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December 1, 2006

Horst Greczmiel
Attn: Associate Director for NEPA Oversight
NEPA Modernization (CE)
722 Jackson Place NW
Washington DC 20503

To Whom It May Concern:

{The following are supplemental comments specific to our concerns about the use of categorical exclusions in the management of livestock grazing on federal lands. These supplemental comments in no way should be interpreted as intending to supersede the substance of our primary comments that were submitted on behalf of our respective member organizations.}

We appreciate this opportunity to comment on the Council on Environmental Quality's (CEQ's) proposed Guidance on Categorical Exclusions (CEs). We also would like to take this opportunity to specifically address the current and potential use of CE's as they affect livestock grazing on our federal lands while offering recommendations that would benefit the management of our federal resources.

Livestock grazing on federal lands is the single largest use of federal lands. Ten federal agencies manage more than 22.6 million animal unit months (AUMs) annually on almost 250 million acres of federal lands. Two of these agencies, the U.S. Forest Service (USFS) and the Bureau of Land Management (BLM), are responsible for managing the vast majority of these affected public acres.

In order to properly manage the vast number of livestock that graze federal lands, the National Environmental Policy Act (NEPA) provides a regulatory framework which is indispensable towards achieving the proper management of these natural resources. Unfortunately, due to myriad reasons, thousands of individual grazing allotments managed by these two agencies have failed to undergo even the most basic of NEPA analyses. The lack of proper NEPA documentation and consideration of options for improved management at the allotment level is particularly troubling given that NEPA analysis is central to informing agency staff and the public during the process of making well informed decisions about how to manage

(and improve management of) livestock grazing.. This NEPA deficit is cumulative because allotment analysis should be informing Forest-wide or BLM land resource management planning. Absent current, allotment-specific information about ecosystem conditions and trends, the large-scale planning also suffers.

Not all of the areas on which we comment directly relate to the parameters defined within CEQ's notice. However, the topics that we address in our comments below do relate to the issue of established and newly established and proposed CE categories. Consequently, we feel that CEQ should incorporate our comments in the process of developing proper CE guidance.

We believe there are at least two distinct areas where agency policy as it relates to CEs for grazing should be considered in relation to CEQ's CE guidance: 1) The proposed changes by the Department of Interior that would alter NEPA guidance so as to allow the use of CEs for livestock grazing by the BLM; 2) Forest Service CE policy as it intersects with congressional policy allowing the use of grazing allotment CEs. We recognize that the legal authority in permitting the Forest Service to issue grazing CEs was originally provided by Congress, and thus the establishment of such CEs is exempt from many forms of CEQ guidance. However, the use of these CEs by the Forest Service often directly conflicts with established policy by CEQ in appurtenant ways. In recognizing that fact, we feel it is critical that CEQ analyze and consider policies that will lead the agency to make management decisions that are consistent with tenets embodied in NEPA.

I. FOREST SERVICE GRAZING ALLOTMENT AUTHORIZATION CEs: CONCERNS

When Congress enacted Section 339 of the 2005 Consolidated Appropriations Act (P.L. 108-447), it created a "new" type of CE, which applies specifically to Forest Service management decisions on public lands livestock grazing allotments. This new CE applies throughout fiscal years 2005 – 2007, and grants the Forest Service the authority to reauthorize livestock grazing on as many as 900 allotments with no NEPA analysis.

Specifically, P.L. 108-447 sets forth a three-pronged test for when the Forest Service may categorically exclude grazing management decisions from NEPA review. A grazing management decision may be categorically excluded if: 1) the decision continues current grazing management; 2) monitoring indicates that current grazing management is meeting, or satisfactorily moving toward, objectives in the applicable Forest Plan; and 3) the decision is consistent with agency policy concerning extraordinary circumstances.

Because the grazing CE was introduced via an appropriations rider- and not through reasoned CEQ consultation- both its development and execution heavily deviate from the procedural and substantive recommendations proposed by the CEQ.

A. Lack of Conformity between the Establishment of the Forest Service Grazing CE Category and CEQ's Proposed Guidance for Establishment of New CE Categories

Congress created the grazing CE in a manner distinctly contrary to the approach being proposed by the CEQ. Authorization of livestock grazing, *e.g.*, for ten years via reauthorization of a term grazing permit, normally warrants preparation of an environmental impact statement (EIS) or environmental assessment (EA). This is true because experience has demonstrated that livestock grazing is closely and generally associated with significant and cumulative environmental impacts. These impacts include: streambank trampling; introduction, establishment, and spread of invasive species; selective removal of native plants; consumption of reproductive portions of forbs and grasses; increased woody plant encroachment in grasslands; soil compaction; trampling of cultural artifacts; seeding of exotic forage; and suppression of fire through removal of fine fuels. Livestock management decisions are typically not ecologically insignificant. However, the grazing CE treats them as such.

Furthermore, this congressional authorization is being broadly applied to regions or areas of the country where livestock grazing has been known to be detrimental for over a hundred years. "Extraordinary circumstances"¹ are commonplace on grazing allotments, especially those in arid regions. For instance, wetlands (*e.g.*, springs, wet meadows), inventoried roadless areas, archaeological sites, and threatened, endangered, and/or Forest Service sensitive species exist on most livestock allotments. Despite this fact, the Forest Service is implementing grazing CEs for long-term management decisions on ecologically vulnerable allotments, and allotments that have high value as wildlife refugia.

The congressional grazing CE category was established without substantiating information regarding lack of significant impacts. Moreover, the congressional grazing CE category was established without a public comment period for the proposed category. Information supporting the CE category was not even made available to the public for review or comment.

