

Guidance for Adopting Another Agency's Categorical Exclusion (CX) Determination
Office of NEPA Policy and Compliance
Office of the General Counsel

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The following Guidance sets forth procedures for use in adopting another agency's CX determination on a case-by-case basis.

Background

In 2020, the Council on Environmental Quality (CEQ) added a provision to its regulations for an agency to adopt the CX determination of another agency.¹

An 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))

Adopting another agency's CX determination is not addressed in DOE's NEPA implementing procedures.² Still, DOE can rely on the CEQ regulations to adopt another agency's CX determination associated with a particular proposed action if the following steps are followed.

Procedures

1. Find that the CX "determination meets the standards for an adequate . . . determination under the [CEQ] regulations . . ." (40 CFR 1506.3(a))
2. Coordinate with the agency that completed the CX determination for the particular proposed action. This is to ensure that the agency is aware of DOE's intended adoption of its CX determination and has had an opportunity to provide input to DOE on its planned adoption.

¹ This is distinct from a separate provision in CEQ's 2020 regulations (40 CFR 1507.3(f)(5)) that allows an agency to establish procedures to borrow another agency's categorical exclusion. DOE has not established such procedures in its regulations and may not, at this time, use a categorical exclusion listed in another agency's NEPA procedures other than when adopting a CX determination as described herein.

² DOE's NEPA implementing procedures state at 10 CFR 1021.200(d): "During the development and consideration of a DOE proposal, DOE shall review any relevant planning and decisionmaking documents, whether prepared by DOE or another agency, to determine if the proposal or any of its alternatives are considered in a prior NEPA document. If so, DOE shall consider adopting the existing document, or any pertinent part thereof, in accordance with 40 CFR 1506.3." At the time this was written, the CEQ regulations did not include adoption of a CX determination.

3. Prepare documentation of the adoption³ that includes:
 - a. The initial CX determination. If the agency making the CX determination did not document that determination, then DOE would coordinate with the agency to ensure that DOE accurately describes the CX determination in DOE's documentation of the adoption.
 - b. An explanation of how DOE's proposed action is substantially the same as that of the agency preparing the CX determination. "Substantially the same" means that DOE and the other agency are proposing actions related to the same project. For example, one agency has permitting authority and the other agency proposes to provide financial support for the same project. For another example, an agency has requested DOE assistance to work on a site, facility, or land managed by or under the jurisdiction of another agency.
 - c. Confirmation that adoption of the CX determination does not conflict with DOE's NEPA implementing procedures. This would entail consideration of DOE's extraordinary circumstances (10 CFR 1021.410(b)(2)), integral elements (appendix B to subpart D of 10 CFR part 1021), and any relevant categorical exclusions or classes of actions listed in appendices A–D of 10 CFR part 1021. The purpose of adopting another agency's CX determination is not to avoid compliance with any aspect of DOE's procedures.
4. Since the CX adoption effort is new and untested within the Department of Energy, send the draft documentation for review by the Office of the General Counsel (GC). Email the draft documentation to Brian Costner, Director, Office of NEPA Policy and Compliance, at brian.costner@hq.doe.gov. Provided the draft is complete, GC will make every effort to respond within two weeks with any comments or questions.
5. Sign and date the documentation. This is done by an authorized DOE official, typically the pertinent office's NEPA Compliance Officer.
6. Submit the documentation that DOE has adopted the CX determination for posting on the DOE NEPA Website (energy.gov/nepa).

³ Adopting another agency's CX determination associated with a particular proposed action is not the same as DOE making a CX determination. Pursuant to 10 CFR 1021.410(b)(1), DOE can only make a CX determination if the "proposal fits within a class of actions that is listed in appendix A or B to this subpart D."