

## **Use and Documentation of Categorical Exclusions**

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September 2014

Capstone paper submitted in partial fulfillment of the  
requirements for the Certificate in NEPA  
Duke Environmental Leadership Program  
Nicholas School of the Environmental at  
Duke University

2014

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## **ABSTRACT**

The Council on Environmental Quality's (CEQ) regulations define "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." 40 CFR § 1508.4. The CEQ regulations go on to state that "[a]n agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in § 1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect." 40 CFR § 1508.4.

This capstone paper evaluates CEQ guidance regarding categorical exclusions, and how a handful of agencies are using and documenting categorical exclusions. Specifically, the paper explores changes in CEQ guidance over the years. In addition, it evaluates a couple of agency's procedures for applying and documenting categorical exclusions. Finally, the paper addresses related judicial decisions.

## INTRODUCTION

The National Environmental Policy Act (NEPA) of 1969, as amended,<sup>1</sup> is a procedural statute designed to help ensure that the Federal government evaluates environmental impacts before taking action; it does not impose substantive duties on agencies mandating particular results.<sup>2</sup>

NEPA also created the Council on Environmental Quality (CEQ) to oversee agencies' implementation of NEPA.<sup>3</sup> CEQ regulations provide procedural requirements for reviewing potential environmental impacts of a proposed agency action. CEQ regulations also require each agency to, as necessary, adopt procedures to supplement the CEQ regulations to address implementing procedures.<sup>4</sup> These procedures will include designation of actions that normally require an environmental impact statement, environmental assessment, or are categorically excluded.<sup>5</sup>

According to CEQ, “[c]ategorical exclusions are the most frequently employed method of complying with NEPA.”<sup>6</sup> The following sections 1) address the development of CEQ guidance for using and documenting categorical exclusions, 2) compare a handful of agencies' implementation of categorical exclusion related requirements and guidance, and 3) explore how the courts have addressed agencies' implementation of categorical exclusion related requirements.

### **CEQ Regulations and Guidance for Use and Documentation of Categorical Exclusions**

In 1978, the Council on Environmental Quality (CEQ) issued final regulations implementing procedural provisions of NEPA.<sup>7</sup> CEQ stated that it expected that these regulations would “reduce paperwork, [] reduce delays, and . . . produce better decisions which further the national policy to protect and enhance the quality of the human environment.”<sup>8</sup> One of the provisions CEQ identified for reducing delays, was section 1508.4, Categorical Exclusions<sup>9</sup>:

Categorical Exclusion means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in § 1508.9 even though it is not required to do

so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

Over the years, CEQ has developed guidance on the use and documentation of categorical exclusions.

In 1981, CEQ sought public comment on how agencies were implementing the 1978 CEQ regulations.<sup>10</sup> Specifically, CEQ asked “Have categorical exclusions been adequately identified and defined?”<sup>11</sup> The response was that categorical exclusions were not adequately identified and defined.<sup>12</sup> In addition, comments included concerns about agencies “requiring too much documentation for projects that were not major federal actions with significant effects and also that agency procedures to add categories of actions to their existing lists of categorical exclusions were too cumbersome.”<sup>13</sup>

In 1983, CEQ issued guidance to agencies on ways to carry out activities under the CEQ regulations that addressed public comments.<sup>14</sup> This guidance included a section devoted to categorical exclusions in which CEQ “strongly encourage[d] agencies to re-examine their environmental procedures and specifically those portions of the procedures where ‘categorical exclusions’ are discussed to determine if revisions are appropriate.”<sup>15</sup> Specific areas of concern identified by CEQ were “(1) the use of detailed lists of specific activities for categorical exclusions, (2) the excessive use of environmental assessments/findings of no significant impact and (3) excessive documentation.”<sup>16</sup>