B. A Serious Gap in NEPA Decisionmaking

If the Forest Service proposal to categorically exclude entire forest plans from NEPA analysis is finalized while Congress simultaneously allows CEs for up to 900 grazing allotments² during 2005-2007, large swaths of federal land may be wholly exempted from NEPA analysis:

¹ The Forest Service Handbook (FSH) defines extraordinary circumstances at 1909.15 Chapter 30.3.2. to include: a) Federally listed threatened or endangered species or designated critical habitat, species proposed for Federal listing or proposed critical habitat, or Forest Service sensitive species; b) Flood plains, wetlands, or municipal watersheds; c) Congressionally designated areas, such as wilderness, wilderness study areas, or national recreation areas; d) Inventoried roadless areas; e) Research natural areas; f) American Indians and Alaska Native religious or cultural sites; and g) Archaeological sites, or historic properties or areas.

² These decisions may include issuing 10-year term grazing permits.

analysis which would otherwise include environmental review of current versus improved management on these grazing allotments. Given that livestock grazing typically involves direct, indirect, and cumulative environmental impacts, as well as significant public controversy, this top down exclusion of many grazing management decisions constitutes a major gap in NEPA analysis for a highly impacting, landscape-scale activity.

C. Lack of Conformity between Forest Service Processes for Use of Grazing Allotment CEs and CEQ's Proposed Guidance for Use of Established CE Categories

As we review current Forest Service proposals and decisions on individual grazing allotment authorizations under congressionally-authorized CEs throughout the West, we are observing that the agency's processes do not conform to CEQ's proposed guidance for use of established CE categories. Typically, when the Forest Service proposes that grazing will be authorized on a given allotment or group of allotments under a CE, the basis for this proposal is not provided.

Generally, no monitoring information is provided showing that current grazing management is meeting, or satisfactorily moving toward, objectives in the applicable Forest Plan. If the public wishes to see such information, a Freedom of Information Act (FOIA) request must be submitted, or the information otherwise requested of the agency. This prevents timely public response to the CE announcement.

Generally, no evidence is provided that extraordinary circumstances will not be significantly affected by the authorized grazing in the coming decade. Again, any such evidence that may exist must be requested through a FOIA request, or otherwise obtained from the agency. Of even greater concern, the agency often wholly lacks on-ground information regarding impacts of current grazing on most extraordinary circumstances, *e.g.*, springs, other wetlands, sensitive species, archaeological sites, species proposed for federal listing, or even threatened or endangered species within or potentially within the allotment(s).

Often, essentially *no* information is provided with the announced proposed CE. Even a map of the allotments involved is typically not presented. Please see Attachment A for examples of concerns with how the Forest Service is administering congressionally-authorized grazing allotment authorization CEs.

II. FOREST SERVICE GRAZING ALLOTMENT AUTHORIZATION CEs: RECOMMENDATIONS

We respectfully recommend that the CEQ take the following steps to help rectify the wide-spread, improper Forest Service implementation of congressional grazing CEs:

- A. Improve communication between CEQ and Congress so that Congress better understands the purposes/practices of NEPA CEs.
- B. Provide guidance to the Forest Service for use of the congressional grazing CE provision. This is especially important because this CE category was legislatively established without consulting CEQ.
 - i. Encourage the Forest Service to engage in collaboration before a particular allotment or group of allotments are proposed for a grazing CE. Both “impact demonstration projects” and/or “benchmarking” as described in CEQ’s proposed guidance for establishment of a new CE category would be useful in showing that authorizing livestock grazing on comparable allotments on the District or Forest legitimately qualifies for a CE.
 - ii. Recommend that a scoping notice be provided for each allotment or group of allotments proposed for grazing authorization under a CE. In order for the public to meaningfully comment on the proposed CE, the scoping notice should include the following, and the public should have an identified time to review underlying documents and/or themselves document the presence of significant impacts that have been missed in the scoping notice:
 - 1. The allotment(s) covered by the CE.
 - 2. The Forest and District(s) of the allotment(s).
 - 3. The deadline, Responsible Officer, and other staff from whom information can be sought and/or to whom comments can be submitted.
 - 4. Map(s) of the allotment(s).
 - 5. For each allotment, the proposed action, acreage, class of livestock, current AUMs and season of use, most recent NEPA analysis including the latest AMP.
 - 6. Summary of CE justification, including monitoring data, which shows: a) either the attainment of, or movement toward, Forest Plan goals and objectives; b) evidence of lack of potential significant impacts on extraordinary circumstances; and c) lack of enforcement problems.
 - iii. Recommend that a Decision Notice be drafted for each CE, and that the notice be appealable.

- C. Provide guidance on how the agency should implement its Forest Service Handbook statement that “the mere presence of one or more of these [listed] resource conditions does not preclude use of a categorical exclusion...the degree of the potential effect of a proposed action on these resource conditions [will] determine[] whether extraordinary circumstances exist.”³ The current language is so vague as to allow any degree of potential or documented effect.

³ See FSH at 1909.15 Chapter 30.3.2.

III. THE PROPOSED CATEGORICAL EXCLUSION OF BLM GRAZING PERMITS FROM NEPA ANALYSIS (516 DM 11.9(D)(11) - (12)) IS UNLAWFUL, UNJUSTIFIED, AND ILL-ADVISED

On January 25, 2006⁴, the Department of Interior proposed new guidance that would significantly expand the use of CEs. The most dramatic change in this guidance was a new interpretation that would permit literally thousands of CEs for the permit renewal of grazing allotments administered by the BLM. The proposal would also permit possibly thousands of temporary non-renewable permits to qualify for CEs as well. It is our contention that CEQ must take a hard look at the reasoning behind the agency's justification to expand the use of CEs in such a critically significant manner. Such a cumulative action, if adopted, would undermine the basic precepts of NEPA. And given that Interior's proposal is still just that- a proposal- this current CEQ process we are commenting upon should provide CEQ with an opportunity to inform the Interior Department's current CE proposals. Ultimately, this is an opportunity for CEQ to reject a proposal from the Department of Interior which we feel is incompatible with the goals of NEPA.

