Testimony by
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Subcommittee on National Parks, Forests and Public Lands
Committee on Natural Resources
U.S. House of Representatives

Oversight Hearing on Management by Exclusion:
The Forest Service Use of Categorical Exclusions from NEPA

Thursday, June 28, 2007 --10:00 a.m.
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Mr. Chairman, Ranking Member Bishop, and members of the Subcommittee, thank you for inviting me to testify today.

The subject of National Environmental Policy Act implementation deserves careful continuing oversight from this Subcommittee and the Congress as a whole. Since its enactment in 1969, NEPA has become a fundamental feature of the architecture of American governance.

NEPA is at the heart of how federal agencies make decisions and engage the American public in the work of governing.

There is simply nothing else like NEPA Other laws, like the Administrative Procedure Act or the Freedom of Information Act, offer the American people a window into their federal government. NEPA is different. It isn't a window -- it's a doorway. It provides federal decision-makers with a convenient way to bring citizens into the decision-making process and to bring decision-making to the American people.

If agencies use NEPA wisely -- and, as discussed below, many do -- the law helps agencies make efficient and intelligent decisions. Used correctly, NEPA helps agencies build public credibility for the agencies themselves, their leaders, and their programs.

Categorical exclusions are an important part of using NEPA wisely. The purpose of categorical exclusions is to accommodate the reality that not every federal agency decision is consequential in terms of impacts on the human environment, and thus not every decision merits incremental analysis and public engagement. There are thousands of decisions made by agencies every week that do not have consequences of a scale or nature that justify re-opening the NEPA door to re-engage the public in the agency's decision-making. Categorical exclusions boiled down to their simplest ingredient are a way of making sure that NEPA compliance does not mean that agencies or members of the public have to waste time poring over things that do not matter very much.

There are risks inherent in the use of categorical exclusions. They can be abused. Intentional or not, an ill-founded categorical exclusion is nothing more than a device by an agency to evade accountability for the impacts on the human environment of decisions the agency chooses to make.

Agencies and Administrations always have reasons to wish to do some things without accounting for them. Individual agency officials have biases and agendas that do not show well in daylight. These are weaknesses inherent in government and human beings. They are entirely non-partisan. The negative consequences eventually afflict every type of stakeholder, though at any given moment the burden tends to follow the political winds.

Federal officials who are unwilling to be honest, or allow their agencies to be honest about the potential adverse impacts of actions they intend to take are malignancies in our system of governance. Unlawful categorical exclusions are symptoms of that underlying malignancy; they tend to come in three different forms.

The first occurs when an agency fails to establish a rational, empirical basis for deciding that certain decisions or actions do not have a significant impact on the human environment. These cases typically involve agencies that never take a serious look at the potential impacts of a category of actions pursuant to NEPA and decide simply to declare by fiat that the particular category of actions does not involve significant impacts. We can call this situation "Flying Blind."

The second typical case occurs when an agency disregards empirical evidence of potentially significant impacts from certain categories of actions. The problem usually is not that the agency pretends that documented impacts don't exist. Instead, the agency usually acknowledges the potential impacts, but decides that the impacts are not "significant" as that term is used in NEPA, and thus do not require further review under NEPA. Usually this means that the agency has decided to ignore the fact that "significance," as that term is used in NEPA, is a carefully nuanced term that requires agencies to consider as evidence not just geographic scale, toxicity, tonnage, cost or other conventional metrics, but context, intensity, and the public controversy surrounding a planned action. In other words, in this second category of unlawful categorical exclusions, the agency will to look past the controversial nature of planned action and simply declare the impacts to be insignificant. We can call this situation "Flying with Eyes Shut."

The third formulation occurs when an agency disregards its own rules governing use of categorical exclusions. This probably deserves the description of "Trying to Fly Without Wings."

It should not need saying that the federal government should not fly blind or with its eyes shut or without wings. These are reckless, unnecessary actions that manifest either incompetence in managing agency business or a willful disregard for the core functions of government.

I am a former seasonal employee of the Forest Service and have worked closely with excellent Forest Service officials in many different contexts over the years. I have great respect for the complexity of the agency's mission and the inescapable difficulty that confronts an agency responsible for stewardship of so many places and things about which so many different people care so deeply.

Without taking a position on the legality of the Forest Service's use of categorical exclusions in recent years, or the actual on-the-ground impacts of the actions taken under those categorical exclusions, I feel confident saying that at least in some respects, the agency's approach to categorical exclusions appears to have had the effect of further weakening the credibility and capability of the agency.

It is not evident how it has benefited the agency, or the agency's mission, to adopt measures that reduce the level or quality of engagement between the agency and the public that is interested in the agency's work.

This ought to be of particular concern in an era when the very nature of our forests is under dramatic pressure from climate change, with associated shifts in precipitation, disease, fire, species distribution, and human needs. Right now is a time when the ability of the U.S. Forest Service to lead with credibility and competence is vitally important.

NEPA is a tool that, used properly, brings federal agencies and the public into a shared understanding about the consequences of agency choices. It works to engage the public in the hard work of governance. Many agencies and agency leaders use NEPA in exactly that way and reap rewards in the form of better decisions, greater credibility and enhanced deference from stakeholders.

Exclusion of the public from involvement in decisions that the public cares about may provide short-term benefits to the agency in the form of expediency, convenience, and perceived momentum. Yet, in our democracy, the approach has all the hallmarks of tactical advantage gained at the expense of strategic victory. Healthy forests represent a goal for our nation that everyone of us can and should endorse. It shouldn't be a heavy lift or require a hard sell. But that goal will give every appearance of a misleading slogan so long as, and to the extent that the Forest Service operates in a way that invites suspicion of its motives, conduct, or impacts.

