



ENVIRONMENTAL PROTECTION AGENCY

[FRL OP-OFA-117]

Notice of Adoption of a Fish and Wildlife Service Categorical Exclusion Under the National Environmental Policy Act

AGENCY: Environmental Protection Agency.

ACTION: Notice of adoption of categorical exclusion.

SUMMARY: The Environmental Protection Agency (EPA) is adopting a Fish and Wildlife Service's (FWS) categorical exclusion (CE) for restoration activities of wetland, riparian, instream, and native habitats under the National Environmental Policy Act (NEPA) to use in certain EPA water grants and loan programs administered by EPA. This notice describes the categories of proposed actions for which EPA intends to use FWS's CE and describes the consultation between the agencies.

DATES: This action is effective upon publication.

FOR FURTHER INFORMATION CONTACT: Julia Thorp, Community Grants Program, by phone at 202-565-2238, or by email at thorp.julia@epa.gov, or Alaina McCurdy, WIFIA, by phone at 202-565-5795, or by email at mccurdy.alaina@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

NEPA and CEs

The National Environmental Policy Act, as amended at, 42 U.S.C. 4321–4347 (NEPA), requires all Federal agencies to assess the environmental impact of their actions. Congress enacted NEPA in order to encourage productive and enjoyable harmony between humans and the environment, recognizing the profound impact of human activity and the critical importance of restoring and maintaining environmental quality to the overall welfare of humankind. 42 U.S.C. 4321, 4331. NEPA's twin aims are to ensure agencies consider the environmental effects of their

proposed actions in their decision-making processes and inform and involve the public in that process. 42 U.S.C. 4331. NEPA created the Council on Environmental Quality (CEQ), which promulgated NEPA implementing regulations, 40 CFR parts 1500 through 1508 (CEQ regulations).

To comply with NEPA, agencies determine the appropriate level of review - an environmental impact statement (EIS), environmental assessment (EA), or CE. 42 U.S.C. 4336. If a proposed action is likely to have significant environmental effects, the agency must prepare an EIS and document its decision in a record of decision. 42 U.S.C. 4336. If the proposed action is not likely to have significant environmental effects or the effects are unknown, the agency may instead prepare an EA, which involves a more concise analysis and process than an EIS. 42 U.S.C. 4336. Following the EA, the agency may conclude the process with a finding of no significant impact if the analysis shows that the action will have no significant effects. If the analysis in the EA finds that the action is likely to have significant effects, however, then an EIS is required.

Under NEPA and the CEQ regulations, a Federal agency also can establish CEs - categories of actions that the agency has determined normally do not significantly affect the quality of the human environment - in their agency NEPA procedures. 42 U.S.C. 4336(e)(1); 40 CFR 1501.4, 1507.3(e)(2)(ii), 1508.1(d). If an agency determines that a CE covers a proposed action, it then evaluates the proposed action for extraordinary circumstances in which a normally excluded action may have a significant effect. 40 CFR 1501.4(b). If no extraordinary circumstances are present or if further analysis determines that the extraordinary circumstances do not involve the potential for significant environmental effects, the agency may apply the CE to the proposed action without preparing an EA or EIS. 42 U.S.C. 4336(a)(2), 40 CFR 1501.4. If the extraordinary circumstances have the potential to result in significant effects, the agency is required to prepare an EA or EIS.

Section 109 of NEPA, enacted as part of the Fiscal Responsibility Act of 2023, allows a Federal agency to “adopt” and use another agency’s CEs for a category of proposed agency actions. 42 U.S.C. 4336(c). To use another agency’s CEs under section 109, the adopting agency must identify the relevant CEs listed in another agency’s (“establishing agency”) NEPA procedures that cover the adopting agency’s category of proposed actions or related actions; consult with the establishing agency to ensure that the proposed adoption of the CE to a category of actions is appropriate; identify to the public the CE that the adopting agency plans to use for its proposed actions; and document adoption of the CE. *Id.* This notice describes EPA’s adoption of FWS’s CE under section 109 of NEPA to use in EPA’s program and funding opportunities administered by EPA.