The following comments concerning the expansion of categorical exclusions by the Department of Interior are an abridged version of comments submitted by Natural Resources Defense Council et al. on February 24, 2006 concerning that agency's proposal. We believe it is necessary to submit these comments for the record because the assertions incorporated within these original comments illustrate the potential pitfalls of expanding the use of CEs as they relate to grazing. Given that the Department of Interior's proposal is still within the draft stages, it is our expectation that the deficiencies that we brought to light within our original February 2006 comments should also be considered in order to ameliorate the Department of Interior's proposal to expand the administrative use of CEs to grazing.

A. The Federal Courts Have Determined That Grazing Permits Significantly Affect the Human Environment

Under the applicable CEQ regulations, CEs may be applied only to "actions which do not individually or cumulatively have a significant effect on the human environment." 40 C.F.R. § 1508.4 (definition of categorical exclusion). However, the federal courts have already determined that the BLM's issuance of grazing permits *does* significantly affect the human environment. *Natural Resources Defense Council, Inc. v. Morton*, 388 F. Supp. 829, 832 (D.D.C. 1974), *aff'd per curiam*, 527 F.2d 1386 (D.C. Cir. 1976), *cert. denied*, 427 U.S. 913 (1976). *See also Idaho Watersheds Project v. Hahn*, 307 F.3d 815 (9th Cir. 2002) (affirming district court decision

⁴ Proposed Revision to the Bureau of Land Management's (BLM) Procedures for Chapter 11 of the Department of the Interior's Manual 516 DM – Managing the NEPA Process. FR 4159–4167 [E6–775] January 25, 2006.

requiring BLM to prepare NEPA analyses before issuing grazing permits); *Western Watersheds Project v. Bennett*, 392 F. Supp.2d 1217 (D. Idaho 2005) (striking down BLM's FONSI for 28 grazing permits and requiring preparation of an EIS); *Western Watersheds Project v. Oke*, No. CV-N-03-197-HDM(VPC) (Aug. 18, 2004) (requiring preparation of an EIS for three grazing allotments).

In *Morton*, after reviewing the overwhelming evidence of grazing's impacts, the court stated:

The court is therefore persuaded that the grazing permit program produces significant impacts on individual locales. And when the cumulative impact of the entire program is considered it is difficult to understand how defendants-intervenors can claim either that the impact of the program is not significant or that the federal action involved is not major.

388 F. Supp. at 835.

In the present case over 100 million acres of public land are being leased for grazing although apparently no thorough analysis has been made of the specific impact of such activity. The court is, therefore, of the opinion that major federal actions having significant effects on the environment are being taken without full NEPA compliance, even though that Act has been in effect almost five years.

Id. at 840.

The Department of the Interior, as a party to *Morton*, is bound by the court's decision, and may not act contrary to it by categorically excluding grazing permits from analysis under NEPA. Nor may the Department escape its responsibilities under *Morton* by claiming that those responsibilities have been fulfilled by the preparation of the EISs that accompany the BLM's land use plans. The Interior Board of Land Appeals has held that the broad-scale, non-site-specific EISs accompanying land use plans do not satisfy *Morton's* mandate for EISs "which discuss in detail the environmental effects of the proposed livestock grazing, and alternatives thereto, in specific areas of the public lands which are or will be licensed for such use . . .," 388 F. Supp. at 841. See *National Wildlife Federation v. BLM*, 140 IBLA 85, 93 - 95 (1997) (the Comb Wash case). See also Joseph M. Feller, *The Comb Wash Case: The Rule of Law Comes to the Public Rangelands*, 17 PUBLIC LAND & RESOURCES LAW REVIEW 25, 37 - 45 (1996) (analyzing the implications of the Comb Wash case for BLM's compliance with NEPA with respect to grazing permits).

B. The Proposed CEs of Grazing Permits Directly Contradict the BLM's Rationale for Pending Amendments to the Grazing Regulations

On December 8, 2003, the BLM issued proposed revisions to its public land grazing regulations. The final regulations have not yet been promulgated, but in June, 2005, the BLM

released a final EIS with the text of the final regulations. Among the most controversial features of these pending new regulations is the deletion of provisions in the current regulations that require the BLM to consult with interested members of the public when it issues, renews, or modifies a grazing permit.

In justifying the proposed deletion of public input requirements from its regulations, the BLM repeatedly asserted that, the deletions notwithstanding, adequate opportunities for public input would be provided in the course of the environmental analyses required by NEPA. Specifically, the BLM stated:

We also propose removing the requirement in paragraph (b) that BLM would consult, cooperate, and coordinate with the interested public prior to the issuance or renewal of grazing permits and leases because this consultation is redundant to consultation that already would have occurred as part of the process of completing NEPA analysis and other documentation that is pre-requisite to permit or lease issuance or renewal.

Proposed Rule, 68 Fed. Reg. 68,452 (2003).

Because BLM provides full opportunity for the interested public to comment during the NEPA and planning processes, and because consultation can be a time-consuming process, not generally conducive to the “rapid response” needed to take advantage of situations that would give rise to approval of an application for temporary and nonrenewable use, BLM is proposing to remove the additional public consultation requirement before issuing temporary and nonrenewable grazing permits or leases.

Id. at 68,463.

The proposed revisions to the BLM’s NEPA Manual, however, would categorically *exclude* the issuance of most grazing permits, including temporary non-renewable permits, from analysis under NEPA. This proposed CE directly contradicts the BLM’s previous assertions that NEPA analyses will provide adequate opportunity for public input into the terms and conditions of grazing permits. The combined effect of the proposed CE and the previously-proposed revisions to the grazing regulations will be to eliminate all opportunities for up-front public consultation regarding the terms and conditions of grazing permits. The only remaining opportunities for public involvement will be the provisions for after-the-fact protest and appeal under 43 C.F.R. Part 4160, and even those opportunities will be eliminated with respect to temporary, non-renewable grazing permits.

