

**Statement of
Mark Rey
Under Secretary
For Natural Resources and Environment
U.S. Department of Agriculture**

Before

**The HOUSE COMMITTEE ON NATURAL RESOURCES
NATIONAL PARKS, FORESTS, AND PUBLIC LANDS SUBCOMMITTEE**

Concerning

**Management by Exclusion: The Forest Service Use of Categorical Exclusions from
NEPA**

June 28, 2007

Mr. Chairman and members of the subcommittee, thank you for the opportunity to discuss Forest Service use of categorical exclusions. I am pleased to be here with you today.

First, I would like to clarify that categorical exclusions (CEs) are a part of National Environmental Policy Act implementation, not an exclusion from NEPA, as provided for by the Council on Environmental Quality (CEQ) regulations. The purpose of a categorical exclusion is to eliminate the need for unnecessary paperwork and effort to assess the environmental effect of actions that normally do not warrant preparation of an Environmental Assessment (EA) or Environmental Impact Statement (EIS) .

As defined by the CEQ regulations, a categorical exclusion is a category of actions which experience has indicated will not have a significant environmental effect on the environment and can be categorically excluded from documentation in an Environmental Assessment or Environmental Impact Statement (40 CFR 1508.4). Categorical exclusions (CEs) are an integral part of the implementation of NEPA and promote the cost-effective use of agency NEPA related resources.

The Forest Service implementation of categorical exclusions considers effects, including cumulative effects, which result from implementation of management actions. The important distinction for categorical exclusions is that the agency has determined, in establishing the categorical exclusion, that these effects for the category of actions are not significant, absent extraordinary circumstances. Using the terminology of the CEQ regulations, a categorically excluded project is exempt from the more lengthy analysis and documentation in an EA or EIS because it does not have significant effects. When using a categorical exclusion, federal agencies must still comply with all requirements of any applicable laws, regulations, and policies including NEPA.

Development of Categorical Exclusions

Categorical exclusions promote the cost-effective use of agency NEPA-related resources. The CEQ, in 1983, encouraged agencies to create additional categorical exclusions because they are perceived to be less of a burden on agency resources than EAs or EISs (CEQ “Guidance Regarding NEPA Regulations”, 48 FR 34263 (July 28, 1983)). The CEQ issued draft guidance in 2006, again encouraging agencies to designate more categorical exclusions (71 FR 54816 (2006)).

When establishing implementing procedures, CEQ regulations direct federal agencies to identify those actions which experience has indicated will not have a significant environmental effect and categorically exclude them from documentation in an EA or EIS (40 CFR 1507.3(b)(2)(ii) and CEQ “Guidance Regarding NEPA Regulations”, 48 FR 34263 (July 28, 1983)). Agencies have been encouraged to identify CEs using broadly defined criteria rather than developing lists of specific activities. By taking this approach, the CEQ believes agencies will have sufficient flexibility to make decisions on a project-by-project basis with full consideration of the issues and impacts that are unique to a specific project. CEQ has used an interagency work group to develop guidance to Federal agencies for establishing and for using categorical exclusions in meeting their responsibilities under NEPA. 71 Fed. Reg. 5418 (September 19, 2006). CEQ is currently considering public comments on that draft guidance.

To establish a categorical exclusion, various sources of information relevant to the proposed category of actions and its environmental effects may be used. Sources may include, but are not limited to: evaluation of implemented actions, impact demonstration projects, information from professional staff and expert opinion or scientific analyses, and others’ experiences (benchmarking). The information used to support establishing a categorical exclusion demonstrates how the agency determined that the proposed category of actions does not typically result in significant environmental effects.

Agencies must consult with and obtain a conformity determination from CEQ for compliance with NEPA and its implementing regulations before establishing a new categorical exclusion. CEQ regulations require federal agencies to publish any proposed categorical exclusion in the Federal Register and provide a period during which the public may submit comments on the proposal (40 CFR 1507.3(a)). The Forest Service provides for public notice and comment on every categorical exclusion it develops.

