CIRCUMVENTING THE NATIONAL ENVIRONMENTAL POLICY ACT: AGENCY ABUSE OF THE CATEGORICAL EXCLUSION

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The National Environmental Policy Act (NEPA), the nation's seminal environmental-protection legislation, has affected tremendously the course of executive-agency decisionmaking. Its broad, ambiguous mandate that agencies consider the potential environmental impact of agency decisions has been interpreted aggressively to require thorough analysis of environmental factors and also that those considerations guide the ultimate conclusions of the decisionmaking process. The demanding analytic requirements, such as the environmental impact statement and the environmental assessment, are recognized to be a significant burden on the resources of executive agencies. Consequently, the agency charged with administrating NEPA has urged executive agencies to promulgate categorical exclusions—categories of actions that are exempted from traditional NEPA analysis due to their repetitive nature and the predictability of their limited environmental impact. This NEPA exception has steadily broadened and invited agency abuse to avoid the burdens of NEPA requirements and the scrutiny of environmental advocacy groups. The resulting litigation brought by advocacy groups to hold these agencies accountable has been expensive and time-consuming. In this Note, Kevin Moriarty explores the history of categorical exclusions and discusses past efforts to remedy potential abuses of agency discretion. The most recent incarnation of categorical exclusions includes a set of burdensome analytic requirements designed to counteract potential abuses that could result from the increased discretion provided in modern categorical-exclusions regulations. In this Note, Moriarty argues that if categorical exclusions were limited to their original form, fewer actions would be excluded, but the actions actually excluded would be protected from challenges through litigation. This Note concludes that the resulting loss of agency discretion through use of broad categorical exclusions would likely increase overall efficiency in agency decisionmaking.

INTRODUCTION

The National Environmental Policy Act (NEPA), passed by Congress in 1969, requires executive agencies to consider the environ-

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mental impact of every major decision.[1] In that same year, Congress created an executive agency, the Council on Environmental Quality (CEQ), to oversee NEPA's implementation and coordinate federal environmental efforts.[2] In the heady days of 1970s government environmentalism, the CEQ and the courts built NEPA into a formidable requirement that is among the most substantive of otherwise procedural "sunshine laws"—laws that require the government to expose its decisionmaking processes and the perceived consequences of its policy decisions for all to see.[3]

With its vague mandate,[4] NEPA had no clear limitations on its application or requirements.[5] The CEQ addressed this problem by requesting that agencies promulgate rules for their own observance of NEPA; these rules were to include categories of actions that would be excluded from NEPA's burdensome environmental-documentation requirements.[6] These "categorical exclusions," according to the CEQ, would apply to actions with insignificant environmental consequences.[7] The purpose of categorical exclusions was to help agencies

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[1] National Environmental Policy Act of 1969 (NEPA) §§ 101–102, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codifed as amended at 42 U.S.C. §§ 4331–4332 (2000)).

[2] NEPA, Pub. L. No. 91-190, § 202, 83 Stat. 854 (1970) (codified as amended at 42 U.S.C. § 4342 (2000)).

[3] *See infra* Part I.A.

[4] 42 U.S.C. § 4331. The National Environmental Policy Act mandate states:

> The Congress . . . declares that it is the continuing policy of the Federal Government . . . to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

Id.

[5] An early decision addressing the ambiguity and appropriate scope of NEPA was *Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971) (holding that NEPA requires full consideration of environmental costs and alternative measures, and that it does not provide "escape hatch for footdragging agencies . . . . Congress did not intend [NEPA] to be . . . a paper tiger"); *see also infra* notes 38–43 and accompanying text.

[6] 40 C.F.R. § 1508.4 (2003). From the perspective of administrative-law theory, however, the structure of NEPA is an unprecedented delegation of power. Indeed, the Council on Environmental Quality (CEQ) behaved in exactly the way a critic concerned with separation of powers would fear. In sum: (1) Congress passed a statute that required certain behavior from executive agencies; (2) Congress created an executive agency to administer that requirement; (3) the executive agency responsible for administering that requirement created an exception to the requirement. Although this congressional-delegation issue is not dealt with directly in this Note, it underlies my criticism of the CEQ and of the use of categorical exclusions.

[7] *Id.* ("*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.").

avoid spending unnecessary time documenting routine activities and, instead, address issues with potential environmental consequences.[8]

The United States Forest Service has been the subject of significant criticism in the academic and public-policy worlds for its use, or abuse, of categorical exclusions.[9] Arguably, the amount of criticism could be explained by noting the Forest Service's unique status as the sole steward of large amounts of natural lands in the United States.[10] There are, however, at least two other agencies with similar responsibility for wilderness areas[11] whose decisions have generated less controversy. This Note argues that the Forest Service, with assistance from the CEQ's politically motivated broadening of the definition of categorical exclusions,[12] has substantively and procedurally extended its use of categorical exclusions beyond the originally intended scope.[13]

In 1980, the Forest Service listed five categories of activities for which its rules required no environmental documentation.[14] These categorical exclusions included changes to the internal organization of an agency, funding or scheduling of projects, routine maintenance of preexisting roads (unless herbicides were to be used), research, and emergencies.[15] The most potentially destructive activities, such as firefighting ("fire suppression"), could be performed without documentation only in the event of "[u]nanticipated emergency situations

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8 Fund for Animals v. Babbitt, 89 F.3d 128, 130 (2d Cir. 1996) ("The CEQ has authorized the use of categorical exclusions to promote efficiency in the NEPA review process.").

9 *See infra* Part I.C.

10 "National forests and grasslands encompass 191 million acres (77.3 million hectares) of land, which is an area equivalent to the size of Texas." United States Department of Agriculture (USDA), USDA Forest Service—About Us, *at* http://www.fs.fed.us/aboutus/ (last visited Aug. 20, 2004).

11 Other major administrators of natural resources include the Bureau of Land Management (BLM) and the Fish and Wildlife Service (FWS). Both of these organizations are sub-agencies of the Department of the Interior, while the Forest Service is part of the Department of Agriculture.

12 *See infra* notes 63–71 and accompanying text.

13 For a discussion of the original scope of categorical exclusions, see *infra* Part II. Substantively, categorical exclusions have been expanded because more types of actions are listed as excluded, and procedurally, categorical exclusions have been expanded because excludable actions may be defined by the severity of their environmental impact. What results is a category of actions that can be excluded late in the decisionmaking process. *See infra* notes 72–78 and accompanying text. The originally intended scope can be divined from the initial types of exclusions that were permitted. *See infra* notes 58–59 and accompanying text.

14 Forest Service NEPA Process, Final Implementation Procedures, 44 Fed. Reg. 44,718, 44,731 (July 30, 1979).

15 *Id.* In all instances falling under categorical exclusions, responsible officials were still free to perform analyses of potential environmental consequences if they believed such analyses relevant or important. *Id.*

that require immediate action to prevent or reduce risks to public health or safety."[16] By 1985, the Forest Service had promulgated rules that allowed it to conduct "small harvest cuts" without extensive documentation.[17] Today, the Bush Administration, in conjunction with its ironically named "Healthy Forests Initiative," has encouraged the Forest Service to wildly expand its categorical exclusions.[18] Included in the recent categorical-exclusion expansion are timber sales of up to 1000 acres when meant to prevent fires,[19] any sales up to 70 acres, and salvage-timber sales of up to 250 acres.[20]

Although the Forest Service's push for increased discretion in categorical exclusions is troubling, equally disturbing has been the CEQ's role in enabling agencies to evade NEPA requirements. Through official rules[21] and in its work with agencies,[22] the CEQ has reformulated the once-narrow categorical exclusion. What was once an exceptional situation is now simply one of three possible avenues for assessing the

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16 *Id.*

17 National Environmental Policy Act; Revised Implementing Procedures, 50 Fed. Reg. 26,078, 26,081 (June 24, 1985). Also, by this time, the use of herbicides did not require an impact statement. *Id.* (identifying "low-impact pest management activities, such as suppressing nuisance insects and poisonous plants in campgrounds and picnic areas; controlling cone and seed insects in seed orchards; and fumigating to control weeds in nurseries" as examples of actions that "usually do not significantly affect the environment individually or cumulatively" and are therefore categorically excluded).

18 For more on the Healthy Forests Initiative, see OFFICE OF COMMUNICATIONS, THE WHITE HOUSE, HEALTHY FORESTS: AN INITIATIVE FOR WILDFIRE PREVENTION AND STRONGER COMMUNITIES (Aug. 2002), *available at* http://www.whitehouse.gov/infocus/healthyforests/toc.html.

