



United States Department of the Interior

BUREAU OF INDIAN AFFAIRS

Washington, D.C. 20240

National Policy Memorandum

Office of Trust Services

Division of Environmental Services and Cultural Resources Management

Number: NPM-TRUS-46 A2

Effective: 5/14/2024

Expires: 5/14/2025

Title: Adoption of Indian Health Service's (IHS) Categorical Exclusion Determination for Sanitation Facilities over Indian Lands – Amendment 2

1. Purpose

The purpose of this memorandum is to extend NPM-TRUS-46 A1: Adoption of Indian Health Service's (IHS) Categorical Exclusion Determination for Sanitation Facilities over Indian Lands – Amendment 1, issued on June 14, 2023, for one additional year. This memorandum documents the Bureau of Indian Affairs' (BIA) policy and procedures for adopting the Indian Health Service's (IHS) categorical exclusion determination under the National Environmental Policy Act (NEPA) for construction of sanitation facilities to serve Indian homes and communities over Indian lands. Sanitation facilities refers to water, wastewater, and solid waste infrastructure for Indian homes and communities. This memorandum also provides a procedure for the compilation and tracking of Decision Files for BIA approvals and other decisions.¹

2. Scope

This policy applies to all BIA program offices, regions, and agencies involved in the NEPA process.

3. Policy and Procedure

It is the BIA's policy to comply with all federal laws and regulations as well as Departmental policies regarding NEPA and records management. BIA will implement the following steps in order to streamline such compliance.

¹ The section concerning Decision Files is a revision of similar guidance from NPM-TRUS-37, the last amendment of which expired on October 2, 2021.

A. Adoption of an IHS Determination that Proposed Sanitation Facilities are Categorically Excluded

As part of delivering health care services to Indian country, IHS administers a program for the construction of domestic sanitation facilities (water, wastewater, and solid waste) for Indian homes and communities (Federal Register Vol. 58 No. 3, Pages 569-572, Jan. 6, 1993). As part of its NEPA procedures, IHS has found that certain categories of proposed actions do not, absent extraordinary circumstances, require preparation of an environmental assessment (EA) or an environmental impact statement (EIS) under NEPA. One of those categories is:

“Actions associated with construction of sanitation facilities to serve Indian homes and communities, except that the following actions are not excluded: (1) Construction of a sanitary landfill at a new solid waste disposal site, and (2) Construction of a new wastewater treatment facility with direct discharge of treated sewage to surface waters.”

When applying this categorical exclusion to a particular proposed action, IHS must determine that the proposed action falls within its established exclusion category and that “there are no extraordinary circumstances related to the proposal that may affect the significance of the environmental effects of the proposal” (see also Department of Health and Human Services (HHS) General Administration Manual (GAM) Part 30 (Environmental Protection), section 30-20-50.A.1).

Under the Council on Environmental Quality (CEQ) regulations implementing NEPA, “[a]n agency may adopt another agency's determination that a categorical exclusion applies to a proposed action if the action covered by the original categorical exclusion determination and the adopting agency’s proposed action are substantially the same. The agency shall document the adoption” (40 CFR § 1506.3(d)²).

Therefore, when a BIA agency or regional office receives an application for a right-of-way (ROW) for IHS sanitation facilities, it should request a copy of the determination prepared by IHS under the HHS GAM provisions above, with background information. The Regional Environmental Scientist/NEPA Coordinator/Regional Environmental Program Manager should then review that information to verify that it meets BIA’s requirements for a categorical exclusion determination, including determining that none of the Department of the Interior’s (DOI) extraordinary circumstances at 43 CFR 46.215 apply, and then prepare a recommendation that it be adopted by BIA.

² This provision of the CEQ regulations does not allow for use of another agency’s categorical exclusion, but rather only adoption of the determination that a particular proposed action falls within a categorical exclusion on a proposed-action-by-proposed-action basis. The use of another agency’s categorical exclusion as part of an agency’s NEPA procedures is provided for in 40 CFR § 1507.3(f)(5), which requires that the recipient agency’s NEPA procedures contain a public process for such use. The DOI’s NEPA regulations at 43 CFR Part 46 do not contain such a process.

Any such recommendation would be in place of a Categorical Exclusion Exception Review (CEER) and would constitute the NEPA review for the ROW underlying that particular sanitation facility. The BIA agency or regional office would still need to comply with the “section 106 review” under 54 U.S.C. § 306108 to assess the effects of the proposed ROW on historic resources, Section 7 of the ESA (50 CFR 402), and Tribal laws and regulations. IHS and BIA will work together through the Section 7 and Section 106 review process to avoid duplicating efforts. The DOI Secretary would also still need to grant the ROW under 25 U.S.C. §§ 323-328 and 25 CFR Part 169.

The Regional Environmental Scientist/NEPA Coordinator/Regional Environmental Program will review IHS’ List of Extraordinary or Exceptional Circumstances and will advise the Regional Director (RD) on whether BIA can adopt IHS’ NEPA Determination. The RD will make the final decision on adopting IHS’s NEPA determination for each proposed action. BIA will work with IHS if further environmental analysis is needed.

B. Decision File Compilation

A Decision File is a collection of documents maintained by a designated employee who is generally the project’s Program Manager, the Project Manager, or staff who has access to the relevant documents that detail the development of the BIA decision. If a decision is appealed, the Decision File is used as the primary basis for the compilation of the administrative record that is prepared for the appeal. The Decision File may also serve as the primary compilation of documents in response to a Freedom of Information Act (FOIA) request or other records request.

