COUNCIL ON ENVIRONMENTAL QUALITY

40 CFR Parts 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, and 1508

Final Guidance for Federal Departments and Agencies on Establishing, Applying, and Revising Categorical Exclusions Under the National Environmental Policy Act

AGENCY: Council on Environmental Quality.

ACTION: Notice of availability.

SUMMARY: The Council on Environmental Quality (CEQ) is issuing its final guidance on categorical exclusions. This guidance provides methods for substantiating categorical exclusions, clarifies the process for establishing categorical exclusions, outlines how agencies should engage the public when establishing and using categorical exclusions, describes how agencies can document the use of categorical exclusions, and recommends periodic agency review of existing categorical exclusions. A categorical exclusion is a category of actions that a Federal agency determines does not normally result in individually or cumulatively significant environmental effects. This guidance clarifies the rules for establishing, applying, and revising categorical exclusions. It applies to categorical exclusions established by Federal agencies in accordance with CEQ regulations for implementing the procedural provisions of the National Environmental Policy Act. The guidance was developed to assist agencies in making their implementation of the National Environmental Policy Act (NEPA) more transparent and efficient.

DATES: The guidance is effective December 6, 2010.

FOR FURTHER INFORMATION CONTACT: The Council on Environmental Quality (ATTN: Horst Greczmiel, Associate Director for National Environmental Policy Act Oversight), 722 Jackson Place, NW., Washington, DC 20503. Telephone: (202) 395–5750.

SUPPLEMENTARY INFORMATION: This guidance applies to categorical exclusions established by Federal agencies in accordance with § 1507.3 of the CEQ Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 40 CFR parts 1500–1508.

Enacted in 1970, the National Environmental Policy Act (NEPA), 42 U.S.C. 4321–4370, is a fundamental tool used to harmonize our environmental, economic, and social aspirations and is a cornerstone of our Nation's efforts to protect the environment. NEPA recognizes that many Federal activities affect the environment and mandates that Federal agencies consider the environmental impacts of their proposed actions before deciding to adopt proposals and take action.[1] Many Federal actions do not normally have significant effects on the environment. When agencies identify categories of activities that do not normally have the potential for individually or cumulatively significant impacts, they may establish a categorical exclusion for those activities. The use of categorical exclusions can reduce paperwork and delay, so that more resources are available to assess proposed actions that are likely to have the potential to cause significant environmental effects in an environmental assessment (EA) or environmental impact statement (EIS). This guidance clarifies the rules for establishing categorical exclusions by describing: (1) How to establish or revise a categorical exclusion; (2) how to use public involvement and documentation to help define and substantiate a proposed categorical exclusion; (3) how to apply an established categorical exclusion; (4) how to determine when to prepare documentation and involve the public when applying a categorical exclusion; and (5) how to conduct periodic reviews of categorical exclusions to assure their continued appropriate use and usefulness.

On February 18, 2010, the Council on Environmental Quality announced three proposed draft guidance documents to modernize and reinvigorate NEPA, in conjunction with the fortieth anniversary of the statute's enactment.[2] This guidance document is the first of those three to be released in final form. With respect to the other two guidance documents, one addresses when and how Federal agencies should consider greenhouse gas emissions and climate change in their proposed actions, and the other addresses when agencies need to monitor commitments made in EAs and EISs, and how agencies can appropriately use mitigated "Findings of No Significant Impact." The **Federal Register** notice announcing the draft categorical exclusion guidance and requesting public comments was published on February 23, 2010.[3] CEQ appreciates the thoughtful responses to its request for comments on the draft guidance. Commenters included private citizens, corporations, environmental organizations, trade associations, and State agencies. CEQ received fifty-eight comments, which are available online at *http://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa/comments* and at *http://www.nepa.gov.* The comments that suggested editorial revisions and requested clarification of terms are addressed in the text of the final guidance. Comments that raised policy or substantive concerns are grouped into thematic issues and addressed in the following sections of this notice.

Process for Developing and Using Categorical Exclusions

Many commenters expressed support for CEQ's categorical exclusion guidance and for the timely and efficient use of categorical exclusions in the NEPA environmental review process to inform agency decisionmaking. Some commenters favored guidance that would limit the use of categorical exclusions. Others expressed concern that this guidance will discourage the appropriate use of categorical exclusions or make the NEPA process more difficult for agencies, and thereby delay agency decisionmaking.

This guidance was developed to provide for the consistent, proper, and appropriate development and use of categorical exclusions by Federal agencies. It reinforces the process required to establish categorical exclusions by explaining methods available to substantiate categorical exclusions. It also seeks to ensure opportunities for public involvement and increasing transparency when Federal agencies establish categorical exclusions and subsequently use those categorical exclusions to satisfy their NEPA obligations for specific proposed actions. Additionally, this guidance affords Federal agencies flexibility in developing and implementing categorical exclusions while ensuring that categorical exclusions are administered in compliance with NEPA and the CEQ Regulations. When appropriately established and applied, categorical exclusions expedite the environmental review process for proposals that normally do not require additional analysis and documentation in an EA or an EIS.

[1] A discussion of NEPA applicability is beyond the scope of this guidance. For more information *see* CEQ, *The Citizen's Guide to the National Environmental Policy Act, available at ceq.hss.doe.gov/nepa/Citizens_Guide_Dec07.pdf.*

[2] For more information on this announcement, *see http://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa.*

[3] National Environmental Policy Act (NEPA) Draft Guidance, Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act, 75 FR 8045, Feb. 23, 2010.

Applicability and Limitations

Some commenters expressed concern that the guidance creates additional limitations and constraints on the establishment of categorical exclusions, while others expressed unqualified support for using text that constrains the scope of the actions to which a categorical exclusion could apply. The discussion in the guidance of physical, temporal, or environmental factors that would constrain the use of a categorical exclusion is consistent with NEPA and past CEQ guidance.

Federal agencies that identify physical, temporal, or environmental constraints in the definition of a proposed category of actions may be able to better ensure that a new or revised categorical exclusion is neither too broadly nor too narrowly defined. Some information regarding implementation of mitigation measures that are an integral part of the proposed actions and how those actions will be carried out may be necessary to adequately understand and describe the category of actions and their projected impacts. A better and more comprehensive description of a category of actions provides clarity and transparency for proposed projects that could be categorically excluded from further analysis and documentation in an EA or an EIS.

Public Involvement

Some commenters expressed concern over the timeliness and burden of NEPA reviews when there is greater public involvement. The final guidance makes it clear that CEQ strongly encourages public involvement in the establishment and revision of categorical exclusions. As the guidance explains, engaging the public in the environmental aspects of Federal decisionmaking is a key policy goal of NEPA and the CEQ Regulations. Public involvement is not limited to the provision of information by agencies; it should also include meaningful opportunities for the public to provide comment and feedback on the information made available. Considering recent advances in information technology, agencies should consider employing additional measures to involve the public beyond simply publishing a **Federal Register** notice as required when an agency seeks to establish new or revised categorical exclusions.[4]

The perceived environmental effects of the proposed category of actions are a factor that an agency should consider when it decides whether there is a need for public involvement in determining whether to apply a categorical exclusion. Accordingly, the guidance clarifies that agencies have flexibility when applying categorical exclusions to focus their public involvement on those proposed actions and issues the agency expects to raise environmental issues and concerns that are important to the public.

