Modernizing the NEPA Process in the Context of the Gulf Disaster

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Jim McElfish: We at ELI are particularly fond of NEPA [National Environmental Policy Act].[1] Our Articles of Incorporation were coincidentally filed on the day that NEPA passed the U.S. Senate in December 1969, so our history as an organization is coextensive with our initial environmental policy. It's an association that we think continues to be important.

I'm pleased to have a really excellent panel with us today. Ted Boling is a senior counsel for environmental policy and public information at the Council of Environmental Quality (CEQ). Ted had previously served as general counsel at the CEQ and as deputy general counsel and before that, had several stints with the U.S. Department of Justice and at least one detail to the U.S. Department of the Interior (DOI), my first employer long ago.

He'll be followed by Dr. Tom Simpson with CH2M HILL, a consulting firm. Tom is based in Atlanta, Georgia, and has over 30 years of consulting experience dealing with environmental permitting, resources, and planning, including an extensive NEPA practice. Tom will be talking with us about some of the different uses of categorical exclusions and a range of issues that we'll be exploring. Tom has also worked internationally on environmental compliance and environmental impact assessment issues.

Monica Goldberg, a senior attorney with The Ocean Conservancy, also has extensive experience in Washington, including a stint at the DOI. Monica, of course, has her hands full with Oceans Policy. The president has just issued an Executive Order yesterday establishing a national oceans policy, so the CEQ will have even more to do among its many coordinating roles.[2]

Ted's going to lead off with an overview focusing on categorical exclusions. Categorical exclusions are one of those NEPA categories that years ago we didn't think much about. We thought NEPA was an environmental impact statement (EIS) statute. And we thought that there was this environmental assessment [EA] that was used originally to determine whether you need to do an EIS, but later became sort of the preferred environmental analysis for many agencies. The categorical exclusions were these lists of actions which, in the words of the regulation, "do not individually or cumulatively have a significant effect on the human environment," and which the agencies have determined through processes that they don't need to do either an EA or an EIS. The categorical exclusion has assumed greater and greater prominence in recent years, and over the last decade, many agencies have expanded their lists of categorical exclusions. And as Ted will point out, even the U.S. Congress has gotten into the act.

Then, we'll move on to Dr. Simpson, who will talk with us about some of the approaches to categorical exclusions that have been used by various agencies. Then, Monica Goldberg will finish by focusing on the Minerals Management Service's (MMS') use of the categorical exclusion and particularly on the way in which categorical exclusions were used in permitting the Macondo Well [in the Gulf of Mexico], which we've all come to know and loathe.

I. Categorical Exclusions: An Overview

Ted Boling: As Jim noted, NEPA is 40 years old this year, and we too at the CEQ are quite fond of it. It's the statute that created the CEQ in Title II. But most people focus on Title I: The Environmental Impact Statement, one requirement of §102(2)(c), and the Environmental Analysis under §102(2)(e) of alternatives for things that don't rise to that threshold of the "major federal actions significantly affecting the quality of human environment."

In the regulations that the CEQ created in 1978 pursuant to an Executive Order,[3] the CEQ provided for categorical exclusions; categories of actions that are individually or cumulatively not significant and therefore should not require an EIS. And in the first slide here, we have the definition excerpted.[4] The thing I'd point out is that this is not a category of actions that agencies are free to create on their own. There is a cross-reference to the procedure for adopting

1. 42 U.S.C. §§4321-4370f, ELR Stat. NEPA §§2-209.
2. Exec. Order No. 13547, 75 Fed. Reg. 43023 (July 22, 2010).
3. Exec. Order. No. 11990, 42 Fed. Reg. 26961 (May 25, 1977).
4. *Id.* §1508.4:
> Categorical Exclusion means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required.

agency NEPA procedures, as in to go through a CEQ review, a *Federal Register* notice, a public review, and then the CEQ's final review on the final agency NEPA procedures for, and here's the statutory or the regulatory standard, conformity with NEPA, and how we actually undertake that has been an evolving area, which I'm going to get into.

The other aspect of the definition of categorical exclusions is equally important—as part of agency NEPA procedures, they have to provide for extraordinary circumstances. These are the out clauses, the escape routes for actions that fit within a category, and they are intended to ensure that agencies do think about the application of a categorical exclusion before they move forward with the action. So, that's part and parcel of the definition.