Administratively Created Categories

In addition to the legislated CEs, the Forest Service has administratively created CEs for a variety of activities, including limited timber harvest, Healthy Forest Initiative, special uses and limited oil and gas exploration and development. All agency documentation for these categories was made available for notice and comment.

Limited Timber Harvest

In 2003, the Forest Service administratively created new categories for limited timber harvest. The activities permitted under the category include limited timber harvest of live trees to maintain forest health and improve stand condition, salvage of dead and dying trees and sanitation harvests in response to ongoing insect and disease infestations. These categories were published as proposals for notice and comment in the Federal Register on January 8, 2003. The comment period was open for 60 days and approximately 16,700 comments were received.

In examining the basis for proposing categorical exclusions for limited timber harvest, the Forest Service looked at two sets of data. In 2001, the Forest Service reviewed 154 timber harvest projects for which monitoring had validated the predicted environmental effects. The Forest Service also analyzed all categorically excluded timber harvest activities reported for 1998, the last year the timber harvest categorical exclusion was available to the Forest Service.

Of the 154 projects reviewed for establishing these categories, 122 were categorical exclusions documented with decision memos and 32 were documented with an environmental assessment. None of the 154 projects reviewed predicted significant effects on the human environment before the project was implemented. After implementation, on-site reviews of environmental effects of these projects were conducted by interdisciplinary teams of resource specialists. The interdisciplinary review teams' measurements and observations were documented in a database. These data remain available on the world wide web and may be viewed at <http://www.fs.fed.us/emc/lth>.

The 1998 data analysis involved 306 categorically excluded timber harvest projects. The analysis was conducted to estimate to what extent the old timber harvest categorical exclusion was used and to determine average project size and harvest volume. (The last year that categorical exclusion could be used was 1998.) Each Forest Service Region provided acreage and volume information for each categorically excluded timber harvest conducted in 1998.

The Forest Service found that the categories of actions defined under the limited timber harvest CE did not individually or cumulatively have significant effects on the human environment. The agency's finding is first predicated on data representing the expert judgment of the responsible officials who made the original findings and determinations for the 154 projects reviewed in 2001; the resource specialists who validated the predicted effects of the 154 reviewed activities after the projects were completed; and a belief that the profile of past timber harvest activities drawn from the 1998 data represents the agency's past practices and is indicative of the agency's future activities. The CEQ, upon review of this CE, found that the CE conformed with NEPA and its implementing regulations. The final guidance for the Limited Timber Harvest CEs was published on July 23, 2003.

Healthy Forest Initiative CEs

Under the Healthy Forests Initiative, the Forest Service and the Department of the Interior administratively created two new categorical exclusions in 2003 for fire management activities. The activities permitted under these categories include hazardous fuels reduction and post-fire rehabilitation. These categories were published as proposals for notice and comment in the Federal Register on December 16, 2002. The comment period was open for 45 days and nearly 39,000 comments were received.

The Forest Service and the Department of the Interior reviewed over 2,500 hazardous fuels reduction and fire rehabilitation projects to establish the basis for proposing these categorical exclusions. Of the 2,559 project records reviewed, 28 were documented with environmental impact statements, 1,434 were documented with environmental assessments, and 1,097 were documented under existing categorical exclusions.

In addition to reviewing 2,559 projects, the agencies also reviewed 153 peer-reviewed scientific publications analyzing the influence of forest structure on wildfire behavior and the severity of its effects. This literature review found that forest thinning and prescribed burning have been long employed by land managers to maintain forest health and reduce wildfire risk. These benefits are supported by hundreds of scientific investigations and years of professional field experience. The review also found that thinning and prescribed burning, when conducted properly with safeguards, can reduce wildfire risk.

Based on site-specific project-level analysis of environmental effects, post-activity validation of those effects, the synthesis of scientific publications, and the belief that the profile of projects reviewed represents the agencies' past practices and is indicative of the agencies' future activities, the agencies concluded that category of actions covered by the Healthy Forest Initiative CEs do not individually or cumulatively have a significant effect on the human environment. While confident in this conclusion, the agencies, nevertheless, have established acreage limitations for these categories and Forest Service Research and Development is continuing to study these relationships. The CEQ, upon review of this CE, found that the CE conformed with NEPA and its implementing regulations. The final guidance for the Healthy Forests Initiative CEs was published on July 23, 2003.