CEQ noted that identifying categorical exclusions using a list of specific activities would not provide agencies “with sufficient flexibility to make decisions on a project-by-project basis with full consideration to the issues and impacts that are unique to a specific project” if this list is applied too narrowly.<sup>17</sup> Accordingly, CEQ encouraged agencies “to consider broadly defined criteria which characterize types of actions that, based on the agency's experience, do not cause significant environmental effects.”<sup>18</sup> CEQ also encouraged agencies “to examine the manner in which they use the environmental assessment process in relation to their process for identifying projects that meet the categorical exclusion definition.”<sup>19</sup>

Specifically, with respect to documentation requirements CEQ “strongly discourage[d] procedures that would require the preparation of additional paperwork to document that an activity has been categorically excluded.”<sup>20</sup> CEQ expressed its belief that “sufficient information

will usually be available during the course of normal project development to determine the need for an EIS and further that the agency's administrative record will clearly document the basis for its decision.”<sup>21</sup> As result of this guidance, some agencies reevaluated and broadened their use of categorical exclusions.<sup>22</sup>

However, while this guidance appears to give agencies broad discretion to identify categorical exclusions, it did provide for a check by CEQ. Specifically, the guidance states that “[c]ategorical exclusions promulgated by an agency should be reviewed by the Council at the draft stage. After reviewing comments received during the review period and prior to publication in final form, the Council will determine whether the categorical exclusions are consistent with the NEPA regulations.”<sup>23</sup>

In September 2003, the NEPA Task Force, established in 2002 by the CEQ Chairman, issued a report to CEQ titled “Modernizing NEPA Implementation,” which provided specific recommendations for categorical exclusion development and revisions.<sup>24</sup> Relevant to this capstone paper, the Task Force found that agencies were confused “about the level of analysis and documentation required to use an approved categorical exclusion, although CEQ consistently has stated that categorical exclusions should have minimal, if any, documentation developed at the time of the specific action application.”<sup>25</sup> Also, the Task Force found that categorical exclusions were infrequently developed and updated by agencies, and that the process varies between agencies.<sup>26</sup>

In February 2010, CEQ announced “steps to modernize, reinvigorate, and ease the use and increase the transparency of the implementation of NEPA.”<sup>27</sup> As part of this, CEQ issued draft guidance for public comment about establishing and applying categorical exclusions.<sup>28</sup> Like the 1983 guidance, the February draft guidance indicated that a purpose of establishing categorical exclusions is to “eliminate unnecessary paperwork and effort reviewing the environmental effects of categories of actions that, absent extraordinary circumstances, do not have significant environmental effects.”<sup>29</sup> The February draft guidance reiterated the 1983 guidance about crafting categorical exclusions (i.e., agencies should broadly define criteria).<sup>30</sup> The draft guidance also restated the 1983 CEQ belief that “sufficient information will usually be available during the course of normal project development,” and went on to state that agencies “should decide if a categorical exclusion determination warrants preparing separate documentation.”<sup>31</sup> Specifically, CEQ suggested that

In cases when an agency determines that documentation is appropriate, the extent of the documentation should be related to the type of action involved, the potential for extraordinary circumstances, and compliance requirements for other laws, regulations, and policies. In all circumstances, categorical exclusion documentation should be brief, concise, and to the point. The need for lengthy documentation should raise questions about whether applying the categorical exclusion in a particular situation is appropriate.<sup>32</sup>

The February draft guidance also provided guidance on substantiating a new categorical exclusion.<sup>33</sup> For example, CEQ identified sources an agency could use to substantiate a new categorical exclusion including previously implemented actions, impact demonstration projects, information from professional staff or scientific analyses, and other agencies' experiences.<sup>34</sup> In addition, it addressed procedures for establishing a new categorical exclusion, which should include opportunities for public review and comment.<sup>35</sup>