19 National Environmental Policy Act Determination Needed for Fire Management Activities: Categorical Exclusions, 68 Fed. Reg. 33,814, 33,814 (June 5, 2003) (providing notice of revised procedures for implementing NEPA and CEQ regulations).

20 National Environmental Policy Act Documentation Needed for Limited Timber Harvest, 68 Fed. Reg. 44,598, 44,598 (July 29, 2003).

21 Guidance Regarding NEPA Regulations, 48 Fed. Reg. 34,263, 34,264–65 (July 28, 1983) (codified at 40 C.F.R. § 1508.4).

22 The CEQ requires that agency rules regarding NEPA documentation be formulated in consultation with the CEQ. 40 C.F.R. § 1507.3(a) (2003) ("Each agency shall consult with the Council while developing its procedures and before publishing them in the Federal Register for comment."); Ninth Progress Report on Agency Implementing Procedures Under the National Environmental Policy Act, 45 Fed. Reg. 77,107, 77,107 (Nov. 21, 1980) ("In the course of developing implementing procedures, agencies are required to consult with the Council and to publish proposed procedures in the Federal Register for public review and comment."); DANIEL R. MANDELKER, NEPA LAW & LITIGATION § 7:10 (2d ed. 2003) ("Consultation with CEQ on the adoption of categorical exclusions is required, but a categorical exclusion adoption does not require an environmental assessment or an impact statement."); *see also* THE NEPA TASK FORCE, REPORT TO THE COUNCIL ON ENVIRONMENTAL QUALITY; MODERNIZING NEPA IMPLEMENTATION 63 (Sept. 2003) [hereinafter NEPA TASK FORCE] (addressing potential CEQ improvements to categorical-exclusion approval process).

environmental impact of agency actions.[23] In some respects, the CEQ's effort to make categorical exclusions easier to use has made them harder to use. In order to avoid claims of having entirely eviscerated the goal of NEPA, the CEQ also has created safety nets known as extraordinary circumstances: Agencies must enumerate characteristics that, when present in an action otherwise categorically excluded, mandate a reversion to full NEPA documentation requirements.[24] The result is that the documentation and decisionmaking necessary for a categorical exclusion are largely similar to those required for other NEPA actions.[25] Even agencies that have not expanded their use of categorical exclusions still perform this due diligence in order to avoid litigation. As a result, many agencies simply use more onerous but (legally) more predictable ways of avoiding costly litigation for actions that should be subject to simple exclusions.[26] Thus, in many respects, the CEQ's effort to simplify categorical exclusions has been counterproductive.[27]

The CEQ has operated in conjunction with agencies such as the Forest Service to undermine two of NEPA's legislative and common-law purposes: public participation and the creation of an administrative record. NEPA's importance as a mechanism for establishing an administrative record was acknowledged in the first major court opinion to interpret NEPA.[28] In addition, NEPA's role in encouraging public participation in the regulatory process was incorporated in the text of the statute itself.[29] The end-products of the NEPA process manifest the legislation's dual purposes: The environmental

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[23] *See infra* Part I.C.

[24] 40 C.F.R. § 1508.4 (2003) ("Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.").

[25] *See* MANDELKER, *supra* note 22, § 7:10; *infra* notes 72–75 and accompanying text.

[26] *See* NEPA TASK FORCE, *supra* note 22, at 58.

[27] To be sure, documentation promotes accountability, but the original impetus for categorical exclusions—that some actions are so exactly repetitious that anything more than a summary acknowledgement of their execution would be wasteful—still exists.

[28] Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1114 (D.C. Cir. 1971) ("Moreover, by compelling a formal 'detailed statement' and a description of alternatives, NEPA provides evidence that the mandated decision making process has in fact taken place and, *most importantly*, allows those removed from the initial process to evaluate and balance the factors on their own." (emphasis added)).

[29] 42 U.S.C. § 4332(C) (2000) ("Copies of such statement[s] and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality *and to the public*." (emphasis added)). The CEQ has promulgated regulations promoting public participation. *See* 40 C.F.R. 1506.6(a) (2003) (requiring that agencies "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures").

impact statement (EIS) and the environmental assessment (EA), documentation central to NEPA, both require public comment and create an extensive administrative record.[30] Public participation and the creation of an administrative record are central elements of sunshine laws because they promote government accountability and create a basis for subsequent litigation.

Part I tracks the regulatory evolution of categorical exclusions, considers the justifications for that evolution, and discusses the intended benefits and whether they are realized in the resulting administrative structure. This Part argues that today's use of categorical exclusions has resulted in ad hoc administrative recordkeeping, a failure of legal accountability among regulatory agencies, and a decline in the important area of public participation. Part II assesses the accuracy of accusations that the Forest Service abuses categorical exclusions. It details the recent and dramatic increase in agency discretion to use categorical exclusions and thereby to bypass NEPA's usual requirements of an extensive administrative record and public participation. It then shows that efforts to reform categorical exclusions without narrowing their scope have failed to minimize litigation. Part II ends with recent examples of litigation over the Forest Service's use of categorical exclusions. Part III of this Note examines proposed solutions to the ever-expanding categorical exclusion and ensuing litigation; these solutions range from eliminating categorical exclusions to further liberalizing them. This Note concludes that, in order to realize any benefits from categorical exclusions, excluded actions must be limited to "easy" cases. Although this proposal limits the types of actions eligible for categorical exclusion, it will also promote efficiency by insulating these actions from litigation based on allegations of categorical-exclusion abuse.

I
NEPA AND THE DEVELOPMENT OF THE CATEGORICAL EXCLUSION

Part I.A describes how NEPA evolved from a generalized mandate from Congress—that the federal government keep in mind the environment when making decisions—into a body of law with specific requirements. It explains that the CEQ envisioned the mandate best being satisfied through one of two avenues, depending on whether the initial impact review revealed potentially significant environmental consequences.[31] Part I.B explains how the promulgation of categor-

[30] 40 C.F.R. § 1508.9, 1508.11 (2003).

[31] *See infra* notes 38–52 and accompanying text.

ical exclusions was seen as necessary to allow agencies to avoid burdensome paperwork for small, typically repetitious activities with negligible environmental consequences. Finally, Part I.C describes the impulse to expand the categorical exclusion and how this expansion has led to structural incoherence, obscuring the original purpose of NEPA.

A. The NEPA Requirements: Environmental Impact Statements and Environmental Assessments

Congress passed the National Environmental Policy Act in 1969 as a simple statement of federal policy. In its opening sections, the statute plainly states that all federal actions must proceed with due regard for any potential impacts on the environment: "[I]t is the continuing policy of the Federal Government . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."[32]

Congress did not at first assign authority to a single agency to interpret NEPA's expansive mandate. Rather, the agency that Congress did create, the CEQ, had responsibility to assess the nation's environmental health and assist the president in developing environmental policies.[33] Thus, as NEPA was first constructed, all federal agencies had responsibilities under NEPA but none had rulemaking authority to interpret the act through definitive regulations. The problem with this approach was that NEPA would be interpreted in different ways by different agencies. As a result, NEPA requirements and enforcement of those requirements became entirely unpredictable.

In 1970, President Nixon amended this oversight by issuing an executive order that directed the CEQ to "[i]ssue guidelines to Federal agencies for the preparation of detailed statements on proposals for legislation and other Federal actions affecting the environment, as required by section 102(2)(C) of the Act."[34] The regulations in their modern form were created in response to another executive order from President Carter.[35] These changes have strengthened

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32 42 U.S.C. § 4331(a) (2000).

33 42 U.S.C. § 4344 (2000).

34 Exec. Order No. 11,514, 35 Fed. Reg. 4247, 4248 (Mar. 7, 1970).

35 Exec. Order No. 11,991, 42 Fed. Reg. 26,967, 26,967–68 (May 25, 1977) (directing CEQ to issue regulations requiring that impact statements be "concise, clear, and to the point, and supported by evidence that agencies have made the necessary environmental analyses" in hopes of making process "more useful to decisionmakers and the public" and reducing paperwork so that decisionmakers and public can "focus on real environmental issues and alternatives").

NEPA by promoting uniformity: No matter how the CEQ interprets NEPA (even in ways that might be less restrictive than agency interpretations), NEPA benefits from having a uniform interpretation that can be enforced by the courts.

