

Chapter 6

Categorical Exclusions

This chapter includes six main sections: Categorical Exclusions General, Establishment of Categorical Exclusions, Interagency Review of Categorical Exclusions, Improvements in the Process of Establishing New Categorical Exclusions, Public Involvement and Categorical Exclusions, and Examples/Best Practices for Establishing Categorical Exclusions.

Categorical Exclusions General

Summary

This section includes the following topics: General Concerns, and Categorical Exclusion Terminology.

General Concerns – Many respondents who address categorical exclusions also present suggestions for modifying the guidance on their use. Some respondents, especially business and natural resource commodities interests and many federal agency representatives, support continuing and expanding the use of categorical exclusions. “We believe categorical exclusions can help streamline regulatory processes, lead to efficiencies, and reduce compliance costs. Categorical exclusions can also help eliminate barriers caused by permitting delays,” writes one such respondent. Other individuals and many preservation/conservation groups, however, regard categorical exclusions with suspicion and request that their use be limited or eliminated. Respondents who object to categorical exclusions cite lack of transparency and public input, redundancy with the FONSI process, previous legal rulings limiting their use, the potential for inappropriate use leading to undesirable environmental consequences and avoidance of responsibility for them, and lack of proper consideration of cumulative effects. “Categorical exclusions are one of the most valuable methods for implementing the law, while still providing a way to proceed with minor actions, but any review must continue to limit their span. It will not serve the public, industry, or the environment if an attempt to make other than non-significant proposals actionable with CEs is your intent,” argues one individual.

Other respondents express concerns over current use of categorical exclusions. Some feel that all existing categorical exclusions need to be reviewed in light of new information and changing circumstances. According to one respondent, “The Task Force should encourage federal agencies to revisit and review their categorical exclusions, which they previously adopted—in some cases decades ago—to determine whether they are still appropriate in light of the mandates of EO13112 on Invasive Species. The same modernization likely is necessary for categorical exclusion regulations in other areas.” Others observe that the documentation for CEs has escalated to the point that they cost the equivalent of EAs. One state agency worries about possible misuse of extraordinary species declarations, leading to delays.

Categorical Exclusion Terminology – Several respondents request that the Task Force clarify the regulatory language and definitions for categorical exclusions. A number of respondents perceive conflicting direction for “exceptions,” “exceptional circumstances,” and “extraordinary,” leading to conflicting use and interpretation by different agencies. Some

respondents request that triggering threshold levels be better defined. “When speaking of ‘Categorical Exclusions,’ your brief synopsis refers to ‘a significant effect on the human environment.’ I would like to see the level of significance defined. Does a remote area of a National Forest that is visited only by outdoor enthusiasts numbering, say, 500 per year, count as nonsignificant? 100? 50?” queries one individual. A timber industry representative observes that “Categorical Exclusions should be based on basic site-specific information that clearly illustrates that the proposed action will not have a significant effect upon the quality of the human environment. Over the years, this threshold has blurred.” Some respondents object to the use of exclusive, finite lists of extraordinary circumstances by agencies to limit the need for EAs, and request that the Task Force prohibit this practice. “This approach conflicts with the basic meaning of ‘extraordinary’ and cannot be squared with either CEQ regulations, see 40 C.F.R. [section] 1508.4, or the statute’s mandate to investigate impacts ‘to the fullest extent possible,’” maintains one preservation/conservation organization. Some also object to the word “controversial” and request that it be dropped from the categorical exclusion regulations.

General Concerns

942. Public Concern: The CEQ Task Force should recognize the value of categorical exclusions.

TO STREAMLINE REGULATORY PROCESSES

NAHB generally supports the concept of “categorical exclusions” and applauds the NEPA Task Force for considering them. We believe categorical exclusions can help streamline regulatory processes, lead to efficiencies, and reduce compliance costs. Categorical exclusions can also help eliminate barriers caused by permitting delays. (Business, Washington, DC - #517.17.60100.XX)

943. Public Concern: The CEQ Task Force should encourage agencies to reevaluate existing categorical exclusions.

FOR ACTIONS THAT MAY AFFECT INVASIVE PATHWAYS

Mainly, the Task Force should encourage Federal agencies to revisit and review their categorical exclusions, which they previously adopted—in some cases decades ago—to determine whether they are still appropriate in light of the mandates of EO13112 on Invasive Species. The same modernization likely is necessary for categorical exclusion regulations in other areas.

Recommendation: Review all agency categorical exclusions, including, but not limited to, those for Federal actions that may affect invasive pathways, to determine which exclusions are allowing actions with potentially significant environmental impacts to escape analysis. (Other, Washington, DC - #476.11.60300.XX)

TO DETERMINE WHETHER ENVIRONMENTAL EFFECTS ARE ACTUALLY MINIMAL

We are opposed to federal agencies increasing the number of activities that are categorically excluded from NEPA review. An example of the controversy that occurs when agencies seek NEPA exception is the recent efforts of the U.S. Forest Service to “clarify” the consideration of extraordinary circumstances as they apply to categorical exclusions (August 23, 2002 Federal Register, 67 FR 54622). Rather than support additional categorical exclusions, CEQ should undertake a review of existing agency categorical exclusions and determine whether the individual and cumulative environmental impacts are indeed minimal. (Preservation/Conservation Organization, Seattle, WA - #363.2.60900.XX)

944. Public Concern: The CEQ Task Force should recognize the effect of court decisions on agency categorical exclusions.

The use of categorical exclusions has been limited. The CEQ regulations allow agencies to exclude an entire category of actions from the preparation of an EIS or an EA if the agency makes a formal finding that such actions do not individually or cumulatively have a significant impact on the environment. 40 C.F.R. 1508.4. The courts have narrowly defined categorical exclusions. A decision in Illinois invalidated the Forest Service categorical exclusion for roadside salvage of scattered hazard trees killed by insects. *Donham v U.S. Forest Service*, No. 98-CV-4289-JPG (S.D. Ill. 1999). This shut down the roadside salvage program throughout the country for over a year. The court ruled that the Forest Service did not adequately consider the environmental effects of the categorical exclusion. The same could be said for the most agency categorical exclusions, and the court ruling leaves agencies vulnerable to a court invalidating their categorical exclusions. (Timber or Wood Products Industry, Portland, OR - #454.42.60500.XX)

945. Public Concern: The CEQ Task Force should address the complexity and cost of categorical exclusions.

Categorical Exclusions (CEs) have become more complicated and costly. CEs recently issued for a chairlift replacement at Timberline Lodge Resort in Oregon cost the ski area \$40,000 each, and were the equivalent of an EA. In a recent CE for Willamette Pass ski area in Oregon, the agency required exhaustive analysis to connect a parking lot and base area via a proposed gondola (a 400 foot distance across a highway) even though the affected area was previously disturbed. Willamette Pass' CE cost the resort \$30,000 and involved specialists on issues ranging from threatened and endangered species to heritage resources. This lengthy and costly analysis defeats the purpose of a CE. (Recreational Organization, No Address - #19.3.60000.A1)

946. Public Concern: The CEQ Task Force should discourage agencies from using categorical exclusions as a means to circumvent the NEPA process.

Categorical exclusions are a useful tool in ensuring that relatively routine actions with insignificant impacts are not overly costly or time-intensive. Too often they are used to inappropriately circumvent the NEPA planning process. In August 2002 the Forest Service issued an interim directive on the use of categorical exclusions that increases the potential for abuse. The Forest Service has given local officials considerable latitude to determine on a case-by-case basis when a proposed action may be categorically excluded even if extraordinary circumstances such as endangered species or wetlands are present. (Preservation/Conservation Organization, No Address - #498.13.60500.XX)

947. Public Concern: The CEQ Task Force should discourage agencies from using categorical exclusions as a means to ignore cumulative effects.

One problem area is the use of CE's to cover up behind-closed doors analysis of potential impacts that belongs in public documents like Environmental Assessments (EAs). Where judgment is exercised by a federal official as to whether environmental impacts may be significant or not, that decision must be made in a publicly available Finding of No Significant Impact (FONSI). In the CE context, this issue arises when factors are present indicating that, despite an activity fitting nominally into an excluded category, there could be environmental impacts. Under these "extraordinary circumstances," agency procedures have to call for the activity to be bumped up to at least the level of an EA. See 40 C.F.R. [section] 1508.4. Agencies cannot, consistent with CEQ's regulations, allow officials to review situations in which extraordinary factors indicate the potential for significant impacts, for the purpose of determining, in-house, whether to proceed on a CE. A different case may be presented when the official can find that there will be no impact whatsoever owing to the extraordinary factors, but if some sort of significance determination is made, that belongs in a publicly noticed and distributed FONSI. (Preservation/Conservation Organization, Washington, DC - #471.24.60400.XX)

The revised NEPA document should:

Require that projects cannot be segmented, ever. We are very concerned that the use of Categorical exclusions will segment individual timber sales to ignore cumulative impacts. (Preservation/Conservation Organization, Spokane, WA - #655.19.60300.XX)

948. Public Concern: The CEQ Task Force should discourage agencies from declaring extraordinary circumstances as a means to delay the process.

We urge the Task Force to ensure that Extraordinary Circumstances are declared only when warranted and not as an excuse for delay. (Idaho Office of Species Conservation, Boise, ID - #578.14.60300.XX)

949. Public Concern: The CEQ Task Force should encourage agencies to use categorical exclusions when it is appropriate to do so.

We see a situation where an agency that often complains about the burdensome requirements of NEPA is using the law to avoid taking decisive action it has the authority to take under the categorical exclusion provision. By doing so, the Forest Service has created longer processes, in this case, the onus is on the Forest Service to act, rather than sit on its hands while damage is occurring. (Preservation/Conservation Organization, Tucson, AZ - #538.9.10310.XX)

950. Public Concern: The CEQ Task Force should advise agencies not to allow development interests to use categorical exclusions to avoid environmental responsibility.

I wish to point out that the granting of exclusions from developing environmental assessments or an environmental impact statement should be a rare occurrence. Efforts should be forthcoming to make sure that this element of discussion does not become the major loophole by which development interests sidestep their responsibility to the environment. (Individual, Lexington, KY - #251.1.60100.E1)

[E3] Let's make it more difficult for developers. They lie on those forms, anyway. (Individual, Garland, TX - #134.1.60300.E3)

951. Public Concern: The CEQ Task Force should continue to limit the span of categorical exclusions.

Categorical exclusions are one of the most valuable methods for implementing the law, while still providing a way to proceed with minor actions, but any review must continue to limit their span. It will not serve the public, industry, or the environment if an attempt to make other than non-significant proposals actionable with CEs is your intent. (Individual, Lakeview, OR - #233.3.60000.XX)

I submit that NEPA's Categorical Exclusion definition (Section 1508.4) should be strengthened to limit the size, impact, and other features of an action so that only truly CE-type actions are covered. . . . CE actions should be limited to activities such as erecting small signs, putting fiber optic cables in existing road right-of-ways, etc. (Individual, San Jose, CA - #437.4.60100.XX)

952. Public Concern: The CEQ Task Force should eliminate categorical exclusions.

BECAUSE THE POLICY IS REDUNDANT

With regard to the Forest Service's regulations, categorical exclusions (CE) policy, CEs include a class of activities that take place on national forest lands but that do not undergo environmental analysis or meaningful public comment. The proposed policy change, as described in the Federal Register announcement, goes to great lengths to persuade readers that the agency merely is attempting a streamlining of the National Environmental Policy Act (NEPA) review process. Yet the very existence of the CE policy is redundant. NEPA already allows for an abbreviated environmental review of those activities that do not pose a significant impact (Finding of No Significant Impact or FONSI). A more

efficient way to streamline the process would be to eliminate the CE exemption altogether. (Preservation/Conservation Organization, Eugene, OR - #98.1.60700.F1)

BECAUSE THE PROCESS DOES NOT CONSIDER PUBLIC INPUT

Drop the idea of Categorical Exclusion! This is a political expedient and will guarantee that public comment is deemed of no significance. Being that I am that public, this is offensive. (Individual, Katy, TX - #199.1.60900.E3)

Categorical Exclusion Terminology

953. Public Concern: The CEQ Task Force should clarify the concept of “exceptions” to categorical exclusions.

TO IMPROVE AGENCY COMPLIANCE

Categorical exclusions. As we believe, uncertainty surrounding fundamental concepts that anchor the NEPA system has broadly impaired agency compliance, including categorical exclusions. In our experience, owing to uncertainty Fish and Wildlife Service CATEXs overapply NEPA through narrow definitions of categories of action relating to management of fish and wildlife, especially habitat management, which experience demonstrates is essential for healthy wildlife populations of both game and non-game species. At the same time, the previous administration sought to establish as Department-wide EXCEPTIONS broad, undifferentiated classes featuring zero tolerance, per se rules unrelated to intensity of impact even though CEQ regulation requires consideration of “intensity,” which in turn refers to severity of impact. [section] 1508.27(b). The notion of “exceptional circumstances” in which a normally excluded action may have a significant environmental effect, [section] 1508.4, is at odds with EXCEPTIONS which are per se rules unrelated to intensity of impact, i.e., unrelated to “the facts in each case.” (Other, Washington, DC - #506.23.60500.XX)

954. Public Concern: The CEQ Task Force should not allow agencies to limit the definition of extraordinary circumstances.

A second problem area concerns agency definition of extraordinary circumstances. Agencies understandably wish to limit the factors a decision maker must stay alert for, as triggers for an EA. Some agencies have tried to define extraordinary circumstances with a finite list of events that are known to occur with some frequency. This approach conflicts with the basic meaning of “extraordinary” and cannot be squared with either CEQ’s regulations, see 40 C.F.R. [section] 1508.4, or the statute’s mandate to investigate impacts “to the fullest extent possible.” 42 U.S.C. [section] 4332. CEQ needs to stay vigilant that agencies do not adopt procedures purporting to include an exclusive list of extraordinary circumstances. (Preservation/Conservation Organization, Washington, DC - #471.25.60600.XX)

955. Public Concern: The CEQ Task Force should define the level of significance regarding the effects of categorical exclusions on the human environment.

When speaking of “Categorical Exclusions,” your brief synopsis refers to “a significant effect on the human environment.” I would like to see the level of significance defined. Does a remote area of a National Forest that is visited only by outdoor enthusiasts numbering, say, 500 per year, count as nonsignificant? 100? 50?

Does an act such as logging an old growth forest which can recover naturally in 500 years count as significant? Or does the fact that it can recover in time mean that there is no significant effect on the human environment?