I'd just note a couple of aspects of it. First of all, categorical exclusions are not definitive rules. They are indications to agency personnel of those actions that would normally not be evaluated under an EA or an EIS, but they are not an across-the-board rule and are subject to exceptions. They are a labor-saving device designed to help reduce paperwork, reduce needless environmental analysis for those circumstances where, based on agency experience, we know how this analysis is going to come out. It's important to note, categorical exclusions are not exemptions from NEPA. They are not absolute rules. They do require some thinking, and if the agency finds, in the course of applying categorical exclusions, that they're not well-crafted to capture the category of actions, that there is routine use of extraordinary circumstances, the agency needs to rethink the scope of its categorical exclusion and come back to the CEQ with a redraft.

In 1983, the CEQ noted that based on five years of experience with the CEQ regulations, there was a tendency among some agencies to have a fairly restrictive view of categorical exclusions. The example often cited to me by Dinah Bear, who served as the CEQ's General Counsel for 25 years, was a categorical exclusion for greeting visitors at visitor centers. I don't know how you'd ever do effects analysis on greeting visitors. Maybe you'd get some sort of a psychological test there as to what sort of welcoming environment you created. Be that as it may, agencies at that time had fairly narrowly drawn categorical exclusions and very precisely defined actions.

And so the CEQ, in 1983, provided guidance on encouraging agencies to think more broadly about categorical solutions. Right now, it may seem kind of odd that the CEQ was pushing agencies to think more broadly at that time, but the purpose of this guidance was to ensure that the efficiencies that categorical exclusions were designed to create were actually attained. Of course, the CEQ also underscored for agencies that they needed to be mindful of not just the individual environmental effects of these categories of actions, but their cumulative effects, and do some measure of tracking of the cumulative effects.

As Jim noted, categorical exclusions were something of a backwater in NEPA litigation. It really wasn't much until the early 1990s, and then you started to have a series of cases along with agencies following the CEQ guidance and thinking more broadly. And I've listed a couple of them that established some of the basic points for consideration of the application of categorical exclusion, particularly *Department of Transportation v. Public Citizen*[5] and *California v. Norton*,[6] which underscored that a categorical exclusion is not something that creative litigators can stand up in court and for the first time say: "Aha! There is a categorical exclusion that applies to this now litigated proposal for agency action." It actually has to be part of an agency's decisionmaking.

Here is a way in which the courts really differed with the CEQ 1983 guidance: the 1983 guidance emphasized that there shouldn't be any special documentation as part of categorical exclusions. There ought to be something in the administrative record that shows the category applies but it should be readily apparent. The courts increasingly were looking for the agency's determination and documentation of how they think about the extraordinary circumstances analysis. How did they determine that the category applies?

And then in *Sierra Club v. Bosworth,*[7] this is the U.S. Court of Appeals for the Ninth Circuit case that first of all, it picked up on another trend in the cases, and that is you don't have to do NEPA on categorical exclusions, the promulgation of categorical exclusions. You don't do NEPA on NEPA. The Ninth Circuit picked up on the *Heartwood*[8] case in the U.S. Court of Appeals for the Seventh Circuit and more or less established, for all intents and purposes, that we don't have to do an EIS. But then just giving and then taking away almost in the same opinion, the court emphasized the rigor of cumulative effects analysis that's necessary to support the promulgation of a categorical exclusion. And you might read that opinion and say: "Well, okay, so maybe we don't have to do alternatives analysis or a full environmental impact statement." But the level of rigor that at least this panel was looking for in the cumulative effects analysis is really setting the bar a bit higher.

As Jim noted, there are also legislative developments, and particularly §390 of the Energy Policy Act created a new category of action, the legislative categorical exclusion.[9] Congress created a rebuttable presumption that certain categories of actions under the Mineral Leasing Act would be subject to categorical exclusion. And it's been an ongoing issue as to whether Congress was using this term "categorical exclusion" as defined by the CEQ in its regulations; in other words, whether Congress intended to apply extraordinary circumstances analysis to this provision, or whether the rebuttable presumption was some new animal in this regard, and that issue continues. But I just note for you legislative categorical exclusions are an entirely different animal from the administratively created ordinary categorical exclusions.

