

# Categorical Exclusion under the National Environmental Policy Act (NEPA)

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Much has been said recently about the applicability of the Categorical Exclusion (CatEx) under the National Environmental Policy Act (NEPA) especially after the Deepwater Horizon release in the Gulf of Mexico. Because the development of the well was approved using a CatEx following reviews that concluded a massive oil spill was unlikely, there has been concern that the CatEx process should be revisited and revised. This White Paper provides a review and update to the CatEx background, the process by which a Federal agency lists an activity as appropriate for a CatEx determination, and changes in the CatEx process that have been recently promulgated, in large part because of the Deepwater Horizon incident.

## Background

A CatEx is one of the NEPA environmental evaluation and documentation categories and for many years has been given little attention. NEPA was generally considered to be an Environmental Impact Statement (EIS) statute, typically preceded by an Environmental Assessment (EA) to determine if an EIS is necessary to make a decision to approve federal actions, federal funding, or otherwise trigger a federal review and approval process. The original (and current) understanding of CatEx use is that it applies to a list of actions by an agency that do not “individually or cumulatively have a significant effect on the human environment” and for which the agencies have determined that neither an EA nor an EIS is necessary. However, over the last decade the list of actions that fall into the CatEx category has been greatly expanded.

It was understood when the CatEx mechanism was made a part of the NEPA process that agencies are not free to just “make up” lists of actions for which a CatEx is applicable. Such proposed actions must first go through a review by the Council of Environmental Quality (CEQ), a Federal Register Notice, a public review, and then a final CEQ review to ensure that the CatEx conforms to NEPA. Another key component of a CatEx is that there must be a process for the agency to consider actions that fit into certain categories for which a CatEx might not be appropriate. These may include actions where public health may be affected; where wetlands, endangered species, or historic properties may be adversely affected; where there are unique risks or uncertainties about impacts; and where a violation of law or environmental protection procedures may occur. In these cases, the agency is expected to give additional thought to the proposed action to confirm that it still meets the definition of a CatEx or if an EA should be prepared. It is also inherent in the CatEx process that the rules that govern it are not really definitive...they are just indications of the kinds of actions for which an EA or an EIS may not be required, but may still be subject to exceptions. However, the underlying basis for a CatEx is still to reduce the paperwork and labor involved for routine decisions for which past reviews and decisions have demonstrated that the proposed actions do not require the additional documentation of an EA or an EIS to reach an informed decision.

## Guidance

In 1983, the CEQ decided that agencies were being too restrictive in application of the CatEx process and provided guidance that was intended to broaden the scope of review and achieve the efficiencies that were originally intended. The 1983 guidance stated that there should be no special documentation as part of the CatEx process, but rather something in the administrative record that shows that the a CatEx is applicable and very apparent in light of the proposed action. By the 1990's, through litigation and court decisions the CatEx mechanism was challenged as not giving due consideration to cumulative impacts and the bar was set higher for an action that was expected to achieve a CatEx determination. By 2005, the Energy Policy Act included what was known as the “legislative categorical exclusion.” This stated that certain actions under the Mineral Leasing Act would be subject to a CatEx, but did not resolve the question of whether there might be extraordinary circumstances under this exclusion for which a CatEx might not apply. Subsequently, a task force of NEPA professionals, following a series of public meetings, recommended to the CEQ that it issue Draft Guidance on defining a CatEx, as well as how a CatEx should be used. This draft guidance was issued in 2008; it was reissued and updated in February of 2010 to clarify the use of a CatEx,

as well as mitigation and monitoring, climate change. The updated guidance can be found at the NEPA.gov website (which will redirect you to: <http://ceq.hss.doe.gov/>).

## CEQ Changes Based on the New Guidance

The final CEQ Guidance on Categorical Exclusions was published on 23 November 2010, in part as a result of the heightened interest following the Deepwater Horizon incident in how a CatEx can and should be used. The guidance is available at [http://ceq.hss.doe.gov/current\\_developments/new\\_ceq\\_nepa\\_guidance.html](http://ceq.hss.doe.gov/current_developments/new_ceq_nepa_guidance.html). This new guidance expands the process by which an agency substantiates a CatEx listing. It puts increased emphasis on requiring an agency to clearly demonstrate extended knowledge of the potential impacts of the proposed action, which may include professional expert opinions or otherwise ground truthing of the effects of a CatEx for specific actions. The new guidance also clarifies that if an agency uses benchmarking by another agency to implement a similar CatEx category, the initiating agency must still provide an administrative record showing how the benchmarked activity of the second agency applies to the initiating agency's circumstances. The guidance acknowledges that there is a sliding CatEx scale that may go from "no brainers" to those for which more rigor is required. The level of rigor may even be tiered to a programmatic NEPA document, in which the applicability of CatEx to certain actions can be documented.