Where does this level of significance begin? If this question must be decided on a case-by-case basis, as item “E” sub 1 suggests, then is there any challenge allowed from the public as to the granting these exclusions? Is any legal review allowed after the exclusion is granted? (Individual, Lexington, KY - #251.1.60100.E1)

956. Public Concern: The CEQ Task Force should emphasize the new definition of “extraordinary circumstances.”

AS IT RELATES TO THREATENED AND ENDANGERED SPECIES

Categorical Exclusions should be based on basic site-specific information that clearly illustrates that the proposed action will not have a significant effect upon the quality of the human environment. Over the years, this threshold has blurred. For example, today, USFS proposed actions that take place in an area that contains a listed specie under the ESA will likely not be categorically excluded as the mere presence of a listed specie can be construed as “Extraordinary Circumstances”. Please clarify that the new definition of Extraordinary Circumstances—Federal Register P. 48412 et seq. 09/20/01—has been codified and provides clear direction to the USFS. Similarly, under the ESA Section 7 Consultation process clarification is needed to allow projects to be categorically excluded, with automatic USFWS/NMFS concurrence, when the USFS specialists determine that the proposed action will either have “no effect” or “may effect—will not adversely effect” a listed specie. (Timber or Wood Products Industry, Kalispell, MT - #462.7.60100.E1)

957. Public Concern: The CEQ Task Force should eliminate references to “controversial.”

Categorical Exclusions. . . . CEQ should eliminate the confusing references to “controversial”. (Timber or Wood Products Industry, Deer River, MN - #377.13.60100.XX)

Establishment of Categorical Exclusions

Summary

This section includes the following topics: Establishment of Categorical Exclusions General, Basis for Establishing Categorical Exclusions, Activities/Actions Appropriate for Categorical Exclusion, and Activities/Actions Not Appropriate for Categorical Exclusions.

Establishment of Categorical Exclusions General – Many respondents who address this topic perceive a lack of regulatory clarity regarding the categorical exclusion process, and assert that this has led to discrepancies in their interpretation and use by different agencies. “The NEPA Task Force should establish clear guidance for how agencies should identify and evaluate categorical exclusions. The standards should be clear and consistent across the agencies,” writes one business interest representative. Others provide more specific suggestions toward this end. “CEQ could provide some guidance for the preparation of categorical exclusion lists. The guiding principle should be that the CE should apply only to those actions and projects that would not require an EIS under any circumstances,” advocates one NEPA professional. Still others feel that the Task Force should require better defined lists, and others add that these lists should include program-specific elements.

Others would like the Task Force to help prevent what they feel constitutes agency misuse of CEs in cases where there are likely significant environmental effects. “DOE [Department of Energy] has used categorical exclusions to avoid addressing some of their biggest problems,” contends one civic group. “A basis and process for establishing categorical exclusions is needed to avoid such abuse of the option. An example is mercury in waste, a categorical exclusion for DOE’s ‘broad spectrum’ waste treatment action in the early 1990s.” Others reflect on the pressing need to balance immediate needs such as national security with longer term environmental effects. “Given the physical and aesthetic damage already done to Washington in the past 18 months, I don’t think any categorical exclusions should be given for building security

measures in Washington, at least, unless there is a maximum impact strictly defined into the exclusion,” opines one resident of the DC Metro area.

Basis for Establishing Categorical Exclusions – Respondents provide a variety of criteria that they feel the Task Force should set forth for determining whether a categorical exclusion may be used. Many of these criteria are provided as list items with little accompanying explanation. Some feel that as long as projects comply with existing state regulations, they should be categorically excluded. “For example, mitigation of environmental impacts from removal of underground storage tanks (UST) in the State of Texas is adequately addressed in existing state regulations. Therefore, there should be no need to prepare an EA for UST removal,” writes a United States military official. Compliance with federal laws and specifically the Data Quality Act are other criteria suggested by the public related to legal considerations.

Regarding the type of data and analysis that should be required for establishing CEs, some submit that a review of existing agencies’ data, including monitoring results, should suffice. Others feel that external data from research institutions and local interest groups should be reviewed and incorporated in the determination process. Still others contend that the data used must correlate to the scale of each proposed action and its ecological context. Some conclude that agencies must rely first and foremost on peer-reviewed science.

Project type is another consideration that agencies should evaluate in the categorical exclusion process, some respondents feel. The Task Force should retain or expand categorical exclusions for the continuance of historically permitted or repeated actions, some uphold. “The NEPA process would be greatly improved if categorical exclusions were allowed for actions such as renewing grazing permits where land use is the same, has been the same, and will have little significant effect or change on the environment,” submits one domestic livestock industry representative. Others request that individual situations be taken into account, including the urgency for undertaking the proposed action—for instance in insect control, hazardous fuels reduction, or timber salvage operations where a window of opportunity may be limited.

Project effects must be the primary criteria for allowing CEs, assert a number of respondents. Given the number of CEs that have been granted over time across numerous agencies, some suggest that a review of their outcomes and impacts could provide a clearer basis for future CEs. “Before a CE category is established, it must be shown that the vast majority of project types and sizes that might be used to accomplish the category objective are environmentally benign,” suggests one respondent. “At first glance, it would appear that an analysis of a large number of past project types (relating to the CE’s proposed objective) could be explored.” Others feel that projects that demonstrate sufficient benefit to the environment should be categorically excluded. Social and economic effects must also be criteria used in the categorical exclusion process, some feel. Echoing comments regarding the types of data that should be required for CEs, some respondents assert that CEs should only be granted if peer-reviewed science conclusively documents insignificant effects to the environment. “Because the implications of establishing a new Categorical Exclusion are profound (i.e., no analysis of potential effects via either an EA or EIS is required), extremely high standards of proof should be maintained,” reasons one individual.

Other respondents propose wider consultation in the categorical exclusion decisionmaking process. Suggestions from the public include requiring interdisciplinary team review of applications and consultation and consensus from local governments and individuals.

Activities/Actions Appropriate for Categorical Exclusion – Some respondents who address this topic request broader clarification of these categories rather than a list of specific actions. A few request that the Task Force clarify the difference between statutory and categorical exclusions to help in determining the level of NEPA analysis needed. Some other respondents feel that the threshold of analysis required is much higher for some agencies than others, and that this discrepancy should be remedied. Opinions differ among respondents as to whether a very specific list of categorically excluded actions is advisable. Some feel that this would save time, duplication of effort, and scarce resources, while others feel that such a list would be too restrictive. Instead, these respondents think that case-by-case evaluation is the best approach.

Many describe additional categories of actions that should be routinely excluded, such as activities in previously developed areas or actions that maintain the status quo. Other respondents enumerate specific actions they feel should be categorically excluded. These include law enforcement for destructive activities on public lands and federal wildlife management actions consistent with state law. Several cite categories of actions that they feel should be excluded because they result in benefits to the environment. Examples provided by the public include juniper removal from aspen stands, hazardous tree removal along roadways, watershed improvements and salvage, and noxious weed control. Some consider certain resource development activities appropriate for CEs. Respondents offer for categorical exclusion inclusion such actions as small scale commercial timber harvest, oil, gas, and mineral development-related activities, grazing permit renewal, and resort development within previously approved footprints or plans.

Activities/Actions Not Appropriate for Categorical Exclusions – While many respondents support expanding the list of actions eligible for CEs, many other respondents counter that these same actions should not qualify for CEs. These respondents tend to challenge the conclusion that these types of actions are environmentally benign or beneficial, asserting to the contrary that they may have significant effects that must be considered through further NEPA analysis. Resource development, wetlands development, timber harvest, oil, gas, and mining activities, grazing permits, and road construction are among activities that the Task Force should not categorically exclude, these respondents feel.

Some contend that existing categories of exclusions have significant effects and should be reevaluated or withdrawn. “Eliminate pesticide and herbicide application as an example of an action that might be categorically excluded—even for noxious needs,” advocates one government employee. “Herbicide and pesticide application is included as an example under several CE categories in FSH 1901.15-31. There are new research findings that show that the inert ingredients (which are trade secrets and do not show on the label) of many of these chemicals are not only strong carcinogens, but harmful in other ways as well. Unfortunately, many of these CE examples apply to areas where humans congregate, such as facilities and recreation sites. If this isn’t a significant impact to the human environment, then I don’t know what is.”

Other existing categorical exclusions that some respondents challenge as inappropriate include field testing of genetically modified plants, fire projects, and OHV trail network expansion. Respondents who feel that these CEs should be eliminated often express concern over what they feel to be the failure to properly evaluate cumulative and combined effects for these activities.

Establishment of Categorical Exclusions General

958. Public Concern: The CEQ Task Force should develop procedures and standards for establishing categorical exclusions.

Clear guidelines need to be developed as to which conditions trigger Categorical Exclusions as well as a set of pre-approved treatments to employ once these conditions are met. (Timber or Wood Products Industry, Princeton, ID - #400.4.60100.XX)

TO PROVIDE CLARITY AND CONSISTENCY IN THE PROCESS

CEQ regulations for categorical exclusions (CEs) present a problem. CEQ provided the CE as a preliminary stage of analysis that could avoid additional and more detailed environmental work. Unfortunately, confusion about the role of CEs and a failure to link CEQ regulations for CEs with other steps in the NEPA process make it difficult to distinguish the CE as an independent step in NEPA analysis.

Although there are a number of criteria agencies are required to use in determining whether they may prepare a CE instead of an environmental assessment, the way in which the regulations are written makes the decision on whether an agency can use a CE turn on whether its environmental effects are significant rather than on what type of action or project is contemplated. The regulations also state an agency may not use a CE if the environmental effects of an action are controversial.

This is confusing and unfortunate, and is a result of the regulation using generalized criteria that describes the effect of an action to determine whether an agency can use a CE. This problem also arises from the tendency of some agencies to use an umbrella catchall phrase as the basis for deciding when a CE can be used in addition to specific lists of actions that can be reviewed through a CE. An example would be a regulation that allows the use of a CE for “similar” actions.

CEQ could provide some guidance for the preparation of CE lists. The guiding principle should be that the CE should apply only to those actions and projects that would not require an EIS under any circumstances. (NEPA Professional or Association - Private Sector, Washington, DC - #450.17.60800.XX)

The NEPA Task Force should establish clear guidance for how agencies should identify and evaluate categorical exclusions. The standards should be clear and consistent across the agencies. The most important thing our members require is clarity and certainty in the regulatory process. We need to know the likely outcome and the path for getting there. NEPA should not be open-ended and/or used to impose undue regulatory burdens on agencies or the private sector. (Business, Washington, DC - #517.17.60100.XX)

TO FACILITATE CONSISTENCY AMONG DIFFERENT AGENCIES

Over 30 years of NEPA experience should provide agencies with many opportunities to establish categorical exclusions that allow projects and programs to proceed without documentation in an environmental assessment or environmental impact statement. However, it has been very difficult for the Forest Service to establish categories similar to what already exists for other agencies. It would be helpful if the Council had clear procedures and standards for establishing categorical exclusions so that all agencies would know what to provide for the Council’s approval. (United States Department of Agriculture, Washington, DC - #110.13.60800.XX)

[E2] All Federal agencies should be using similar NEPA guidelines, not different ones for each agency. (Federal Highway Administration, Wyoming Division, Cheyenne, WY - #83.10.60100.E2)

TO AVOID AGENCY ABUSE OF CATEGORICAL EXCLUSIONS

DOE [Department of Energy] has used categorical exclusions to avoid addressing some of their biggest problems. A basis and process for establishing categorical exclusions is needed to avoid such abuse of the option. An example is mercury in waste, a categorical exclusion for DOE’s “broad spectrum” waste treatment action in the early 1990s. The purpose of the action was to put several different waste streams

out for bid by outside contractors for treatment and disposal, and DOE did not want to address the complicating issue of mercury as a particularly problematic contaminant. Certainly Oak Ridge stakeholders would be opposed to mercury content becoming a categorical exclusion when applied to other actions on the Oak Ridge Reservation, because it is one of the major contaminants of concern in a variety of waste streams and polluted lands and water bodies. (Civic Group, Oak Ridge, TN - #88.11.60300.XX)

959. Public Concern: The CEQ Task Force should encourage agencies to develop and use more categorical exclusions.

The CEQ must once again direct federal agencies to develop and use more and better defined categorical exclusions. (Wisconsin Department of Natural Resources, Madison, WI - #458.25.60000.XX)

PROGRAM-SPECIFIC CATEGORICAL EXCLUSIONS

Lists of categorical exclusions should include program specific elements. The Fish and Wildlife Service, for instance, has only one set of categorical exclusions for the agency. There should be more specific categorical exclusions tailored to the particular program, such as refuge management or federal aid. (Wisconsin Department of Natural Resources, Madison, WI - #458.20.60200.E2)

960. Public Concern: The CEQ Task Force should ensure that agencies balance immediate needs with environmental effects when applying categorical exclusions.

New mandates for agency actions need to be considered for their environmental impact and also for addition to the categorical exemptions list, where appropriate. For example, it may be appropriate, in the name of building security, to put up barriers around federal buildings in Washington and elsewhere; but the environmental impact of these structures ought to be examined with an eye toward maintaining the values of our society and the beauty of its capital and other cities. Given the physical and aesthetic damage already done to Washington in the past 18 months, I don't think any categorical exclusions should be given for building security measures in Washington, at least, unless there is a maximum impact strictly defined into the exclusion. For example, physical changes for security should be categorically exempt only if they do not exceed a few cubic feet in size-say three feet up, out, or down and do not make visual impacts lasting more than one week. As a Washingtonian, I have had it with the avoidable damage done to this city in recent years, from tasteless redevelopment of commercial and residential areas, more recently from communications companies taking turns ruining streets and not putting them back in shape, and recently from security madness.

In short, agencies have to continue to strike a balance, in their use of categorical exemptions, between meeting immediate needs, including efficient agency and project management, and avoiding adverse environmental impacts that environmental analysis and public review might have identified and either stopped or allowed. (Individual, Washington, DC - #503.3.60600.XX)

961. Public Concern: The CEQ Task Force should consider environmental effects over political issues when establishing categorical exclusions.

Politicized projects (e.g., forestry and any conservation project in the area of a listed species) should not be denied exclusion because of their profile instead of their effects or potential effects. (Idaho Office of Species Conservation, Boise, ID - #578.13.60300.XX)

We believe certain categorical exclusions are granted not because of their environmental qualities, but because of their overall political qualities. 42 U.S.C. [section] 4332(C). (E1-3). We have written to federal agencies as diverse as the Forest Service and Department of Transportation on the details regarding this issue, and would be happy to supply you with additional information if necessary. (Preservation/Conservation Organization, Washington, DC - #465.15.60500.XX)

Basis for Establishing Categorical Exclusions

Laws/Regulations

962. Public Concern: The CEQ Task Force should outline the basis for establishing categorical exclusions.

COMPLIANCE WITH FEDERAL LAWS

The basis for establishing categorical exclusions should be compliance with federal laws (Recreational/Conservation Organization, Washington, DC - #89.26.60100.E1)

COMPLIANCE WITH THE DATA QUALITY ACT

The exclusion . . . must be based on data that meets the requirements of the Data Quality Act. The categorical exclusion should be identified and justified in the NEPA document. (Individual, Huachuca City, AZ - #372.30.60100.E1)

EXISTING ENVIRONMENTAL REGULATIONS

Where existing environmental regulations adequately address potential environmental impacts, the citation of those regulations should be adequate for establishing a Categorical Exclusion. For example, mitigation of environmental impacts from removal of underground storage tanks (UST) in the State of Texas is adequately addressed in existing state regulations. Therefore, there should be no need to prepare an EA for UST removal. (United States Air Force, Washington, DC - #525.23.60100.E1)

Data/Analysis

963. Public Concern: The CEQ Task Force should outline the basis for establishing categorical exclusions.

EXISTING DATA

What information, data studies, etc. should be required as the basis for establishing a categorical exclusion?

