

Written Testimony of Nancy H. Sutley
Chair of the Council on Environmental Quality
Before the U.S. Senate Environment and Public Works Committee
May 18, 2010

Thank you Chairman Boxer, Ranking Member Inhofe, and members of the Committee.
I appreciate the opportunity to testify today on the National Environmental Policy Act (NEPA).

Before I move to discuss NEPA, I want to express my condolences to the families of the 11 people who lost their lives in the explosion and sinking of the Deepwater Horizon.

I also want to stress that the Administration is committed to aggressively responding to the environmental crisis in the Gulf, and to protecting the lives and livelihoods of the people in the region.

Last week, the President sent Congress a legislative package proposal that would help individuals manage the claims process and enable the Federal government to speed assistance in the event that the spill gets worse and if the responsible parties are not paying claims to affected individuals quickly and fairly. The legislation provides states with additional help to provide one-stop services for those affected by the oil spill, including filing claims with BP, and seeking other assistance that may be available, including Small Business Administration Disaster Loans. The Administration's proposal enables the President to trigger and mobilize, in partnership with states, new forms of assistance – such as Unemployment and Nutrition Aid – if the claims process established by the Oil Pollution Act is not sufficient to meet the needs of affected individuals. It also enables the government to recoup the expenses of providing these services from the responsible parties.

National Environmental Policy Act (NEPA)

In 1970, President Nixon signed the National Environmental Policy Act into law, which passed Congress with overwhelming bipartisan support. In passing NEPA, Congress recognized that nearly all Federal activities affect the environment and created an affirmative obligation for

Federal agencies to consider the effects of their actions on the quality of the human environment. As part of NEPA, Congress established the White House Council on Environmental Quality (CEQ) within the Executive Office of the President to work across the Federal government on agency implementation of the environmental impact assessment process.

Today I will provide you with an overview of the NEPA process and discuss how it relates to agency actions and informs Federal decision-making. I will discuss CEQ's oversight role and the Minerals Management Service's (MMS) application of NEPA to offshore drilling decisions. I will also discuss how CEQ is moving to update its oversight of agency NEPA processes and practices.

Overview of NEPA Process

NEPA provides a tool for informed agency decision-making. Every agency in the Federal Government has an affirmative obligation to comply with NEPA. The NEPA environmental review process begins when an agency proposes an action. The agency must determine if the action has the potential to affect the quality of the human environment. Agencies may apply one of three levels of NEPA analysis. They may: prepare an Environmental Impact Statement (EIS); prepare an Environmental Assessment (EA); or apply a Categorical Exclusion (CE).

Under NEPA, when the proposed action has the potential for significant environmental effects, agencies are required to prepare an Environmental Impact Statement. In those situations where there is uncertainty over whether there will be significant effects, the agency can prepare an Environmental Assessment to determine whether to prepare an EIS or make a Finding of No Significant Impact. Categorical Exclusions are used for the categories of actions that an agency has found do not typically result in individual or cumulative significant environmental effects or impacts, and are based on agencies' past experience with similar actions.

NEPA charges the Council on Environmental Quality (CEQ) with working with Federal agencies on their implementation of the Act.

In 1978, CEQ issued regulations implementing the procedural provisions of NEPA. Those regulations apply to all Federal agencies and put into place the basic framework for all NEPA analyses. The regulations required Federal agencies to establish their own NEPA implementing procedures, and to ensure that they have the capacity, in terms of personnel and other resources, to comply with NEPA. Agencies have more than 30 years experience in implementing NEPA. CEQ periodically issues guidance and other documents, such as guides and handbooks. CEQ also convenes meetings with Federal NEPA contacts to provide CEQ's interpretation of NEPA requirements and focus on how agencies can improve their NEPA analyses and documents. Through case law, the Federal courts and the Supreme Court have established that the agencies can rely on CEQ's interpretation of, and guidance on, NEPA.

Agencies establish their NEPA implementing procedures, which tailor the CEQ requirements to a specific agency's authorities and decision making processes. CEQ provides assistance when agency-specific procedures are developed. An agency's NEPA procedures are not finalized until CEQ reviews proposed procedures and determines that they are in conformity with NEPA and the CEQ regulations. Any subsequent revisions or changes to the agency procedures are subject to the same CEQ oversight. Periodically, CEQ also reviews agency's NEPA implementing regulations and procedures.

On occasion, CEQ engages with Federal agencies on specific NEPA reviews. This typically occurs when an agency requests assistance, or when stakeholders raise concerns with the NEPA process as it applies to a particular project or interest. For example, in the recent Corporate Average Fuel Economy (CAFE) rulemaking, CEQ worked with National Highway Traffic Safety Administration and the Environmental Protection Agency to ensure NEPA compliance for the decision making that led to the rule.