The following "sound bite" from the final guidance is especially relevant:

*Where a CatEx is dependent on specific mitigation factors, such as time of year when it can be applied, frequency of use, or some geographical limitations, these mitigation requirements must be clearly stated in the CatEx description by the agency and the application of any mitigation should be part of the administrative record when the CatEx is used.*

There are broad definitions that are used by the agencies for proposed actions that may be considered as falling under a CatEx. Each agency will usually also provide a list of "**extraordinary circumstances**" under which a CatEx is not appropriate. Each agency may have some "extraordinary circumstances" that are specific to that agency so their specific NEPA guidance should be reviewed. But an example of what might be considered "extraordinary circumstances" is provided by the following list of potential actions from the Department of Defense under 32 CFR 651.29:

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 as specified in 40 CFR part 302, Designation, Reportable Quantities, and Notification.*
6. *Releases of petroleum, oils, and lubricants (POL) 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 (RONA) 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, as defined in paragraph (c) of this section.*
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.*

Paragraph (c) referred to above states:

*If a proposed action would adversely affect “environmentally sensitive” resources, unless the impact has been resolved through another environmental process (e.g., CZMA, NHPA, CWA, etc.) a CX cannot be used (see paragraph (e) of this section). Environmentally sensitive resources include:*

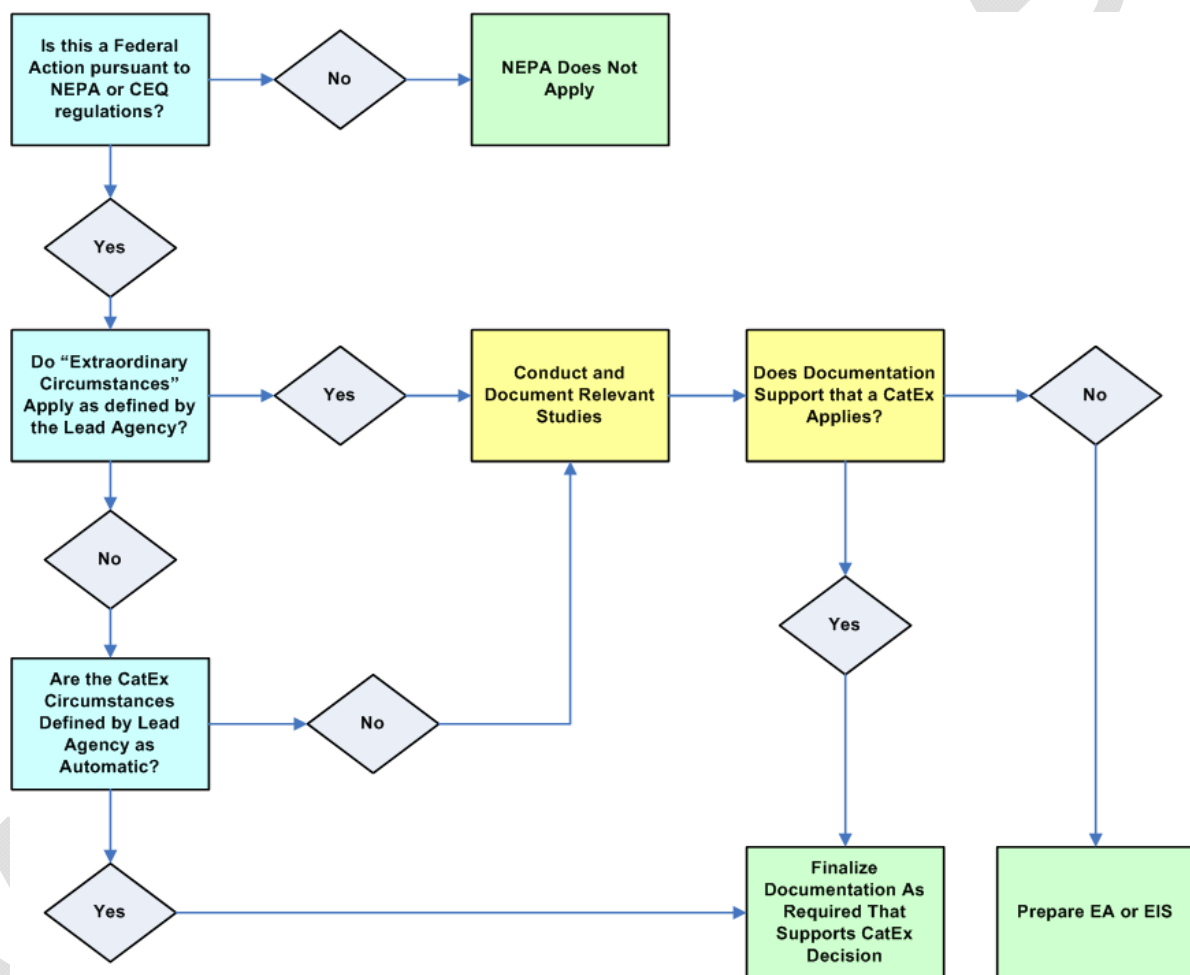
1. *Proposed federally listed, threatened, or endangered species or their designated critical habitats.*
2. *Properties listed or eligible for listing on the National Register of Historic Places (AR 200-4).*
3. *Areas having special designation or recognition such as prime or unique agricultural lands; coastal zones; designated wilderness or wilderness study areas; wild and scenic rivers; National Historic Landmarks (designated by the Secretary of the Interior); 100-year floodplains; wetlands; sole source aquifers (potential sources of drinking water); 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.*

