

November 30, 2006

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

We appreciate the opportunity to comment on the Council on Environmental Quality's (CEQ's) proposed Guidance on Categorical Exclusions. The controversy around Categorical Exclusions has arisen from agency efforts to use them for actions where there is concern and debate about the impacts. Categorical Exclusions should not be used to shut the ears and eyes of federal agencies. They should not become a mechanism to exclude citizens from participating in agency actions that citizens are concerned about. We offer the following recommendations to strengthen and clarify the use of Categorical Exclusions.

Categorical Exclusions Must be Reserved for Non-Contentious Actions.

The clearest guidance that CEQ can give agencies is to stay where things are black and white. Congress did not provide for Categorical Exclusions (CEs) in the National Environmental Policy Act (NEPA). NEPA's mandate is to investigate impacts "to the fullest extent possible." 42 U.S.C. § 4332. We acknowledge a role for Categorical Exclusions. CEs can save agency time and resources when limited to minor day-to-day actions which by their nature do not affect the environment. Problems have arisen when agencies improperly extend the use of CEs from minor day-to-day actions to actions – such as logging, drilling, off road vehicle use or grazing – which often do have significant environmental impacts. When there are questions about whether an action's impacts are significant, the public deserves the opportunity to be part of the process for evaluating potential impacts. In such cases, a Categorical Exclusion should not be used.

CEQ's guidance should include an explicit presumption that an Environmental Assessment (EA) or Environmental Impact Statement (EIS) is required. A Categorical Exclusion should be an exception reserved for situations where no concern over the proposed action exists. The goal of NEPA is to inform government decisions and to give those affected by them a say in the decisions. CEQ was created by NEPA. 42 U.S.C. § 4342. It is CEQ's responsibility "to develop and recommend to the President national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation." 42 U.S.C. § 4344(4). CEQ should add language to its guidance articulating the benefits of doing the analysis required by NEPA.

CEQ's guidance should instruct agencies to avoid establishing a new Categorical Exclusion for types of activities likely to generate public opposition. Specifically, we

propose adding the following language to the end of the first paragraph in Section II of the proposed guidance: “A Federal agency, however, should not seek to establish a Categorical Exclusion for types of activities which are likely to generate public opposition. Trying to use a CE under these circumstances is likely to increase controversy and could require more time and resources than proceeding with a simple Environmental Assessment.”

Even after a Categorical Exclusion is established, CEQ’s guidance should encourage agencies to use simple and straight-forward EAs, rather than try to squeeze a contentious action into a Categorical Exclusion. Agencies should be required to include public opposition/ concern as an extraordinary circumstance. The guidance should make it clear that if extraordinary circumstances are present, a Categorical Exclusion cannot be used. Many times an agency will prepare what amounts to a Finding of No Significant Impact (FONSI) discussing the minimal impact of the extraordinary circumstances instead of preparing an Environmental Assessment. As the U.S. Court of Appeals for the Seventh Circuit held, “It is not enough that the Forest Service has conducted an internal review to determine whether the extraordinary circumstance will cause the proposed action to have a significant impact on the environment. An environmental assessment is the process required to make that determination.” *Rhodes v. Johnson*, 153 F.3d 785, 790 (7<sup>th</sup> Cir 1998). *See also* 40 C.F.R. § 1501.4(b) (requiring an EA to determine whether a full EIS is needed). An agency cannot simply conduct its own in-house analysis to determine whether the environment could significantly be affected. That determination must get a public airing in an EA unless the agency involved decides to move directly to the full public process of an EIS.

#### Public Record and Involvement Should be Mandatory.

CEQ’s guidance should also ensure a meaningful public process for creating a new Categorical Exclusion. In order to create a new CE, an agency must first identify it as part of the agency’s procedures to implement NEPA. 40 C.F.R. § 1507.3(b)(2)(ii). Changing such procedures to add new CEs require public notice in the Federal Register and an opportunity for the public to comment. 40 C.F.R. § 1507.3(a). In order to make this public input meaningful, an agency must provide the public the record that supports the proposed Categorical Exclusion during the comment period. This information should normally be made available on the Internet. Rather than simply encouraging agencies to provide this information, CEQ’s guidance should direct that agencies “must” make information supporting the categorical exclusion available to the public. (*See* Section IV).

The public should not have to depend on Freedom of Information Act (FOIA) requests to obtain information supporting the establishment of a new categorical exclusion. This is a waste of time and energy for both the public and the agency involved.

We support CEQ’s guidance regarding the importance of documentation of agency decisions related to Categorical Exclusions. Whether to create or apply a

Categorical Exclusion is not an agency's decision alone. Both actions are subject to judicial review under the Administrative Procedure Act (APA). *See, e.g., Heartwood, Inc. v. U.S. Forest Service*, 73 F.Supp.2d 962, 975-76 (S.D. Ill. 1999), aff'd 230 F.3d 947 (7th Cir. 2000) ("the [Forest Service] must explain its decision adequately so that the Court can determine that it was not arbitrary. In doing so, the Court may not rely merely on the agency's expertise.") (citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989)); *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 641 (9<sup>th</sup> Cir. 2004). Documentation for both creating and applying a CE is necessary to demonstrate to a court that an agency's action is not arbitrary and capricious. 5 U.S.C. § 706(2)(a). *See also, California v. Norton*, 311 F.3d 1162, 1176 (9<sup>th</sup> Cir. 2002) ("It is difficult for a reviewing court to determine if the application of an exclusion is arbitrary and capricious where there is no contemporaneous documentation to show that the agency considered the environmental consequences of its action and decided to apply a categorical exclusion to the facts of a particular decision."); *Wilderness Watch and Public Employees for Environmental Responsibility v. Mainella*, 375 F.3d 1085, 1095 (11<sup>th</sup> Cir. 2004) (struck down use of CE to permit vans to transport tourist through wilderness areas to access historical site); *Center For Food Safety v. Johanns*, 451 F.Supp.2d 1165 (D.Hawaii 2006) (struck down use of CE for open air testing of genetically engineered plants).

#### Potential Cumulative Impacts Must be Explicitly Addressed When Establishing a New Categorical Exclusion.

The guidance should discuss the issue of cumulative impacts. CEQ's regulations define a "categorical exclusion" as "a category of actions which do not individually *or cumulatively* have a significant effect on the human environment . . . ." 40 C.F.R. § 1508.4 (emphasis added). CEQ's guidance should remind agencies that establishing a categorical exclusion for a type of activity that may have cumulatively significant impacts violates NEPA. For example, a single, small timber sale alone might not have significant impacts, but several in the same general area could. Agencies must not establish a Categorical Exclusion for a type of activity such as logging, drilling, off road vehicle use or grazing that has the potential for significant cumulative impacts.

#### Conclusion

We appreciate CEQ's efforts to make the use of Categorical Exclusions as simple as possible and consistent across agencies. There are many federal actions, such as cutting the grass at a ranger station, that everyone can agree do not significantly impact the environment. We agree that there is no need to waste agency resources on analyzing these actions. The use of Categorical Exclusions, however, has become complicated by agency attempts to use it for actions about which there is a lot of public concern. For such actions, we urge CEQ to recommend that agencies use a simple Environmental Assessment rather than a Categorical Exclusion.

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