

SUBJECT: ESTABLISHING, REVISING, AND USING CATEGORICAL EXCLUSIONS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT

I. Introduction

The following guidance is provided to assist Federal agencies in improving and modernizing their administration of categorical exclusions under NEPA. The guidance recommends procedures and approaches for establishing and revising categorical exclusions; involving the public; documenting development, revision, and use of categorical exclusions; and periodically reviewing categorical exclusions.

The CEQ regulations define categorical exclusion in 40 CFR § 1508.4:

“Categorical exclusion” means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. . . . Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

CEQ established the CEQ NEPA Task Force to review NEPA implementation and identify opportunities to improve and modernize the NEPA process. To promote consistent categorical exclusion development and use, the CEQ NEPA Task Force recommended that CEQ issue clarifying guidance on categorical exclusions.¹ This guidance is based on existing CEQ regulations and guidance, legal precedent, and agency NEPA experience. In keeping with CEQ regulations at 40 CFR § 1507.1, the intent of this guidance is to allow agencies flexibility in implementing the procedures for categorical exclusions that are adapted to the requirements of other applicable laws.

This guidance applies to establishing new or revised categorical exclusions proposed or developed as a result of administrative action originated by an agency. For categorical exclusions established by statute (e.g. categorical exclusions established by Section 390 of the Energy Policy Act of 2005), guidance on use or application is to be determined with reference to the statute.

II. The Purpose of Establishing New Categorical Exclusions²

Categorical exclusions should be used for those actions that do not have a significant impact on the human environment. The purpose of a categorical exclusion is

¹ Council on Environmental Quality, “The NEPA Task Force Report to the Council on Environmental Quality – Modernizing NEPA Implementation,” (Sept. 2003), available at <http://www.ceq.eh.doe.gov/ntf>.

² The term “new” refers to revisions of categorical exclusions that are more than administrative (e.g., revise to update outdated office or agency title) or editorial (e.g., correct spelling or typographical errors).

Comment [r1]: Per the teleconference last month, CEQ indicated its willingness to include such clarifying language.

Comment [r2]: API believes the guidance document should include an explicit statement encouraging the use of categorical exclusions where appropriate.

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to eliminate the need for unnecessary paperwork and effort under NEPA for categories of actions that normally do not warrant preparation of an environmental impact statement (EIS) or environmental assessment (EA).³ Developing appropriate categorical exclusions promotes the cost-effective use of agency NEPA related resources. Federal agency personnel should develop a categorical exclusion when they identify a class of actions without significant environmental impacts. A Federal agency should also consider developing categorical exclusions to respond to changes in mission or responsibilities as the agency gains experience with the new activities and their environmental consequences.⁴

Revision of an existing categorical exclusion can promote efficiency by clarifying the actions that are covered by an existing categorical exclusion. For example, a Federal agency may find that an existing categorical exclusion is not being used because the category of actions is too narrowly defined. In such cases, the agency should consider expanding the category of actions. Conversely, if an agency finds that an existing categorical exclusion includes actions that are regularly found to require additional NEPA analysis, then the agency should revise the categorical exclusion to limit the category of actions included.

III. Substantiating a New Categorical Exclusion

A key issue confronting Federal agencies is how to evaluate whether a proposed categorical exclusion is appropriate and how to support the determination that it describes a category of actions that do not individually or cumulatively have a significant effect on the human environment.⁵ The information that supports establishing a categorical exclusion should demonstrate how the agency determined that the proposed category does not typically result in significant environmental effects.

A. The Elements of a Categorical Exclusion

The text of a proposed categorical exclusion should clearly define the category of actions, including the scope or the limits of the actions. In defining a categorical exclusion, an agency can specify the scope or limits of the exclusion through the use of physical, environmental, or regional constraints. An example of a physical constraint is a limit on the extent of the action (e.g., miles). Examples of environmental constraints are limits on where and under what conditions the categorical exclusion may be used (e.g., particular seasons in habitat areas). Federal agencies should also consider the opportunity to develop categorical exclusions that are limited in their application to regions or areas of the country where it can demonstrate that the actions do not present significant impacts based on the similarity of environmental settings.

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Comment [m3]: Shortening this sentence serves to simplify the guidance here. The deleted language is unnecessary and confusing.

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Deleted: and set forth the methodology and any criteria used to define the proposed category of actions.

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³ 40 C.F.R. §§ 1500.4(p) and 1500.5(k).