Several months later, in December 2010, CEQ issued its final guidance on categorical exclusions.<sup>36</sup> CEQ's responses to public comments indicate that commenters on the draft February guidance were concerned with potentials for delay and creation of administrative burdens.<sup>37</sup> In response, CEQ stated that its final "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."<sup>38</sup> Documentation "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."<sup>39</sup> The final guidance modified previous CEQ guidance in 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."<sup>40</sup> The guidance explained that in some cases, courts required documentation to demonstrate that the environmental effects associated with extraordinary circumstances had been considered by the agency.<sup>41</sup> If an agency determines that documentation is appropriate, CEQ states that this documentation should "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."<sup>42</sup>

## **Agency Procedures for Using and Documenting Categorical Exclusions**

### *U.S. Nuclear Regulatory Commission*

In 1974, the U.S. Nuclear Regulatory Commission (NRC) published a final rule adding 10 CFR Part 51, then titled “Licensing and Regulatory Policy and Procedures for Environmental Protection,” to its regulations. These requirements included four categorical exclusions.<sup>43</sup> In 1980, soon after CEQ published its regulations for implementing NEPA, the NRC issued a proposed rule for comment implementing the CEQ regulations. Specifically, with respect to categorical exclusions, the NRC described the function of the categorical exclusions and proposed expanding its list of categorical exclusions.<sup>44</sup>

The final NRC rule implementing CEQ’s regulations was published in 1984.<sup>45</sup> This final rule expanded the list of categorical exclusions from four to eighteen.<sup>46</sup> Since then, the Commission, through notice and comment rulemaking, has revised its list of categorical exclusions on a couple of occasions.<sup>47</sup>

The NRC’s regulations do not, however, provide specific requirements for documenting categorical exclusions that do not meet the special circumstances criteria. Provisions for documenting NRC’s use of categorical exclusions is contained in NRC guidance documents. For example, NUREG-1748, Environmental Review Guidance for Licensing Actions Associated with NMSS Programs, provides flexibility, stating that all categorical exclusions should be documented “in some manner.”<sup>48</sup> It explains that this documentation provides “evidence that the staff carried out the NEPA process and provides the rationale for applying the [categorical exclusion].”<sup>49</sup> The guidance also provides that, “[a]t a minimum the categorical exclusion should be documented in the safety or technical review or a letter of response to the applicant/licensee noting which categorical exclusion applies and how it applies” and for actions not clearly encompassed by the categorical exclusion, additional documentation should be placed in the license file.<sup>50</sup>

### *U.S. Department of Energy*

Like NRC regulations, the Department of Energy’s (DOE) regulations also include a list of categorical exclusion determinations involving classes of actions.<sup>51</sup> Consistent with CEQ guidance, and like the NRC, DOE has updated its regulations regarding categorical exclusions to

help ensure that the categorical exclusions align with the Department's activities and experiences.<sup>52</sup>

However, unlike NRC's regulations which do not include specific documentation requirements for categorical exclusions, DOE's regulations provide that "categorical exclusion determinations for actions listed in Appendix B shall be documented and made available to the public by posting online, generally within two weeks of the determination, unless additional time is needed in order to review and protect classified information, 'confidential business information,' or other information that DOE would not disclose pursuant to the Freedom of Information Act . . . ."<sup>53</sup> DOE's procedures for online posting were established to further transparency and openness in the Department of Energy's implementation of the NPA process in response to a directive to take affirmative steps to use modern technology to inform the public about DOE operations.<sup>54</sup> DOE's website allows members of the public to search categorical exclusions by date, the categorical exclusion applied, State and Program/Field/Site Office.<sup>55</sup>

DOE also has detailed guidance regarding documentation and online posting of categorical exclusion determinations.<sup>56</sup> Like the NRC guidance in NUREG-1748, DOE's guidance provides the agency some flexibility in its categorical determination documentations, stating "[t]he format and content of the documentation for a [categorical exclusion] determination is not prescribed and, appropriately, may vary among Program and Field Offices."<sup>57</sup>