Existing data should be sufficient to make this determination. Conclusions can be drawn from monitoring of these activities. The historical record, including previous EAs showing no impact, and the effects of monitoring of these activities, will often speak for themselves. (Bob Cope, Commissioner, Lemhi County Board of Commissioners, Salmon, ID - #70.23.60100.E1)

When deciding whether to establish a categorical exclusion for a particular proposed action, the land manager should review existing: 1) biological assessments to learn how the proposed activity would impact wildlife and fish species that inhabit the planning unit; 2) social impact assessments to understand how the proposed activity would impact users of the planning unit (economically, recreationally, aesthetically, etc.); and 3) resource inventories to determine what the resource conditions are compared to what they should be. (Recreational/Conservation Organization, Washington, DC - #89.27.60100.E1)

DATA PERTINENT TO PLAN GOALS

Sec. E #1. Any data is pertinent to the master plan and goals that are set forth in said plan and should be considered. The Data that usually is best in determining the perspective (Technical and interpretive) comes from Local groups and foundations that provide grant research and data collection that could be utilized within the parameters of action plan. If the data is not from a Government agency the standard may be difficult to interpret, however, potentially revealing and pertinent, e.g.; Southern Appalachian Man and the Biosphere (SAMAB) Studies, Southern Alliance for Clean Air, Blue Ridge Environmental Group and Union of Concerned Scientists. (Individual, Johnson City, TN - #631.17.60100.E1)

DATA CONSISTENT WITH THE SCALE OF ACTION

Because the implications of establishing a new Categorical Exclusion are profound (i.e., no analysis of potential effects via either an EA or EIS is required), extremely high standards of proof should be maintained. In establishing such an exclusion, the following information should be required and made available for public review: . . .

c. Data and studies should support the conclusion that the activity has no significant environmental effect across the entire range of ecological settings in which such an activity might be proposed (i.e., some actions may have no effect if implemented in high desert sage country, but have significant effects if implemented in tall grass prairie lands or coniferous forests—or vice versa).

d. Data and studies should cover the scale of the activity being considered for a Categorical Exclusion (i.e., environmental effects can be a function of the scale and scope of an action). If the action for which a Categorical Exclusion is being established can vary in size, the exclusion should not encompass projects larger than that for which scientific, peer-reviewed published literature establishes as posing not significant individual or cumulative effect. (Individual, Rogue River, OR - #382.21.60100.E1)

DATA FROM VARIOUS STUDIES

I recommend studies such as vegetation maps, hydrological studies, threatened and endangered species inventories, historical resource studies, ethnographic studies, etc., to be carefully considered before applying a categorical exclusion. (Individual, Homestead, FL - #491.1.60100.E1)

PEER-REVIEWED SCIENCE

CEQ should base their decisions for categorical exclusions solely on peer reviewed science . . . Subjectivity should not enter into the determination of whether an action or class of actions is eligible for categorical exclusion. (Timber or Wood Products Industry, Cleveland, TX - #402.4.60300.XX)

Project Type

964. Public Concern: The CEQ Task Force should outline the basis for establishing categorical exclusions.

CONTINUANCE OF HISTORICALLY PERMITTED ACTIONS

The[se] items could be used to expand the basis for establishing categorical exclusions. They are . . . Continuation of historically permitted actions. The NEPA process would be greatly improved if categorical exclusions were allowed for actions such as renewing grazing permits where land use is the same, has been the same, and will have little significant effect or change on the environment. A grazing permit is usually part of an overall land management plan; therefore many of the environment impacts have already been assessed and no further action is required to renew the permit. (Domestic Livestock Industry, Boise, ID - #576.6.60100.XX)

REPETITIVE NATURE OF PROJECTS

The basis for establishing categorical exclusions should be . . . the repetitive nature of projects, the likelihood that there is no need to disclose non-significant environmental effects . . . (Recreational/Conservation Organization, Washington, DC - #89.26.60100.E1)

FREQUENCY AND GEOGRAPHIC BREADTH OF THE ACTION

The decision to use a categorical exclusion should include an assessment of the frequency and geographic breadth of the practice to be excluded. (Recreational/Conservation Organization, Washington, DC - #89.29.60100.E2)

PAST EXPERIENCE WITH SIMILAR PROJECTS

The basis for establishing a categorical exclusion should [be] past experience with the same type of impact. Since NEPA became law the number of projects that have gone through a NEPA analysis must be in the millions. (NEPA Professional or Association - Private Sector, Tucson, AZ - #100.7.60100.A1)

INDIVIDUAL SITUATIONS

Individual situations, each with its own unique environmental impacts and effects, should be considered under categorical exclusions. Fire, weather, pest, and other impacts, such as human environmental damages, should be considered for each categorical exclusion. What information, data studies, etc, that should be used as a required basis are examples drawn from similar events that have happened before. Base these decisions on individual situations, assessed off previous experience. (Individual, Washington, DC - #59.1.60100.E1)

During project scoping an analysis should be performed on all environmental areas, although not necessarily in great detail initially, to determine if a project is a CE or not. (Federal Highway Administration, Wyoming Division, Cheyenne, WY - #83.8.60100.E2)

EXTRAORDINARY CIRCUMSTANCES

For new agency actions, such as those resulting from technological advances or a statutory expansion of an agency's jurisdiction, SEA suggests that agencies conduct a technical review of each specific action or broader class of actions to see whether it should be proposed for categorical exclusion. During this review, the agency should consider the following:

Extraordinary circumstances of special concern. (Surface Transportation Board, No Address - #519.26.60100.E1)

Project Effects

965. Public Concern: The CEQ Task Force should outline the basis for establishing categorical exclusions.

EXPECTED LEVEL OF EFFECTS

CEQ should base their decisions for categorical exclusions solely on . . . the expected level or degree of adverse effects. Subjectivity should not enter into the determination of whether an action or class of actions is eligible for categorical exclusion. (Timber or Wood Products Industry, Cleveland, TX - #402.4.60300.XX)

ENVIRONMENTAL EFFECTS OF SIMILAR PAST PROJECTS

[E1] Response: Before a CE category is established, it must be shown that the vast majority of project types and sizes that might be used to accomplish the category objective are environmentally benign. At first glance, it would appear that an analysis of a large number of past project types (relating to the CE's proposed objective) could be explored. (Government Employee/Union, Grangeville, ID - #44.22.60100.E1)

EFFECTS TO THE HUMAN ENVIRONMENT

The effects to the human environment that are generally positive . . . should be considered as a basis for their establishment. (Recreational/Conservation Organization, Washington, DC - #89.26.60100.E1)

SOCIAL AND ECONOMIC EFFECTS

The concept of categorical exclusions is a good one, allowing the agencies to decide which issues pertain to a particular issue or proposal, and not requiring them to consider issues that are not relevant. However, in our experience with federal land management agencies, often the agency will decide an issue does not merit consideration and not include it in an EA, when in fact it is a very important issue. Both social and economic impacts to the nearby communities are vitally important and need always to be addressed. Agencies must be required to consider these concerns to adequately fulfill NEPA requirements. (Domestic Livestock Industry, Tucson, AZ - #361.15.60600.XX)

EXISTING ENVIRONMENTAL ASSESSMENT DOCUMENTS WHICH DEMONSTRATE THE PROPOSED ACTION WILL HAVE NO ADVERSE EFFECTS

Categorical exclusions (CE) are a useful tool in making land management decisions. CE's should continue to be an option available for use with greater flexibility to draw upon prior experience from previously conducted actions. After the completion of Environmental Assessments (EA) and Environmental Impact Statements (EIS) for a proposed action, which have proven to have no adverse effects on the human environment, CE's could be used by agencies to prevent the repetition of conducting further EAs or EIS' that are unnecessary and will lead to the same decisions that have already been analyzed. (Oil, Natural Gas, or Coal Industry, Casper, WY - #643.3.60000.XX)

Categorical exclusions, as defined by the CEQ, is the result of an analysis that finds a certain category of activities, based upon demonstration in the past and an analysis of the future, that the category of activities will not individually or cumulatively result in a significant impact on the human environment. By definition, then, past environmental documents should be evaluated and categorized by activity to determine if an action always results in a finding of no significant impact. The evidence must be comprehensive and compelling to determine the conditions that will always have a non-significant impact. The criteria should consider a quantity of documents over a number of years. We believe the greatest flexibility exists when categorical exclusions are considered for local areas. (Placed-Based Group, Sacramento, CA - #522.30.60100.E1)

PEER REVIEWED, PUBLISHED SCIENTIFIC LITERATURE DEMONSTRATING INSIGNIFICANT EFFECTS

Because the implications of establishing a new Categorical Exclusion are profound (i.e., no analysis of potential effects via either an EA or EIS is required), extremely high standards of proof should be maintained. In establishing such an exclusion, the following information should be required and made available for public review:

- a. Peer-reviewed, published scientific literature that demonstrates that the action will not individually effect the human environment.
- b. Peer-reviewed, published scientific literature that demonstrates that the action will not interact with other past, present or reasonably foreseeable future actions and have a significant cumulative effect on the human environment. (Individual, Rogue River, OR - #382.21.60100.E1)

Other

966. Public Concern: The CEQ Task Force should outline the basis for establishing categorical exclusions.

CONSULTATION WITH AN INTERDISCIPLINARY TEAM

An interdisciplinary team should be consulted before establishing a categorical exclusion, as each member has special knowledge that, when joined with other member's knowledge, forms a well-thought out basis for a categorical exclusion. (Individual, Homestead, FL - #491.1.60100.E1)

CONSENSUS WITH LOCAL GOVERNMENTS AND INDIVIDUALS

The agencies should be allowed to establish categorical exclusions only with agreement of the individuals in the NEPA action area and local government. (Individual, Huachuca City, AZ - #372.30.60100.E1)

NUMBER OF CATEGORICAL EXCLUSIONS RECEIVING FEDERAL HIGHWAY ADMINISTRATION CONCURRENCE

[E1] The information that would be most effective is the number of Categorical Exclusions receiving FHWA concurrence. Most commonly these are road rehabilitation or minor bridge projects that use minimal or no new right of way. WisDOT uses a checklist to determine whether a project conforms to the programmatic documentation, and if it does, the checklist becomes the de facto environmental document and is placed in the project files. (Wisconsin Department of Transportation, Madison, WI - #214.21.60100.E1)

TIME-SENSITIVE PROJECTS RELATING TO FOREST HEALTH AND PUBLIC SAFETY

What information, data studies, etc. should be required as the basis for establishing a categorical exclusion?

Impacts on public safety should take priority over extended assessment of low-risk environmental evaluations. Hazardous roads, fuel accumulations, erosion, or insect-borne infectious disease, to name only a few examples, should be acted upon in a timely manner, even if it means bypassing environmental assessments. The welfare of the human population must be a primary priority. (Bob Cope, Commissioner, Lemhi County Board of Commissioners, Salmon, ID - #70.23.60100.E1)

The basis for establishing categorical exclusions should be . . . information regarding the urgency of the need to control insects, diseases, reduce hazardous fuels, or perform salvage operations prior to product deterioration. (Recreational/Conservation Organization, Washington, DC - #89.26.60100.E1)

We would prefer regulations be amended to provide categorical exclusions for such projects deemed necessary. While no one can predict where fires will occur, agencies should prioritize those areas most at risk due to excess hazardous fuel loads, and thinning projects should be permitted to occur without NEPA delays or with minimal NEPA requirements. NEPA does allow for emergency situations, but emergencies are usually only declared after a devastating wildfire. The goal here is to prevent those fires from occurring in the first place. (Agriculture Industry, Boise, ID - #464.26.60100.XX)

Activities/Actions Appropriate for Categorical Exclusion

Activities General

967. Public Concern: The CEQ Task Force should establish criteria for agencies to distinguish between actions that are statutorily excluded versus categorically excluded.

The Port Authority finds that actions often fit the regulatory qualifications applicable to both statutory and categorical exclusions. The NEPA Task Force needs to establish specific criteria for distinguishing when such actions, or their components, will be viewed as statutorily excluded versus categorically excluded. In terms of the level of NEPA analysis that may be triggered, this is an important threshold distinction for the applicant. The Port Authority's experience is that the current regulatory framework does not provide clear distinctions or criteria to be used by the regulatory agencies that would move an action into one or the other of the exclusions when they fit into both. (Port Authority of New York and New Jersey, New York, NY - #457.12.60500.XX)

968. Public Concern: The CEQ Task Force should address the inequity between actions that qualify for categorical exclusion.

We are not familiar enough with agencies other than the USFS, but anecdotally, there appears to be a higher threshold for categorically excluding projects that involve forest management action—especially the harvest of trees—than any other actions. An internal example of inequity within USFS actions would be the categorical exclusions adopted for ski area permit actions- that may have a more significant effect upon the quality of the human environment than a proposed salvage logging project to recover timber damaged in a 250 acre wildfire area. We suspect that there are even greater thresholds of inequity between different agencies. For instance, we suspect USDOT road maintenance projects can be categorically excluded at a much higher tolerance of effect upon the quality of the human environment than a proposed USFS tree thinning or other forest management project. (Timber or Wood Products Industry, Kalispell, MT - #462.8.60200.E2)

969. Public Concern: The CEQ Task Force should develop an objective checklist for determining categorical exclusion eligibility.

An objective checklist should be developed for agencies to determine eligibility for categorical exclusion. (Multiple Use or Land Rights Organization, Waynesville, NC - #444.12.10230.XX)

970. Public Concern: The CEQ Task Force should compile a list of universal categorical exclusions that apply to common activities among agencies.

Recommend that CEQ review the agency lists of Categorical Exclusions to develop a CEQ list of universal exclusions that apply to common activities in the absence of unusual circumstances. (United States Air Force, Washington, DC - #525.28.60600.XX)

971. Public Concern: The CEQ Task Force should limit agencies to specific lists of actions that may be categorically excluded.

[The] problem with CEs is that agencies devote too many resources to preparing them. In many cases the CE document is as detailed and expansive as an environmental assessment. If allowable CEs were limited to listed actions, the only information needed would be information showing a particular action falls within a listed category. There would be no need for the kind of more comprehensive analysis that is required at the environmental assessment stage to determine whether an action has significant environmental impacts that require the preparation of an environmental impact statement.

Limit agencies to specific lists of actions and projects they decide can be the subject of a CE and to eliminate any generalized criteria, such as controversy. Agencies could revise their CE lists from time to time as experience indicates which actions and projects can be included. (NEPA Professional or Association - Private Sector, Washington, DC - #450.18.60600.XX)

972. Public Concern: The CEQ Task Force should not limit agencies to specific lists of actions that may be categorically excluded.

To prevent duplication and unnecessary analysis, categorical exclusions should be based on a broad array of criteria. Federal agencies should be able to identify categorical exclusions by referencing established lists of activities as well as through the application of criteria on a case-by-case basis as previously alluded to in the guidance issued by the CEQ.

As indicated in the comments received in response to the 1981 Federal Register notice, CEQ should allow categorical exclusions based on information and a finding consistent with the definition in 40 CFR 1506.4. It is impossible to anticipate all the types of actions that will come before the agency for a decision. Many, on their face, will not demand further environmental analysis. However, the current process of establishing action lists for categorical exclusion results in very limited lists and very infrequent updating. As in an adaptive management concept or process, agencies must have the ability to determine no environmental analysis is needed on minor projects that clearly have little or no impact on the environment. (Wisconsin Department of Natural Resources, Madison, WI - #458.19.60100.XX)

973. Public Concern: The CEQ Task Force should provide direction for agencies regarding the application of categorical exclusions to stop illegal activities on public lands.