The statute itself required only that agencies include in "every recommendation or report on proposals for . . . major Federal actions," a "detailed statement" about anything that might "significantly affect[ ] the quality of the human environment."[36] The purpose of the requirement is twofold: to require that those responsible for making a given decision consider the environmental consequences of their decision, and to inform the public of any potential consequences so that stakeholders may influence decisions through political or judicial avenues.[37] The "detailed statement," and consequently NEPA, were to have no actual substantive consequences. This "detailed statement" requirement was simply intended to highlight any potential environmental consequences, thereby creating a basis for advocacy groups to lobby for political change or challenge a decision through litigation.

The first major case to examine the requirements of NEPA was *Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission*.[38] In finding the actions of the Atomic Energy Commission insufficient to satisfy the then uncertain requirements of NEPA, Judge Wright of the D.C. Circuit interpreted the "detailed statement" required by Section 102(2)(C) to include a consideration of alternatives and cost-benefit analysis.[39] Judge Wright also interpreted the potentially equivocal phrase in that same section, "to the fullest extent possible," as meaning "to the fullest extent."[40] Negating the word "possible," he defined such a mandate to mean "that environmental issues be considered at every important stage in the deci-

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[36] 42 U.S.C. § 4332(2)(C) (2000); *see also* MANDELKER, *supra* note 22, § 1:1 (describing requirements at "[t]he heart of NEPA").

[37] See, for example, *Sierra Club v. Morton*, 510 F.2d 813, 819 (5th Cir. 1975), noting that:

> The purposes of an environmental impact statement are to detail the environmental and economic effects of proposed federal action to enable those who did not have a part in its compilation to understand and consider meaningfully the factors involved, and to compel the decisionmaker to give serious weight to environmental factors in making discretionary choices.

Id. (citations and quotations omitted); *see also* Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693, 697 (2d Cir. 1972) (observing that environmental impact statement (EIS) discloses information to general public and forces federal agencies to consider environmental factors in making discretionary choices).

[38] 449 F.2d 1109 (D.C. Cir. 1971).

[39] *Id.* at 1114.

[40] *Id.* at 1115 ("[NEPA requirements] must be complied with to the fullest extent, unless there is a clear conflict of *statutory* authority.").

sion making process."[41] *Calvert Cliffs'* transformed what would become known as an EIS into something of a substantive requirement, indicating that technical, insincere compliance would not be enough to satisfy NEPA requirements.[42] Rather, the agency would have to genuinely consider any environmentally friendly options revealed by the environmental analysis.[43]

The years of subsequent interpretation have affirmed the substantive and substantial nature of the EIS requirement. The CEQ-promulgated regulations suggest a page range of between 150 and 300, depending on the scope of the project.[44] This number, however, is grossly out of line with the actual sizes of "typical" EISs.[45] The EIS has become an incredibly costly endeavor.

The CEQ created the option of the environmental assessment in order to alleviate the bureaucratic burden of the EIS. An EA must be performed when an action does not "[n]ormally require[ ] an environmental impact statement" nor qualify as a categorical exclusion.[46] In other words, an EA is required if an action falls into the gray area between explicit exceptions and explicit requirements; it thus serves an exploratory purpose in order to determine whether the agency must then conduct an EIS.[47] If the agency decides that the findings are sufficiently significant to require an EIS, the agency files a Notice of Intent (NOI) to submit an EIS. The purpose of the NOI is to declare the "positive" results of the EA and briefly to describe the proposed action and alternatives that the EIS will explore.[48] If the agency determines that the results of the EA are "negative," then it

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41 *Id.* at 1118.

42 *Id.* at 1113 n.5 ("Thus a purely mechanical compliance with the particular measures required in § 102(2)(C) & (D) will not satisfy the Act if they do not amount to full good faith *consideration* of the environment."); *id.* at 1115 (declaring that court could reverse agency's decision if it could be "shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values").

43 The agency has to consider the environmental effects, though not necessarily *pursue* a more environmentally friendly outcome. *See* Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980) ("NEPA was designed 'to insure a fully informed and well-considered decision,' but not necessarily 'a decision the judges of the Court of Appeals or of this Court would have reached had they been members of the decision-making unit of the agency.'" (quoting Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978))).

44 40 C.F.R. § 1502.7(a) (2003).

45 NEPA TASK FORCE, *supra* note 22, at 66 (noting that EISs typically range from between 200 to more than 2000 pages). The Report details other characteristics of "typical" EISs: They "[a]re developed by an interdisciplinary team; [r]equire from 1 to more than 6 years to complete; and [c]ost between $250,000 and $2,000,000." *Id.*

46 40 C.F.R. § 1501.4(b) (2003).

47 § 1501.4(c).

48 40 C.F.R. § 1508.22(a) (2003); MANDELKER, *supra* note 22, § 7.11 (documenting requirements of Notice of Intent (NOI)). The NOI is not exclusively a post-Environmental

submits a Finding of No Significant Impact (FONSI). The FONSI briefly presents "the reasons why an action, not otherwise excluded . . . , will not have a significant effect on the human environment and for which an [EIS] therefore will not be prepared."[49]

Although the EA serves an analytic purpose for environmental issues, it is not simply a cheaper version of the EIS.[50] Rather, its legal requirements are distinct from that of an EIS.[51] With its two central requirements, the EA aims for brevity. The first requirement is that the EA will serve as a building block upon which the agency will decide whether to perform an EIS: Either the EA will provide the framework and ideas necessary for an EIS, or it will provide evidence that the agency has successfully and incontrovertibly complied with the requirements of NEPA, laying the groundwork for a FONSI. The second requirement is that the EA contain elements of a mini-EIS, with "brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted."[52] The EA thus has fewer requirements than the EIS but still generates a thorough administrative record.

B. The Rise of Categorical Exclusions

The CEQ defines the categorical exclusions as "a category of actions which do not individually or cumulatively have a significant effect on the human environment."[53] The category must be found to have no significant effect through "procedures adopted by a Federal agency."[54] If a federal agency adopts such procedures, it can thus bypass the typical NEPA requirements (EA and EIS) for any actions that fall into the no-impact category. An action that is categorically excluded through this provision will have limited legal requirements and should produce little in the way of an administrative record.

Assessment (EA) submission. It is filed prior to an EIS whether or not an EA is performed. § 1508.22.

[49] 40 C.F.R. § 1508.13 (2003).

[50] The minimum-level EAs that satisfy CEQ regulations "typically: [r]ange from 10 to 30 pages in length; [a]re developed by one author; [r]equire from 2 weeks to 2 months to complete; and [c]ost between $5000 and $20,000." NEPA TASK FORCE, *supra* note 22, at 65. By comparison, larger EAs "typically: [r]ange from 50 to more than 200 pages in length; [a]re developed by an interdisciplinary team; [r]equire from 9 to 18 months to complete; and [c]ost between $50,000 and $200,000." *Id.*

[51] 40 C.F.R. § 1508.9(b) (2003) (describing legal requirements of EA).

[52] *Id.*

[53] 40 C.F.R. § 1508.4 (2003).

[54] *Id.*

The categorical exclusion might benignly be described as improving NEPA by narrowing the focus of NEPA to actions that would most benefit from the publicity and mandatory analysis of an EIS. The public need not participate in minor decisions, and requiring them to do so would only distract them from environmentally significant decisions and unnecessarily burden agencies. Categorical exclusions thus promote agency efficiency and avoid masses of paper that might otherwise divert attention away from federal actions with real environmental effects.[55]

The concept of a categorical exclusion first arose in 1978 under the Carter Administration.[56] Early litigation interpreted the provision as an effort to codify the "non-major" provision of NEPA.[57] The categorical exclusion was seen as a subset of projects having negligible environmental impact and capable of being identified in advance based on some common characteristic.

Initially, the CEQ sought categorical exclusions that were highly specific.[58] The purpose of such categorical exclusions was to prevent a potential flood of paperwork should the overall project be seen as a series of major federal actions, each with environmental effects requiring NEPA-style investigation. When agencies anticipated multiple actions with a common thread, they could frontload their environmental review by promulgating a category of excludable actions, and thereby avoid further irrelevant and burdensome environmental scrutiny. Promulgating each new categorical exclusion required cre-

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[55] Fund for Animals v. Babbitt, 89 F.3d 128, 130 (2d Cir. 1996) ("The CEQ has authorized the use of categorical exclusions to promote efficiency in the NEPA review process.").