In the final guidance, CEQ uses the terms "encourage" and "recommend" interchangeably. The language of the guidance relating to public engagement reflects CEQ's authority under NEPA and the CEQ regulations to guide agency development and implementation of agency NEPA procedures. It also reflects the importance of allowing agencies to use their expertise to determine the appropriate level of engagement with the public.

Substantiating and Documenting Categorical Exclusions

Some commenters raised the concern that the requirement to substantiate and document categorical exclusions would be burdensome and cause delay. One commenter recommended that the guidance should encourage consultation with State agencies, other Federal agencies with special expertise, and other stakeholders. Another commenter suggested that the guidance permit agencies to consult with industry project proponents that possess information that would be useful in substantiating a categorical exclusion. Along the same lines, another commenter stated that agencies should be encouraged to seek information from the most relevant and reliable sources possible.

The guidance has been revised to reflect that, when substantiating and documenting the environmental effects of a category of actions, a Federal agency need not be limited to its own experiences. Instead, the agency should consider information and records from other private and public entities, including other Federal agencies that have experience with the actions covered in a proposed categorical exclusion. The guidance acknowledges that the reliability of scientific information varies according to its source and the rigor with which it was developed, and that it is the responsibility of the agency to determine whether the information reflects accepted knowledge, accurate findings, and experience with the environmental effects relevant to the actions that would be included in the proposed categorical exclusion.

The guidance addresses the concerns over timeliness and undue burdens by explaining that the amount of information required to substantiate a proposed new or revised categorical exclusion should be proportionate to the type of activities included in the proposed category of actions. Actions that potentially have little or no impact should not require extensive information or documentation. Determining the extent of substantiation and documentation is ultimately the responsibility of the agency and will vary depending on the nature of the proposed action and the effects associated with the action. The guidance encourages agencies to make use of agency Web sites to provide further clarity and transparency to their NEPA procedures. It also recommends using modern technology to maintain and facilitate the use of documentation in future evaluations and benchmarking.

Extraordinary Circumstances

Several commenters requested clearer and more detailed guidance on the application of extraordinary circumstances. Extraordinary circumstances are appropriately understood as those factors or circumstances that will help an agency identify the situations or environmental settings when an otherwise categorically-excludable action merits further analysis and documentation in an EA or an EIS. Specific comments noted that the determination that an extraordinary circumstance will require additional environmental review in an EA or an EIS should depend not solely on the existence of the extraordinary circumstance but rather on an analysis of its impacts. CEQ agrees with this perspective. For example, when an agency uses a protected resource, such as historic property or threatened and endangered species, as an extraordinary circumstance, the guidance clarifies that whether additional review and documentation of a proposed action's potential environmental impacts in an EA or an EIS is required is based on the potential for significantly impacting that protected resource. However, CEQ recognizes that some agency NEPA procedures require additional analysis based solely on the existence of an extraordinary circumstance. In such cases, the agencies may define their extraordinary circumstances differently, so that a particular situation, such as the presence of a protected resource, is not considered an extraordinary circumstance per se, but a factor to consider when determining if there are extraordinary circumstances, such as a significant impact to that resource. This

[4] *See* 40 CFR 1506.6(a) (requiring agencies to make diligent efforts to involve the public in preparing and implementing their NEPA procedures).

way of structuring NEPA procedures is also appropriate. What is important is that situations or circumstances that may warrant additional analysis and documentation in an EA or an EIS are fully considered before a categorical exclusion is used.

The guidance was also revised to clarify how agencies can use the factors set out in the CEQ Regulations to determine significance. The Federal agencies are ultimately responsible for the determination of specific extraordinary circumstances for a category of actions, as well as the determination of whether to use the significance factors set out in the CEQ Regulations when establishing extraordinary circumstances.[5] Agency determinations are informed by the public and CEQ during the development of the categorical exclusions.

Documenting the Use of Categorical Exclusions

Commenters were most concerned over the potential for delay and the creation of administrative burdens for projects and programs. The guidance makes it clear that the documentation prepared when categorically excluding an action should be as concise as possible to avoid unnecessary delays and administrative burdens for projects and programs. The guidance explains that each agency should determine the circumstances in which it is appropriate to prepare additional documentation. It also explains that for some activities with little risk of significant environmental effects, there may be no practical need for, or benefit from, preparing any documentation beyond the existing record supporting the underlying categorical exclusion and any administrative record for that activity. The guidance makes it clear that the extent of the documentation prepared is the responsibility of the agency and should be tailored to the type of action involved, the potential for extraordinary circumstances, and compliance requirements of other laws, regulations, and policies.

Cumulative Impacts

Some commenters were concerned that the guidance overlooked the importance of cumulative effects. As specifically set out in the CEQ Regulations and the final guidance, the consideration of the potential cumulative impacts of proposed actions is an important and integral aspect of the NEPA process. The guidance makes it clear that both individual and cumulative impacts must be considered when establishing categorical exclusions. With regard to the cumulative impacts of actions that an agency has categorically excluded, the guidance recommends that agencies consider the frequency with which the categorically-excluded actions are applied. For some types of categorical exclusions, it may also be appropriate for the agency to track and periodically assess use of the categorical exclusion to ensure that cumulative impacts do not rise to a level that would warrant further NEPA analysis and documentation.

Monitoring

Commenters voiced concerns that the guidance would create a new requirement for monitoring. The final guidance makes it clear that any Federal agency program charged with complying with NEPA should develop and maintain sufficient capacity to ensure the validity of NEPA reviews that predict that there will not be significant impacts. The amount of effort and the methods used for assessing environmental effects should be proportionate to the potential effects of the action that is the subject of a proposed categorical exclusion and should ensure that the use of categorical exclusions does not inadvertently result in significant impacts.

As the guidance explains, agencies seeking to substantiate new or revised categorical exclusions can rely on the information gathered from monitoring actions the agency took in the past, as well as from monitoring the effects of impact demonstration projects. Relying solely on completed EAs and Findings of No Significant Impact (FONSIs) is not sufficient without information validating the FONSI which was projected in advance of implementation. The guidance makes it clear that FONSIs cannot be relied on as a basis for establishing a categorical exclusion unless the absence of significant environmental effects has been verified through credible monitoring of the implemented activity or other sources of corroborating information. The intensity of monitoring efforts for particular categories of actions or impact demonstration projects is appropriately left to the judgment of the agencies. Furthermore, the guidance explains that in some cases monitoring may not be appropriate and agencies can evaluate other information.

Review of Existing Categorical Exclusions

Several commenters advocated "grandfathering" existing categorical exclusions. Two other commenters voiced support for the periodic review of agency categorical exclusions and specifically requested that the guidance call for rigorous review of existing categorical exclusions. Two commenters requested that the guidance explicitly provide for public participation during the review process. Several verbal comments focused on the recommended seven year review period and suggested alternative review periods ranging from two to ten years. Several commenters also requested that the guidance describe with greater clarity how the periodic review should be implemented.

