Concentrated Animal Feeding Operations/National Environmental Policy Act: Federal Court Addresses Challenge to Farm Service Agency Categorical Exclusion for Loans

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04/06/2023

A United States District Court (District of Columbia) ("Court") in a March 4th Opinion addressed the Farm Service Agency's ("FSA") compliance with the National Environmental Policy Act ("NEPA"). See *Dakota Rural Action, et al. v. United States Department of Agriculture, et al.*, 2023 WL 2770390.

The issue involved whether an FSA rule applying a NEPA categorical exemption ("CE") to loans made to concentrated animal feeding operations ("CAFOs") in approving loans was inappropriate.

NEPA requires federal agencies to include environmental values and issues in their decision-making processes. This federal mandate is accomplished by agency consideration of environmental impacts of proposed actions and reasonable alternatives to those actions. The statute requires federal agencies in certain instances to prepare a detailed Environmental Impact Statement ("EIS"). However, the requirement to produce this document is only triggered in the event of a "major federal action" that will "significantly affect the environment." In other words, an EIS is only required to be produced if:

1. there is a federal action
2. that will significantly affect the environment

As opposed to an EIS, which is a much more detailed document, an Environmental Assessment ("EA") provides sufficient evidence and analysis for determining whether a finding of no significant impact for an EIS should be prepared. Neither an EA nor an EIS need be prepared if a particular federal action falls within the scope of a NEPA categorical exclusion. Categorical exclusions are promulgated by the federal agencies and are described actions which have been determined to not involve significant environmental impacts.

Regulations implementing NEPA define a categorical exclusion as "a category of actions which do not individually or cumulatively have a significant effect on the human environment. . . and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. See 40 CFR § 1508.4.

NEPA differs from action enforcing environmental statutory programs such as the Clean Air Act or Clean Water Act. It does not impose substantive mandates. Instead, it is limited to requiring federal agencies to

meet procedural requirements such as preparation of an EA or EIS in certain instances. As a result, NEPA does not require a certain alternative or meet a particular standard. Nevertheless, the failure to comply with procedural mandates can result in an activity or project being enjoined.

FSA is a component of the United States Department of Agriculture. It extends loans to family farmers. Because such lending activity is a federal action, it is subject to NEPA.

FSA promulgated a rule in 2016 that provided a categorical exemption for loans to medium-sized CAFOs. See 7 C.F.R. §§ 799.41(a)(9)(10).

Prior to promulgating this rule, FSA had conducted some degree of environmental review before providing financial assistance for most medium CAFOs. It subsequently proposed a rule in which it would use an environmental screening worksheet ("ESW") to determine whether a particular loan to a medium CAFO should require a NEPA environmental assessment. This proposed rule is stated to have not provided notice that FSA would forego an ESW for loan actions to medium sized CAFOs. It also did not provide notice that there would be a categorical exemption for such actions from NEPA review.

The Court states that FSA received one comment in the Federal Register that argued:

. . . As proposed the provisions for medium CAFOs would be an onerous impediment to obtaining financing for operations that will often include young or beginning farmers.

The Court states that FSA therefore apparently believed that the commentor viewed ESW reviews as overly onerous. However, FSA apparently stated that the ESW review would be required for small and medium CAFOs. Nevertheless, FSA in its final rule reversed position and categorically exempted loans to medium CAFOs.

Plaintiff Dakota Rural Action ("DRA") challenged the rule arguing that it was arbitrary and/or capricious and should be vacated pending remand.

The Court in reviewing the administrative record stated that it had:

. . . been unable to locate FSA's reasoning for this change or the sources of data upon which FSA relied. In August 2013, it appears that FSA discussed certain new categorical exemptions, although these proposed categorical exemptions predated the August 2016 exemption for loans to mediums CAFOs.

Rejected was FSA's argument that it relied on its experience implementing similar actions or the experience of other agencies. It also discounted public comments received in 2014 arguing there should be a categorical exemption for such loans because they predated this rulemaking.

The Court held that the rule promulgating this categorical exemption had two deficiencies:

- FSA provided no notice that it would categorically exempt all loan actions to medium CAFOs from NEPA review and, therefore, provided the public no opportunity to comment on the change
- The record provided essentially no reasoning for the change

The Court noted that to create a categorical exemption the federal agency must first determine through notice and comment rulemaking that the excluded action does not individually or cumulatively have a significant effect on the human environment. Further, opportunity for public comment and submission of the categorical exemption for approval to the Council of Environmental Quality must be undertaken.

FSA agreed that it did not make a finding as to environmental impact. Therefore, it conceded the error. Rejected was its claim that it relied on substantial data as the Court disagreed that such information could be found in the administrative record.

The Court therefore vacated the final rule.

A copy of the Opinion can be downloaded here.