[56] National Environmental Policy Act—Regulations, 43 Fed. Reg. 55,977, 55,991 (Nov. 29, 1978) (codified at 40 C.F.R. § 1500.4(p) (2003)) ("Agencies shall reduce excessive paperwork by . . . [u]sing 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 environmental impact statement.").

[57] *See, e.g.*, Sierra Club v. Hassell, 636 F.2d 1095, 1098 (5th Cir. 1981) ("These regulations, issued by the Council on Environmental Quality, state that an environmental impact statement is not required for a 'categorical exclusion,' which is similar to a 'non-major' project." (quoting § 1508.4, 1508.8)). The text of NEPA regarding "major" federal actions reads as follows: "[T]he Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement." 42 U.S.C. § 4332(2)(C) (2002). The "major" provision of NEPA has not received much judicial analysis, with courts frequently folding it into the "significance" question. MANDELKER, *supra* note 22, § 8:32 (noting that some courts find that if impact of federal action on environment is significant, then it is major). That early cases interpreting the categorical-exclusion provision, which speaks of actions that do not have a significant effect on the environment, would interpret it as a restatement of the "non-major" language affirms such an approach.

[58] *See, e.g.*, Friedman Bros. Inv. Co. v. Lewis, 676 F.2d 1317, 1318 (9th Cir. 1982) (reviewing case involving Urban Mass Transportation Administration's decision to promulgate site-specific categorical exclusion for decisions relating to construction project).

ating an administrative record as well as providing opportunity for the public to respond.[59]

The CEQ also mandated that every categorical exclusion have an "except" clause—that is, a provision for improvidently granted categorical exclusions. This requirement stated that "[a]ny procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect."[60] Any action improperly derailed from the EIS track can thus "get back on track." Extraordinary circumstances have played a more substantial role as agencies have expanded the breadth of categorical exclusions.[61]

C. *Problems with the Categorical Exclusion*

Descriptively, the categorical exclusion differs from the EA because it circumvents the requirements of the EA and EIS. Normatively, it differs because the bulk of the effort to categorically exclude a given action should have been completed before the specific action is even considered. When a particular action falls into the pre-existing, already-documented categorical exclusion, all that should be necessary is limited documentation verifying that the action fits into the category.

In practice, the categorical exclusion has failed to increase efficiency without sacrificing scrutiny. This failure is due in part to efforts to broaden the scope of categorical exclusions, which have been accompanied by increased efforts to scrutinize their use. As forces attempt to manipulate the categorical exclusions, categorical-exclusion analysis has begun to mirror the EA analysis,[62] rendering formalistic the descriptive difference. While assuming the burdens of the EA, categorical exclusions lack the corresponding predictability. As a result, the categorical exclusion has become an unattractive and inefficient alternative for agencies. This Section tracks the evolution of the categorical exclusion to its present state.

In 1983, the CEQ expanded the scope of categorical exclusions after hearing from federal agencies that "categorical exclusions were not adequately identified and defined."[63] The CEQ agreed that it had

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[59] New categorical exclusions require publication in the Federal Register and opportunity for public comment. 40 C.F.R. § 1507.3(a) (2003) ("The procedures shall be adopted only after an opportunity for public review and after review by the Council for conformity with the Act and these regulations.").

[60] 40 C.F.R. § 1508.4 (2003).

[61] *See infra* Part II.B.

[62] *See* MANDELKER, *supra* note 22, § 7:10.

[63] Guidance Regarding NEPA Regulations, 48 Fed. Reg. 34,263, 34,264 (July 28, 1983) (codified at 40 C.F.R. pt. 1500).

poorly communicated what it had intended by categorical exclusions; it agreed with commentators that "agencies had not identified all categories of actions that meet the categorical-exclusion definition (§ 1508.4) or that agencies were overly restrictive in their interpretations of categorical exclusions."[64] The recommendations cite a report by the Environmental Law Institute showing an inefficiently high number of FONSIs.[65]

In its effort to redefine the role of categorical exclusions, the CEQ makes clear in this document that categorically-excluded actions should be used as frequently as actions that begin with EISs and EAs. The three potential avenues would be: First, if the proposal is a "major federal action significantly affecting the quality of the human environment," then there must be an EIS;[66] second, "[i]f there is insufficient information to answer the question, an environmental assessment is needed" before any further conclusions can be made;[67] and third, if there is sufficient information to answer this question in the negative, then the action is categorically excluded and no further work is necessary.[68]

Aiming to fix this third avenue, the CEQ recommended that agencies broaden the scope of excludable actions. They wrote:

> The Council encourages the agencies to consider broadly defined criteria which characterize types of actions that, based on the agency's experience, do not cause significant environmental effects. If this technique is adopted, it would be helpful for the agency to offer several examples of activities frequently performed by that agency's personnel which would normally fall in these categories.[69]

This new approach to the categorical exclusion increased agency discretion to avoid NEPA requirements in marginal cases. Perhaps even more important than the "broadly" language is the "types of actions" language, signifying that the list of categorical exclusions would contain not specific actions, but rather general examples of low-impact actions. The new rule discourages the use of EAs, recommending that agencies "examine their decisionmaking process to ascertain if some . . . [EA] actions do not, in fact, fall within the categorical exclusion definition, or, conversely, if they deserve full EIS

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64 *Id.*

65 *Id.* at 34,265, 34,268 n.1 (citing ENVTL. L. INST., NEPA IN ACTION; ENVIRONMENTAL OFFICES IN NINETEEN FEDERAL AGENCIES: A REPORT TO THE COUNCIL ON ENVIRONMENTAL QUALITY 16 (1981)) .

66 *Id.* at 34,265.

67 *Id.*

68 *Id.*

69 *Id.*

treatment."[70] Finally, the report recommends that agencies not require due diligence beyond what is necessary to identify an exclusion, encouraging them to ignore non-mandated procedures.[71]

The expansion of categorical exclusions has exacerbated, not resolved, the confusion: How is a categorical exclusion, based on consideration of extraordinary circumstances, different than an EA? The EA is a "concise public document"[72] that takes a preliminary look at the potential consequences and alternatives but does not weigh their relative merits.[73] If the actions are found not to have significant impact on the environment, a FONSI is filed, and no further action is taken. An action is simply categorically excluded, on the other hand, if an agency finds "based on the agency's experience [that the action will not] cause significant environmental effects" *and* a separate document shows no extraordinary circumstances. Commentators declare that these requirements for a categorical exclusion confuse it with the EA: "The effect of this method of defining categorical exclusions is to apply the same criteria for determining whether an impact statement is necessary to the categorical exclusion decision."[74] This conflation of the two procedures undercuts the CEQ's claim that significantly less documentation and analysis is necessary when an action is to be categorically excluded.[75]

Agencies have been mixed in their acceptance of the broadened categorical exclusion. Some avoid categorical exclusions altogether for fear of subsequent litigation,[76] while others exploit the flexibility of the category in order to avoid EA requirements.[77]

The Forest Service, in particular, has been accused of exploiting this flexibility. The Forest Service has promulgated broad categorical exclusions that require a case-by-case determination of applicability, deemed by some a contradiction in terms.[78] Although the Forest

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[70] *Id.*

[71] *Id.* ("[T]he Council strongly discourages procedures that would require the preparation of additional paperwork to document that an activity has been categorically excluded.").

[72] 40 C.F.R. § 1508.9 (2003).

[73] Unlike an EIS, "[a]n EA aims simply to identify (and assess the 'significance' of) potential impacts on the environment; it does not balance different kinds of positive and negative environmental effects." Sierra Club v. Marsh, 769 F.2d 868, 875 (1st Cir. 1985).

[74] MANDELKER, *supra* note 22, § 7:10.

[75] *See* NEPA TASK FORCE, *supra* note 22, at 58.

[76] *See id.*

[77] *See infra* Part II.

[78] *See* Myron L. Scott, *Defining NEPA out of Existence: Reflections on the Forest Service Experiment with "Case-by-Case" Categorical Exclusion*, 21 ENVTL. L. 807, 814 (1991) (stating that "[t]he process came to be known by the oxymoron 'case-by-case' categorical exclusion").

Service has proposed altering some of its case-by-case provisions, its service manual continues to promote discretion that violates the spirit of NEPA and strains the meaning of CEQ rules.