Healthy public forests will ultimately depend on healthy public governance. I fear, however, that today's real or perceived procedural infirmities, particularly those that create the impression that the Forest Service is uninterested in knowing or disclosing or discussing the impacts of its actions, will cripple the Forest Service's ability to lead for a long time to come.

If the Congress and the Forest Service choose to look ahead to new policy choices, it will be helpful to take guidance from concrete examples of appropriate use of categorical exclusions shown in other agency NEPA procedures and on cases where the federal courts have found agency actions involving use of categorical exclusions to be unlawful. Attachment A to this testimony describes the NEPA categorical exclusion procedures of four different agencies. These approaches have generally withstood legal challenges and show on their face carefully

drawn boundaries between those activities that may cause significant impacts and those that are highly unlikely to do so. The second major section of Attachment A also describes eleven recent federal court decisions involving agencies using categorical exclusions in ways found to be unlawful.

Thank you for this opportunity to testify. I would ask that my full statement be included in the record. I would be happy to respond to questions.

Attachment A - Testimony of Thomas C. Jensen

Oversight Hearing on Use of NEPA Categorical Exclusions
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I. Appropriate Use of Categorical Exclusions: Four Examples

The National Environmental Policy Act (NEPA) provides a concise definition for categorical exclusions:

> "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 . . . and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. . . . Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.[1]

Most federal agencies have incorporated use of categorical exclusions into their policies and regulations governing NEPA implementation. Examples from four very different agencies illustrate how agencies have employed categorical exclusions appropriately.

a. Department of the Army

The Department of the Army's categorical exclusion guidelines are especially relevant when considering the types of categorical exclusions that have been used with such frequency by agencies under the Bush Administration.

The guidelines for determining when it is appropriate to exempt an action from EA or EIS analysis under a categorical exclusion require that three main conditions are met: (1) the action has not been segmented; (2) no exceptional circumstances exist; (c) one (or more) categorical exclusion(s) encompasses the proposed action.[2]

The categorical exclusions approved by the Department of Army include the following broad types of activities, each of which is further described with detailed examples and restrictions:

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[1] 40 C.F.R. § 1508.4 (1978).
[2] 67 Fed. Reg. 61, §651.29(a). (March 29, 2002).

(b) Administration/operation activities:

(1) Routine law and order activities performed by military/military police and physical plant protection and security personnel, and civilian natural resources and environmental law officers.

(2) Emergency or disaster assistance.

(3) Preparation of regulations, procedures, manuals, and other guidance documents that implement, without substantive change, the applicable HQDA or other federal agency regulations, procedures, manuals, and other guidance documents that have been environmentally evaluated (subject to previous NEPA review).

(4) Proposed activities and operations to be conducted in an existing non-historic structure which are within the scope and compatibility of the present functional use of the building, will not result in a substantial increase in waste discharged to the environment, will not result in substantially different waste discharges from current or previous activities, and emissions will remain within established permit limits, if any.

(5) Normal personnel, fiscal, and administrative activities involving military and civilian personnel.

(6) Routinely conducted recreation and welfare activities not involving off-road recreational vehicles.

(7) Deployment of military units on a temporary duty or training basis where existing facilities are used for their intended purposes consistent with the scope and size of existing mission.

(8) Preparation of administrative or personnel-related studies, reports, or investigations.

(9) Approval of asbestos or lead-based paint management plans.

(10) Non-construction activities in support of other agencies/organizations involving community participation projects and law enforcement activities.

(11) Ceremonies, funerals, and concerts.

(12) Reductions and realignments of civilian and/or military personnel that: fall below the thresholds for reportable actions as prescribed by statute and do not involve related activities such as construction, renovation, or demolition activities that would otherwise require an EA or an EIS to implement.

(13) Actions affecting Army property that fall under another federal agency's list of categorical exclusions when the other federal agency is the lead agency, or joint actions on another federal agency's property that fall under that agency's list of categorical exclusions.

(14) Relocation of personnel into existing federally-owned or commercially-leased space, which does not involve a substantial change in the supporting infrastructure.

(c) Construction and demolition:

(1) Construction of an addition to an existing structure or new construction on a previously undisturbed site if the area to be disturbed has no more than 5.0 cumulative acres of new surface disturbance, not including construction of facilities for the transportation, distribution, use, storage, treatment, and disposal of solid waste, medical waste, and hazardous waste.

(2) Demolition of non-historic buildings, structures, or other improvements and disposal of debris therefrom, or removal of a part thereof for disposal, in accordance with applicable regulations.

(3) Road or trail construction and repair on existing rights-of-ways or on previously disturbed areas.

(d) Cultural and natural resource management activities:

(1) Land regeneration activities using only native trees and vegetation, including site preparation. This does not include forestry operations.

(2) Routine maintenance of streams and ditches or other rainwater conveyance structures and erosion control and stormwater control structures.

(3) Implementation of hunting and fishing policies or regulations that are consistent with state and local regulations.

(4) Studies, data collection, monitoring and information gathering that do not involve major surface disturbance.

(5) Maintenance of archaeological, historical, and endangered/threatened species avoidance markers, fencing, and signs.

(e) Procurement and contract activities:

(1) Routine procurement of goods and services (complying with applicable procedures for sustainable or "green" procurement) to support operations and infrastructure.