⁴ When legislative or administrative restructuring creates a new agency or realigns an existing agency, the agency may need to develop new NEPA procedures that include categorical exclusions.

⁵ 40 C.F.R. §§ 1508.7, 1508.8, and 1508.27.

When developing a categorical exclusion, the Federal agency must make certain that the proposed category clearly describes all the actions that should be included. Categorical exclusions should not be established in a disaggregated or segmented format simply to circumvent the evaluation of environmental effects required for NEPA compliance through an EA or EIS.

Comment [m4]: This is confusing. Perhaps it would be better to use an example of such a format rather than make this statement.

A Federal agency's NEPA procedures for categorical exclusions must provide for extraordinary circumstances.⁶ Extraordinary circumstances function to identify the atypical situation or environmental setting where an otherwise excluded action merits further analysis and documentation in an EA or an EIS. For many agencies, their existing extraordinary circumstances provisions (often presented as a list) will suffice. However, an agency may develop extraordinary circumstances that specifically relate to the new categorical exclusion and propose them in conjunction with the categorical exclusion.

B. Gathering Information to Substantiate a Categorical Exclusion

CEQ guidance generally addresses establishing categorical exclusions.

Section 1507 of the CEQ regulations directs federal agencies when establishing implementing procedures to identify those actions which experience has indicated will not have a significant environmental effect and to categorically exclude them⁷

Various sources of information relevant to the action and its environmental effects may be used to substantiate a categorical exclusion including but not limited to evaluation of implemented actions, impact demonstration projects, information from professional staff and expert opinion or scientific analyses, and the experiences of other agencies (benchmarking).⁸ Agencies generally have the expertise required to identify and evaluate information to support establishing a categorical exclusion. This section is designed to provide a general description of some of the different types of information that can be used to support the establishment of a categorical exclusion.

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If an agency chooses to benchmark with reference to procedures followed by another agency, substantiating information should account for similarities and differences relative to the proposed categorical exclusion in terms of the scope of actions, methods of implementation, and environmental settings. The Federal agency should maintain an

Comment [r5]: API suggests that the most relevant sources for benchmarking will be other agencies, rather than a less specific reference to "others".

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⁶ 40 C.F.R. § 1508.4.

⁷ Council on Environmental Quality, "Guidance Regarding NEPA Regulations," 48 FR 34263 (July 28, 1983), available at <http://www.nepa.gov/nepa/regs/1983/1983guid.htm>.

⁸ Agencies should be mindful of their obligations under the Information Quality Act to ensure the quality, objectivity, utility, and integrity of the information they use or disseminate as the basis of an agency decision to establish a new categorical exclusion. Section 515, Public Law 106-554; Office of Management and Budget Information Quality Guidelines, 67 Fed. Reg. 8452 (Feb. 22, 2002), available at <http://www.whitehouse.gov/omb/inforeg/infopoltech.html>. Additional laws and regulations establish obligations that apply or may apply to the processes of establishing and applying categorical exclusions, such as the Federal Records Act; these are beyond the scope of this guidance.

administrative record that includes all sources of information used and related findings. The agency should also summarize that information and the related findings in the Federal Register publication of the proposed categorical exclusion.

1. Evaluating an Agency's Implemented Actions

Evaluation of implemented actions, as used in this guidance, refers to monitoring and evaluating the environmental effects of the Federal agency's completed or ongoing actions. The benefit of evaluating an agency's own actions is that the implementation and operating procedures are in place and well known. The evaluation should include data collected before the proposed categorical exclusion is finalized. Collaboratively monitoring and evaluating implemented actions with non-federal entities can provide useful information for substantiating a categorical exclusion.

For a category of actions that the agency analyzed in EAs that supported Findings of No Significant Impact (FONSIs), evaluations can validate the predicted environmental effects, and provide strong support for a proposed categorical exclusion. Evaluation of implemented actions analyzed in an EIS may also be used to substantiate a categorical exclusion for activities. An EIS can be used when the action is minor, subordinate to and not dependent upon other actions. An EIS can also be used when it analyzes both a large management action and a smaller, independent action.

Finally, Federal agencies with an Environmental Management System (EMS) may be able to use data generated through their EMS.⁹ An EMS may provide a record of environmental performance and help identify actions that should be included in a proposed categorical exclusion or proposed extraordinary circumstances.