CEQ believes it is extremely important to review the categorical exclusions already established by the Federal agencies. The fact that an agency's categorical exclusions were established years ago is all the more reason to review them to ensure that changes in technology, operations, agency missions, and the environment do not call into question the continued use of these categorical exclusions. The guidance also explains the value of such a review. Reviewing categorical exclusions can serve as the impetus for clarifying the actions covered by an existing categorical exclusion. It can also help agencies identify additional extraordinary circumstances and consider the appropriate documentation when using certain categorical exclusions. The guidance states that the review should focus on categorical exclusions that no longer reflect current environmental circumstances or an agency's policies, procedures, programs, or mission.

This guidance recommends that agencies develop a process and timeline to periodically review their categorical exclusions (and extraordinary circumstances) to ensure that their categorical exclusions remain current and appropriate, and that those reviews should be conducted at least every seven years. A seven-year cycle allows the agencies to regularly review categorical exclusions to avoid the use of categorical exclusions that are outdated and no longer appropriate. If the agency believes that a different timeframe is appropriate, the agency should articulate a sound basis for that conclusion, explaining how the alternate timeframe will still allow the agency to avoid the use of categorical exclusions that are outdated and no longer appropriate. As described in the guidance, agencies should use their Web sites to notify the public and CEQ about how and when their reviews of existing categorical exclusions will be conducted. CEQ will perform oversight of agencies' reviews, beginning with

[5] *See* 40 CFR 1508.27 (defining "significantly" for NEPA purposes in terms of several context and intensity factors for agencies to consider).

those agencies currently reassessing or experiencing difficulties with implementing their categorical exclusions, as well as with agencies facing challenges to their application of categorical exclusions.

The Final Guidance

The final guidance is provided here and is available on the National Environmental Policy Act Web site (*http://www.nepa.gov*) specifically at, ceq.hss.doe.gov/ceq_regulations/guidance.html. For reasons stated in the preamble, above, CEQ issues the following guidance on establishing, applying, and revising categorical exclusions.

MEMORANDUM FOR HEADS OF FEDERAL DEPARTMENTS AND AGENCIES

FROM: NANCY H. SUTLEY
Chair
Council on Environmental Quality
SUBJECT: *Final Guidance for Federal Departments and Agencies on Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act*

The Council on Environmental Quality (CEQ) is issuing this guidance for Federal departments and agencies on how to establish, apply, and revise 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 (CEQ Regulations), 40 CFR Parts 1500–1508.[6] This guidance explains the requirements of NEPA and the CEQ Regulations, describes CEQ policies, and recommends procedures for agencies to use to ensure that their use of categorical exclusions is consistent with applicable law and regulations.[7] The guidance is based on NEPA, the CEQ Regulations, legal precedent and agency NEPA experience and practice. It describes:

- How to establish or revise a categorical exclusion;
- How to use public involvement and documentation to help define and substantiate a proposed categorical exclusion;
- How to apply an established categorical exclusion, and determine when to prepare documentation and involve the public;[8] and
- How to conduct periodic reviews of categorical exclusions to assure their continued appropriate use and usefulness.

This guidance is designed to afford Federal agencies flexibility in developing and implementing categorical exclusions, while ensuring that categorical exclusions are administered to further the purposes of NEPA and the CEQ Regulations.[9]

I. Introduction

The CEQ Regulations provide basic requirements for establishing and using categorical exclusions. Section 1508.4 of the CEQ Regulations defines a "categorical exclusion" as

> 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.[10]

Categories of actions for which exclusions are established can be limited by their terms. Furthermore, the application of a categorical exclusion can be limited by "extraordinary circumstances." Extraordinary circumstances are factors or circumstances in which a normally excluded action may have a significant environmental effect that then requires further analysis in an environmental assessment (EA) or an environmental impact statement (EIS).[11]

Categorical exclusions are not exemptions or waivers of NEPA review; they are simply one type of NEPA review. To establish a categorical exclusion, agencies determine whether a proposed activity is one that, on the basis of past experience, normally does not require further environmental review. Once established, categorical exclusions provide an efficient tool to complete the NEPA environmental review process for proposals that normally do not require more resource-intensive EAs or EISs. The use of categorical exclusions can reduce paperwork and delay, so that EAs or EISs are targeted toward proposed actions that truly have the potential to cause significant environmental effects.[12]

When determining whether to use a categorical exclusion for a proposed activity, a Federal agency must carefully review the description of the proposed action to ensure that it fits within the category of actions described in the categorical exclusion. Next, the agency must consider the specific circumstances associated with the proposed activity, to rule out any extraordinary circumstances that might give rise to significant environmental effects requiring further analysis and documentation in an EA or an EIS.[13] In other words, when evaluating whether to apply a categorical exclusion to a proposed activity, an agency must consider the specific circumstances associated with the activity and may not end its review based solely on the determination that the activity fits within the description of the categorical exclusion; rather, the agency must also consider whether there are extraordinary circumstances that would warrant further NEPA review. Even if a proposed activity fits within the definition of a categorical exclusion and does not raise extraordinary circumstances, the CEQ Regulations make clear that an agency can, at its discretion, decide "to prepare an environmental assessment * * * in order to assist agency planning and decisionmaking."[14]

Since Federal agencies began using categorical exclusions in the late 1970s,

[6] The Council on Environmental Quality (CEQ) Regulations for Implementing the Procedural Provisions of NEPA (CEQ Regulations), *available on www.nepa.gov at ceq.hss.doe.gov/ceq_regulations/regulations.html.* This guidance applies only to categorical exclusions established by Federal agencies in accordance with section 1507.3 of the CEQ Regulations, 40 CFR 1507.3. It does not address categorical exclusions established by statute, as their use is governed by the terms of specific legislation and subsequent interpretation by the agencies charged with the implementation of that statute and NEPA requirements. CEQ encourages agencies to apply their extraordinary circumstances to categorical exclusions established by statute when the statute is silent as to the use and application of extraordinary circumstances.

[7] This guidance is not a rule or regulation, and the recommendations it contains may not apply to a particular situation based upon the individual facts and circumstances. This guidance does not change or substitute for any law, regulation, or any other legally binding requirement and is not legally enforceable. The use of non-mandatory language such as "guidance," "recommend," "may," "should," and "can," is intended to describe CEQ policies and recommendations. The use of mandatory terminology such as "must" and "required" is intended to describe controlling requirements under the terms of NEPA and the CEQ regulations, but this document does not establish legally binding requirements in and of itself.

[8] The term "public" in this guidance refers to any individuals, groups, entities or agencies external to the Federal agency analyzing the proposed categorical exclusion or proposed activity.

[9] 40 CFR 1507.1 (noting that CEQ Regulations intend to allow each agency flexibility in adapting its NEPA implementing procedures to requirements of other applicable laws).

[10] *Id.* at § 1508.4.

[11] *Id.*

[12] *See id.* at §§ 1500.4(p) (recommending use of categorical exclusions as a tool to reduce paperwork), 1500.5(k) (recommending categorical exclusions as a tool to reduce delay).

[13] 40 CFR 1508.4 (requiring Federal agencies to adopt procedures to ensure that categorical exclusions are not applied to proposed actions involving extraordinary circumstances that might have significant environmental effects).

[14] 40 CFR 1501.3(b).

the number and scope of categorically-excluded activities have expanded significantly. Today, categorical exclusions are the most frequently employed method of complying with NEPA, underscoring the need for this guidance on the promulgation and use of categorical exclusions.[15] Appropriate reliance on categorical exclusions provides a reasonable, proportionate, and effective analysis for many proposed actions, helping agencies reduce paperwork and delay. If used inappropriately, categorical exclusions can thwart NEPA's environmental stewardship goals, by compromising the quality and transparency of agency environmental review and decisionmaking, as well as compromising the opportunity for meaningful public participation and review.