C. The Fact That Most Grazing Permit EAs Have Resulted in FONSI Does Not Demonstrate that EAs are Unnecessary or that Impacts Are Not Significant

The BLM's only justification for the proposed CE of grazing permits is presented in a document dated "12/12/2005" and posted on the BLM's web site under the link "Categorical Exclusion Analysis Report: Grazing." In this document, the only "factual evidence" supporting the proposed categorical exclusions is the observation that the vast majority of EAs prepared for grazing permits have resulted in FONSI. However, this observation fails to justify the proposed CEs for at least four reasons.

First, the statistics presented in this document are extraordinarily misleading because they fail to reveal the multiple instances in which the federal courts or Interior Department administrative law judges (ALJs) have found that the BLM violated NEPA by failing to prepare an EIS. *See, e.g., Western Watersheds Project v. Bennett*, 392 F. Supp.2d 1217 (D. Idaho 2005) (striking down BLM's FONSI for 28 grazing permits and requiring preparation of an EIS); *Western Watersheds Project v. Oke*, No. CV-N-03-197-HDM (VPC) (Aug. 18, 2004) (requiring preparation of an EIS for three grazing allotments); *National Wildlife Federation v. BLM*, 140 IBLA 85, 93 - 95 (1997) (the Comb Wash case) (affirming decision by an ALJ to require an EIS if the BLM allows the current grazing system to continue on one allotment). In fact, the FONSI tabulated in this document probably include the 28 FONSI found unlawful by the court in *Western Watersheds Project*.

Second, it is likely that many of the EAs and FONSI tabulated in this document were not subject to challenge by environmental, conservation, or wildlife interests. Experience has shown that, when subjected to administrative or judicial challenge, a high percentage of BLM's FONSI for grazing permits are found to be unlawful. If more had been challenged, it is likely that many more of the FONSI would have been overturned and EIS would have been required.

Third, in quite a few instances the BLM has prepared lengthy EAs that have included much of the information and analysis that would have been contained in an EIS had one been prepared.⁵ In many of these instances, interested individuals and organizations have chosen to focus on the content of the EAs rather than on the labels given them. These individuals' and organizations' decision not to insist on EIS should not be taken as acquiescence in CE that would result in *neither* EAs *nor* EIS being prepared for most grazing permits.

Fourth, even where an EA results in a FONSI, it still provides critical information to the public and gives interested citizens an opportunity to provide comments and suggestions that can

⁵ *See, e.g.,* SAN JUAN RESOURCE AREA, MOAB DISTRICT, UTAH BLM, PROPOSED COMB WASH WATERSHED PLAN AND SAN JUAN RESOURCE MANAGEMENT PLAN AMENDMENT AND ENVIRONMENTAL ASSESSMENT (EA-UT-069-97-23) (1997) (127-page EA for one grazing allotment); & LOWER GILA RESOURCE AREA, PHOENIX DISTRICT, ARIZONA BLM, ENVIRONMENTAL ASSESSMENT, LIVESTOCK USE AUTHORIZATION, SANTA MARIA RANCH ALLOTMENT (No. 05046) (EA AZ-026-91-14) (1991) (33-page EA, plus 72 pages of public comments, tables, and maps for one grazing allotment).

prevent or correct mistakes by the BLM. *See, e.g., Western Watersheds Project v. Bennett*, 392 F. Supp.2d 1217, 1220-22 (D. Idaho 2005) (EAs revealed that, contrary to applicable land use plan, BLM was proposing to increase grazing levels despite serious impacts of grazing even at existing levels.) Categorically excluding grazing permits from NEPA analysis would remove these opportunities for public input.

Before taking the drastic step of categorically excluding grazing permits from NEPA analysis, the BLM should survey the EAs that have been prepared for grazing permits to determine the nature and scope of the information and analysis that they have contained and the public comment that they have engendered. Only in the unlikely event that the BLM determines that such information, analysis, and public comment were unnecessary and unhelpful can the BLM justify the proposed CE.

D. Environmental Assessments of Grazing Permits are a Key Element of BLM Livestock Management

The BLM's justification for the proposed CE apparently relies on the assumption that the *only* function of an EA is to determine whether an EIS is needed, and that therefore any EA that resulted in a FONSI need never have been prepared. However, EAs perform essential functions even when they result in FONSIs. The proposed CE, by eliminating EAs for most grazing permits, would leave a gaping hole in BLM's livestock management.

According to the applicable CEQ regulations, among the functions of an EA is to “[a]id an agency's compliance with the Act [NEPA] when no environmental impact statement is necessary.” Among other things, grazing EAs assemble information and inform both the public and the BLM about the resources and conditions of BLM lands and the effects of grazing on those resources and conditions⁶, provide opportunities for public input,⁷ and require the BLM to develop and consider alternatives for grazing management.⁸ In addition, EAs help the BLM to comply with FLPMA's mandate to provide the public an opportunity to “participate in . . . the management of the public lands.” 43 U.S.C. § 1739(e).⁹ The proposed CE for grazing permits,

⁶ *See* 40 C.F.R. § 1500.1(b) (“NEPA procedures [including the development of EAs] must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.”)

⁷ *See id.* §§ 1500.2(d) (Federal agencies shall “[e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment.”), 1506.6 (Agencies shall “[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures.”) *See also* Joseph Feller, *Public Participation Under NEPA*, in SECTION OF NATURAL RESOURCES, ENERGY AND ENVIRONMENTAL LAW, AMERICAN BAR ASSOCIATION, THE NEPA LITIGATION GUIDE 101, 115-20 (Karin P. Sheldon and Mark Squillace, eds. 1999) (explaining the importance of EAs for public participation).