2. Impact Demonstration Projects

As used in this guidance, the term impact demonstration project describes a project that includes the NEPA analysis of a proposed action (for which the agency ~~may not~~ have extensive experience), implementation of the action, and evaluation of the environmental effects of the action. The NEPA documentation prepared for the demonstration project should explain that one of the purposes of the NEPA process is to generate analyses for substantiating a proposed categorical exclusion.

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Comment [r6]: Agencies may wish to undertake demonstration projects for categorical exclusions in subject areas for which the agencies possess some level of direct experience.

In designing an impact demonstration project it is particularly important that the action being evaluated accurately reflect the category of actions described in the proposed categorical exclusion and that the action is implemented under similar operational and environmental conditions as in the proposed categorical exclusion. Several projects may be useful when environmental conditions vary in different regions where the categorical exclusion would be used.

⁹ An EMS provides a systematic framework for a Federal agency to monitor and continually improve its environmental performance through audits, evaluation of legal and other requirements, and management reviews.

3. Professional Staff and Expert Opinions, and Scientific Analyses

A Federal agency may use their professional staff and outside expert opinions as a valid source of information to substantiate a categorical exclusion. Those individuals should have special knowledge, training, experience, or understanding relevant to implementation of the actions described in the proposed categorical exclusion and the environmental effects of the action. The agency record should include such individuals' credentials (e.g., education, training, certifications, years of related experience).

The use of scientific analyses need not be limited to peer-reviewed findings and may also include professional opinions, reports, and research findings. However, because the reliability of scientific information varies according to its source and the rigor with which it was developed, the Federal agency remains responsible for determining whether the information in question reflects accepted knowledge or findings and addresses the effects of the actions included in the proposed categorical exclusion. Quality and relevance of scientific analyses should be guiding principles, rather than the quantity of accompanying documentation.

4. Benchmarking Public and Private Entities' Experiences

As used in this guidance, the term benchmarking means using information and records from other private and public entities' experience with similar actions. When evaluating whether it is appropriate to rely on others' experience, it will be necessary to demonstrate that the categorically excluded actions and their environmental effects are comparable to the category of actions in the proposed categorical exclusion. Benchmarking should consider the similarities and differences in: (1) methods of implementing the actions; (2) characteristics of the actions; (3) frequency of the actions; (4) applicable standard operating procedures or implementing guidance; and (5) environmental settings in which the actions take place. Although an agency cannot simply use another agency's categorical exclusion for a proposed action, a Federal agency may find it useful to consider another Federal agency's experience and supporting information involving categorically excluded actions.

C. Modifying or Revising a Proposed New Categorical Exclusion

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If a proposed categorical exclusion is found to have a potentially significant effect, the Federal agency should either drop consideration of the categorical exclusion or consider modifying it. Examples include: limiting or removing actions included in the proposed categorical exclusion; adding text that places additional constraints on the use of the categorical exclusion; or refining the applicable extraordinary circumstances.

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Federal agencies may also consider limiting the geographic applicability of the categorical exclusion. For example, if the category of actions is typically without significant effects in the northeastern United States or in a particular set of watersheds, it may be appropriate to establish a regional or spatially-based categorical exclusion.

Furthermore, when developing a new categorical exclusion, it may be helpful or necessary to identify extraordinary circumstances specifically tailored for that categorical exclusion. Such tailoring would facilitate identifying atypical circumstances and further ensure that the use of the categorical exclusion would typically not result in individual or cumulative significant environmental effects.

IV. Procedures for Establishing a New Categorical Exclusion

The process of establishing or revising an agency's NEPA procedures, as distinguished from explanatory guidance, is found in 40 CFR §1507.3(a).

Each agency shall consult with the Council while developing its procedures and before publishing them in the FEDERAL REGISTER for comment. Agencies with similar procedures should consult with each other and the Council to coordinate their procedures, especially for programs requesting similar information from applicants. The procedures shall be adopted only after an opportunity for public review and after review by the Council for conformity with the Act and these regulations [40 CFR parts 1500 – 1508]. The Council shall complete its review within 30 days. Once in effect they shall be filed with the Council and made readily available to the public. Agencies are encouraged to publish explanatory guidance for these regulations and their own procedures. Agencies shall continue to review their policies and procedures and in consultation with the Council to revise them as necessary to ensure full compliance with the purposes and provisions of the Act.

