



# CENTER FOR BIOLOGICAL DIVERSITY

November 27, 2006

Horst G. Greczmiel  
Associate Director for NEPA Oversight  
722 Jackson Place NW  
Washington, D.C. 20503

Dear Mr. Greczmiel:

These are comments by the Center for Biological Diversity regarding the September 19, 2006 Federal Register notice on National Environmental Policy Act Guidance on Categorical Exclusions. The Center for Biological Diversity is a non-profit conservation organization with over 25,000 members in the United States. We are very familiar with the National Environmental Policy Act (NEPA) and its provisions concerning the use of categorical exclusions. We appreciate the opportunity to provide comment on this guidance because we believe that the role categorical exclusions are designed to play in agency decision-making is misunderstood, and we see categorical exclusions being misused in a widespread fashion. We therefore agree guidance is needed, and we believe the CEQ can make tremendous positive changes for federal agencies, the public, and public resources in a short period of time and with some straightforward new guidance. We believe this is an opportunity for the CEQ to overhaul the use of categorical exclusions in federal projects, reduce litigation, and increase the cost-effectiveness and environmental benefits in agency decision-making.

We work with NEPA daily, and we daily admire both its vision and its architecture. Unfortunately, NEPA has somehow become ungainly and complicated where it is actually quite simple, and the ungainliness is nearly all in the realm of categorical exclusions. We notice that the NEPA Task Force, which you cite as the source of the CEQ's decision to issue new guidance, urges an expansion of the number of federal projects that can be completed under a categorical exclusion. We believe that increasing the types of projects that may be conducted under categorical exclusions will only exacerbate the problems the task force identifies—primarily increased cost and litigation—while taking the opposite course and increasing the use of smaller, simpler environmental assessments is more likely to improve federal efficiency, reduce the distrust that results in litigation, and make the NEPA process more rational, easy to follow, and less vulnerable to lawsuits. We therefore suggest you do the opposite of what the NEPA Task

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Force suggests in order to accomplish the objectives of reduced cost, complexity, and litigation that they and we desire.

The NEPA apparatus is simple. In any federal action, a deciding official faces one of three possibilities: first, the official may *know* that the action *will* have a significant impact on the environment; second, the official may *be unsure* whether the action will have a significant effect on the environment; and finally the official may *know* the action *will not* have a significant effect on the environment. Those three situations make up the entirety of the universe of possibilities an official can be faced with.

In the first instance (say a proposal to construct a large dam) where significant effects are expected, an EIS is obviously called for. In the second instance (say a smallish logging project in a national forest), an EA is needed in order to get to the point where the federal agency can be confident that there will be no significant impact (or that there will be, in which case an EIS follows).

It is the third instance where all the trouble comes up. In the third instance, where the agency knows there will not be significant impacts (say mowing the lawn at the ranger station), a categorical exclusion is the obvious choice, and in this instance no documentation, no FONSI, and no analysis should be required, and none is envisioned by either the statute or the CEQ regulations. 40 CFR §1508.4.

The trouble arises because federal agencies, evidently seeking to avoid what they (erroneously) believe is a burdensome EA analysis, have consistently expanded the types of actions that fall under a categorical exclusion, and, worse, have incorporated a kind of “mini-EA” process into their decision-making process for these categorical exclusions. That is to say, agencies are conducting analyses to show that a categorically excluded action will not have a significant impact on the environment, and, once having shown this to be so, are signing the decision. Why isn’t such a decision simply done with an EA? Why have agencies (and the NEPA Task Force) sought to blur the line between a CE and an EA to such an extent that they are now conducting on-the-ground, site-specific analyses complete with large administrative records, multiple public comment periods, and even administrative appeal provisions for categorically excluded projects?

NEPA does not instruct or permit agencies to write “mini-EAs” in order to determine whether a given site-specific project can be categorically excluded from documentation in, of all things, an EA, yet this is happening every day. Agencies have even developed different kinds of categories within the category, further complicating this now cumbersome and perplexing process. For example, the U.S. Forest Service has four different types of categorically excluded actions: those that require no notice, comment, or documentation; those that require no documentation, but do require an abbreviated notice and comment; those that require notice, comment, and documentation, but no administrative appeal rights; and those that require notice, comment, documentation, and also carry administrative appeal rights. Just determining which category a project falls in within the categorical exclusion list itself is a complex undertaking, and it is no wonder that the agency frequently gets it wrong, and has been subjected to several lawsuits in the past decade over the distinction between the categories. *See Earth Island v.*

*Ruthenbeck*, 376 F. Supp. 2d 994 (E.D. Cal. 2005); *Wilderness Soc’y v. Rey*, CV 03-119-M-DWM (Mont. 2006).

Once agencies have started down the path of conducting site-specific environmental analyses in categorical exclusions, they have lost track of where the line between a categorical exclusion and an environmental assessment is even to be located. Indeed, if site-specific analysis is countenanced at all in a categorical exclusion, then there no longer is any good way to know where this line would be, and a categorical exclusion becomes just another EA, albeit an abbreviated one. Such line-blurring is likely to be the source of many more lawsuits in the future if it continues.