#### *Department of Agriculture, U.S. Forest Service*

The Department of Agriculture regulations identify specific categorical exclusions for the U.S. Forest Service.<sup>58</sup> These categorical exclusions are organized in two groups: 1) "Actions requiring a supporting record and a decision memo documenting the decision to proceed," and 2) "actions where a supporting record and a decision memo are not required, but may be prepared at the discretion of the responsible official."<sup>59</sup> In addition to categorical exclusions identified by the Forest Service, Congress has also statutorily established categorical exclusions. For example, the Energy Policy Act of 2005 established a categorical exclusion for five types of actions related to oil and gas exploration and development conducted pursuant to the Mineral Leasing Act.<sup>60</sup>

Like the NRC and DOE, the Forest Service also has agency documents that outline policies and procedures with respect to categorical exclusions.<sup>61</sup> For those categories of actions for which a project case file and decision memo are required, the Forest Service Handbook states that “[a]s a minimum, the project or case file should include any records prepared, such as: the names of interested and affected people, groups, and agencies contacted; the determination that no extraordinary circumstances exist; a copy of the decision memo; and a list of the people notified of the decision.”<sup>62</sup> The Handbook also provides prescriptive requirements for the format and content of a decision memo.<sup>63</sup> In addition, it explains that the decision memos are distributed to or notice thereof is provided to “agencies, organizations, and persons interested in or affected by the proposed action.”<sup>64</sup>

Alternatively, for those actions that do not require a decision memo, the Handbook states that “[a]t the discretion of the responsible official, a project or case file and a decision memo . . . may be prepared for” specified categories of actions.<sup>65</sup> For example, the official may choose to prepare a document if it is determined that public interest on the proposed action is high.<sup>66</sup> Even when a decision memo is not required, the Forest Service Handbook states that “any interested and affected persons shall be informed in an appropriate manner of the decision to proceed with the proposed action.”<sup>67</sup>

#### *Department of Interior*

Like agency regulations discussed above, the Department of Interior’s regulations also include a list of categorical exclusions for Department wide-application, most of which are administrative in nature (e.g., routine financial transactions, nondestructive data collection, and budget activities).<sup>68</sup>

In addition, the Department has a manual for its Environmental Programs; various chapters address programs for the Department’s different Bureaus and Services.<sup>69</sup> For example, the chapter for the Bureau of Reclamation includes Bureau specific categorical exclusions.<sup>70</sup> This Bureau also has a NEPA handbook that provides guidance for documenting the use of categorical exclusions.<sup>71</sup> According to this guidance, this documentation

should be a fairly rapid process, taking a few hours or a few days and involving a little research, a few coordination telephone calls, and/or short face-to-face discussions to get information, as needed, to fill out the checklist. Some internal

and external scoping of issues and documentation may also be required. . . . It should include a description of the proposed action, documentation on how it meets the exclusion category, and a list of any environmental commitments associated with the action.<sup>72</sup>

The Department of Interior also had a Manual for the Minerals Management Service (MMS), which includes a list of categorical exclusions.<sup>73</sup> MMS's use of a categorical exclusion recently came under scrutiny after the BP oil disaster.<sup>74</sup> On August 16, 2010, the Secretary of Interior issued a statement that the use of categorical exclusions for offshore oil and gas drilling development activities would be restricted while the Department undertook a comprehensive review of its NEPA process and the use of categorical exclusions.<sup>75</sup>

### **Views from the Courts on the Use and Documentation of Categorical Exclusions**

Over the years, questions regarding categorical exclusions have been addressed by courts. The decisions below illustrate the information and analysis courts may look for when reviewing an agency's use and documentation of a categorical exclusion.