II. Establishing and Revising Categorical Exclusions

A. Conditions Warranting New or Revised Categorical Exclusions

Federal agencies may establish a new or revised categorical exclusion in a variety of circumstances. For example, an agency may determine that a class of actions—such as payroll processing, data collection, conducting surveys, or installing an electronic security system in a facility—can be categorically excluded because it is not expected to have significant individual or cumulative environmental effects. As discussed further in Section III.A.1, below, agencies may also identify potential new categorical exclusions after the agencies have performed NEPA reviews of a class of proposed actions and found that, when implemented, the actions resulted in no significant environmental impacts. Other categories of actions may become appropriate for categorical exclusions as a result of mission changes. When agencies acquire new responsibilities through legislation or administrative restructuring, they should propose new categorical exclusions after they, or other agencies, gain sufficient experience with the new activities to make a reasoned determination that any resulting environmental impacts are not significant.[16]

Agencies sometimes employ "tiering" to incorporate findings from NEPA environmental reviews that address broad programs or issues into reviews that subsequently deal with more specific and focused proposed actions.[17] Agencies may rely on tiering to make predicate findings about environmental impacts when establishing a categorical exclusion. To the extent that mitigation commitments developed during the broader review become an integral part of the basis for subsequently excluding a proposed category of actions, care must be taken to ensure that those commitments are clearly presented as required design elements in the description of the category of actions being considered for a categorical exclusion.

If actions in a proposed categorical exclusion are found to have potentially significant environmental effects, an agency can abandon the proposed categorical exclusion, or revise it to eliminate the potential for significant impacts. This can be done by: (1) Limiting or removing activities included in the categorical exclusion; (2) placing additional constraints on the categorical exclusion's applicability; or (3) revising or identifying additional applicable extraordinary circumstances. When an agency revises an extraordinary circumstance, it should make sure that the revised version clearly identifies the circumstances when further environmental evaluation in an EA or an EIS is warranted.

B. The Text of the Categorical Exclusion

In prior guidance, CEQ has generally addressed the crafting of categorical exclusions, encouraging agencies to "consider broadly defined criteria which characterize types of actions that, based on the agency's experience, do not cause significant environmental effects," and to "offer several examples of activities frequently performed by that agency's personnel which would normally fall in these categories."[18] CEQ's prior guidance also urges agencies to consider whether the cumulative effects of multiple small actions "would cause sufficient environmental impact to take the actions out of the categorically-excluded class."[19] This guidance expands on CEQ's earlier guidance, by advising agencies that the text of a proposed new or revised categorical exclusion should clearly define the eligible category of actions, as well as any physical, temporal, or environmental factors that would constrain its use.

Some activities may be variable in their environmental effects, such that they can only be categorically excluded in certain regions, at certain times of the year, or within a certain frequency. For example, because the status and sensitivity of environmental resources varies across the nation or by time of year (*e.g.,* in accordance with a protected species' breeding season), it may be appropriate to limit the geographic applicability of a categorical exclusion to a specific region or environmental setting. Similarly, it may be appropriate to limit the frequency with which a categorical exclusion is used in a particular area. Categorical exclusions for activities with variable impacts must be carefully described to limit their application to circumstances where the activity has been shown not to have significant individual or cumulative environmental effects. Those limits may be spatial (restricting the extent of the proposed action by distance or area); temporal (restricting the proposed action during certain seasons or nesting periods in a particular setting); or numeric (limiting the number of proposed actions that can be categorically excluded in a given area or timeframe). Federal agencies that identify these constraints can better ensure that a categorical exclusion is neither too broadly nor too narrowly defined.

When developing a new or revised categorical exclusion, Federal agencies must be sure the proposed category captures the entire proposed action. Categorical exclusions should not be established or used for a segment or an interdependent part of a larger proposed action. The actions included in the category of actions described in the categorical exclusion must be stand-alone actions that have independent utility. Agencies are also encouraged to provide representative examples of the types of activities covered in the text of the categorical exclusion, especially for broad categorical exclusions. These examples will provide further clarity and transparency regarding the types of actions covered by the categorical exclusion.

C. Extraordinary Circumstances

Extraordinary circumstances are appropriately understood as those factors or circumstances that help a Federal agency identify situations or environmental settings that may require

[15] *See* CEQ reports to Congress on the status and progress of NEPA reviews for Recovery Act funded projects and activities, *available on http://www.nepa.gov* at *ceq.hss.doe.gov/ceq_reports/recovery_act_reports.html.*

[16] When legislative or administrative action creates a new agency or restructures an existing agency, the agency should determine if its decisionmaking processes have changed and ensure that its NEPA implementing procedures align the NEPA review and other environmental planning processes with agency decisionmaking.

[17] 40 CFR 1502.4(d), 1502.20, 1508.28.

[18] Council on Environmental Quality, "Guidance Regarding NEPA Regulations," 48 FR 34,263, 34,265, Jul. 28, 1983, *available on http://www.nepa.gov at ceq.hss.doe.gov/nepa/regs/1983/1983guid.htm.*

[19] *Id.*

an otherwise categorically-excludable action to be further analyzed in an EA or an EIS. Often these factors are similar to those used to evaluate intensity for purposes of determining significance pursuant to section 1508.27(b) of the CEQ Regulations.[20] For example, several agencies list as extraordinary circumstances the potential effects on protected species or habitat, or on historic properties listed or eligible for listing in the National Register of Historic Places.

When proposing new or revised categorical exclusions, Federal agencies should consider the extraordinary circumstances described in their NEPA procedures to ensure that they adequately account for those situations and settings in which a proposed categorical exclusion should not be applied. An extraordinary circumstance requires the agency to determine how to proceed with the NEPA review. For example, the presence of a factor, such as a threatened or endangered species or a historic resource, could be an extraordinary circumstance, which, depending on the structure of the agency's NEPA implementing procedures, could either cause the agency to prepare an EA or an EIS, or cause the agency to consider whether the proposed action's impacts on that factor require additional analysis in an EA or an EIS. In other situations, the extraordinary circumstance could be defined to include both the presence of the factor and the impact on that factor. Either way, agency NEPA implementing procedures should clearly describe the manner in which an agency applies extraordinary circumstances and the circumstances under which additional analysis in an EA or an EIS is warranted.

Agencies should review their existing extraordinary circumstances concurrently with the review of their categorical exclusions. If an agency's existing extraordinary circumstances do not provide sufficient parameters to limit a proposed new or revised categorical exclusion to actions that do not have the potential for significant environmental effects, the agency should identify and propose additional extraordinary circumstances or revise those that will apply to the proposed categorical exclusion. If extensive extraordinary circumstances are needed to limit a proposed categorical exclusion, the agency should also consider whether the proposed categorical exclusion itself is appropriate. Any new or revised extraordinary circumstances must be issued together with the new or revised categorical exclusion in draft form and then in final form according to the procedures described in Section IV.

