

**SWALLOWING THE RULE:
EXPLORING CATEGORICAL EXCLUSIONS
IN NATIONAL FORESTS**

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I. INTRODUCTION

There is perhaps no more famous environmental law in the United States than the National Environmental Policy Act (NEPA). Sometimes billed as the Magna Carta of U.S. environmental law,¹ NEPA looms large for both industry and environmentalists. For the former, NEPA is cumbersome and expensive, or as Congressman Don Young of Alaska put it less delicately, “a bureaucratic and lawsuit-prone monstrosity.”² For environmentalists, NEPA offers a guaranteed opportunity for public participation in the decision-making process and an additional procedural hook for litigation.³ This long-running push and pull over NEPA’s purposes and processes has led to significant procedural evolutions since its creation in 1969.⁴ One major development is the expansion of

1. Daniel R. Mandelker, *The National Environmental Policy Act: A Review of Its Experience and Problems*, 32 WASH. U. J. L. & POL’Y 293, 293 (2010).

2. Press Release, Cong. W. Caucus, Forest Service Acts to Modernize Bureaucratic NEPA Process (June 13, 2019), <https://westerncaucus.house.gov/news/documentsingle.aspx?DocumentID=3049>.

3. 40 C.F.R. § 1506.6 (2020).

4. See generally Denis Binder, *NEPA at 50: Standing Tall*, 23 CHAP. L. REV. 1 (2020) (detailing key cases in the history and application of NEPA).

Categorical Exclusions (CE). Under a CE, agencies circumvent most NEPA requirements for categories of activities that are deemed to have no significant effect on the human environment.⁵ The U.S. Forest Service (USFS) has embraced the use of CEs,⁶ and routinely draws criticism from the environmental community for the practice.

On November 19, 2020, USFS finalized a rule to modify its NEPA procedures to “increase the pace and scale of forest management operations on the ground” with “reduced costs and time spent on environmental analysis.”⁷ The Final Rule creates six new CEs that allow USFS to fast-track logging projects under 2,800 acres, construct roads up to two miles, and issue special permits for private entities to use up to twenty acres of forest land.⁸ Proponents argue that the additional CEs promote efficient management of wild fires, pests, and disease in federal forests.⁹ Local conservation groups, however, assert that the CEs will restrict public participation, leading to increased ecological impacts with no public oversight.¹⁰

These recent rule changes provide a vehicle for exploring the history and evolution of CEs in forestry management, and create an opportunity to reassess such policy choices. This Article does not suggest that CEs should be eliminated, or that CEs are inherently incompatible with NEPA. However, the rapid expansion of CEs (both in scale and scope) has created a process prone to abuse and fraught with public distrust. In short, both the USFS's historical use of CEs and its Final Rule suggest that the Forest Service is moving in the wrong direction—opting for increasingly expansive exclusions to the detriment of public participation and buy-in. This Article suggests that a set of modifications to CE promulgation and implementation can help restore legitimacy to USFS NEPA reviews, reduce controversy, and ultimately improve NEPA efficiencies.

5. 40 C.F.R. § 1508.1(d) (2020).

6. See generally COUNCIL ON ENV'T QUALITY, LIST OF FEDERAL AGENCY CATEGORICAL EXCLUSIONS (June 18, 2020), <https://ceq.doe.gov/nepa-practice/categorical-exclusions.html> (cataloguing codified CEs by agency).

7. National Environmental Policy Act (NEPA) Compliance, 84 Fed. Reg. 27, 544 (June 13, 2019) (to be codified at 36 C.F.R. pt. 220).

8. National Environmental Policy Act (NEPA) Compliance, 85 Fed. Reg. 73, 621 (Nov. 19, 2020) (to be codified at 36 C.F.R. pt. 220).

9. Laura Lundquist, *Forest Service Favors Reducing Public Input to Fast-Track Projects*, MISSOULA CURRENT (Apr. 2, 2020), <https://missoulacurrent.com/outdoors/2020/04/forest-service-projects/>.

10. Complaint at *8, *The Clinch Coalition v. Hubbard*, 2021 WL 119073 (W.D. Va. Jan. 8, 2021) (No. 2:21-cv-0003).

II. CATEGORICAL EXCLUSIONS IN THE FOREST SERVICE

A. Overview of NEPA

For all the sound and fury, at its core, NEPA is a procedural requirement for federal agencies to “look before they leap.”¹¹ The “twin aims” of NEPA require agencies to “consider every significant aspect of the environmental impact of a proposed action,” and to assure the public that environmental considerations are weighed in their decision-making.¹² NEPA’s statutory guidance itself, however, is brief and fairly undetailed. Accordingly, Title II of NEPA establishes the Council for Environmental Quality (CEQ), which provides regulations and guidelines for agency implementation of NEPA obligations.¹³ CEQ, in turn, requires agencies to adopt their own procedures to supplement CEQ regulations.¹⁴

To ensure uniformity among federal agencies, CEQ first produced guidelines for NEPA implementation in 1971 and subsequently issued the guidelines as regulations in 1978.¹⁵ Over the years, various congressional and executive actions have attempted to “streamline” NEPA procedures.¹⁶ Streamlining efforts vary by agency but have included efforts to expand CEs, limit judicial review, and set time and page limits for environmental reviews.¹⁷ In response to such calls for streamlining, CEQ finalized a comprehensive update of its NEPA regulations in 2020, briefly discussed below in Part II(b).

CEQ’s regulations provide for three levels of NEPA review: Environmental Impact Statements, Environmental Assessments, and Categorical Exclusions. If the proposed action is “significantly

11. Nicholas C. Yost, *The Background and History of NEPA*, THE NEPA LITIGATION GUIDE (2012), <https://www.americanbar.org/content/dam/aba-cms-dotorg/products/inv/book/215087/Chapter%201.pdf>.

12. *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

13. *E.g.*, 40 C.F.R. § 1507.3 (2020).

14. *Id.*

15. Linda Luther et al., CONG. RSCH. SERV., RL33152, THE NATIONAL ENVIRONMENTAL POLICY ACT: BACKGROUND AND IMPLEMENTATION 10 (2008) (noting that President Nixon issued an Executive Order in 1970 authorizing CEQ to adopt NEPA regulations, which led to CEQ issuing guidelines throughout the 1970s); *see also* H.R. REP. NO. 92-316 (1971).

16. *See* Helen Leanne Serassio, *Legislative and Executive Efforts to Modernize NEPA and Create Efficiencies in Environmental Review*, 45 TEX. ENV’T L. J. 317, 319 (2015); *see also* NAT’L ASS’N OF ENV’T PROS., ANNUAL NEPA REPORT 2018, 1, 30–31 (2018).

