

1 Introduction

1.1 Purpose

To ensure National Indian Gaming Commission (NIGC) compliance with the requirements set forth in the Council on Environmental Quality (CEQ) regulations for implementing the provisions of the National Environmental Policy Act of 1969, as amended, (NEPA), 42 U.S.C. §§ 4321-4347, 40 Code of Federal Regulations (C.F.R.) parts 1500-1508 and other related statutes and directives, consistent with the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701 – 2721, and to assign responsibilities within the NIGC for the preparation, review, and approval of environmental documents prepared under NEPA.

1.2 Definitions

- 1.2.1** Unless otherwise specified, the terminology used in the CEQ regulations (*See* 40 C.F.R. part 1508) is applicable.
- 1.2.2 Environmental Impact Statement (EIS):** An environmental document prepared according to the requirements of CEQ regulations for a major federal action that will have a significant effect on the quality of the human environment.
- 1.2.3 Environmental Assessment (EA):** A concise document prepared according to the requirements of CEQ regulations that briefly provides sufficient evidence and analysis for determining whether to prepare an EIS. An EA aids compliance with NEPA when no EIS is necessary and facilitates preparation of an EIS when one is necessary.
- 1.2.4 Categorical Exclusion (CATEX):** A published category of actions that do not individually or cumulatively have a significant impact on the human environment under normal circumstances, and, therefore, do not require either an environmental assessment or an environmental impact statement.
- 1.2.5 Record of Decision (ROD):** An environmental document signed by the Chair of the NIGC. A ROD sets out a concise summary of the final decision and selected measures for mitigation (if any) of adverse environmental impacts of the alternative chosen from those considered in an EIS.
- 1.2.6 Finding of No Significant Impact (FONSI):** A document that sets out the reasons why an action not otherwise categorically excluded will not have a significant impact on the human environment, and for which an EIS will not therefore be prepared. A FONSI will include the EA or a summary of it and shall note any other environmental documents related to it. A FONSI may be one result of review of an EA.

1.2.7 Controversial: Meaning a substantial dispute exists as to the environmental consequences of the proposed action and does not refer to the mere existence of opposition to a proposed action.

1.3 Policy

1.3.1 It is NIGC policy to: comply with the procedures and policies of NEPA and other related environmental laws, regulations, and orders applicable to NIGC actions;

1.3.2 Interpret and administer, to the fullest extent possible, the policies, regulations, and public laws of the United States administered by the NIGC, including IGRA, in accordance with sections 101 and 102 of NEPA;

1.3.3 Initiate the NEPA processes at the earliest possible time to be an effective decision-making tool, while cooperating and consulting with other federal, tribal, state and local organizations/departments/agencies when necessary;

1.3.4 Employ a systematic and interdisciplinary approach to NEPA compliance and documentation prior to taking a major federal action, including the development and assessment of reasonable alternatives to proposed actions that will avoid or minimize adverse effects upon the quality of the human environment while also achieving the purpose of the proposed action;

1.3.5 Ensure that compliance with NEPA includes public involvement during appropriate stages of the NEPA process. This includes public notice of NEPA related hearings, as well as soliciting appropriate information through comments; and

1.3.6 Identify actions that require no analysis or documentation under NEPA or its implementing regulations.

1.4 Responsibilities

1.4.1 NIGC Chair: The Chair shall approve and sign all NEPA decision documents. The Chair will also designate the responsible NIGC official for NEPA compliance

1.4.2 NIGC Office of General Counsel (OGC): The OGC shall be consulted on legal matters that arise during the preparation of any NEPA compliance document.

1.5 Applicability

The provisions of this manual and CEQ regulations apply to major federal actions by the NIGC that may affect the quality of the human environment. These actions may be directly undertaken by the NIGC or where the NIGC has sufficient control and responsibility to condition approvals of a non-federal entity. The procedures in this manual shall apply to the fullest extent practicable to ongoing activities and environmental documents begun before the effective date, except that this manual

does not apply to decisions made and draft or final environmental documents issued prior to the effective date of this manual.

2 Levels of NEPA review

2.1 There are three (3) levels of NEPA review. The level of NEPA review will be dependent on the type and potential impacts of the action being taken.