It would behoove the Task Force and the Council on Environmental Quality to clarify to land management agencies when and how they can use categorical exclusions to stop illegal, environmentally destructive activities on our public lands. (Preservation/Conservation Organization, Tucson, AZ - #538.10.60700.XX)

974. Public Concern: The CEQ Task Force should consider what actions are appropriate for categorical exclusion.

ACTIONS IMPLEMENTING DECISIONS THAT ARE ALREADY MADE

Categorical exclusions (CE) have been used much less frequently in the past several years, despite the fact that there are many good reasons to issue them. Nevertheless, there are many actions that warrant a CE from complex NEPA analysis. In those situations where an EA or the EIS has already been completed for a specific project, it is reasonable to expect that no additional NEPA analysis would be necessary. This is particularly true for actions that merely implement decisions already made. Agencies and users should be spared additional, extraneous analyses in these situations.

In our view, if an analysis specifically details operating standards, conditions, and stipulations, actions consistent with those requirements do not warrant additional analysis. (Oil, Natural Gas, or Coal Industry, Denver, CO - #545.24.60100.XX)

ACTIONS OCCURRING IN AREAS ALREADY DEVELOPED

Activities that take place in already developed areas should be approved through a CE if they would not result in any significant new disturbance. (Oil, Natural Gas, or Coal Industry, Denver, CO - #545.24.60100.XX)

ACTIONS THAT MAINTAIN THE STATUS QUO

One point of comparison for establishing a categorical exclusion can be found in USFS's own list of categorical exclusions as established by the Chief of the Forest Service. Forest Service Handbook 1909.15 section 31.1b. One categorical exclusion exists for the sale or exchange of land. *Id.* At section 31.1b(7). In this provision is the phrase "where land uses remain essentially the same." *Id.* As mentioned before grazing has long been a use of federal lands where properly managed grazing will result in little or no impact to the physical environment. The land will be basically the same before a permit renewal and after the permit is renewed. If the fundamental principle of "where land uses remain essentially the same" exists as the basis for a categorical exclusion, then the renewal of a permit should fall under a categorical exclusion.

Courts grant a great deal of deference to an agency's interpretation of its own categorical exclusions, as long as that interpretation is not clearly erroneous or inconsistent with the agency's own regulations. *City of Alexandria v. Federal Highway Admin.*, 756 F.2d 1014, 1020 (4th Cir. 1985). Therefore, since a site-specific analyses has already been completed during the land use planning phase, sufficient data exists to establish a categorical exclusion "where land uses remain essentially the same." (Domestic Livestock Industry, La Grande, OR - #496.36.60100.E2)

Categorical exclusions should be encouraged for actions that continue the status quo. An EIS is not required when the subject federal action would not change the status quo. See e.g. *Burbank Anti-Noise Group v. Goldschmidt*, 623 F.2d 115, 116 (9th Cir. 1980), cert denied, 450 U.S. 965 (1981), and *Committee for Auto Responsibility v. Solomon*, 603 F.2d 992 (D.C. Cir. 1979). Thus, when an agency can clearly define a category of action that does not change the status quo, it should create a categorical exclusion for that action. (Domestic Livestock Industry, Sacramento, CA - #463.9.60100.XX)

FEDERAL WILDLIFE MANAGEMENT ACTIONS CONSISTENT WITH STATE WILDLIFE PLANS

A type of situation that should be categorically excluded is federal wildlife management actions that are consistent with the wishes and desires of a state with respect to management of state-resident wildlife species or that, at a minimum, clearly fit within established state plans for managing resident wildlife species. The States have traditionally maintained management jurisdiction and responsibility over such resident wildlife species and exercise broad authority over management actions. The environmental status quo in such cases is what the states decide for management of these resident species. Federal actions that are consistent with the states' management desires do not typically result in a change from the status quo because agencies would generally carry out or authorize to some other entity the authority to carry out the actions even in the absence of federal action or assistance. In these situations, the federal entity has no ability to affect the environmental outcome which means environmental analysis is meaningless. We think such categorical exclusions should clearly apply to federal actions that do not

affect habitat and are conducted in areas where the states maintain jurisdiction and management authority. Thus, they might not be appropriate for areas such as National Parks. (Domestic Livestock Industry, Boise, ID - #576.8.60300.XX)

Beneficial Management Actions

975. Public Concern: The CEQ Task Force should consider what actions are appropriate for categorical exclusion.

ACTIONS THAT HAVE POSITIVE EFFECTS ON THE ENVIRONMENT

Projects that are repetitive in nature, clearly benefit the health of our forests and rangelands, improve wildlife habitat, reduce hazardous fuels, and generally have positive impacts on the human environment should be considered for categorical exclusions. (Recreational/Conservation Organization, Edgefield, SC - #89.31.60100.E3)

ONLY ACTIONS THAT PROTECT THE ENVIRONMENT

Categorical exclusions are only appropriate when it is well accepted that the proposed action is of a type that protects the environment, such as designating critical habitat for a species listed under the Endangered Species Act. (Other, Seattle, WA - #213.10.60100.E1)

ACTIONS NEEDED TO RESPOND TO NATURAL DISASTERS

Conditions that occur due to natural disasters should be under categorical exclusions, especially when a timely response is critical and not usually possible under NEPA processes. For example, in forests—large windthrows creating fuel loads which will lead to fires or extreme drought conditions leading to large catastrophic fires. Removal of fuel loads, either by salvage logging or prescribed fire, as soon as conditions are right, should be allowed to proceed if the natural event occurs in areas where active forest management is the preferred land use. If these events occur in Wilderness areas, fires should not be suppressed, but allowed to follow the natural course of events. (Individual, Moscow, ID - #10.1.60100.E1)

ACTIONS IN RESPONSE TO ILLEGAL RESOURCE DEGRADATION

Under federal law, the Forest Service, as a land management agency, has the authority and the mandate to immediately stop the ongoing illegal damage under the categorical exclusions provided for in NEPA. The authority to take protective measures to prevent resource degradation stems not only from NEPA, but also from the National Forest Management Act, its regulations, and the Coronado National Forest land and Resource Management Plan. While NEPA analysis is appropriate to assess the economic, public safety and environmental issues related to the transportation system, the Forest Service has an obligation to act now in order to maintain the integrity of the land under its jurisdiction. (Preservation/Conservation Organization, Tucson, AZ - #538.8.10520.XX)

REMOVAL OF JUNIPERS TO REGENERATE ASPEN STANDS

The County wishes CEQ good luck in trying to provide direction on common sense to the agencies on what should constitute a CE. We have experience with several basic candidates for CEs that the agencies are unwilling to tackle. They include removal of junipers to protect and regenerate aspen stands (Willy Hage, Supervisor, Modoc County Board of Supervisors, No Address - #636.14.60100.XX)

REMOVAL OF HAZARDOUS TREES ALONG ROADS

The County wishes CEQ good luck in trying to provide direction on common sense to the agencies on what should constitute a CE. We have experience with several basic candidates for CEs that the agencies are unwilling to tackle. They include . . . removal of hazard trees along roads. (Willy Hage, Supervisor, Modoc County Board of Supervisors, No Address - #636.14.60100.XX)

WATERSHED IMPROVEMENTS AND SALVAGE TIMBER HARVEST

Broaden the use of categorical exclusions. Projects like watershed improvements and timber salvage should be excluded if cleared for T and E species, cultural resources, and the Fish and Wildlife Service. (Individual, Hamilton, MT - #11.2.60100.F1)

NOXIOUS WEED CONTROL

We suggest that noxious weed controls receive exemption when the herbicide use has received a label and is examined for use on a region wide basis for weed management. Modern chemical and biological controls are more environmentally friendly than ever before. Each and every square foot of land doesn't need an entire document to address the impacts herbicide use will have when the issue has been covered from a chemical and scientific investigation required before general use. Streamlining redundant activities would help improve the NEPA process. Allowing noxious weeds to grow while an EIS is put together may be more harmful than a proper herbicide and application without an EIS. (Domestic Livestock Industry, La Grande, OR - #496.34.60100.E1)

Delayed action has allowed many small local weed problems to become substantial widespread problems. Several members stressed the need for categorical exclusions that would permit land managers to make small-scale herbicide treatments without preparing EAs or EISs. A useful modification of this approach would be an environmental checklist that would provide documentation that pertinent environmental considerations have not been overlooked. Currently, the National Invasive Species Council (NISC) and the Federal Interagency Committee for Management of Noxious and Exotic Weeds (FICMNEW) are developing plans for Early Detection and Rapid Response (EDRR) systems. The premise of these systems is that there is a narrow window of opportunity to find and treat incipient infestations of invasive species before they become unmanageable. A categorical exclusion for small-scale herbicide treatments would permit this type of rapid response. (Other, Washington, DC - #585.11.60300.XX)

Resource Development Activities

976. Public Concern: The CEQ Task Force should consider what actions are appropriate for categorical exclusion.

SMALL SCALE COMMERCIAL TIMBER HARVEST

Small scale (less than 25-50 MBF) commercial timber projects should be approved for categorical exclusion analysis unless extraordinary circumstances are involved. Full environmental analysis on these projects makes these projects prohibitive to even do. (Individual, Cortez, CO - #379.2.60100.XX)

ACTIONS SPECIFICALLY RELATED TO OIL, GAS, AND MINING DEVELOPMENT

There are also a number of administrative type approvals that should utilize the categorical exclusion process. Examples of projects are listed below:

- a. Approval of minor modifications or variances from activities described in approved development/production plans.
- b. Approval of unitization agreements, communitization agreements, drainage agreements or development contracts.
- c. Approval or suspensions of operations, force majeure suspensions, and suspensions of operations and production.
- d. Issuance and modifications of regulations, orders, standards, notices to lessees and operators and field rules where the impacts are obviously limited to administrative, economic or technological effects and the environmental impacts are minimal.
- e. Approval of production measurement methods, facilities and procedures.
- f. Approval of off-lease storage in or on existing facilities.

- g. Establishment of terms and conditions in Notices of Intent to conduct geophysical exploration of oil and gas pursuant to 43 CFR 3150 where road building and long term (greater than one year) surface damage is not expected.
- h. Offering and issuance onshore competitive oil and gas leases where the issuance of the lease is determined using existing land use plans and the associated EIS.
- i. Approval of an Application for Permit to Drill (APD) in the following circumstances: 1) re-entry or modification of an existing well bore, 2) approval of a new well drilled from an existing well pad and 3) approval of an in-field development well where multiple prior environmental assessments (EA's) have found no significant impacts, the well is within the scope of an existing Reasonable Development Scenario (RFD) and the total disturbance of the APD is less than 5 acres.
- j. Approval of disposal of produced water in accordance with Federal and State regulatory requirements.
- k. Routine hydraulic fracturing of rock formations to enhance production or injection.
- l. Approval of Sundry Notices and Reports on Wells for administrative or reporting purposes or where the surface disturbance is less than 5 acres.
- m. Approval of on lease linear facilities (e.g.) when placed in existing corridors or areas of prior disturbance.
- n. Grants of rights of way within an existing right of way or RMP approval corridor.
- o. Issuance of authorization where there is minimal or no surface disturbance.
- p. Remediation of soils or groundwater where all activity is conducted on-site.
- q. Exceptions to lease terms or conditions of approval that do not result in involve surface disturbance. (Oil, Natural Gas, or Coal Industry, Denver, CO - #598.22.60100.E1)

The agencies are reluctant to use Categorical Exclusions for Documentation on the simplest decisions because they believe that this action is not defensible in court. They are convinced that to prevail in court the action requires more documentation and that all possibilities must be analyzed. An example is the process used to analyze mineral exploration on the Mark Twain National Forest since 1992. There is a portion of the Forest that has been explored and mined for over 40 years. This area is a world-class mining district called the Viburnum Trend, where approximately fifty per cent of the district is situated on public lands. Mineral exploration activities have been conducted on a routine basis in this area since 1952. Several case history studies have proven these activities to be a temporary impact on the forest that can be fully mitigated. For many years prior to 1992, the USFS treated exploration activities conducted under prospecting permits as subject to Categorical Exclusions for purposes of NEPA compliance. In 1992 the USFS amended wording to its manual to limit Categorical Exclusions to short-term (one year or less) mineral, energy or geophysical investigations and their incidental support activities. These changes were made without public review or consultation with the mining industry. The result of these changes has been to significantly slow the process to permit exploration activities through the USFS administered lands. We propose the CEQ work with the Forest Service and BLM to allow mineral exploration as an exclusion from NEPA documentation regardless of the duration of exploration. Under the current policy, investment by the private sector has been greatly reduced and resulting mineral discoveries, and royalties from those discoveries, have not benefited the government. (Mining Industry, Viburnum, MO - #638.3.60500.XX)

RENEWAL OF GRAZING PERMITS

In situations where grazing has occurred for a lengthy period of time, a categorical exclusion should be established for renewing a grazing permit. A grazing permit is usually part of an over all land management plan and therefore many of the environmental impacts have already been assessed and no further action is required to renew the permit. The two predominant federal land management agencies, the BLM and USFS, must develop land management plans as dictated by the Federal Land Policy Management Act, 43 U.S.C. section 1712, and the National Forest Management Act, 16 U.S. C. sections 1600-1614. Each of these provisions call for multiple use and do not favor one use over another.