III. Substantiating a New or Revised Categorical Exclusion

Substantiating a new or revised categorical exclusion is basic to good decisionmaking. It serves as the agency's own administrative record of the underlying reasoning for the categorical exclusion. A key issue confronting Federal agencies is how to substantiate a determination that a proposed new or revised categorical exclusion describes a category of actions that do not individually or cumulatively have a significant effect on the human environment.[21] Provided below are methods agencies can use to gather and evaluate information to substantiate proposed new or revised categorical exclusions.

A. Gathering Information To Substantiate a Categorical Exclusion

The amount of information required to substantiate a categorical exclusion depends on the type of activities included in the proposed category of actions. Actions that are reasonably expected to have little impact (for example, conducting surveys or purchasing small amounts of office supplies consistent with applicable acquisition and environmental standards) should not require extensive supporting information.[22] For actions that do not obviously lack significant environmental effects, agencies must gather sufficient information to support establishing a new or revised categorical exclusion. An agency can substantiate a categorical exclusion using the sources of information described below, either alone or in combination.[23]

1. Previously Implemented Actions

An agency's assessment of the environmental effects of previously implemented or ongoing actions is an important source of information to substantiate a categorical exclusion. Such assessment allows the agency's experience with implementation and operating procedures to be taken into account in developing the proposed categorical exclusion.

Agencies can obtain useful substantiating information by monitoring and/or otherwise evaluating the effects of implemented actions that were analyzed in EAs that consistently supported Findings of No Significant Impact. If the evaluation of the implemented action validates the environmental effects (or lack thereof) predicted in the EA, this provides strong support for a proposed categorical exclusion. Care must be taken to ensure that any mitigation measures developed during the EA process are an integral component of the actions considered for inclusion in a proposed categorical exclusion.

Implemented actions analyzed in an EIS can also be a useful source of substantiating information if the implemented action has independent utility to the agency, separate and apart from the broader action analyzed in the EIS. The EIS must specifically address the environmental effects of the independent proposed action and determine that those effects are not significant. For example, when a discrete, independent action is analyzed in an EIS as part of a broad management action, an evaluation of the actual effects of that discrete action may support a proposed categorical exclusion for the discrete action. As with actions previously analyzed in EAs, predicted effects (or lack thereof) should be validated through monitoring or other corroborating evidence.

Agencies can also identify or substantiate new categorical exclusions and extraordinary circumstances by using auditing and implementation data gathered in accordance with an Environmental Management System or other systems that track environmental performance and the effects of particular actions taken to attain that performance.[24]

[20] *Id.* at § 1508.27(b).

[21] *See id.* at §§ 1508.7, 1508.8, 1508.27.

[22] Agencies should still consider the environmental effects of actions that are taken on a large scale. Agency-wide procurement and personnel actions could have cumulative impacts. For example, purchasing paper with higher recycled content uses less natural resources and will have lesser environmental impacts. *See* "Federal Leadership in Environmental, Energy, and Economic Performance," E.O. No. 13,514, 74 FR 52,117, Oct. 8, 2009.

[23] 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 categorical exclusion. *See* Information Quality Act, Pub. L. No. 106–554, section 515 (2000), 114 Stat. 2763, 2763A–153 (codified at 44 U.S.C. 3516 (2001)); *see also* "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, Republication," 60 FR 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.

[24] 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 to support NEPA work is further described in CEQ's

Continued

Agencies should also consider appropriate monitoring or other evaluation of the environmental effects of their categorically-excluded actions, to inform periodic reviews of existing categorical exclusions, as discussed in Section VI, below.

2. Impact Demonstration Projects

When Federal agencies lack experience with a particular category of actions that is being considered for a proposed categorical exclusion, they may undertake impact demonstration projects to assess the environmental effects of those actions. As part of a demonstration project, the Federal agency should monitor the actual environmental effects of the proposed action during and after implementation. The NEPA documentation prepared for impact demonstration projects should explain how the monitoring and analysis results will be used to evaluate the merits of a proposed categorical exclusion. When designing impact demonstration projects, an agency must ensure that the action being evaluated accurately represents the scope, the operational context, and the environmental context of the entire category of actions that will be described in the proposed categorical exclusion. For example, if the proposed categorical exclusion would be used in regions or areas of the country with different environmental settings, a series of impact demonstration projects may be needed in those areas where the categorical exclusion would be used.

3. Information From Professional Staff, Expert Opinions, and Scientific Analyses

A Federal agency may rely on the expertise, experience, and judgment of its professional staff as well as outside experts to assess the potential environmental effects of applying proposed categorical exclusions, provided that the experts have 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 experts' credentials (*e.g.,* education, training, certifications, years of related experience) and describe how the experts arrived at their conclusions.

Scientific analyses are another good source of information to substantiate a new or revised categorical exclusion. 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 experience relevant to the environmental effects of the actions that would be included in the proposed categorical exclusion. Peer-reviewed findings may be especially useful to support an agency's scientific analysis, but agencies may also consult professional opinions, reports, and research findings that have not been formally peer-reviewed. Scientific information that has not been externally peer-reviewed may require additional scrutiny and evaluation by the agency. In all cases, findings must be based on high-quality, accurate technical and scientific information.[25]

4. Benchmarking Other Agencies' Experiences

A Federal agency cannot rely on another agency's categorical exclusion to support a decision not to prepare an EA or an EIS for its own actions. An agency may, however, substantiate a categorical exclusion of its own based on another agency's experience with a comparable categorical exclusion and the administrative record developed when the other agency's categorical exclusion was established. Federal agencies can also substantiate categorical exclusions by benchmarking, or drawing support, from private and public entities that have experience with the actions covered in a proposed categorical exclusion, such as State and local agencies, Tribes, academic and professional institutions, and other Federal agencies.

When determining whether it is appropriate to rely on another entity's experience, an agency must demonstrate that the benchmarked actions are comparable to the actions in a proposed categorical exclusion. The agency can demonstrate this based on: (1) Characteristics of the actions; (2) methods of implementing the actions; (3) frequency of the actions; (4) applicable standard operating procedures or implementing guidance (including extraordinary circumstances); and (5) timing and context, including the environmental settings in which the actions take place.

B. Evaluating the Information Supporting Categorical Exclusions

After gathering substantiating information and determining that the category of actions in the proposed categorical exclusion does not normally result in individually or cumulatively significant environmental effects, a Federal agency should develop findings that demonstrate how it made its determination. These findings should account for similarities and differences between the proposed categorical exclusion and the substantiating information. The findings should describe the method and criteria the agency used to assess the environmental effects of the proposed categorical exclusion. These findings, and the relevant substantiating information, should be maintained in an administrative record that will support: Benchmarking by other agencies (as discussed in Section III.A.4, above); applying the categorical exclusions (as discussed in Section V.A, below); and periodically reviewing the continued viability of the categorical exclusion (as discussed in Section VI, below). These findings should also be made available to the public, at least in preliminary form, as part of the process of seeking public input on the establishment of new or revised categorical exclusions, though the final findings may be revised based on new information received from the public and other sources.