(2) Acquisition, installation, and operation of utility and communication systems, mobile antennas, data processing cable and similar electronic equipment that use existing right-of-way, easement, distribution systems, and/or facilities.

(3) Conversion of commercial activities under the provisions of AR 5–20. This includes only those actions that do not change the actions or the missions of the organization or alter the existing land-use patterns.

(4) Modification, product improvement, or configuration engineering design change to materiel, structure, or item that does not change the original impact of the materiel, structure, or item on the environment.

(5) Procurement, testing, use, and/or conversion of a commercially available product which does not meet the definition of a weapon system, and does not result in any unusual disposal requirements.

(6) Acquisition or contracting for spares and spare parts, consistent with the approved Technical Data Package.

(7) Modification and adaptation of commercially available items and products for military application, as long as modifications do not alter the normal impact to the environment.

(8) Adaptation of non-lethal munitions and restraints from law enforcement suppliers and industry for military police and crowd control activities where there is no change from the original product design and there are no unusual disposal requirements.

(f) Real estate activities:

(1) Grants or acquisitions of leases, licenses, easements, and permits for use of real property or facilities in which there is no significant change in land or facility use.

(2) Disposal of excess easement areas to the underlying fee owner.

(3) Transfer of real property administrative control within the Army, to another military department, or to other federal agency, including the return of public domain lands to the Department of

Interior, and reporting of property as excess and surplus to the GSA for disposal.

(4) Transfer of active installation utilities to a commercial or governmental utility provider, except for those systems on property that has been declared excess and proposed for disposal.

(5) Acquisition of real property where the land use will not change substantially or where the land acquired will not exceed 40 acres and the use will be similar to current or ongoing Army activities on adjacent land.

(6) Disposal of real property where the reasonably foreseeable use will not change significantly.

(g) Repair and maintenance activities:

(1) Routine repair and maintenance of buildings, airfields, grounds, equipment, and other facilities.

(2) Routine repairs and maintenance of roads, trails, and firebreaks.

(3) Routine repair and maintenance of equipment and vehicles which is substantially the same as that routinely performed by private sector owners and operators of similar equipment and vehicles. This does not include depot maintenance of unique military equipment.

(h) Hazardous materials/hazardous waste management and operations:

(1) Use of gauging devices, analytical instruments, and other devices containing sealed radiological sources; use of industrial radiography; use of radioactive material in medical and veterinary practices; possession of radioactive material incident to performing services such as installation, maintenance, leak tests, and calibration; use of uranium as shielding material in containers or devices; and radioactive tracers.

(2) Immediate responses in accordance with emergency response plans for release or discharge of oil or hazardous materials/substances; or emergency actions taken by Explosive Ordnance Demolition detachment or Technical Escort Unit.

(3) Sampling, surveying, well drilling and installation, analytical testing, site preparation, and intrusive testing to determine if hazardous wastes, contaminants, pollutants, or special hazards are present.

(4) Routine management, to include transportation, distribution, use, storage, treatment, and disposal of solid waste, medical waste, radiological and special hazards, and/or hazardous waste that complies with agency requirements. This CX is not applicable to new construction of facilities for such management purposes.

(5) Research, testing, and operations conducted at existing enclosed facilities consistent with previously established safety levels and in compliance with applicable federal, state, and local standards. For facilities without existing NEPA analysis, including contractor-operated facilities, if the operation will substantially increase the extent of potential environmental impacts or is controversial, an EA (and possibly an EIS) is required.

(6) Reutilization, marketing, distribution, donation, and resale of items, equipment, or materiel; normal transfer of items to the Defense Logistics Agency. Items, equipment, or materiel that have been contaminated with hazardous materials or wastes will be adequately cleaned and will conform to the applicable regulatory agency's requirements.

(i) Training and testing:

(1) Simulated war games (classroom setting) and on-post tactical and logistical exercises involving units of battalion size or smaller, and where tracked vehicles will not be used .

(2) Training entirely of an administrative or classroom nature.

(3) Intermittent on-post training activities (or off-post training covered by an ARNG land use agreement) that involve no live fire or vehicles off established roads or trails.

(j) Aircraft and airfield activities:

(1) Infrequent, temporary (less than 30 days) increases in air operations up to 50 percent of the typical installation aircraft operation rate.

(2) Flying activities in compliance with Federal Aviation Administration Regulations and in accordance with normal flight patterns and elevations for that facility, where the flight patterns/elevations have been addressed in an installation master plan or other planning document that has been subject to NEPA public review.

(3) Installation, repair, or upgrade of airfield equipment.

(4) Army participation in established air shows sponsored or conducted by non-Army entities on other than Army property.

Extraordinary circumstances that preclude the use of a categorical exclusion are:

(1) Reasonable likelihood of significant effects on public health, safety, or the environment.

(2) Reasonable likelihood of significant environmental effects (direct, indirect, and cumulative).

(3) Imposition of uncertain or unique environmental risks.

(4) Greater scope or size than is normal for this category of action.

(5) Reportable releases of hazardous or toxic substances.

(6) Releases of petroleum, oils, and lubricants except from a properly functioning engine or vehicle, application of pesticides and herbicides, or where the proposed action results in the requirement to develop or amend a Spill Prevention, Control, or Countermeasures Plan.

(7) When a review of an action that might otherwise qualify for a Record of Non-applicability reveals that air emissions exceed *de minimis* levels or otherwise that a formal Clean Air Act conformity determination is required.

