

December 19, 2006

NEPA Modernization (CE)
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To Whom it May Concern:

Here are the comments of the National Capital Planning Commission on CEQ's Proposed Guidance: Establishing, Revising, and Using Categorical Exclusions Under the National Environmental Policy Act. This comment is in response to CEQ's draft published in the Federal Register on September 19, 2006 (71 Fed. Reg. 54816-54820).

NCPC welcomes the opportunity to comment on this important proposed guidance. NCPC's Environmental and Historic Preservation Policies and Procedures, adopted by the Commission on April 1, 2004, and available at NCPC's website (<http://www.ncpc.gov/info/environmental.html>), set forth a number of categorical exclusions, and NCPC continues to monitor its work to assess whether modification of those exclusions, through either addition or subtraction, may be appropriate. In addition, because NCPC reviews, and under its statutory authorities is required to approve, actions of other federal agencies, NCPC has had substantial experience with reviewing other agencies' use of their own categorical exclusions. These comments stem from our agency experiences.

1. Since the same standards apply to adding new categorical exclusions, deleting old ones, and reviewing and confirming or revising existing exclusions, the guidance could be substantially clarified by stating, at the outset, that all three types of actions use the same approaches and require the same analysis. As it is presently drafted, the guidance appears to focus on "new" categorical exclusions, then mention along the way the possibility of deleting old exclusions, revising existing exclusions, and generally reviewing existing exclusions. For example, that "new" also means "revised" is addressed in footnote 2—that is a confusing way to handle the matter. Listing all possible actions (e.g. new categorical exclusions, old categorical exclusions, review and confirmation or modification), then listing the approaches to those actions, would be more helpful. This approach requires a general reorganization of the guidance, but not an extensive rewriting. The result would be far more helpful to agencies.

2. It appears (but is not clear) that the standards for establishing new catexes, revising existing catexes, or deleting old catexes, are set forth in the second paragraph of III.B. ("Various sources of information relevant to the action...may be used to substantiate." A number of subsequent paragraphs then define terms "as used in this guidance." See, e.g., first paragraph of III. B. 1. Finding the action paragraph in this draft to which the defining terms relate is difficult. If the paragraph "various sources" is so critical, it would be appropriate to give the paragraph its own name and number, and make clear that each of the sources of information specified there will be

further defined in paragraphs below. It may even be helpful to cross-reference the paragraphs (e.g. “evaluation of implemented actions (see below, par. #_); impact demonstration projects (see below, par. #_), etc.

In addition, the critical paragraph notes that it is exemplary but not conclusive (“including but not limited to”). However, there is no general standard to which an agency may refer in applying that clause. Thus, there is no real way for an agency to determine what sources of information other than those listed would be acceptable.

3. These procedures seem to require, even if an agency would like to undertake environmental review of an action, that if the type of action could be categorically excluded it should be. (See, e.g. Section II, first paragraph, “Federal agency personnel should develop a categorical exclusion when they identify a class of actions...”. See also CEQ guidance quoted at Section III, B, first paragraph). CEQ may want to consider being less discouraging of agency interest in developing environmental information through an environmental assessment even for actions that could be considered to meet a standard for developing a categorical exclusion. NCPC faces this issue in the context where an agency seeking NCPC approval for an action categorically excludes that proposed action and NCPC does not. Under the standards proposed in this guidance, NCPC’s efforts to encourage the applicant agency to delete or revise its catex would run into CEQ’s strong encouragement that a catex be used.

4. The guidance does not address what happens when the agency routinely has experience that an action, if mitigated, will not have significant impacts, and the agency routinely requires mitigation. Environmental review is important in such circumstances because it provides the basis for requiring mitigation. It would be helpful, possibly through developing a few examples, to make this point clear in the guidance. An example in the guidance of where this problem is implicitly presented but not addressed is in Section III, B, 1., second paragraph, first sentence (“for a category of actions that the agency analyzed in EAs....”).

5. It is implicit but not explicit in the draft guidance that agencies should develop a system for periodic review of all categorical exclusions (not necessarily all at the same time), to determine whether each is still usable or outmoded, whether revisions are necessary, etc. In addition, through such review the agency may develop the analytic record that supports the catex and that it may not have developed so well when the catex was first promulgated years ago. We suggest making explicit, in the listing of types of steps the agency may take, that a periodic review is useful and important. This approach is also preferable to that taken in Section VII of the draft (see comment #21 below).

6. In Section III, introductory (unnumbered) paragraph, the proposed guidance states: “The information that supports establishing a categorical exclusion should demonstrate how the agency determined that the proposed categorical exclusion does not typically result in significant environmental effects...”. It would be preferable to modify this sentence to state...”how the agency determined that the proposed actions—individually and collectively—do not typically result in significant environmental impacts...” Since an “exclusion” does not have impacts, the alternate terminology is more accurate. This problem recurs in the draft and should be corrected throughout.

7. In Section III, A, second full paragraph, the clause “proposed category clearly describes all the actions that should be included” is not clear. It may be preferable (if this is the intent) to state “category clearly describes the entire action that is covered by the exclusion.” This would also be a good place to note that it is the individual and collective actions that must meet the standard.

8. In Section III, A, last paragraph, addressing extraordinary circumstances, the draft notes that an agency may develop extraordinary circumstances criteria specifically related to a new catex. Of course, it may do so for a revised or old catex as well. This issue may be addressed by adopting the approach described above of listing all types of catex-related actions covered here, then listing steps that apply.

