



HEARTWOOD

DEDICATED TO THE HEALTH AND WELL BEING OF THE
NATIVE FORESTS OF THE CENTRAL HARDWOOD REGION

NEPA Modernization (CE)
Attn: Associate Director for NEPA Oversight
722 Jackson Place NW
Washington, DC 20503
hgreczmiel@ceq.eop.gov

December 1, 2006

Dear CEQ:

Thank you for the opportunity to comment on the CEQ's proposed guidance¹ for CEs. We offer these comments as an organization that has done extensive litigation over the Forest Service's abuse of CEs.

The underlying problem would appear to be agencies not caring about what the public thinks and not wanting to do anything that gets in the way of their predetermined actions. The CEQ Regulations state:

Ultimately, of course. It is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork even excellent paperwork but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.
40 CFR § 1500.1(c).

A Forest Service Ranger recently told us they want to do the easiest thing not the best. This is the general attitude that results in the abuse of CEs. What we see with the Forest Service is instead of preparing an EIS, they will prepare a 2-300 page EA and instead of preparing a 10-15 page EA, they will use a CE. The CEQ should remind agencies that the easiest way is not always the best. Many times the easiest way results in litigation and an upset public. When one chooses the easiest way instead of the best, you usually will not get the best result.

CEQ's guidance should encourage agencies to use simple and straight-forward EAs, rather than try to squeeze a contentious action into a CE. In many cases agencies prepare EAs hundreds of pages long and then claim doing an EA is too difficult. The CEQ should restate the 40 Questions guidance that states, "While the regulations do not contain page limits for EA's, the Council has generally advised agencies to keep the length of EAs to not more than approximately 10-15 pages. * * * In most cases, however, a lengthy EA indicates that an EIS is needed."

CEQ's guidance should instruct agencies that establishing a CE for a type of activity that may have cumulatively significant impacts violates NEPA. For example, a small grazing or logging project alone might not

¹Establishing, Revising, and Using Categorical Exclusions under the National Environmental Policy Act

have significant impacts, but several could when repeated several times in the same general area could. Agencies must not establish a CE for actions such as Forest Plans, logging, drilling, ORVs, and grazing. These types of projects have potential for significant cumulative impacts.

Agencies should be required to periodically review their CEs to determine if any should be removed. When there is regularly public opposition to the use of a CE, the agency needs to reconsider the CE. See 40 CFR § 1507.3(a).

Agencies should be required to do a reasonable amount of actual on the ground monitoring to make sure the CEed projects are not having any significant effects. Saying we determined there will be no significant effects, therefore there were none, should not be allowed. Actual on the ground monitoring needs to be done.

The guidance should make it clear that if extraordinarily circumstances are present, a CE cannot be used. Many times an agency will prepare what amounts to a FONSI on the extraordinary circumstances instead of preparing an EA. As the 7th Circuit has ruled, “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 (7th Cir. 1998). When an agency established the CE, they only determined that the category of actions absent extraordinary circumstances do not have significant individual or cumulative effects. Therefore, whenever there are extraordinary circumstances present, the agency needs to either prepare an EIS or an EA/FONSI.

Agencies should also be required to include public opposition/controversy as an extraordinary circumstance to prohibit a CE under those circumstances. When there is public opposition to the project or serious concerns raised by the public, the agency needs to at least prepare an EA.

The guidance should specifically prohibit the use of FONSI as a basis to establish a CE. Just because the agency concluded there would be no significant effects, does not mean none occurred. The agency needs to have on the ground monitoring data (that complies with the Information Quality Act) that shows there were no impacts.

The guidance should make it clear that Impact Demonstration Projects cannot be approved with a CE. Either an EA or EIS must be prepared for these projects.

When an agency uses opinions of agency personnel and outside sources as a basis to establish a CE, the guidance should require any potential conflict of interest to be disclosed. For example, the Forest Service has an economic incentive to log (they increase their budget through means such as the KV fund.) *Cf Sierra Club v. Thomas*, 105 F.3d 248, 251-2 (6th Cir. 1997) *vacated on other grounds* 523 U.S. 726. This gives the Forest Service an incentive to want to make it easy to increase their budget by approving timber sales with a CE. These types of conflicts need to be disclosed.

If the agency uses research that has not been peer reviewed, the agency needs to disclose this and address the reliability of the research.

The guidance should state that if there is significant public opposition to a proposed CE (regardless of if the comments are substantive), as a general rule the CE should be rejected.

Step one for establishing a CE should be to consult with the citizens and groups who regularly comment on the kinds of actions under consideration for a CE.

Regardless of what the courts have ruled, the CEQ should require a NEPA process to adopt CEs. This would not be inconsistent with any court ruling and would be consistent with the CEQ issuing an EA for adoption of the CEQ Regulations.

The guidance needs to restate that if there are “unresolved conflicts” alternatives must be developed.

The agency should be required to address if and how public involvement will be allowed for each proposed CE as part of the rulemaking process. Certainly agencies do not need to provide public involvement for actions such as cutting the grass at a Ranger Station. Agencies, however, should be required to provide public involvement for categories of actions that come close to the need for an EA.

The proposed guidance states, “Developing appropriate categorical exclusions promotes the cost-effective use of agency NEPA related resources.” The CEQ should add, “Inappropriate CEs promote public dissatisfaction, poor decisions, and costly litigation.”

The proposed guidance states:

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 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\

This is bad guidance that should be removed. It does not make much sense. The issue with a CE is not the need for an EIS. The issues are if it is in a category that has been established in rulemaking and if there are extraordinary circumstances. If there is no paperwork to document the action has been CEed, what category it supposedly is in, and addresses extraordinarily circumstances, how can the public or courts judge if the proper procedures have been followed. While for some things like cutting the grass at an office, we agree there would be no need for paperwork, but most of the things many agencies use CEs for, need some kind of documentation. It could be as little as a page. This part of the guidance is reasonable:

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.

The guidance then goes on:

A Federal agency may decide to create a concise record for an action where there are reasonable questions regarding the existence of extraordinary circumstances that may create the potential for the use of the categorical exclusion to be questioned.

“May decide to” should be changed to “must.” Without this record there can be no reasonable public scrutiny or judicial review of this determination. As the CEQ Regulations state, “public scrutiny [is] essential to implementing NEPA.” 40 CFR § 1500.1(b).

The proposed guidance states:

B. Public Involvement

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.

Many times an agency will try to improperly use a CE to avoid letting the public find out about a controversial project until after the project is completed. Instead of encouraging public involvement in these kinds of cases, the CEQ should require it.

We appreciate the CEQ’s efforts make the use of CEs 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 CEs, 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 EA rather than a CE. We also urge the CEQ to not approve the establishment of CEs for actions such as Forest Plans, logging, drilling, ORVs, and grazing.

Thank you for the opportunity to comment.

Sincerely,

Jim Bensman
Heartwood Forest Watch Coordinator
1802 Main Street
Alton, IL 62002
(618)463-0714
jim@heartwood.org