EPA’s Programs

EPA intends to use the FWS’s CE for its restoration activities under two programs, the Community Grants Program and the Water Infrastructure Finance and Innovation Act (WIFIA) Program. EPA’s Community Grants Program funds projects for drinking water, wastewater, stormwater infrastructure, and water quality protection projects, which may include restoration projects of wetland, riparian, instream, or native habitats. For the Community Grants Program, Congress appropriates resources for specifically named water infrastructure projects identified as Congressionally Directed Spending and Community Project Funding items in Appropriations Acts.

EPA’s WIFIA Program provides credit assistance (also referred to as direct loans or loan guarantees) for a range of drinking water and wastewater infrastructure projects. Eligible activities include habitat protection and restoration projects, such as shoreline activities, instream activities, water quality improvements, control of invasive vegetative and aquatic species, and fish and wildlife habitat conservation efforts.

Both Community Grants and WIFIA Program activities may involve the construction of new or upgrades to existing small structures or improvements, such as water control structures,

berms, and dikes, for the restoration of wetland, riparian, instream, or native habitats, and may include revegetation actions, such as the planting of native species. These types of restoration activities typically result in no or minor adverse effects on the environment.

II. FWS Categorical Exclusions

EPA is adopting the FWS CE for restoration activities of wetland, riparian, instream, and native habitats. EPA has identified the following FWS CE listed in the Department of the Interior's (DOI) Departmental Manual (516 DM 8.5(B)(3)).

516 DM 8.5(B)(3)

B. Resource Management.

(3) The construction of new, or the addition of, small structures or improvements, including structures and improvements for the restoration of wetland, riparian, instream, or native habitats, which result in no or only minor changes in the use of the affected local area. The following are examples of activities that may be included.

- (a) The installation of fences.
- (b) The construction of small water control structures.
- (c) The planting of seeds or seedlings and other minor revegetation actions.
- (d) The construction of small berms or dikes.
- (e) The development of limited access for routine maintenance and management purposes.

EPA intends to apply this categorical exclusion to restoration projects administered by the EPA Community Grants Program and WIFIA Program. EPA will consider each proposal for restoration activities to ensure that the proposal is within the scope of the CE. In addition, EPA will coordinate with affected Federal agencies, states, Tribal, and local governments prior to carrying out restoration activities, as appropriate.

III. Consultation with FWS and Determination of Appropriateness

EPA consulted with FWS on the appropriateness of EPA's adoption of the CE in November 2023. EPA and FWS's consultation included a review of FWS's experience developing and applying the CE, as well as the types of actions for which EPA plans to utilize the CE. The EPA actions under the Community Grants and WIFIA Programs are very similar to the type of projects for which FWS has applied the CE and therefore the effects of EPA projects will be very similar to the effects of FWS projects, which are not significant, absent extraordinary circumstances. Therefore, EPA has determined that its proposed use of FWS's CE as described in this notice is appropriate.

IV. Consideration of Extraordinary Circumstances

When applying this CE, EPA will evaluate whether the proposed action has the potential to result in significant effects by reviewing both DOI's extraordinary circumstances list found at 43 CFR 46.215 and EPA's list of extraordinary circumstances found at 40 CFR 6.204(b).

V. Notice to the Public and Documentation of Adoption

This notice serves to identify to the public and document EPA's adoption of FWS's CE (516 DM 8.5(B)(3)) for restoration activities. This notice identifies the types of actions to which EPA will apply the CE, as well as the considerations that EPA will use in determining whether an action is within the scope of the CE for restoration activities.

Andrew D. Sawyers,

Director, Office of Wastewater Management.

[FR Doc. 2024-07894 Filed: 4/12/2024 8:45 am; Publication Date: 4/15/2024]