

COMPLYING WITH NEPA

HOW TO USE NRCS' CATEGORICAL EXCLUSIONS (CatEx'S)

CATEGORICAL EXCLUSION: A category of actions NRCS considers do not individually or cumulatively have a significant effect on the human environment.

In 2009 NRCS expanded our list of categorical exclusions (CatEx's) in conformity with NEPA and the CEQ regulations. A complete list of USDA and NRCS CatEx's is included below. These CatEx's can be used for all NRCS activities.

Although the 21 new actions on the list, by definition, have been found not to have a significant effect on the human environment and no longer require preparation of an EA or EIS, it is important to note that NRCS will still be required to "show our work" by conducting environmental evaluations (EE) for all NRCS assistance. Actions that are CatEx'd still require a review/analysis process to determine whether "extraordinary circumstances" might apply and to determine that all parts of the action fit the criteria for the CatEx. In determining whether "extraordinary circumstances" exist, NRCS will use the same criteria that is used for determining "significance" when conducting the EE as listed on the NRCS-CPA-52. The list of "significance"/"extraordinary circumstances" criteria is included at the end of this document for your convenience.

To be applicable, all actions of a conservation plan must:

- 1) meet the specified purpose of the CatEx and involve no "extraordinary circumstances";**
- 2) meet the over-arching sideboards/criteria identified below, as well as each CatEx-specific sideboard/criteria, and;**
- 3) have no adverse (short or long-term) impacts that can NOT be mitigated.**

Also, these new CatEx's only apply to compliance with the National Environmental Policy Act (NEPA). They do not relinquish NRCS' responsibility to comply with any other applicable NRCS policy associated with PL-566, Principles & Guidelines (P&G), areas of concern denoted on the EE, or environmental laws, such as the Endangered Species Act (ESA), the National Historic Preservation Act (NHPA), Clean Water Act (CWA), Executive Orders, etc., included in the NRCS list of "Special Environmental Concerns."

What situations preclude the use of CatEx's?

- **Mixing Actions:** If a proposed plan involves actions listed as CatEx's along with other actions that are not included in this list, NRCS may not CatEx the entire action from review under NEPA.
- **Segmenting:** Nor can NRCS look at the actions individually if they are interdependent parts of the plan. This would be construed as "segmenting" an action into smaller component parts to avoid the requisite and appropriate level of environmental review under NEPA.
- **Additional Requirements:** The appropriate NEPA documentation is to be prepared for those plans/activities that, according to other laws/regulations/ NRCS policy, require additional analysis through an EA/EIS (i.e. watershed planning or other conservation and easements program plans)
- **Adverse Impacts:** When significant adverse impacts are anticipated and measures cannot be implemented to fully mitigate the impact, CatEx's cannot be invoked, even if the impacts are short-term or are off-set by beneficial impacts. This includes NRCS policy on rare, threatened, and endangered species of plants and animals; floodplain management, Clean Water Act, etc.

Recommended protocol for Analysis and Documentation of project, if invoking CatEx's:

- 1) The EE (CPA-52) should be as detailed as possible. **You can invoke CE's IF, and only IF, you can argue defensibly that you will not be having a "significant" impact on resource concerns also known under NEPA as "extraordinary circumstances" (including Special Environmental Concerns such as ESA, NHPA, CWA, etc).**

Words like “significant” and “substantial” tend to present some difficulties for folks. I suggest not getting too bogged down with them. There are ways to think about these terms that makes life fairly easy. See item #4 below.

- 2) **Remember to check whether the project fits within the general and CE-specific “sideboards/criteria” (see below). The overarching sideboards are listed below on the use of the CE’s and then each individual CE has its own specific sideboards/criteria for use.....** If your action fits within those sets of sideboards and there are no “extraordinary circumstances” (same thing as “significance”), and you can provide rationale why this is all true, you’re good to go. If not, it’s safest to move towards an EA or EIS..... Remember NEPA is all about accountability and public disclosure – and even though we don’t share details of our actions with the general public, we are obliged to explain (if challenged) why what we do is not going to cause significant impact on something else.

