

**STAFF ANALYSIS
OF
COUNCIL ON ENVIRONMENTAL POLICY
GUIDELINES FOR CATEGORICAL EXCLUSIONS
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Abstract. Review of a categorical exclusion rule-making proposal by the Council of Environmental Quality (CEQ) identified four areas of suggestions to clarify and strengthen the procedures. The process should include interdisciplinary involvement, clarify the standards of data quality, explain the application of extraordinary circumstances, and have workable criteria.

Background. The CEQ has responsibility for promulgating regulations implementing the National Environmental Policy Act (NEPA). The CEQ has initiated a review of NEPA and has initiated a NEPA rule-making effort to guide development of categorical exclusion (CE) development by agencies. The proposed procedures are in a comment phase required by rule-making. The comments are due to CEQ before 1 December 2006.

U.S. Army Environmental Command Interest and Role. The US Army Environmental Command (USAEC) provides staff review, oversight, advice and recommendations on NEPA matters for Army projects and activities. The Environmental Planning Support Branch (EPSB) has the primary USAEC responsibility for NEPA matters and has reviewed the proposed CEQ rule and formulated a response based upon the field, project, litigation, and program management experience of its staff.

Analysis. The USAEC staff developed suggestions involving four areas to facilitate a workable procedure. Analysis produced suggestions in the following four areas: improve the process, add definitions, consider extraordinary circumstances, and evaluate agency proposals for adoption.

Process.

Interdisciplinary Review Needed.

One tenant of NEPA is the interdisciplinary evaluation of environmental effects. The proposed rule is silent on this issue. Interdisciplinary review adds depth to the analysis and increases the likelihood that a potential environmental issue will be identified in scoping, analyzed for effects, and documented for the decision-maker and the public. Many agencies have a staff strong in one career field. For example engineers may develop a strong project design but may not identify the potential biological, physical, social or economic projects effects. Including a requirement for interdisciplinary scoping for proposed categories would further NEPA goals.

Supporting Information.

The USAEC lends its qualified support to the use of sound data and analysis to establish new CE categories. There is a point of diminishing returns with respect to data collection and analysis. The proposed rule alludes to requirements of the Information Quality Act (IQA) that cover a broad range of projects and goals. The rule-making falls into the IQA's realm of actions that "will have or does have a clear and substantial impact on important public policies." This will require that agencies "apply these standards and develop their administrative mechanisms so they can be implemented in a common sense and workable manner."

The CEQ can facilitate common sense and make the procedures workable by to emulating NEPA's spirit of transparent disclosure. The analysis process and the data that drive analyses should be publicly available and disclosed in supporting process record. The IQA states "If sufficient transparency is achieved on each of these matters," then an analytic result should meet the standard of "being substantially reproduced." This concept should allow for the incorporation of professional judgment and expert opinion of agency personnel and their contractors in terms of reproducibility. Much of the IQA focuses on laboratory data relating to medicines, industrial hygiene, and other programs that easily can have reproducible results:

"Reproducibility means that the information is capable of being substantially reproduced, subject to an acceptable degree of imprecision."

In the final rule an "appropriate degree of imprecision" is a point that should be set in a NEPA project context as opposed to that of a laboratory experiment.

Environmental analyses are in part subjective because they often contain extrapolations and apply to a point in time for a complex ecosystem. The IQA recognizes this:

"With regard to original and supporting data related thereto, agency guidelines shall not require that all disseminated data be subjected to a reproducibility requirement."

Agency experts and practitioners can and do make reasonable judgments that would meet the standards of NEPA case law and the Administrative Procedures Act. Inter-disciplinary teams and decision-makers use the preponderance of evidence as a threshold for developing environmental analyses and making decisions. Courts have found with respect to the Administrative Procedures Act, that they should not substitute their judgment for that of the agency.