II
THE UNITED STATES FOREST SERVICE: CATEGORICAL EXCLUSIONS RUN AMOK

This Part demonstrates that neither agencies nor the environment have benefited from expanded agency discretion. Part II.A describes how the Forest Service has taken advantage of the CEQ's permissiveness and thereby undermined NEPA in two important ways: First, the Forest Service subjects fewer actions to the more rigorous analysis conducted in environmental assessments and environmental impact statements, instead approving these actions under the permissive categorical-exclusion standard. Second, the Forest Service procedures for classifying an action as excluded have failed to promote any public participation or genuine assessment of environmental consequences. Part II.B argues that previous efforts to address these problems through categorical-exclusion reform have simply changed the focus of litigation. But the process still allows public participation primarily through post hoc litigation only. Finally, this Part discusses two recent prototypical lawsuits against the Forest Service in which plaintiffs allege categorical-exclusion abuse. With their differing outcomes, these lawsuits show that: (1) environmental advocates are guaranteed to find a compliance issue upon which to base litigation, and (2) the outcome of such litigation is unpredictable.

A. Expanding Categorical Exclusions to Fit the Pace of the CEQ Permissiveness

The Forest Service has significantly undermined NEPA by expanding categorical exclusions. Put simply, the EA and EIS require significant environmental analysis and provide many opportunities for public comment. The more actions that avoid these processes, the less opportunity for analysis and comment. In response to this criticism, the Forest Service initially included public-comment and environmental-analysis requirements in its categorical-exclusion documentation. However, these requirements have limited force and application.

1. More Actions Subject to Exclusions

The Forest Service at first limited categorical exclusions to a narrow list of activities, such as altering organizational charts, funding

and scheduling projects, emergencies, routine and repetitive activities, and inventories.[79] This rule preserved the option of more rigorous analysis by granting the agency expert discretion to perform an environmental analysis despite the availability of the exclusion.[80] Two years later, categorical exclusions were expanded to include activities such as "[g]athering firewood," "[s]iting of bee hives," and "[r]iver floating."[81]

The CEQ guidance recommending the expansion of categorical exclusions, issued on July 22, 1983,[82] unambiguously supported broad categories: "The Council encourages the agencies to consider broadly defined criteria which characterize types of actions that, based on the agency's experience, do not cause significant environmental effects."[83] The CEQ urged agencies to trust their experts as to which activities had significantly little environmental impact, and not to create any elaborate administrative record to justify the experts' decisions.

In 1985, the Forest Service greatly expanded the types of actions that could be excluded from all NEPA evaluation.[84] Included in the items eligible for exclusion were "[c]onstruction of . . . auxiliary support buildings or other structures," "[l]ow-impact silvicultural activities" such as "small harvest cuts," and "[t]ransfer of interests in land."[85] While this expansion was significant, the expansion in recent years has been unprecedented. Examples of recent categorical exclusions include: "harvest of live trees not to exceed 70 acres, [requiring] no more than 1/2 mile of temporary road construction,"[86] "[s]alvage of dead and/or dying trees not to exceed 250 acres, [requiring] no more than 1/2 mile of temporary road construction,"[87] and "[c]ommercial and non-commercial felling and removal of any trees necessary to control insects or disease on no more than 250 acres, [requiring] no more than 1/2 mile of temporary road construction."[88] This new cate-

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[79] Forest Service NEPA Process, Final Implementation Procedures, 44 Fed. Reg. 44,718, 44,731 (July 30, 1979).

[80] *Id.* ("Categories not listed herein require documentation of the analysis. The responsible official should recognize, however, that there may be circumstances when the environmental analysis will indicate that an action listed above should be documented.").

[81] National Environmental Policy Act; Revised Implementing Procedures, 46 Fed. Reg. 56,998, 57,000 (Nov. 19, 1981).

[82] Guidance Regarding NEPA Regulations, 48 Fed. Reg. 34,263 (July 22, 1983) (codified at 40 C.F.R. pt. 1500).

[83] *Id.* at 34,265.

[84] National Environmental Policy Act; Revised Implementing Procedures, 50 Fed. Reg. 26,078, 26,081–82 (June 24, 1985).

[85] *Id.*

[86] National Environmental Policy Act; Documentation Needed for Limited Timber Harvest, 68 Fed. Reg. 44,598, 44,598 (July 29, 2003).

[87] *Id.*

[88] *Id.*

gorical exclusion includes the removal of infested or infected trees and adjacent live uninfested or uninfected trees as determined necessary to control the spread of insects or disease.

The Bush Administration has initiated these final changes in the name of preventing forest fires. Consequently, actions with significant impact on the environment are escaping the close scrutiny and extensive documentation accompanying EAs and EISs.

2. *Elimination of Scoping Procedures*

The Forest Service initially brought "in-house" many of the analytic requirements of environmental assessments (known as scoping) and environmental impact statements by incorporating significant analysis into an existing categorical exclusion.[89] These procedures included solicitation of public comment.[90] But the Forest Service eliminated public comment seeking for some actions in 1989 when it promulgated a rule concerning the appeals process for administrative decisions.[91] This rule established a "Decision Memo"[92] method of categorical exclusions whereby public-comment solicitation and the creation of a case file were reserved only for the most significant of potential categorical exclusions.[93] The remainder of the categorical exclusions were to be made on a case-by-case basis with little or no

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[89] The Forest Service noted:

> Some reviewers were concerned that excluding additional actions might result in reduced public involvement . . . . The [Forest Service] does not believe that the revisions of categorical exclusion direction will have these results. Under the revised policy, scoping is necessary for all proposed actions, including those which may be categorically excluded from documentation.

National Environmental Policy Act; Revised Implementing Procedures, 50 Fed. Reg. 26,078, 26,079 (June 24, 1985).

[90] *Id.* at 26,088 (requiring Forest Service to "[i]nvite participation from potentially affected Federal, State, and local agencies; Indian tribes; interested individuals and groups; and others who might be affected by the action or its alternatives").

[91] Appeal of Decisions Concerning the National Forest System, 54 Fed. Reg. 3342, 3342, 3358 (Jan. 23, 1989).

[92] A Decision Memo is defined as a "concise memorandum to the files signed by a Deciding Officer recording a decision to take or implement an action that has been categorically excluded from documentation in either an environmental assessment or environmental impact statement." *Id.* at 3358.

[93] National Environmental Policy Act; Revised Policy Act; Revised Policy and Procedures, 54 Fed. Reg. 9073, 9073–74 (Mar. 3, 1989) (adopted by U.S. Forest Service, Forest Service Handbook § 1909.15, ch. 30 (2000)) (maintaining previous categorical-exclusion documentation and notification processes for "small harvest cuts of . . . less than 10 acres" but minimizing necessary documentation and notification for administrative activities including maintenance and "construction of low impact facilities"). This rule was enacted and codified at 36 C.F.R. pt. 217 (1999). It was eliminated by the 2000 Plan Development Rule. National Forest System Land and Resource Management Planning, 65 Fed. Reg. 67,514, 67,568 (Nov. 9, 2000) (codified at 36 C.F.R. § 219.32 (2000)).

documentation, significantly limiting the potential administrative record.[94]

In the early nineties, the Forest Service devised the modern means of dealing with categorical exclusions, reintroducing public participation into the categorical-exclusion decisions.[95] However, the requirements for seeking public participation were limited to merely including in a case file the names of those notified about the decision.[96] Moreover, the Forest Service maintained a category of exclusions that would be allowed without either a Decision Memo or public participation.[97] Although these latter activities do have a limited-notice requirement, the absence of the Decision Memo requirement limits the opportunities for meaningful analysis.

B. The Effect of the 1992 Alterations: Extraordinary Circumstances, A New Focus of Litigation

Rather than reducing the frequency of litigation over the use of categorical exclusions, the Forest Service's 1992 alterations have only changed the focus of litigation. Before the 1992 reforms, litigation challenging categorical exclusions spoke about the appropriateness of

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[94] National Environmental Policy Act; Revised Policy Act; Revised Policy and Procedures, 54 Fed. Reg. at 9073–74. These changes were decried in a 1991 article by Myron Scott. Scott argued that the "typical classes" language preceding the list of categorically excluded activities (activities requiring no documentation), and the failure to consistently implement the Decision Memo policy at the local level created a culture of case-by-case categorical exclusions. This case-by-case approach allowed certain significant actions to escape scrutiny and fundamentally undermined long-range planning required by NEPA. Scott, *supra* note 78, at 814–17.