(8) Reasonable likelihood of violating any federal, state, or local law or requirements imposed for the protection of the environment.

(9) Unresolved effect on environmentally sensitive resources.

(10) Involving effects on the quality of the environment that are likely to be highly controversial.

(11) Involving effects on the environment that are highly uncertain, involve unique or unknown risks, or are scientifically controversial.

(12) Establishes a precedent (or makes decisions in principle) for future or subsequent actions that are reasonably likely to have a future significant effect.

(13) Potential for degradation of already existing poor environmental conditions. Also, initiation of a degrading influence,

activity, or effect in areas not already significantly modified from their natural condition.

(14) Introduction/employment of unproven technology.[3]

A list of the environmentally sensitive resources mentioned in §651.29(b)(9) is provided in §651.29(c):

(1) Proposed federally listed, threatened, or endangered species or their designated critical habitats.

(2) Properties listed or eligible for listing on the National Register of Historic Places.

(3) Areas having special designation or recognition such as prime or unique agricultural lands; coastal zones; designated wilderness or wilderness study areas; wild and scenic rivers; National Historic Landmarks; 100-year floodplains; wetlands; sole source aquifers ; National Wildlife Refuges; National Parks; areas of critical environmental concern; or other areas of high environmental sensitivity.

(4) Cultural Resources as defined in AR 200–4.

Of course, if an action can be excluded from environmental study under a categorical exclusion, the agency must still comply with other applicable statutes.[4]

The Department of Army encourages regular review and modification of existing categorical exclusions.[5]

b. Department of Justice

The United States Marshals Service, Department of Justice, supplemented its procedures for NEPA compliance in 2006.[6] These procedures detail the extraordinary circumstances that bar the application of a categorical exclusion as well as actions that could be eligible for a categorical exclusion. The actions that would normally qualify for a categorical exclusion are presented first in this discussion.

7. Categorical Exclusions

(c) Actions that normally qualify for a categorical exclusion include:

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[3] §651.29(b)
[4] §651.29(d).
[5] *Id.* at §651.31.
[6] 71 Fed. Reg. 236. (Dec. 8, 2006).

(1) Minor renovations or repairs within an existing facility, unless the project would adversely affect a structure listed in the National Register of Historic Places or is eligible for listing in the register;

(2) Facility expansion, or construction of a limited addition to an existing structure, or facility, and new construction or reconstruction of a small facility on a previously developed site. The exclusion applies only if:

> (i) The structure and proposed use comply with local planning and zoning and any applicable State or Federal requirements; and
>
> (ii) The site and the scale of construction are consistent with those of existing adjacent or nearby buildings.

(3) Security upgrades of existing facility grounds and perimeter fences, not including such upgrades as adding lethal fences or major increases in height or lighting of a perimeter fence in a residential area or other area sensitive to the visual impacts resulting from height or lighting changes;

(4) Federal contracts or agreements for detentions services, including actions such as procuring guards for detention services or leasing bed space from an existing facility operated by a State or a local government or a private correctional corporation;

(5) General administrative activities that involve a limited commitment of resources, such as personnel actions or policy related to personnel issues, organizational changes, procurement of office supplies and systems, and commitment or reallocation of funds for previously reviewed and approved programs or activities;

(6) Change in contractor or Federal operators at an existing contractor-operated correctional or detention facility,

(7) Transferring, leasing, maintaining, acquiring, or disposing of interests in land where there is no change in the current scope and intensity of land use;

(8) Transferring, leasing, maintaining, acquiring, or disposing of equipment, personal property, or vessels that do not increase the current scope and intensity of USMS activities;

(9) Routine procurement of goods and services to support operations and infrastructure that are conducted in accordance with Department of Justice energy efficiency policies and applicable Executive Orders;

> (10) Routine transportation of prisoners or detainees between facilities and flying activities in compliance with Federal Aviation Administration Regulations, only applicable where the activity is in accordance with normal flight patterns and elevations for the facility and where the flight patterns/elevations have been addressed in an installation master plan or other planning document that has been the subject of a NEPA review; and
>
> (11) Lease extensions, renewals, or succeeding leases where there is no change in the intensity of the facility's use.

(b) Extraordinary circumstances must be considered before relying upon a categorical exclusion to determine whether the proposed action may have a significant environmental impact. . . . the following circumstances preclude the use of a categorical exclusion:

> (1) The project may have effects on the quality of the environment that are likely to be highly controversial;
>
> (2) The scope or size of the project is greater than normally experienced for a particular action;
>
> (3) There is potential for degradation, even if slight, of already-existing poor environmental conditions;
>
> (4) A degrading influence, activity, or effect is initiated in an area not already significantly modified from its natural condition;
>
> (5) There is a potential for adverse effects on areas of critical environmental concern or other protected resources including, but not limited to, threatened or endangered species or their habitats, significant archaeological materials, prime or unique agricultural lands, wetlands, coastal zones, sole source aquifers, 100-year-old flood plains, places listed, proposed, or eligible for listing on the National Register of Historic Places, natural landmarks listed, proposed, or eligible for listing on the National Registry of Natural Landmarks, Wilderness Areas or wilderness study areas, or Wild and Scenic River areas; or
>
> (6) Possible significant direct, indirect, or cumulative environmental impacts exist.

