"THE LEGAL BRIEF"

Advice to the Guardians of the Great Lakes

Ninth District Legal Office
1240 East Ninth Street
Cleveland, Ohio 44199-2060
Phone: (216) 902-6010
Fax: (216) 902-6055

September 2011: A Reminder About NEPA in Rulemaking and Permitting

References: (a) National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4347
(b) *U.S. v. Coalition for Buzzard's Bay*, 2011 WL 1843818 (1st Cir. May 17, 2011)
(c) National Environmental Policy Act, COMDTINST M16475.1D

The National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4347, requires that the United States Coast Guard consider the environmental implications of proposed actions, such as rulemaking and marine event permitting, and determine the appropriate level of environmental documentation for the actions, i.e., Environmental Impact Statement (EIS) or an Environmental Assessment (EA). Reference (c) sets forth the procedures for implementing NEPA and the appropriate procedures to follow for considering environmental impacts of a particular activity. As a matter of procedure, the Coast Guard must first determine if a proposed action requires an EIS or an EA or whether the proposed action is exempted from these requirements through a Categorical Exclusion. Categorical exclusions refer to a category of actions which do not individually or cumulatively have a significant effect on human environment and for which, therefore, neither an EA nor an EIS is required.[1] However, it is important to note that some actions that normally would be categorically excluded could require additional environmental review and, for this reason, responsible personnel should be alert for circumstances that dictate the need to prepare an EA or EIS. If an activity is determined to be categorically excluded, the appropriate documentation must still be completed and signed by the appropriate individuals.

A recent case highlights the pitfalls of not following this process: In 2007, the Coast Guard issued a regulation to establish manning and escort requirements for Buzzard's Bay, MA. This was done, however, without preparing an EIS or EA on the basis that the action fell within a categorical exclusion that obviated any such analysis. The regulation was challenged in federal court. On 17 May 2011, the United States Court of Appeals for the First Circuit held that during the rule making process the Coast Guard failed to comply with its obligations under NEPA. The Court explained that because circumstances existed justifying further environmental review, the Coast Guard's reliance on a categorical exclusion without this review was inappropriate. In short, by failing to comply with NEPA you risk having a court order you to start the process all over again.

This newsletter is to remind units that when taking any regulatory or permitting action they must consider not only the categorical exclusions but also the exceptions to these exclusions that may dictate the need for further environmental review. Reference (c) provides a list of categorical exclusions (figure 2-1) and a checklist for determining the applicability of exceptions. If a proposed action appears to fall into a categorical exclusion, enclosure (2) should be completed to determine if further environmental review is warranted. Following these steps helps ensure compliance with the Coast Guard's obligations under NEPA.

Should you have any questions, please contact D9 Legal at 216-902-6010. To reach the Duty Attorney after normal working hours, contact the D9 Command Center at 216-902-6117.