This brings me to the draft guidance that the CEQ has issued in draft form, not once, but now twice. The first draft

5. *Dep't of Transp. v. Public Citizen*, 54 U.S. 752, 34 ELR 20033 (2004).
6. *California v. Norton*, 311 F.3d 1162, 33 ELR 20119 (2002).
7. *Sierra Club v. Bosworth*, 199 F. Supp. 2d 971, 32 ELR 20618 (N.D. Cal. 2002).
8. *Heartwood, Inc. v. U.S. Forest Serv.*, 230 F.3d 947, 31 ELR 20217 (7th Cir. 2000).
9. 42 U.S.C. §15801 (2005).

guidance was issued in September 2006[10] in response to an interagency task force that the CEQ created, culminating in a report to the CEQ in September of 2003.[11] The task force was made up of NEPA professionals from around the federal community who conducted a series of outreach meetings. Lots of public input recommended that the CEQ establish guidance on establishing categorical exclusions, as well as guidance on using categorical exclusions. And what the CEQ did was, September 2008, proposed a guidance document in draft that did both of those in the same document. The CEQ didn't finalize that, but on February 18 of this year, as part of a broader effort celebrating NEPA's 40th year and as a part of a broader theme of modernizing and sustaining NEPA, the CEQ reissued that draft guidance on clarifying the use of categorical exclusions, along with guidance on mitigation and monitoring, and on climate change, as well as also updating our website for resources, NEPA resources, called NEPA.gov.[12]

In the draft categorical exclusion guidance, we expanded on how you substantiate a categorical exclusion, the basis for it, going into further detail on the evaluation of agencies' implementing actions that basically agency experience which is really the bedrock of any good categorical exclusion administrative record, and developing impact demonstration projects as a means of groundtruthing the effects analysis using professional staff, expert opinions. The draft also detailed benchmarking, which is sort of the CEQ term for the answer to the question we often get from agencies. And that is, well, another agency has a categorical exclusion that we really like and we'd like to use, and can we just use the other agency's categorical exclusion? The answer is "yes, but." Yes, you can adopt the text of another agency's categorical exclusion, *but* you have to have your own administrative record and basically your own showing that it is equally applicable to your circumstances, that the extraordinary circumstances that go along with it are appropriately tailored to your agency action.

I would also note that this guidance document reversed the CEQ 1983[13] guidance where it talked about the level of documentation required, basically recognizing that the practice had evolved to the point where we have sort of a sliding scale-level of rigor in categorical exclusions. Suffice it to say, you have the no-brainer categorical exclusions, so you're greeting visitors at visitor centers. But then you have categorical exclusions that have developed over time that necessarily require greater degrees of documentation, greater degrees of analysis, including categorical inclusions that are, in some ways, tiered to programmatic EISs and have some relationship to programmatics that they rely upon.

We sent this out for public comment. The comment period closed on May 24. We received 58 total responses. And just to give you a sample of some of the comments—these are by no means the most significant ones or the ones that you can bank on the CEQ adopting—we did receive a number of comments that really take the CEQ to task in some of the assumptions regarding the guidance. Some took the guidance as indicating that major reforms were necessary to correct misuses of categorical exclusions, and those comments were born of some concern that the CEQ is going to set the bar so much higher for new categorical exclusions or the reanalysis of categorical exclusions that we'd have an increasing constraint on their use.

A second set of comments regarding legislative categorical exclusions was needed just to clarify the difference there. A third issue is the question of mere presence. A very typical extraordinary circumstance is threatened and endangered species or another protected resource in the area of the categorically excluded action. For those of you who are familiar with threatened and endangered species, you could have critical habitat that covers wide swaths of area, and that just the mere presence of the critical habitat may not indicate extraordinary circumstance. Comments encouraged the CEQ to clarify on that point, as the U.S. Forest Service and some of its rulemaking has done.

We also had comments on how we go about providing more information on the nature and extent of the CEQ's periodic review, which we indicated we were going to undertake. In fact, on May 17 of this year, CEQ publicly indicated it was undertaking review of the MMS, now the Bureau of Ocean Energy Management, Regulation, and Enforcement, I believe, BOEMRE. The review of their NEPA procedures, particularly use of categorical exclusions, is ongoing. So, please watch this space. That's the new and improved NEPA.gov, the CEQ website for all your NEPA products, where the final CEQ guidance can be expected to reside.