The United States Marshals Service's approach to use of categorical exclusions seems to be especially concerned with those actions that would alter the intensity and scope of current land uses. The agency's approach also shows concern as to whether that a proposed activity is within the same scope and intensity of other activities commonly exempted under the categorical exclusion.

c. <u>Department of Transportation-FAA</u>

To facilitate the use of categorical exclusions for airports, the Federal Aviation Administration provides a checklist[7] to be completed when submitting a proposed activity for exemption from environmental study under a categorical exclusion. The FAA has also produced tables detailing types of categorical exclusions and extraordinary circumstances that prevent use of such exclusions from NEPA review. The checklist mirrors the requirements set forth in the guidelines and tables provided and discussed below.

The FAA characterizes categorical exclusions as either situations that may involve extraordinary situations or those that are unlikely to involve extraordinary circumstances. The situations the FAA has determined *unlikely* to involve extraordinary circumstances include:

- Grants for airport planning;
- Bond retirement for terminal development;
- Conditional airport layout plan approval;
- Grants to prepare environmental documents;
- Grants to prepare noise exposure maps and compatibility programs;
- Approval of passenger facility charge;
- Issuing policy and planning documents;
- Safety equipment for airport certification
- Security equipment purchase.[8]

The list detailing categorical exclusions that *may* involve extraordinary circumstances is significantly longer. Included in Table 6-2, these actions center around physical airport maintenance and improvement, and other regular airport activities that affect the physical space and air near airports:

- Airfield barriers.
- Airfield improvements, aircraft parking areas.
- Airfield improvements, roads.
- Airfield improvements, runways.
- Airfield improvements, storage areas.
- Airfield lighting.
- Cargo building.
- Conveying Federally-owned airport land.
- Deicing/anti-icing facility.
- Fill activity.
- General landscaping.

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[7] Available at http://www.faa.gov/airports_airtraffic/airports/regional_guidance/central/environmental/environmental_review/catex/. Accessed 6/18/2007.

[8] FAA Order 5050.4 - National Environmental Policy Act Implementing Instructions for Airport Projects. Chapter 6 Categorical Exclusions. Table 6-1.

- Heliport at an existing airport.
- Low emission technology equipment, including the Voluntary Airport Low Emission Program
- Non-radar facilities.
- Noise barriers.
- Noise compatibility programs.
- Non-U.S. waters, including wetlands in which categorically excluded actions are proposed.
- On-airport obstruction treatment.
- Ownership change by purchase or transfer.
- Parking areas.
- Passenger handling building.
- Radar installation.
- Releasing airport land.
- Relocation.
- Repair and maintenance.
- Replacement structures.
- Restrictions, aircraft access.
- Runway threshold.
- Security.
- Transfer land by long-term lease or acquisition.
- U.S. Waters, including wetlands, in which categorically excluded actions are proposed.
- Utility line construction, temporary.
- Wildlife Hazard Management Plan implementation.[9]

Table 6-3 details the extraordinary circumstances that may require an otherwise excluded action undergo environmental studies. Largely, these circumstances mirror those seen in the previously considered categorical exclusion guidelines. There are, however, a number that are unique to the FAA:

- Air quality.
- Coastal zone areas.
- Community disruption.
- Cumulative impacts.
- Endangered species.
- Farmlands conversion.
- Floodplains.
- Hazardous materials.
- Highly controversial action.
- Historic or cultural property.
- Inconsistency with applicable laws.
- Noise.

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[9] FAA Order 5050.4 - National Environmental Policy Act Implementing Instructions for Airport Projects. Chapter 6 Categorical Exclusions. Table 6-2.

- Traffic congestion.
- U.S. waters, including jurisdictional wetlands.
- Water quality.
- Wild and Scenic Rivers.[10]

d. Department of Energy

The Department of Energy's guidelines on categorical exclusions is an especially useful approach because the analysis required for a categorical exclusion determination is presented in a step-by-step format.[11]

First, the agency determines whether the activity falls into one of the categories of activities that can qualify for a categorical exclusion. The agency has detailed both general agency actions and specific agency actions.

Categorical exclusions applicable to general agency actions:

A1 Routine actions necessary to support the normal conduct of agency business, such as administrative, financial, and personnel actions.

A2 Contract interpretations, amendments, and modifications that are clarifying or administrative in nature.

A3 Adjustments, exceptions, exemptions, appeals, and stays, modifications, or rescissions of orders issued by the Office of Hearings and Appeals.

A4 Interpretations and rulings with respect to existing regulations, or modifications or rescissions of such interpretations and rulings.

A5 Rulemaking interpreting or amending an existing rule or regulation that does not change the environmental effect of the rule or regulation being amended.

A6 Rulemakings that are strictly procedural, such as rulemaking establishing procedures for technical and pricing proposals and establishing contract clauses and contracting practices for the purchase of goods and services, and rulemaking establishing application and review procedures for, and administration, audit, and closeout of, grants and cooperative agreements.

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[10] FAA Order 5050.4 - National Environmental Policy Act Implementing Instructions for Airport Projects. Chapter 6 Categorical Exclusions. Table 6-3.
[11] §1021.410(b). Available at http://www.eh.doe.gov/NEPA/tools/REGULATE/NEPA_REG/1021/nepa1021_rev.pdf. Accessed 6/22/2007.

A7 Transfer, lease, disposition, or acquisition of interests in personal property or real property, if property use is to remain unchanged; i.e., the type and magnitude of impacts would remain essentially the same.

A8 Award of contracts for technical support services, management and operation of a government-owned facility, and personal services.

A9 Information gathering, data analysis, document preparation and dissemination, but not including site characterization or environmental monitoring.