2.1.1 An action that “normally requires an environmental impact statement [EIS]” (40 C.F.R. §1501.4(a)(1)).

2.1.1.1 An EIS is required when an EA has been done for a proposed action and the impacts of that action will exceed the applicable threshold of significance for any resource category and those impacts cannot be mitigated to a level below the threshold of significance. The threshold of significance for any resource category must be clearly identified within the EA. If the NIGC anticipates that significant impacts will result from a proposed action, it can elect to prepare an EIS without first developing an EA. The NIGC may issue its Record of Decision (ROD) 30 days following the EA’s publication in the *Federal Register* of the notice of availability of the Final EIS. The ROD represents the agency’s official decision on the proposed action. The ROD must include all appropriate mitigation measures, as discussed in the Final EIS.

2.1.2 An action that is subject to NEPA but does not qualify for a CATEX or warrant the preparation of an EIS requires the preparation of an EA.

2.1.2.1 An EA is not required if the NIGC has elected to prepare an EIS on the proposed action. An EA is appropriate when the NIGC believes that impacts of the proposed action will not result in impacts that meet or exceed the threshold of significance for any impacted resource category. When an EA is prepared and it is determined that the proposed action’s impacts will not exceed the threshold of significance, the responsible NIGC official will prepare a FONSI to be issued by the NIGC Chairman. The FONSI is the official NIGC determination that the proposed action will not result in any significant impacts to the human environment. It does not represent the agency’s decision to implement or approve the proposed action.

2.1.2.2 For the purpose of avoiding delay and conserving tribal resources, the NIGC may adopt, in whole or in part, a draft or final EA or the EA portion of an EA/FONSI prepared for another federal, tribal, state or local agency/organization.

2.1.3 An action that “normally does not require either an environmental impact statement or an environmental assessment is categorically excluded” (40 C.F.R. §1501.4(a)(2)).

2.1.3.1 A CATEX identifies a group of actions that typically will not have a significant individual or cumulative impact on the human environment. Unless the

proposed action involves an extraordinary circumstance, an EIS or EA is not required.

3 Activities Not Subject to NEPA

3.1 There are some NIGC activities that for NEPA purposes do not meet the traditional meaning of “Federal actions” and therefore are not subject to NEPA review.

3.2 *Advisory Actions:* When the NIGC takes an action that is advisory in nature, the requirement to comply with NEPA does not apply. As a result, a CATEX, EA or EIS is not required. However, if the NIGC knows or anticipates that a subsequent federal action that is subject to NEPA might occur, it must point that fact out in the advisory action. The following are typical actions taken by the NIGC that are advisory in nature:

3.2.1 NIGC’s Office of General Counsel issuance of Indian Lands opinions;

3.2.2 NIGC’s Office of General Counsel issuance of game classification opinions;

3.2.3 NIGC’s Office of General Counsel issuance of advisory opinions regarding whether a contract is a management contract requiring the NIGC Chairman’s approval or violates IGRA’s sole proprietary interest requirement.

3.3 *Enforcement Actions:* The following NIGC actions are administrative enforcement actions that are not considered to be “Federal actions” and are not subject to review under NEPA (40 C.F.R. §1508.18(a)). As a result, a CATEX, EA or EIS is not required for the following actions:

3.3.1 Issuance of orders of temporary closure of gaming activities as provided in §2713(b) of IGRA;

3.3.2 Levying and collecting civil fines as provided in §2713(a) of IGRA;

3.3.3 Making permanent a temporary order of the NIGC Chairman closing a gaming activity as provided in §2713(b)(2) of IGRA;

3.3.4 Issuance of subpoenas pursuant to an enforcement action as authorized in §2715 of IGRA;

3.3.5 Holding such hearings, sit and act at such times and places, take such testimony, receive such evidence, and render such decisions as the Commission deems appropriate, when done pursuant to an enforcement action, as authorized in §2706(b)(8) of IGRA;

3.3.6 Administering oaths or affirmations to witnesses appearing before the Commission, when done pursuant to an enforcement action, as authorized in §2706(b)(9) of IGRA;

3.3.7 Issuance of warning letters, notices of violation, civil fine assessments, closure orders, or any other action consistent with the Commission’s authority to enforce IGRA, the NIGCs regulations, and approved tribal gaming ordinances.