For example, in 2002, the Court of Appeals for the Ninth Circuit held that the Department of Interior did not adequately document its reliance on a claimed categorical exclusion.<sup>76</sup> Specifically, environmental groups and the State of California challenged the United States' use of a categorical exclusion for lease suspensions because the United States had not made a categorical exclusion determination at the time it granted the suspensions.<sup>77</sup> The groups argued that, therefore, the United States was improperly relying on a categorical exclusion as post hoc rationalization.<sup>78</sup>

The Court, quoting a 1996 decision, explained that

“An agency satisfies NEPA if it applies its categorical exclusions and determines that neither an EA nor an EIS is required, so long as the application of the exclusions to the facts of the particular action is not arbitrary and capricious.” It is difficult for a reviewing court to determine if the application of an exclusion is arbitrary and capricious where there is no contemporaneous documentation to show that the agency considered the environmental consequences of its action and decided to apply a categorical exclusion to the facts of a particular decision. Post hoc invocation of a categorical exclusion does not provide assurance that the agency actually considered the environmental effects of its action before the decision was made.<sup>79</sup>

The court went on to state that even “a brief statement that a categorical exclusion is being invoked will suffice.”<sup>80</sup> The court further explained that, “[w]here there is substantial evidence in the record that exceptions to the categorical exclusion may apply, the agency must at the very least explain why the action does not fall within one of the exceptions.”<sup>81</sup> The Court directed the agency to “provide a reasoned explanation for its reliance on the categorical exclusion.”<sup>82</sup>

Another example where an agency’s categorical exclusion was examined by the courts, is a challenge by environmental groups to the Forest Service’s establishment of a categorical exclusion regarding fuel reduction projects.<sup>83</sup> The categorical exclusion at issue was developed in response to the Healthy Forests Initiative, which was announced by President Bush in August 2002.<sup>84</sup> The Forest Service announced its intention to develop a categorical exclusion and then issued a data call.<sup>85</sup> Environmental groups alleged that this categorical exclusion was invalid for a number of reasons, including that it inappropriately included activities that had significant effects; was not supported by data; and the Forest Service did not adequately identify activities covered by the categorical exclusion.<sup>86</sup>

The court found “that because the Forest Service failed to demonstrate that it made a ‘reasoned decision’ to promulgate this categorical exclusion, that its promulgation was arbitrary and capricious.”<sup>87</sup> Specifically, the court concluded that the

Service erred by conducting the data call as a post-hoc rationale for its predetermined decision to promulgate the Fuels CE, failing to properly assess significance, failing to define the categorical exclusion with the requisite specificity, and therefore basing its decision on an inadequate record. . . . Post-hoc examination of data to support a pre-determined conclusion is not permissible because “[t]his would frustrate the fundamental purpose of NEPA, which is to ensure that federal agencies take a ‘hard look’ at the environmental consequences of their actions, early enough so that it can serve as an important contribution to the decision making process.” *California v. Norton*, 311 F.3d 1162, 1175 (9th Cir.2002) (citation omitted). Post-decision information [ ] may not be advanced as a new rationalization either for sustaining or attacking an agency's decision.” *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir.1996).<sup>88</sup>

The court addressed numerous additional failures including, for example, failure to engage in the required “scoping process” prior to establishment of the categorical exclusion; failure to consider adequately the unique characteristics of the applicable

geographic areas, and failure to define the categorical exclusion with requisite specificity.<sup>89</sup>

More recently, in 2013, the Bureau of Land Management's use of a categorical exclusion for a "free use permit" to extract certain amounts of gravel was challenged.<sup>90</sup> The Bureau found that certain free use permits fell within a categorical exclusion and that no extraordinary circumstances existed that would merit more extensive environmental analysis.<sup>91</sup>

The District Court found that the Bureau "provided no more than a ' cursory statement' of no cumulatively significant impacts in applying the categorical exclusion" when issuing the permit.<sup>92</sup> BLM later provided further explanation as to its use of the categorical exclusion, which the District Court found was sufficient and therefore, use of the categorical exclusion was not arbitrary and capricious.<sup>93</sup> The Court of Appeals for the Ninth Circuit affirmed this opinion, concluding that the Bureau "appropriately found that issuance of the gravel permit fell into a categorical exclusion and adequately explained why the permit had no ' cumulatively significant' environmental effects preventing application of the categorical exclusion."<sup>94</sup>