IV. Procedures for Establishing a New or Revised Categorical Exclusion

Pursuant to section 1507.3(a) of the CEQ Regulations, Federal agencies are required to consult with the public and with CEQ whenever they amend their NEPA procedures, including when they establish new or revised categorical exclusions. An agency can only adopt new or revised NEPA implementing procedures after the public has had notice and an opportunity to comment, and after CEQ has issued a determination that the procedures are in conformity with NEPA and the CEQ regulations. Accordingly, an agency's process for establishing a new or revised categorical exclusion should include the following steps:

- Draft the proposed categorical exclusion based on the agency's experience and substantiating information;
- Consult with CEQ on the proposed categorical exclusion;
- Consult with other Federal agencies that conduct similar activities to coordinate with their current procedures, especially for programs

Guidebook, "Aligning National Environmental Policy Act Processes with Environmental Management Systems" (2007), *available on http://www.nepa.gov* at *ceq.hss.doe.gov/publications/nepa_and_ems.html.*

[25] *See* 40 CFR 1500.1(b), 1502.24.

requesting similar information from members of the public (*e.g.,* applicants);

• Publish a notice of the proposed categorical exclusion in the **Federal Register** for public review and comment;

• Consider public comments;

• Consult with CEQ on the public comments received and the proposed final categorical exclusion to obtain CEQ's written determination of conformity with NEPA and the CEQ Regulations;

• Publish the final categorical exclusion in the **Federal Register**;

• File the categorical exclusion with CEQ; and

• Make the categorical exclusion readily available to the public through the agency's Web site and/or other means.

A. Consultation With CEQ

The CEQ Regulations require agencies to consult with CEQ prior to publishing their proposed NEPA procedures in the **Federal Register** for public comment. Agencies are encouraged to involve CEQ as early as possible in the process and to enlist CEQ's expertise and assistance with interagency coordination to make the process as efficient as possible.[26]

Following the public comment period, the Federal agency must consider the comments received and consult again with CEQ to discuss substantive comments and how they will be addressed. CEQ shall complete its review within thirty (30) days of receiving the final text of the agency's proposed categorical exclusion. For consultation to successfully conclude, CEQ must provide the agency with a written statement that the categorical exclusion was developed in conformity with NEPA and the CEQ Regulations. Finally, when the Federal agency publishes the final version of the categorical exclusion in the **Federal Register** and on its established agency Web site, the agency should notify CEQ of such publication so as to satisfy the requirements to file the final categorical exclusion with CEQ and to make the final categorical exclusion readily available to the public.[27]

B. Seeking Public Involvement When Establishing or Revising a Categorical Exclusion

Engaging the public in the environmental aspects of Federal decisionmaking is a key aspect of NEPA and the CEQ Regulations.[28] At a minimum, the CEQ Regulations require Federal agencies to make any proposed amendments to their categorical exclusions available for public review and comment in the **Federal Register**,[29] regardless of whether the categorical exclusions are promulgated as regulations through rulemaking, or issued as departmental directives or orders.[30] To maximize the value of comments from interested parties, the agency's **Federal Register** notice 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 that was used to substantiate the categorical exclusion, including an evaluation of the information and related findings;[31]

• Define all applicable terms;

• Describe the extraordinary circumstances that may limit the use of the categorical exclusion; and

• Describe the available means for submitting questions and comments about the proposed categorical exclusion (for example, e-mail addresses, mailing addresses, Web site addresses, and names and phone numbers of agency points of contact).

When establishing or revising a categorical exclusion, agencies should also pursue additional opportunities for public involvement beyond publication in the **Federal Register** in cases where there is likely to be significant public interest and additional outreach would facilitate public input. The extent of public involvement can be tailored to the nature of the proposed categorical exclusion and the degree of expected public interest.

CEQ encourages Federal agencies to engage interested parties such as public interest groups, Federal NEPA contacts at other agencies, Tribal governments and agencies, and State and local governments and agencies. The purpose of this engagement is to share relevant data, information, and concerns. Agencies can involve the public by using the methods noted in section 1506.6 of the CEQ Regulations, as well as other public involvement techniques such as focus groups, e-mail exchanges, conference calls, and Web-based forums.

CEQ also strongly encourages Federal agencies to post updates on their official Web sites whenever they issue **Federal Register** notices for new or revised categorical exclusions. An agency Web site may serve as the primary location where the public learns about agency NEPA implementing procedures and their use, and obtains efficient access to updates and supporting information. Therefore, agencies should ensure that their NEPA implementing procedures and any final revisions or amendments are easily accessed through the agency's official Web site including when an agency is adding, deleting, or revising the categorical exclusions and/or the extraordinary circumstances in its NEPA implementing procedures.

V. Applying an Established Categorical Exclusion

When applying a categorical exclusion to a proposed action, Federal agencies face two key decisions: (1) Whether to prepare documentation supporting their determination to use a categorical exclusion for a proposed action; and (2) whether public engagement and disclosure may be useful to inform determinations about using categorical exclusions.

A. When To Document Categorical Exclusion Determinations

In prior guidance, CEQ has "strongly discourage[d] procedures that would require the preparation of additional paperwork to document that an activity has been categorically excluded," based on an expectation that "sufficient information will usually be available

[26] 40 CFR 1507.3(a) (requiring agencies with similar programs to consult with one another and with CEQ to coordinate their procedures).

[27] *Id.*

[28] National Environmental Policy Act of 1969, § 2 *et seq.,* 42 U.S.C. 4321 *et seq.; see, e.g.,* 40 CFR 1506.6(a) (requiring agencies to make diligent efforts to involve the public in preparing and implementing their NEPA procedures); 40 CFR 1507.3(a) (requiring each agency to consult with CEQ while developing its procedures and before publishing them in the **Federal Register** for comment; providing that an agency's NEPA procedures shall be adopted only after an opportunity for public review; and providing that, once in effect, the procedures must be made readily available to the public).

[29] *See* 40 CFR 1507.3 (outlining procedural requirements for agencies to establish and revise their NEPA implementing regulations), 1506.6(a) (requiring agencies to involve the public in rulemaking, including public notice and an opportunity to comment).

[30] NEPA and the CEQ Regulations do not require agency NEPA implementing procedures, of which categorical exclusions are a key component, to be promulgated as regulations through rulemaking. Agencies should ensure they comply with all appropriate agency requirements for issuing and revising their NEPA implementing procedures.

[31] This step is particularly beneficial when the agency determines that the public will view a potential impact as significant, as it provides the agency the opportunity to explain why it believes that impact to be presumptively insignificant. Whenever practicable, the agency should include a link to a Web site containing all the supporting information, evaluations, and findings. 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 *http://www.regulations.gov.*

during the course of normal project development" to determine whether an EIS or an EA is needed.[32] Moreover, "the agency's administrative record (for the proposed action) will clearly document the basis for its decision."[33] This guidance modifies our prior guidance to the extent that it recognizes that each Federal agency should decide—and update its NEPA implementing procedures and guidance to indicate—whether any of its categorical exclusions warrant preparation of additional documentation.

Some activities, such as routine personnel actions or purchases of small amounts of supplies, may carry little risk of significant environmental effects, such that there is no practical need for, or benefit from, preparing additional documentation when applying a categorical exclusion to those activities. For those activities, the administrative record for establishing the categorical exclusion and any normal project development documentation may be considered sufficient.

For other activities, such as decisions to allow various stages of resource development after a programmatic environmental review, documentation may be appropriate to demonstrate that the proposed action comports with any limitations identified in prior NEPA analysis and that there are no potentially significant impacts expected as a result of extraordinary circumstances. In such cases, the documentation should address proposal-specific factors and show consideration of extraordinary circumstances with regard to the potential for localized impacts. It is up to agencies to decide whether to prepare separate NEPA documentation in such cases or to include this documentation in other project-specific documents that the agency is preparing.