More recently, CEQ has been actively engaged in ensuring agency NEPA compliance for projects and activities funded under the American Recovery and Reinvestment Act. On behalf of the President, CEQ submits quarterly reports on NEPA and the Recovery Act to this Committee and to the House Natural Resources Committee. Currently, the agencies have completed more

than 95 percent of the NEPA reviews required for projects and activities funded under the Recovery Act.

CEQ provides informal and formal advice and review of NEPA analyses. Occasionally, CEQ receives formal referrals for inquiry based on either an alleged violation of NEPA, the environmentally unsound nature of a proposed action, or a combination of those. The referral process was established in the Clean Air Act and the CEQ NEPA regulations. In the forty years since NEPA was enacted, CEQ has handled 27 formal referrals. In all its interactions with the agencies, CEQ takes into account the extensive body of law developed over the years as courts interpret NEPA in fact-specific cases.

Updating NEPA Practice

On February 18, 2010, the Obama Administration moved to update NEPA practice. CEQ released draft guidance that will assist Federal agencies to meet the goals of NEPA, enhance the quality of public involvement in governmental decisions relating to the environment, increase transparency and ease implementation. The draft guidance clarifies: 1) when and how Federal agencies must consider greenhouse gas emissions and climate change in their proposed actions; 2) the appropriateness of “Findings of No Significant Impact” and when there is a need to monitor environmental mitigation commitments; and 3) the use of Categorical Exclusions. CEQ is also enhancing public tools for reporting on NEPA activities.

I would like to specifically discuss CEQ’s draft guidance as it relates to Categorical Exclusions. Categorical Exclusions have been used by Federal agencies since the 1970s. When experience has shown that certain groups of actions are unlikely to have significant environmental effects, agencies can establish CEs. In recent years, the expansion of the number and range of activities categorically excluded, combined with the extensive use of CEs and the limited opportunity for public involvement in CE application, has underscored the need for additional guidance about the development and use of CEs. Categorical Exclusions are the most frequently employed method of complying with NEPA, underscoring the value for guidance on CE development and use.

The draft guidance clarifies when it is appropriate for agencies to establish CEs, how agencies should apply existing CEs, and that agencies should conduct periodic reviews of CEs to assure their continued appropriate use and usefulness. It also recommends greater documentation and public involvement in the process.

In the proposed guidance, CEQ made clear that it will increase its review of agencies' use of CEs. Many have commented on this proposed guidance, and CEQ is reviewing and considering all public comments as we finalize that guidance.

NEPA and Offshore Drilling

NEPA applies to every stage of Federal decision making related to offshore oil and gas exploration and development.

The Mineral Management Service (MMS) is required to apply NEPA to drilling decisions in the outer continental shelf, beginning with the initial planning of outer continental shelf leasing, and ending with a decision on a specific well.

In the case of the Gulf of Mexico leases, MMS prepared several NEPA analyses. Environmental Impact Statements (EIS), the most intensive level of analysis, were prepared at two decision points. First, in April 2007, MMS prepared a broad "programmatic" EIS on the Outer Continental Shelf Oil and Gas Leasing Program, which includes the five-year lease plan for 2007-2012. Also, in April 2007, MMS prepared an EIS for the Gulf of Mexico OCS Oil and Gas Lease Sales in the Western and Central Planning Areas, the "multi-sale" EIS.

In October 2007, MMS completed another NEPA analysis, an Environmental Assessment (EA), tiered off the multi-sale EIS, for Central Gulf of Mexico Lease Sale 206. This is the sale in which the lease was issued for the location that includes the Deepwater Horizon well.

In addition, companies wishing to explore and develop oil and gas offshore submit their offshore operations plans for MMS approval. MMS approved BP's development operations based on a programmatic EA that MMS prepared in December 2002.

In the decision to approve the Exploration Plan that included the drilling of the Deepwater Horizon well, MMS applied its existing Categorical Exclusion (CE) review process.

Under section 11 of the Outer Continental Shelf Lands Act, 43 U.S.C. section 1340, MMS has 30 days to complete its environmental review and act on the application to permit drilling. The Administration, in its supplemental budget request sent to Congress on May 12, 2010, seeks to change that timeline to a minimum of 90 days.

Review of MMS Application of NEPA Procedures

The Categorical Exclusion used by MMS for Deepwater Horizon was established more than 20 years ago. At that time, CEQ reviewed and provided a conformity letter stating CEQ's determination that establishing the CE was in conformity with NEPA and the CEQ regulations. CEQ does not review every application of a Categorical Exclusion, every agency project, or the NEPA review for every agency project.

To ensure that NEPA is being properly applied, CEQ and the Department of the Interior announced last week a review of MMS's NEPA procedures. CEQ has begun reviewing MMS NEPA procedures for OCS oil and gas exploration and development, including the five-year plan, the oil and gas lease sales, and the exploration well permitting process. This review is to ensure that NEPA is being applied in a rigorous way that meets its intent. I expect this review to be completed by mid-June.

