad needs of Indian people.

We welcome the request for comments on the BIA's list of CATEXs, but we also note that the list of CATEXs is but one aspect of the BIA's implementing procedures for compliance with NEPA. We recommend that the BIA initiate, in consultation with Tribal Nations, a more comprehensive review of its approach to the NEPA process. We note that in the Department of the Interior (DOI) Regulatory Plan, streamlining NEPA implementation is already on the agenda for BIA³. Under the heading for “Indian

¹ 83 Fed. Reg. 9535 (March 6, 2018).

² USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Aroostook Band of Micmac Indians (ME), Catawba Indian Nation (SC), Cayuga Nation (NY), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

³ See https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201710/Statement_1000.html.

Affairs,” the Regulatory Plan states: “Because many of its existing regulations require compliance with the NEPA, BIA will examine whether it can streamline NEPA implementation.”

BACKGROUND

To frame the subject, we begin by noting that the statutory requirement of NEPA is that an environmental impact statement (EIS) must be prepared for any major Federal action “significantly affecting the quality of the human environment.”⁴ This requirement is implemented through regulations issued by the Council on Environmental Quality (CEQ).⁵ The CEQ regulations provide two basic ways for a federal agency to determine that a proposed federal action will not “significantly” affect the environment and thus achieve compliance with NEPA without preparing an EIS. One is that an agency may prepare, or require an applicant to prepare, a less-detailed kind of document known as an environmental assessment (EA). If, based on an EA, the responsible federal official signs a finding of no significant impacts (FONSI), an EIS is not required. An agency decision to proceed with the proposed action in reliance on an EA and FONSI for NEPA compliance is, however, subject to judicial review. While the CEQ regulations say that an EA should be “concise,” they are often lengthy and typically take at least several months to produce.

The use of a CATEX is the other way that the CEQ regulations allow for NEPA compliance without an EIS. The CEQ regulations define the term, “categorical exclusion,”⁶ and require each federal agency to develop its own list of CATEXs in agency-specific implementing procedures that supplement the CEQ regulations⁷. Agency implementing procedures must “provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.”⁸ “Extraordinary circumstances” applicable to actions by DOI bureaus are listed in the DOI NEPA implementing procedures⁹. If an extraordinary circumstance does apply, then NEPA compliance requires at least an EA¹⁰. A BIA guidance document advises that when the responsible BIA official determines that a CATEX applies to a proposed action, a “Categorical Exclusion Exception Review (CEER) Checklist” should be completed to document the determination that no extraordinary circumstances apply¹¹. If the use of a CATEX is appropriate, and is not precluded by an extraordinary circumstance, NEPA compliance can be accomplished with much less time and resources than an EA and FONSI.

RECOMMENDATIONS

Since the Federal Register notice specifically seeks comments on the BIA’s list of CATEXs, we begin by taking note of a CEQ guidance document on “Establishing, Applying, and Revising Categorical Exclusions.”¹² Noting that agencies have been using CATEXs since the late 1970s, CEQ recommends that agencies periodically review their existing CATEXs and consider making changes and adopting new ones,

⁴ 42 U.S.C. § 4332(C).

⁵ 40 C.F.R. Parts 1500 -1508.

⁶ 40 C.F.R. § 1508.4 (“a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a [Federal agency](#) in implementation of these regulations ([§ 1507.3](#)) and for which, therefore, neither an environmental assessment nor an [environmental impact statement](#) is required”).

⁷ 40 C.F.R. § 1507.3 (requiring each agency too adopt implementing procedures).

⁸ 40 C.F.R. § 1508.4.

⁹ 43 C.F.R. § 46.215.

¹⁰ 43 C.F.R. § 46.205.

¹¹ INDIAN AFFAIRS NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) GUIDEBOOK, 59 IAM 3-H, §§ 2.2.2, 4 (August 2012). The CEER Checklist is found in Appendix 2.

¹² Council on Environmental Quality, Memorandum for Heads of Federal Departments and Agencies: Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act, at 9 (Nov. 23, 2010).

in light of their experience and changes in their legislative authorities. Agencies may also draw on the experience of other agencies.

Except for a few recent additions, the BIA's CATEX list has been in effect since 1980. We recommend that a comprehensive review of the entire list be initiated, in consultation with Tribal governments, in accordance with the CEQ guidance. The recent Federal Register notice should be seen as only the beginning of this consultation process.

In addition to calling for a comprehensive review, we must call attention to the overlap between the review of the CATEX list and the ongoing review of the Department's regulations for fee-to-trust acquisitions under 25 C.F.R. Part 151. In this context, we recommend two new CATEXs to address NEPA compliance for fee-to-trust conveyances. We then offer some recommendations on the more general topic of streamlining NEPA implementation.