Special Use Permit CE

In 2004, the Forest Service administratively created a categorical exclusion for the issuance of a new special use authorization to replace an existing or expired special use authorization. This CE can only be used when the issuance of a new special use authorization is ministerial, that is when there are no changes to the authorized facilities or increase in the scope or intensity of authorized activities, and the applicant or holder is in full compliance with the terms and conditions of the special use authorization. This category was published as a proposal for notice and comment in the Federal Register on September 20, 2001. The comment period was open for 60 days and nearly 26,000 comments were received.

To document rationale for the CE, the Agency's Special Uses Program approached its Regional Lands and Recreation Special Use Program Coordinators to obtain their input and feedback on why they believe the proposed categorical exclusion was appropriate. Moreover, the Forest Service wanted to more clearly validate its rationale based on the experience of these program experts.

Responses indicated that the categorical exclusion would primarily be used to continue the authorization of a variety of "static" non-ground disturbing facilities or activities, which based on their past experience, do not have significant environmental effects. Furthermore, the Forest Service determined that the evaluation for extraordinary circumstances would ensure appropriate use of the categorical exclusion.

The program managers who provided written responses to questions posed at the annual special uses coordinators meeting represent over 550 years of combined experience in Forest Service special uses administration. The NEPA specialists queried represent over 250 years of combined experience with NEPA policy and compliance. Based on over 800 person-years of experience with special use authorizations and NEPA compliance; and considering the provisions of law, regulation, agency policy; and the effects of past actions; the activities authorized in decisions documented under the new categorical exclusion would not individually or cumulatively have a significant effect on the human environment. Accordingly, the Agency determined it appropriate to identify this category of action as excluded from requirements for documentation in an EA or EIS. The CEQ, upon review of this CE, found that the CE conformed with NEPA and its implementing regulations. The final guidance for the special use permit CEs was published on July 6, 2004.

Oil and Gas Exploration CE

The Forest Service has promulgated a new CE for limited oil and gas exploration and development activities in newly identified fields. This CE does not, and is not intended to, overlap or duplicate the activities contained in the CEs provided under Section 390 of the Energy Policy Act of 2005. It is complementary to Section 390 and taken in concert, this CE and the five statutory CEs provide the ability to analyze and approve a full range of small projects with non-significant environmental effects in existing and new fields or corridors. In approving this CE, the Forest Service followed a public notice and comment process. This category was published as a proposal for notice and comment in the Federal Register on December 13, 2005. The comment period was open for 60 days and 108 comments were received.

In establishing this CE, the Forest Service reviewed the effects of every small oil and gas exploration and development project authorized over a five year period. Based on general program experience and the results of this review, the Forest Service determined that activities with limited road-building and utility-laying do not have significant effects and therefore would not require documentation in an environmental assessment or environmental impact statement. This CE covers decisions to approve a surface use plan of operations for oil and gas exploration and initial development activities, associated with or adjacent to a new oil and/or gas field or area, so long as the approval will not

authorize activities in excess of any of the following: one mile of new road construction; one mile of road reconstruction; three miles of individual or co-located pipelines and/or utilities disturbance; and four drill sites. The CEQ, upon review of this CE, found that the CE conformed with NEPA and its implementing regulations. Since approval of this new CE on February 15, 2007, the category has been used two times.

Legislated Categorical Exclusions

Recently enacted laws have established or directed the establishment of several categorical exclusions. The Energy Policy Act of 2005 (P.L. 109-58) included statutory categorical exclusions for certain oil and gas development for projects disturbing fewer than five acres. The FY2005 Consolidated Appropriations Act (PL 108-447) included a categorical exclusion for decisions made to authorize grazing on an allotment. In addition, section 404 of the Healthy Forests Restoration Act (P.L. 108-148) of 2003 established a categorical exclusion for applied silvicultural assessments.