Information concerning grazing is a constant process. Farmers and ranchers constantly monitor range conditions and usually keep records of range conditions. Our answers in Section D illustrate the type of information necessary to establish a categorical exclusion. Other information that may be helpful in

establishing categorical exclusions include is the length of the particular use. For instance, livestock grazing has been the predominant use of federal lands in the West. Some areas of the West have been grazed for over 200 years and, in some cases, by the same family who has ranched in the same area for generations. As long as the use remains the same, there is no change to the status quo, no change in the physical environment, and no extraordinary circumstances exist, the renewal of a grazing permit should qualify for a categorical exclusion. (Domestic Livestock Industry, La Grande, OR - #496.33.60100.E1)

Recreation Development

977. Public Concern: The CEQ Task Force should consider what actions are appropriate for categorical exclusion.

RESORT ACTIVITIES

The Forest Service should consider further expanding CEs [categorical exclusions], and developing new categories of CEs that are more specifically geared towards resort activities. For example, activities which are similar in nature to previously approved activities and will take place in the same footprint or corridor should be covered under a CE. Examples would include: lift replacements (even with different tower locations), modifying existing trails, snowmaking pipeline installations, expansion of snowmaking to new terrain, improving existing parking lots (particularly when the resort is reducing sediment loads and managing runoff by catching oil and sediments), and replacing structures like mountain restaurants in the same footprint. These new CEs should include flexibility to avoid costly and lengthy surveys for the types of projects described above. (Recreational Organization, No Address - #19.4.60100.A1)

Low-Impact Activities

978. Public Concern: The CEQ Task Force should consider what actions are appropriate for categorical exclusion.

LOW IMPACT PROJECTS

The Task Force should continue to categorize low impact projects as being excluded from further analysis. Over time, the list should expand. (NEPA Professional or Association - Private Sector, Tucson, AZ - #100.7.60100.A1)

I do believe . . . that there can be a simple analysis for projects that are small and without significant impacts. (Idaho State Division of Environmental Quality, Boise, ID - #300.4.60100.E1)

ACTIONS WITH NO SIGNIFICANT ENVIRONMENTAL EFFECTS

Different governmental entities use different processes for developing/updating their lists of actions deemed to be categorically excluded from the NEPA process. These processes, when conducted at all, are not uniform, advertised to the Tribes, or conducted at the appropriate frequency. This lack of CE determinations is forcing the preparation of untold numbers of EAs in cases that the preparer knows will lead to determinations of FONSI. Actions of a similar nature that routinely lead to FONSI should be deemed categorically excluded from the NEPA process to preserve the integrity of both the EA and EIS processes. (Cherokee Nation Department of Natural Resources, Tahlequah, OK - #406.2.60100.F1)

NEPA defines a Categorical Exclusion as a "category of federal actions that does not individually or cumulatively have a significant effect on the human environment". Excluded activities should include only those minor, routine, or ongoing undertakings with no potentially significant environmental effects. (Individual, Rogue River, OR - #382.21.60100.E1)

[E1] Previous, peer-reviewed case studies that definitively establish that there are no (zero) negative effects of the activity in question. Footprint(s) below some small (e.g., 0.25 acre) threshold, as measured by coverage - not actual contact with the Earth's surface. (Individual, Coolville, OH - #180.1.60100.E1)

PRIVATE ACTIONS WITH MINIMAL EFFECT ON FEDERAL LAND

Although the process may not need to be improved, agencies should be encouraged/required to categorically exclude actions that are truly private in nature but may have an incidental impact on federal lands or require the use of a small piece of federal land. For example, agencies should categorically exclude a request for access across federal land to private land or the placement of a pipe that merely crosses a very small portion of federal lands. Federal resources are being wasted in analyzing projects that have minimal or insignificant impacts to federal lands. (Oil, Natural Gas, or Coal Industry, No Address - #634.5.60300.E3)

Activities/Actions Not Appropriate for Categorical Exclusions

Natural Resource Development

979. Public Concern: The CEQ Task Force should consider what actions are not appropriate for categorical exclusion.

RESOURCE DEVELOPMENT

NEPA should not be circumvented by use of categorical exclusions in projects that involve resource extraction as primary components. (Individual, Minneapolis, MN - #595.10.60300.XX)

WETLANDS DEVELOPMENT

Actions that should not be covered in a CE include . . . wetlands destruction (Individual, San Jose, CA - #437.4.60100.XX)

TIMBER HARVEST

Actions that should not be covered in a CE include logging (Individual, San Jose, CA - #437.4.60100.XX)

OIL AND GAS ACTIVITIES

Actions that should not be covered in a CE include . . . oil/gas activities (Individual, San Jose, CA - #437.4.60100.XX)

MINING

Actions that should not be covered in a CE include . . . mining (Individual, San Jose, CA - #437.4.60100.XX)

GRAZING

Actions that should not be covered in a CE include . . . grazing (Individual, San Jose, CA - #437.4.60100.XX)

ROAD CONSTRUCTION

Actions that should not be covered in a CE include . . . roading (Individual, San Jose, CA - #437.4.60100.XX)

NEW HIGHWAY ROUTING OR CONSTRUCTION

NEPA should not be circumvented by use of categorical exclusions in projects that involve new highway routing or construction, or significant changes (i.e., as where a 1400' causeway is planned to replace a bridge.) (Individual, Toledo, OH - #516.9.60300.XX)

URBANIZATION

Actions that should not be covered in a CE include . . . urbanization. (Individual, San Jose, CA - #437.4.60100.XX)

Activities Having Potentially Significant Effects

980. Public Concern: The CEQ Task Force should consider what actions are not appropriate for categorical exclusion.

ACTIONS WHERE CUMULATIVE EFFECTS ARE A KEY FACTOR

Using categorical exclusions is also inappropriate when cumulative impacts are a key factor. For example, the Prescott National Forest used a categorical exclusion to redesignate a relatively obscure trail as part of much-publicized Canada to Mexico ORV trail. The potential cumulative effects of including an independent trail segment in a much larger trail system are much greater and distinguishable from the original trail designation. (Preservation/Conservation Organization, No Address - #498.15.60100.XX)

CIRCUMSTANCES THAT TRIGGER NEPA SIGNIFICANCE

[E1] All extraordinary circumstances that could trigger NEPA “significance” must be ruled out. (Preservation/Conservation Organization, Eugene, OR - #106.20.60100.E1)

FIRE PROJECTS

I do not believe that fire projects are suitable for categorical exclusions due to the potential human health and visibility impacts. The U.S. Fish and Wildlife Service does not conduct environmental analysis on any of their fire treatment projects using this exclusion. This is a misuse of the concept. It is not possible for every fire project to not have some significant impacts. (Idaho State Division of Environmental Quality, Boise, ID - #300.4.60100.E1)

PESTICIDE AND HERBICIDE APPLICATION

It is urgent for changes to FSH 1909.15, chapter 30 (categorical exclusion) [to] be made ASAP. This would include: updates to reflect the current times, clarification, and just writing/grammar improvements that are 1) understandable, 2) clear, and 3) not ambiguous.

Eliminate Pesticide and Herbicide application as an Example of an Action that might be Categorically Excluded—even for Noxious Weeds. Herbicide and Pesticide application is included as an example under several CE categories in FSH 1901.15-31. There are new research findings that show that the inert ingredients (which are trade secrets and do not show on the label) of many of these chemicals are not only strong carcinogens, but harmful in other ways as well.

Unfortunately, many of these CE examples apply to areas where humans congregate, such as facilities and recreation sites. If this isn't a significant impact to the human environment, then I don't know what is. (Government Employee/Union, Grangeville, ID - #44.29.60100.XX)

FIELD TESTING OF GENETICALLY MODIFIED PLANTS

We call the Task Force's attention to APHIS's categorical exclusion at 7 CFR372.5(c)(ii), providing a general exclusion for “permitting, or acknowledgment of notifications for, confined field releases of genetically engineered organisms and products.” The situation now exists in which APHIS has done no NEPA analysis on GM [genetically modified] glyphosate resistant (RoundUp Ready) creeping bentgrass (*Agrostis stolonifera*). Under APHIS's categorical exclusion, the product's proponents, Monsanto and Scotts, have been allowed to plant about 2,000 acres of this product in 35 field trials across 32 States. [Footnote 5: “See APHIS biotech field test database at www.nbiap.vt.edu/cfdos/fieldtests1.cfm.] According to weed experts, glyphosate-resistant creeping bentgrass is—right now, in these excluded field test plots—a serious genetic pollution and invasion risk.

Based on the scientific evidence she gathered, Marilyn Jordan, Ph.D., an ecologist with The Nature Conservancy (TNC), the world's largest private land preserve organization, pleaded with APHIS: [Footnote 6: “Marilyn Jordan, TNC, email to James White, USDA APHIS, and attached unpublished report dated Dec. 28, 2001, entitled “References documenting the widespread presence of bentgrass and bluegrass (*Agrostis* species, *Poa pratensis*) in natural ecosystems.” For further information on this situation and more background to the TNC position, see the formal CTA/CFS petition to the Secretary of Agriculture seeking improvements in the regulation and analysis of GM turfgrasses, and seeking listing of certain GE turfgrasses as noxious weeds, available online at www.icta.org/petit-grass.htm.

Bentgrass and other turfgrass are indeed widespread and serious weeds across the United States and Canada. We sincerely hope that these herbicide resistant turfgrasses will NOT be released for commercial use. I also hope that all field tests of herbicide resistant turfgrasses will be stopped immediately. Because of the great distances which pollen can be carried it is highly likely that the gene for herbicide resistance will inevitably escape into the environment, if it hasn't already.

TNC's report on the matter concludes:

Ultimately permits may be sought for commercial release of herbicide-resistant bentgrass and bluegrass. Field tests of these grasses are likely to result in escape of herbicide-resistance into surrounding natural areas, since windborne pollen carries long distances.

Yet, according to a recent Oregon Department of Agriculture report, Scotts already intends to engage in seed production in that State as part of its ramping up to anticipated commercial release before APHIS conducts any NEPA compliance whatsoever to determine that it is safe, despite scientific evidence that it is not. [Footnote 7: "Presiding Officer's Report, In the matter of proposed rulemaking hearing to create a control area for genetically bentgrass in Jefferson County. Oregon Dept. of Agric., July 1, 2002, p. 1"] The point is that by taking advantage of the far-too-generous categorical exclusions allowed by APHIS for field tests of GM crops, Scotts is creating a genetic pollution fait accompli. This must be stopped.

Again, do not just take our word for it: The NAS report on APHIS and biotech crops says the same thing, referring to the categorically excluded "notification" process for field tests.

The assessment of notifications is not subject to external scientific review or any other public input. A few transgenic plants are now grown to produce commercial products under notification (Footnote 8: "National Research Council/National Academy of Sciences. 2002. Environmental Effects of Transgenic Plants: The Scope and Adequacy of Regulation. Washington, DC., at p. 108.")

This is not a NEPA process at all if companies are allowed to commercialize GM plant products and sow them anywhere they want across the country, while evading any formal public or outside expert review. It is worse than EIS avoidance, it is EA avoidance.

Recommendation - Eliminate the existing APHIS categorical exclusions for extensive field tests of risky GM products. Clarify that genetic pollution and other environmental risks presented by potentially invasive GM species in even limited plantings are such that EAs and in some cases full EISs must be required before field tests. (Other, Washington, DC - #476.9.60300.XX)

981. Public Concern: The CEQ Task Force should recognize that many activities are inappropriately authorized for categorical exclusion.

BECAUSE A CUMULATIVE EFFECTS ANALYSIS IS NOT REQUIRED

Many of the activities that currently are authorized under the CE [categorical exclusion] policy do in fact create environmental impacts. Perhaps individually the impacts are not significant, but the cumulative effects are unknown because no environmental analysis is required. The high potential for significant impacts, particularly cumulative impacts, is of particular concern with regard to the "extraordinary circumstances" section of the proposed policy (FN), which includes roadless areas, high-risk sites, areas that support at-risk species, Native American sites, and other invaluable resources. Furthermore, the allowed activities are inappropriate for other ecologically sensitive areas that are not included in the current or proposed extraordinary circumstances list, such as riparian (streamside) areas, watersheds that serve as refugia for imperiled aquatic species, and uninventoried roadless areas. (Preservation/Conservation Organization, Eugene, OR - #98.2.60100.F1)

Interagency Review of Categorical Exclusions

Summary

This section includes the following topics: Interagency Review General, and Factors to Evaluate in Interagency Review.

Interagency Review General – Among those who comment on the role of interagency review and coordination of categorical exclusions, some respondents suggest that agencies that undertake similar actions or projects be able to adopt categorical exclusion categories from each other. A few suggest that agencies should regularly review each other’s categorical exclusions, and some suggest a streamlined process for adopt existing CEs from other agencies. “If an agency is establishing a similar categorical exclusion that already exists in another agency the detail of analysis to justify the categorical exclusion should be less,” writes one timber industry representative. A federal agency representative suggests that federal agencies that host other agencies on their installations or administrative property should be able to adopt the CEs of the agencies being hosted. This respondent requests that each agency retain the right to refuse adopting categorical exclusion categories from other agencies, however.

Factors to Evaluate in Interagency Review – Respondents suggest a variety of procedural or analytical factors that they feel the Task Force should establish in the creation of an interagency categorical exclusion review process. Their responses consist mostly of short list items. “An agency should be permitted to use identical or directly applicable points from another agency’s categorical exclusion to justify its own CATEX,” writes one federal agency representative. To evaluate whether a CATEX from another agency is applicable to the project in question, respondents list such criteria as differences in state and local laws, degree of similarity in actions, effects and environmental consequences, land types affected, frequency and geographic scope of action, presence of extraordinary circumstances, controversy levels, and consistency of terminology and definitions. Additional factors that respondents suggest be evaluated in a cross-agency categorical exclusion adoption process include the degree of similarity in agency missions, environmental justice issues, success rate in appeals decisions, baseline data, and monitoring results.

Interagency Review General

982. Public Concern: The CEQ Task Force should encourage agencies to review and apply other agencies’ categorical exclusions.

It would be helpful for any Federal agency to be able to use another agency’s categorical exclusion once approved by the Council. (United States Department of Agriculture, Washington, DC - #110.14.60200.XX)

Although each federal agency develops its own list of Categorical Exclusions, it is not uncommon for more than one agency to have some responsibility for the same “major federal action.” This is a frequent occurrence on Air Force installations, which may host tenant organizations from several different federal agencies. In such cases the Air Force, at times as host, assumes a NEPA compliance responsibility for the tenant’s actions on the host installation. This becomes problematic when the tenant has an appropriate categorical exclusion available but the Air Force does not. Currently CEQ regulations do not provide a means to adopt the other agency’s categorical exclusions. However, the existence of a valid and applicable categorical exclusion should be sufficient basis for establishing, or adopting, a similar categorical exclusion by the host agency in order to fulfill its related NEPA responsibility. Restricting the application of such adopted categorical exclusions to actions by the agency that formally established them would prevent abuse. (United States Air Force, Washington, DC - #525.23.60100.E1)

983. Public Concern: The CEQ Task Force should require less analysis from agencies adopting another's categorical exclusion.

If an agency is establishing a similar categorical exclusion that already exists in another agency the detail of analysis to justify the categorical exclusion should be less. The agency could obtain and incorporate any information used to establish the existing categorical exclusion. (Timber or Wood Products Industry, Portland, OR - #454.30.60100.E2)

984. Public Concern: The CEQ Task Force should allow agencies to retain the right to decline another agency's application to adopt a categorical exclusion.

The host agency should retain the right to decline application of any such categorical exclusions, particularly in the presence of extenuating circumstances. (United States Air Force, Washington, DC - #525.24.60200.E2)

Factors to Evaluate in Interagency Review

Laws/Regulations

985. Public Concern: The CEQ Task Force should consider what factors are appropriate to evaluate in interagency review.

LOCAL LAWS AND REGULATIONS

An agency should be permitted to use identical or directly applicable points from another agency's categorical exclusion to justify its own CATEX. . . . To ensure applicability, the new CATEX should possibly compare the following item: state and local laws and regulations. (United States Navy, Washington, DC - #568.24.60200.E2)

OUTCOME OF APPEALS

In reviewing CATEXs issued by others, Federal agencies should make sure that the CATEX has been upheld where challenged in court. (Federal Aviation Administration, No Address - #534.20.60200.E2)

ENVIRONMENTAL JUSTICE ISSUES

Points of comparison before using another agency's categorical exclusion to establish its own include: ethnography (environmental justice issues) . . . (Individual, Homestead, FL - #492.1.60200.E2)

Agency Processes

986. Public Concern: The CEQ Task Force should consider what factors are appropriate to evaluate in interagency review.

SIMILARITY IN AGENCY MISSIONS

Points of comparison before using another agency's categorical exclusion to establish its own include: similarity in agency missions (Individual, Homestead, FL - #492.1.60200.E2)

FREQUENCY AT WHICH THE OTHER AGENCY CONDUCTS THE NEPA PROCESS

In reviewing categorically-excluded actions of other agencies for potential adoption by another agency, SEA suggests that the following factors be considered: Frequency at which the other agency identifies extraordinary circumstances and implements an EA or EIS process. (Surface Transportation Board, No Address - #519.27.60200.E2)

Data/Analysis

987. Public Concern: The CEQ Task Force should consider what factors are appropriate to evaluate in interagency review.

SCIENTIFIC DATA

E #2 Any Baseline Data and Current State and Federal Scientific research collections that are from the area of impact or from the private sector as well. If the data used for comparison is not qualifiable then an interpretive and analytical assessment would be necessary (rather than dismissing the data). (Individual, Johnson City, TN - #631.18.60200.E2)

MONITORING RESULTS

What points of comparison could an agency use when reviewing another agency's use of a similar categorical exclusion in order to establish a new categorical exclusion? . . . monitoring of results should . . . be applicable. (Bob Cope, Commissioner, Lemhi County Board of Commissioners, Salmon, ID - #70.24.60200.E2)

Project Type

988. Public Concern: The CEQ Task Force should consider what factors are appropriate to evaluate in interagency review.

SIMILARITY IN HISTORICAL USE

Points of comparison before using another agency's categorical exclusion to establish its own include: similarity in historical use (Individual, Homestead, FL - #492.1.60200.E2)

SIMILARITY OF PROJECTS

Agencies should determine whether the impacts are similar in intensity and duration to determine if they should also categorically exclude projects that another agency has excluded. The more federal agencies with the same exclusions, the more logical the process. (NEPA Professional or Association - Private Sector, Tucson, AZ - #100.8.60200.A1)

SIMILARITY OF SITUATION

What points of comparison could an agency use when reviewing another agency's use of a similar categorical exclusion in order to establish a new categorical exclusion?