A10 Reports or recommendations on legislation or rulemaking that is not proposed by DOE.

A11 Technical advice and planning assistance to international, national, state, and local organizations.

A12 Emergency preparedness planning activities, including the designation of onsite evacuation routes.

A13 Administrative, organizational, or procedural Orders, Notices, and guidelines.

A14 Approval of technical exchange arrangements for information, data, or personnel with other countries or international organizations, including, but not limited to, assistance in identifying and analyzing another country's energy resources, needs and options.

A15 Approval of DOE participation in international "umbrella" agreements for cooperation in energy research and development activities that would not commit the U.S. to any specific projects or activities.[12]

Categorical exclusions applicable to specific agency actions are significantly more detailed. Descriptions of these activities are abbreviated here:

B1 Categorical exclusions applicable to facility operation. Representative examples include:

B1.3 Routine maintenance/custodial services for buildings, structures, infrastructures, equipment;

B1.4 Installation/modification of air conditioning systems for existing equipment;

B1.5 Improvements to cooling water systems within existing building, structure;

[12] Appendix A to Subpart D of §1021.

B1.7 Acquisition/installation/operation/removal of communication systems, data processing equipment;

B1.9 Placement of airway safety markings/painting (not lighting) of existing lines, antennas;

B1.13 Construction/acquisition/relocation of onsite pathways, short onsite access roads/railroads;

B1.16 Removal of asbestos from buildings;

B1.21 Noise abatement;

B1.22 Relocation of buildings;

B1.27 Disconnection of utilities;

B2 Categorical exclusions applicable to safety and health. Representative examples include:

B2.1 Modifications to enhance workplace habitability;

B2.3 Installation of equipment for personnel safety and health;

B3 Categorical exclusions applicable to site characterization, monitoring, and general research. Representative examples include:

B3.3 Research related to conservation of fish and wildlife;

B3.8 Outdoor ecological/environmental research in small area;

B3.9 Certain Clean Coal Technology Demonstration Program activities;

B4 Categorical exclusions applicable to Power Marketing Administrations and to all of DOE with regard to power resources. Representative examples include:

B4.1 Contracts/marketing plans/policies for excess electric power;

B4.2 Export of electric energy;

B4.6 Additions/modifications to electric power transmission facilities within previously developed area;

B4.7 Adding/burying fiber optic cable;

B4.11 Construction or modification of electric power substations;

B5 Categorical exclusions applicable to conservation, fossil, and renewable energy activities. Representative examples include:

B5.1 Actions to conserve energy;

B5.2 Modifications to oil/gas/geothermal pumps and piping;

B5.6 Oil spill cleanup operations;

B5.7 Import/export natural gas, no new construction;

B5.12 Workover of existing oil/gas/geothermal well;

B6 Categorical exclusions applicable to environmental restoration and waste management activities. Representative examples include:

B6.1 Small-scale, short-term cleanup actions under RCRA, Atomic Energy Act, or other authorities;

B6.4 Siting/construction/operation/decommissioning of facility for storing packaged hazardous waste for 90 days or less;

B6.8 Modifications for waste minimization/reuse of materials;

B6.9 Small-scale temporary measures to reduce migration of contaminated groundwater;

B7 Categorical exclusions applicable to international activities;

B7.1 Emergency measures under the International Energy Program;

B7.2 Import/export of special nuclear or isotopic materials.[13]

Second, the guidelines require a determination that no extraordinary circumstances exist that could affect the level of environmental impact of the activity. The extraordinary circumstances detailed by the Department of Energy differ from the types of circumstances found in the Department of the Army and U.S. Marshals' regulations:

- Unique situations presented by specific proposals, such as scientific controversy about the environmental effects of the proposal;
- Uncertain effects or effects involving unique or unknown risks;
- Or unresolved conflicts concerning alternative uses of available resources.[14]

[13] Appendix B to Subpart D of §1021.
[14] §1021.410(2).

Third, the guidelines require that the proposed action is not connected to other activities that do have substantial environmental impacts or to other proposed actions that cumulatively will have a substantial environmental impact.[15]

II. Unlawful Categorical Exclusions: Eleven Examples

In recent years, the federal courts have been called on to assess the legality of categorical exclusions adopted by a variety of agencies, including the Forest Service, Department of the Interior, Department of Energy, and Department of Transportation. The following cases illustrate a range of circumstances in which the use of categorical exclusions were found to be illegal.

Heartwood v. United States Forest Service.[16] The plaintiffs here - a land owner with property adjacent to the Shawnee National Forest in Southern Illinois, a user of national forests and an environmental group - challenged a proposed Forest Service categorical exclusion concerning timber harvests. Following notice and comments in 1991, the Forest Service had issued new categorical exclusions in 1992 that had the effect of increasing by ten times the amount of salvageable wood product and by 2.5 times the amount of live trees that could be harvested without environmental analysis. The U.S. District Court for the Southern District of Illinois found that these substantial increases were simply not supported by any findings in the administrative record. The court also found that the administrative record did not provide support for, and in fact the Forest Service did not address, whether actions of this magnitude would truly have no significant individual or cumulative effects on the environment, as is required by NEPA for categorical exclusions.[17]

