



United States Department of the Interior
OFFICE OF THE SECRETARY
Washington, DC 20240

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PEP/NRM

ENVIRONMENTAL COMPLIANCE MEMORANDUM NO. ECM 50-1¹

To: Heads of Bureaus and Offices

From: Michaela E. Noble, Director /s/09/12/2018
Office of Environmental Policy and Compliance

Subject: Environmental Review Compliance and Federal Finance Assistance Programs

PURPOSE

This memorandum provides guidance to ensure compliance with the National Environmental Policy Act (NEPA) and related environmental review laws related to financial assistance, including through grants.

GUIDANCE

Any type of financial assistance can be subject to environmental review laws. The bureaus and offices have the responsibility to comply with the NEPA (516 DM 1) and associated environmental laws. This compliance responsibility includes financial assistance under their purview. All discretionary grants, unless otherwise specifically exempted by statute, require compliance with NEPA and other relevant environmental laws. The level of NEPA review, and whether environmental analysis is needed, depends on the activity that the grant will fund.

Following are the three possible types of grants, discretionary, non-discretionary, and routine, and their disposition under NEPA:

1. Discretionary grants are those where a bureau/office exercises control over the funding and what it funds. The Department's NEPA regulation defines a "proposed action" subject to NEPA at 43 CFR 46.30:

Proposed action. This term refers to the bureau activity under consideration. It includes the bureau's exercise of discretion over a

¹ The guidance in this Environmental Compliance Memorandum (ECM) is being issued under the authority provided to the Office of Environmental Policy and Compliance (OEPC) by 381 Departmental Manual (DM) 4.5B, to convey instructions and guidance through its Environmental Memoranda Series, and by 516 DM 3.2, which authorizes OEPC to provide advice and assistance to the Department on matters pertaining to environmental quality and for overseeing and coordinating the Department's compliance with the National Environmental Policy Act (NEPA), the Council on Environmental Quality (CEQ) regulations, and 516 DM 1.21, which authorizes OEPC to provide further guidance concerning NEPA.

non-Federal entity's planned activity that falls under a Federal agency's authority to issue permits, licenses, grants, rights-of-way, or other common Federal approvals, funding, or regulatory instruments.

Even though the level of control may vary according to appropriations law and program authorities, when a bureau/office has a role in determining the level of funding or what the funds are used for, such as through conditions for funding and/or selection among alternative funding proposals, the bureau/office is considered to have some level of control over the use of that funding and thus it is discretionary. All discretionary grants are subject to environmental review laws unless expressly exempted through a superseding law. Exemption from environmental review compliance is atypical and should be confirmed by the Office of the Solicitor (SOL).

Under NEPA, if a proposed grant is discretionary, does not meet any Departmental (43 CFR 46.210) or bureau categorical exclusion (516 DM 6-15) for the proposed action to be funded, and is not otherwise exempt from NEPA by statute, the bureau/office must prepare an environmental assessment or environmental impact statement (43 CFR Part 46). It is recommended that a bureau/office consult with their NEPA program staff in determining NEPA compliance requirements. For reoccurring grants for similar actions where environmental assessments are frequently done and conclude with a NEPA Finding of No Significant Impact determination, consider exploring with your NEPA program staff whether establishing a new categorical exclusion is preferable.

2. Non-discretionary grants are those that meet the regulatory description at 43 CFR 46.100(a):

A bureau proposed action is subject to the procedural requirements of NEPA if it would cause effects on the human environment (40 CFR 1508.14), and is subject to bureau control and responsibility (40 CFR 1508.18). The determination of whether a proposed action is subject to the procedural requirements of NEPA depends on the extent to which bureaus exercise control and responsibility over the proposed action and whether Federal funding or approval are necessary to implement it. If Federal funding is provided with no Federal agency control as to the expenditure of such funds by the recipient, NEPA compliance is not necessary. The proposed action is not subject to the procedural requirements of NEPA if it is exempt from the requirements of section 102(2) of NEPA.

Any determination that a grant is non-discretionary should be confirmed by the Environmental Policy and Compliance (OEPC) and SOL.

3. Some financial assistance actions that are routine qualify for a categorical exclusion under Departmental NEPA regulations at 43 CFR 46.210(c):

Routine financial transactions including such things as salaries and expenses, procurement contracts (e.g., in accordance with applicable procedures and Executive Orders for sustainable or green procurement), guarantees, financial assistance, income transfers, audits, fees, bonds, and royalties.

In addition to this categorical exclusion, there are a number of other categorical exclusions in Departmental and bureau/office specific NEPA procedures that might apply to a grant. Lists of these categorical exclusions are found at 43 CFR 46.210 and Departmental Chapters (DM) at 516 DM 6-15.

The bureaus have the responsibility to ensure environmental compliance for grants under their purview and to meet all appropriate requirements. To assist in reviewing current grant programs and NEPA compliance, the [US Government Learning Center Assistance Listings website](https://beta.sam.gov/help/assistance-listing) at <https://beta.sam.gov/help/assistance-listing> provides a list of Departmental grant assistance programs, as well as a full listing of all Federal programs, available to entities who qualify for Federal assistance programs. (NOTE: This website was formerly called Catalog of Federal Domestic Assistance at CFDA.gov). The bureaus should identify compliance protocols that they will use to document compliance with environmental review requirements for each grant program.

This compliance can be achieved with bureau/office resources or through grant resources and may require a monitoring component and/or documentation of the compliance. It is recommended that documentation associated with the grant making process reflect the consideration of this environmental review. For example, under cooperative agreements, grants, or contracts, responsibilities often include “ensuring that grantees meet their environmental compliance responsibilities.” In turn, any sub-contracts similarly require that they ensure “that all project activities comply with NEPA, Endangered Species Act, National Historic Preservation Act, Federal, State, and local laws and ordinances [etc.]...” Although contractors or grant recipients can assist in the compliance process, NEPA compliance is a Federal responsibility and rests with the bureau/office. The NEPA completion is required prior to any non-recoverable use of resources or construction activity and the cooperative agreement, grant, or contract language should include an explicit prohibition on construction prior to the bureau/office having met its NEPA requirements.

See attachment for proposed sample language to include in Grant Agreements.

GENERAL

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Additionally, nothing in this guidance is intended to affect the authority and responsibility of the United States Department of Justice with respect to the conduct of litigation on behalf of the United States.

This memorandum is new.

Attachment

Proposed Grant Agreement language:

The grantee may not draw down funds or incur expenses under this Grant Agreement unless and until the National Environmental Policy Act (NEPA) process has been completed, and approved by [AGENCY] with a determination of whether further review, documentation, and/or mitigation measures are required; and the Grantee has satisfied any requirements contained in [AGENCY's] determination. Once these conditions have been successfully completed, [AGENCY] will then notify the Grantee that the review is complete. At that time, the distribution and expenditure of Grant funds will be authorized.

[AGENCY] reserves the right to de-obligate funds obligated under this Grant Agreement (or to require the return of such funds) in the event a Grantee breaches or otherwise fails to perform under any of the Grant requirements.