17. LINDA LUTHER, CONG. RSCH. SERV., RL33267, THE NATIONAL ENVIRONMENTAL POLICY ACT: STREAMLINING NEPA 11–14 (2007); *see also* Exec. Order No. 13,807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects, 82 Fed. Reg. 40,463 (Aug. 15, 2017).

affecting the quality of the human environment,” then NEPA requires a detailed Environmental Impact Statement (EIS).¹⁸ The EIS process requires public participation at multiple stages,¹⁹ and consideration of “reasonable alternatives” that might avoid or mitigate environmental impacts.²⁰ A recent review of USFS NEPA data found that it takes the agency an average of 882 days to complete an EIS, notably faster than any other federal agency.²¹ For comparison, the average for other federal agencies is 3.4 years.²²

The second type of NEPA review is the Environmental Analysis (EA). An EA is utilized when the proposed action “is not likely to have significant effects,” or when the effects are unknown, and is considerably less rigorous than a full EIS.²³ If the EA concludes that the environmental impacts are significant, a full EIS is required.²⁴ If the EA concludes that the action will not have significant environmental impacts, the agency will issue a FONSI, or Finding of No Significant Impact, allowing the federal action to proceed.²⁵ On average, USFS takes just over a year to complete an EA.²⁶

The final type of NEPA review is the Categorical Exclusion (CE), for actions which do not “normally have a significant effect on the human environment.”²⁷ CEs are not an exemption from NEPA review, but rather are a specific type of NEPA review. CEs are designed to boost agency efficiency and allow agency resources to be focused on projects that may have a more significant impact on the environment.²⁸ CEs also include an exception for normally

18. 42 U.S.C. § 4332(C) (2020); *see also* 40 C.F.R. § 1501.3(a)(3).

19. *See generally* Council of Environmental Quality, *A Citizens Guide to the NEPA* 1, 7 (2007) (flow chart indicating public participation which occurs during scoping, at the outset of the EIS, and again when the Draft EIS is published and made available for a minimum of 45 days of public comment).

20. 40 C.F.R. § 1502.14 (2020).

21. Forrest Fleischman et al., *US Forest Service Implementation of the National Environmental Policy Act: Fast, Variable, Rarely Litigated, and Declining*, 118 J. FORESTRY 403, 412 (Apr. 27, 2020), *but see* Todd A. Morgan et al., *Response to the Journal of Forestry Article: “US Forest Service Implementation of the National Environmental Policy Act: Fast, Variable, Rarely Litigated, and Declining.”* 119 J. FORESTRY 589, 598 (May 11, 2021) (finding the estimated time it takes USFS to complete an EIS was 1,082 days).

22. Piet deWitt & Carole A. deWitt, *How Long Does It Take to Prepare an Environmental Impact Statement?*, 10 ENVIRONMENTAL PRACTICE 164, 167 (2008).

23. 40 C.F.R. § 1501.5(a) (2020).

24. 40 C.F.R. § 1501.3(a)(3) (2020).

25. 40 C.F.R. § 1501.6(a) (2020).

26. Fleischman, *supra* note 21, at 412.

27. 40 C.F.R. § 1501.4 (2020). This definition reflects the new CEQ regulations, but is a major departure from the previous definition as discussed *infra* Part II.B.

28. CEQ Chair Nancy H. Sutley, *Memo: Establishing, Applying and Revising Categorical Exclusions under the National Environmental Policy Act* (2010) (noting that CEs are an “efficient tool” for NEPA analyses that can “reduce paperwork and delay, so that EAs or EISs are targeted toward proposed actions that truly have the potential to cause significant

excludable actions when there are “extraordinary circumstances” that may result in a significant effect.²⁹ On average, a CE conducted by USFS takes only 105 days.³⁰ CEQ regulations encourage agencies to adopt broad categories of CEs.³¹

B. CEQ’s New CE Rule

To contextualize the impacts of the Forest Service’s Final Rule discussed in Part III, it is important to review CEQ’s recent NEPA Rulemaking. As this section briefly explores, CEQ’s new rules continue to lower the bar for CEs, diminishing some of the few remaining guardrails designed to prevent their abuse.

Immediately upon taking office, President Trump issued Executive Order (EO) 13766, “Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects.” The EO decried agency processes and procedures that “routinely and excessively delayed” infrastructure projects.³² The solution, according to the EO, was to “streamline and expedite environmental reviews.”³³ In August 2017, President Trump directed CEQ to “enhance and modernize the Federal environmental review and authorization process” with an emphasis on expediting, streamlining, and simplifying the NEPA process.³⁴ These EOs spurred CEQ and USFS into updating their NEPA procedures.³⁵ On January 10, 2020, shortly after USFS closed public comments on its own proposed NEPA overhaul, CEQ released its proposed rule, dramatically modifying the existing NEPA framework.³⁶ CEQ finalized their NEPA regulations on July 16, 2020.³⁷ A discussion of CEQ’s new NEPA policies is beyond the scope of this

environmental effects.”), *see also* 85 Fed. Reg. 73620,73623 (Nov. 19, 2020) (to be codified at 36 C.F.R. pt. 220).

29. 40 C.F.R. § 1501.4(b) (2020).

30. Fleischman, *supra* note 21, at 412.

31. Guidance Regarding NEPA Regulations, 48 Fed. Reg. 34, 263, 34, 264-65 (July 28, 1983) (codified at 40 C.F.R. pt. 1500).

32. Exec. Order No. 13766 (2017), 82 C.F.R. 8657 (2017).

33. *Id.*

34. Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects, Exec. Order. 13,807, 82 Fed. Reg. at 40,467.

35. *Id.*

36. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1684 (notice issued Jan. 10, 2020) (to be codified at 40 C.F.R. pts. 1500-1505, 1507-1508).

37. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020) (to be codified at 40 C.F.R. pts. 1500-1508, 1515-18).

project, but relevant to our purposes, the CEQ regulations dramatically expand the scope and potential application of CEs.

First, the new rule lowers the standard for creating CEs. Historically, a CE was “a category of actions which do not individually or cumulatively have significant effect on the human environment.”³⁸ Under the new rule, CEs are “a category of actions that normally do not have a significant effect on the human environment.”³⁹ This modification omits any reference to cumulative impacts, and with the addition of “normally” seems to allow for CEs that may, in some cases, have a significant effect on the environment. Secondly, the rule explicitly allows the use of CEs even when extraordinary circumstances are present, such as the presence of federally listed endangered species or a congressionally designated wilderness area, as long as the agency “determines that there are circumstances that lessen the impacts or other conditions sufficient to avoid significant effects.”⁴⁰ Finally, the regulations allow an agency to adopt another agency’s CE, if the proposed actions are “substantially the same.”⁴¹

As discussed below, the CEQ regulations were promulgated during USFS’s rulemaking, causing the Forest Service to discard many of the provisions in its own draft rulemaking that would have conflicted with the new CEQ regulations. CEQ’s revised regulations will require the Forest Service to engage in another round of rulemaking to bring the Agency’s regulations into compliance with CEQ’s new rules, but the new rules create less of a burden for the USFS, so any subsequent USFS regulations will presumably be less protective of the environment. However, the new CEQ rules must still survive a barrage of legal challenges⁴² and a new administration.⁴³

38. 40 C.F.R. § 1508.4 (1978).