Because of the blurred distinction between a categorical exclusion and an EA, agencies have been shoe-horning projects that have uncertain effects into categorical exclusions, and then using this “mini-EA” process to determine significance. For example, the Payette National Forest in Idaho is currently analyzing ten-year grazing permits under categorical exclusions for areas that contain endangered species, roadless areas, significant archaeological sites, and acknowledged severe riparian damage from livestock that is so bad it is even discussed in their programmatic, long-term planning documents.<sup>1</sup> In another case, the Payette National Forest wishes to use a categorical exclusion to justify continued livestock grazing over nearly the entire range of the critically endangered North Idaho ground squirrel, an animal whose population has plummeted to a tiny fraction of its former numbers in just three decades and whose endangered status is at least in part due to livestock grazing.<sup>2</sup> This same National Forest is planning to conduct large-scale logging operations on steep, erosive slopes above occupied endangered chinook salmon and bull trout streams (and the Salmon River itself) in an area for which EISs were routinely prepared for logging projects just ten years ago.<sup>3</sup> Similarly, water developments in New Mexico to drill deep water wells in areas where water tables are declining and endangered species are suffering aquatic habitat loss are also being conducted under categorical exclusions. Here in Arizona we have long-term grazing plans inside National Monuments with significant archaeological sites, again conducted under categorical exclusions.<sup>4</sup> In every case, the agency is engaging in some level of analysis—in some cases fairly robust analysis—to show that its actions will not have significant effects. Such analysis is lawfully required to be conducted under an environmental assessment, not a categorical exclusion.

Because the NEPA architecture surrounding categorical exclusions is misapplied or misunderstood in such widespread and significant fashion that it is resulting in large-scale site-specific analysis for categorically excluded projects which entail uncertain impacts, we suggest that the CEQ issue guidance that recognizes the simple architecture of the statute and draws a

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<sup>1</sup> Warm Springs Cattle and Horse Allotment, Council Ranger District, Payette National Forest. See letter to interested parties, September 13, 2006, announcing a categorical exclusion to authorize the renewal of a ten-year grazing permit for this allotment, which the Payette Forest Plan declares is “frequently” out of compliance with utilization standards in riparian areas. *Revised Payette NF Land and Resource Management Plan*, p. III-27. (2003).

<sup>2</sup> North Hornet Cattle and Horse Allotment, Council Ranger District, Payette National Forest. See September 13, 2006 letter to interested parties; for more information on the status of the Idaho ground squirrel, whose population has fallen to approximately ten percent of its numbers just two to three decades ago, see *Recovery Plan for the Northern Idaho Ground Squirrel*, U.S. Fish and Wildlife Service (2003).

<sup>3</sup> Fall Creek timber sale, McCall Ranger District, Payette National Forest. In planning stage, 2006.

<sup>4</sup> There are many, but see e.g. the Beloit Allotment on the Sonoran Desert National Monument.

bright line between those projects which should and should not be categorically excluded. This guidance would acknowledge that if any analysis beyond a simple look at a checklist is required to determine whether an action will have a significant effect on the environment, that analysis should be conducted in an environmental assessment. There is no reason that environmental assessments should be burdensome—they only need be long enough and thorough enough to justify a FONSI. The CEQ guidelines themselves recognize that environmental assessments may at times be very brief.

Categorical exclusions, for their part, should be reserved only for actions where the agency is certain that no significant effects will occur, because no (among other reasons) extraordinary circumstances are not present. The mere existence of extraordinary circumstances will thus throw a project into the environmental assessment regime (although this does not mean that large scale or time consuming analysis must follow—it only means that a FONSI must be prepared and justified).

To illustrate with an example: we believe that the removal of individual hazard trees along roads and adjacent to campgrounds on U.S. Forest Service lands is an action that can legitimately be categorically excluded from documentation in an environmental assessment or environmental impact statement. In the case of a hazard tree, the agency should be able to remove the tree without any formal documentation other than a completed checklist that indicates that no extraordinary circumstances occur. (Completing such a checklist requires observation, obviously, but no analysis.) That is, an agency employee should be able to identify the tree, observe that removing it will not disturb, say, an archaeological site or an endangered species, and remove the tree. If, however, upon reaching the tree it appears that there is an archaeological site or nesting endangered bird, extraordinary circumstances would be present and an EA would be required. Obviously, an EA to remove a single tree would be very brief—it would likely simply discuss how to remove the tree without disturbing the archaeological resources (for example) and include a FONSI.

Looking at the NEPA this way reduces the complexity of categorical exclusions tremendously, and is a far more rational way to conduct a NEPA analysis than having a multitude of different levels of categorical exclusions, some of which require considerable documentation and analysis to justify. It has the additional virtue of being the only lawful way to apply NEPA, since any action which requires analysis to determine whether it may have a significant effect on the environment is not an action that can be conducted under a categorical exclusion, and requires an EA to be prepared. 40 C.F.R. §1598.9(a)(1).