Conclusion

In closing, NEPA is a useful tool that has served the nation for the past 40 years. The Deepwater Horizon event reminds us of the need for thorough environmental review of offshore oil and gas drilling projects, and I am committed to working with MMS to ensure it applies NEPA in a manner that meets the goals of the Act.

Thank you for the opportunity to testify today, and I look forward to your questions.



February 18, 2010

MEMORANDUM FOR HEADS OF FEDERAL DEPARTMENTS AND AGENCIES

FROM: NANCY H. SUTLEY, Chair, Council on Environmental Quality

SUBJECT: ESTABLISHING AND APPLYING CATEGORICAL EXCLUSIONS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT

In this Memorandum, the Council on Environmental Quality (CEQ) proposes guidance on establishing, applying, and revising categorical exclusions in accordance with Section 102 of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332, and the CEQ Regulations for Implementing the Procedural Provisions of NEPA.¹ The guidance memorandum does not establish new requirements. CEQ's interpretation of NEPA is entitled to deference. *Andrus v. Sierra Club*, 442 U.S.347, 358 (1979). CEQ is providing this draft guidance for public review and comment. CEQ intends to issue final guidance expeditiously after reviewing public comment. CEQ does not intend for this guidance to become effective until issued in final form.

I. INTRODUCTION

A "categorical exclusion" describes a category of actions that do not typically result in individual or cumulative significant environmental effects or impacts. When appropriately established and applied, categorical exclusions serve a beneficial purpose. They allow Federal agencies to expedite the environmental review process for proposals that typically do not require more resource-intensive Environmental Assessments (EAs) or Environmental Impact Statements (EISs).

The CEQ Regulations define "categorical exclusion" at 40 Code of Federal Regulations (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. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in § 1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

Before applying a categorical exclusion, a Federal agency reviews a proposed action to ensure there are no factors that merit analysis and require documentation in an EA or EIS. This review assesses

¹ Council on Environmental Quality, "Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act," 40 C.F.R. Parts 1500-1508 (Nov. 1978), available at http://ceq.hss.doe.gov/nepa/regs/ceq/toc_ceq.htm.

whether there are any “extraordinary circumstances” to determine whether the application of a categorical exclusion is appropriate. Extraordinary circumstances are a required element of all Federal agency National Environmental Policy Act (NEPA) implementing procedures.²

Though categorical exclusions have been one method used since the 1970s to satisfy Federal agencies’ NEPA obligations, the expansion of the number and range of activities categorically excluded combined with the extensive use of categorical exclusions has underscored the need for guidance about the promulgation and use of CEs. An inappropriate reliance on categorical exclusions may thwart the purposes of NEPA, compromising the quality and transparency of agency decisionmaking as well as the opportunity for meaningful public participation and review. Categorical exclusions are the most frequently employed method of complying with NEPA, underscoring the value for guidance on the development and use of categorical exclusions³ Previously, CEQ established the CEQ NEPA Task Force, made up of senior agency experts, to review, improve, and modernize NEPA implementation. The Task Force recommended CEQ issue clarifying guidance to promote the consistent and appropriate development and use of categorical exclusions.⁴ This guidance addresses that recommendation.

This guidance is provided to assist Federal agencies in establishing and applying categorical exclusions under NEPA. It addresses the substantive and procedural predicates for establishing categorical exclusions. This guidance is limited to categorical exclusions established by Federal agencies pursuant to 40 C.F.R. § 1507.3.⁵ It is based on CEQ regulations and guidance, legal precedent, and agency NEPA experience. In accordance with 40 C.F.R. § 1507.1 of the CEQ Regulations, the intent of this guidance is to afford agencies flexibility in developing and implementing categorical exclusions while ensuring categorical exclusions are administered to further the purposes of NEPA and the CEQ implementing regulations.

The guidance addresses how to:

- Establish categorical exclusions by outlining the process required to establish a categorical exclusion.
- Use public involvement and documentation to help define and substantiate a proposed categorical exclusion.
- Apply an established categorical exclusion, and determine when to prepare documentation and involve the public.
- Conduct periodic reviews of categorical exclusions to assure their continued appropriate use and usefulness.

² 40 C.F.R. § 1508.4.

³ See the CEQ reports to Congress at <http://ceq.hss.doe.gov/nepa/nepanet.htm>. This speaks to the wide use of categorical exclusions and therefore the value of clearer guidance.

⁴ Council on Environmental Quality, “The NEPA Task Force Report to the Council on Environmental Quality – Modernizing NEPA Implementation,” (Sep. 2003), available at <http://ceq.hss.doe.gov/ntf/report/index.html>.

⁵ This guidance does not address categorical exclusions established by Congress, as their use is governed by the terms of specific legislation and its interpretation by the agencies charged with implementation of that statute and NEPA.