Riverhawks v. Zepeda.[18] This case centered around motorboat use on a wild portion of the Rogue River in Oregon. The plaintiff here, a river advocacy group, claimed that extraordinary circumstances precluded the Forest Service's use of a categorical exclusion because of evidence that motor boats on the river would significantly impact populations of juvenile salmonids and Western Pond Turtles, as well as some vegetation. The categorical exclusion in question allowed the Forest Service to grant special issue permits for commercial tour and fishing boats without engaging in NEPA analysis. The District Court for the District of Oregon found that the administrative record supported the plaintiff's argument. The Decision Memo issued by the Forest Service for the categorical exclusion specifically stated that the turtles and salmon might be affected. The court found that the level of impact was not addressed in the administrative record; the agency failed to provide justification for issuing a categorical exclusion in the face of acknowledged but unquantified impacts.[19] The court refused to uphold

[15] §1021.410(b)(3).
[16] 73 F.Supp.2d 962 (S.D. Ill. 1999).
[17] *Id.* at 975-76.
[18] 228 F.Supp.2d 1173 (D. Or. 2002).
[19] *Id.* at 1189-90.

the agency's use of this categorical exclusion, and granted summary judgment for the plaintiff on their NEPA claim.[20]

High Sierra Hikers Assoc. v. Blackwell.[21] This 2002 case focused on the use of a Forest Service categorical exclusion to exempt one-year renewals of trail permits to commercial packstock operators in the John Muir and Ansel Adams wilderness areas. This use of a categorical exclusion failed because the Forest Service's internal regulations do not allow the use of categorical exclusions for activities in wilderness areas. Because the Forest Service acted in violation of its own regulations on the use of categorical exclusions, the court held that an EA or EIS was required for these permit renewals.[22]

Wilderness Watch v. Mainella.[23] At the district court level, summary judgment was granted in favor of the National Park Service where the plaintiff sought an injunction to disallow motor vehicle tours in a designated wildness area on Cumberland Island, Georgia.[24] The National Park Service allowed the tours without environmental analysis, arguing the action fell under a categorical exclusion. The categorical exclusion invoked by the Park Service excluded "routine and continuing government business, including such things as supervision, administration, operations, maintenance and replacement activities having limited context and intensity; e.g. limited size and magnitude or short-term effects."[25] The court rejected use of the categorical exclusion because the Park Service provided no evidence in the administrative record that the action was considered a categorical exclusion when these tours were actually permitted (that is, the categorical exclusion was a post hoc rationalization). Further, the court did not accept the Park Service's assertion that approval of such motor vehicle tours properly fell within the category of "routine and continuing government business," finding that obtaining a large van to accommodate fifteen tourists hardly appeared to be a routine and continuing form of administration and maintenance.[26]

California v. Norton.[27] In this 2002 case, the California Coastal Commission filed suit against the Department of the Interior's Minerals Management Service challenging a categorical exclusion drafted for suspensions of off-shore oil leases. The agency suspended the leases so they would not expire.[28] California argued that the Department of the Interior was required to prepare an EIS before suspending the leases. Interior asserted that the agency was not required to perform any environmental analysis because lease suspensions were categorically excluded from NEPA review. The plaintiffs argued that the agency had not relied upon a categorical

[20] Additional challenges related to this categorical exclusion were mounted by the plaintiffs; only the challenge here was successful.
[21] 390 F.3d 630 (9th Cir. 2004).
[22] *Id.* at 641.
[23] 375 F.3d 1085 (11th Cir. 2004).
[24] *Id.* at 1087.
[25] *Id.* at 1094.
[26] *Id.* at 1095.
[27] 311 F.3d 1162 (9th Cir. 2002).
[28] *Id.* at 1164-65.

exclusion determination when it suspended the leases and was relying on the existence of the exclusions as a post hoc rationalization for failure to perform an environmental review.[29]

The Ninth Circuit heard the case on appeal following a district court ruling in favor of the plaintiffs, who sought to enjoin the suspensions pending environmental analysis as well as a justification for the use of the categorical exclusion.[30] The court underscored the importance of an administrative record for judicial review: "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."[31] Additionally, the court expressed some skepticism about the use of a categorical exclusion here. "At the very least, there is substantial evidence in the record that exceptions to the categorical exclusion *may* apply, and the fact that the exceptions may apply is all that is required to prohibit use of the categorical exclusion."[32] The case was remanded to the district court to determine exactly what level of NEPA analysis would be required.[33]

West v. Sec'y of the Dep't of Transportation.[34] The Federal Highway Administration's categorical exclusion of a highway interchange project in Washington was challenged by a citizen. In examining whether a categorical exclusion applied to the a new highway construction project, the court found that the Federal Highway Administration's own regulations disallowed this type of categorical exclusion.[35] The court found that the agency's own regulations do not allow reliance on categorical exclusions for projects that will significantly impact travel patterns. The underlying reason for the new interchange was to relieve traffic congestion.[36] The court rejected the agency's argument that a new highway project could simultaneously relieve traffic congestion without significantly impacting travel patterns.