Federal agencies are encouraged to involve CEQ early in the process to take advantage of CEQ expertise and assist in coordinating with other agencies to make the process as efficient as possible. Federal agencies should consult with CEQ on both the proposed categorical exclusion and the final categorical exclusion.¹⁰

Any proposed categorical exclusion must be made available for public review and comment. At a minimum, the CEQ regulations require Federal agencies to publish the proposed categorical exclusion in the Federal Register and provide a period during which the public may submit comments on the proposal.¹¹ Federal agencies are encouraged to maintain a file of the comments and responses. To maximize the value of input from interested parties and assist them in focusing their comments, the agency should make information supporting the categorical exclusion available to the public.

Following the public comment period, the Federal agency should consult with CEQ and review the nature of any substantive comments received and how they were addressed. For consultation to successfully conclude, CEQ must provide a written statement that the final proposed categorical exclusion was developed in conformity with NEPA and the CEQ regulations. CEQ must complete its review within 30 days of receiving the final text of the proposed categorical exclusion.

¹⁰ 40 C.F.R. § 1507.3.

¹¹ 40 C.F.R. §§ 1507.3 and 1506.6(b)(2).

The final categorical exclusion must then be published in the Federal Register. This publication can serve to satisfy the requirements that the agency file the categorical exclusion with CEQ, and make it readily available to the public.

The following recommended and required steps establish a categorical exclusion as part of the agency NEPA procedures, regardless of the format the agency uses for its NEPA procedures.¹²

1. Draft proposed categorical exclusion based on experience indicated in supporting information.
2. Consult with CEQ on draft of proposed categorical exclusion.
3. Consult other Federal agencies with similar procedures, jurisdiction by law, or special expertise regarding the category of activities and their effects.
4. Publish notice of proposed categorical exclusion in the Federal Register for public review and comment.
5. Consider public comments in developing final categorical exclusion.
6. Consult with CEQ on final categorical exclusion to obtain determination of conformity with NEPA and the CEQ regulations.
7. Publish final categorical exclusion in the Federal Register.
8. File final categorical exclusion with CEQ.
9. Make final categorical exclusion readily available to the public.

V. Public Involvement in Establishing a Categorical Exclusion

Engaging the public in the environmental aspects of federal decisionmaking is a key aspect of NEPA. ~~An agency should consider means and/or forums for public review and comment that in the agency's judgment are appropriate to the proposed categorical exclusion being considered and perceived environmental effects.~~¹⁴ The Federal Register notice requesting comment on the proposed categorical exclusion should:

- Describe the proposed categorical exclusion and provide the proposed text.
- Summarize the agency rationale and history for its development and advise the public on how to access the agency's supporting information and, whenever practicable, include a link to a website containing the supporting information.¹⁵
- Define all applicable terms.
- Summarize how the proposed categorical exclusion fits into the existing agency NEPA implementation process.

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Comment [r7]: API agrees that agencies should be able to exercise judgment on what level of public engagement is appropriate for proposing a new categorical exclusion. We believe the suggested revision expresses this principle while avoiding creating the expectation that NEPA process can or should be ignored as a matter of course.

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¹² NEPA and the CEQ regulations do not require agency NEPA implementing procedures to be promulgated as regulations through formal rulemaking; therefore the rulemaking process is not described herein. Agencies that use rulemaking should ensure they comply with all appropriate requirements.

¹⁴ "Agencies shall: (a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures." 40 C.F.R. § 1506.6.

¹⁵ Ready access to all supporting information may minimize the need for members of the public to depend on Freedom of Information Act requests and enhance the NEPA goals of outreach and disclosure.

- Explain how extraordinary circumstances, and possibly other factors such as connected actions and cumulative impacts, may limit the use of the categorical exclusion.
- Explain available avenues for public comment and feedback on the proposed categorical exclusion.

CEQ encourages Federal agencies to engage interested parties such as public interest groups, Federal NEPA contacts at other agencies, consultants, and Tribal, State, and local government agencies to share relevant data, information and concerns. The methods noted in 40 CFR § 1506.6 and other public involvement techniques such as focus groups, meetings, e-mail exchanges, conference calls, and web-based forums can be used to stimulate public involvement.

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VI. Using an Established Categorical Exclusion

The CEQ regulations do not address documentation or public involvement for using a categorical exclusion. CEQ guidance states:

(T)he 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.¹⁶

A. Documentation

Each Federal agency should decide if a categorical exclusion determination warrants preparing additional paperwork and, if so, how much documentation is appropriate. Documentation is an important component of any adequate administrative record. The extent of the documentation should be related to the type of action involved, the potential for extraordinary circumstances, and compliance with other laws, regulations, and policies.

