

UNITED STATES DEPARTMENT OF AGRICULTURE

Farm Service Agency  
Washington, DC 20250

<b>Environmental Quality Programs 1-EQ (Revision 3)</b>	<b>Amendment 3</b>
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Approved by: Administrator



**Amendment Transmittal**

**A Background**

In accordance with the May 8, 2023, Amended Order in *Dakota Rural Action v. USDA* (ECF No. 57, 18-cv-02852), certain loan actions involving medium Concentrated Animal Feeding Operations (CAFO's) cannot be CatExed.

**B Reasons for Amendment**

Subparagraph 3 C has been amended to include medium CAFO's in the 24 months or longer limitation placed on refinancing or terming out.

Subparagraph 33 C has been amended to eliminate guidance providing for use of supported categorical exclusions for the construction or expansion of a medium CAFO or the refinancing of a newly constructed medium CAFO.

Exhibit 17 has been amended according to the following:

- Supported CatEx (S) 7 b) to remove applicability to medium CAFO's
- Supported With Ground Disturbance CatEx (SG) 10 a) to remove applicability to medium and small CAFO's
- the table for "Possible Example CatExs for CAFOs" to remove applicability to medium and small CAFO's.

Page Control Chart		
TC	Text	Exhibit
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### 3 Basic Requirements (Continued)

#### C Level of NEPA Review and Segmentation (Continued)

**[40 CFR 1508.27 (b) (7) ....Significance cannot be avoided by terming an action temporary or breaking it down into small component parts.**

NEPA specifies actions cannot be evaluated in isolation and requires “connected actions” be evaluated simultaneously as “but for” one action, another would not be possible or required; therefore the entire proposed project and related action(s) must be evaluated. Potential applicants and lenders contemplating FSA assistance must come to FSA early in the initial project planning processes to be able to comply with NEPA. Care must be exercised, especially when refinancing is involved, to ensure “creative planning” or other devices which may give the appearance of an attempt to circumvent NEPA compliance were not employed. While refinancing of existing debt does not typically create the potential for adverse impacts; due to specific NEPA constraints against segmentation of a project/action, it is necessary to consider the timeline when refinancing or “terming out” construction related debt.

Once the construction phase of a connected project/action has started, it becomes segmented as it is not possible for a Federal agency to complete the requisite level of environmental review and consultations after-the fact, and the request must be denied. FSA officials must follow the guidance in 1-APP when notifying an applicant of denial.

- If there has been new ground disturbance/construction and the facility has been in operation less than 12 months, then any related refinancing request is deemed to be part of the same/original construction project.
- \*--Being highly controversial, large and medium CAFOs are further limited and may not--\* be refinanced or “termed out” unless/until the facility has been in operation for 24 months or longer.

### 3 Basic Requirements (Continued)

#### C Level of NEPA Review and Segmentation (Continued)

**[7 CFR 799.2 (a) (5) ... if an FSA action represents one of several phases of a larger proposal, the entire proposal is the subject of an environmental review independent of the phases of funding. If the FSA action is one segment of a larger action funded by private parties or other governmental agencies, the entire action will be used in determining the appropriate level of FSA environmental review.**

Attempts to segment or avoid the need for an appropriate level of environmental review may include but are not limited to proposals that may involve refinancing, phased construction, subordinations, releases without compensation, creative or ambiguous transactions which are not clearly commercial arm's length, or related to additional credit, joint financing, or shared facilities. Common examples of proposals we cannot approve include but are not limited to the following:

Applicant A is anxious to start construction of a new milking barn. His lender agrees to provide construction funds without waiting for completion of FSA environmental reviews needed for a guaranteed loan and indicates an FSA guarantee can be obtained later by refinancing the "existing" operation after construction is complete. Such an action constitutes an inappropriate device to avoid NEPA compliance.

Applicant B obtains financing from lender to build a large CAFO without an EA and creates a new operating entity which applies for FSA loan assistance to finance the transfer/purchase of the "existing" operation to the entity, and additional funds to renovate an existing dwelling on the farm so applicant can live on the farm now that livestock is present. Such an action gives the appearance of being an inappropriate device to avoid NEPA compliance and creates questions regarding the "test for credit."