II. ESTABLISHING NEW CATEGORICAL EXCLUSIONS

A. The Purpose for Establishing New Categorical Exclusions⁶

Agencies should establish new categorical exclusions to eliminate unnecessary paperwork and effort reviewing the environmental effects of categories of actions that, absent extraordinary circumstances, do not have significant environmental effects. By establishing new categorical exclusions and using them appropriately, agencies can focus their environmental review efforts on proposals that warrant preparation of an EA or an EIS.⁷ Thus, categorical exclusions should be established as an integral part of an agency's NEPA program that ensures agency capacity to implement NEPA, the CEQ regulations, and the agency implementing procedures,⁸ and identifies actions that "normally" do or do not require environmental impact statements and environmental assessments in its implementing procedures.⁹

B. Conditions Warranting a New Categorical Exclusion

Federal agencies should develop and propose a categorical exclusion whenever they identify a category of actions that under normal circumstances does not have, and is not expected to have, significant individual or cumulative environmental impacts. Agency actions that are typically subject to categorical exclusion are readily identified based on a considered determination that the activities are expected to have no significant environmental effects (e.g., administrative activities [such as payroll processing], conducting surveys and data collection, and routine procurement of goods and services [such as office supplies]). Other potential categorical exclusions may be identified after conducting NEPA reviews, mission changes, or the addition of new responsibilities. Federal agencies typically propose new categorical exclusions after they gain experience with new activities, perhaps through new legislation or an administrative restructuring, and determine the environmental consequences are not significant.¹⁰

Other activities may be more variable in their environmental effects and therefore require a more detailed description to ensure the category is limited to actions that have been shown not to have individual or cumulatively significant effects. For example, the status and sensitivity of environmental resources vary across the nation; consequently, it may be appropriate to categorically exclude a category of actions in one area or region rather than across the nation as a whole. Federal agencies should consider establishing categorical exclusions limited to those regions or areas where an agency can conclude the actions will not have significant environmental effects individually or cumulatively.

C. The Elements of a Categorical Exclusion

1. Categorical Exclusion

⁶ This guidance applies to agencies establishing new or revised categorical exclusions, and uses the term "new" to include revisions or modifications that are more than administrative (e.g., revisions to update outdated office or agency title) or editorial (e.g., correcting spelling or typographical errors).

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

⁸ 40 C.F.R. § 1507.2.

⁹ 40 C.F.R. § 1507.3.

¹⁰ When legislative or administrative restructuring creates a new agency or realigns an existing agency, the agency will need to determine if the decisionmaking processes have changed and then develop new NEPA procedures that align the NEPA and other environmental planning processes with agency decisionmaking.

Prior CEQ guidance generally addresses the crafting of categorical exclusions:

The Council encourages the agencies to consider broadly defined criteria which characterize types of actions that, based on the agency's experience, do not cause significant environmental effects. If this technique is adopted, it would be helpful for the agency to offer several examples of activities frequently performed by that agency's personnel which would normally fall in these categories. Agencies also need to consider whether the cumulative effects of several small actions would cause sufficient environmental impact to take the actions out of the categorically excluded class.¹¹

The text of a proposed categorical exclusion should clearly define the category of actions, as well as any physical, temporal, or environmental factors that would constrain its use. Physical constraints are spatial limits on the extent of the action (e.g., distance or areas). Temporal and environmental constraints are limits on the time when a particular categorical exclusion is applicable (e.g., seasons or nesting periods in a particular environmental setting) or limits on the number of actions that can rely upon a categorical exclusion in a given area or timeframe. Federal agencies that identify these constraints can better ensure a new categorical exclusion is neither too broadly nor too narrowly defined.

Agencies are encouraged and, in the case of broad categorical exclusions should, provide representative examples of the types of activities the categorical exclusion covers. This will provide further clarity and transparency regarding the category of actions covered by the categorical exclusion.

When developing a categorical exclusion, Federal agencies must be sure the proposed category is reflective of the entire proposed action to be categorically excluded. Categorical exclusions should not be established or used to divide a proposed action into smaller elements or segments that do not have independent utility to the agency.

The Federal agency program charged with complying with NEPA should develop and maintain the capacity to monitor actions approved based on categorical exclusions where necessary to ensure the prediction that there will not be significant impacts is borne out in practice. Providing the results of such monitoring will also enable the agency to engage stakeholders in determining whether to revise categorical exclusions and extraordinary circumstances.

2. Extraordinary Circumstances

Extraordinary circumstances identify the atypical situations or environmental settings when an otherwise categorically excludable action merits further analysis in an EA or EIS. Extraordinary circumstances are often presented as a list of factors that must be considered when the Federal agency determines relying upon the categorical exclusion is appropriate. Many Federal agencies present that list in their agency NEPA procedures (for example, several agencies use the potential effects on protected species or habitat or the potential effects of hazardous materials as extraordinary circumstances).