II. Approaches to Categorical Exclusions

Tom Simpson: Surrounded by so many attorneys here, I'm not sure that we always see things the same way, but our clients expect us to actually help them get through this process. And so we struggle, as some others have struggled sometimes, to decide when the threshold occurs. Is it an EA? Is it an EIS? And often, of course, as everyone should know, I'm sure does know, it's not a permit. I've had clients that say: "Can I get a NEPA permit?" There is no permit. It's a process and it's a decision process.

And so essentially, keep in mind that with these various levels, the primary goal, the ultimate goal is to make an informed decision. And so the knowledge that you need to make that decision really is what drives which of these categories you're heading into, so the assumption is that a categorical exclusion, or Cat Ex, presumes that you know enough about the potential effects of that action that you can make a decision without going into any higher level of investigation.

And as Ted pointed out, the reasons that we have Cat Exes are largely driven by the attempt to reduce the amount of time and effort and cost associated with projects or actions

10. Guidance of Categorical Exclusions, 71 Fed. Reg. 54816 (Sept. 19, 2006).
11. CEQ, The NEPA Task Force Report to the Council on Environmental Quality: Modernizing NEPA Implementation (Sept. 2003), *available at* http://ceq.hss.doe.gov/ntf/report/totaldoc.html.
12. CEQ, Establishing and Applying Categorical Exclusions Under the National Environmental Policy Act (2010), *available at* http://www.whitehouse.gov/administration/eop/ceq/initatives/nepa.
13. 48 Fed. Reg. 34263 (July 28, 1983).

that have minor or insignificant impacts. The little bike trail you see on this slide actually required over $1 million worth of additional environmental studies because, at that time, it was not considered in a Cat Ex category. And also, for some agency actions, there are a lot of things that go on routinely that are simply updates. Remarking trails, for example, or a railroad just moving a rail slightly to increase the speed of that line, minor pavement increase on a highway—these are all actions that are very minor, and to facilitate making those happen, the Cat Ex allows you to do those and also to save time by avoiding extensive environmental reviews. In other words there are a lot of minor activities that need to be done very quickly or on a regular basis and can use the Cat Ex to reduce the time to implement those programs.

Ted has already commented on some of these Cat Exes, but I'll repeat them to a certain extent. To get to a Cat Ex for a certain type of action, the most important part is building a case for it. You have to establish, as an agency, that there is enough information and case history available that you can understand fully what the types of impacts might be, what the range of things are that might occur by carrying out that action and therefore why a Cat Ex might be the proper way to go.

And some of the ideas that were mentioned, such as prior projects where you, for example, did an EA on a project and you got a Finding of No Significant Impact, or FONSI, and you did another project very similar to that and another one very similar to that and every single one of them all obtained FONSIs, then this type project should be considered as one that qualifies for a Cat Ex.

Similarly, input from experts and analyses from people in the field that do these types of activities and understand what the impacts might be, can also provide support as to the kinds of conditions that need to be applied if you're going to apply a Cat Ex. Underlying all of this, as was mentioned, is coordination with the CEQ early and frequently throughout the process of developing Cat Ex criteria, instead of waiting until you have everything together and then walking in to say: " I'm here to get my Cat Ex. When do I start?"

Getting the CEQ involved is important, again, in order to also coordinate any public involvement that may be appropriate. There has been a tendency, as some of you are aware, to not bring public involvement into any Cat Ex process. But public interests may need to be brought in at some point for those types of projects that are not routine, may not be perceived as routine, or may have areas either in geography or in time where the proposed action may be more sensitive than other times. For example, a Cat Ex might be appropriate for this particular activity in the summer, but during the winter, there may be a migratory animal that uses that space, and a Cat Ex might not be appropriate at that time.

So, deciding if and when to involve the public can be a ticklish issue. Many of our clients, for example, are not eager to bring the public into a review process early, even though they may qualify for a Cat Ex. But it is important that you understand what the public concerns are going to be, so that you know whether there is likely to be an outcry of concern and whether the proposed action is a more sensitive process than you might think. Once you have completed consultation with the CEQ, including resolving any public comments that might have been associated with your proposed action, then you should get a CEQ determination for the Cat Ex that conforms with NEPA and publish a final Cat Ex in the *Federal Register* and then file it with the CEQ.