## 32 Levels of Environmental Review

### A Pathways for Environmental Reviews

Environmental reviews are divided into three pathways depending on the potential environmental concerns of the proposed action:

- CatEx
  - **Listed** CatEx, as enumerated in Exhibit 17, based on specific exclusion and recorded on FSA-850 (Exhibit 18)
  - **Supported** CatEx, as enumerated in Exhibit 17, based on completion of FSA-850 (Exhibit 18) review and attachment of supporting documentation, when appropriate
- EA (Exhibit 21) and FONSI (Exhibit 23)
- EIS and ROD

## 33 CatEx's

### A Background

As 7 CFR 799.30 sets forth, FSA has determined that certain categories of actions do not normally individually or cumulatively have a significant effect on the human environment. If upon completion of the FSA-850 it is determined that an action falls within one of these categories and there are no extraordinary circumstances as provided by 7 CFR 799.33, the action can be categorically excluded from the need to prepare an EA or EIS.

Detailed information about extraordinary circumstances warranting a higher level of review is provided in paragraph 25. Projects which are precedent-setting or controversial, have impacts to protected resources or that are unclear, are considered to have extraordinary circumstances and, therefore, require EA.

Also, when consultation or provisions of specific plan or permits or other appropriate documents are unable to definitively rule out concerns for a protected resource for actions evaluated with FSA-850, an EA will be required. If it is already known that an EA or EIS is warranted, the FSA-850 step is not needed.

When referenced in any of the following categories or anywhere within this handbook, "previous disturbance" shall refer to soils that are not likely to possess intact and distinct soil horizons and have the reduced likelihood of possessing historic properties with their original depositional contexts in the area and to the depth to be excavated. This is also referred to as the "plow zone" and means the depth or previous disturbance or tillage.

## 33 CatEx's (Continued)

**B Listed CatEx**

Listed CatEx are actions with no new ground disturbance below the existing plow zone and, as provided by 7 CFR 799.31, that fit within specific categories that may be categorically excluded if there are no extraordinary circumstances, as specified in § 799.33, without the need to complete further review. Documentation is limited to identification of the appropriate category from the CatEx Catalog in Exhibit 17 and recording the related alpha numeric code on FSA-850.

Unless otherwise noted, these actions also do not have the potential to cause effects to historic properties, and will, therefore, not be reviewed for compliance with section 106 of NHPA (16 U.S.C. 470f) or its implementing regulations, 36 CFR Part 800.

**C Supported CatEx**

Supported CatEx, as provided by 7 CFR 799.32, are actions that fit within specific categories which are eligible for categorical exclusion **after** completion of a review with an FSA-850 with the attachment of appropriate documentation and confirmation that the action does not involve any of the extraordinary circumstances specified in 7 CFR 799.33.

Supported CatEx's consist of actions with no/limited ground disturbance (S) and those with ground disturbance or construction (SG). \* \* \*

**\*--Note:** Under a court order in *Dakota Rural Action v. USDA* (18-cv-02852), an EA is required for financing to medium CAFO's, as defined by the EPA at 40 CFR 122.23(b)(6), for the following activities: (1) construction or expansion of a medium CAFO; or (2) refinancing of a newly constructed medium CAFO that has been in operation for 24 months or less.--\*

In completing the FSA-850 review, attachment of supporting documentation and consultations under NHPA, ESA, and other relevant environmental mandates, may be required to substantiate that the proposed project will not have an adverse impact. Supported CatEx categories are further enumerated in the CatEx Catalog in Exhibit 17 for reference in completing FSA-850 and other documents.

## Summary Categorical Exclusion Catalog (Continued)

### Listed Categorical Exclusions (Continued)

- c) Tillage
  - (i) Chiseling and subsoiling;
  - (ii) Contour farming;
  - (iii) Planting site preparation;
  - (iv) Strip cropping;
  - (v) Conservation crop rotation;
  - (vi) Clean tilling firebreaks.
  
- 5. Management actions occurring on land that has been tilled in the past and will not exceed the depth of previous tillage
  - a) Forage harvest management;
  - b) Thinning and pruning of plants;
  - c) Plant grafting;
  - d) Integrated crop management;
  - e) Mulching, including plastic mulch;
  - f) Netting for hard woods;
  - g) Obstruction removal; (without ground disturbance);
  - h) Pest management (consistent with all labelling and use requirements);
  - i) Residue management including seasonal management;
  - j) Roof runoff management;
  - k) Toxic salt reduction;
  - l) Plugging artesian wells;
  - m) Water spreading.
  
