

Implementation Guidance for the DOE Policy on Documentation and Online Posting of Categorical Exclusion Determinations: NEPA Process Transparency and Openness

To further transparency and openness in its implementation of the National Environmental Policy Act (NEPA), the Department of Energy (DOE) has established a policy with regard to the online posting of certain categorical exclusion determinations. Under the policy, each Program and Field Office (including the National Nuclear Security Administration and the Power Marketing Administrations) will document and post online all categorical exclusion (CX) determinations involving classes of actions listed in Appendix B to Subpart D of the Department's NEPA regulations, 10 CFR Part 1021. As directed by Deputy Secretary Daniel B. Poneman in his October 2, 2009, memorandum, "NEPA Process Transparency and Openness," the Office of NEPA Policy and Compliance (NEPA Office), in consultation with the Office of the Assistant General Counsel for Environment, has prepared implementation guidance to facilitate Departmental compliance with the policy. This guidance has been developed based on input from DOE's NEPA Compliance Officers (NCOs), who are responsible under DOE Order 451.1B (NEPA Compliance Program) for making CX determinations, and is presented in question and answer format to reflect questions posed by NCOs about how the policy will be implemented. This guidance may be updated as needed to reflect DOE experience implementing the policy.

WHAT

1. What exactly should be posted: just the "determination" or also any checklist or background information?

Answer: The format and content of the documentation for a CX determination is not prescribed and, appropriately, may vary among Program and Field Offices. NCOs may continue to use their existing formats and procedures for documenting CX determinations. It would be prudent, however, for NCOs to review their procedures to ensure that the documentation of a CX determination provides evidence of their consideration of all necessary factors.

To that end, documentation of CX determinations should include the elements in *Guidance on Categorical Exclusion Determinations*, which contains a "model record" of CX determinations (issued by the Assistant Secretary for Environment, Safety and Health on January 16, 1998, and available online at

http://nepa.energy.gov/nepa_documents/TOOLS/GUIDANCE/Volume2/5-3-cxguidance.htm).

These elements include: a brief description of the proposed action; the number and title of the CX(s) being applied (e.g., "B3.5 Tank car tests"); a statement that the proposed action fits within the specified class(es) of action, including a statement that all of the integral elements for Appendix B CXs (10 CFR 1021.410(b)) are met; a statement that there are no extraordinary circumstances related to the proposed action that may affect the significance of the environmental effects of the proposed action; and a statement that the proposed action is not "connected" to other actions with potentially significant impacts, is not related to other proposed actions with cumulatively significant impacts, and is not precluded by 40 CFR 1506.1 or 10 CFR 1021.211.

Adequate documentation of a CX determination could be one or two pages, such as the “model record,” or may include more information, such as checklists and supporting or background information relied upon in making the determination. Because of the level of interest in American Recovery and Reinvestment Act of 2009 (Recovery Act) projects, clearly identify each CX determination for such projects as under the Recovery Act.

Before posting a CX determination or any supporting information, review the information and ensure that it does not contain classified, trade secrets or commercial or financial information that is privileged or confidential (CBI) or other information that is exempt from disclosure under the Freedom of Information Act (FOIA). (See question 10.)

2. Does the policy require documentation and posting of all CX determinations, or only posting of CX determinations that NCOs, at their discretion, otherwise decided to document?

Answer: All Appendix B CX determinations must be documented and, with the narrow exception set forth in the response to question 10, all Appendix B CX determinations must be posted online.

3. What about Appendix A CXs: if an NCO documents Appendix A CX determinations, should they be posted?

Answer: Documenting and posting Appendix A CX determinations are not required. At their discretion, NCOs may choose to document and post Appendix A CXs, such as for American Recovery and Reinvestment Act of 2009 (Recovery Act) projects, when there are particular circumstances of interest to the public, or for certain classes of actions listed in Appendix A that sometimes are of interest to members of the public. A CX determination that invokes both an Appendix A and an Appendix B CX should be documented and posted online.

4. Does the policy apply retroactively to CX determinations made before the effective date of the policy?

Answer: The policy applies only to CX determinations made after the effective date of the policy (see question 5 below). In view of the extraordinary interest in Recovery Act projects, NCOs may choose to post prior CX determinations for Recovery Act projects, or brief summaries of them; some NCOs may already have prepared such summaries for Recovery Act tracking and reporting purposes.

WHEN

5. What is the effective date of the policy?

Answer: According to the Deputy Secretary’s memorandum, the policy will be fully in place by November 2, 2009. NCOs should notify the NEPA Office of the internet address where their CX determinations can be found as soon as possible, but no later than **October 23, 2009**, so that links to the internet addresses can be provided on the DOE NEPA Website by the effective date of the policy.