BLM also successfully defended a claim that its application of a categorical exclusion to authorization of road maintenance on various routes throughout public land was arbitrary and capricious.<sup>95</sup> In upholding BLM's application of the categorical exclusion, the court explained that "[A]n agency's interpretation of the meaning of its own categorical exclusion should be given controlling weight unless plainly erroneous or inconsistent with the terms used in the regulation."<sup>96</sup>

## **CONCLUSION**

This capstone paper illustrates the evolution and implementation of guidance and requirements related to the use and documentation of categorical exclusions by Federal agencies. As illustrated above, agencies have adopted practices and procedures over the years to address changes in CEQ guidance as well as their own experiences. While agencies have discretion in when and how to document decisions for using and applying categorical exclusions, as illustrated by case law, it behooves agencies to ensure that their decisions for using categorical exclusions

are reasoned and supported, particularly where there is significant public interest in a proposed action.

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<sup>1</sup> National Environmental Policy Act of 1969, as amended, 42 USC 4331 *et seq.*

<sup>2</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 333 (1989) (“it is well settled that NEPA itself does not impose substantive duties mandating particular results, but simply prescribes the necessary process for preventing uninformed-rather than unwise-agency action”).

<sup>3</sup> 42 USC 4342.

<sup>4</sup> 40 CFR § 1507.3.

<sup>5</sup> CEQ, Report Regarding the Minerals and Management Service’s National Environmental Policy Act Policies, Practices, and Procedures as they Relate to Outer Continental Shelf Oil and Gas Exploration and Development, at 8-9 (Aug. 16, 2010), available at <http://www.whitehouse.gov/sites/default/files/microsites/ceq/20100816-ceq-mms-ocs-nepa.pdf> (last visited Sept. 30, 2014) (“CEQ Report Regarding MMS”) (outlining NEPA and CEQ requirements).

<sup>6</sup> Memorandum for Heads of Federal Departments and Agencies, from Nancy Sutley, Chair, CEQ, Establishing and Applying Categorical Exclusions Under the National Environmental Policy Act, at 2 (Feb. 18, 2010) (“2010 Memorandum”).

<sup>7</sup> National Environmental Policy Act – Regulations, 43 Fed. Reg. 55,978 (Nov. 29, 1978).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 55,979. Other measures designed to reduce delay included requirements related to time limits on the NEPA process, integrating EIS requirements with other environmental review requirements, accelerated procedures for legislative proposals, and finding of no significant impact. *Id.*

<sup>10</sup> Publication of Memorandum to Agencies Containing Guidance on Agency Implementation of NEPA Regulations, 48 Fed. Reg. 34,263 (July 22, 1983) (explaining that CEQ requested comments on August 14, 1981).

<sup>11</sup> *Id.*

<sup>12</sup> 48 Fed. Reg. at 34,264

<sup>13</sup> *Id.* at 34,264-65.

<sup>14</sup> *Id.* at 34,263.

<sup>15</sup> *Id.* at 34,265.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> See Kevin Moriarty, *Circumventing the National Environmental Policy Act: Agency Abuse of the Categorical Exclusion*, 79 N.Y.U. L.REV. 2312, 2325 (2004).

<sup>23</sup> 48 Fed. Reg. at 34,265.

<sup>24</sup> The NEPA Task Force, Report to the Council on Environmental Quality, *Modernizing NEPA Implementation*, at vii (Sept. 2003), available at [http://cdn.ca9.uscourts.gov/datastore/library/2013/02/26/Pacific\\_NEPA%20final.pdf](http://cdn.ca9.uscourts.gov/datastore/library/2013/02/26/Pacific_NEPA%20final.pdf) (last visited Sept. 29, 2014) (“Task Force Report”).

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<sup>25</sup> Task Force Report at 57-58.

<sup>26</sup> *Id.* at 58.

<sup>27</sup> National Environmental Policy Act (NEPA) Draft Guidance, Establishing, Applying, and Revising Categorical Exclusions Under the National Environmental Policy Act, 75 Fed. Reg. 8045 (Feb. 23, 2010).