Accordingly, we urge you to offer the following guidance regarding the overall configuration of the NEPA: projects which the agency has found do not affect the environment cumulatively or individually should be categorically excluded. If extraordinary circumstances are present, the actions should be subjected to enough analysis to justify a FONSI, and this analysis should be conducted in the form of an environmental assessment. Any degree of analysis that is required beyond the completion of the extraordinary circumstances checklist should automatically render the project inapplicable for a categorical exclusion.

Obviously, this would reduce the number of projects that are categorically excluded and increase the number of projects that are analyzed in an environmental assessment—the opposite objective of industry groups and the NEPA Task Force, which was rather transparently designed to smooth the process as much as possible for private corporations—in many cases foreign held corporations—to appropriate public resources for private gain.<sup>5</sup>

We believe however that our solution, and not the Task Force’s solution, would decrease complexity, misunderstanding, “analysis paralysis,” and litigation. Litigation, in particular, would be decreased because the public would not have reasons to be suspicious about the true effects of a categorically excluded project. Currently, oil and gas wells, enormous livestock plans, piece-meal water developments in sensitive areas, and substantial logging plans, all of which often occur in endangered species habitat, are being conducted under categorical exclusions. Naturally the public has no reason to believe that such projects are truly benign, and the agencies spend a good deal of time justifying controversial projects that have moved forward under a process that is often conducted out of the public view. Increasing that suspicion, as the NEPA Task Force’s recommendations will most assuredly do, will not improve matters and will further bog down federal agency planning and further tarnish the agencies’ reputations as objective entities entrusted with public resources. Moreover, the blurred line between EAs and categorical exclusions increases the uncertainty of the legitimacy of the final document, and is a productive field for litigation.

Along with decreased litigation, another result of establishing a proper distinction between projects that can and cannot be conducted under a categorical exclusion is that environmental assessments, though used more often, would be shorter and more appropriately tailored to the question at hand, which is whether a given project will have a significant effect on the environment. Projects that may be truly damaging would get analyses to mitigate effects or to transform the projects in ways that avoid those effects, and the public and the public’s resources would be better for it.

Finally, agencies would have a bright line rule to tell them when a project can be excluded and when it cannot. To be excluded it must fall under an enumerated category (as now) and it must not have extraordinary circumstances. A mere checklist answers the question, rather than time consuming analysis in a legal landscape that is not clearly defined and that is unmoored to the statute or CEQ regulations.

We have several other comments to make. First, we believe that the categories that are enumerated should expire and come up for renewal on a schedule, to be publicly reviewed. For example, the Forest Service categorically excludes water developments including well drilling, pipelines, and minor water impoundments and diversions on Forest Service lands. At one time this may have been sensible, but it is painfully obvious to anyone who cares to look that now, after years of drought, the southwest cannot afford more of these developments, and that these developments do, in fact, have a cumulative impact on the wildlife and water quality across the

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<sup>5</sup> The Task Force seems to have taken great care to pack the hearings with advocates for gutting the NEPA, and limited alternative views as much as possible. That’s their prerogative, of course, but it doesn’t result in good decision-making or leadership, and such tactics have been repudiated by the American public, which ultimately favors open and inclusive lawmaking.

southwest. Yet there is no good way for the public to engage in this discussion, and no incentive for the agencies to remove the category. The public's wildlife, water, and resources, not to mention the agency's credibility, all suffer.

Your guidance also suggests that agencies should review past environmental assessments and FONSI's to discover new categories of actions that can be excluded. You suggest that where previous projects have been shown to have no effect, an agency can explore creating a category for this type of action. Unfortunately there is a logical flaw in what superficially appears to be good reasoning. Often a FONSI is issued on a project only after the analysis that went into preparing the EA has modified a project to a degree that the FONSI is justified. Moreover, the really bad projects fall out of the analysis process right away and never even reach the stage where a FONSI might be contemplated at all. As an example, there are hundreds of mid-sized logging projects across the west that have obtained FONSI's, but this does not mean that mid-sized logging projects in the west are naturally benign and should be issued willy-nilly under categorical exclusions. Mid-sized logging projects undergo a considerable degree of site-specific analysis in order to get to a point where a FONSI can be issued; they are not by their nature insignificant, and many mid-sized logging projects ultimately require an EIS.

Finally, you also state that background information on categorical exclusions should be posted, to the extent possible, on the internet. We agree. However, you state that the reason for this is to reduce the number of FOIA requests that are necessary. With this we could not disagree more. Whether or not the background information is posted on the internet, it should be made available for review by appointment without the need for FOIA requests, which are increasingly burdensome and time consuming for both the public and the agency. It often takes us many months to obtain basic information under the FOIA, and we often only obtain the documents after we have notified our litigation team and commenced legal action. To the extent the categorical exclusion process is done behind closed doors, it will always increase distrust, hostility, and litigation between the federal government and the public. But the government never suffers from conducting dealings in the open when public resources are at stake.

Sincerely,

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