A Proposed New CATEX for Conveyances to the United States in Trust for Land Dedicated to Conservation Purposes

The Tribal Nations located in the eastern part of what is now the United States have a lengthier history when it comes to the systematic dispossession of our lands as a result of hundreds of years of federal (and before that, colonial) policies. In the wake of these policies, a majority of USET SPF Tribal Nations hold only a fraction of their homelands and some remain landless. The acquisition of additional land is a priority for USET SPF Tribal Nations, typically with the intent to convey title to the United States in trust. There is one existing CATEX that sometimes applies to fee-to-trust conveyances, the one codified at 516 DM 10, § 10.5.I, which applies to:

Land Conveyance and Other Transfers. Approvals or grants of conveyances and other transfers of interests in land where no change in land use is planned.

Given the wording of this CATEX, it would only apply to the conveyance described above if there were to be no change in land use. We believe that the process for transferring title into trust should be less burdensome. Treating fee-to-trust conveyances as CATEXs for NEPA compliance, in appropriate cases, is one way to make such conveyances less burdensome. In addition to conveyances with no change in land use, we believe that treatment as a CATEX would also be appropriate for conveyances in which there is a change in land use but the change is to a use that involves less intense environmental impacts. Treatment as a CATEX would be particularly appropriate when the reason for the acquisition of the land by the Tribal Nation is to manage it for conservation purposes.

For example, a Tribal Nation might acquire some land that has been used for grazing cattle and intend to manage the land for wildlife habitat. Maybe the land has been used for harvesting timber and the Tribal Nation plans to dedicate the land to be managed for watershed protection. Maybe the land has been used for extraction of some mineral resource and the Tribal Nation is mainly concerned with restoration of the environment, or maybe prevention of further damage to historic properties and other cultural resources. In any of these scenarios the environmental impacts are very unlikely to be significant, yet they do not fit the existing categorical exclusion because a change in land use is planned. Accordingly, we suggest a new CATEX for:

Approvals of Tribal requests for the acquisition of land in trust status where the land is dedicated to conservation purposes, including but not limited to preservation of historic properties or other cultural resources, wildlife habitat, watershed and/or aquifer protection, or ecological restoration.

A Proposed New CATEX for BIA Approvals Reviewed Under Tribal Environmental Review Processes Meeting the Requirements of the HEARTH Act

We also recommend a new category of CATEX for any BIA approvals requested by a Tribal Nation that has properly evaluated pursuant to an environmental review process enacted under its own Tribal law when that Tribal review process meets the requirements of the HEARTH Act.¹³ The HEARTH Act amended the Long-Term Indian Leasing Act¹⁴ by authorizing Tribal Nations to lease trust land without BIA approval. In order for a Tribal Nation to make use of the HEARTH Act's authorization to lease Tribal trust land without BIA approval, the Tribal Nation must adopt Tribal regulations to govern leasing activities, and the Tribal Nation's regulations must be approved by the Secretary of the Interior. Further, the HEARTH Act requires a Tribal Nation to establish and apply a Tribal environmental review process in lieu of the NEPA process.

This proposal, which supports BIA recognition of Tribal sovereignty and self-determination, would allow BIA to adopt a CATEX and bypass further environmental analysis as long as BIA could confirm that the Tribal Nation requesting BIA approval had fully analyzed the environmental impacts of the proposed action under a Tribal environmental review process that BIA has already approved pursuant to the HEARTH Act. Such a process has the potential to streamline BIA's NEPA reviews for requested approvals as a requesting Tribal Nation may be able to more quickly and efficiently complete needed environmental review, leaving BIA free to provide necessary oversight and merely confirm that no additional agency analysis was needed once the Tribal Nation's analysis was complete.

Beyond these suggestions, we support and incorporate by reference the suggestions for expanded use of CATEXs included in the comments filed by the National Congress of American Indians.

Consultation with Tribal Nations on Streamlining NEPA Implementation

In the era of Tribal self-determination, much of the work to prepare and review NEPA documentation for proposed BIA actions is performed by Tribal government staff, and much of that work is funded through self-determination contracts and self-governance compacts. In practice, the BIA "action" is often simply the final approval of a Tribal action. As such, an initiative by the BIA to streamline NEPA implementation should be designed to help meet the needs of Tribal government staff in performing this work. A logical starting point would be consultation with Tribal Nations that would include an assessment of the needs, from Tribal perspectives.

We believe that one theme that would emerge from such a needs assessment is that the information regarding NEPA implementation for BIA actions should be readily accessible, much more so than it is currently. The BIA's list of CATEXs illustrates this point. Formally, it is codified in the Departmental Manual (DM), at 516 DM Chapter 10, Section 10.5. Keeping this information in the DM makes little sense. Most of the information contained in 516 DM 10 is not really internal guidance. Rather, it is information that is needed by people outside the federal government, especially Tribal officials and staff.