[95] National Environmental Policy Act; Revised Policy and Procedures, 57 Fed. Reg. 43,180, 43,183 (Sept. 18, 1992) (adopted by U.S. Forest Service, Forest Service Handbook § 1909.15, ch. 30 (2000)). The Forest Service noted:

> After fully considering these comments, this chapter has been rewritten to better describe the categories of actions which can be excluded from documentation. . . . [S]coping has been included to the extent necessary to determine whether or not the action will fit an existing category and whether or not there are any extraordinary circumstances.

Id.

[96] The requirements state:

> As a minimum, the project or case file should include any records prepared, such as: (1) The names of interested and affected people, groups, and agencies contacted; (2) the determination that no extraordinary circumstances exist; (3) a copy of the decision memo (sec. 30.5 (2) [sic]); (4) a list of the people notified of the decision; (5) a copy of the notice required by 36 CFR Part 217 [1992], or any other notice used to inform interested and affected persons of the decision to proceed with or to implement an action that has been categorically excluded.

Id. at 43,209.

[97] *Id.* at 43,210.

categories in more generalized terms.[98] After the 1992 reforms, litigation over extraordinary circumstances latched onto the regulatory language regarding what characteristics constitute extraordinary circumstances.[99] In its efforts to further refine the terrain of categorical exclusions, the Forest Service has simply increased the complexity of the debate.

This Section provides two recent examples of how categorical exclusions remain a litigious and uncertain path in NEPA compliance. In the following two cases, environmental groups challenged the exclusion of actions under similar provisions that allow the Forest Service to exclude reapproval of a previously existing plan.[100] These exclusions are typical of post-1985 exclusions: The categorical exclusions are so broadly defined that it is hard to identify why the specific action is deemed excludable. Actions that are approved under these exclusions could range from a three-day, five-person leave-no-trace backpacking excursion to a weekend-long jamboree involving several hundred all-terrain vehicles (ATVs).[101] Regardless of the extreme impacts of potentially excludable actions, however, the only recourse for organizations concerned with environmental impact is costly and

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[98] *See, e.g.*, Jones v. Gordon, 792 F.2d 821, 828–29 (9th Cir. 1986) (finding that "[National Marine Fisheries] Service's final report on the Sea World permit application reveals the arguable existence of 'public controversy based on potential environmental consequences,'" and therefore may fall within "extraordinary circumstances" exception to categorical exclusions, as described in 40 C.F.R. § 1508.27(b)(4) (2003)).

[99] The extraordinary-circumstance rule said that an item could be categorically excluded only if "there are no extraordinary circumstances related to the proposed action." National Environmental Policy Act; Revised Policy and Procedures, 57 Fed. Reg. at 43,208. It continued:

> Extraordinary circumstances include, but are not limited to, the presence of the following: a. Steep slopes or highly erosive soils. b. Threatened and endangered species or their critical habitat. c. Flood plains, wetlands, or municipal watersheds. d. Congressionally designated areas, such as wilderness, wilderness study areas, or National Recreation Areas. e. Inventoried roadless areas. f. Research Natural Areas. g. Native American religious or cultural sites, archaeological sites, or historic properties or areas.

Id.

[100] *Id.* at 43,209 (noting following categorical-exclusion provisions: 1) "Approval, modification, or continuation of minor, short-term (one year or less) special uses of National Forest System lands"; 2) "Approval, modification, or continuation of minor special uses of National Forest System lands that require less than five contiguous acres of land"). The first of these categories of exclusion does not require documentation in a case file. *Id.* at 43,208 ("The following categories of routine administrative, maintenance, and other actions normally do not individually or cumulatively have a significant effect on the quality of the human environment (sec. 05) and, therefore, may be categorically excluded from documentation in an EIS or an EA unless scoping indicates extraordinary circumstances."). The second category requires limited documentation in the form of a Decision Memo, a list of interested and affected parties notified, and preparation of a case file. *Id.* at 43,209. For limited documentation requirements, see also *supra* Part II.A.2.

[101] For the latter example, see *infra* Part II.B.2.

time-consuming post-decision litigation over the presence of extraordinary circumstances. As a result, both the agencies and the environment will suffer.

1. Riverhawks v. Zepeda*: Fluid Categories for Exclusion*

In *Riverhawks v. Zepeda*,[102] the Forest Service employed liberal categorical exclusions to avoid preparing an environmental impact statement for the reapproval of a plan issuing commercial permits in excess of a longstanding limit on motorboat use in a congressionally protected river in Oregon. NEPA served as an anchor claim for many violations alleged by the Western Environmental Law Center (WELC). In its NEPA claim, WELC alleged that the Forest Service violated the requirements to provide opportunity for meaningful public input, consider and document possible alternatives, and perform a cost-benefit analysis of environmental impacts through an EIS. The court agreed with this NEPA claim and provided injunctive relief on this ground.[103]

The Forest Service was found to have violated NEPA by presuming that its reissuance of special-use permits based on a prior alteration of its River Management Plan qualified as a categorical exclusion.[104] In 1972, the Forest Service and the Bureau of Land Management (BLM) jointly adopted a River Management Plan discouraging the use of motorized commercial boats on the Rogue River to the level in 1968.[105] That same year, the Oregon State Marine Board (OSMB), which regulated motorized uses of the river, had begun issuing permits for commercial use in excess of this level.[106] The Forest Service assumed full regulatory management of the river in 1986 and agreed to issue the same number of special-use permits as the OSMB.[107] The Forest Service decided to reissue these special-use permits in a Decision Memo on January 31, 2000.[108] To exclude this decision from review, the Forest Service relied on the categorical exclusion for agency decisions that amount to the "[a]pproval, modification, or continuation of minor special uses of National Forest System lands that require less than five contiguous acres of land."[109]

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[102] 228 F. Supp. 2d 1173 (D. Or. 2002).

[103] *Id.* at 1191.

[104] *Id.* at 1189.

[105] *Id.* at 1177, 1182 (noting that River Management Plan merely "encouraged," rather than required, that motorized use not exceed 1968 levels).

[106] *Id.* at 1177.

[107] *Id.*

[108] *Id.*

[109] *Id.* at 1189; National Environmental Policy Act; Revised Policy and Procedures, 57 Fed. Reg. 43,180, 43,209 (Sept. 18, 1992).

This provision categorically excluded any decision involving "minor" uses of the land in a small area, regardless of the nature of that decision.

Based on admissions of the Forest Service, the court deemed the categorical exclusion misapplied. Between the decision to maintain levels of authorized commercial motorboat use and the Decision Memo of January 2000, the Forest Service and the BLM issued several reports analyzing effects of motorboat use on protected species in the Rogue River. In the Decision Memo extending special-use permits, the Forest Service stated: "This proposal may impact western pond turtles, but no mitigation measures are required at this time."[110] Further, the Decision Memo noted that a take permit under the Endangered Species Act had previously been submitted because the permits had been deemed "likely to adversely affect" protected species.[111] Nonetheless, the Decision Memo concluded, "This proposal is within the scope of the take permit, and no additional consultation is required."[112] Essentially, the Decision Memo claimed that, despite the possible environmental effects, the proposed action fell within the Forest Service's broad category of exclusions, allowing the agency to forego NEPA evaluation.

The court agreed with WELC and rejected the Forest Service's argument that an action that adversely impacts the environment to either a known or unknown extent could qualify as an excluded category of agency actions. The decision relied on the most basic definition of categorical exclusion, ignoring the interpretation given in the Forest Service Manual.[113] In so doing, the court deemed the category as defined by the Forest Service to be an illegal interpretation of NEPA.

An alternative reading of *Riverhawks* is that, if a broad categorical exclusion is to be used, an agency must rigorously test for the presence of extraordinary circumstances that would trigger the need for an EIS. Such was the court's conclusion at least with regard to the take permit: "The fact that the Forest Service deemed the permit renewals within the scope of the incidental take permit does not negate the presence of extraordinary circumstances."[114] Thus, the ill-

110 *Riverhawks*, 228 F. Supp. 2d at 1189.

111 *Id.*

112 *Id.*

113 *Id.* ("A categorical exclusion, however, is appropriate only when the agency determines that the proposed action will have 'no effect' on the environment." (citing 40 C.F.R. § 1508.4 (2003) ("[A] category of actions which do not individually or cumulatively have a significant effect on the human environment.")).

114 *Id.* at 1190.

defined extraordinary-circumstance provision voided the Forest Service's categorical exclusion, but only through expensive litigation was this error revealed.