3.4 *Emergency Actions:* In the event of an emergency situation, the NIGC may be required to take an action to prevent or reduce the risk to the environment, public health, or safety that may impact the human environment without evaluating those impacts under NEPA.

Upon learning of the emergency situation, the NIGC will immediately inform CEQ of the emergency situation when the proposed NIGC action is expected to result in significant impacts on the human environment. In some cases, the emergency action may be covered by an existing NEPA analysis or an exemption. In other cases, it may not be covered. In these cases, NIGC (in consultation with CEQ) will obtain guidance on NEPA compliance. NIGC will provide continued follow-up consultation with CEQ throughout the duration of the emergency situation. The provisions of this section do not apply to actions taken after the emergency situation has been resolved or those related to recovery operations. In cases where the NIGC proposed action is not expected to result in significant impacts on the human environment, NIGC shall ensure the appropriate NEPA documentation (CATEX or EA) is prepared following the actions required to control the emergency and before any follow-up actions are taken.

3.5 *Statutory Conflict:* In some cases, the NIGC's statutory requirements are inconsistent with NEPA. The following NIGC action(s) have been determined to fit into this category:

3.5.1 Approval of tribal gaming ordinances or resolutions as provided in § 2710 of the IGRA, which must be completed within ninety (90) days of submission to the NIGC

4 Categorical Exclusions and Extraordinary Circumstances

4.1 Categorical Exclusion Screening

The use of a CATEX can only be applied to an action if all of the following criteria are met:

4.1.1 The responsible NIGC official must determine that the NIGC action is encompassed by a listed CATEX.

4.1.2 The responsible NIGC official must determine that the action has not been segmented in order for the NIGC action to meet the definition of an action that can qualify for a CATEX. Segmentation occurs when an action is broken into smaller parts in an effort to avoid properly documenting impacts associated with the complete action. Segmentation also occurs when the NIGC action is too narrowly defined and the potential impacts are minimized in order to avoid a higher level of NEPA documentation. Connected and cumulative actions must be considered (*See* 40 C.F.R. §1508.25).

4.1.3 The responsible NIGC official must determine if the NIGC action will involve any of the extraordinary circumstances that would prevent the use of a CATEX.

4.2 Categorical Exclusions

The NIGC, based on past experience with similar actions, has determined that the following types of actions are categorically excluded and do not require the preparation of an EA or EIS because they will not individually or cumulatively result in a significant impact on the human environment. These types of federal actions meet the criteria established in 40 C.F.R. §1508.4.

4.2.1 CATEGORY 1 - Administrative and Routine Office Activities:

- A. Normal personnel, fiscal, and administrative activities involving personnel (recruiting, hiring, detailing, processing, paying, supervising and records keeping).
- B. Preparation of administrative or personnel-related studies, reports, or investigations.
- C. Routine procurement of goods and services to support operations and existing infrastructure, including routine utility services and contracts, conducted in accordance with applicable procurement regulations, executive orders, and policies (e.g. Executive Order 13101).
- D. Normal administrative office functions (record keeping; inspecting, examining, and auditing papers, books, and records; processing correspondence; developing and approving budgets; setting fee payments; responding to request for information).
- E. Routine activities and operations conducted on or in an existing structure that are within the scope and compatibility of the present functional use of the building, will not result in a substantial increase in waste discharge to the environment, will not result in substantially different waste discharges from current or previous activities, and will not result in emissions that exceed established permit limits, if any. In these cases, a Record of Environmental Consideration (REC), documentation is required.
- F. NIGC training in classrooms, meeting rooms, gaming facilities, or via the internet.

4.2.2 CATEGORY 2 - Regulation, Monitoring and Oversight of Indian Gaming Activities:

- A. Promulgation or publication of regulations, procedures, manuals, and guidance documents necessary for NIGC's oversight of Indian Gaming Facilities and intra-agency operations at existing facilities.
- B. Support of compliance and enforcement functions by conducting compliance training for tribal gaming regulators and managers in classrooms, meeting rooms, gaming facilities, or via the internet.
- C. Preparing and issuing subpoenas, holding hearings, and taking depositions for informational gathering purposes, not associated with administrative enforcement actions.