39. 40 C.F.R. § 1508.1(d) (2020) (emphasis added).

40. 40 C.F.R. § 1501.4(b) (2020); 36 C.F.R. § 220.6(b) (2020); *see* discussion *infra* Part III.A-B.

41. 40 C.F.R. § 1506.3(d) (2020).

42. In one of the pending cases, *Wild Virginia v. Council on Env’t Quality*, No. 3:20CV00045, 2020 WL 5494519 (W.D. Va. Sept. 11, 2020), the Biden Administration has requested the court remand to allow CEQ to reconsider the rule in light of “numerous concerns.” Other pending cases include: *Alaska Cmty. Action on Toxics v. Council on Env’t Quality*, No. 3:20-CV-5199 (N.D. Cal. filed July 29, 2020), *California v. Council on Env’t Quality*, No. 3:20-CV-6057 (N.D. Cal. filed Aug. 28, 2020), *Env’t Just. Health All. v. Council on Env’t Quality*, No. 1:20-CV-6143 (S.D.N.Y. filed Aug. 6, 2020).

43. The future of the new CEQ rule is unclear, to say the least. Upon taking office, President Biden issued Executive Order 13990. Executive Order 13990 of January 20, 2021, Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7037 (Jan. 25, 2021). The EO tasks federal agencies with reviewing regulations promulgated within the last four years that conflict with the new Administration’s priorities. The Administration subsequently stated that the new CEQ regulations were among the agency actions to be reviewed. *See* The White House Briefing

C. Overview CEs in the Forest Service

In recent decades, the Forest Service has embraced the use of CEs. USFS has the unenviable task of managing their 193 million acres of forests and grasslands⁴⁴ for “multiple use,” including recreation, range, timber, watershed and wildlife.⁴⁵ Many of these National Forests struggle with insect and disease infestations, encroaching communities, climate change driven wildfires, and inadequate management practices that have led to the buildup of hazardous fuels.⁴⁶ Moreover, USFS is beset by budgetary woes and insufficient resources.⁴⁷ At least in part, these challenging circumstances help explain why CEs have been so alluring for the USFS. This section provides an overview of the substantial expansion of CEs in the Forest Service. This history is not intended to be encyclopedic, but rather to illustrate the most pervasive trends in recent decades.

In 1980, Forest Service NEPA regulations contained just five types of Categorical Exclusions, broadly: internal organizational changes; funding or scheduling of projects; emergency situations to protect public health, public safety, or major resource losses; routine maintenance activities; and inventories/studies.⁴⁸ Since 1980, the scope of USFS CEs has expanded dramatically to include oil and gas exploration,⁴⁹ the harvest of live trees under 70 acres, salvage of

Room, *Fact Sheet: List of Agency Actions for Review*, WHITEHOUSE.GOV (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/>. Shortly thereafter, CEQ initiated “Phase I” of a two-phase rulemaking to address revisions to the NEPA regulations, 86 Fed. Reg. 55757 (Oct. 7, 2021).

44. U.S. DEPT OF AGRIC., FOREST SERV., FS-383, LAND AREAS OF THE NATIONAL FOREST SYSTEM 1 (2020).

45. 16 U.S.C. § 528 (2020).

46. *See generally* U.S. FOREST SERVICE, FS-1138, MAJOR FOREST INSECT AND DISEASE CONDITIONS IN THE UNITED STATES: 2017 (Nov. 2019) https://www.fs.usda.gov/sites/default/files/fs_media/fs_document/ConditionsReport_2017.pdf; *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-20-52, *WILDLAND FIRE: FEDERAL AGENCIES' EFFORTS TO REDUCE WILDLAND FUELS AND LOWER RISK TO COMMUNITIES AND ECOSYSTEMS* (Dec. 2019), <https://www.gao.gov/assets/gao-20-52.pdf>.

47. *See generally* KATIE HOOVER, CONG. RSCH. SERV., R46557, FOREST SERVICE APPROPRIATIONS: TEN-YEAR DATA AND TRENDS (FY2011–FY2020) (2020).

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

49. In 2007, in response to President Bush's Executive Order 13212 from 2001, “Actions to Expedite Energy-Related Projects,” USFS created a new CE, (e)(17), for oil and gas exploration. National Environmental Policy Act Documentation Needed for Oil and Natural Gas Exploration and Development Activities (Categorical Exclusion), 72 Fed. Reg. 7391, 7402 (Feb. 15, 2007) (codified at 36 C.F.R. § 220.6(e)(17)) (creating a CE for any Surface Use Plan of Operations for oil and gas, associated with or adjacent to a new oil/gas field as long as the project will not lead to more than one mile of new road construction or reconstruction, more than three miles of pipelines, or more than four drilling sites).

dead or dying trees under 250 acres, commercial and non-commercial sanitation harvests of diseased trees under 250 acres,⁵⁰ and the issuance and amendment of special use authorizations.⁵¹ In 2013, USFS added three broad new CEs to “promote hydrologic, aquatic, and landscape restoration activities and thereby sustain natural resource values through more efficient management.”⁵² Despite the environmental restoration objectives of the CEs, several commenters still expressed concern that the rules were an attempt to circumvent NEPA, and that the broad language of the CEs gave the USFS too much latitude for interpretation.⁵³

Today, USFS regulations contain thirty-three non-legislative CEs split into two broad categories: those that require a project or case file and decision memo are listed in Subsection (e), and those that do not are listed in Subsection (d).⁵⁴ Subsection (d) includes the more routine, (arguably) less controversial categories related to agency administration, short-term resource protection, protection of public safety, and special use authorizations.⁵⁵ This is not to suggest that CEs in Subsection (d) are without controversy, especially as the scope of special use authorizations has expanded in the Final Rule.⁵⁶ Subsection (e) houses the most controversial and sweeping CEs—oil and gas exploration, harvest of live trees, salvage of dead trees, restoration activities, etc. While these CEs require a supporting record, the requirements are minimal.⁵⁷

Compared to other federal agencies, the Forest Service conducts the most EISs annually.⁵⁸ Nevertheless, the vast majority of NEPA analyses are CEs. Of the 33,976 Forest Service decisions made between 2005 and 2018, 82.3% were CEs, 15.8% were EAs, and 1.9% were full EISs.⁵⁹ CEs were utilized most frequently in

50. National Environmental Policy Act Documentation Needed for Limited Timber Harvest 68 Fed. Reg. 44,598, 44,598 (Jul. 29, 2003) (codified at 36 C.F.R. § 220.6(e)(12)-(14)).