Section 390 of the Energy Policy Act directs the Secretaries of the Interior and Agriculture to use five new categorical exclusions (CEs) for approving oil and gas activities conducted pursuant to the Mineral Leasing Act. The Section 390 CEs are limited to oil and gas activities in existing areas of development that have had previously approved development analyzed through a NEPA process. The new activities must either be within areas covered by a land use plan approved within the previous five years, or with surface disturbance limited to 5 acres and a previous project with a NEPA process decision. To date, the Forest Service has used the Section 390 CEs to approve about 300 projects.

Section 339 of the FY2005 Consolidated Appropriations Act provided the Secretary of Agriculture with authority to categorically exclude decisions to authorize grazing and reissue grazing permits for 900 grazing allotments nationally through FY2007. The CEs may be used if: (1) the decision continues current grazing management; (2) monitoring indicates that current grazing management is meeting, or satisfactorily moving toward, objectives in the land and resource management plan, as determined by the Secretary; and (3) the decision is consistent with agency policy concerning extraordinary circumstances. To date, the Forest Service has used this category to authorize grazing on 272 allotments.

Title IV, section 404 of the Healthy Forests Restoration Act provided the Secretaries of Agriculture and the Interior authority to carry out applied silvicultural assessments and research treatments on not more than 1,000 acres. The silvicultural assessments and research treatments allowed under this category are not to be adjacent and are subject to the extraordinary circumstances established by the agency. To date, the Forest Service has used this category to approve 7 projects.

Use of Categorical Exclusions

The procedure by which the Forest Service identifies important issues and determines the extent of analysis necessary for an informed decision on a proposed action is termed scoping (40 CFR 1506.6). Although the CEQ regulations require scoping for only EIS preparation, the Forest Service has broadened the concept to apply to all proposed

actions, including those that would appear to be categorically excluded (FSH 1909.15 30.3(3)).

In determining the scope of a proposed action, the responsible official is required to consider the action's environmental effects, including the direct, indirect and cumulative impacts (see 40 CFR 1508.25). Section 30.3(3) of FSH 1909.15 adds this consideration before categorically excluding an action from documentation in an environmental assessment or an environmental impact statement:

“Scoping is required on all proposed actions, including those that would appear to be categorically excluded. If the responsible official determines, based on scoping, that it is uncertain whether the proposed action may have a significant effect on the environment, prepare an EA. If the responsible official determines, based on scoping, that the proposed action may have a significant environmental effect, prepare an EIS.”

The Forest Service Manual provides direction to line officers that the degree of the potential direct, indirect, and cumulative effects on extraordinary circumstances must be considered when scoping a proposed action that might be categorically excluded.

Scoping influences the appropriate level of documentation. After the nature of the proposed action is determined, preliminary issues and interested and affected agencies, organizations, and individuals are identified and the extent of existing documentation determined, the responsible official should have sufficient data to establish whether the proposed action can be categorically excluded from further documentation in an EIS or an EA.

In addition to scoping, notice is given to the public of all upcoming proposals, including proposals that may be authorized with CEs, and those which may undergo analysis and documentation in an EA and EIS, through the use of a quarterly schedule of proposed actions. The purpose of the schedule is to give the public an early informal notice of projects of which they may have an interest (FSH 1909.15, 07).

In determining whether a categorical exclusion may be used, the Forest Service applies a two prong test: (1) whether the proposed action fits within an existing categorical exclusion, and (2) whether there are any extraordinary circumstances that would preclude the proposed action from qualifying to be categorically excluded (FSH 1909.15, 30.3).

In accordance with CEQ regulations, a federal agency's NEPA procedures for categorical exclusions must provide for extraordinary circumstances (40 CFR 1508.4). Extraordinary circumstances function to identify the atypical situation or environmental setting where an otherwise excluded action merits further analysis and documentation in an EA or EIS.