⁸ *See* 43 U.S.C. § 4332(2)(E). Development of alternatives is required even when no EIS is needed. *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228-29 (9th Cir. 1988).

⁹ This provision requires “some form of public input for all decisions that may have significant impact on

however, would eliminate all these functions currently performed by EAs for grazing permits.

E. Rangeland Health Assessments Are Not an Adequate Substitute for the Environmental Analysis Required by NEPA

The proposed CE for grazing permits would exclude from NEPA analysis term permits and temporary non-renewable permits on every allotment that has been “assessed and evaluated” and the BLM has made a “determination” that the allotment is either “[m]eeting land health standards” or failing to meet such standards solely for reasons other than grazing. The amendments to the NEPA Manual do not define “assessed”, “evaluated”, “determination”, or “land health standards.” However, the document dated 12/12/2005 that purports to provide the justification for these CEs defines “assessment”, “evaluation”, and “determination.” These definitions make clear that the “assess[ment]” to which the CE refers to is *not* an EA pursuant to NEPA but rather an assessment conducted for the limited purpose of determining whether an allotment meets the standards for rangeland health and the guidelines for grazing administration. (We will refer to such an assessment as a “rangeland health assessment.”) In other words, the BLM is attempting to substitute rangeland health assessments for EAs and is attempting to equate conformance with standards and guidelines with an absence of significant environmental impacts.

The substitution of rangeland health assessments for EAs, and the assumption that there are no significant impacts of grazing on any allotment that is meeting the standards and guidelines, are entirely unjustified and turn the standards and guidelines on their head. The standards and guidelines were designed to provide a “safety net” of minimal standards that all allotments must meet. They were never intended to serve as a substitute for the thorough environmental analysis required by NEPA, or to allow the BLM to ignore all environmental impacts of grazing that do not constitute violations of grazing standards and guidelines.

i. Significant Impacts May Exist Even Where Standards Are Attained

The standards for rangeland health are *minimum* standards that every grazing allotment should meet and that trigger requirements for prompt action when they are violated. A determination that an allotment meets these minimum standards is *not* a determination that grazing is having no significant impacts on the allotment, and it is *not* a determination that conditions on the allotment could not be improved, or made to improve more quickly, by changes in grazing management. Therefore, there is no justification for skipping the environmental analysis and consideration of alternatives required by NEPA on all allotments where such standards are met.

For example, an allotment may be determined by the BLM to meet standards and guidelines because it has sufficient plant cover to maintain minimally acceptable levels of soil stability, water infiltration, and nutrient cycling, and water quality, yet still have far less plant cover than its natural potential. On such an allotment, a reduction in grazing intensity or other

federal lands.” *National Wildlife Fed. v. Burford*, 835 F.2d 305, 322 (D.C. Cir. 1987).

changes in grazing management might substantially improve ground cover and therefore provide better soil stability, water infiltration, and nutrient cycling, not to mention better wildlife habitat, more native plant diversity, cleaner water, a more scenic landscape, and fewer conflicts between grazing and recreation. But under the proposed CEs, such an allotment would be excluded from the environmental analysis that might reveal the potential for such improvements and develop grazing management alternatives to achieve them.

Similarly, an allotment may be determined to meet riparian standards because its riparian areas are in “proper functioning condition,” yet those riparian areas may be held in an early or mid-seral stage by grazing pressure. On such an allotment, more rest for some of the riparian areas might allow them to develop into a late seral stage that would provide additional native biodiversity, habitats for different types of wildlife, and additional recreational opportunities. But under the proposed CE, such an alternative would never be considered.

ii. Many Significant Impacts Are Not Addressed by Rangeland Health Standards

An even greater problem that will result from the substitution of rangeland health assessments for NEPA compliance will be that many of the most severe environmental impacts of grazing will not be assessed or considered at all. The standards and guidelines address an important, but limited set of environmental concerns, mostly related to soils, watersheds, and ground cover. Many important environmental impacts of grazing are *not* addressed by the standards and guidelines, including the following:

- Impacts of grazing on archaeological sites
- Impacts of grazing and grazing-related facilities (fences, corrals, water developments, vehicle routes) on wilderness values
- Effects of grazing and grazing-related facilities on scenery
- Effects of grazing and grazing-related facilities on the quality of recreational opportunities
- Impacts of grazing on native wildlife other than threatened, endangered, or special status species
- Depletion of springs and streams by diversion of water for livestock use
- Substitution of exotic forage plants for native plant species that are sensitive to livestock grazing

A proper analysis (EA or EIS) of a grazing permit pursuant to NEPA would entail evaluation of these and all other impacts of grazing and consideration of alternatives to eliminate, reduce, or mitigate such impacts. However, under the proposed CE of grazing permits, analysis and consideration of these impacts will never occur on any allotment that meets minimal standards for rangeland health.

iii. Experience has Shown that Rangeland Health Assessments Fail to Address Many Significant Impacts of Grazing

The potential for significant environmental impacts of grazing that are not addressed by rangeland health assessments is not merely hypothetical. In Arizona, at least, the BLM has repeatedly produced rangeland health assessments that fail to address numerous important impacts. Professor Joseph Feller of Arizona State University's College of Law, has carefully examined the BLM's rangeland health assessments of five grazing allotments in Arizona.¹⁰ The comments reveal that all five assessments examine extremely limited data and (a) fail to assess impacts that are not measured by those data, and (b) determine that rangeland health standards are met even when the limited available data indicate that resource conditions have been severely degraded by grazing.

iv. Rangeland Health Assessments Do Not Address the Cumulative Impacts of Grazing on Multiple Allotments

A key requirement of NEPA is that the BLM analyze, document, and consider the cumulative environmental impacts of grazing across multiple allotments. Analysis of cumulative impacts is an essential element of every EA and EIS, and EAs that fail to address cumulative impacts have been struck down as inadequate. *See Western Watersheds Project v. Bennett*, 392 F. Supp.2d 1217, 1223-25 (D. Idaho 2005) But BLM's rangeland health assessments focus on single allotments and usually give no consideration to cumulative impacts. The failure of rangeland health assessments to address cumulative impacts is another reason why they are not an adequate substitute for EAs or EISs

F. The Exclusion of Permits Issued as a "result of an administrative action" is Overbroad, Unjustified, and Unlawful

Section 11.9(D)(11)(b) of the proposed NEPA Manual revisions would categorically exclude from NEPA analysis any grazing permit issued as "the result of an administrative action." "Administrative action" is not defined. Two examples of "administrative action" are given, but the text states that "administrative actions" are not limited to these examples.