- 6. Other FSA actions
  - a) Conservation easement purchases with no construction planned;
  - b) Emergency program actions (including Emergency Conservation Program and Emergency Forest Restoration Program) that have a total cost share of less than \$5,000;
  - c) Financial assistance to supplement income, manage the supply of agricultural commodities, influence the cost and supply of such commodities or programs of a similar nature or intent (i.e., price support programs);
  - d) Individual farm participation in FSA programs where no ground disturbance or change in land use occurs as a result of the action or participation; (for example, purchase of farm real estate with FSA financial assistance when there is no change in use or operations or the purchase of stock, replacement stock or additions when there is no associated change in use or operations, and the total capacity of the operations does NOT constitute a medium or large CAFO i.e. animal numbers are less than that required to be considered a medium CAFO and no plans or permits are required);
  - e) Inventory property disposal or lease with protective easements or covenants;
  - f) Safety net programs administered by FSA;
  - g) Site characterization, environmental testing, and monitoring where no significant alteration of existing ambient conditions would occur, including air, surface water, groundwater, wind, soil, or rock core sampling; installation of monitoring wells; installation of small scale air, water, or weather monitoring equipment;
  - h) Stand analysis for forest management planning;
  - i) Tree protection including plastic tubes;
  - j) Actions involving another agency that are fully covered by one or more of that agency's categorical exclusions (on the ESW, the other agency will be named and specific categorical exclusion(s) that applies provided).

## Summary Categorical Exclusion Catalog (Continued)

### Supported Categorical Exclusions

**Supported CatEx's** are actions defined in 7 CFR § 799.32 as those that fit within specific categories that are eligible for a categorical exclusion **after** completion of a **review** with an environmental screening worksheet with attachment of appropriate documentation **provided there are no extraordinary circumstances** as specified in § 799.33. Supported CatEx's consist of both actions without ground disturbance or construction as well as those with some disturbance, but which the **review** finds does not rise to the level of "significance". These categories are referenced in subparagraph 33 C and listed below for reference in documenting the ESW/FSA-850 and other documents. Documentation required may include, but is not limited to: permits, plans, and consultations under NHPA, ESA, and other relevant environmental mandates to document that no extraordinary circumstances exist.

**Supported CatEx's with No Ground Disturbance (S)** are applicable for the following actions when supported by attachment of the appropriate consultation(s) and/or documentation provided that ground disturbance is limited to areas which have been previously disturbed (that is, no new ground disturbance or change in use).

#### 7. Loan actions

- a) Farm storage and drying facility loans for added capacity;
- b) Loans for livestock purchases and/or facilities when facility capacity or animal numbers present (the larger of two is used) will not constitute a new\* or major expansion to an existing large CAFO as designated by the EPA (i.e., loans for livestock, livestock facilities, livestock operations, expansions, repairs, retrofits, refinancing or subordination of such an operation). For existing medium and large CAFOs, the documentation to be attached will consist of current right-sized permit and plan required by the State for the proposed project. An EA is required for \*--the construction or expansion of a medium CAFO or the refinancing of a newly constructed medium CAFO that has been in operation for 24 months or less. An EA is also required for a new large CAFO or expansion of large CAFO by 30% or more.--\*

- c) Release of loan security for forestry purposes;
- d) Reorganizing farm operations;
- e) Replacement building loans (same footprint);

\* In this context, "new ground disturbance" means construction that is causing disturbance below the existing plow zone/level of disturbance.

#### 8. Minor management, construction, or repair actions in areas of previous ground disturbance that *will not impact soil below the previous level of disturbance*

- a) Minor construction, such as a small addition to an existing structure or restoring and replacing property.
- b) Soil and water development
  - (i) Drain tile replacement;
  - (ii) Erosion control measures;
  - (iii) Minor grading, leveling, shaping, and filling;
  - (iv) Grassed waterway establishment;
  - (v) Hill side ditches;
  - (vi) Permanent establishment of a water source for wildlife (not livestock);
  - (vii) Spring development;
  - (viii) Trough or tank installation;
  - (ix) Water harvesting catchment.
- c) Land-clearing operations of no more than 15 acres, provided any amount of land involved in tree harvesting (without stump removal) is to be conducted on a sustainable basis and according to a Federal, State, Tribal, or other governmental unit as part of an *approved forestry management plan*.
- d) Nutrient management (planning and application practices).