If a record is prepared, it should cite the categorical exclusion used and show that the agency considered: (1) how the action fits within the class of actions described in the categorical exclusion, and (2) whether there are any extraordinary circumstances that would preclude the project or proposed action from qualifying as a categorically excluded action.

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Some courts have required documentation to demonstrate that a Federal agency has considered extraordinary circumstances in cases where the absence of extraordinary

¹⁶ Council on Environmental Quality, "Guidance Regarding NEPA Regulations," 48 FR 34263 (July 28, 1983), available at <http://www.nepa.gov/nepa/regs/1983/1983guid.htm>.

circumstances is not obvious.¹⁷ Documenting the use of a categorical exclusion facilitates judicial review under the Administrative Procedure Act, which requires review to be based upon a pre-existing record.¹⁸

Using a categorical exclusion does not absolve Federal agencies from complying with the requirements of other laws, regulations, and policies. Documentation created for individual actions or projects may be necessary to comply with such requirements. When that is the case, all resource analyses and the results of any consultations or coordination that are required (e.g., under Endangered Species Act or National Historic Preservation Act), should be included or incorporated by reference in the administrative record for the action. Agencies may also determine what level of notification to the public is appropriate, based upon the regional, environmental or stakeholder context for the action.

Comment [r8]: Similar to the comment above, API believes that agencies should be encouraged to use their discretion and informed judgment. This document should avoid creating the expectation that broad public input is to be expected in each case where an agency considers a categorical exclusion.

VII. Periodic Review of Categorical Exclusions

The CEQ regulations direct Federal agencies to periodically review their policies and procedures; however, they do not describe how such a review should be conducted.¹⁹ CEQ encourages Federal agencies to develop procedures for identifying and revising categorical exclusions that no longer effectively reflect current environmental circumstances or where agency procedures, programs, or missions have changed.

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Most Federal agencies do not routinely notify the public when they use a categorical exclusion to meet their NEPA responsibilities. In situations where there is a high public interest in an action that will be categorically excluded, CEQ encourages Federal agencies to involve the public in some manner (e.g., notification, scoping), particularly when the public can assist the agency in determining whether a proposal involves extraordinary circumstances or cumulative impacts.¶

A Federal agency can keep a record of its experience by tracking information provided by agency field offices.²⁰ In such cases, a Federal agency review of a categorical exclusion could consist of e-mails, memos, and letters from field offices that include observations of the effects of implemented actions, and public input on actions and their environmental effects.

Another approach to reviewing existing categorical exclusions is through a program review. Program reviews can occur at various levels (e.g., field office, division office, headquarters office) and on various scales (e.g., geographic location, project type, or as a result of an interagency agreement). While a Federal agency may choose to initiate a program review that specifically focuses on categorical exclusions, it is possible that program reviews with a different focus may also be able to provide documentation of experience relevant to a categorical exclusion.

¹⁷ Council on Environmental Quality, “The NEPA Task Force Report to the Council on Environmental Quality – Modernizing NEPA Implementation,” p. 58, (Sept. 2003), available at <http://www.ceq.ch.doe.gov/ntf>.

¹⁸ The agency determination that an action is categorically excluded may be challenged under the Administrative Procedures Act. 5 U.S.C. 702 et seq.

¹⁹ 40 C.F.R. § 1506.6.

²⁰ Council on Environmental Quality, “The NEPA Task Force Report to the Council on Environmental Quality – Modernizing NEPA Implementation,” p. 63, (Sept. 2003), available at <http://www.ceq.ch.doe.gov/ntf>.

There are many good reasons why Federal agencies should perform categorical exclusion reviews. They can serve as the impetus for expanding the categorical exclusion to include actions not previously categorically excluded. They may help identify additional extraordinary circumstances. Categorical exclusion reviews may also help a Federal agency consider the appropriate documentation when using certain categorical exclusions.

Finally, the rationale and supporting information for establishing or documenting experience with using a categorical exclusions can be lost when there are inadequate systems and procedures for recording, retrieving, and preserving agency documents and administrative records. Therefore, Federal agencies may benefit from a review of current practices used for maintaining and preserving such records. Measures to ensure future availability may include, but not be limited to, redundant storage systems (e.g., multiple drives, paper copies), and improvements in the agency electronic and hard copy filing and retrieval systems.²¹

²¹ Agencies should be mindful of their obligations under the Federal Records Act for maintaining and preserving agency records. 44 U.S.C. chapters 21, 29, 31, and 33.