- **Example: The following CatEx can only be invoked if the proposed action meets its specific sideboards:**
CE #4: “Replacing and repairing existing culverts, grade stabilization, and water control structures and other small structures that were damaged by natural disasters **where there is no new depth required and only minimal dredging, excavation, or placement of fill is required.**”
- **Example: CatEx #11 for WRP Plan can only be invoked if all actions in the plan fit within the general and CatEx-specific Sideboards – in this example, the question is whether any of the practices will cause “substantial excavation” (Sideboard #5 below):**
CE #11: “Restoring an ecosystem, fish and wildlife habitat, biotic community, or population of living resources to a determinable pre-impact condition.”
 - The Conservation Plan includes Wetland Restoration (657); Wetland Wildlife Habitat Management (644); Streambank Stabilization (580); Structure for Water Control (587); Stream Habitat Improvement and Management (395); and Access Road (560).
 - **Installation of some of these practices may end up requiring substantial excavation. You must determine whether these practices meet the criteria applicable to all CE actions that there is NO “substantial excavation” (Sideboard #5 below).**
 - You must provide rationale that this action meets the overarching criteria/sideboard of “no substantial excavation” and there are no adverse impacts which cannot be mitigated.
 - **Important note:** You may find that all the components of the plan meet the CatEx criteria/sideboards for #11, but there are potentially adverse impacts to a resource, which will preclude the use of the CatEx
 - Example: Soils on the property are contaminated with DDT and there is the presence of a Threatened bird species. The soil movement “may affect, likely to adversely impact” the species and a formal ESA consultation is required would be considered an “extraordinary circumstance” precluding the use of the CatEx.
- **Example: CatEx #5 for a GRP Plan can only be invoked if all actions of the plan meet the purpose of the CatEx:**
CE #5: “Restoring the *natural topographic features* of agricultural fields altered by farming and ranching activities for the purposes of restoring ecological process.”
 - The Conservation Plan includes **Pond (378)***; Fence (382); Access Control (472); Pipeline (516); Prescribed Grazing (528); Range Planting (550); **Spring Development (574)***; Watering Facility (614); Upland Wildlife Habitat Management (645)

- **The CatEx is not applicable** since pond development and spring development do not restore “natural conditions.” The best approach for documenting compliance with NRCS’ NEPA process would be to make a finding on the EE that these actions are covered in one of the National Programmatic EA’s.
- 3) **If you find that there are no “extraordinary circumstances” that would preclude the use of the CE’s, and ALL of the actions fit within the CE sideboards** discussed below and within the CE, indicate in the “Findings” section of the CPA-52 that the action will be categorically excluded. So, in the “rationale” section (Q) of the CPA-52, you would indicate how the action meets the specific “sideboards” for the particular CatEx being invoked.
 - 4) **To defend your finding of “no extraordinary circumstances” or “non-significance,” I recommend using the 3-column table below that can be attached to your CPA-52.** Remember to consider both short and long-term impacts. The questions you’ll want to answer include:
 - a) What is the context? The “What”
 - b) What is the intensity? The How Much”
 - c) Why is this NOT significant? This would include any mitigation being planned that would reduce “significance”
 - d) Does the action trigger compliance concerns for any of the other “Special Resource Concerns,” such as ESA or NHPA which may require additional mitigation or consultation? If so, it may be difficult to argue insignificance unless consultation has been completed with agreed to terms and conditions, etc.

Three-Column Table Technique for Development of a Defensible FONSI¹

Context (“What”) -Consider benchmark conditions	Intensity (“How Much”)	Reasons why that amount is NOT significant
Loss of Floodplain	5 Acres	(Mitigated acres on another unit?)
Wildlife Displacement	Temporary	(Long-term benefits from enhanced habitat in riparian area are significant, whereas short-term adverse impacts are insignificant)
Increase PM10 emissions	220 Acres of HEL	(Mitigation – crop rotations, residue mgmt, etc.)
Etc.	Etc.	

- 5) **Document your analysis – show your work.** It’s helpful for planning and also provides defensible rationale in case of a challenge. The RFO then signs the bottom of the CPA-52 after the “Findings” section.