4.2.3 CATEGORY 3- Management Contract and Agreement Review Activities:

- A. Approval of management contracts and collateral agreements (e.g. development, construction, or financial agreements) or management contract amendments.
- B. Conducting background investigations in connection with a management contract amendment that only changes the persons or entities with a financial interest in or management responsibilities for the contract.

4.3 Extraordinary Circumstances

Some types of actions that would normally be categorically excluded may not qualify for a CATEX because an extraordinary circumstance exists (*See* 40 C.F.R. §1508.4). The responsible NIGC official must evaluate each proposed action and use best professional judgment to determine if it meets the CATEX requirements described above and does not have any extraordinary circumstances. If the proposed action has one or more of the following conditions, extraordinary circumstances exist and the action cannot be categorically excluded:

- 4.3.1** There is a reasonable likelihood the proposed action/project will have a significant impact on public health or safety.
- 4.3.2** There is a reasonable likelihood the proposed action/project would involve effects on the environment that involve risks that are highly uncertain, unique, or are scientifically controversial.
- 4.3.3** There is a reasonable likelihood the proposed action/project would violate one or more federal, tribal, state, or local environmental laws/regulations/orders.
- 4.3.4** There is a potential that the proposed action/project will have an adverse effect on a property or structure eligible for listing or listed on the National Register of Historical Places, including degradation of scientific, cultural, or historical resources protected by the National Historic Preservation Act of 1966, as amended, requiring consultation.
- 4.3.5** There is a potential that the proposed action/project will have a significant impact on natural, ecological, or scenic resources of federal, tribal, state and/or local significance. These resources include federal or state listed endangered, threatened, or candidate species or designated or proposed critical habitat under the Endangered Species Act (ESA); resources protected by Coastal Zone Management Act (CZMA); resources protected by the Fish and Wildlife Coordination Act; prime, unique, tribal, state or locally important farmlands; and federal or state listed wild or scenic rivers, requiring consultation.
- 4.3.6** There is a reasonable likelihood the proposed action/project will have effects that are highly controversial on environmental grounds.

4.4 Categorical Exclusion Documentation

- 4.4.1** The purpose of categorical exclusions is to reduce paperwork and delay. The NIGC is not required to repeatedly document actions that qualify for a categorical exclusion and do not involve an extraordinary circumstance (*See* 40 C.F.R. §1500.4(p)).
- 4.4.2** The NIGC will document its decision to treat a particular action as categorically excluded from further NEPA review, when the CATEX applied specifically requires the preparation of a REC. In those cases, a REC will include:
 - 4.4.2.1** A complete description of the proposed action/project;
 - 4.4.2.2** The CATEX relied upon, including a brief discussion of why there are no extraordinary circumstances;
 - 4.4.2.3** Supplemental documentation that supports the conclusions in the narrative. Examples include exhibit(s) showing boundaries of historical or archeological site(s) previously identified near the proposed project, documentation from the U.S. Fish and Wildlife Service noting that no endangered species or habitat is

present near the proposed project, evidence that the proposed project site is located outside any non- attainment area(s), etc. In some cases, a “no effect” determination from the State Historic Preservation Office or Tribal Historic Preservation Office may be required;

4.4.2.4 The following statement: *I certify that, to the best of my knowledge, the information provided is the best available information and is accurate;*

4.4.2.5 A signature from an environmental professional with a signature block that includes the professional’s credentials.

5 Additional Considerations

5.1 Public Participation

The NIGC recognizes the importance of public participation in preparing environmental assessments. In recognition, the agency will provide public notice of NEPA related hearings, public meetings, and the availability of environmental documents to affected and interested parties. Affected and interested parties can obtain NEPA related information by contacting the NIGC Director of Public Affairs.

5.2 Scoping

Scoping, if appropriate, shall occur as set forth in 40 C.F.R. §1501.7.

5.3 Delegation

At its discretion, the NIGC may delegate preparation of any NEPA related documents to an outside agency or firm. Such agency or firm shall prepare any necessary documents as set forth in CEQ regulations.