How do you implement and how do you use a Cat Ex? The extensive amount of documentation is one of the major concerns clients have when they do an EIS. I have had to prepare massive volumes of documents in the completion of an EIS. An EA is considerably less effort, or it should be, and limited considerably in size and scope compared to an EIS.

In theory, a Cat Ex for an action where the activities are really minor, to the extent that they have no issues of concern, should not require any documentation. The reality is that there are some Cat Exes that are going to be controversial, or under certain conditions because of cumulative impacts associated with that Cat Ex, are really more substantive than they might have been otherwise, and do require some documentation. And I think many attorneys would advise you that, if you anticipate that there may be some challenge to your Cat Ex, then getting additional documentation as part of your process is very important as well.

It never hurts to build an administrative record, whether you think you are going to need it or not. On the other hand, the intent is not that you slow the whole process down by building layers and layers of unnecessary documentation. If your documentation becomes lengthy, then perhaps a Cat Ex is not the appropriate approach you should be using.

The public process, if included as part of your Cat Ex, can vary in level of involvement. The level in which you engage the public is a lot easier today than it was many years ago. It's very easy, for example, for an applicant who has a Cat Ex to be considered, to simply use an e-mail chain that is sent out to let people know that a Cat Ex is being proposed for a specific activity. Websites that companies use are also a means for informing the public that you will be doing a Cat Ex. And all of these are steps that you can document to show you did alert the public to what you were doing. It doesn't necessarily mean that you're having a public hearing. It doesn't necessarily mean that you're expecting comments back from them. But if you get comments back, that helps you understand whether in fact what you're carrying out is controversial or is likely to be challenged later on.

Also, what the agencies do—and some better than others—is to conduct a periodic review of the Cat Exes they have; a Cat Ex that you did 10 years ago may actually be either easier or more difficult today. There may be things that have happened in 10 years either because of case law or other events that have made a particular Cat Ex less applicable. So, it's important to review the Cat Exes that you use to confirm that you're still applying the same criteria. Again, the objective is to get to the right decision. So, when you do your review of your Cat Exes, are you able to get to the same decision you did 10 years ago by applying the same considerations you had for this Cat Ex at this time?

The concept of extraordinary circumstances is somewhat of a judgment call in some areas, and in others it's not, but again there are certain categories that very clearly show up as extraordinary circumstances. This almost always includes threatened or endangered species or critical habitats for them, flood plains, wetlands, municipal watersheds, congressionally designated areas, such as wilderness areas, national recreation areas, any type of Native American, Alaskan native, religious or cultural sites, archeological sites, historical properties, or any impact to public health and safety. To the extent that you are aware of those and are able to determine that those are issues that may in fact be part of the decisionmaking, then they need to be incorporated into your Cat Ex documentation.

Just because you have an extraordinary circumstance, however, does not mean that you cannot get a Cat Ex. It means that you need to investigate further what the elements of those issues are to determine if they are in fact at such a level that they suggest transforming in fact into an EA or an EIS and that perhaps a Cat Ex is not appropriate.

If there is no federal funding involved, and if you're not engaging a federal agency or federal planning is associated with the proposed action, then typically NEPA does not apply. But if NEPA does apply, then your next question should be, are there unusual circumstances? Do you know enough about the activities that you might have unusual circumstances? And if you do, then you may have to go right into an EA. You might just look at where you are and what you are going to do and say: "I cannot carry out this action without causing such an incredible strain on this issue or this sensitive area that it's clear I'm going to have to go to an EA anyway." So, at that point, you might say: "We're just going to go right into an EA, or based on the magnitude of the proposed action, and perhaps even bypass the EA and go to an EIS, depending on the circumstances."

But it's also possible that you could confirm by some additional studies what the magnitude of that impact really is, and you might be able to modify your action to avoid that impact or mitigate it to such extent that it really is not the substantive impact it might have been otherwise, and perhaps you then could meet the criteria for a Cat Ex. If the proposed action is not an extraordinary circumstance and you are clearly heading for a Cat Ex, then you look at the kind of Cat Ex circumstances that you have. Some of these Cat Exes may be considered automatic, i.e., one in which the activity is such a straightforward process, it's been looked at so many times, it's obviously of no or insignificant impact, and it's clear that you don't have to document anything.