The similarity of the situation, particularly in regard to the land and its vegetation, is an apparent point of comparison (Bob Cope, Commissioner, Lemhi County Board of Commissioners, Salmon, ID - #70.24.60200.E2)

FREQUENCY OF ACTION

In reviewing categorically-excluded actions of other agencies for potential adoption by another agency, SEA suggests that the following factors be considered: Frequency of occurrence of the action (Surface Transportation Board, No Address - #519.27.60200.E2)

PROXIMITY OF ACTIONS

[Factors to consider:] The proximity of the activities to each other (Placed-Based Group, Sacramento, CA - #522.31.60200.E2)

GEOGRAPHIC SCOPE OF ACTION

[Factors to consider:] The extent of the area the categorical exclusions apply (Placed-Based Group, Sacramento, CA - #522.31.60200.E2)

PRESENCE OF EXTRAORDINARY CIRCUMSTANCES

In reviewing categorically-excluded actions of other agencies for potential adoption by another agency, SEA suggests that the following factors be considered: Likelihood of extraordinary circumstances to be present . . . (Surface Transportation Board, No Address - #519.27.60200.E2)

Project Effects

989. Public Concern: The CEQ Task Force should consider what factors are appropriate to evaluate in interagency review.

RELATIVE EFFECTS

Relative impacts, or lack thereof, should be the primary point of comparison. (Port Authority of New York and New Jersey, New York, NY - #457.10.60200.E2)

FINDINGS OF THE EFFECTS ANALYSIS

[E2] Response: I think the question here revolves around an agency adopting another agency's category for a CE. In order for the project to qualify for a CE, the effects analysis must arrive at a no significant effects finding and have no effects to extraordinary circumstances. I would recommend that one agency review these analyses and findings. If after the review, the reviewing agency comes up with nearly identical effects findings, then the category could be adopted. If the review findings were different, then the opposite would be true. (Government Employee/Union, Grangeville, ID - #44.23.60200.E2)

[E2] The comparison must involve proposals that have the same or similar effects. (Wisconsin Department of Transportation, Madison, WI - #214.22.60200.E2)

ECOLOGICAL, SOCIOLOGICAL, AND ECONOMIC CONSEQUENCES

When establishing a new categorical exclusion that another agency is already implementing, the agency should review what ecological, sociological and economic consequences supported the categorical exclusion in the other agency. (Recreational/Conservation Organization, Edgefield, SC - #89.30.60200.E2)

Other

990. Public Concern: The CEQ Task Force should consider what factors are appropriate to evaluate in interagency review.

ENVIRONMENTAL CONDITIONS

[Factors to consider:] The environmental conditions would all be important comparisons. (Placed-Based Group, Sacramento, CA - #522.31.60200.E2)

CONSISTENCY OF TERMINOLOGY

Using an existing CATEX of another agency as a basis for developing a new CATEX can be very helpful to an agency. . . . When establishing a new CATEX based on another agency's CATEX, the agencies should carefully compare the terminology in the original and proposed CATEXs to ensure that definitions are consistent between the agencies; otherwise, adopting another agency's terminology may alter the applicability and scope of a CATEX when included in another agency's procedures. (Federal Aviation Administration, No Address - #534.20.60200.E2)

SUCCESS RATES

What points of comparison could an agency use when reviewing another agency's use of a similar categorical exclusion in order to establish a new categorical exclusion? . . . Success rates . . . should . . . be applicable. (Bob Cope, Commissioner, Lemhi County Board of Commissioners, Salmon, ID - #70.24.60200.E2)

APPLICABLE RESOURCE AREAS

If another agency's CE covers all resource areas then it should be easily adopted by an agency. (Federal Highway Administration, Wyoming Division, Cheyenne, WY - #83.9.60200.E2)

DEGREE OF CONTROVERSY

[Factors to consider:] The degree of controversy (Placed-Based Group, Sacramento, CA - #522.31.60200.E2)

Improvements in the Process of Establishing New Categorical Exclusions

Summary

This section includes the following topics: Improvements General, Improvements in Agency Handbook Direction, Analysis Requirements, and Regulatory Changes.

Note: This section covers much of the same material presented elsewhere regarding categorical exclusions, given that most respondents who answer the questions posed by the Task Force do make concrete suggestions for improvements or changes to the CEQ NEPA regulations by topic area.

Improvements General – In general, respondents emphasize the need for clarity and the reduction of existing ambiguities in existing regulations to reduce delays and inconsistent interpretation between agencies. Thus some urge the Task Force to focus its attention on streamlining and efficiency. Others maintain that reining in abuses of the categorical exclusion process should be one of the Task Force's primary objectives. Respondents who discuss improvements to the categorical exclusion process often specifically request more detailed criteria in determining whether a categorical exclusion is appropriate. Some suggest a searchable nationwide reference database for use by agency personnel to compile and make accessible all approved CEs. Updating this list and allowing CEs for similar actions would expedite the process, assert some federal agency representatives. Others ask that the criteria be narrowed, with some timber industry officials specifically requesting that this be done for the kick-out criteria that trigger an EA.

Some, however, feel that the existing categorical exclusion regulations are adequate as written and need no revision. "No changes are needed. Because our categorical exclusions are part of our DOE NEPA implementing regulations, the Administrative Procedure Act governs their amendment process. Though time-consuming, the rulemaking process affords public participation and confers legitimacy," observes one federal agency official.

Improvements in Agency Handbook Direction – Some respondents suggest that the Task Force eliminate the list of examples of CEs from the handbook, replacing them with goal-oriented category definitions. Others request a complete rewrite of the extraordinary circumstances section by establishing an all-inclusive list that must be updated annually.

Analysis Requirements – This section echoes comments found in the Data/Analysis Requirements section earlier in the chapter. Some believe that better documentation must be required. Reasons cited include the need to reduce legal challenges and to discourage the practice of segmenting projects to avoid cumulative effects analysis. Others, however, believe that documentation requirements should not be increased because this will lead to greater delays and costs.

Regulatory Changes – Some request revision of Category 8 time limitations from one to five years to accommodate short seasons of work. Others request that guidance issued in 1983 by Alan Hill be formally added to regulatory guidance.

Improvements General

991. Public Concern: The CEQ Task Force should improve the process of establishing new categorical exclusions.

We have limited knowledge of the existing process and would defer comment to others better versed in the nuances of the existing process. We believe this is one of the primary tasks for CEQ and it should be their direction to agencies as to the necessary process to establish new categorical exclusions. (Timber or Wood Products Industry, Kalispell, MT - #462.9.60300.E3)

CEQ should take the lead in developing a streamlined process for review/approval of proposed new agency CX. (Business, Fairfax, VA - #520.19.60300.E3)

BY NOT TOLERATING ABUSE OF THE PROCESS

Any new regulations must reaffirm that Categorical Exclusions must be used only when impacts will truly be minimal. The federal land management agencies in particular have flagrantly abused the CE procedure, spawning yet more lawsuits. The situation regarding CEs demonstrates the general principle that lawsuits derive from a lack of public participation, not from an abundance of it. The Task Force must state clearly and emphatically that abuse of CE provisions will not be tolerated, and recognize that such abuse only causes more “process gridlock” in the long run. (Individual, Logan, UT - #383.5.60300.XX)

BY CONSIDERING ENVIRONMENTAL EFFECTS

[E3] Categorical exclusions are presently too easy to obtain. Environmental impacts that exist are sometimes overlooked in this process. (Individual, Chico, CA - #387.1.60300.E3)

TO AVOID NATIONAL BANKRUPTCY

Improvements and changes are necessary because, the way it is now, this country is going to become bankrupt. I wonder if anyone has ever thought of the all the cost, homeland security, regulations of all sorts and the only ones making money are the lawyers. (Individual, Chugiak, AK - #135.1.60300.E3)

992. Public Concern: The CEQ Task Force should expedite the process of establishing categorical exclusions.

A mechanism should be considered to allow agencies to adopt categorical exclusions easily. The current practice makes it extremely difficult for an agency to add to their existing CE lists in a timely manner. (Federal Highway Administration, Washington, DC - #658.24.60300.XX)

TO DIMINISH SUSCEPTIBILITY TO LITIGATION

While we realize the development and adoption of improved processes involves difficult politics, some substantial improvements are needed to reduce the amount of work thought to be required, exclude projects of little or no environmental consequence, dramatically improve responses to emergencies, shortening the time required for project preparation and diminish the susceptibility of the rules and process to delays from appeals and litigation. (Timber or Wood Products Industry, Sacramento, CA - #405.5.60300.XX)

BY LIMITING REQUIRED ANALYSIS

Clearly, there is a need for a simple, short time frame process to let public land managers initiate recovery actions which, although they may be considered disturbing to the environment, produce such large offsetting benefits as to merit having approvals carried out on a routine basis and isolated from the threats of delaying appeals and litigation. Early recovery efforts tend to reduce the potential of further

loss, help stabilize the site and speed final recovery. Characteristically, following a sizable fire the Forest Service misses the opportunity to do substantial pre-first winter erosion control work and generally two planting seasons while it deals with paperwork and public involvement.

The current guidelines for NEPA compliance have been so distorted by appeals and litigation that small, almost ministerial projects have become nearly impossible. The removal of hazard trees, improving roads and their erosion control facilities and the harvesting of small volumes of timber to achieve forest health purposes, for example have too often in many forests become as cumbersome to bring to fruition as major timber sales. To bring the work required for these projects back into proper perspective, revisions are needed that explicitly limit the amount of study and analysis required and provide some categorical exclusion for at least an initial list of projects that can be carried out without significant amounts of paperwork. (Timber or Wood Products Industry, Sacramento, CA - #405.3.60300.XX)

993. Public Concern: The CEQ Task Force should issue a guidance document regarding the establishment of categorical exclusions.

A CEQ guidance document that outlines when and how to establish categorical exclusions would be valuable to SEA. Furthermore, the CEQ guidance could encourage and facilitate the adoption of additional categorically excluded actions and increase consistency in the nature and scope of activities categorically excluded by all Federal agencies. (Surface Transportation Board, No Address - #519.28.60300.E3)

994. Public Concern: The CEQ Task Force should improve the process of establishing new categorical exclusions by providing guidance on criteria.

BY DEVELOPING AN OBJECTIVE LIST OF CRITERIA FOR AGENCIES TO FOLLOW

CEQ should consider developing a set of criteria—a checklist that is not subjective—for agencies to determine whether an action or class of actions is eligible for categorical exclusion. (Timber or Wood Products Industry, Deer River, MN - #377.14.60300.XX)

BY DEVELOPING A NATIONWIDE DATABASE OF APPROVED CATEGORICAL EXCLUSIONS

The appropriate and timely use of the CATEX can be greatly improved on if we create a Federal Database master file of the basic CATEX and/or the CATEX and checklist that have been previously approved by the CEQ. Specific, individual approval for every Federal Agencies' actions that have no impact on the human or natural environment, directly or indirectly or by way of cumulative effect can be compared, evaluated and processed by the use of a master CATEX database available for review and use by all Federal Agencies.

For instance, there is no real difference between a road maintenance project being conducted by the BLM or the US Border Patrol or the Park Service. Why then must each Agency seek prior CATEX approval, on an individual basis for required road maintenance? There are numerous Federal actions (projects) that can be processed, in a more economical and timely manner if each Agency has the availability to access a previously approved set of CATEXs for similar projects. The lack of any available, approved set of CATEXs for similar projects. The lack of any available, approved database now forces an Agency to seek approval for a CATEX action or perform an E.A. Both methods of environmental resolution in support of decisionmaking are costly and time consuming for the taxpayer and the Agency. Both of these consequences would appear to defeat one of the major purposes of both NEPA and the CEQ Regulations regarding economic feasibility and timely resolution of potential environmental impacts.

I would therefore respectfully recommend the Task Force seriously consider, approve and implement a nationwide, agency wide Federal database of all approved Categorical Exclusions. This database could then be researched by any Federal Agency to determine which previously approved CATEX will match their proposed action and can document the proposal accordingly. (Individual, Santa Ana, CA - #481.1.60200.E3)

BY NARROWING THE CRITERIA FOR EXCEPTIONS TO CATEGORICAL EXCLUSIONS

The process of updating and expanding agency lists of categorical exclusions must also include the lists of “exceptions to categorical exclusions”. Currently, the exceptions are so broad that categorical exclusions may be of little real value. We recommend that “exceptions” be more specific and limited in scope. Much of the problem may be interpretation, but clarification is necessary so as not to end up with absurd results and unnecessary environmental analysis. For instance, federal agencies currently may require further environmental analysis for an activity that may include a wetland or flood plain, even though the activity will have no adverse effects on these resources or may be taken for the protection and maintenance of the wetland or flood plain. (Wisconsin Department of Natural Resources, Madison, WI - #458.22.60200.E3)

BY ALLOWING SIMILAR ACTIONS TO BE CATEGORICALLY EXCLUDED

One suggested improvement is for CEQ to revisit the presumption that an agency action must specifically be included in its list of CATEXs in approved agency guidance in order to be eligible for a CATEX. It is not unusual for FAA to be presented with a new action that is similar to (and even more benign than) items on FAA’s CATEX list, but the item is not precisely listed. An EA is onerous for such actions, and so are frequent revisions to FAA’s NEPA guidance to update the CATEX list. (Federal Aviation Administration, No Address - #534.21.60300.E3)

BY RECONSIDERING THE “KICK OUT” CRITERIA

CEQ should reconsider fully the “kick out” criteria and develop a narrower set of criteria for excluding categorical exclusions based solely on science and the expected level or degree of adverse effects. (Multiple Use or Land Rights Organization, Kane, PA - #447.17.60100.XX)

We think the most important contribution that CEQ can make to ensure that vitality is restored to the categorical exclusion concept is to reconsider the “kick out” criteria that lift any action from categorical exclusion status to imposition of an EA. The CEQ rules contain several troublesome criteria that define “significantly” and thereby require an EA in lieu of applying a categorical exclusion (or substitute an EIS for an EA). The two most problematic criteria are effects on the environment that are “highly controversial” and “highly uncertain or involve unique or unknown risks.” 40 C.F.R. 1508.27(b)(4) and (5) and 1508.4. No matter how often the CEQ asserts that “controversial” does not mean the level of opposition to the Federal action but rather scientific disputes over the projected effects, the agencies quickly abandon the categorical exclusion option as soon as any organized grumbling is heard. And, few agencies have the stomach to place any weight on the “highly” modifier of “controversial.” Similarly, since site conditions for even the most frequently repeated actions always differ, any advocate worth his or her salt can allege uncertainty or unique risks, again artfully dodging the supremely vague “highly” modifier.