<sup>28</sup> *Id.*

<sup>29</sup> 2010 Memorandum at 3.

<sup>30</sup> *Id.* 4 (quoting 1983 Guidance).

<sup>31</sup> *Id.* at 10.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 5-10.

<sup>34</sup> *Id.* at 5.

<sup>35</sup> *Id.* at 8.

<sup>36</sup> Final Guidance for Federal Departments of Agencies on Establishing, Applying, and Revising Categorical Exclusions Under the National Environmental Policy Act, 75 Fed. Reg. 75,628 (Dec. 6, 2010).

<sup>37</sup> *Id.* at 75,630.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 75,636.

<sup>41</sup> *Id.* (citing *California v. Norton*, 311 F.3d 1162, 1175-78 (9th Cir. 2002)).

<sup>42</sup> *Id.*

<sup>43</sup> 39 Fed. Reg. 26,279 (July 18, 1974).

<sup>44</sup> Proposed Rule, Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions and Related Conforming Amendments, 45 Fed. Reg. 13739, 13742 (Mar. 3, 1980).

<sup>45</sup> Final Rule, Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions and Related Conforming Amendments, 49 Fed. Reg. 9352 (Mar. 12, 1984).

<sup>46</sup> Categorical Exclusions from Environmental Review, 75 Fed. Reg. 20248, 20249 (Apr. 19, 2010) (describing changes between 1980 proposed rule and 1984 final rule).

<sup>47</sup> *See, e.g., id.* (explaining that as of 2010, NRC had made 14 amendments to the categorical exclusions in 10 CFR 51.22 since 1984).

<sup>48</sup> NUREG-1748, Environmental Review Guidance for Licensing Actions Associated with NMSS Programs, at 2-1 (2003).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> 10 CFR Part 1021, Appendices A & B to Subpart D.

<sup>52</sup> National Environmental Policy Act Implementing Procedures, 76 Fed. Reg. 63,764, 63,764 (Oct. 13, 2011).

<sup>53</sup> 10 CFR 1021.410(e).

<sup>54</sup> Online Posting of Certain DOE Categorical Exclusion Determinations; Policy Statement, 74 Fed. Reg. 52,129 (Oct. 9, 2009). *See also* National Environmental Policy Act Implementing Procedures, 76 Fed. Reg. 63,764, 63,770 (“DOE is codifying at 10 CFR 1021.410(e) its policy to document and post online appendix B categorical exclusion determinations.”) (Oct. 13, 2011).

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<sup>55</sup> See Categorical Exclusion Determinations, [energy.gov/nepa/nepa-documents/categorical-exclusion-determinations](http://energy.gov/nepa/nepa-documents/categorical-exclusion-determinations) (last visited Sept. 29, 2014).

<sup>56</sup> Implementation Guidance for the DOE Policy on Documentation and Online Posting of Categorical Exclusion Determinations: NEPA Process Transparency and Openness, Rev. 1 (May 25, 2010), available at <http://energy.gov/sites/prod/files/G-DOE-ImplGuide-post-CXs-2010.pdf> (last visited Sept. 29, 2014).

<sup>57</sup> *Id.* at 1.

<sup>58</sup> 36 CFR 220.6.

<sup>59</sup> National Environmental Policy Act Procedures, 73 Fed. Reg. 43084, 43088 (July 24, 2008).

<sup>60</sup> Section 390 of the Energy Policy Act of 2005, 42 USC 15492. See also Memorandum to Regional Foresters, Energy Policy Act of 2005, Use of Section 390 Categorical Exclusions for Oil and Gas (June 9, 2010), available at <http://www.fs.fed.us/emc/nepa/includes/390guidance2.pdf> (last visited Sept. 30, 2014).