When proposing new categorical exclusions, Federal agencies should evaluate the extraordinary circumstances described in their NEPA procedures to ensure the circumstances adequately account for the atypical situations that could affect the use of the categorical exclusion for a particular action. For example, the presence and nature of a protected resource (e.g., threatened or endangered species or historic resource) and the proposed action's impacts on that resource, is an appropriate extraordinary circumstance for situations where the categorical exclusion would not be appropriate for a proposed

¹¹ Council on Environmental Quality, "Guidance Regarding NEPA Regulations," 48 Federal Register (FR) 34263 (Jul. 28, 1983), available at <http://ceq.hss.doe.gov/nepa/regs/1983/1983guid.htm>.

action taking place in areas where protected resources may be present. When the extraordinary circumstances provided in the agency NEPA procedures are not sufficient for a newly proposed categorical exclusion, an agency can identify extraordinary circumstances that will specifically apply to the new categorical exclusion. Such extraordinary circumstances must be issued along with the new categorical exclusion in both draft form, for public review and comment, and in final form.

III. SUBSTANTIATING A NEW CATEGORICAL EXCLUSION

Two key issues confronting Federal agencies are how to evaluate whether a new categorical exclusion is appropriate, and how to support the determination that the proposed categorical exclusion describes a category of actions that does not individually or cumulatively have a significant effect on the human environment.¹²

When substantiating a new categorical exclusion, Federal agencies should: (1) gather information supporting a proposed categorical exclusion; (2) evaluate the information; and (3) make findings to explain how the agency determined the proposed category of actions does not result in individual or cumulatively significant environmental effects.

A. Gathering Information to Substantiate a New Categorical Exclusion

The amount of information required to substantiate a new categorical exclusion is directly related to the type of activities included in the proposed category of actions. Actions that obviously have little or no impact (e.g., conducting surveys or purchasing office supplies consistent with applicable acquisition standards such as Executive Order 13514) require little information. Actions that are not intuitively obvious in their lack of environmental effects require more information to support their establishment as categorical exclusions.

There are several sources of information an agency can draw upon to substantiate a categorical exclusion. These include: (1) previously implemented actions; (2) impact demonstration projects; (3) information from professional staff, expert opinion, or scientific analyses; and (4) other agencies' experiences.¹³ These sources of information, or any combination of them, are appropriate to support a proposed categorical exclusion.

1. Evaluating Implemented Actions

Evaluation of implemented actions refers to a Federal agency's monitoring and evaluation of the environmental effects of completed or ongoing actions. The benefit of such an evaluation is that the agency's implementation and operating procedures are well known and can be taken into account in developing the proposed categorical exclusion. Monitoring and evaluating implemented actions internally or collaboratively with other agencies and groups can provide additional, useful information for substantiating a categorical exclusion. The evaluation must consist of data collected before the proposed

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

¹³ 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, Pub.L.No. 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 that establish obligations that apply or may apply to the processes of establishing and applying categorical exclusions (such as the Federal Records Act) are beyond the scope of this guidance.

categorical exclusion is finalized.

For implemented actions analyzed in EAs that supported Findings of No Significant Impact, evaluations that validate the predicted environmental effects may provide strong support for a proposed categorical exclusion. When mitigation is developed during the EA process, care must be taken to ensure such mitigation measures are an integral component of the action considered.

Evaluation of implemented actions analyzed in an EIS may also be useful. In such cases, the action must have independent utility to the agency, separate and apart from the broader action analyzed in the EIS, and the EIS must specifically address its environmental effects and determine them not to be significant. For example, when a discrete, independent action is analyzed in an EIS that analyzed a broad management action, an evaluation of the actual effects of that discrete action may support a proposed categorical exclusion for the discrete action.

Federal agencies may also be able to use data generated through their Environmental Management System (EMS) or other data systems that contain a record of environmental performance for particular actions. This information can help agencies identify or substantiate new categorical exclusions and extraordinary circumstances.¹⁴

2. Impact Demonstration Projects

When Federal agencies lack experience with a particular category of actions, impact demonstration projects may be used to evaluate the projects' impacts and potential for the category of actions to be the subject of a proposed categorical exclusion. As used in this guidance, an "impact demonstration project" consists of the EA or EIS prepared for a proposed action an agency lacks experience with, implementation of the action, evaluation of the action's environmental effects, and the subsequent monitoring of the environmental effects of the project. The NEPA documentation for the impact demonstration project should explain how the results of the analysis will be used to evaluate the merits of a proposed categorical exclusion.

When designing an impact demonstration project, it is particularly important for the action being evaluated to accurately represent the category of actions that will be described in the proposed categorical exclusion. This includes a similar scope, as well as similar operational and environmental conditions. A series of impact demonstration projects may be useful when environmental conditions vary in different settings. For example, a Federal agency could develop a series of projects in different regions or areas of the country where the proposed categorical exclusion might be used.