As this list indicates, most of these are based on a judgment call as to whether the potential impact crosses some level of significance. Generally this call is based on prior decisions that were made by a resource agency through an EA or an EIS or some other assessment that confirmed that an action similar to the one proposed did, or did not, cross a threshold level of significance so that a decision can be made as to whether the proposed action is acceptable for a CatEx. The agency must carefully consider the occurrence, or potential occurrence, of extraordinary circumstances and respond to this potential by either removing that action from a CatEx listing, place additional constraints on the application of the CatEx, or provide documenting analyses that demonstrate that the extraordinary circumstance does not limit the use of the CatEx as proposed. In many cases, the potential occurrence of an extraordinary circumstance may be the basis for deciding that a CatEx is not appropriate. For example, the proposed action may be in an area where the occurrence of a Federally protected species is possible. The agency would be expected to conduct and document sufficient surveys to determine that the species is not present or that the proposed action would not affect the species and then be allowed to apply a CatEx. In and of itself, this avoids crossing the threshold where a formal biological assessment or an EA might otherwise be required.

- The CatEx must capture the entire proposed action and cannot be used to segment some lesser component of the action. The CatEx must be a stand-alone action with independent utility.
- There should be substantiating evidence that a CatEx is appropriate for those actions that do not fit the category of a “no brainer.” Rather than a sliding scale, most agencies provide two categories: [1] those that do not typically raise any concern by the public because the risk of environmental impacts is low, and [2] actions that are more likely to raise public concern.
- The administrative record can be tailored to the level of documentation required, but generally should show the results of any analyses that were conducted to document that a CatEx is appropriate for the action to which it is being applied, including any substantiating studies or demonstration projects, benchmarking results, tiered EAs or EISs that support the CatEx, or professional or expert opinions that support the CatEx.
- There may be different considerations for extraordinary circumstances that raise the need for more documentation, especially when new technologies are being used for which there may be little experience. This was the issue raised by the CEQ in reviewing the Minerals Management Service (MMS) application of NEPA via the CatEx process to deepwater oil and gas drilling.

- There should be an appropriate amount of public involvement and review of any new or modified CatEx. This level of public involvement may be no more than a notice in the appropriate media of the proposed action and request comments on any public interests or concerns; other actions may suggest the need for a public meeting, especially when the potential for extraordinary circumstances may apply and there has been little prior experience from other proposed actions to evaluate the significance of impacts to a particular resource. The objective of this and other steps for documentation and public review is to document that appropriate steps were taken such that the decision can be made without going through a more elaborate and time consuming process of an EA or an EIS.
- Agencies are expected to provide a periodic review of their CatEx lists; the final guidelines suggest every 7 years. The agencies are also expected to a review and track existing and newly issued CatEx actions to determine whether they are in fact meeting the expected outcome; that is, no significant environmental impacts.

The graphic below provides a decision tree for determining whether a CatEx might apply to a specific action.



Note that there are points at which a decision must be made as to (1) whether or not extraordinary circumstance may apply and (2) whether or not the agency considers the proposed action as “automatic.” If extraordinary circumstances may apply or the action is not one that is specifically listed as qualifying for an automatic CatEx, then additional thought, review, and or studies may be required before a CatEx can be applied. These extra steps also may include public involvement, the level of which can be determined by the agency based on the likely public interest, and any comments should be included in the administrative record for the CatEx. Examples of what may be considered an automatic CatEx (unless extraordinary circumstances apply) are the following categories from the Department of Defense as administration and 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 provided to federal, state, or local entities (REC required).*
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 (REC required).*
5. *Normal personnel, fiscal, and administrative activities involving military and civilian personnel (recruiting, processing, paying, and records keeping).*
6. *Routinely conducted recreation and welfare activities not involving off-road recreational vehicles.*
7. *Deployment of military units on a temporary duty (TDY) 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 drafted in accordance with applicable laws and regulations (REC required).*
10. *Non-construction activities in support of other agencies/organizations involving community participation projects and law enforcement activities.*
11. *Ceremonies, funerals, and concerts. This includes events such as state funerals, to include flyovers.*
12. *Reductions and realignments of civilian and/or military personnel that: fall below the thresholds for reportable actions as prescribed by statute (10 U.S.C. 2687) and do not involve related activities such as construction, renovation, or demolition activities that would otherwise require an EA or an EIS to implement (REC required). This includes reorganizations and reassignments with no changes in force structure, unit redesignations, and routine administrative reorganizations and consolidations (REC required).*
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 (decision maker), or joint actions on another federal agency's property that fall under that agency's list of categorical exclusions (REC required).*
14. *Relocation of personnel into existing federally-owned (or state-owned in the case of ARNG) or commercially-leased space, which does not involve a substantial change in the supporting infrastructure (for example, an increase in vehicular traffic beyond the capacity of the supporting road network to accommodate such an increase is an example of substantial change) (REC required).*