Moreover, as codified in the DM, the BIA's list of CATEXs has not been kept up-to-date. As noted in the Federal Register notice to which this letter is a response¹⁵, in 2015 the BIA adopted three new CATEXs

¹³ Helping Expedite and Advance Responsible Tribal Home Ownership (HEARTH) Act, Pub. L. No. 112-151 (codified at 25 U.S.C. § 415(h)).

¹⁴ 25 U.S.C. § 415.

¹⁵ 83 Fed. Reg. 9535 (Mar. 6, 2018).

relating to forestry¹⁶. Two-and-a-half years earlier, the BIA adopted a new CATEX for leases of trust land for homesites. A notice of the adoption of that CATEX was published in the Federal Register on August 10, 2012¹⁷. Although more than five years have passed since the publication of the notice regarding the homesite lease CATEX, and three years have passed since the adoption of the forestry CATEXs, none of those CATEXs have as yet been incorporated into the edition of 516 DM 10 that is posted on the DOI website¹⁸.

A New Part in Title 25 of the Code of Federal Regulations

The BIA's list of CATEXs really should be in the Code of Federal Regulations, as a new Part in Title 25. Among other benefits, this would make the information readily available on the Government Printing Office website. To implement this recommendation, the BIA would have to proceed through rulemaking. We suggest that this project could be a candidate for negotiated rulemaking. While the BIA's list of CATEXs would be featured, the rulemaking project should also consider whether other topics included in the DM should be moved to 25 C.F.R., such as the BIA's list of classes of actions that normally do require environmental impact statements.¹⁹ In addition, as a matter of convenience, the new Part could include reproductions of the Department-wide list of categorical exclusions²⁰ and the list of extraordinary circumstances applicable to actions by DOI bureaus.²¹ We note that the CEQ guidance document on CATEXs advises, "Agencies should review their existing extraordinary circumstances concurrently with the review of their categorical exclusions."²²

Reviewing Proposed Actions for Extraordinary Circumstances

It might also be useful for the new Part to include, probably as an appendix, a version of the BIA's "Categorical Exclusion Exception Review (CEER) Checklist" that may be completed for a proposed action to document the determination that no extraordinary circumstances apply. In connection with such a checklist, we note that the CEQ has issued a guidance document advising that for many kinds of federal actions that are covered by CATEXs, "there is no practical need for, or benefit from, preparing additional documentation when applying a categorical exclusion to those activities," while also acknowledging that there are cases in which "courts have required documentation to demonstrate that a Federal agency has considered the environmental effects associated with extraordinary circumstances."²³

It would be helpful to have some guidance on how to distinguish between these two kinds of actions. On the one hand, if there is no need to complete a checklist, then time and effort can be devoted to other tasks; on the other hand, the checklist does serve to draw attention to possible impacts that may be of particular concern to Tribal Nations and/or may be subject to laws other than NEPA, such as the Endangered Species Act and National Historic Preservation Act. We also note that the DOI list of extraordinary circumstances includes actions that would "Violate a ... Tribal law or requirement imposed for the protection of the environment" and actions that would "Limit access to and ceremonial use of Indian

¹⁶ 80 Fed. Reg. 8098 (Feb. 13, 2015).

¹⁷ 77 Fed. Reg. 47863.

¹⁸ Electronic Library of Interior Policies, at: <https://elips.doi.gov/elips/browse.aspx?dbid=0>. That edition of 516 DM 10 is identified as having been as issued on 5/27/04, replacing the release dated 3/18/80.

¹⁹ 516 DM § 10.4.

²⁰ 43 C.F.R. § 46.210.

²¹ 43 C.F.R. § 46.215.

²² CEQ, Memorandum for Heads of Federal Departments and Agencies: Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act, at 6 (Nov. 23, 2010).

²³ CEQ, Memorandum for Heads of Federal Departments and Agencies: Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act, at 13 (Nov. 23, 2010) (citing *California v. Norton*, 311 F.3d 1162, 1175-78 (9th Cir. 2002)).

sacred sites on Federal lands by Indian religious practitioners or significantly adversely affect the physical integrity of such sacred sites.”²⁴

Conclusion

Thank you for your consideration of these comments. We look forward to further discussions and consultation regarding NEPA implementation, as well as the Tribally-guided removal of obstacles to the full exercise of sovereignty. Should you have any questions or require further information, please contact Ms. Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at LMalerba@usetinc.org or 202-624-3550.

Sincerely,



Kirk Francis
President



Kitcki A. Carroll
Executive Director

²⁴ 43 C.F.R. § 46.215(i), (j) (emphasis added).