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NEPA Modernization (CE)
ATTN: Associate Director for NEPA Oversight
722 Jackson Place NW
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To Whom It May Concern:

The American Farm Bureau Federation is pleased to offer our comments on the proposed Guidance on Categorical Exclusions (CE).

The National Environmental Policy Act (NEPA) requires that agencies assess the environmental impacts of proposed actions when the proposed action significantly affects the human environment. The requirements of NEPA are so vague and uncertain, however, that NEPA has been a very difficult law to administer. There has been more litigation over alleged violations of NEPA than any other environmental statute. Compliance with NEPA through preparation of Environmental Assessments (EA) or Environmental Impact Statements (EIS) has consumed an increasing amount of agency time and resources. The problems lie not in the requirements for environmental review, but in the uncertainty within the agency regarding what those requirements entail and to what types of actions they must be applied.

Because of the threat of litigation, federal agencies often “over-analyze” the possible impacts of proposed actions in order to make their decisions “litigation proof.” Forest Service Chief Dale Bosworth calls this “analysis paralysis,” which causes agency personnel to spend more time and resources on NEPA compliance than on field projects.

CE provide another filter for agencies to determine the appropriate level of NEPA compliance. They apply to agency actions that normally do not result in significant environmental impacts and for which full EAs do not have to be prepared because the significance of the action has already been determined to not warrant it.

Categorical exclusions do not bypass the NEPA process or NEPA requirements. Rather, they provide another level of analysis. Actions that form CEs have already been screened for environmental impacts, and found not to be significant enough to warrant further analysis. As stated in the guidance, if there are extraordinary circumstances that make the impact of the proposed action different from that already analyzed, NEPA and the guidance requires another analysis.

We support the promulgation of the Guidance as a blueprint for how and when to use CEs. The guidance provides a uniform framework for agencies, while at the same time

being flexible enough to allow each agency to set its own procedures. The guidance will be a useful tool for agencies in the development of CEs.

The utility of the guidance and the use of CEs, as with any NEPA promulgations, must ultimately be measured against the threat of litigation. The guidance will be of little use if agencies continue to over-analyze their actions because of the possibility of litigation.

For that reason, the provisions in the guidance that caution agencies to carefully document their reasons in an administrative record for a particular CE, provide sound advice. Describing the types of information that will justify an agency's promulgation of a CE is also desirable, because it leads the agency to develop appropriate information and criteria for evaluating possible CEs. The guidance should require agencies to open an administrative record on the development and application of CEs, rather than merely encourage it.

We have some concerns about the use of "professional staff and outside expert opinion" as a scientific justification for the use of CEs. While not meant to be a criticism of professional agency staff, it seems that justifications for the use of CEs need to be scientifically defensible and transparent. Opinions are not reviewable, and reliance on professional opinion as a justification for the use of CEs is not transparent. Reliance on opinion creates the appearance of agency bias, abandonment of science and possible abuse by the agency. While professional opinion and judgment may be needed to interpret and apply the relevant science, it should not be a stand alone justification for the use of CEs.

The interests of transparency also demand that agencies give at least notice to the public when they use CEs in discharge of their NEPA responsibilities. The guidelines suggest that something be done "when there is a high public interest" in the proposed action. The better course is that notification be made in all cases. We make this suggestion with caution, since it could lead to more litigation. We believe, however, that greater transparency may serve to reduce litigation. Transparency brings a level of trust and understanding about a particular action that lessens the inclination to challenge it in court.

We appreciate the opportunity to offer our comments on the guidance and look forward to working with the agency to finalize it.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Maslyn". The signature is fluid and cursive, with the first name "Mark" being more prominent than the last name "Maslyn".

Mark Maslyn
Executive Director
Public Policy