51. National Environmental Policy Act Documentation Needed for Certain Special Use Authorizations, 69 Fed. Reg. 40,591 (July 6, 2004) (merged with previously cited CE in USFS most recent rulemaking and now codified at 36 C.F.R. § 220.6(3)(11)).

52. National Environmental Policy Act: Categorical Exclusions for Soil and Water Restoration Activities, 78 Fed. Reg. 56,153, 56,15 (Sept. 12, 2013) (codified at 36 C.F.R. § 220.6(e)(18)-(20)).

53. *Id.* at 56160.

54. 36 C.F.R. § 220.6 (2020).

55. *See* 36 C.F.R. § 220.6(d)(1)-(12) (2020).

56. *See infra* Part III.A-B.

57. 36 C.F.R. § 220.6(e) (2020) (requiring project file to contain “any records prepared, such as: The names of interested and affected people, groups, and agencies contacted; the determination that no extraordinary circumstances exist; a copy of the decision memo; and a list of the people notified of the decision.”).

58. NAT'L ASS'N OF ENV'T PROS., 2018 ANNUAL NEPA REPORT 3 (2018), https://naep.memberclicks.net/assets/documents/2019/NEPA_Annual_Report_2018.pdf.

59. Fleischman et al., *supra* note 21, at 408.

actions related to special-use management (44.4%), followed by actions related to recreation management (14.9%), and vegetation management (12.5%).⁶⁰ Interestingly, the number of CEs utilized annually has trended downward since peaking in 2005.⁶¹ This seems to be less about CEs, and more about USFS NEPA analyses in general, as EAs and EISs declined at a similar rate over the same time period.⁶² Additionally, while there may be fewer CEs, their size and variety has undoubtedly increased, potentially leading to their use for larger and more complex projects.

Finally, in addition to the increasing number and variety of CEs, USFS has modified or attempted to modify other aspects of CEs that increase their use and, in many cases, their controversy. For example, in the most recent NOPR, USFS attempted to codify the policy of “stacking” CEs to allow the responsible official to rely on multiple categories for a single proposed action.⁶³ This approach improperly shields large, complex projects from adequate environmental assessment and consideration of cumulative effects.⁶⁴ While this change was not included in the Final Rule, it is yet another example of USFS’s effort to categorically exclude increasingly large, complex, and controversial projects without rigorous environmental review or public participation.

Similarly, USFS’s treatment of extraordinary circumstances is another example of eroding procedural guardrails. CEQ requires agencies to address extraordinary circumstances where a normally excludable action may have a significant environmental effect.⁶⁵ At first blush, USFS’s regulations seem straightforward and protective.⁶⁶ Examples of extraordinary circumstances include the presence of federally listed species or congressionally designated areas such as wilderness or national recreation areas.⁶⁷ In 2002, following a spate of litigation on extraordinary circumstances⁶⁸ and

60. *Id.* at 409.

61. *Id.* at 411.

62. *Id.* at 411–13.

63. National Environmental Policy Act (NEPA) Compliance, 84 Fed. Reg. 27,544, 27,546 (June 13, 2019) (to be codified at 36 C.F.R. § 220.5).

64. *See* Forest Conservation Council v. U.S. Forest Serv., 110 Fed. App’x 26, 27-28 (9th Cir. 2004) for an example of stacking. There, environmentalists challenged the Forest Service’s approval of a tree removal project in which USFS broke the project into three sub-parts, approving each one under a separate CE. The Ninth Circuit upheld the practice, but a dissent by Judge Pregerson challenged the “Forest Service’s ‘divide and conquer’ use of CEs.”

65. *See* 40 C.F.R. § 1501.4(b) (2020).

66. *See* 36 C.F.R. § 220.6(a) (2020) (“A proposed action may be categorically excluded from further analysis and documentation in an EIS or EA only if there are no extraordinary circumstances related to the proposed action.”).

67. 36 C.F.R. § 220.6(b) (2020).

68. *See* Utah Env’t Cong. v. U.S. Forest Serv., No. 2:01-CV-00390B, 2001 WL 34036256, at *8 (D. Utah June 19, 2001) (deferring to USFS’s interpretation of circumstances, that “mere

citing “public and employee confusion,” USFS “clarif[ied]” how the Agency would address extraordinary circumstances.⁶⁹ USFS declared that the “mere presence” of an extraordinary circumstance does not preclude the use of a CE.⁷⁰ Instead, it is the “degree of potential effect” of the action on the extraordinary circumstance that determines whether or not a CE is appropriate.⁷¹ Additionally, the new CEQ rules further reduce the role of extraordinary circumstances, allowing an action to proceed under a CE “if the agency determines that there are circumstances that lessen the impacts or other conditions sufficient to avoid significant effects.”⁷² USFS has also clearly indicated a desire to further weaken the extraordinary circumstances analysis in its most recent NEPA rulemaking.⁷³

III. FINAL RULE & LEGAL CHALLENGE

On January 3, 2018, the U.S. Forest Service published an Advance Notice of Proposed Rulemaking, citing shifting resources, limited staff capacity, and a backlog of special use permits and reforestation projects as the impetus for the NEPA overhaul.⁷⁴ As rulemaking began, pressure mounted to prioritize the use and expansion of CEs. President Trump issued Executive Order 13855, “Promoting Active Management of America’s Forests, Rangelands, and Other Federal Lands to Improve Conditions and Reduce Wildfire Risk.”⁷⁵ The EO described “weakened” forests and rangelands that place “communities and homes at risk of damage from catastrophic wildfires” due to “decades [of], dense trees and

presence” of some factor did not preclude the use of a CE). *But see* *Riverhawks v. Zepeda*, 228 F. Supp. 2d 1173, 1190 (D. Or. 2002) (rejecting the use of a CE when extraordinary circumstances are present). *See also* Kevin H. Moriarty, *Circumventing the National Environmental Policy Act: Agency Abuse of the Categorical Exclusion*, N.Y.U. L. REV. 2312, 2331 (2004) (exploring these conflicting holdings in detail).

69. Clarification of Extraordinary Circumstances for Categories of Actions Excluded from Documentation in an Environmental Assessment or an Environmental Impact Statement, 67 Fed. Reg. 54,622, 54,623 (Aug. 23, 2002).