¹⁰ Professor Feller's comments on these five assessments are attached to our original comments submitted to the Department of Interior's CE proposal. These allotments are the Beanhole, House Rock, and Soap Creek Allotments in the Arizona Strip District and the Santa Maria Ranch and Santa Maria Community Allotments in the Kingman Field Area. There is no reason to believe that the assessments of these allotments, or the impacts overlooked by those assessments, are at all unusual or atypical, at least for these BLM offices.

i. “Administrative Action” is Not Defined, and Potentially Includes All BLM Actions

The lack of a definition of “administrative action” leaves the scope of this CE unknown and potentially unlimited. The BLM is an administrative agency and therefore *all* BLM actions are “administrative actions.” In fact, NEPA applies *only* to actions by administrative agencies. Therefore, to exclude “administrative actions” from NEPA analysis is to effectively repeal NEPA.

ii. Where Site-Specific Analysis has Not Previously Been Performed, Renewal of a Grazing Permit Requires NEPA Analysis

One of the examples given of an “administrative” action to be categorically excluded from NEPA analysis is “changing permit termination date.” In other words, the renewal of a grazing permit, which is achieved by changing the termination date, will be categorically excluded. This broad exclusion of permit renewals from NEPA analysis is unjustified and unlawful.

Despite the fact that NEPA was enacted in 1969, BLM only began performing site-specific environmental analyses of grazing permits in the 1990s. There remain thousands of grazing permits that have never been analyzed pursuant to NEPA. The proposed CE would allow the BLM to renew these permits indefinitely into the future without ever complying with NEPA.

Both the federal courts and the Interior Board of Land Appeals have held that the renewal of a grazing permit, even with no changes other than the termination date, is an action requiring NEPA analysis if the site-specific impacts of the permit have not previously been analyzed under NEPA. *See Natural Resources Defense Council, Inc. v. Morton*, 388 F. Supp. 829, 832 (D.D.C. 1974), *aff’d per curiam*, 527 F.2d 1386 (D.C. Cir. 1976), *cert. denied*, 427 U.S. 913 (1976); *National Wildlife Federation v. BLM*, 140 IBLA 85, 93 - 95 (1997) (the Comb Wash case). *See also Oregon Natural Resources v. BLM*, 129 IBLA 269 (1994) (holding that the extension of a permit’s termination date and the substitution of a new permittee constitute an “action” requiring notice and opportunity to protest). The proposed CE for “changing permit termination date” is directly contrary to these legal mandates.

G. The Proposed CE of Grazing Permits Will Allow Major Changes in Grazing Management Without Environmental Analysis

i. The Proposed CE for Grazing Permits Will Exclude Even New Permits and Permits with Major Changes

Remarkably, the proposed CE for “[i]ssuance of livestock grazing permits/leases” contains *no limitations whatsoever* on the content of those permits. It does not require that the permit have the same terms and conditions as a previous permit. So long as an allotment has been determined to be currently meeting land health standards, this CE will allow the BLM to issue a

permit for any number or type of livestock, for any season, with (or without) any terms and conditions, without performing any analysis pursuant to NEPA. It would allow major increases in livestock numbers or in the lengths of grazing seasons without any NEPA analysis. It would even allow the BLM to issue, without NEPA analysis, a new permit authorizing grazing on an allotment that is currently meeting land health standards because it has been ungrazed for years or decades. Clearly, this CE is overly broad, unjustified, and unlawful.

ii. The Proposed CE of Temporary, Non-Renewable Grazing Use Will Allow Authorization of Grazing by Unlimited Numbers of Livestock Without Environmental Analysis or Public Input

The proposed CE for temporary, non-renewable (TNR) grazing use is also overly broad and will invite abuse. Because they are not limited by any pre-established determinations of permitted use levels, TNR permits are an enormous loophole which can be, and has been, used to circumvent legal requirements for environmental analysis and public consultation. *See Western Watersheds Project v. Bennett*, 392 F. Supp.2d 1217, 1225 (D. Idaho 2005). The proposed CE for TNR permits purports to be limited by the requirement that the authorized officer document that the TNR use “will not change the status of land health on the allotments” but it provides no standards or criteria by which such a determination must be justified. Also, it does not require any documentation of the *basis* for the determination; apparently a simple one-sentence declaration will suffice. Finally, and most important, the CE provides no opportunity for advance public notice or comment on the TNR use or the determination that it will not “change the status of land health.”

In summary, the proposed CE for TNR permits allows the BLM to authorize grazing by unlimited numbers of livestock with no environmental analysis and no oversight by the public.

H. Proposed Categorical Exclusions of BLM Grazing Combined with Newly Adopted BLM Grazing Rules Virtually Eliminates Public Participation

On December 8, 2003, the BLM issued proposed revisions to its public land grazing regulations. The final regulations, which were promulgated on August 11, 2006, introduced several controversial provisions. Arguably the most sweeping of these new provisions was the adoption of a severely revised definition of “interested public.” The new definition of interested public eliminated provisions in the previous regulations that required the BLM to consult with interested members of the public when it issues, renews, or modifies a grazing permit.