## Summary Categorical Exclusion Catalog (Continued)

### Supported Categorical Exclusions (Continued)

9. Other FSA actions
  - a) Fence installation and replacement;
  - b) Fish stream improvement;
  - c) Grazing land mechanical treatment;
  - d) Inventory property disposal or lease without protective easements or covenants (this action, in particular, has the potential to cause effects to historic properties and, therefore, requires analysis under section 106 of NHPA (16 U.S.C. 470f), as well as under the ESA and wetland protection requirements);

**Supported CatEx's with ground disturbance or construction (SG)** are applicable for the following actions when upon **review** they can be supported by appropriate consultations (s) and/or other documentation:

10. Loan actions
  - a) Loans and loan subordinations with construction, demolition, or ground disturbance and based on documentation and consultation as appropriate found to have no significant impacts. \* \* \*
11. Construction activities
  - a) Construction of a new farm storage facility;
  - b) Dugouts;
  - c) Excavation;
  - d) Grade stabilization structures;
  - e) Grading, leveling, shaping and filling in areas or to depths not previously disturbed;
  - f) Chiseling and subsoiling in areas not previously tilled;
  - g) Excavation;
  - h) Grade stabilization structures;
  - i) Land smoothing;
  - j) Pesticide containment facility;
  - k) Precision land farming with ground disturbance;
  - l) Roads, including access roads;
  - m) Rock barriers;
  - n) Site preparation for planting or seeding in areas not previously tilled;
  - o) Soil and conservation structures;
  - p) Surface roughening;
  - q) Terracing.

**Summary Categorical Exclusion Catalog (Continued)**

**Supported Categorical Exclusions (Continued)**

12. Construction activities involving water resources
  - a) Bridges (includes culverts and irrigation equipment crossings);
  - b) Dams, dikes and levees;
  - c) Diversions;
  - d) Drop spillways;
  - e) Installation of structures designed to regulate water flow such as pipes, flashboard risers, gates, chutes, and outlets;
  - f) Irrigation systems;
  - g) Lining waterways or outlets;
  - h) Lining;
  - i) Livestock crossing facilities;
  - j) Pipe drop;
  - k) Pipeline for watering facility;
  - l) Ponds, including sealing and lining;
  - m) Riparian buffer establishment;
  - n) Rock filled infiltration trenches;
  - o) Sediment basin;
  - p) Sediment structures;
  - q) Water conservation structures;
  - r) Stream bank and shoreline protection;
  - s) Structures for water control;
  - t) Subsurface drains;
  - u) Underground outlets;
  - v) Watering tank or trough installation, if in areas not previously disturbed;
  - w) Wells;
  - x) Wetland restoration.
  
13. Management and planting actions found to have no significant impacts
  - a) Establishing or maintaining wildlife plots in areas not previously tilled or disturbed;
  - b) Prescribed burning;
  - c) Tree planting when trees have root balls of one gallon container size or larger;
  - d) Wildlife upland habitat management.

**Summary Categorical Exclusion Catalog (Continued)**

**Supported Categorical Exclusions (Continued)**

**Extraordinary Circumstances, Controversy or Uncertainty**

When the review and consultation or attachment of a specific plan, permit or other appropriate documentation is unable to definitively rule out concerns for a protected resource for any action evaluated with an FSA-850, an EA will be required. These include but are not limited to:

- projects that are precedent setting
- when there is scientific controversy over impacts
- if the degree or extent of possible impacts and effects is not clear
- the potential is high that effects may occur or the risks are uncertain
- highly controversial or contentious issues associated with water quality, oil, gas and mineral exploration or removal, hydraulic fracking, cell towers, wind and geo thermal or alternative energy sources that have not been resolved by permits or regulatory action
- large CAFO establishment or expansion of capacity by 30 percent or more.

**Possible Example CatExs for CAFOs**

\*--As depicted in the chart below, it is helpful to remember that refinancing (after 24 months in--\* operation), retrofitting, and/or purchasing existing CAFO's where total livestock capacity is above the EPA threshold for a medium/large CAFO is considered a supported CatEx and cannot be considered a listed CatEx because current right-sized permits and plans need to be attached to document current compliance.

\*--

	<b>Construction</b> (new* or additional ground disturbance or expansion)	<b>Purchase Existing</b> (unrelated arms-length sale)	<b>Repairs, Retrofits, Upgrades</b> (no ground disturbance)	<b>Refinancing</b> (new* disturbance and after <u>24 mo.</u> of operation)	<b>Refinancing</b> (no new* ground disturbance & after <u>24 mo.</u> of ops.)	<b>Refinancing</b> (no ground disturbance & after <u>24 mo.</u> of ops.)
<b>Medium CAFO</b>	EA	S-7b	S-7b	SG-10a	S-7b	S-7b
<b>Large CAFO</b>	EA	S-7b	S-7b	<b>Minor</b> expansion and after <u>24 mo.</u> of operation = SG-10a and pick from 11-13 <b>Major</b> expansion (≥30%) = EA	<b>Minor</b> expansion and after <u>24 months</u> = S-7b <b>Major</b> expansion (≥30%) = EA	<u>After 24 months</u> = S-7b

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