In some cases, courts have required documentation to demonstrate that a Federal agency has considered the environmental effects associated with extraordinary circumstances.[34] Documenting the application of a categorical exclusion provides the agency the opportunity to demonstrate why its decision to use the categorical exclusion is entitled to deference.[35]

Documentation may be necessary to comply with the requirements of other laws, regulations, and policies, such as the Endangered Species Act or the National Historic Preservation Act. When that is the case, all resource analyses and the results of any consultations or coordination should be incorporated by reference in the administrative record developed for the proposed action. Moreover, the nature and severity of the effect on resources subject to additional laws or regulations may be a reason for limiting the use of a categorical exclusion and therefore should, where appropriate, also be addressed in documentation showing how potential extraordinary circumstances were considered and addressed in the decision to use the categorical exclusion.

For those categorical exclusions for which an agency determines that documentation is appropriate, the documentation should cite the categorical exclusion being used and show that the agency determined that: (1) The proposed action fits within the category of actions described in the categorical exclusion; and (2) there are no extraordinary circumstances that would preclude the proposed action from being categorically excluded. The extent of the documentation should be tailored to the type of action involved, the potential for extraordinary circumstances and environmental effects, and any applicable requirements of other laws, regulations, and policies. If lengthy documentation is needed to address these aspects, an agency should consider whether it is appropriate to apply the categorical exclusion in that particular situation. In all circumstances, any documentation prepared for a categorical exclusion should be concise.

B. When To Seek Public Engagement and Disclosure

Most Federal agencies do not routinely notify the public when they use a categorical exclusion to meet their NEPA responsibilities. There are some circumstances, however, where the public may be able to provide an agency with valuable information, such as whether a proposal involves extraordinary circumstances or potentially significant cumulative impacts that can help the agency decide whether to apply a categorical exclusion. CEQ therefore encourages Federal agencies to determine—and specify in their NEPA implementing procedures—those circumstances in which the public should be engaged or notified before a categorical exclusion is used.

Agencies should utilize information technology to provide the public with access to information about the agency's NEPA compliance. CEQ strongly recommends that agencies post key information about their NEPA procedures and implementation on a publicly available Web site. The Web site should include:

- The text of the categorical exclusions and applicable extraordinary circumstances;
- A synopsis of the administrative record supporting the establishment of each categorical exclusion with information on how the public can access the entire administrative record;
- Those categorical exclusions which the agency determines are and are not likely to be of interest to the public;[36] and
- Information on agencies' use of categorical exclusions for proposed actions, particularly in those situations where there is a high level of public interest in a proposed action.

Where an agency has documented a categorical exclusion, it should also consider posting that documentation online. For example, in 2009, the Department of Energy adopted a policy to post documented categorical exclusion determinations online.[37] By adopting a similar policy, other agencies can significantly increase the quality and transparency of their decisionmaking when using categorical exclusions.

VI. Periodic Review of Established Categorical Exclusions

The CEQ Regulations direct Federal agencies to "continue to review their policies and procedures and in consultation with [CEQ] to revise them as necessary to ensure full compliance with the purposes and provisions of [NEPA]."[38] Many agencies have categorical exclusions that were established many years ago. Some Federal agencies have internal procedures for identifying and revising categorical exclusions that no longer reflect current environmental circumstances, or current agency policies, procedures, programs, or mission. Where an agency's categorical exclusions have not been regularly

[32] "Guidance Regarding NEPA Regulations," 48 FR 34,263, 34,265, Jul. 28, 1983, *available on http://www.nepa.gov_at ceq.hss.doe.gov/nepa/regs/1983/1983guid.htm.*

[33] *Id.*

[34] *See, e.g., California* v. *Norton,* 311 F.3d 1162, 1175–78 (9th Cir. 2002).

[35] The agency determination that an action is categorically excluded may itself be challenged under the Administrative Procedure Act, 5 U.S.C. 501 *et seq.*

[36] Many agencies publish two lists of categorical exclusions: (1) Those which typically do not raise public concerns due to the low risk of potential environmental effects, and (2) those more likely to raise public concerns.

[37] *See* Department of Energy, Categorical Exclusion Determinations, *available at http://www.gc.energy.gov/NEPA/categorical_exclusion_determinations.htm.*

[38] 40 CFR 1507.3.

reviewed, they should be reviewed by the agency as soon as possible.

There are several reasons why Federal agencies should periodically review their categorical exclusions. For example, a Federal agency may find that an existing categorical exclusion is not being used because the category of actions is too narrowly defined. In such cases, the agency should consider amending its NEPA implementing procedures to expand the description of the category of actions included in the categorical exclusion. An agency could also find that an existing categorical exclusion includes actions that raise the potential for significant environmental effects with some regularity. In those cases, the agency should determine whether to delete the categorical exclusion, or revise it to either limit the category of actions or expand the extraordinary circumstances that limit when the categorical exclusion can be used. Periodic review can also help agencies identify additional factors that should be included in their extraordinary circumstances and consider whether certain categorical exclusions should be documented.

Agencies should exercise sound judgment about the appropriateness of categorically excluding activities in light of evolving or changing conditions that might present new or different environmental impacts or risks. The assumptions underlying the nature and impact of activities encompassed by a categorical exclusion may have changed over time. Different technological capacities of permitted activities may present very different risk or impact profiles. This issue was addressed in CEQ's August 16, 2010 report reviewing the Department of the Interior's Minerals Management Service's application of NEPA to the permitting of deepwater oil and gas drilling.[39]

Agencies should review their categorical exclusions on an established timeframe, beginning with the categorical exclusions that were established earliest and/or the categorical exclusions that may have the greatest potential for significant environmental impacts. This guidance recommends that agencies develop a process and timeline to periodically review their categorical exclusions (and extraordinary circumstances) to ensure that their categorical exclusions remain current and appropriate, and that those reviews should be conducted at least every seven years. A seven-year cycle allows the agencies to regularly review categorical exclusions to avoid the use of categorical exclusions that are outdated and no longer appropriate. If the agency believes that a different timeframe is appropriate, the agency should articulate a sound basis for that conclusion, explaining how the alternate timeframe will still allow the agency to avoid the use of categorical exclusions that are outdated and no longer appropriate. The agency should publish its process and time period, along with its articulation of a sound basis for periods over seven years, on the agency's Web site and notify CEQ where on the Web site the review procedures are posted. We recognize that due to competing priorities, resource constraints, or for other reasons, agencies may not always be able to meet these time periods. The fact that a categorical exclusion has not been evaluated within the time established does not invalidate its use for NEPA compliance, as long as such use is consistent with the defined scope of the exclusion and has properly considered any potential extraordinary circumstances.

In establishing this review process, agencies should take into account factors including changed circumstances, how frequently the categorical exclusions are used, the extent to which resources and geographic areas are potentially affected, and the expected duration of impacts. The level of scrutiny and evaluation during the review process should be commensurate with a categorically-excluded activity's potential to cause environmental impacts and the extent to which relevant circumstances have changed since it was issued or last reviewed. Some categorical exclusions, such as for routine purchases or contracting for office-related services, may require minimal review. Other categorical exclusions may require a more thorough reassessment of scope, environmental effects, and extraordinary circumstances, such as when they are tiered to programmatic EAs or EISs that analyzed activities whose underlying circumstances have since changed.