In justifying the proposed deletion of public input requirements from its regulations, the BLM repeatedly asserted that, the deletions notwithstanding, adequate opportunities for public input would be provided in the course of the environmental analyses required by the National Environmental Policy Act (NEPA). Specifically, the BLM stated:

We also propose removing the requirement in paragraph (b) that BLM would consult, cooperate, and coordinate with the interested public prior to the issuance

or renewal of grazing permits and leases because this consultation is redundant to consultation that already would have occurred as part of the process of completing NEPA analysis and other documentation that is pre-requisite to permit or lease issuance or renewal. (Proposed Rule, 68 Fed. Reg. 68,452 (2003))

and

Because BLM provides full opportunity for the interested public to comment during the NEPA and planning processes, and because consultation can be a time-consuming process, not generally conducive to the "rapid response" needed to take advantage of situations that would give rise to approval of an application for temporary and nonrenewable use, BLM is proposing to remove the additional public consultation requirement before issuing temporary and nonrenewable grazing permits or leases. (*Id.* at 68,463.)

The proposed revisions to the BLM's NEPA Manual, however, would categorically *exclude* the issuance of most grazing permits, including temporary non-renewable permits, from analysis under NEPA. This proposed categorical exclusion directly contradicts the BLM's previous assertions that NEPA analyses will provide adequate opportunity for public input into the terms and conditions of grazing permits. The combined effect of the proposed categorical exclusion and the newly adopted revisions to the grazing regulations is to eliminate all opportunities for up-front public consultation regarding the terms and conditions of grazing permits. The only remaining opportunities for public involvement if the CE guidance is adopted, will be the provisions for after-the-fact protest and appeal under 43 C.F.R. Part 4160, and even those opportunities will be eliminated with respect to temporary, non-renewable grazing permits.

IV. CONCLUSION

The above supplementary comments address the use of “new” CEs for livestock grazing on Forest Service and BLM lands. These comments raise the concern that “categorical exclusion” has one meaning under NEPA and CEQ regulations; and quite another meaning within P.L. 108-447; providing for Forest Service grazing allotment CEs and 2006 Department of Interior guidance for BLM livestock allotment CEs.

Nevertheless, CEQ guidance for use of these new, “NEPA-less” CE categories is essential if these agencies are to remain compliant with NEPA and CEQ regulations, and if the two agencies are to meaningfully engage the public in livestock management on their public lands. Almost inherently, livestock grazing as currently practiced on federal lands entails significant environmental and social impacts. It is out of this understanding that we offer the above comments and recommendations.

Again, thank you for the opportunity to comment on this vital issue. Please let us know if you have any questions or comments.

Sincerely,



Bobby McEnaney
Natural Resources Defense Council
1200 New York Avenue, NW Suite 400
Washington, DC 20005
202.289.6868
bmcenaney@nrdc.org

Melissa Hailey
Forest Guardians
312 Montezuma Avenue
Santa Fe, NM 87501
505.988.9126 x159
mhailey@fguardians.org

Bill Hedden
Executive Director
Grand Canyon Trust
2601 N. Fort Valley Road
Flagstaff, AZ 86001
928.774-7488

ATTACHMENT A

EXAMPLES OF PROBLEMATIC FOREST SERVICE PROPOSED CEs

1. Extraordinary Circumstances: Tamarack Allotment in Northeastern Oregon

The Tamarack allotment is in the Heppner Ranger District of the Umatilla National Forest, and lies within the John Day River Basin. The John Day River is the second longest undammed river in the West, providing exquisite habitat for federally listed steelhead and Chinook salmon. The rivers and streams of the John Day River Basin are so important for the viability of these species, in fact, that the Umatilla Forest Plan was amended in 1995 by two regional aquatic conservation strategies to further protect the fish.

These conservation strategies- commonly referred to as PACFISH and INFISH- protect both anadromous and inland native fish species. PACFISH applies to anadromous fish-bearing streams, while INFISH applies to streams bearing redband and bullhead trout. The strategies promote things like proper stream temperatures, pool frequency, width/depth ratio, and bank stability.

To achieve the riparian goals of PACFISH and INFISH, the Forest Plan sets objectives for riparian areas, and states that the Forest Service must modify grazing practices that prevent the attainment of such objectives. This is because livestock grazing has detrimental effects on stream and riparian habitats. These include, but not limited to, reduction and/or elimination of herbaceous, streamside vegetation, collapsed streambanks, increased erosion and sedimentation, widening, pool loss, and increased temperature. This series of synergistic effects adversely affects steelhead, Chinook salmon, and their habitat.

Many of the riparian areas within the Tamarack allotment are not meeting the riparian objectives of the Forest Plan. What is more, the Forest Service has largely failed to monitor these areas for compliance with the Plan, and does not employ methodologies that appropriately measure indicators of stream health. Hence, the Forest Service has offered little to no evidence to support a conclusion that the listed fish were being adequately protected.

When the Forest Service issued its decision to categorically exclude the reauthorization of livestock grazing on the Tamarack allotment from NEPA review, it simply concluded that there would be no effect on extraordinary circumstances. This statement fails to identify the federally listed species as “extraordinary circumstances,” and further fails to acknowledge the documented, significant impacts to the fish and their habitat from livestock grazing.

The Tamarack allotment is one of many allotments in the John Day River Basin that has undergone categorical exclusion from NEPA. The contiguous clusters of categorically excluded allotments within the River Basin leave large swaths of stream habitat unprotected, placing

numerous federally listed fish species at risk. Interestingly, all eight allotments slated for categorical exclusion within the Umatilla National Forest are located within the John Day River Basin.