But there are many of them, as Ted suggested, that you really need to take a look at, especially those for which you may have some uncertainty about the consequences. You want to take a hard look and say am I really clear on why this fits into this category of Cat Ex?

This is again why you may want to build an administrative record. This is where you may want to say: "Well, it's cleared you're a Cat Ex but you're going to document in some form why you think it's a Cat Ex and why it applies." And some agencies may require some sort of a form, even if it's nothing much more than just a checklist to show that you did look for any extraordinary circumstances. Are there wetlands present? No. Endangered species present? No. You will have looked at each of these issues and you've got a form as documentation that shows you did that review before you decided it met the criteria for a Cat Ex. And then ultimately, from that point forward, you go through the necessary documentation, if you have to, file that documentation, and you have your Cat Ex.

A good example of what I would refer to as generally automatic Cat Exes are these on this slide that are part of the DOI Cat Exes. This is a good example of what I call a common suite of actions that most agencies use that are fairly straightforward actions for which a Cat Ex is clearly applicable in most cases. I won't go through all of these, but as you can see, they are fairly straightforward in most cases: personnel actions, data collection, legislative proposals, a lot of paper administrative details for example for which, because it's a federal action, requires some kind of consideration under NEPA, but nonetheless, it can be carried forward with a Cat Ex and may or may not require a lot of documentation to support it.

The last couple of items on this list include fuel reduction and post-fire rehabilitation activities. You'll notice in this case, the DOI has actually prescribed conditions for which a Cat Ex would apply. So, you can say it's a Cat Ex if specific conditions apply. There are a lot of agencies that have said they clearly want certain actions to be covered by a Cat Ex, but only if this activity is going to take place under specific conditions. For example, if I'm moving a railroad line to accomplish a speed improvement, if I'm doing that within my right-of-way, that probably ought to qualify for a Cat Ex. But if it's outside my right-of-way, then I need to take another look, because if I've got to acquire property and/or disturb a substantial area of land, there may be other issues that come to bear that suggest it doesn't really meet the criteria for Cat Ex.

For example, the Forest Service has included among their simple Cat Exes, if you will, constructions of trails and utility lines.[14] And even though I might refer to them as simple or automatic, if you read the guidelines in the regulatory guidance that the agencies have, you may see that they actually have a lot of caveats. For example, a proposed new utility line might obtain a simple Cat Ex "if" it is not causing endangered species, if it does not put in a lot of poles, it's not causing other impacts for which a Cat Ex would not apply. So, there are certain conditions for each of these.

The National Park Service, for example, has criteria for Cat Exes that relate to visitor use, resource management, and seasonal closing of roads to protect wildlife migration patterns. Clearly, these should be Cat Exes. These actions are not the kind that's likely to rise to a level that would require an EA. Similarly, the construction of bicycle lanes by the FHWA.

14. 36 C.F.R. §§220.1, 220.6 (2008).

There are some changes in Cat Ex criteria that you'll notice with DOE, the U.S. Department of Energy. For example, DOE has developed a Cat Ex searchable database, and perhaps others have done the same thing.[15] I think this is certainly a very strong component of their Cat Ex program that's very useful, because you can go to that website, and you can see what prior Cat Exes have been used and whether this action you're carrying out in fact seems to be aligned with how those Cat Exes were applied recently. I think that's really a good basis for setting a standard for Cat Exes among many of the agencies.