9. In Section III, B, third paragraph (starting “Sources with substantial similarities....”) – this paragraph assumes that agencies must publish proposed catexes in the Federal Register. For small agencies, Federal Register publication is prohibitively expensive, and effective notice may be given through other means such as posting on agency websites. It would be helpful for the guidance to acknowledge that a series of methods for public notice are available, and then refer to that list rather than referencing the Federal Register.

In the same sentence, two points: first, it would be helpful to clarify whether the “information and the related findings” referred to is the same as “sources” referred to in the paragraph above; second, the requirement that the agency make public the information on which it relies—a sound requirement—could be seen to be contracted by Section VI, A. It seems likely that the guidance intends Section VI, A to apply to use of the catex rather than its development; if so, making that point clearer would be helpful. It would also be helpful to address what agencies should do when they have developed categorical exclusions in use for some years without specific findings.

10. Footnote 8 reminds agencies of their obligations under other statutes. In addition to the statutes mentioned, it would be useful to refer to the Administrative Procedure Act.

11. In Section III, B, 1, the discussion is not clear (it is so unclear I cannot suggest an editorial change). Is the expectation that an agency identifies a number of actions of a type for which it thinks a categorical exclusion may be appropriate, then, after it proposes but before it finalizes the exclusion, develops certain information about it? How an agency should go about using this approach or whatever other approach is intended, may be clarified as well with a few examples. Finally, the word “collaboratively” should be moved to be between “actions” and “with non-federal...”. Similarly, the last two sentences of Section II, B., 1, paragraph 2 could be made more clear.

12. In Section III, B, 4, the last sentence states that “Although an agency cannot simply use another agency’s categorical exclusion for a proposed action....” For a number of years NCPC indeed did rely on other agencies’ catexes. While, as required by law we no longer do so, the sentence is not sufficiently clear, and I suggest deleting the word “simply”. Further, I suggest adding at the end of the paragraph, after “excluded actions” the phrase “in determining whether to develop its own categorical exclusion for a similar class of actions.”

13. In Section III, C, first paragraph, we suggest changing the first sentence to read: “If actions--individually or collectively--in a class of actions considered for a categorical exclusion is/are found to have a potentially significant impact on the human environment, the agency may want to consider refining the class of actions by narrowing the category or placing constraints on the use of the category....”. Because it is not clear how constraints could be placed on actions, or what CEQ has in mind, a few examples may be helpful.

14. In Section IV, the guidance sets forth procedures for establishing a new categorical exclusion. However, it would seem that the same procedures apply to revisions to and deletions of existing categorical exclusions. It may be helpful to revise this section to provide “procedures for adding, deleting, or revising categorical exclusions.” This comment is similar to the comments above related to substance.

15. In Section IV, second full paragraph (“federal agencies are encouraged to involve CEQ...”), it is not clear whether CEQ must approve new, revised, or deleted catexes. Clarifying that point would be helpful.

16. In Section IV, sixth paragraph (“The following recommended and required steps...”), it is not clear which steps are recommended and which required. Clarifying that point would be useful. In addition, it would be helpful if the guidance could be specific about how agencies that do not have supporting information for existing catexes should approach that problem.

17. In Section IV, sixth paragraph, #1, it seems likely that the guidance is intended to cover catexes drafted in reliance on any of the approaches described above (as well as the “including but not limited to ones—see above). A revision of #1 to be more inclusive would be useful.

18. Section V refers several times to “Federal Register” notice. Since notice by other means may be adequate (see discussion above) these references should be modified to “public notice”. Alternatively, if CEQ really intends to reference “Federal Register” notice, some discussion of how agencies should address the cost issue would be helpful.

19. In Section VI, A, there is discussion of what paperwork is necessary in applying a categorical exclusion. First, the title should make clear it applies to documentation in application, if that is the case, rather than documentation of development of the catex. Because writing down what catex is used and how it applies is an important tool to assure that an agency thinks through how the catex applies to the facts, some written notation is important. For example, at NCPC, we have received documents from agencies noting use of a catex without referring to which one is used. We urge that a sentence be added noting that a short written notation of what catex is used and how it applies aids agencies in thinking through what they are doing and assures accurate and effective use of catexes.

20. In Section VI B, it would be useful to encourage agencies to include the catex determination with the action, so that when the action is made public, the use of the catex (with the information described above) is also made public.

21. In Section VII, CEQ addresses the point that agencies should review their catexes periodically by noting that an agency should develop procedures for identifying and revising a catex that no longer effectively reflect circumstances or where missions have changed. However, to make that determination most effectively, an agency must review all its categorical exclusions periodically, determine which are fine, which need revision, which need deletion. Even those that are fine may require additional documentation. Revising this paragraph to encourage periodic review of all categorical exclusions would most effectively achieve the result this paragraph seems to seek. See also discussion at #5 above.

22. There are a number of grammatical mistakes throughout the guidance. Examples include disagreement of noun and pronoun (“agency”...”their actions” – should be agency and its actions; or agencies...it – should be “agencies” and “their”); use of “can” where “may” would be correct (throughout); use of the same word twice in a sentence (under II, second paragraph, “revision of existing categorical exclusion can promote efficiency by clarifying the actions that are covered by an existing categorical exclusion.”).

Thank you for the opportunity to comment on this proposed guidance.

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December 19, 2006