70. 36 C.F.R. § 220.6(b)(2) (2020).

71. *Id.*

72. 40 C.F.R. § 1501.4(b)(1) (2020).

73. *See* National Environmental Policy Act (NEPA) Compliance, 84 Fed. Reg. 27,544, 27,554 (June 13, 2019) (proposing allowing the responsible official to consider “whether long-term beneficial effects outweigh short-term adverse effects” and modifying the definition to require a “likelihood of *substantial* adverse effects”) (emphasis added). How the responsible official can properly make these assessments without an actual environmental analysis and relevant data is one unanswered question, and whether any of this is appropriate under a CE (rather than an EA) is yet another.

74. National Environmental Policy Act Compliance, 83 Fed. Reg. 302, 302 (2018).

75. Exec. Order No. 13855 (2018), 84 Fed. Reg. 45 (2019).

undergrowth.”⁷⁶ To “improve the condition of America’s forests, rangelands, and other Federal lands,” the EO urged robust use of existing CEs and the creation of new CEs to support forest management.⁷⁷

The NPRM was a substantial departure from the existing rule and proposed a number of significant changes.⁷⁸ In addition to expanding the number and scope of CEs, the NPRM proposed changes to weaken the extraordinary circumstances criteria and broadly reduce public participation throughout its NEPA procedures.⁷⁹ In the Final Rule, USFS retained most of the CE changes, but abandoned nearly all their other proposals.⁸⁰ However, the proposals were not removed due to public opposition, but rather were eliminated in order to comply with the newly updated CEQ NEPA rules.⁸¹ In the Final Rule, USFS clearly noted that the jettisoned changes will be reconsidered when the agency reviews the revised CEQ regulations.⁸²

The NPRM proposed the creation of eight new CEs, merging the two existing CEs, and expanding two existing CEs.⁸³ USFS calculated that, under the new rule, each CE would be used an average of 1–30 times a year, resulting in somewhere between 7–210 decision memos created in lieu of decision notices.⁸⁴ In the Final Rule, USFS approved six of the new CEs, expanded three existing CEs, and merged two existing CEs.⁸⁵ The resulting CEs generally fall into four categories: special uses, roads, other infrastructure, and restoration.⁸⁶

76. *Id.*

77. *Id.*

78. *See generally* 84 Fed. Reg. 27544.

79. *Id.* The NPRM would have eliminated scoping requirements for CEs and EAs, only requiring scoping for EISs. The NPRM also proposed changes to the way projects are communicated to the public. The 2008 rules specifically require additional scoping outside of the agency’s Schedule of Proposed Actions (SOPA), the proposed rule stated that posting on SOPA would qualify as sufficient public notice. That means the USFS would no longer have to publish notice on the Forest Service website or in a local newspaper.

80. 85 Fed. Reg. 73620, 73621 (Nov. 19, 2020) (to be codified at 36 C.F.R. pt. 220).

81. 85 Fed. Reg. 73620, 73621 (Nov. 19, 2020) (to be codified at 36 C.F.R. pt. 220).

82. *Id.*

83. 84 Fed. Reg. 27544, 27546-47 (proposed June 12, 2019).

84. *Id.* at 27551.

85. 85 Fed. Reg. at 73621.

86. Susan Jane M. Brown, *U.S. Forest Service Finalizes Procedures: Implementing the National Environmental Policy Act*, AMERICAN BAR ASSOCIATION (Feb. 3, 2021), https://www.americanbar.org/groups/environment_energy_resources/publications/fr/20210203-us-forest-service-finalizes-procedures/.

A. Special Uses

Subsection (d)(11) is the result of a merger of two existing Categorical Exclusions on special uses, subsections (d)(10) and (e)(15).⁸⁷ The new CE covers issuance of a new special use authorization to replace an existing or expired authorization related only to administrative changes.⁸⁸ This modification may reduce public participation in some decisions as one of the merged rules, Subsection (e)(15), previously required a decision memo.⁸⁹ The new category, however, does not require a decision memo.⁹⁰ An example of the potential application of the CE is the issuance of a replacement permit for a road that is used to access non-Forest Service lands.⁹¹

Subsection (d)(12) creates a new CE for the issuance of new recreational special uses on existing roads, trails, facilities, recreation sites, etc.⁹² An example includes issuing a permit for onetime use of facilities for recreational events.⁹³

Subsection (e)(3) significantly modifies and expands an existing rule that covered approval, modification, or continuation of minor special uses that require less than five contiguous acres of land.⁹⁴ The new rule quadruples the acreage of area from five acres to twenty, and removes requirements that the special use be “minor” and the acreage be “contiguous.”⁹⁵ This type of CE can be used for a variety of purposes, ranging from the less controversial approval of a onetime group event to the highly contentious approval of a utility corridor.⁹⁶

B. Roads

Subsections (e)(20), (23), and (24) relate to road management, restoration, and construction.⁹⁷ In the NPRM, subsection (e)(23) included a provision for the Forest Service to convert illegal and unauthorized non-Forest Service roads and trails into authorized Forest Service roads and trails. After public outcry, the provision

87. 84 Fed. Reg. at 27547.

88. 36 C.F.R. § 220.6(d)(11) (2020).

89. 85 Fed. Reg. at 73630.

90. *Id.*

91. *Id.*

92. 36 C.F.R. § 220.6(d)(12).

93. *Id.*

94. 84 Fed. Reg. at 27547.

95. *Id.*

96. 36 C.F.R. § 220.6(e)(3).

97. 85 Fed. Reg. at 73631-32 (Nov. 19, 2020) (to be codified at 36 C.F.R. pt. 220).

was removed.⁹⁸ Public pushback also resulted in a modification of subsection (e)(24), reducing new roads from five miles to two miles, and reconstruction from ten miles to eight miles.⁹⁹ USFS already maintains a 370,000-mile system of roads, many of which are in disrepair.¹⁰⁰ Critics balk at the idea expediting additional road projects, noting their well-documented environmental impacts.¹⁰¹

C. Other Infrastructure

Subsections (e)(21) and (e)(22) allow construction; reconstruction; decommissioning; relocation; or disposal of buildings, infrastructure, or other improvements at an existing administrative site or an existing recreation site.¹⁰² Subsection (e)(21), specific to existing administrative sites, is designed to go beyond the existing CE at subsection (d)(3), which provides for routine maintenance and repair of administrative sites, to include reconstruction or major repairs.¹⁰³ An example of subsection (e)(21) is the construction of a new office.¹⁰⁴ Examples of subsection (e)(22) include constructing a new shower facility or reconstructing campsites.¹⁰⁵

D. Restoration

Subsection (e)(25) is the most controversial of the new CEs because of its broad scope and scale. The CE allows up to 2,800 acres of management activities, including: “stream restoration, aquatic organism passage rehabilitation, or erosion control; invasive species control and reestablishment of native species; prescribed burning; reforestation; road/trail decommissioning; pruning; vegetation thinning; and timber harvesting,”¹⁰⁶ as long as the activities have a “primary purpose of meeting restoration objectives or increasing

98. 85 Fed. Reg. 73620, 73624 (Nov. 19, 2020) (to be codified at 36 C.F.R. pt. 220).