Citizens for Better Forestry v. United States Dep't of Agriculture.[37] In this case, the Forest Service sought to implement a programmatic rule that changed the forest management requirements related to species viability and diversity within national forests. The 2005 rule in question, which was not open to public notice or comment, eliminated special viability and diversity requirements for forest management first established in the 1982 Planning Regulations that built on the National Forest Management Act of 1976.[38] The agency took the view that the rule should be exempt from environmental analysis because the rule itself simply provided a starting point for NEPA analysis, rather than directly producing environmental effects.[39] This 2005 rule was exempted by the Forest Service under a categorical exclusion that includes "routine administrative, maintenance, and other actions."[40] The court noted that no Ninth Circuit

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[29] *Id.* at 1175.
[30] *Id.* at 1165.
[31] *Id.* at 1176.
[32] *Id.* at 1177.
[33] *Id.* at 1178.
[34] 206 F.3d 920 (9th Cir. 2000).
[35] *Id.* at 927, 929.
[36] *Id.* at 929.
[37] 481 F.Supp.2d 1059 (N.D. Cal 2007).
[38] *Id.* at 1064-67.
[39] *Id.*
[40] *Id.* at 1082.

court has ever upheld such a broad action as appropriate under a categorical exclusion.[41] The court found that the agency could not document any findings that supported the assertion that no significant effects would result from the rule change, and required that the agency perform either an EA or EIS.[42]

California v. United States Dep't of Agriculture.[43] This complex case involved the replacement of a Forest Service rule limiting road construction in national forests. In 2001, the Forest Service promulgated the Roadless Rule, prohibiting road construction, road reconstruction and timber harvesting in specific roadless areas nationwide.[44] This initial rule was set to take effect on March 13, 2001, but President Bush issued a moratorium on pending Clinton administration regulations before the Roadless Rule went into effect.[45] Court proceedings were initiated in Idaho and Wyoming.[46] While these cases were pending, the Forest Service enacted the State Petitions Rule, which eliminated the uniform national protections found in the 2001 rule, reverting oversight of construction projects back to forest-by-forest analysis, and adding a state-by-state appeals process through which states could take over the forests within their borders.[47] The agency argued that the new rule fell within the scope of a categorical exclusion that covered routine administrative procedures.[48] The court found that the agency was still required to study the new rule, as it could not fall under a categorical exclusion because the new rule substantially impacted the environment.[49]

Arkansas Nature Alliance v. United States Army Corps of Eng'rs.[50] In this case from 2003, heard in the Eastern District of Arkansas, the Army Corps of Engineers approved a change to the height and length of a bridge using a so-called "Letter of Permission." This Letter of Permission was issued on January 22, 2001. Under a Corps categorical exclusion, Letters of Permission do not require individual environmental review. The plaintiffs argued and the court agreed that the proposed action could have a significant environmental effect, was not a minor action, and was likely to be met with controversy - all of which disqualified the action from coverage under categorical exclusion.[51] The new bridge, however, had already been completed when this court heard the case. Nonetheless, the court ruled that the Corps' use of the categorical exclusion, because unreasonable, should be revoked. What's more, full NEPA analysis was required of the original application. The court ordered that the bridge be returned to

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[41] *Id.* at 1087.
[42] *Id.* at 1090.
[43] 459 F.Supp.2d 874 (N.D. Calif. 2006).
[44] *Id.* at 879-80.
[45] *Id.* at 880.
[46] *Id.* at 880-81. *Kootenai Tribe v. Veneman,* 142 F.Supp.2d 1231 (D. Idaho 2001); *Wyoming v. United States Dep't of Agric.*, 277 F.Supp.2d 1197 (D. Wyo. 2003).
[47] *Id.* at 881.
[48] *Id.* at 894.
[49] *Id.* at 904.
[50] 266 F.Supp.2d 876 (E.D. Ark. 2003).
[51] *Id.* at 886-87.

its original dimensions, but stayed this order pending environmental analysis of the original application.[52]

Sierra Club v. United States Dep't of Energy.[53] This case centers on an easement on Department of Energy land that was granted to a mining company for use in connection with new, then unapproved, gravel mining operations.[54] The court found that , while the easement itself may not have had significant environmental effects, the Department of Energy's internal regulations disallow a categorical exclusion that is "connected to other actions with potentially significant impacts."[55] Because the granting of the easement and establishment of the new mining operation were linked, they were required to be considered together. Agency assurances that the mine would be studied under NEPA guidelines in the future were not sufficient. The categorical exclusion was found arbitrary and capricious.[56]

Comm. for Idaho's High Desert v. Collinge.[57] The plaintiff here, an environmental group, initiated this case to enjoin a sage grouse population control program initiated by the U.S. Fish and Wildlife Service; the district court granted the plaintiff a preliminary injunction to remain in effect until the propriety of this categorical exclusion use by the Service was litigated.[58] The sage grouse control program involved killing avian predators of the sage grouse, as well as using various hunting techniques to control other predators, including coyotes, red foxes, black bears, mountain lions, bobcats, raccoons, badgers, striped skunks, ravens and magpies.[59] The Service categorically excluded an action to control sage grouse populations under two possible categorical exclusions:

> "(i) Activities that are carried out in laboratories, facilities, or other areas designed to eliminate the potential for harmful environmental effects-internal or external-and to provide for lawful waste disposal;"[60] or "routine measures."[61]

In choosing to issue an injunction requested by the plaintiff to enjoin these activities, the court found that the plaintiffs were likely to succeed in their case in large part because the agency failed to keep an administrative record that supported their use of the either of the proposed categorical exclusions.[62]

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[52] *Id.* at 894-95.
[53] 255 F.Supp.2d 1177 (D. Colo. 2002).
[54] *Id.* at 1181.
[55] *Id.*at 1183, citing 10 C.F.R. § 1021.410(b)(3).
[56] *Id.* at 1185.
[57] 148 F.Supp.2d 1097 (D. Idaho 2001).
[58] *Id.* at 1099.
[59] *Id.* at 1100.
[60] *Id.* at 1101.
[61] *Id.* at 1102.
[62] *Id.* at 1103.