6. How soon after an NCO applies a CX must the determination be posted?

Answer: The policy states that CX determinations should be posted within two weeks unless some additional delay is needed to protect classified, CBI, or otherwise exempt information (see question 10 below). While it is recognized that some additional time may be required to conduct appropriate reviews specifically for web posting, it is expected that the vast majority of DOE's CX determinations will not contain exempt information and that most such reviews can be completed quickly so that determinations are posted in a timely fashion. In rare cases, a delay in posting a CX determination may be appropriate because the delay itself may reduce or eliminate issues related to CBI or may allow time to resolve such issues.

WHERE

7. On what website(s) should CX determinations be posted?

Answer: Generally, the CX determinations should be posted on the website of the Program or Field Office at which the determinations are made. In cases where a Field Office does not have and cannot reasonably create a website, the CX determinations should be posted on the cognizant Program Office's website.

Recovery Act projects are a special case because NCOs at multiple DOE Field Offices and Program Offices are making CX determinations in support of one Program Office. NCOs making CX determinations for Recovery Act projects should consult with the lead Program Office (e.g., the Office of Energy Efficiency and Renewable Energy) to determine the best location to post the determinations.

The CX determinations should be easy for the public to find. This may be accomplished in a number of ways, such as by creating a new "NEPA" or "NEPA Categorical Exclusion Determinations" webpage with a link to it from the Program or Field Office's homepage. In cases where the primary website viewed by members of the public is a laboratory website managed by a site's management and operating contractor, it may be appropriate to post CX determinations on the laboratory website and provide a link to that site from the DOE site office website.

Where posting on a Field Office or the cognizant Program Office's website is not feasible, the CX determinations will be posted on the DOE NEPA Website.

8. What will be posted on the DOE NEPA Website?

Answer: The DOE NEPA Website (www.gc.doe.gov/NEPA/) will provide a central location for information about the policy and links to Program and Field Office websites where CX determinations are posted. The DOE NEPA Website will also contain any CX determinations submitted by Field Offices where online posting by the Field Office and cognizant Program Office is not feasible.

HOW

9. What are the procedures for submitting CX determinations for posting on the DOE NEPA Website?

Answer: In those cases where posting on a Program or Field Office website is not feasible, CX determinations should be sent to the NEPA Office by email to: askNEPA@hq.doe.gov. Please add “CX Determination” to the subject line. Documentation generally should be submitted within one week of the CX determination to ensure posting within two weeks as required by the policy.

10. How should classified and confidential information be handled?

Answer: When posting a CX determination, do not disclose or release information that DOE would not disclose or release pursuant to FOIA. This includes, but is not limited to classified information, information protected by the Privacy Act, or confidential business information such as information protected by the Trade Secrets Act or which is otherwise confidential commercial or financial information.¹

The principles embodied in DOE’s NEPA regulations for protecting information are applicable to posting CX determinations. In most cases, it should be possible to avoid including classified or confidential information in a CX determination. However, when such information is present in a CX determination, seek first to redact that information so that the CX determination may be posted. If redaction would cause the document to be essentially meaningless, do not post the determination.

In regard to potentially classified or confidential information, the preparing office should use its existing policies and procedures to review the CX determination prior to posting.

In regard to confidential business information, if a CX determination or the redacted version of a CX determination contains only information that falls within one of the following three categories, and meets the timing requirements set forth below, the determination may be posted:

- a. The CX determination contains only publicly available information, *or*
- b. The CX determination contains only information found within a publicly releasable document such as an abstract provided by the entity submitting the information (Submitter), *or*
- c. The CX determination is: (1) for a project whose solicitation or funding opportunity announcement required the Submitter to mark confidential business information at the time it submitted information and informed the Submitter that unmarked information may be disclosed or released by the Department, and (2) the CX determination only contains information that was not marked as confidential business information.

If a CX determination does not fall within one of the three categories above, or if you are concerned that it may otherwise contain classified or confidential information, seek advice from local counsel on how to proceed. In these instances, please also send an e-mail to

¹ See e.g. 18 U.S.C. §1905 (Trade Secrets Act, establishing penalties for disclosure); 5 U.S.C. §552a (Privacy Act); 10 CFR §1021.340 (DOE NEPA regulations).

askNEPA@hq.doe.gov so that headquarters is aware of issues arising related to confidential business information.

Post a CX determination only after all classified and confidential issues have been resolved. In some cases, this may require waiting until after DOE finalizes an award. If you are unsure, see the guidance above on contacting local counsel.

11. Are reviews by the Office of the General Counsel required before CX determinations are posted?

Answer: No. Although Program and Field Office NCOs may consult legal counsel or the NEPA Office in making CX determinations, no additional consultation or review is required under the new CX posting policy.

12. How long should CX determinations remain online?

Answer: Consistent with electronic records management procedures and policies, CX determinations should remain online as long as the action may be of interest, and for at least three years. If circumstances (e.g., site closure or reorganization) require disestablishment of the host Office's website, please notify the NEPA Office so that the determinations can be posted on the DOE NEPA Website or archived, as appropriate.

FUTURE

The NEPA Office may amend this guidance based on experience in implementing the policy. The NEPA Office continues to explore measures to make the policy more user-friendly.