99. 84 Fed. Reg. at 27557.

100. U.S. FOREST SERVICE, *USDA Forest Service Invites Public Feedback on Proposed List of Deferred Maintenance Projects for Fiscal Year 2022* (2020), <https://www.fs.usda.gov/detail/r3/news-events/?cid=FSEPRD853589>.

101. Kevin Boston, *The Potential Effects of Forest Roads on the Environment and Mitigating their Impacts*, 2 CURR. FORESTRY REP. 215 (2016) (describing negative impacts to wildlife attributable to forest roads).

102. 36 C.F.R. § 220.6(e)(21) (existing administrative sites); *id.* § 220.6(e)(22) (existing recreational sites).

103. 85 Fed. Reg. at 73626.

104. 36 C.F.R. § 220.6(e)(21).

105. *Id.* § 220.6(e)(22).

106. The CE excludes salvage harvesting and requires that any timber harvesting be designed to meet restoration objectives, *see* 36 C.F.R. § 220.6(e)(25).

resilience.”¹⁰⁷ The CE requires projects to be developed through a “collaborative process” but does not articulate requirements for such a process.¹⁰⁸ The category also allows the construction of permanent roads up to 0.5 miles and temporary roads up to 2.5 miles.¹⁰⁹

Environmentalists strongly opposed the new restoration CE for its scale and for the ability of extractive industries to use the CE for commercial activities under the guise of restoration. As the Outdoor Alliance noted, “nearly every timber sale we are aware of on Forest Service lands includes a restoration element, meaning that almost every timber sale of 4,200 acres or less . . . could potentially be covered by the proposed CE as written.”¹¹⁰ Moreover, the data used to create the restoration CE was minimal. USFS randomly selected sixty-eight projects from a pool of 718 EAs from 2012 to 2016.¹¹¹ Of those sixty-eight projects, twenty-three were selected for additional review through a questionnaire on project implementation and effects.¹¹² Ultimately, two forests did not respond, and two projects had not been implemented, so USFS relied on data from just nineteen projects.¹¹³

The new rule is currently being challenged by a group of environmental organizations in the southeast.¹¹⁴ The groups cite concerns over reduced public participation, arguing that the final rule will make project improvements “a thing of the past.”¹¹⁵ A number of groups also raise concerns over the scale of the new restoration CE, noting “[v]irtually every timber project in recent memory within the Cherokee, Pisgah, and Nantahala National Forests has fallen under this threshold.”¹¹⁶ The groups note that a survey of project data from the Southern Appalachian national forests in Virginia, Tennessee, North Carolina and Georgia found that seventy out of seventy-one logging projects fell below the acreage threshold for the new restoration CE.¹¹⁷ Within those

107. 36 C.F.R. § 220.6(e)(25) (subsections omitted from quotation).

108. *Id.*

109. *Id.*

110. Outdoor Alliance, Re: National Environmental Policy Act Compliance Proposed Rule, (Aug. 26, 2019), <https://static1.squarespace.com/static/54aabb14e4b01142027654ee/t/5d6543ad312a41000162281e/1566917549898/OA+USFS+NEPA+comments+Final.pdf>. (The comment references the initial proposed acreage limit of 4,200).

111. U.S. FOREST SERVICE, SUPPORTING STATEMENT: CATEGORICAL EXCLUSIONS FOR CERTAIN SPECIAL USES, INFRASTRUCTURE, AND RESTORATION PROJECTS 62 (2020).

112. *Id.* at 63.

113. *Id.*

114. Complaint at 3-4, *The Clinch Coalition v. Hubbard*, 2021 WL 119073, at *3-4 (W.D. Va. Jan. 8, 2021).

115. *Id.* at 23.

116. *Id.* at 35.

117. *Id.* at 34.

seventy-one projects, public participation in EAs resulted in project reductions of twelve percent on average, with some shrinking as much as sixty percent.¹¹⁸ The Plaintiffs also argue that USFS failed to consider geographic differences between these Southern Appalachian forests and the forests where data for the new rule was aggregated.¹¹⁹ The litigation is ongoing, but USFS has also publicly stated that implementation of the new rule will be delayed until the new CEQ NEPA regulations have been reviewed.¹²⁰

IV. ONE SIZE FITS SOME: SHORTCOMINGS & SOLUTIONS

Categorical Exclusions, like any decision-making tool, are neutral. When used appropriately, they increase efficiency, reduce paperwork and expense, and help agencies function under budgetary and staffing constraints.¹²¹ When used inappropriately, they undermine public faith in the agency, increase conflicts, and stifle local expertise.¹²² There is no doubt that the USFS has dramatically increased the variety, scope, and scale of CEs in recent decades.¹²³ These CEs reduce opportunities for public participation and foment public distrust of agency decisions. These issues are compounded by procedural changes in the application of CEs, such as the weakening of extraordinary circumstances, which seem to be at odds with the intent of NEPA.¹²⁴ To overcome these challenges, this paper proposes a series of policy modifications to foster public buy-in, while promoting efficient and well-informed forest management decisions.

A. Public Participation

If most agencies' application of NEPA can be characterized as, "[O]ne part information disclosure, one part public participation,

118. *Id.*

119. *Id.*

120. Susan Jane M. Brown, *U.S. Forest Service Finalizes Procedures: Implementing the National Environmental Policy Act*, AMERICAN BAR ASSOCIATION (Feb. 3, 2021).

121. *See generally* 85 Fed. Reg. 73629 (noting that CEs can be completed an average of 1 to 17 months faster than EAs, resulting in increased efficiency, more timely decisions, and reduced costs spent on environmental analysis).

122. *See generally* 85 Fed. Reg. 73629 (noting that CEs can be completed an average of 1 to 17 months faster than EAs, resulting in increased efficiency, more timely decisions, and reduced costs spent on environmental analysis).

123. *See discussion supra* pp. 8–11.