Indeed, the vagueness of the “kick out” criteria reaches truly heroic proportions with the phrase: “The degree to which the action represents a decision in principle about a future consideration.” 40 C.F.R. 1508.27(b)(6). We find that phrase indecipherable. (Timber or Wood Products Industry, Washington, DC - #507.29.60800.XX)

995. Public Concern: The CEQ Task Force should improve the process of establishing new categorical exclusions by providing guidance on agency practices.

BY ENCOURAGING AGENCIES TO USE A TRANSPARENT PROCESS

E3. We would encourage the agencies to use a transparent process in determining whether a CE is an appropriate venue for projects that affect the environment. (Preservation/Conservation Organization, Vancouver, WA - #103.16.60300.E3)

BY PLACING MORE RELIANCE ON PROFESSIONAL MANAGERS

Clearly, there is a need for a simple, short time frame process to let public land managers initiate recovery actions Greater reliance should be placed on certification by professional managers. (Timber or Wood Products Industry, Sacramento, CA - #405.3.60300.XX)

BY ALLOWING AGENCIES TO PUBLISH FINDINGS IN THE FEDERAL REGISTER

The process for amending an agency's NEPA procedures to include additional categorical exclusions often requires a lengthy period of time. In many cases, it has become more effective to prepare EAs on projects that clearly have no significant impact rather than to amend an agency's implementing procedures. CEQ should consider the following change. When an agency believes that an action clearly has no significant impacts, but lacks an appropriate categorical exclusion, an agency should be allowed to publish in the Federal Register its finding and basis for its finding that the action will clearly not have significant environmental impacts. (United States Navy, Washington, DC - #568.25.60200.E2)

The only method we are familiar with agencies establishing categorical exclusions is through the Federal Register. A less formal process may be possible if the categorical exclusion was specific to a local geographic area and was proposed by a local office of a particular agency. In these cases, a posting in the local office or notice via a mailing list could be used to obtain input. For categorical exclusions for agency-wide use, the Federal Register may be the most efficient process available. (Oil, Natural Gas, or Coal Industry, Denver, CO - #598.24.60300.E3)

BY ADVISING AGENCIES TO PERIODICALLY REVIEW AND UPDATE CATEGORICAL EXCLUSIONS

Are improvements needed in the process that agencies use to establish a new categorical exclusion?

Absolutely. We are unaware of any established process within many federal agencies, including the Department of the Interior, Fish and Wildlife Service, for periodically reviewing and updating categorical exclusions. We recommend such review processes be implemented immediately at the direction of the Council. Such a review ought to include a solicitation to state partners who will have the most knowledge and experience about activities subject to federal review. Categorical exclusion lists must be revisited on a periodic basis such as every five years in order to reflect the current decision-making environment. (Wisconsin Department of Natural Resources, Madison, WI - #458.21.60200.E3)

BY ENCOURAGING AGENCIES TO ESTABLISH REGIONAL- OR AREA-SPECIFIC CATEGORICAL EXCLUSIONS

Are improvements needed in the process that agencies use to establish a new categorical exclusion? If so, please describe them.

Yes! Currently, the Forest Service writes more Environmental Impact Statements than any other agency, even though there is relatively little environmental risk when compared to some other entities. The system should consider relative long-term impact associated with management decisions. The option should be allowed for regional-or area-specific categorical exclusions. Local federal land managers should be allowed more latitude proportionate to their experience and expertise. (Bob Cope, Commissioner, Lemhi County Board of Commissioners, Salmon, ID - #70.25.60300.E3)

While many of the CATEXs have direct utility for the states receiving federal aid, the current Department of Interior (DOI)/Fish and Wildlife Service (FWS) CATEXs do not adequately address the unique situation of states' resource management programs. States receiving Federal Aid in Fish and Wildlife Restoration funds are required to maintain facilities constructed or acquired with those funds. They must also manage land acquired with Federal Aid in a manner consistent with the purposes for which they were acquired (50 CFR 80). Most states agreed to these stipulations over 30 years prior to the implementation of NEPA. Additional categorical exclusions need to be defined for routine state management actions that state are required to conduct in order for the state to remain in compliance with Federal Aid rules. The 40 CFR 1507.3 supports the promulgation of CATEXs specifically for Federal Aid. It reads in part:

"Sec. 1507.3 Agency Procedures. (a) When the agency is a department, major subunits are encouraged (with the consent of the department) to adopt their own procedures. Such procedures shall not

paraphrase these regulations.” (Michigan Department of Natural Resources, Lansing, MI - #563.2.60300.XX)

BY ENCOURAGING AGENCIES TO CONSIDER CATEGORICAL EXCLUSIONS ON A LOCAL BASIS

Agencies have been reluctant to use categorical exclusions except over a broad area. The last category exclusion was developed for the entire nation, although evidence indicated green timber harvests under 1000 mbf or salvage under 2000 mbf in the West would not result in a significant impact compared to the East in which under 250 mbf green or 1000 mbf salvage would not result in significant impact. Yosemite National Park fuel reduction activities for example, have been authorized under a categorical exclusion unique to Yosemite, rather than all park service lands. Agencies, especially the Forest Service, must improve the process to consider categorical exclusions on a local basis. (Placed-Based Group, Sacramento, CA - #522.32.60300.E3)

BY REMOVING AGENCIES AND SPECIAL INTEREST GROUPS FROM THE PROCESS

[E2] Get the agencies and their special interest lap dogs out of the process entirely. Lean heavily on the impacted decision area and really begin to work the law as intended and written. (Individual, Pioche, NV - #341.1.60300.E2)

996. Public Concern: The CEQ Task Force should establish an administrative review process for agency decisions to apply a categorical exclusion.

I don't think that [exemptions of] any categorical exclusions from review are appropriate! Those would both be too subject to political pressure (I want the environment to provide the feedback) and by their nature could end up being ridiculously narrowly applied.

Each time an area is considered to be of limited concern, that assertion should be agreed upon by the reviewing agencies and the dissent/concurrence documented. (Individual, Katy, TX - #197.1.60100.E1)

TO AVOID UNNECESSARY LEGAL CHALLENGES

The Task Force should consider whether some form of administrative review might be desirable for an agency's decision to select a categorical exclusion. At present, there are no administrative remedies to exhaust when a project is categorically excluded, meaning that an initial challenge can be brought in U.S. District Court. In our experience this can lead to greater inefficiency and deprives the agency of any ability to “self-police” controversial projects. Today's public land interest groups face few philosophical or logistical limits in filing suits against federal land managers, and many apparently relish the opportunity to do so. Even a cursory review process at the level immediately above the decision-maker might provide an opportunity to avoid wasteful and unnecessary legal challenges. (Recreational Organization, Boise, ID - #90.16.60300.XX)

997. Public Concern: The CEQ Task Force should apply more flexibility in establishing categorical exclusions.

FOR SIMPLE SPECIAL USE PERMITS

The CEQ should also give the USFS greater authority to use categorical exclusions (CEs) for . . . simple special use permits. (Timber or Wood Products Industry, Ketchikan, AK - #524.3.60100.XX)

FOR ROUTINE MAINTENANCE PROJECTS

It would help if NEPA Task Participants could:

Consider more flexibility in applying Categorical Exclusions for routine maintenance projects such as road resurfacing and associated shoulder backing in rural areas within existing roadways. (Imperial County Department of Public Works, El Centro, CA - #15.2.60300.XX)

FOR SMALL MINERAL EXPLORATION PROJECTS

Under “E, Categorical Exclusions”, the Forest Service needs the flexibility to use CEs for small-scale locatable minerals exploration projects. The process for establishing new categories is cumbersome and there is no process in place for field units to submit categories they feel they need.

Public scoping and scoping via the SOPAs [Schedule of Proposed Actions], ID Team involvement, generation of site-specific mitigation measures and reclamation plans, should all be a part of the process to approve exploration Plans of Operations under CEs. Just because floodplains and wetlands are in the area where test holes will be excavated (extraordinary circumstances), this would not necessarily prohibit the District Ranger from using a CE. If there will be no adverse effect on the floodplain or wetland which would result in irreparable damage to the land, the District Ranger should have the option of using a CE. Most exploration plans of operation never result in a mining plan. (Individual, Unity, OR - #216.5,7.60100.XX)

998. Public Concern: The CEQ Task Force should broaden the use of categorical exclusions.

As long as the proposed action is consistent with the long-range land use plan for a land management agency, then categorical exclusions should be broadened and the major NEPA assessments would be limited to truly “major actions significantly affecting the quality of the human environment.” Somehow the definitions of “major” and “significantly” has been changed considerably from what most scholars believe was the intent of congress in 1969. (Individual, Moscow, ID - #10.2.60600.E1)

BY STUDYING EA'S THAT CONCLUDE THERE IS INSUFFICIENT EFFECT TO HAVE JUSTIFIED AN EA

The only improvement recommended is to increase the number of projects subject to categorical exclusion by studying environmental assessments (EAs) that conclude there is insufficient impact to have really justified going to the EA level. (NEPA Professional or Association - Private Sector, Tucson, AZ - #100.9.60300.A1)

TO ALLOW DECISIONS AND ACTIONS TO MOVE FORWARD

NEPA analysis, at times, has been used to prevent decisions and actions. Some producers have approached agencies with suggestions which would improve management only to be told that before any action could occur, some level of NEPA analysis must be completed and the time and cost is too great to do such an analysis. It is very likely that some of the fixes are beyond the rule making process, but clearly every effort needs to be made to expand categorical exclusions. (Agriculture Industry, Laramie, WY - #644.9.60000.XX)

999. Public Concern: The CEQ Task Force should use existing, broadly defined categorical exclusions rather than establishing new ones.

[E3] WisDOT does not see a problem in this area. The establishment of new categorical exclusions assumes that new activities are being proposed. In the early 1970s WisDOT, as part of the Wisconsin Environmental Policy Act's implementation, defined all its major actions into the three traditional categories of EIS, EA, and CE. The resulting list of actions was detailed but ended up being too restrictive and unwieldy. The solution was to use the more broadly defined CEs as in federal regulations. (Wisconsin Department of Transportation, Madison, WI - #214.23.60300.E3)

1000. Public Concern: The CEQ Task Force should recognize that no improvements are needed in the process of establishing categorical exclusions.

Are improvements needed in the process that agencies use to establish a new categorical exclusion? If so, please describe them.

No changes are needed. Because our categorical exclusions are part of our DOE NEPA implementing regulations, the Administrative Procedure Act governs their amendment process. Though time-consuming, the rulemaking process affords public participation and confers legitimacy. After rulemaking there is no requirement for public participation. (United States Department of Energy, Washington, DC - #536.30.60300.E3)

Improvements in Agency Handbook Direction

1001. Public Concern: The CEQ Task Force should advise the Forest Service to strengthen its handbook requirements for categorical exclusions.

I would strengthen the requirement in the FSH [Forest Service Handbook] that every project considered for a CE must have:

- an ID team.
- an environmental effects analysis.
- scoping.
- an analysis of the project's effects to extraordinary circumstances. (Government Employee/Union, Grangeville, ID - #44.28.60300.XX)

1002. Public Concern: The CEQ Task Force should advise the Forest Service to remove all examples of categorical exclusions in FSH 1909.15, and retain just a goal-oriented category definition.

It is urgent for changes to FSH 1909.15, chapter 30 (categorical exclusion) to be made ASAP. This would include: updates to reflect the current times, clarification, and just writing/grammar improvements that are 1) understandable, 2) clear, and 3) not ambiguous.

Many NEPA users find the examples under each CE category in FSH 1909.15-31 very confusing. The examples are non-inclusive. Its not stated what the examples are meant to represent.

In my view, it would be better to not include any examples and let the effects analysis and analysis of the project's effects to extraordinary circumstances sort out what should and should not be categorically excluded. Of course these two analyses should be done at the present time when making CE eligibility determination, but sometimes they aren't depending on the person's interpretation of what the samples represent. I strongly believe that all CE categories [should] be written such that they are goal or objective oriented. For instance, in 1909.15:

Here is a goal oriented category: Repair and Maintenance of Administrative Sites.

Here is a project type category, where the current category description should be an example: Construction and Reconstruction of Trails. The correct category here would be: Enhance Forest Visitor Recreational Experience.

If examples must be included under each CE category, and are deemed as helpful to NEPA practitioners, then the section should have an introduction, which clearly states what the examples are meant to represent. There is currently a wide range of interpretations of the CE category examples, including:

If your proposed project is listed as an example, then it is certain that the project may be categorically excluded. This view is quite dangerous, since it does not consider the ecosystem sensitivity of the project location, project specifics such as the equipment that might be used, time of the year the project should be done, etc. etc.

Folks who believe this many times do not feel that any environmental analysis is needed.

- if your proposed project is listed as an example, then it shows the reader that some of these project types listed as examples, have been categorically excluded in the past.
- if your proposed project is listed as an example, then it shows the reader that these are the most common project types categorically excluded using this particular category.

Recommendation: I would remove all category examples in FSH 1909.15, and stick with just a goal-oriented category definition. Under this scenario, any project type could potentially be categorically excluded, as long as the project's objective and the category objective are the same. (Government Employee/Union, Grangeville, ID - #44.27.60300.XX)

1003. Public Concern: The CEQ Task Force should advise the Forest Service to revise FSH 1909.15 Chapter 30 to clarify direction regarding extraordinary circumstances.

It is urgent for changes to FSH 1909.15, chapter 30 (categorical exclusion) to be made ASAP. This would include: updates to reflect the current times, clarification, and just writing/grammar improvements that are 1) understandable, 2) clear, and 3) not ambiguous.

The Extraordinary Circumstances Section MUST be rewritten. This is the section that I receive the most questions on, and the one where I respond “I don’t know” the most. The list of Extraordinary Circumstances is non-inclusive. When was the last time anyone heard of a new one being created for the specific project? Never. This section should be made all-inclusive and updated yearly.

I am always asked about the nature of Extraordinary Circumstances effects. Specialists ask me what type of effects would disqualify the project for a CE: only adverse effects, both adverse and beneficial effects, only significant effects, or any effects?