Effective immediately, the guidance herein should be followed regarding Decision File compilation and tracking. The Decision File itself should contain the complete story of the BIA decision-making process, including options considered and rejected by the BIA as well as substantive information (including both paper and electronic documents (e.g., letters, emails, reports)) that was presented to, relied on, or reasonably available to the decision-maker.

Additionally:

- The DOI Office of the Solicitor should be consulted throughout the process of making the decision and compiling the Decision File as necessary.
- A Decision File should be created once consideration of a proposal, application, request, or decision begins, which will vary based on the situation.
- The Decision File should serve as a single organized source of information that records the agency decision and decision-making process.
- As a routine matter, the Decision File should capture information from employees who are involved in the decision-making process, prior to those employees leaving such roles.

- The Decision File should be kept in an accessible location and should be organized in a logical manner, such as chronologically or by topic (or even chronologically within each topic) so that documents can be added to the Decision File as they are generated or received.
- To the extent that documents may be subject to a privilege, they should be so marked to the extent practicable during the decision-making process.
- All documents placed in the Decision File should be appropriately labeled and dated.
- Substantive meetings that are relevant to the decision-making process should be sufficiently documented.
- Drafts that help substantiate the BIA's decision-making process should be included in the Decision File.
- Documentation of electronic information (such as that found on websites) should be maintained in the Decision File only if relevant, substantive, and if it documents the decision-making process.
- When information contained on websites is relied on, the Decision File should contain a contemporaneous copy of the website, including the URL and date it was downloaded, to ensure that the information relied on is preserved before the website content changes.
- Memoranda that document relevant oral communication, serve to explain otherwise confusing emails, or that document other matters that demonstrate the agency's decision-making process should be written or collected and placed in the Decision File before the final decision is reached.
- Once the decision-maker has made a final decision, the Decision File should be closed.

C. Decision File Tracking

Decision File tracking must comply with Department and BIA requirements regarding timelines for decision-making. BIA maintains the NEPA Tracker 2 system and participates in the DOI NEPA Environmental Management Information System (EMIS) to track decisions and timelines in coordination with the Office of the Solicitor, the Office of Environmental Policy and Compliance, and the Office of the Chief Information Officer.

4. Roles and Responsibilities

- Director, BIA** is responsible for ensuring that appropriate organizational arrangements, resources, and personnel are available to implement and maintain the environmental and cultural program. The Director serves as the Senior Accountable Official for this program, and has primary responsibility for implementing and executing BIA programs in accordance with statute, regulation, and Departmental policy.

- B. Deputy Bureau Director (DBD), Office of Trust Services (OTS), BIA** is responsible for ensuring that statutory and regulatory timetables for environmental documents are met; ensuring that guidance is available to BIA regional and agency staff tasked with processing environmental and cultural documents; initiating periodic program reviews of regional and agency programs; and assisting in the development and dissemination of trust resource policy to the Regional Directors (RDs).
- C. Associate Deputy Bureau Director, Environmental and Natural Resources Directorate, Office of Trust Services (OTS), BIA** is responsible for providing coordination, management, planning and oversight for the development and protection of trust land and natural resources on Indian forested, agricultural and range lands held in trust by the United States of America or restricted status by Indian Tribes or Indian individuals. The Associate Deputy Bureau Director provides executive level guidance to the Division of Environmental Services and Cultural Resources Management.
- D. Chief, Division of Environmental Services and Cultural Resources Management (DESCRM), OTS** is responsible for overall policy and guidance development within DESCRM and provides oversight of the division and respective branches to ensure compliance with applicable law and guidance.
- E. Chief, Branch of Environmental Services (BES) and the Chief, Branch of Cultural Resources Management (BCRM)** are responsible for ensuring technical assistance and training is provided to BIA regions as needed; conducts program reviews; and manages BIA's federal reporting requirements as they relate to this program.
- F. Regional Environmental Scientist/NEPA Coordinator/Regional Environmental Program Manager** is responsible for providing technical advice to RDs and Agency Superintendents regarding proper compliance with NEPA; reviewing NEPA CEERs, EAs, and EISs for actions occurring within the region, including documents prepared by BIA as well as documents prepared by other agencies for activities occurring on or affecting Indian lands; coordinating the compilation of Decision Files; serving as the region's representatives for cooperating agencies on environmental analysis affecting Indian lands; and ensuring that all required mitigation measures are carried out in accordance with all regulatory requirements and BIA/DOI policies.
- G. BIA Regional Directors** serve as the Senior Accountable Official for the environmental and cultural program in their respective regions, and are responsible for reviewing and acting on any NEPA documents, including CEERs, EAs, and EISs that are not otherwise delegated to the BIA agency level.
- H. BIA Agency Superintendents** manage their respective organization's environmental and cultural program compliance in day-to-day operations, and coordinate reviews of NEPA

documents, CEERs, and EAs with the Regional Environmental Scientist/NEPA Coordinator/Regional Environmental Program Manager, as appropriate.

5. Approval

Darryl LaCounte Digitally signed by Darryl LaCounte
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5/14/24

Darryl LaCounte
Director, Bureau of Indian Affairs

Date