3. Professional Staff and Expert Opinions, and Scientific Analyses

A Federal agency may use its professional staff and rely upon their expertise, experience, and professional judgment to assess the potential environmental effects of applying proposed categorical exclusions. In addition, outside experts can be looked to as sources of information to substantiate a new categorical exclusion. Those individuals should have expert knowledge, training, and experience relevant to the implementation and environmental effects of the actions described in the proposed categorical exclusion. The administrative record for the proposed categorical exclusion should document the

¹⁴ 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. The potential for EMS supporting NEPA work is further described in "Aligning National Environmental Policy Act Processes with Environmental Management Systems" available at http://ceq.hss.doe.gov/nepa/nepapubs/Aligning_NEPA_Processes_with_Environmental_Management_Systems_2007.pdf.

credentials (e.g., education, training, certifications, years of related experience) and describe how the staff and any experts not employees of the agency arrived at their conclusions.

The use of scientific analyses need not be limited to peer-reviewed findings. Although such findings may be especially useful to support an agency's scientific analysis, other sources may include professional opinions, reports, and research findings. In all cases, however, any findings must be based on the best available technical and scientific information. Specifically, 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 reflects accepted knowledge, accurate findings, and agency experience with the environmental effects of the actions in the proposed categorical exclusion.

4. Benchmarking Public and Private Entities' Experiences

As used in this guidance, "benchmarking" means evaluating information and records from other private and public entities that have experience with the actions covered in a proposed categorical exclusion. Those other entities include state, local and tribal agencies, and academic and professional institutions, as well as other federal agencies. When determining whether it is appropriate to rely on others' experience, it will be necessary to demonstrate the benchmarked actions are comparable to the actions in a proposed categorical exclusion.

Benchmarking should consider the similarities and differences in: (1) characteristics of the actions; (2) methods of implementing the actions; (3) frequency of the actions; (4) applicable standard operating procedures or implementing guidance (to include extraordinary circumstances); and (5) context, including the environmental settings in which the actions take place. Although a Federal agency cannot simply use another agency's categorical exclusion, the agency may find it useful to consider another agency's experience with a categorical exclusion along with the administrative record developed when the categorical exclusion was established.

B. Evaluating the Supporting Information

Following review of the supporting information, Federal agencies should develop findings that account for similarities and differences between the proposed categorical exclusion and the information used to substantiate it. The findings should include a description of the methodology and criteria used to define the proposed category of actions, and include the rationale for any new extraordinary circumstances.

The Federal agency should maintain an administrative record that includes the supporting information used, the evaluation of that information and the agency's related findings. The record should be maintained so that it remains available for consideration by the agency when reviewing its categorical exclusions and for benchmarking by other agencies.

C. Refining a Proposed Categorical Exclusion

If a type of action or category of actions proposed for a categorical exclusion is found to have a potentially significant environmental effect, the Federal agency can either end its consideration and not proceed with the proposal, or refine the proposed categorical exclusion. Refining a proposed categorical exclusion can consist of limiting or removing actions, placing additional constraints on the categorical exclusion's applicability, or refining the applicable extraordinary circumstances. 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 limit the geographic applicability of the categorical exclusion to a specific region or environmental setting. An agency may also identify additional

extraordinary circumstances specifically tailored to ensure that the proposed actions do not have the potential for significant impacts.

This process of refining, or tailoring, can result in an appropriate categorical exclusion that further clarifies the atypical circumstances that warrant further environmental evaluation in an EA or EIS. Any revision to either the proposed categorical exclusion or the extraordinary circumstances should be summarized in the agency's evaluation and included in the administrative record.

IV. Procedures for Establishing a New Categorical Exclusion

The process of establishing or revising an agency's NEPA procedures is found in 40 C.F.R. §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 C.F.R. 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 must consult with CEQ when developing the categorical exclusion.¹⁵ Federal agencies are encouraged to involve CEQ early in the process to take advantage of CEQ expertise and assist with agency coordination to make the process as efficient as possible.

All proposed categorical exclusions must be made available for public review and comment. At a minimum, the CEQ Regulations require Federal agencies to publish the categorical exclusion in the *Federal Register*, and provide a period during which the public may submit comments.¹⁶ To maximize the value of input from interested parties and assist them in focusing their comments, the Federal agency should:

- Describe the proposed activities covered by the categorical exclusion and provide the proposed text of the categorical exclusion.
- Summarize the information in the agency's administrative record used to support the categorical exclusion, the evaluation of the information, and the findings. Where the public might view a specific impact as potentially significant, the agency should explain why it believes that impact to be presumptively insignificant. Whenever practicable, include a link to a website containing all the supporting information, evaluations, and findings.¹⁷

¹⁵ 40 C.F.R. § 1507.3.

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

¹⁷ Ready access to all supporting information will likely 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. Agencies should consider using their regulatory development tools to assist in maintaining access to supporting information, such as establishing an online docket using www.regulations.gov.

- Define all applicable terms.
- Explain how extraordinary circumstances may limit the use of the categorical exclusion.
- Explain the options for submitting questions and comments about the proposed categorical exclusion (e.g., email addresses, mailing addresses, and names and phone numbers of points of contact).