124. *See discussion supra* pp. 10–11.

and eight parts administrative discretion”¹²⁵ the Forest Service’s use of CEs is all-parts administrative discretion. CEQ’s own guidance recognizes the potential for CEs to “thwart NEPA’s environmental stewardship goals, by compromising the quality and transparency of agency environmental review and decision making, as well as compromising the opportunity for meaningful public participation and review.”¹²⁶ CEs do not require robust public participation prior to implementation, so the opportunity to benefit from diverse, local perspectives is lost.¹²⁷ This lack of public participation during implementation is compounded by a lack of meaningful participation in the CE rulemaking process itself.¹²⁸ Most CEs only have thirty to forty-five days of public comment on the Federal Register.¹²⁹

When creating or modifying CEs, agencies would be well served to expand their public outreach beyond the Federal Register and into local communities. By hosting local meetings and targeted outreach, the benefits are two-fold. First, by participating in a public dialogue the USFS is able to educate stakeholders and improve public buy-in. While this benefits the public, it also has the potential to benefit administrative efficiency by reducing controversy and avoiding subsequent litigation.¹³⁰ Secondly, by increasing local engagement, agencies can create a product that is more informed and that better addresses regional nuances. As an example, the scale the new restoration CE will impact National Forests in the Southeast differently than it does the West. National Forests in the Southeast are smaller and, in some areas, more biologically diverse.¹³¹ A restoration logging project that might be innocuous in the 4.2-million-acre Salmon-Challis

125. Michael C. Blumm, *The National Environmental Policy Act at Twenty: A Preface*, 20 ENV’T L. 447, 453 (1990).

126. Nancy H. Sutley, *Memorandum for Heads of Federal Departments and Agencies: Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act* 3 (Nov. 23, 2010) <https://storage.googleapis.com/wzukusers/user-26245507/documents/5b22b62749377vHfcVEB/CEQ-Categorical%20Exclusions%20Under%20NEPA.pdf>.

127. Importantly, despite a rollback attempt in the NPRM, USFS rules require scoping for *all* Forest Service proposed actions, including CEs. The exact scoping procedures vary based on “the nature and complexity of a proposed action,” but nevertheless should be supported and augmented whenever possible.

128. 36 C.F.R. § 220.4(e)(1) (2020).

129. 36 C.F.R. § 220.4(e)(2) (2020).

130. NEPA TASK FORCE, *REPORT TO THE COUNCIL ON ENVIRONMENTAL QUALITY: MODERNIZING NEPA IMPLEMENTATION* (2003), <https://ceq.doe.gov/docs/ceq-publications/report/finalreport.pdf>.

131. Cameron Oglesby, *One of the most biodiverse regions in the US is also its least protected*, GRIST MAGAZINE (Jan. 22, 2021), <https://grist.org/climate/one-of-the-most-biodiverse-regions-in-the-us-is-also-its-least-protected/>.

National Forest in Idaho, could be inappropriate for the 500,000 acre Pisgah National Forest in North Carolina.¹³²

B. Data Collection & Transparency

As Justice Brandeis observed, “[s]unlight is said to be the best of disinfectants.”¹³³ USFS should prioritize robust and transparent data collection to promote public confidence in USFS’s NEPA procedures, and to help the public better understand the costs and benefits of CEs. In 2005, USFS began using the Planning, Appeals, and Litigation System (PALS), an online database, to track its NEPA analyses.¹³⁴ This data collection is laudable and important, but could be improved in two significant ways. First, by collecting data on all CEs, and second, by making that data available to the public.

Currently, only CEs that involve a decision memo are required to be entered into PALS.¹³⁵ This leaves major data gaps on the use of non-decision memo CEs. For example, in the Final Rule, when USFS merged two existing CEs, subsections (d)(10) and (e)(15), to create CE (d)(11), it relied on data from PALS.¹³⁶ CE (e)(15) required documentation through decision memo, and thus, all projects were recorded in PALS.¹³⁷ This allowed USFS to determine the frequency of use (approximately 317 times a year), and to review the appropriateness of its application and the efficacy of its limiting factors.¹³⁸ CE (d)(10), however, did not require a decision memo and, therefore, was not required to utilize PALS.¹³⁹ Accordingly, USFS could only review 157 voluntary entries in PALS.¹⁴⁰ Mandatory reporting for all CEs would result in better data collection to improve future policy making. Additionally, this data must be made available to the public. Many agencies do not track their CEs, and even fewer make that data available to the public.¹⁴¹ This lack of transparency fosters distrust and misinformation. Opening public

132. U.S. FOREST SERVICE, FS-383, LAND AREAS OF THE NATIONAL FOREST SYSTEM (Sept. 30, 2017) https://www.fs.fed.us/land/staff/lar/LAR2011/LAR2011_Book_A5.pdf.

133. Louis D. Brandeis, *What Publicity Can Do*, HARPER’S WEEKLY (Dec. 20, 1913).

134. Fleischman, *supra* note 21, at 403.

135. *See Generally*, U.S. FOREST SERVICE, *Supporting Statement: Categorical Exclusions For Certain Special Uses, Infrastructure, and Restoration Projects* 20 (2020).

136. *Id.* at 19.

137. *Id.* at 20.

138. *Id.*

139. *Id.*

140. *Id.*

141. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-14-369, *NATIONAL ENVIRONMENTAL POLICY ACT: LITTLE INFORMATION EXISTS ON NEPA ANALYSES* 8 (Apr. 2014), <https://www.gao.gov/assets/gao-14-369.pdf>.

access to the PALS database would lead to improved public understanding of agency decision making and potentially reduce conflicts between stakeholders.¹⁴²

A final data deficiency that could be improved to bolster public support is the inclusion of monitoring data from past actions. Most agencies find an adequate basis for a new CE if all the previously evaluated actions resulted in FONSI, however, few agencies utilize post-implementation monitoring to ground-truth their findings.¹⁴³ For example, in creating subsection (d)(12), a new CE for the authorization of recreational special uses, USFS reviewed NEPA documents from twelve recent projects that could have been covered by the new CE.¹⁴⁴ Of those twelve projects, only two of the actions included monitoring or implementation data.¹⁴⁵ Post-implementation surveys and monitoring data provide a wealth of information on the longer-term impacts of actions that might be included in CEs—essential information to build agency credibility and inform future decision making.

C. Accounting for Public Controversy

No one is fighting CEs allowing the USFS to mow the lawn or paint a building. The same cannot be said for CEs that allow miles of oil pipeline or live timber harvests.¹⁴⁶ If the USFS is unwilling to limit the scope and scale of CEs, as the Final Rule and agency history suggest, the agency should consider a new category of extraordinary circumstances for highly controversial effects. CEQ's own regulations require consideration of public controversy in the determination of whether an action is significant, weighing "the degree to which the effects on the quality of the human environment

142. Fleischman, *supra* note 21, at 416.

143. NEPA TASK FORCE, *Report to the Council on Environmental Quality: Modernizing NEPA Implementation* (2003), <https://ceq.doe.gov/docs/ceq-publications/report/final-report.pdf>.