The Department of Defense includes other areas of actions that may fall under Categorical Exclusion as noted below but the specific regulatory guidance in 32 CFR 651, App. B should be consulted for details:

- Construction and demolition
- Cultural and natural resource management activities
- Procurement and contract activities:
- Real estate activities
- Repair and maintenance activities
- Hazardous materials/hazardous waste management and operations
- Training and testing:
- Aircraft and airfield activities

Extraordinary circumstances generally are defined within an agency's implementation of CatEx categories. Specific examples for a number of agencies other than the Department of Defense are shown in Table 1.

TABLE 1  
Other Agency CatEx Examples

Agency	Specific CatEx Add-Ons	Added Extraordinary Circumstances	Other
US Forest Service (USFS)	Construction of trails, utility lines, short term mineral, energy investigations; limited harvesting of trees; surface use plans for oil and gas exploration and initial development	USFS sensitive species, roadless areas, potential wilderness areas, research natural areas.	Issued guidance 9 June 2010 re: O&G exploration. Requires Scoping for all CatEx decisions.
Department of Interior (DOI)	Provides broad suite of CatEx types for Department-wide application		
National Park Service (NPS)	Development (land acquisition, upgrading utility facilities, fencing); Visitor Use (permits for concerts, shows), Resource Management (archeological surveys, seasonal closing of roads, removal of exotic plants)	Presence of steep slopes or highly erosive soils	
Federal Highway Administration (FHWA)	Construction of bicycle lanes, noise barriers, scenic easements; alteration to facilities to ease access; track and railbed maintenance w/in ROW	Follows Standard set (Federally protected species, important cultural resources, etc.)	
Department of Energy (DOE)	Recommend simple form completion for all but very simple CatEx decisions.	Siting and construction of major expansion of waste storage, disposal, recovery, or treatment facilities; disturb hazardous substances.	Has CatEx searchable database of prior CatEx decisions.
Environmental Protection Agency (EPA)	Facility maintenance at EPA owned facilities, minor upgrades of WWTP capacity, reissuance of NPDES permit for new source; containment, removal, disposal of asbestos or lead paint from EPA facilities.	Follows Standard set	
US Fish and Wildlife Service (USFWS)	Restore wetlands, riparian, instream, or native habitats; prescribed burning; stocking species; NRDA plans.	Follows Standard set	
National Oceanic and Atmospheric Administration (NOAA)	NEXRAD Radar Coverage	Follows Standard set	
US Coast Guard (USCG)	Maintenance dredging where no new depths required, minor renovations to waterfront facilities, establishing minor aids to navigation, approvals of regattas.	Follows Standard set	
Bureau of Land Management (BLM)	Categorical exclusions for hazardous fuels and post-fire rehabilitation.	Drilling in Rocky Mountains and "ecologically significant areas" in March 2010 in response to court decision.	Proposing additional CatEx's for emergency stabilization, forestry, geophysical work, grazing, recreation.
Department of Justice/Bureau of Prisons (DOJ/BOP)	Construction projects for existing facilities; contracts for halfway houses, community corrections centers, comprehensive sanction centers, community detention centers.	Follows Standard set	
Bureau of Reclamation (BOR)	Renewal of grazing, recreation management, or cabin leases; permits for removal of gravel or sand; minor safety of dams construction activities	Follows Standard set	

Note that the DOE has a protocol for documenting, through a searchable data base, prior CatEx decisions. The CEQ is likely to promote similar approaches by other agencies to simplify the process for making CatEx determinations.

## Summary

For a specific project where NEPA applies and an applicant is pursuing a CatEx determination, it is especially important to review the latest implementing NEPA regulations for the appropriate agency to confirm what their CatEx categories may be and any other guidance they may have on what components of the proposed action may be specifically defined as qualifying for a CatEx. Lacking such clarification, and if no extraordinary circumstances are likely to occur, it is important to seek other agency benchmarks or other documentation that may be available to support the determination that a CatEx is appropriate.

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