The Forest Service NEPA procedures at FSH 1909.15, Chapter 30, list the extraordinary circumstances in which a normally excluded action may have a significant environmental effect. Extraordinary circumstances, listed as resource conditions in the agency's

handbook, that should be considered in determining whether the proposed action warrants further analysis and documentation in an EA or an EIS are:

- a. Federally listed threatened or endangered species or designated critical habitat, species proposed for Federal listing or proposed critical habitat, or Forest Service sensitive species.
- b. Flood plains, wetlands, or municipal watersheds.
- c. Congressionally designated areas, such as wilderness, wilderness study areas, or national recreation areas.
- d. Inventoried roadless areas.
- e. Research natural areas.
- f. American Indians and Alaska Native religious or cultural sites.
- g. Archaeological sites, or historic properties or areas.

Section 30.3 of the Forest Service Handbook also states, “The mere presence of one or more of these resource conditions does not preclude use of a categorical exclusion. It is the degree of the potential effect of a proposed action on these resource conditions that determines whether extraordinary circumstances exist.”

Categorical exclusions are used to analyze a variety of projects implemented by the Forest Service. There are 15 administratively created and 7 legislated categories of actions for which a project or case file and decision memo are required and 15 categories for which a project or case file and decision memo are not required. The categories for which a project or case file and decision memo are required include trail construction and reconstruction, timber stand and/or wildlife habitat improvement, hazardous fuels reduction, limited timber harvest, authorization of grazing and approval of limited oil and gas activities.

Currently, available data indicates that over the last two fiscal years the agency has used categorical exclusions for roughly 80% of its NEPA documentation (See Table 1). These percentages are similar to those documented by the Congressional Research Service for categorical exclusions used by the Federal Highway Administration in 2005.

Table 1
Decision Type for FY 2005 - 2006

	FY2005	FY2006
EIS Record of Decision (ROD)	73 (2%)	72 (2%)
EA Decision Notice (DN)	574 (18%)	544 (17%)
CE Decision Memo (DM)	2489 (80%)	2677 (81%)
Total	3136	3293

The Government Accountability Office (GAO) produced a report in 2006 on the Forest Service's use of categorical exclusions for vegetation management projects for calendar years 2003 through 2005. The GAO examined the Forest Service's use of five specific types of categorical exclusions, environmental assessments, and environmental impact statements to approve vegetation management projects. The audit included 155 national forests, representing 509 ranger districts.

During the study period categorical exclusions were used to approve 72% of the studied projects (2,187 projects); Environmental assessments and environmental impact statements were used to approve 28% of the studied projects (831 projects). The majority of the studied projects were approved using categorical exclusions. The total acres treated under decisions analyzed and documented under CEs was slightly less than that treated under decisions analyzed and documented under environmental assessments and environmental impact statements.

Categorical exclusions were used to approve 46% of the acreage within the studied projects (2.9 million acres); Environmental assessments and environmental impact statements were used to approve 54% of the acreage within the studied projects (3.4 million acres).

Recent court rulings on the Forest Service use of CEs have had a significant impact on a range of management activities throughout the country. Thousands of projects that we had found to have insignificant environmental impacts are now subject to formal notice, comment and appeal under the rules implementing the Appeals Reform Act, 36 CFR 215, lengthening the time to conduct such activities, increasing their costs and increasing the amount of information needed to document decisions.

The Forest Service is the only federal agency with a statutory notice, comment, and appeal process applied to CEs. As a result of a 2005 District Court ruling, that legislated process now applies to Forest Service categorical exclusions. On October 9, 2005, US District Judge for the Eastern District of California James Singleton in Earth Island v. Pengilly, 376 F. Supp. 2d 994 (E.D. Cal. 2005); affirmed in part Earth Island Institute v. Ruthenbeck, No. 05-16975 (9th Cir. amended opinion June 8, 2007) ruled that categorically excluded timber sales and ten other categorically excluded activities are subject to notice, comment, and appeal under the 36 CFR 215 rules. As a result of that ruling, items usually covered under categorical exclusions are now required to undergo notice, comment, and appeal; a process that can take over 135 days to complete. Prior to this court decision, categorical exclusions for vegetation management projects were not subject to this additional time.

The procedural changes brought on by rulings in the *Earth Island Institute* case have had important consequences on our ability to conduct routine operations where there are no adverse effects to extraordinary circumstances. Being able to move swiftly to accomplish project work is essential to people whose livelihood is dependent upon time-sensitive

decision making. In fact, the risk of not taking action may often exceed the environmental effects of project implementation.