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

The final categorical exclusion should then be published in the *Federal Register*. This publication, when combined with publication on an established agency website, can satisfy the requirements to file the final categorical exclusion with CEQ and to make the final categorical exclusion readily available to the public.

Following is a summary of the steps for an agency to establish a categorical exclusion as part of the agency NEPA procedures.¹⁸

- Draft the proposed categorical exclusion based on the agency's experience and supporting information.
- Consult with CEQ on the proposed categorical exclusion.
- Consult with other Federal agencies that have similar procedures to coordinate their procedures, especially for programs requesting similar information from applicants.
- Publish a notice of the categorical exclusion in the *Federal Register* for public review and comment.
- Consider public comments.
- Consult with CEQ on the final categorical exclusion to obtain CEQ's written determination of conformity with NEPA and the CEQ Regulations.
- Publish the categorical exclusion in the *Federal Register*.
- File the categorical exclusion with CEQ (publication in the *Federal Register* and on the agency website can satisfy this requirement).
- Make the categorical exclusion readily available to the public (publication in the *Federal Register* and on the agency website can satisfy this requirement).

V. Public Involvement in Establishing a Categorical Exclusion

An Environmental Assessment or an Environmental Impact Statement is not required for establishing or revising a categorical exclusion.¹⁹ However, engaging the public in the environmental aspects of federal decisionmaking is a key aspect of NEPA. Therefore, an opportunity for public involvement beyond publication in the *Federal Register* should be considered.²⁰

¹⁸ NEPA and the CEQ Regulations do not themselves require agency NEPA implementing procedures to be promulgated as regulations through rulemaking. Agencies should ensure they comply with all appropriate agency rulemaking requirements.

¹⁹ *Heartwood, Inc. v. U.S. Forest Service*, 73 F. Supp. 2d 962, 972-73 (S.D. Ill. 1999), *aff'd*, 230 F.3d 947, 954-56 (7th Cir. 2000).

²⁰ "Agencies shall: (a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures." 40 C.F.R. § 1506.6.

When establishing a categorical exclusion, the Federal agency should tailor the type and length of public involvement to the nature of the proposed category of actions, and its perceived environmental effects. CEQ encourages Federal agencies to engage interested parties such as public interest groups, Federal NEPA contacts at other agencies, and Tribal, State, and local government agencies to share relevant data, information and concerns. The methods noted in 40 C.F.R. § 1506.6 and other public involvement techniques such as focus groups, e-mail exchanges, conference calls, and web-based forums can be used to stimulate public involvement.

CEQ also encourages Federal agencies to post updates on their official websites whenever they issue *Federal Register* notices for new or revised categorical exclusions. Not only is this another method for involving the public, an agency website can serve as the centralized location for informing the public about agency NEPA implementing procedures and their use, and provide access to updates and supporting information. At a minimum, agency NEPA implementing procedures and any final revisions or amendments should be accessible through an agency's website.

VI. APPLYING AN ESTABLISHED CATEGORICAL EXCLUSION

There are two key issues Federal agencies face when they want to use a categorical exclusion that has been established and made part of the agency's NEPA implementing procedures. They are: (1) whether to prepare documentation supporting a categorical exclusion determination; and (2) whether external outreach may be useful to inform determinations about categorically excluded actions.

A. Documentation

CEQ guidance states:

The 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 (for the proposed action) 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.²¹

Each Federal agency should decide if a categorical exclusion determination warrants preparing separate documentation. There are some activities with little risk of significant environmental effects that generate no practical need or benefit for preparing any additional documentation (e.g., routine personnel actions or purchases of supplies). In those cases, the administrative record for establishing the categorical exclusion may be considered sufficient documentation for applying the categorical exclusion to future actions.

In cases when an agency determines that documentation is appropriate, the extent of the documentation should be related to the type of action involved, the potential for extraordinary circumstances, and compliance requirements for other laws, regulations, and policies. In all circumstances, categorical exclusion documentation should be brief, concise, and to the point. The need for lengthy documentation should raise questions about whether applying the categorical exclusion in a particular situation is appropriate.

²¹ Council on Environmental Quality, "Guidance Regarding NEPA Regulations," 48 FR 34263 (Jul. 28, 1983), available at <http://ceq.hss.doe.gov/nepa/regs/1983/1983guid.htm>.

If a record is prepared, it should cite the categorical exclusion used and show that the agency determined: (1) the action fits within the category of actions described in the categorical exclusion; and (2) there are no extraordinary circumstances that would preclude the project or proposed action from qualifying as a categorically excluded action.

In some cases, courts have required documentation to demonstrate that a Federal agency has considered the environmental effects associated with extraordinary circumstances.²² Documenting the application of a categorical exclusion can demonstrate the agency decision to use the categorical exclusion is entitled to deference and should not be disturbed.²³

Using a categorical exclusion does not absolve Federal agencies from complying with the requirements of other laws, regulations, and policies (e.g., the Endangered Species Act or National Historic Preservation Act). Documentation may be necessary to comply with such requirements. When that is the case, all resource analyses and the results of any consultations or coordination should be included or incorporated by reference in the administrative record developed for the proposed action.