¹NEPA Models and Case Lists, 3rd Edition, Owen Schmidt, March 2009

USDA and NRCS Categorical Exclusions

USDA CATEGORICAL EXCLUSIONS:

1. Policy development; planning and implementation which relate to routine activities, such as personnel, organizational changes, or similar administrative functions;
2. Activities which deal solely with the funding of programs, such as program budget proposals, disbursements, and transfer or reprogramming of funds;
3. Inventories, research activities, and studies, such as resource inventories and routine data collection when such actions are clearly limited in context and intensity;
4.]Educational and informational programs and activities;
5. Civil and criminal law enforcement and investigative activities;
6. Activities which are advisory and consultative to other agencies and public and private entities, such as legal counseling and representation; and
7. Activities related to trade representation and market development activities abroad.

ORIGINAL NRCS CATEGORICAL EXCLUSIONS:

1. Soil Survey;
2. Snow Survey and Water Supply Forecasts (does NOT include structural activities);
3. Plant Materials for Conservation;
4. Inventory and Monitoring;
5. River Basin Studies under Section 6 under Public law (PL) 83-566 as amended;

NEW NRCS CATEGORICAL EXCLUSIONS (REQUIRING DOCUMENTATION)

All the actions identified as a categorical exclusion below require documentation in accordance with 7 CFR §650.6 that address whether extraordinary circumstances are determined to exist. This documentation is to be done through use of the environmental evaluation process.

“Over arching Criteria/Sideboards”

The following categorical exclusions ONLY apply to proposed actions that:

- (1) Are designed to mitigate soil erosion, sedimentation, and downstream flooding;
- (2) Require disturbed areas to be vegetated with adapted species that are neither invasive nor noxious;
- (3) Are based on current Federal principles of natural stream dynamics and processes, such as those presented in the Federal Interagency Stream Corridor Restoration Working Group document, “Stream Corridor Restoration, Principles, Processes, and Practices;”
- (4) Incorporate the applicable NRCS conservation practice standards as found in the Field Office Technical Guide (FOTG)
- (5) Do not require substantial dredging, excavation, or placement of fill; and
- (6) Do not involve a significant risk of exposure to toxic or hazardous substances.

The identification of these actions as categorical exclusions under NEPA does not relinquish the responsibility of NRCS to comply with the mandatory consultation requirements under the National Historic Preservation Act and implementing regulations, the Endangered Species Act and implementing regulations, and any other legal requirements.

Categorical Exclusions:

- (1) Planting appropriate herbaceous and woody vegetation, which does not include noxious weeds or invasive plants, on disturbed sites to restore and maintain the sites ecological functions and services;
- (2) Removing dikes and associated appurtenances (such as culverts, pipes, valves, gates, and fencing) to allow waters to access floodplains to the extent that existed prior to the installation of such dikes and associated appurtenances;
- (3) Plugging and filling excavated drainage ditches to allow hydrologic conditions to return to pre-drainage conditions to the extent practicable;
- (4) Replacing and repairing existing culverts, grade stabilization, and water control structures and other small structures that were damaged by natural disasters where there is no new depth required and only minimal dredging, excavation, or placement of fill is required;
- (5) Restoring the natural topographic features of agricultural fields that were altered by farming and ranching activities for the purpose of restoring ecological processes;
- (6) Removing or relocating residential, commercial, and other public and private buildings and associated structures constructed in the 100-year floodplain or within the breach inundation area of an existing dam or other flood control structure in order to restore natural hydrologic conditions of inundation or saturation, vegetation, or reduce hazards posed to public safety;
- (7) Removing storm debris and sediment following a natural disaster where there is a continuing and eminent threat to public health or safety, property, and natural and cultural resources and removal is necessary to restore lands to pre-disaster conditions to the extent practicable. Excavation shall not exceed the pre-disaster condition;
- (8) Stabilizing stream banks and associated structures to reduce erosion through bioengineering techniques following a natural disaster to restore pre-disaster conditions to the extent practicable, e.g., utilization of living and nonliving plant materials in combination with natural and synthetic support materials, such as rocks, rip-rap, geo-textiles, for slope stabilization, erosion reduction, and vegetative establishment and establishment of appropriate plant communities (bank shaping and planting, brush mattresses, log, root wad, and boulder stabilization methods);
- (9) Repairing or maintenance of existing small structures or improvements (including structures and improvements utilized to restore disturbed or altered wetland, riparian, in stream, or native habitat conditions). Examples of such activities include the repair or stabilization of existing stream crossings for livestock or human passage, levees, culverts, berms, dikes, and associated appurtenances;
- (10) Constructing small structures or improvements for the restoration of wetland, riparian, in stream, or native habitats. Examples of activities include: (1) installation of fences, and (2) construction of small berms, dikes, and associated water control structures;
- (11) Restoring an ecosystem, fish and wildlife habitat, biotic community, or population of living resources to a determinable pre-impact condition;
- (12) Repairing or maintenance of existing constructed fish passageways, such as fish ladders, or spawning areas impacted by natural disasters or human alteration;
- (13) Repairing, maintaining, or installing fish screens to existing structures;
- (14) Repairing or maintaining principal spillways and appurtenances associated with existing serviceable dams, originally constructed to NRCS standards, in order to meet current safety standards. Work will be confined to the existing footprint of the dam, and no major change in reservoir or downstream operations will result;