144. U.S. FOREST SERVICE, *SUPPORTING STATEMENT: CATEGORICAL EXCLUSIONS FOR CERTAIN SPECIAL USES, INFRASTRUCTURE, AND RESTORATION PROJECTS*, 21–22 (Oct. 23, 2020), <https://www.fs.fed.us/emc/nepa/revisions/includes/docs/NEPAFinalRule-SupportingStatement-20201023.pdf>.

145. *Id.*

146. See generally Bradley W. Parks, *Judge halts post-fire roadside logging on Oregon's Willamette National Forest*, OREGON PUBLIC BROADCASTING (Nov. 5, 2021) (discussing legal challenge of CE used to approve logging along 300 miles of roads in the Willamette National Forest); Keith Ridler, *Lawsuit seeks to stop Idaho forest project near Yellowstone*, KTVB7 (Dec. 18, 2020) (detailing legal challenge of CE used to approve logging and prescribed burning project in the Caribou-Targhee National Forest); *Forest Sued Over Decision to Allow Exploratory Drilling for Gold Near Hot Creek*, MAMMOTH TIMES (Nov. 5, 2021) (discussing legal challenge of CE used to approve exploratory drilling in Inyo National Forest).

are highly controversial.”¹⁴⁷ A number of other agencies’ NEPA regulations have a category of extraordinary circumstances to account for public controversy. National Marine Fisheries Service, for example, lists “[p]ublic controversy based on potential environmental consequences” as an extraordinary circumstance and the Bureau of Land Management lists “[h]ighly controversial environmental effects,” to name only a few examples.¹⁴⁸

Including a similar category in the USFS extraordinary circumstances analysis would allow the agency to better account for public opposition and avoid certain projects. By avoiding CEs for the most controversial projects, USFS could reduce potential litigation and build public trust. Fear of litigation¹⁴⁹ has driven agencies to adopt additional internal procedures for CEs, reducing efficiency and increasing administrative costs.¹⁵⁰ If fewer controversial projects utilized CEs, presumably there would be fewer lawsuits, and agencies would be able to reduce their self-imposed internal procedures to litigation-proof their decisions.

D. Bolstering Agency Budgets

If wishes were horses, beggars would ride, and if agencies were funded, CEs would not be in nearly such high demand. For too long USFS programs have been underfunded by “fire-borrowing” budgetary diversions to cover wildfire suppression costs.¹⁵¹ As climate change fuels increasing large and destructive wildfires, USFS lacks sufficient staffing and funding to respond adequately,

147. 40 C.F.R. § 1508.27(b)(4) (2020). See also, William Murray Tabb, *The Role of Controversy in NEPA: Reconciling Public Veto with Public Participation in Environmental Decisionmaking*, 21 WM & MARY ENVTL L. & POL. J. 4, 175 (1997) (discussing the significance of public “controversy” in the NEPA process).

148. U.S. FOREST SERVICE, *Appendix J- Summary of Extraordinary Circumstances by Agency*, https://www.fs.fed.us/emc/nepa/restorationCE/includes/USFS_CE_Supporting_Statement_Appendix%20J.pdf.

149. See Fleischman, *supra* note 21, at 414. (This study suggests that the fear of NEPA litigation is unfounded. A review of USFS data from 2005–2018 found that less than 1% of competed NEPA analyses ended in litigation. That same study found litigation over CEs peaked in 2007, with 48 CEs being challenged. The author notes that the litigation was likely linked to new CEs by the Bush Administration).

150. NEPA TASK FORCE, *Report to the Council on Environmental Quality: Modernizing NEPA Implementation* (2003), <https://ceq.doe.gov/docs/ceq-publications/report/finalreport.pdf> (CEQ notes that “Many agencies interviewed state that their own internal procedures require documentation of project-specific categorical exclusions partly due to concern about potential litigation.”).

151. U.S. Department of Agriculture, *The Rising Cost of Wildfire Operations: Effects on the Forest Service’s Non-Fire Work* (Aug. 4, 2015) (“In many years, fighting fire costs more than was planned for that year, requiring mid-season transfer of additional dollars from already depleted accounts to pay for firefighting: a practice referred to as ‘fire transfer.’ In some cases, the agency is forced to divert money away from the same forest restoration projects that prevent or lessen the impacts of future wildfire.”).

let alone meet its other statutory missions.¹⁵² From 2001–2015, funding for Land Management Planning declined 64%, Vegetation and Watershed Management declined 24%, and Wildlife and Fishers Habitat Management declined 18%.¹⁵³ In its recent proposed rule, the Forest Service cited the dramatic increase in resources spent on wildfire suppression—16% of the annual budget in 1995, but more than 50% in 2017.¹⁵⁴ This funding shift has in turn, lead to staffing shifts including a 39% reduction in non-fire personally since 1995.¹⁵⁵ To an agency hamstrung by budgetary and staffing constraints, CEs are all the more alluring and in many cases, necessary. In 2018, Congress took steps to discourage the practice of “fire-borrowing” and created the \$2.25 billion Wildfire Suppression Operations Reserves Fund.¹⁵⁶ Next, Congress must fully fund USFS to allow the agency to rebuild its non-fire staffing and capacity. Allowing the agency adequate resources to refocus on its multiple use mission will reduce the overreliance on CEs and allow a return to more deliberative, public, and participatory NEPA processes.

V. CONCLUSION

When it comes to Categorical Exclusions, USFS is moving in the wrong direction. Agency history and the Final Rule suggest USFS will continue to support bigger, broader, and more extensive CEs. These reduce public participation and damage agency credibility. If the Forest Service truly wants to improve efficiency in its NEPA reviews, it should integrate more robust public participation and transparency in the creation and implementation of CEs. These incremental changes will help the USFS better balance expediency with environmental protection.

152. *Id.* at 6–7 (noting that between 1995–2015, wildfire management programs have tripled their portion of USFS budget, which “has reduced the Forest Service’s ability to sustain staffing in vital non-fire program areas, which negatively impacts the Forest Service’s ability to deliver work on the ground, including forest restoration and management, recreation, research, watershed protection, land conservation, and other activities.”).

153. UNITED STATES DEPARTMENT OF AGRICULTURE, *THE RISING COST OF WILDLIFE OPERATIONS: EFFECTS ON THE FOREST SERVICE’S NON-FIRE WORK* (Aug. 4, 2015), <https://www.fs.usda.gov/sites/default/files/2015-Fire-Budget-Report.pdf>.

154. *Id.*

155. *Id.*

156. Katie Hoover, et al, CRS-R45696, *Forest Management Provisions Enacted in the 115th Congress* (Apr. 17, 2019), <https://crsreports.congress.gov>.