2. Utah Environmental Congress v. United States Forest Service: *Extraordinary Circumstances; Present but Unaffected*

In *Utah Environmental Congress v. United States Forest Service* (*UEC*),[115] the Forest Service was again alleged to have abused the categorical-exclusion process by failing to properly consider the presence of extraordinary circumstances. The case involved the special-use permit approval for an event called the "Fillmore Jamboree," in which "250–350 participants . . . take guided ATV rides on certain existing roads and trails in Fishlake National Forest."[116] The event had been approved each year for the prior fourteen years; the Forest Service had issued special-use permits each year to allow for the presence of otherwise illegal ATVs on Forest Service–managed land. After an abortive attempt to conduct an EA, a time-pressed Forest Service[117] authorized the event under a Forest Service categorical exclusion similar to the one employed in the *Riverhawks* case.[118] Unlike *Riverhawks*, however, the court found the alleged extraordinary circumstances insufficient to warrant finding that the Forest Service acted arbitrarily and capriciously with regard to its legislative and administrative mandate.

The *UEC* case rested on a constricted reading of "extraordinary circumstances."[119] The court explained that neither the CEQ guidelines nor the Forest Service's own rules clarify whether the "mere presence of sensitive environment conditions" qualifies as an extraordinary circumstance, or whether the action must "pose a *potentially* significant threat to [this] environment" to qualify.[120] The court opted for the latter—a narrow view of extraordinary circumstances, as recommended by the Forest Service, but contrary to precedent identi-

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115 No. 2:01-CV-00390B, 2001 U.S. Dist. LEXIS 24752 (D. Utah June 19, 2001).

116 *Id.* at *2.

117 The Forest Service was pressed for time because the public-comment phase of the EA allowed a time for appeal that would have lasted past the scheduled date of the jamboree. *Id.* at *7.

118 National Environmental Policy Act; Revised Policy and Procedures, 57 Fed. Reg. 43,180, 43,209 (Sept. 18, 1992) (adopted by U.S. Forest Service, Forest Service Handbook § 1909.15, ch. 30 (2000)) ("Approval, modification, or continuation of minor, short-term (one year or less) special uses of National Forest System lands.").

119 *UEC*, 2001 U.S. Dist. LEXIS 24752, at *16 ("The main question here is whether the Forest Service's categorical exclusion of the Jamboree from environmental review by way of an EIS or EA was arbitrary and capricious. This question depends on what the Forest Service Handbook means when it refers to 'extraordinary circumstances.'").

120 *Id.* at *19. For further discussion of this distinction, see *id.* at *18–*23.

fied in the court's decision.[121] The *UEC* court concluded that, above all, it is the judiciary's responsibility to defer to the agency's reasonable interpretation.[122]

In arriving at the decision, the court cited and dismissed the conclusion of the Seventh Circuit in *Rhodes v. Johnson*.[123] The *Rhodes* decision found an extraordinary circumstance to exist because of the mere presence of certain sensitive environmental conditions, according to the plain language of the 1992 rule.[124] Thus, if there were erosive soils or endangered plants, an EA was imperative. The court in *UEC* dismissed this approach, holding instead that the term "conditions" in the rule refers to conditions of the *action* rather than of the environment, and that these conditions must have a potentially significant impact on the environment in order to qualify as an "extraordinary circumstance."[125] In other words, the action in question must have a documentable impact on those erosive soils or endangered plants in order to qualify as an extraordinary circumstance and hence negate the categorical exclusion.

The court in *Riverhawks* nominally followed *UEC*, but came to the opposite conclusion on the grounds that the Forest Service effectively admitted that an extraordinary circumstance was present. In *Riverhawks*, the court ruled that the threshold for finding an extraordinary circumstance is met when the agency, by its own terms, finds some indication of impact.[126] In the *UEC* case, on the other hand, the Forest Service did not go beyond finding the mere presence of sensitive environmental conditions to finding potential impact; on this ground, the *UEC* court refused to overturn the Forest Service's use of a categorical exclusion. Thus, in addition to allowing an environmentally hazardous activity in an area known to be particularly delicate, the *UEC* court also rewarded the lack of an administrative record: The court authorized the activity because the Forest Service

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121 *Id.* at *23–*24 (referring to *Rhodes v. Johnson*, 153 F.3d 785 (7th Cir. 1998), in which "extraordinary circumstances" was interpreted as "mere presence of one of the enumerated environmental concerns").

122 *Id.* at *21 ("The Court must defer to the Forest Service's interpretation of 'extraordinary circumstances' unless it is plainly erroneous or inconsistent with the handbook.").

123 153 F.3d 785 (7th Cir. 1998).

124 *Id.* at 790 ("[T]he plaintiffs' interpretation is compelled by the regulations' plain language: a proposed action 'has' or 'involves' an extraordinary circumstance, or the extraordinary circumstance is 'related to' the proposed action, whenever an extraordinary circumstance is present.").

125 *UEC*, 2001 U.S. Dist. LEXIS 24752, at *19 ("As such, the handbook's definition of 'extraordinary circumstances' suggests that the proposed action must pose a *potentially* significant threat to the environment and that the mere presence of sensitive environment conditions does not constitute 'extraordinary circumstances.'").

126 Riverhawks v. Zepeda, 228 F. Supp. 2d 1173, 1189 (D. Or. 2002).

had not ascertained whether the action would have a significant impact on the environment.[127]

Further evidence that the Forest Service's 1992 revisions have failed to enhance the efficiency and predictability of categorical exclusions comes from recently renewed efforts to "modernize" NEPA.[128] The recent Task Force Report on NEPA notes that "agencies interviewed indicated some confusion about the level of analysis and documentation required to use an approved categorical exclusion."[129] The report addresses categorical exclusions as one of six key areas in need of improvement.[130] Some of the recommendations, and the problems that the recommendations aim to address, are discussed in Part III.

III
PROPOSED SOLUTIONS

The decisions in *Riverhawks* and *UEC* demonstrate the inefficiency of litigation in determining the appropriate use of categorical exclusions. The problem in both of these cases is that the Forest Service took heed of the CEQ's encouragement for agencies to define broad categories of exclusions into which a variety of actions might fit. In so doing, the Forest Service failed to account adequately for extraordinary circumstances. More critically, the Forest Service attempted an end-run around the most important aspect of NEPA: public participation. The result was public participation in another sense—through litigation. Except for the limited public-notice requirement in the exclusion used in *Riverhawks*, this was the only means of participation allowed to the public.[131] It is nearly inevitable that an advocacy group, if largely excluded from the decisionmaking process, will likely find a merit-worthy claim alleging the presence of extraordinary circumstances.

Thus, as much as the broad categories act as an incentive to avoid NEPA paperwork, the risk of litigation aimed at uncovering abuses has acted as a deterrent to some agencies' use of categorical exclu-

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127 *UEC*, 2001 U.S. Dist. LEXIS 24752, at *17 ("[I]f the Forest Service is correct that 'extraordinary circumstances' means there must be a potential that the proposed action will impact the environment, the categorical exclusion would be valid because there is no evidence that the Jamboree may have a significant impact on the listed environmental conditions.").

128 NEPA TASK FORCE, *supra* note 22, at vii.

129 *Id.* at 57.

130 *Id.* at iii–vi.

131 The categorical exclusion used in *UEC* was of the type requiring neither a public-comment process nor case file creation. *See supra* note 100.

sions.[132] The CEQ has attempted to increase efficiency by expanding agency discretion. In this effort, it has destabilized the entire categorical-exclusion process by undermining certainty in even the most conservative categorical exclusions. This Part examines solutions identified in the Task Force Report and argues that only a fundamental procedural alteration will repair the categorical exclusion.

A. Government Proposals for Fixing Categorical Exclusions

In order to improve the use of categorical exclusions without radically altering the current system, the NEPA Task Force recommends that agencies "periodically review and update their categorical exclusions."[133] However, at the same time, the Task Force Report continues to advise the CEQ to "[e]ncourage agencies to develop categorical exclusions, where appropriate, based on broadly defined criteria . . . , and encourage the agency to offer several examples of activities frequently conducted that would usually fall within the categories."[134]

Criticism of the current approach to categorical exclusions comes from interest groups on all sides, commercial and environmental. Commercial groups decry the costs associated with categorical exclusions. The Timberline Lodge Resort paid $40,000 for each categorical exclusion needed to replace a chairlift;[135] in that same area, the Willamette Pass Ski Area paid $30,000 for a short extension of a gondola across a highway. A representative of these groups complained: "This lengthy and costly analysis defeats the purpose of a [categorical exclusion]."[136]

In response to complaints about the cost of categorical exclusions, the Task Force Report recommends only that agencies "[a]ddress the documentation prepared at the time a categorical exclusion is used."[137] With this suggestion—that agencies perform no more work than that which is required statutorily—the Task Force hopes to improve efficiency by decreasing the amount of paper. The real source of inefficiency, however, is not the production of paper at the exclusion phase, but rather the threat of paperwork if an exclusion

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[132] *See* NEPA TASK FORCE, *supra* note 22, at 58 ("Many agencies interviewed stated that their own internal procedures require documentation of project-specific categorical exclusions partly due to concern about potential litigation.").