- (15) Repairing or improving (deepening/widening/armoring) existing auxiliary/emergency spillways associated with dams, originally constructed to NRCS standards, in order to meet current safety standards. Work will be confined to the dam or abutment areas, and no major change in reservoir or downstream operation will result;
- (16) Repairing embankment slope failures on structures, originally built to NRCS standards, where the work is confined to the embankment or abutment areas;
- (17) Increasing the freeboard (which is the height from the auxiliary (emergency) spillway crest to the top of embankment) of an existing dam or dike, originally built to NRCS standards, by raising the top elevation in order to meet current safety and performance standards. The purpose of the safety standard and associated work is to ensure that during extreme rainfall events, flows are confined to the auxiliary/emergency spillway so that the existing structure is not overtopped which may result in a catastrophic failure. Elevating the top of the dam will not result in an increase to lake or stream levels. Work will be confined to the existing dam and abutment areas, and no major change in reservoir operations will result. Examples of work may include the addition of fill material, such as earth or gravel, or placement of parapet walls;
- (18) Modifying existing residential, commercial, and other public and private buildings to prevent flood damages, such as elevating structures or sealing basements to comply with current State safety standards and Federal performance standards;
- (19) Undertaking minor agricultural practices to maintain and restore ecological conditions in floodplains after a natural disaster or on lands impacted by human alteration. Examples of these practices include: mowing, haying, grazing, fencing, off-stream watering facilities, and invasive species control which are undertaken when fish and wildlife are not breeding, nesting, rearing young, or during other sensitive timeframes;
- (20) Implementing soil control measures on existing agricultural lands, such as grade stabilization structures (pipe drops), sediment basins, terraces, grassed waterways, filter strips, riparian forest buffer, and critical area planting; and
- (21) Implementing water conservation activities on existing agricultural lands, such as minor irrigation land leveling, irrigation water conveyance (pipelines), irrigation water control structures, and various management practices.

“EXTRAORDINARY CONCERN” CRITERIA (SAME AS “SIGNIFICANCE” CRITERIA ON NRCS-CPA-52)

The following criteria must be reviewed to determine whether a proposed NRCS action meets the criteria for “extraordinary circumstances” to ensure that an action does not involve and thus preclude an action from being eligible for a CatEx.

- (A) The proposed action cannot cause significant effects on public health or safety.
- (B) The proposed action cannot significantly affect unique characteristics of the geographic area such as proximity to historic properties or cultural resources, park lands, prime farmlands, floodplains, wetlands, wild and scenic rivers, or ecologically critical areas.
- (C) The effects of the proposed action on the quality of the human environment cannot be highly controversial.
- (D) The proposed action cannot have highly uncertain effects, including potential unique or unknown risks on the human environment.
- (E) The proposed action cannot include activities or conservation practices that establish a potential precedent for future actions with significant impacts.

(F) The proposed action is known to have or reasonably cannot be expected to have potentially significant environment impacts to the quality of the human environment either individually or cumulatively over time.

(G) The proposed action cannot cause or promote the introduction of invasive species or have a significant adverse effect on any of the following special environmental concerns not previously identified in paragraph C(2)(B) of this section, such as: endangered and threatened species, environmental justice communities as defined in Executive Order 12898, wetlands, other waters of the United States, wild and scenic rivers, air quality, migratory birds, and bald and golden eagles.

(H) The proposed action will not violate Federal or other applicable law and requirements for the protection of the environment.