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The White House Council on Environmental Quality has issued the first of three expected final guidance documents for federal agencies implementing the National Environmental Policy Act. This one, which covers the use of categorical exclusions, is an excellent start.

NEPA is the “look before you leap” environmental law. It requires that federal agencies publicly evaluate environmental impacts before taking action. That means preparing an Environmental Impact Statement before taking actions that significantly affect the quality of the human environment, or an Environmental Assessment if it’s not clear whether an EIS is required.

Categorical exclusions minimize needless paperwork by allowing agencies to identify in advance actions that, individually and collectively, do not have significant environmental impacts and therefore do not require either an EA or an EIS. But it’s important that categorical exclusions accurately identify actions that don’t have significant environmental impacts, because the adoption of a categorical exclusion means those actions won’t get more than a cursory individual look. The shortcomings of current categorical exclusion practice were brought home by the Deepwater Horizon disaster; the ill-fated Macondo well and hundreds of others in the Gulf of Mexico were approved without detailed environmental analysis under a categorical exclusion established 30 years ago.

The new guidance is intended to make sure that categorical exclusions are used only where appropriate. Since, as the guidance points out, “categorical exclusions are the most frequently employed method of complying with NEPA,” oversight of their use is critical to assuring that NEPA achieves its goals of assuring that agencies and the public understand the environmental consequences of federal actions. If followed, this guidance will provide new rigor and transparency to the use of categorical exclusions. Although CEQ has been careful to describe the guidance as non-binding, it will have substantial force both because it explains CEQ’s view of what its binding regulations require and because it represents the considered view of the White House.

The guidance encourages important changes both to the creation of new categorical exclusions and to the application of existing ones.

With respect to new categorical exclusions, it urges clearer explanation and more

substantial showing that the actions included will not have significant environmental impacts. CEQ recognizes that in some cases it is obvious that classes of actions — the examples given include conducting a surveys and purchasing small amounts of office supplies — will not have significant environmental effects. But many categorical exclusions cover actions like timber harvests and exploratory oil drilling, where it is obvious that there are *some* environmental impacts and the question is where the threshold lies between significant and insignificant effects. In those cases, CEQ is calling for categorical exclusions to be supported by evidence, such as documentation that similar actions in the past have not produced significant impacts. Importantly, CEQ is not ready to accept unverified forecasts as substantiating evidence. Agencies can't simply say that they've done a lot of EAs for this type of action and have never decided that they needed an EIS, which is how the former Minerals Management Service justified the Gulf of Mexico categorical exclusion. They'll have to revisit those forecasts to make sure they were right. Or they can do impact demonstration projects, essentially experiments to check the environmental impacts, or provide a literature review and the opinions of qualified experts. Whatever the justification, it will have to be explained not only to CEQ but to the public, with an opportunity for comment.

With respect to existing categorical exclusions, the guidance encourages both more rigorous application and periodic review.

It tells agencies that they may need to document the application of a categorical exclusion when it's not obvious that there are no significant environmental impacts. And although they need not offer a public comment period, agencies are encouraged to use their web sites to provide information about their categorical exclusions and the use of those exclusions.

The guidance also encourages agencies to review their categorical exclusions at least every seven years. CEQ correctly rejected calls to "grandfather" existing categorical exclusions. Instead, it encourages all agencies to review their categorical exclusions under the new, more rigorous, standards to determine if they have been appropriately defined and whether they require updating because of changes in the underlying activities. That's an obvious nod to the Deepwater Horizon experience, where MMS continued to apply a categorical exclusion adopted for shallow-water operations as drilling moved into deeper and deeper waters. CEQ calls for review first of the categorical exclusions "that were established earliest and/or . . . may have the greatest potential for significant environmental impacts." While it leaves agencies room to defend whatever timeframe they think is

appropriate, the guidance suggests that every categorical exclusion be reviewed at least every seven years. In a nod to executive discretion and practical realities, the guidance stops short of saying that use of older categorical exclusions would automatically violate NEPA, but it certainly raises the possibility of a successful challenge if an agency could not document the continued viability of an old categorical exclusion.

Overall, this guidance is a very positive sign that CEQ is flexing its White House muscles, and an excellent start at standardizing quality NEPA implementation. If followed, it will go a long way toward reining in overuse of categorical exclusions. There is every reason to expect that it will be followed, if CEQ provides continued oversight and has the support of the President. It also suggests that the coming guidance on evaluation post-NEPA will be strong. At several points, this guidance encourages and provides incentives for monitoring and follow-up. It seems clear that CEQ understands the importance of not simply shelving NEPA forecasts once a project has been approved.