<sup>61</sup> FSH 1909.15, National Environmental Policy Act Handbook, Chapter 30 – Categorical Exclusion From Documentation (May 28, 2014), available at [http://www.fs.fed.us/emc/nepa/nepa\\_procedures/index.htm](http://www.fs.fed.us/emc/nepa/nepa_procedures/index.htm) (last visited Sept. 29, 2014).

<sup>62</sup> *Id.* at 32.2 – Categories of Actions for which a Project or Case File and Decision Memo are Required.

<sup>63</sup> *Id.* at 33.3 – Format and Content of a Decision Memo.

<sup>64</sup> *Id.* at Chapter 34 – Notice and Distribution of Decision Memo.

<sup>65</sup> *Id.* at Chapter 32 – Categories of Actions Excluded from Documentation.

<sup>66</sup> *Id.* at 33.1.

<sup>67</sup> *Id.*

<sup>68</sup> 43 CFR 46.210.

<sup>69</sup> See Department of Interior, Series 31 – Environmental Quality Programs, available at <http://elips.doi.gov/ELIPS/Browse.aspx?startid=1715> (last visited Sept. 29, 2014) (listing separate chapters for the various Bureaus and services, including for example, Bureau of Indian Affairs, National Park Service, and the Bureau of Reclamation).

<sup>70</sup> *Id.* at Chapter 14, Section 14.5 (last updated Aug. 2012), available at <http://elips.doi.gov/ELIPS/DocView.aspx?id=1727> (last visited Sept. 29, 2014).

<sup>71</sup> Reclamation Managing Water in the West, Reclamation's NEPA Handbook (Feb. 2012), available at [http://www.usbr.gov/nepa/docs/NEPA\\_Handbook2012.pdf](http://www.usbr.gov/nepa/docs/NEPA_Handbook2012.pdf) (last visited Sept. 29, 2014).

<sup>72</sup> *Id.* at 5-1.

<sup>73</sup> CEQ Report Regarding MMS, at 20 n.60 (citing Chapter 15 of DOI's Departmental Manual).

<sup>74</sup> See Anne Brinkmann, The BP Oil Spill and Calls to Improve NEPA's Categorical Exclusions, posted February 26, 2011 at <http://gwujeel.wordpress.com/2011/02/26/the-bp-oil-spill-and-calls-to-improve-nepas-categorical-exclusions/> (last visited Sept. 30, 2014) (discussing the use of a categorical exclusion for Deepwater drilling); CEQ, Report Regarding MMS.

<sup>75</sup> Press Release, Categorical Exclusions for Gulf Offshore Activity to be Limited While Interior Review NEPA Process and Develops Revised Policy (Aug. 16, 2010), available at <http://www.doi.gov/news/pressreleases/Categorical-Exclusions-for-Gulf-Offshore-Activity-to-be-Limited-While-Interior-Reviews-NEPA-Process-and-Develops-Revised-Policy.cfm>.

<sup>76</sup> *California v. Norton*, 311 F.3d 1162 (9th Cir. 2003).

<sup>77</sup> *Id.* at 1175.

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 1176 (quoting *Bicycle Trails*, 82 F.3d 1445 (9th Cir. 1996)).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 1177.

<sup>82</sup> *Id.* at 1178.

<sup>83</sup> *Sierra Club v. Bosworth*, 510 F.3d 1016 (9th Cir. 2007).

<sup>84</sup> *Id.* at 1019.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 1021-22.

<sup>87</sup> *Id.* at 1026.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 1026-1033.

<sup>90</sup> *Center for Biological Diversity v. Salazar*, 706 F.3d 1085 (9th Cir. 2013).

<sup>91</sup> *Id.* at 1089.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 1090.

<sup>94</sup> *Id.* at 1097.

<sup>95</sup> *Oregon Natural Desert Ass'n v. Cain*, 2014 WL 1706457 (D. Oregon Apr. 29, 2014) (slip op.).

<sup>96</sup> *Id.* at \*2 (quoting *Alaska Ctr. For Env't v. US Forest Serv.*, 189 F.3d 851, 857 (9th Cir. 1999)).