B. Public Engagement and Disclosure²⁴

Most Federal agencies currently do not routinely notify the public when they use a categorical exclusion to meet their NEPA responsibilities. CEQ encourages Federal agencies in appropriate circumstances to engage the public in some way (e.g., through notification or disclosure) before using the categorical exclusion. For example, an agency may use scoping or other means to engage or notify the public in circumstances where the public can assist the agency in determining whether a proposal involves extraordinary circumstances or cumulative impacts. Agencies can both include circumstances where the public could be helpful and identify categorical exclusions that would not merit public engagement or disclosure in the agencies' NEPA implementing procedures.

Agencies should also make use of current technologies to provide the public with access to information on how the agency has complied with NEPA. CEQ recommends agencies provide access to the status of NEPA compliance (e.g., completing environmental review by using a categorical exclusion) on agency websites, particularly in those situations where there is a high public interest in a proposed action. The recent initiative by the Department of Energy to post categorical exclusion determinations provides an example of how agencies can effectively increase transparency in their decision making when using categorical exclusions.²⁵

VII. Periodic Review of Agency Established Categorical Exclusions

Though the CEQ Regulations direct Federal agencies to periodically review their NEPA policies and procedures, they do not describe how such a review should be conducted.²⁶ Some Federal agencies

²² Council on Environmental Quality, "The NEPA Task Force Report to the Council on Environmental Quality – Modernizing NEPA Implementation," p. 58, (Sep. 2003), available at <http://ceq.hss.doe.gov/ntf/report/index.html>.

²³ The agency determination that an action is categorically excluded may itself be challenged under the Administrative Procedures Act. 5 U.S.C. 702 et seq.

²⁴ The term "public" includes any external individuals, groups, entities or agencies.

²⁵ See the DOE website at http://www.gc.energy.gov/NEPA/categorical_exclusion_determinations.htm.

²⁶ 40 C.F.R. § 1507.3.

have internal procedures for reviewing categorical exclusions and identifying and revising categorical exclusions that no longer reflect current environmental circumstances, or an agency's procedures, programs, or mission.

There are several reasons why Federal agencies should periodically review their categorical exclusions. A review can serve as the impetus for clarifying the actions covered by an existing categorical exclusion. For example, a Federal agency may find an existing categorical exclusion is not being used because the category of actions is too narrowly defined. In these cases, the agency should consider expanding the category of actions. Conversely, if an agency finds an existing categorical exclusion includes actions that potentially have or do have significant effects with some regularity, then the agency should revise the categorical exclusion to limit the category of actions. Periodic review can also help agencies identify additional extraordinary circumstances and consider the appropriate documentation when using certain categorical exclusions.

As part of its oversight role and responsibilities under NEPA, CEQ will begin regularly reviewing agency categorical exclusions. CEQ will make every effort to align its oversight with any reviews currently being conducted by the agency and will begin with those agencies currently reassessing or experiencing difficulties with implementing their categorical exclusions, as well as agencies facing litigation challenging their application of categorical exclusions. The agencies and the public will be provided with more information regarding the scope of review on the CEQ websites.²⁷

A Federal agency can keep a record of its experience with certain activities by tracking information provided by agency field offices.²⁸ In such cases, a Federal agency review of a categorical exclusion could consist of communications from field offices that include observations of the effects of implemented actions, both from agency personnel and the public. On-the-ground monitoring to evaluate environmental effects of an agency's categorically excluded actions can be incorporated into an agency's procedures for conducting its quality management reviews and included as part of regular site visits to project areas. The extent and scope of agency monitoring will be considered during the CEQ review.

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 areas identified in an interagency agreement). While a Federal agency may choose to initiate a program review specifically focused on categorical exclusions, it is possible that program reviews with a broader focus may also be able to provide documentation of experience relevant to a categorical exclusion.

Finally, the rationale and supporting information for establishing or documenting experience with using a categorical exclusion may be lost if there are inadequate procedures for recording, retrieving, and preserving agency documents and administrative records. Therefore, Federal agencies will benefit from a review of current practices used for maintaining and preserving such records. Measures to ensure future availability should include, but not be limited to, redundant storage systems (e.g., multiple drives or paper copies), and improvements in the agency's electronic and hard copy filing systems.²⁹

²⁷ www.whitehouse.gov/ceq and www.nepa.gov.

²⁸ Council on Environmental Quality, "The NEPA Task Force Report to the Council on Environmental Quality – Modernizing NEPA Implementation," p. 63, (Sep. 2003), available at <http://ceq.hss.doe.gov/ntf/report/index.html>.

²⁹ 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.

VIII. CONCLUSION

This draft guidance addresses how agencies establish, apply, and review categorical exclusions. Questions regarding this draft guidance should be directed to the CEQ Associate Director for NEPA Oversight.

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