[133] *Id.* at 63.

[134] *Id.*

[135] *See* CEQ TASK FORCE, REVIEW OF THE NEPA PROCESS: SUMMARY OF PUBLIC COMMENT § 6-3, no. 945 (Dec. 20, 2002) [hereinafter CEQ TASK FORCE], *available at* http://ceq.eh.doe.gov/ntf/catreport/ceq_ch6.pdf.

[136] *Id.*

[137] NEPA TASK FORCE, *supra* note 22, at 63.

is challenged in court. If only generic recommendations define the categorical exclusions, agencies will continue to overproduce documentation at the earlier stages in order to "litigation-proof" their actions.

On the opposite side of the debate, environmental-advocacy groups argue that no matter how extensive the categorical exclusion–related documentation, the process still lacks critical public input.[138] Others even argue that categorical exclusions should be eliminated on the ground that, if a lot of paperwork is to be generated regardless, the process should assume the formality of the environmental assessment.[139]

B. Fixing Categorical Exclusion for Good: Fundamental Changes

The problems cited and solutions offered in the Task Force Report deal with categorical exclusions as they function now, rather than as they were intended to function. Categorical exclusions transformed from a narrow procedural mechanism meant to avoid unnecessary paperwork into a gaping hole in the NEPA requirements, beckoning to agencies as a panacea for environmental regulatory obstacles. Categorical exclusion must be fixed either by increasing scrutiny of proposed excludable actions, subjecting them to the same types of analysis as major federal actions, or by returning to a more limited concept of the categorical exclusion.

Based on the problems identified in this Note, categorical exclusions could be fixed in two ways. First, categorical exclusions could be generated by the issuance of a prior environmental impact statement. The EIS would include the necessary public involvement and create a useful administrative record. In order for this initial EIS to cover subsequent exclusions, it would have to analyze the cumulative effect of many actions, present and future. The amount of work required for such a promulgation would discourage agencies from abusing categorical exclusions, and the administrative record would provide a solid basis for challenging improper use.

Second, categorical exclusions could be returned to their pre-1983 levels, where they were limited to site-specific actions; the actions to be excluded were explicitly identified in the initial rule promulgation. This revision would limit both the use of categorical exclusions and the capacity for legal challenges.

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138 *See* CEQ TASK FORCE, *supra* note 135, at § 6-3, no. 945 ("One problem area is the use of [categorical exclusions] to cover up behind-closed doors analysis of potential impacts that belongs in public documents like environmental assessments.").

139 *Id.* at § 6-4, no. 952 (arguing that EA, along with finding of no significant impact, was intended to serve role that categorical exclusion now sometimes serves).

Although efforts to require that categorical exclusions be accompanied by the type of environmental analysis accompanying an EIS have failed,[140] this suggestion must be reconsidered given the breadth of recently promulgated categorical exclusions.[141] With silent approval from the CEQ, the Forest Service has long allowed its categorical exclusions to speak in general terms of "typical classes."[142] Considered in light of other actions with potential environmental impact, this approach borders on the absurd: No court would allow a nuclear power plant to substitute the EIS prepared for another plant and argue that it was merely conducting a repetitious activity with similar effects. The magnitude of recently promulgated categorical exclusions makes this analogy more real than alarmist.[143] In addition to any sort of useful specificity, a substituted EIS would certainly miss a central element of the environmental impact analysis: What will result, not just when this action is performed, but when this action is performed repeatedly?

The creation of a useful administrative record is critical to the reform of categorical exclusions.[144] The administrative record acts as a proxy for the review that the CEQ originally required through an EIS and then through the EA. If a category of excludable actions is detailed in the preliminary documentation, including consideration of potential cumulative impacts, then there is little need for further documentations when the actions arise. Furthermore, from an efficiency perspective, rigorous documentation of the sort required for an EIS would be more amenable to judicial determinations of adequacy, rendering legal outcomes more predictable.

Alternatively, categorical exclusions could return to their pre-1983 limitations. In their pre-1983 form, categorical exclusions served as a unique and productive step in the EIS process. They consisted only of repetitive activities without cumulative impacts. Most importantly, they were the *same* activities, such that the administrative record, prepared in advance for the repeated activity, would replicate the analysis of an EA performed for an individual activity. Even though the record prepared for these categorical exclusions reviewed

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140 *See* MANDELKER, *supra* note 22, § 7:10 ("[A] categorical exclusion adoption does not require an environmental assessment or an impact statement."); *see also* Heartwood, Inc. v. U.S. Forest Serv., 73 F. Supp. 2d 962, 971 (S.D. Ill. 1999) (rejecting argument that agency must have written approval of categorical exclusion), *aff'd on other grounds*, 230 F.3d 947 (7th Cir. 2000).

141 *See supra* notes 86–88 and accompanying text.

142 *See supra* note 94.

143 *See supra* notes 18–20 and accompanying text; *supra* Part II.A.

144 *See* NEPA TASK FORCE, *supra* note 22, at 59–60.

multiple actions, not one, it nonetheless assessed all projected cumulative impact.

Revisiting *Riverhawks* in light of the first proposed solution—creating a categorical exclusion through an EIS—the categorical exclusion never would have been issued. Even limited inquiry would have shown that it is impossible to anticipate all the potential consequences of the reapproval of many special-use permits, much less to deem all those consequences insignificant.

Similarly, revisiting *Riverhawks* in light of the second proposed solution—returning to the highly specific pre-1983 guidelines—the categorical exclusion never would have been granted. Indeed, the Forest Service would have to radically alter its category of exclusions by specifically detailing eligible activities. That is, the categorical exclusion could not include all "minor" actions affecting small areas or lasting short periods of time, but must instead be confined to highly specific, pre-designated activities.

Both of these proposals satisfy critics of the current categorical exclusion. A report by an environmentalist group has accused the Bush Administration of encouraging the Forest Service to ignore extraordinary circumstances and hence avoid NEPA requirements.[145] The problem in *Riverhawks*, however, is more structural than political.[146] But even if the problem of NEPA avoidance were political, it would be solved by limiting the use of categorical exclusions. If the CEQ plays a hands-on role in developing categorical exclusions and requires that categorical exclusions be site- and project-specific, then categorical exclusions will improve twofold: First, they will better serve their intended role, as a procedurally distinct alternative that still produces a thorough administrative record; second, they will be used less frequently, therefore inviting less litigation.

CONCLUSION

Agencies would find categorical exclusions more useful if the exclusions were limited to their pre-1983 form. The most significant problems cited in the NEPA Task Force Report are confusion about

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145 William Snape & John M. Carter, *Weakening the National Environmental Policy Act: How the Bush Administration Uses the Judicial System to Weaken Environmental Protections*, Defenders of Wildlife, at 16, *available at* http://www.defenders.org/publications/nepareport.pdf (last visited Oct. 1, 2004).

146 In fact, the decision was made on January 31, 2000 under the Clinton Administration. Riverhawks v. Zepeda, 228 F. Supp. 2d 1173, 1177 (D. Or. 2002). Regardless of the presidential administration, executive agencies will seek interpretations of legislation that afford them more discretion and less scrutiny.

what documentation is necessary and fear that litigation will ensue.[147] By limiting the number of categorical exclusions and supporting remaining categorical exclusions with more thorough documentation, agencies will find an overall gain in the value of categorical exclusions as these exclusions become more "litigation proof." Although some actions best suited for an exclusion will end up in the more arduous EA process, the overall process will benefit from increased predictability and increased efficiency through litigation avoidance.

Categorical exclusions serve an important and valuable role in the NEPA process. But any application of a categorical exclusion without a thorough record will encourage abuse of the process and diminish the value of NEPA. If categorical exclusions are limited and more thoroughly documented, they will again serve the purpose for which they were designed: to benefit both agencies and environmental accountability.

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147 NEPA TASK FORCE, *supra* note 22, at 58.