Setting a data quality standard above that reasonably available and sustained in case law would not support the excellent action envisioned by NEPA. Such a threshold would likely engender litigation exploiting differences between that required for decision-making and claims that a peer review study or replications of tightly controlled experiments are needed. Endless circular litigation cycles of data collection and

analysis processes could follow. Case law concerning categorical exclusions held that the categories themselves were just that, categories, and did not have environmental effects. The NEPA process at the project level holds the key to assessing and documenting environmental effects. A robust selection of test cases or projects that represent an envelope of conditions and applications should support a category proposal.

The proposed rule seems to allow agencies and CEQ flexibility in assessing the information quality basis for adopting a new CE authority. The final rule should clarify that the referenced IQA standards should meet those normally associated with the preparation of NEPA documents and not those associated with laboratory driven situations. It should also cite the difficulty in recreating circumstances where the basis for a proposed CE comes from qualified professional staff observations or outside expert opinions.

As a minor point, the rule speaks in terms of submitting one proposal at a time. An agency may want to propose a number of categories at one time. Several agencies have categories that cover similar projects that could be of value to another agency. The submission of a group of categories would give a more integrated look at the overall agency NEPA strategy. CEQ could then consider them collectively or on their individual merits.

Definitions/Explanation.

"Significant negative environmental effect" is a phrase that pervades discussion of categorical exclusions. The CEQ should articulate a threshold that is so remote from environmental effects that even consideration of a categorical exclusion should be outside the intent of NEPA. Several agencies have categorical exclusions for installing safety equipment or other items inside an existing building. Such items are covered by building codes or mandated by other regulations. This type of action should be added to personnel and budget actions that are identified as not needing NEPA consideration.

Consideration of Extraordinary Circumstances.

The presence of "extraordinary circumstances" requires scoping to determine if that presence should influence the level of decision documentation. The process for establishing categories could benefit from describing the considerations that may create limitations.

- Nexus – Does the proposed action negatively affect environmental components classified as extraordinary circumstances?
- Probability of environmental harm – Is the potential effect so improbable that it is a matter of remote speculation; e.g., the possibility of harm requires a series of improbable events to occur concurrently to produce an environmental insult?
- Magnitude of environmental harm – Does the environmental insult produce

immeasurable harm or can assured mitigation reduce impacts to those associated with a categorical exclusion; e.g., losses of environmental components cannot be measured accurately due to their limited extent?

- Context of environmental harm is such that the effects are ameliorated below a threshold impact of significance; e.g., vegetative buffers around disturbed soils that preclude sedimentation.
- Temporal interval. Are effects so transitory that cumulative effects are only remotely possible?

Categorical Exclusion Criteria.

Review of several agency categorical exclusion guidance documents suggests that several criteria may be appropriate for category approval. These include:

- Activities broadly applied by several agencies, generally following industry standards such as ASHTO, ASCE, ISO etc. e.g traffic markers, road repair, security fence installation
- Actions complying with regulatory law such as OSHA, or uniform building code upgrades within a non-historic building
- Effects are environmentally positive or correct small scale existing impacts
- A programmatic NEPA document discusses direct, indirect and cumulative actions as well as extraordinary circumstances and the project lies within areas identified for treatment
- Compelling public safety actions where a NEPA document will follow the emergency actions or proceed concurrently with it
- Actions by that will forestall or prevent broader environmental effects; e.g., Small scale application of pesticides to exotic weeds or exotic insects
- Actions that have compelling immediate effects on national security

Conclusions. The proposed rule presents a process that creates a clear path for adopting categorical exclusions. Mention of using interdisciplinary evaluation would add strength and depth. The suggestions offered would add clarity and utility. Leaving an open-ended reference to the Data Quality Act could leave a door open for litigation that could hamstring Agencies in a cycle of unnecessary data needs. Some discussion of the role of extraordinary circumstances to the rule-making process should occur to clarify the context of their role. Finally, some actions should be exempt from NEPA by virtue of the absence of consequential influence on the human environment.