To facilitate reviews, the Federal agency offices charged with overseeing their agency's NEPA compliance should develop and maintain sufficient capacity to periodically review their existing categorical exclusions to ensure that the agency's prediction of no significant impacts is borne out in practice.[40] Agencies can efficiently assess changed circumstances by utilizing a variety of methods such as those recommended in Section III, above, for substantiating new or revised categorical exclusions. These methods include benchmarking, monitoring of previously implemented actions, and consultation with professional staff. The type and extent of monitoring and other information that should be considered in periodic reviews, as well as the particular entity or entities within the agency that would be responsible for gathering this information, will vary depending upon the nature of the actions and their anticipated effects. Consequently, agencies should utilize the expertise, experience, and judgment of agency professional staff when determining the appropriate type and extent of monitoring and other information to consider. This information will help the agency determine whether its categorical exclusions are used appropriately, or whether a categorical exclusion needs to be revised. Agencies can also use this information when they engage stakeholders in developing proposed revisions to categorical exclusions and extraordinary circumstances.

Agencies can also facilitate reviews by keeping records of their experiences with certain activities in a number of ways, including tracking information provided by agency field offices.[41] In such cases, a Federal agency could conduct its periodic review of an established categorical exclusion by soliciting information from field offices about the observed 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, where appropriate, can also be incorporated into an agency's procedures for conducting its oversight of ongoing projects and can be included as part of regular site visits to project areas.

Agencies can also conduct periodic review of existing categorical exclusions through broader program reviews. Program reviews can occur at various levels (for example, field office, division office, headquarters office) and on various scales (for example, geographic location, project type, or areas identified in an interagency agreement). While a

[39] Council on Environmental Quality, *Report Regarding the Mineral Management Service's National Environmental Policy Act Policies, Practices, and Procedures as They Relate to Outer Continental Shelf Oil and Gas Exploration, available at ceq.hss.doe.gov/current_developments/docs/CEQ_Report_Reviewing_MMS_OCS_NEPA_Implementation.pdf* (Aug. 2010) at 18–20 (explaining that MMS NEPA review for the Macondo Exploratory Well relied on categorical exclusions established in the 1980s, before deepwater drilling became widespread).

[40] 40 CFR 1507.2.

[41] Council on Environmental Quality, *The NEPA Task Force Report to the Council on Environmental Quality—Modernizing NEPA Implementation,* p. 63 (Sept. 2003), *available on http://www.nepa.gov* at *ceq.hss.doe.gov/ntf/report/index.html.*

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 yield information relevant to categorical exclusions and may thus substitute for reviews specifically focused on categorical exclusions. However, the substantial flexibility that agencies have in how they structure their review procedures underscores the importance of ensuring that the review procedures are clear and transparent.

In working with agencies on reviewing their existing categorical exclusions, CEQ will look to the actual impacts from activities that have been subject to categorical exclusions, and will consider the extent and scope of agency monitoring and/or other substantiating evidence. As part of its oversight role and responsibilities under NEPA, CEQ will contact agencies following the release of this guidance to ascertain the status of their reviews of existing categorical exclusions. CEQ will make every effort to align its oversight with reviews being conducted by the agency and will begin with those agencies that are currently reassessing their categorical exclusions, as well as with agencies that are experiencing difficulties or facing challenges to their application of categorical exclusions.

Finally, it is important to note that the rationale and supporting information for establishing or documenting experience with using a categorical exclusion may be lost if an agency has inadequate procedures for recording, retrieving, and preserving documents and administrative records. Therefore, Federal agencies will benefit from a review of their current practices for maintaining and preserving such records. Measures to ensure future availability could include greater centralization of records, use of modern storage systems and improvements in the agency's electronic and hard copy filing systems.[42]

VII. Conclusion

This guidance will help to guide CEQ and the agencies when an agency seeks to propose a new or revised categorical exclusion. It should also guide the agencies when categorical exclusions are used for proposed actions, when reviewing existing categorical exclusions, or when proposing new categorical exclusions. Questions regarding this guidance should be directed to the CEQ Associate Director for NEPA Oversight.

Nancy H. Sutley,

Chair.

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[42] Agencies should be mindful of their obligations to maintain and preserve agency records under the Federal Records Act for maintaining and preserving agency records. 44 U.S.C. 3101 *et seq.*

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 100218107–0199–01]

RIN 0648–XY31

Fisheries Off West Coast States; Modifications of the West Coast Commercial and Recreational Salmon Fisheries; Inseason Actions #12 and #13

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Modification of fishing seasons, gear restrictions, and landing and possession limits; request for comments.

SUMMARY: NOAA Fisheries announces two inseason actions in the ocean salmon fisheries. Inseason action #12 modified the commercial fishery in the area from the U.S./Canada Border to Cape Falcon, Oregon. Inseason action #13 modified the commercial and recreational fisheries in the area from U.S./Canada Border to Cape Falcon, Oregon.

DATES: Inseason actions #12 and #13 were effective on August 6, 2010, and remain in effect until the closing date of the 2010 salmon season announced in the 2010 annual management measures or through additional inseason action. Comments will be accepted through December 21, 2010.

ADDRESSES: You may submit comments, identified by 0648–XY31, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal *http://www.regulations.gov*.
- *Fax:* 206–526–6736, Attn: Peggy Busby.
- *Mail:* 7600 Sand Point Way, NE., Building 1, Seattle, WA, 98115.

Instructions: No comments will be posted for public viewing until after the comment period has closed. All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, *etc.*) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Peggy Busby, by phone at 206–526–4323.

SUPPLEMENTARY INFORMATION: In the 2010 annual management measures for ocean salmon fisheries (75 FR 24482, May 5, 2010), NMFS announced the commercial and recreational fisheries in the area from the U.S./Canada Border to the U.S./Mexico Border, beginning May 1, 2010.

The Regional Administrator (RA) consulted with representatives of the Council, Washington Department of Fish and Wildlife, and Oregon Department of Fish and Wildlife on August 5, 2010. The information considered during this consultation related to Chinook and coho salmon catch to date and Chinook and coho salmon catch rates compared to quotas and other management measures established preseason.

Inseason action #12 reduced the landing and possession limit for Chinook salmon in the commercial salmon fishery from the U.S./Canada Border to Cape Falcon, Oregon. Previously, inseason action #11 (75 FR 54791, September, 9, 2010) imposed an open period landing and possession limit of 60 Chinook salmon and 50 coho per vessel. Inseason action #12 decreased the Chinook salmon landing and possession limit to 30 Chinook salmon per vessel; the open period landing and possession limit for coho was unchanged by inseason action #12. This action was taken because Chinook salmon catches increased dramatically in the previous week, and there was concern that if the landing limit was not reduced the fishery would quickly exhaust the remaining Chinook salmon quota. On August 5, 2010, the States recommended this action and the RA concurred; inseason action #12 took effect on August 6, 2010. Modification of quota and/or fishing seasons is authorized by 50 CFR 660.409 (b)(1)(i).

Inseason action #13 modified the quotas for the commercial and recreational fisheries through an inseason trade and transfer of quota; 7,000 coho were transferred from the