The following are examples of projects analyzed and documented using CEs prior to the *Earth Island Institute* case. These projects illustrate the utility of CEs to accomplish a variety of objectives on National Forests.

In response to the devastation of Hurricane Katrina, District Rangers on the De Soto National Forest in Mississippi signed multiple decision memos to remove hazardous trees from along roadsides, trails, recreation areas, and boundary lines beginning in November 2005 and continuing through 2007. The decisions included identification of hazard trees by Forest Service employees and mitigation of hazards by felling or follow-up tree disposal methods, to minimize health and safety concerns for the public, as well as for the protection of both Forest Service and privately owned resources.

Because Hurricane Katrina blew down trees and created heavy fuels buildup, the forest revisited existing decisions using categorical exclusions for prescribed fire and establishing fire control lines. This facilitated a swift response to the threat of catastrophic wildland fire and the unit's ability to quickly establish fuel breaks in areas near the wildland urban interface.

Using categorical exclusions expedited the response to the catastrophic impacts of Hurricane Katrina. They were instrumental in providing for public safety and support of emergency response operations. Although most of these activities took place in the middle of a disaster, the Forest made every effort to keep the public informed throughout the recovery effort.

Using categorical exclusions to analyze and document the environmental effects enabled the forest to open 1304 miles of roads for emergency support access and wildland fire suppression response. Over 750 miles of fuel breaks were established to protect adjacent high values at risk from a catastrophic wildland fire in the wildland urban interface. Hazardous fuels were removed from developed recreation and administrative sites. Developed recreation areas were reopened for public use within 10 months after Hurricane Katrina landed. To date, over 80 miles of trails are open for public use on the De Soto National Forest as a result of decisions documented using CEs.

In southwest Utah, the rapidly growing community of New Harmony has expanded along the boundaries of the Dixie National Forest (Dixie NF), the Bureau of Land Management (BLM), and Zion National Park (Zion NP). Many homes and subdivisions now border the heavily vegetated foothills of the Pine Valley Mountains. Large wildland fires, such as the Sequoia Fire (8,100 acres) in 2002 and the Harmon Creek Fire (493 acres) in 2000, and numerous small wildland fires have burned around New Harmony and several of the outlying subdivisions. In the summer of 2003, planning was initiated for the Dixie NF to extend and expand the fuel break that was started during the 2002 Sequoia Fire. This would strengthen the existing fuel break and link it to the Ash Creek Project on BLM lands. The Dixie National Forest used the newly released Healthy Forests Initiative

Categorical Exclusion. Scoping letters were mailed to 559 members of the public, government entities and interested organizations. A decision memo was signed on the project in 2003 and the fuels treatments were completed in 2004. On June 25, 2005, at 1:49 p.m., lightning ignited the Blue Spring fire south of New Harmony. It grew over 5 days to 12,286 acres, ending in the backyards of Harmony Heights. Dixie National Forest and BLM fuel treatments influenced the movement of the fire, allowing firefighters to protect homes from destruction. While the Blue Spring fire was by no means the largest fire in southern Utah in 2005, it was significant in that the fuels projects were dominant factors in the rate and direction of spread. Homes were preserved because of the fuel breaks created under these categorical exclusions.

Summary

In summary, CEs are part of full compliance with the National Environmental Policy Act (NEPA). Categorical exclusions are not an exclusion from NEPA. The CEQ regulations (40 CFR 1500 et seq.) for implementing NEPA allowed agencies to include categorical exclusions in agency NEPA procedures. Agencies are to reduce excessive paperwork and delay by using categorical exclusions to define categories of actions which do not individually or cumulatively have a significant effect on the human environment and which are therefore exempt from requirements to prepare an EA or EIS (§ 1500.4(p)) and (§ 1500.5(k)).

The Department considers categorical exclusions an integral tool for NEPA compliance used to meet its mission of “Caring for the Land and Serving People.” I would be happy to answer any questions you may have.