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# memorandum

DATE: January 16, 1998

REPLY TO  
ATTN OF: Office of NEPA Policy and Assistance: Osborne: 202-586-4596

SUBJECT: Guidance on National Environmental Policy Act (NEPA) Categorical Exclusion Determinations

TO: Secretarial Officers and Heads of Field Organizations

This memorandum provides a reminder of the requirements for applying categorical exclusions pursuant to the Department of Energy's (DOE's) NEPA regulations and guidance for simple recordkeeping of such determinations. Recent litigation has prompted our review of DOE's procedures for making these determinations.

The draft version of this guidance was discussed at the June 1997 NEPA Community Meeting. Issues raised then that are not addressed here concern the breadth and duration of categorical exclusion determinations and how to decide whether subsequently proposed actions are within the scope of a previous determination. My staff is discussing these important issues with the Office of General Counsel, and we intend to present proposed guidance on these issues to the DOE NEPA Community for review and comment soon.

This memorandum (1) outlines the factors that must be considered in applying a categorical exclusion, (2) briefly describes the relevant aspects of the NEPA litigation, (3) reviews the established policy (under DOE Order 451.1A, NEPA Compliance Program) that no documentation is required for categorical exclusion determinations and current DOE practices, and (4) recommends a format for simple recordkeeping to foster compliance with applicable regulations without costly and elaborate documentation.

## Background

Categorical exclusions are categories of actions that do not individually or cumulatively have a significant effect on the human environment and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. DOE's categorical exclusions are listed in Appendices A and B to Subpart D of its NEPA regulations, 10 CFR Part 1021. In applying a categorical exclusion under 10 CFR 1021.410(b) to a specific proposed action, DOE must determine that:

1. the proposed action fits within a class of actions listed in the regulations,
2. there are no extraordinary circumstances related to the proposal that may affect the significance of its environmental effects, and
3. the proposal is not connected to other actions with potentially significant impacts, related to other proposals with cumulatively significant actions, or an improper interim action.

Two recent lawsuits have challenged the Department's application of categorical exclusions.

In one case, the court held that DOE's administrative record did not document that DOE had considered whether the proposed action presented extraordinary circumstances or was connected to other actions with potentially significant impacts. As a result, the Department's categorical exclusion determination was held to be arbitrary and capricious. In the second case, the plaintiff also challenged DOE's compliance with 10CFR 1021.410(b) and questioned the determination to categorically exclude two proposed actions, alleging that DOE should have treated the two actions as connected. In a settlement agreement, DOE committed to prepare one environmental assessment for the two actions.

These lawsuits highlight the need for DOE to consider all necessary factors in determining that a proposed action is categorically excluded. Under DOE 451.1A (section 5.d.(2)), DOE's NEPA Compliance Officers (NCOs) make categorical exclusion determinations. The policy stated in that Order, that determinations need not be documented, was intended to eliminate the time and cost that was being devoted to the preparation of elaborate and unnecessary paperwork. The evaluation process that the NCOs must follow in applying the DOE NEPA regulations to make categorical exclusion determinations remains necessary with or without documentation.

### Guidance

Based on consultation with the Office of General Counsel, we recommend that a simple record of a categorical exclusion determination be kept for all but the most routine proposed actions (e.g., most determinations under Appendix A to Subpart D of the DOE NEPA regulations would not warrant a record). Such a record should ensure that the NCO considers all necessary factors in the categorical exclusion determination process and provide adequate evidence of this consideration to a reviewing court.

The attached model record of a categorical exclusion determination is intended to assist your NCOs in meeting their NEPA responsibilities. NCOs could incorporate the content of the model into other environmental review records if desired.

We understand that most NCOs already are documenting their determinations

for most categorical exclusions, sometimes quite extensively, although they may not be documenting that all relevant factors have been considered. We believe that thoughtfully preparing a simple categorical exclusion determination record, such as outlined in the attached model, would adequately and efficiently ensure and demonstrate compliance. We continue to believe that more detailed documentation for categorical exclusion determinations is not needed.

Please direct any questions on this matter to Carol Borgstrom, Director, Office of NEPA Policy and Assistance, at 202-586-4600.

Peter Brush /Signature/

Attachment

cc: NEPA Compliance Officers and Field Counsel

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**MODEL: RECORD OF CATEGORICAL EXCLUSION DETERMINATION**<sup>1</sup>

- A. **Brief Description of Proposed Action:** (1 or 2 sentences; include title, general activities, location, timeframe)
- B. **Number and Title of the Categorical Exclusion Being Applied:** (See text in 10 CFR 1021, Subpart D.)
- C. **Regulatory Requirements in 10 CFR 1021.410 (b):** (See full text in regulation.)
  - A. The proposed action fits within a class of actions that is listed in Appendix A or B to Subpart D.

For classes of actions listed in Appendix B, the following conditions are integral elements; i.e., to fit within a class, the proposal must not:

- A. Threaten a violation of applicable statutory, regulatory, or permit requirements for environment, safety, and health, including DOE and/or Executive Orders;
    - B. Require siting, construction, or major expansion of waste storage, disposal, recovery, or treatment facilities, but may include such categorically excluded facilities;
    - C. Disturb hazardous substances, pollutants, contaminants, or CERCLA-excluded petroleum and natural gas products that pre-exist in the environment such that there would be uncontrolled or unpermitted releases; or
    - D. Adversely affect environmentally sensitive resources (including but not limited to those listed in paragraph B.(4)).<sup>2</sup>
- B. There are no extraordinary circumstances related to the proposal that may affect the significance of the environmental effects of the proposal; and
- C. The proposal is not "connected" to other actions with potentially significant impacts, is not related to other proposed actions with cumulatively significant impacts, and is not precluded by 40 CFR 1506.1 or 10 CFR 1021.211.

**D. Determination:**

Based on my review of information conveyed to me and in my possession (or attached) concerning the proposed action, as NEPA Compliance Officer (as authorized under DOE Order 451.1A), I have determined that the proposed action fits within the specified class of actions, the other regulatory requirements set forth above are met, and the proposed action is hereby categorically excluded from further NEPA review.

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**Signature**

**NEPA Compliance Officer, Program or Field Office**

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**Date**

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<sup>1</sup> May be incorporated in its entirety into other environmental review records.

<sup>2</sup> All reviews and discussions supporting the "not adversely affect" determination have been completed.

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