Even the list of Extraordinary Circumstances is inconsistent. Some refer to a resource where we don’t want any adverse effects, such as Threatened and Endangered Species listed under ESA. Others refer to a condition that would trigger project concern, such as steep slopes, and erosive soils. These usually aren’t by themselves resources of concern, but they are contributing factors. (Government Employee/Union, Grangeville, ID - #44.25.60700.XX)

Analysis Requirements

1004. Public Concern: The CEQ Task Force should require agencies to provide supporting documentation of a decision to apply a categorical exclusion.**TO ACCOMMODATE UNANTICIPATED SITUATIONS**

Better documentation is important so that unique or unanticipated situations can be fit into existing exclusions. (Utility Industry, Birmingham, AL - #584.13.60100.XX)

TO AVOID UNNECESSARY LEGAL CHALLENGES

Categorical exclusions are a potential valuable tool whose utility has been diminished by recent judicial decisions. The focus of the questions posed by the Notice seems to be at the rulemaking level, where each agency establishes the broad categories of actions that may be approved through a categorical exclusion. To the extent interest groups or courts have legitimately questioned the categories of actions identified in the regulations, they have done so based on the virtual absence of supporting rationale. In other words, we do not feel that the agency must undertake a Herculean effort in documenting its categorical exclusion regulations, but must at least provide some documentation addressing relevant on-the-ground issues. The agency must provide some record demonstrating “technical expertise” to which a reviewing court can defer. The courts considering this question have not suggested this to be a difficult task, but instead seem to suggest that the agency need only advance a good-faith effort to justify their technical conclusions.

Largely ignored by the Notice is what we feel to be a more widespread issue, which is the degree to which an agency must document its decisions to utilize a categorical exclusion. There may be value in creating new rules adding to or better documenting the types of actions which may be categorically excluded, but there is arguably greater value in standardizing and solidifying procedures for applying categorical exclusions. (Recreational Organization, Boise, ID - #90.15.60300.XX)

SHOULD REQUIRE THE SAME SUPPORTING SCIENTIFIC INFORMATION FOR ESTABLISHING CATEGORICAL EXCLUSIONS AS THAT REQUIRED FOR AN EA OR EIS

E1. Similar to the information required for an EA or EIS, the agencies should have substantial scientific information available that supports its conclusion that a categorical exclusion is appropriate for the type of activity proposed. In our experience, CEs have been used to segment otherwise large and environmentally degrading projects such as the Back Country Discovery Route in California, Oregon, and Washington. A project of this nature—a multi-state off-road vehicle route—should not have been

considered with a categorical exclusion, a mechanism that is reserved by law for minor projects that have very limited (if any) effects on the environment.

Therefore, we strongly recommend that the decision to use CEs be supported by the same scientific evidence as the decision to prepare an EA or EIS. (Preservation/Conservation Organization, Vancouver, WA - #103.15.60100.E1)

1005. Public Concern: The CEQ Task Force should not require agencies to provide supporting documentation of a decision to apply a categorical exclusion.

In most cases, studies are not and should not be required to establish that an action can be categorically excluded. (Port Authority of New York and New Jersey, New York, NY - #457.9.60100.E1)

Some suggest that nothing specific should be “required” as long as the agency can present adequate justification in line with 1500.4 and 1500.5.

A brief narrative describing how a proposed action or category of actions meets established criteria for a CX [categorical exclusion]. The narrative may include reference to a series of EAs or other studies establishing the legitimacy of the CX. (Business, Fairfax, VA - #520.17.60100.E1)

1006. Public Concern: The CEQ Task Force should adequately identify the level of analysis necessary for certain types of categorical exclusions.

While we hope to see improvement to the NEPA process over the next few years, several large projects dating from 1996 to the present have moved through NEPA reasonably well. Two major lift replacements have been done—one with considerable disturbance near a creek—requiring rock wall construction adjacent to riparian vegetation. Combined effort by the resort and the Forest Service resulted in meaningful mitigation designs that permitted the project to proceed. A culvert near a lift terminal was removed, replaced by a carefully designed creek bed, creating additional fish habitat. Three years later a large day lodge was constructed with a relatively short EA.

Much of the success of these projects came from the Forest Service genuinely understanding the need for the improvements, as well as their willingness to help develop significant, yet workable mitigation. All of this was done within the context of the Northwest Forest Plan, an additional challenge some areas of the country have not faced.

While we can list positive experiences with the NEPA process, there remain areas where simplification is needed, and where over-analysis should be avoided. For example, a 20-foot addition on the end of one of the day lodges was proposed, enclosing a concrete patio and removing a short section of vegetation adjacent to the building. Although the entire area had been previously disturbed and was within the base area, it was considered necessary to bring an ID team to the site and perform a short biological review. Given the setting and scale of the project, we believe there should be a mechanism within NEPA to quickly exclude projects of this sort from analysis by specialists—to end the analysis at the level of the permit administrator—and complete the CE without additional study. We would agree that a broader range of analysis would sometimes be needed to complete a defensible CE, depending upon circumstances.

What we are suggesting is language in the NEPA process that describes the kind of situations where the input of specialists and an ID team is not necessary. (Special Use Permittee, Skykomish, WA - #76.1.60100.XX)

Current NEPA direction requires the preparation of an Environmental Impact Statement for any “major Federal actions significantly affecting the quality of the human environment.” This direction has at times been interpreted by the courts, federal agencies, and interested publics to apply to virtually any proposed action. This interpretation is seriously flawed in significant respects.

[It] fails to adequately recognize and allow for the variability in the degree of impact of proposed actions.

The above has been addressed to some degree, yet with only limited success by agencies through the development of guidelines for “categorical exclusions.” In essence, the identification of categorical

exclusions has created a tiered system of analyses based on the likely ramifications of the proposed actions. This tiered system could be expanded to provide guidance for agency professionals and interested publics, and to better target the use of limited agency resources. Both the spatial and temporal effects of the proposed appropriate level of analysis. In addition, it could be helpful to explicitly differentiate between site and/or facility “development”, and the manipulation of natural systems that does not alter existing land use.

Clearly, it would be problematic to establish guidelines that would encompass all possible on-the-ground situations or guidelines that would receive universal support and acceptance. However, current staff and financial resources and public patience are an untenable situation. (Recreational/Conservation Organization, Rice Lake, WI - #105.3.60300.XX)

ON A CASE-BY-CASE BASIS

Under some circumstances, an agency may feel that data is required to correctly scope the extent of the categorical action. Normally, however, creation of a categorical exclusion should be founded upon responsible, independent analysis that finds a logical nexus between common characteristics of the category and reasons why NEPA is non-applicable. This does not necessarily require new data or particular data, and in fact might not require data at all. The need for data in determining categorical exclusions should be determined on a case-by-case basis. (Domestic Livestock Industry, Alturas, CA - #463.8.60100.XX)

1007. Public Concern: The CEQ Task Force should provide further clarification regarding the format and level of analysis that should occur in categorical exclusion decision documents.

The Task Force could provide further clarification regarding the format and level of analysis that should occur in categorical exclusion decision documents. Claimants typically challenge (1) whether the selected action fit within an available categorical exclusion; (2) whether “extraordinary circumstances” preclude use of a categorical exclusion; and/or (3) whether the agency’s decision was “arbitrary and capricious” or was not supported by sufficient evidence. Agencies defending their use of categorical exclusions are rarely able to point to definitive regulatory guidance, particularly when facing the latter challenge. A clearer standard in the CEQ Regulations would restrict the ability of reviewing courts to create ever-changing “know it when I see it” standards for second-guessing agency decisions to use categorical exclusions. (Recreational Organization, Boise, ID - #90.17.60300.XX)

Regulatory Changes

1008. Public Concern: The CEQ Task Force should revise 36 CFR 228.31 Category 8 for short-term mineral, energy, or geophysical activities.

Proposed Revision of 36CFR 228.31.2 Category 8

Currently, in Region 6, the Forest Service is unable to use CEs for most locatable minerals projects where the operator submits a plan of operation to conduct assessment work using mechanized equipment, or proposes exploration work using equipment. The mining season in Northeastern Oregon is very short, and the one-year restriction on duration of activities in the current CE category is not reasonable. Also, with the restriction of floodplains (100 year floodplain) it lets out about 75% of the test operations. It takes the Forests Service much longer than one year to approve a one-year CE. EAs take many years longer. There is a huge backlog of Plans of Operation submitted from 1-6 years ago, which have not been responded to.

Category 8 should be for “Short term (five years or less) mineral, energy, or geophysical investigations and their incidental support activities that may require cross-country travel by vehicles and equipment, construction of less than one mile of low standard road, or use and miner repair of existing roads.” (Individual, Unity, OR - #216.6.60500.XX)

1009. Public Concern: The CEQ Task Force should incorporate direction from “Guidance Regarding NEPA Regulations” into categorical exclusion regulations.

In A. Alan Hill’s GUIDANCE REGARDING NEPA REGULATIONS, issued in the Federal Register in 1983, further germane direction was issued to federal agencies as follows:

“The CEQ regulations were issued in 1978 and most agency implementing regulations and procedures were issued shortly thereafter. In recognition of the experience with the NEPA process that agencies have had since the CEQ regulations were issued, the Council believes that it is appropriate for agencies to examine their procedures to insure that the NEPA process utilizes this additional knowledge and experience. Accordingly, the Council still strongly encourages agencies to re-examine their environmental procedures and specifically those portions of the procedures where “categorical exclusions” are discussed to determine if revisions are appropriate. The specific issues which the Council is concerned about are (1) the use of detailed lists of specific activities for categorical exclusions, (2) the excessive use of environmental assessments/findings of no significant impact and (3) excessive documentation.

The Council also encourages agencies to examine the manner in which they use the environmental assessment process in relation to their process for identifying projects that meet the categorical exclusion definition. A report (1) to the Council indicated that some agencies have a very high ratio of findings of no significant impact to environmental assessments each year while producing only a handful of EIS’s. Agencies should examine their decision making process to ascertain if some of these actions do not, in fact, fall within the categorical exclusion definition, or, conversely, if they deserve full EIS treatment.

As previously noted, the Council received a number of comments that agencies require an excessive amount of environmental documentation for projects that meet the categorical exclusion definition. The Council believes that sufficient information will usually be available during the course of normal project development to determine the need for an EIS and further that the agency’s administrative record will clearly document the basis for its decision. Accordingly, the Council strongly discourages procedures that would require the preparation of additional paperwork to document that an activity has been categorically excluded.”

This Guidance is consistent with the CEQ regulations that direct federal agencies to continue to review agency policies and procedures and revise them as necessary in consultation with the Council to ensure full compliance with the purposes and provisions of the Act (40 CFR 1507.3), and reduce excessive paperwork by using categorical exclusions (40 CFR 1500.4). It needs to be incorporated into the regulations. (Wisconsin Department of Natural Resources, Madison, WI - #458.16 and 17.60800.XX)

Public Involvement and Categorical Exclusions

Summary

Respondents who address the role of public involvement in the categorical exclusions process often express concern over ensuring that there is sufficient notification, transparency, and opportunity for public input. “Because the establishment of any categorical exclusion is likely to be scrutinized by select interest groups, it is imperative that its consideration occurs in an open, collaborative manner from start to finish,” explains one recreational/conservation organization. Among those who express reservations over the use of categorical exclusions, many fear their misapplication and resulting negative environmental consequences in contravention to regulatory intent. “Categorical exclusions are originally envisioned to authorize minor administrative actions such as trail and building maintenance. The Forest Service has loosened its regulations in order to facilitate activities with clear resource implications such as cross-country ORV races and oil and gas exploration in roadless areas,” charges one preservation/conservation group. “Presently, there are few activities that a federal agency could conduct that would have no

impact on the human environment,” notes one respondent. Other respondents fear that overly broad use of categorical exclusions only results in more litigation, cost, and delay.

1010. Public Concern: The CEQ Task Force should require agencies to involve the public and stakeholders in developing new categorical exclusions.

We find that categorical exclusions are normally acceptable but believe that future activities must be subjected to stringent public review before they can be included in this heading. (Preservation/Conservation Organization, Boise, ID - #570.3.60400.XX)

Because the establishment of any categorical exclusion is likely to be scrutinized by select interest groups, it is imperative that its consideration occurs in an open, collaborative manner from start to finish. (Recreational/Conservation Organization, Washington, DC - #89.28.60400.E1)

There should be a more aggressive notification process for stakeholders and sources of expertise, including other federal agencies. Bear in mind that when establishing a categorical exclusion, you are assuming that the public, or some segment thereof, would not be interested in the activities. Presently, there are few activities that a federal agency could conduct that would have no impact on the human environment. (Recreational/Conservation Organization, Gaithersburg, MD - #89.32.60300.E3)

1011. Public Concern: The CEQ Task Force should discourage agencies from applying categorical exclusions as a means to avoid public participation.

Categorical exclusions should not be used to dodge public participation of proposed federal actions. When used for such purposes, categorical exclusions are likely to result in a greater number of lawsuits, thereby negating the purported benefit of greater efficiency that categorical exclusions are supposed to provide. (Other, Seattle, WA - #213.11.60400.E1)

Categorical exclusions are originally envisioned to authorize minor administrative actions such as trail and building maintenance. The Forest Service has loosened its regulations in order to facilitate activities with clear resource implications such as cross-country ORV races and oil and gas exploration in roadless areas. Overly broad use of categorical exclusions contravenes NEPA’s intent by removing the public from the decision making process for actions in ecologically and culturally sensitive areas. (Preservation/Conservation Organization, No Address - #498.14.60400.XX)

Examples/Best Practices for Establishing Categorical Exclusions

Summary

In the Notice of Intent, the Task Force requested that members of the public submit specific examples of best practices in the use of categorical exclusions. Some respondents object to this request in the first place. “May I comment at this point that the structure of these last few questions [section E] is biased, assuming in their presentation that Categorical Exclusions are a Best Practice. I’m sorry, but that offends me,” states one individual. Others, however, believe that categorical exclusions play an important role in the NEPA process and cite examples of their beneficial use.

1012. Public Concern: The CEQ Task Force should not assume that categorical exclusions represent a best practice.

May I comment at this point that the structure of these last few questions [section E] is biased, assuming in their presentation that Categorical Exclusions are a Best Practice. I'm sorry, but that offends me. (Individual, Katy, TX - #199.2.60000.E3)

1013. Public Concern: The CEQ Task Force should consider examples of methods for establishing categorical exclusions.**WASHINGTON STATE GUIDELINES**

Categorical exclusions seem appropriate in certain circumstances. Washington's SEPA provides for categorical exemptions . . . but also provides a "safety valve" under unique circumstances where categorical exemptions may place resources at risk. (Washington State Department of Natural Resources, Olympia, WA - #128.20.60100.XX)

FEDERAL HIGHWAY ADMINISTRATION METHODS

The FHWA approach to categorical exclusions may not be fully appreciated or understood by CEQ or other agencies. CEQ should examine the way in which we have successfully used the CE option to narrow the gap between the EIS and the traditional CE process for projects where it can individually be demonstrated that the action does not result in significant impacts to the human environment. The CEQ could endorse the FHWA approach and make it available for other agencies to use. (Federal Highway Administration, Washington, DC - #658.23.60200.XX)

AASHTO supports efforts to ensure that other federal agencies accept the CE list contained in FHWA's regulations, so that all federal agency decisions would be covered by a single list of CEs. This approach could be implemented consensually through programmatic agreements or other non-regulatory changes; it also could be implemented as a legal requirement through federal legislation. (American Association of State Highway and Transportation Officials, Washington, DC - #591.12.60200.XX)