2. Extraordinary Circumstances: T Bar Allotment in Southwestern New Mexico¹¹

The T Bar allotment is in the Gila National Forest, which lies wholly within the Blue Range Wolf Recovery Area- land designated as the site of reintroduction and recovery of the endangered Mexican gray wolf. Scientists agree that the T Bar allotment contains some of the best wolf habitat in the Gila National Forest, as its interspersion of grasslands and forest naturally attracts elk herds, which constitute a viable wolf prey base. Wolves now roam through and live within the T Bar allotment.

Two lone wolves, as well as members of both the Saddle and the Luna packs are currently using portions of the T Bar allotment. The Saddle pack has been confirmed to have six pups- new members which are critical to the growth of the wild population and to attaining reintroduction goals. These goals have long remained out of reach, however, due largely to livestock-wolf conflicts. Like many past and present packs in the Recovery Area, both the Saddle and Luna packs have been involved in depredation incidents on T Bar and elsewhere. Indeed, the potential for livestock-wolf conflicts is constant on the allotment; as is the potential for wolf removal under the local “three strikes” policy.

At 77,220 acres, the T Bar allotment could play a crucial role for Mexican gray wolf recovery in and of itself. There are, however, thirteen other categorical exclusions planned or completed for the Gila National Forest before the close of fiscal year 2007. When the Forest Service categorically excludes its grazing management decisions on the Gila from NEPA review, it fails to mention the potential for, or presence of, wolves in the various action areas. The Forest Service likewise makes no reference to the Gila’s inclusion in the Recovery Area nor the agency’s voluntary commitment to wolf recovery, as evidenced in the 2003 Memorandum of Understanding between various federal, state, and local agencies.

Wolves are not the only federally listed species on the T Bar. The Mexican spotted owl also lives in and around the allotment, which contains portions of its critical habitat. Owls are heavily dependent on healthy riparian areas for their survival and recovery in New Mexico. Still, the proposed action on the T Bar allotment fails to protect riparian areas for the owl. The Forest Service proposes no riparian exclosures to benefit the owl or any other species on the allotment. Instead, it will continue to allow cattle to graze around these sensitive areas, even though some are in unsatisfactory condition.

The brief decision memo that sets forth the categorical exclusion on the T Bar allotment contains

¹¹ The Decision Memo for the T Bar allotment was recently withdrawn after Forest Guardians appealed the use of a CE there. We have left it here as an example of an improper CE because the District Ranger has publicly stated his intention to reissue a CE for this allotment in 2007.

no analysis of the effects of cattle grazing to the Mexican gray wolf or Mexican spotted owl. The decision memo fails to even mention that these or any other protected species inhabit the allotment and/or depend on its ecological integrity. Instead, the decision memo draws an unsupported conclusion that continued livestock management will have no significant effect on any extraordinary circumstances on the T Bar allotment.

3. Extraordinary Circumstances: The Bridger-Teton in Wyoming

The Bridger-Teton National Forest is making robust use of the grazing categorical exclusion. In all, the Forest has excluded, or is proposing to exclude, sixty-two grazing management decisions through the end of fiscal year 2007. The total area of such exclusions represents roughly 75% of that portion of the Forest that is open to livestock grazing.

Due to their numbers and close proximity to one another, no individual allotment on the Bridger-Teton National Forest is singled out for discussion. Collectively, the allotments hold a wide range of extraordinary circumstances, including, but not limited to, aquatic sensitive species, riparian zones, and wetlands. The significant impacts of cattle grazing to riparian areas and wetlands are well known. One of these impacts is habitat impairment for fishes such as the cutthroat trout. By categorically excluding grazing management decisions from NEPA review on such an overarching scale, the Forest Service is putting numerous streams and wetlands at risk, along with those species that depend on these vulnerable areas.

Interestingly, many of the grazing management decisions being categorically excluded on the Bridger-Teton implement allotment management plans that predate the current Forest Plan. This means that the management plans do not contain details of Forest Plan Standards and Guidelines to be followed, and do not incorporate current range science and/or monitoring techniques. Specifically, the old management plans do not incorporate current standards for livestock movement, streambank stability, forage utilization, riparian grazing, forage improvement, and fish, wildlife, and protected species.

In making its decisions to categorically exclude the Bridger-Teton allotments from NEPA review, the Forest Service has failed to provide evidentiary support that conditions are moving towards Forest Plan objectives or that its decision will not affect extraordinary circumstances. Further, the Forest Service has made no analysis of how such a wide spread use of categorical exclusions is cumulatively affecting the resources of the Forest. Though not enumerated as a criterion in the Forest Service Handbook, one could argue that the sheer size of the collective project area poses an extraordinary circumstance in and of itself.

4. Extraordinary Circumstances: Marble Mountains Wilderness Area of the Klamath National Forest

The Marble Mountain Wilderness was designated in 1964 and it now has a total of 241,744 acres. Thousands of people visit this rugged wilderness area every year to backpack, fish in one

of the over 80 lakes and take in the spectacular scenery.

On December 9, 2005, the Klamath National Forest (KNF) released a scoping notice that identified the need to analyze grazing use on allotments in the Marble Mountains Wilderness Area. Scoping Notice at 1. The Forest Service intended to prepare an environmental assessment with public input generated during this scoping effort. Ibid. The EA would have covered the Westside Allotment Group, including six allotments on 76,660-acres in the wilderness area.

Instead of planning the EA on all six allotments, the KNF issued four decision memos on September 26, 2006 covering 1,680 Animal Months of grazing on over 63,000 acres in the wilderness area. The allotments are the Big Ridge, Big Meadows, Little North Fork, and Shelly Meadows.

The KNF acknowledges conflicts between wilderness visitors and ongoing cattle grazing. For example, it states that a resource management need for the Big Ridge allotment is to develop educational material in order to inform recreation users of forage conditions/availability. Scoping Notice at 11.