Another set of these agency examples on this slide relates to restoring wetlands for fish and wildlife. For example, repairing habitat and restoration of streams; these have limits as to how much they could do, but there are a lot of things that might be done on federal properties, U.S. Fish and Wildlife properties, that are minor enough and are clearly positive from an environmental standpoint that they should apply under a Cat Ex. Notice NOAA [the National Oceanographic and Atmospheric Administration] has a special add on of their own called the NEXRAD, something that they do specifically that is unique to that agency for which they feel a Cat Ex is appropriate.[16]

BLM [the Bureau of Land Management] is interesting in that they have got a lot of activities that BLM carries out. BLM has an enormous number of actions and programs that they're involved in. They are also currently proposing some additional Cat Exes. For example, they have on the books now some plans for emergency stabilization actions and forestry action and geophysical work, which they plan to implement under a Cat Ex.[17]

I'll touch on the last couple of slides that include the categories of Cat Exes that have been applied for by the MMS, since this is really a key part of the topic today. Categorical exclusions for MMS activities have been established through a public review process and a departmental approval process.[18] They've gone through a programmatic EIS. They've also gone through a large number of EAs and from those, tiered off of that programmatic EIS, have made certain decisions about Cat Exes based upon that prior documentation.

Just to be clear, there in fact has been a NEPA process that the MMS has carried out to get through the stage at which they developed Cat Exes. They were based upon EAs, which were based upon a programmatic EIS, all of which looked at the issues that would be of concern for the kind of activities for which they have responsibility.

They've also designated a general set of what are considered the automatic or simplistic, if you will, Cat Exes that the MMS uses. Resource evaluation activities, for example, such as surveying and mapping, geophysical surveying, geophysical data collection, well-logging, a lot of installations that they put into the field for research and monitoring, all of these are the kinds of activities that are referred to as straightforward Cat Exes under the MMS.

They've also defined certain categories as extraordinary circumstances that require either an EA or an EIS or at least require an additional look to confirm whether in fact this is really an extraordinary circumstance or not. And they include a number of these, which we've already talked about previously, like protected species, historic sites, and so on. But they also include the following four bullets for actions that:

- have a highly controversial environmental effect or involve unresolved conflicts concerning alternative uses of available resources;
- have highly uncertain or potentially significant environmental effects or involve unique or unknown environmental risk;
- establish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects; or
- have a direct effect relationship to other actions with individually insignificant but cumulatively significant environmental effects.

And I'm sure there will be more said about these, but these are defined actions that the MMS has already defined as extraordinary circumstances for which a Cat Ex probably does not apply or, if it does, will likely require additional studies to determine if the circumstances are really extraordinary or not.

III. The MMS' Use of Categorical Exclusions

Monica Goldberg: The views I'm about to express are my own, not those of The Ocean Conservancy. I'm going to talk about what obviously provides the context for our discussion today, the MMS NEPA process that, in my view, downplayed the risks of drilling, shortchanged the analysis that should have occurred, and helped to create the conditions that led to the Deepwater Horizon disaster, and that's what we all remember all too well. Fortunately, it doesn't look like that anymore, but this is as of 10 days ago, and as we know, it went on for about two-and-a-half months.[19]

I like to think that I'm relatively aware of NEPA developments, but I found out about the application of a categorical exclusion to exploration drilling in the central and western Gulf of Mexico the way probably a lot of other people did, which is by reading about it in the *Washington Post*, a tried

15. U.S. DOE, Categorical Exclusions (CX) Determinations, *available at* http://cxnepa.energy.gov/.
16. NOAA, NEXRAD Radar Operation Center, http://www.roc.noaa.gov/WSR88D/.
17. *See, e.g.*, BLM, Categorical Exclusion Documentation for All Projects Other Than Hazardous Fuels and Fire Rehabilitation Projects (Feb. 10, 2009), http://www.blm.gov/or/districts/salem/plans/files/PlmCrVlstzRWA_Amnd_CX.pdf.
18. 43 C.F.R. §46.210 (2008). *See also* U.S. DOI, NEPA Categorical Exclusion Review, http://www.boemre.gov/eppd/compliance/nepa/policy/ce/index.htm.
19. *See, e.g.*, Adam Geller & Alan Breed, *Well Capping Brings Relief but Fear of Abandonment*, Assoc. Press. (Aug. 8, 2010), http://www.ap.org/pages/about/whatsnew/wn_gulfoilspill_080810.html.

and true method.[20] And my initial reaction was: "Are you kidding?" Is it really possible that drilling an oil well that's 5,000 feet below the surface of the ocean could fall into a category of actions that do not individually or cumulatively have a significant effect on the human environment?

So, I went and looked into it further and came up with the same information that Tom was just alluding to, which is that this is not an unusual occurrence at all. In fact, there was a quotation on a slide that comes from the MMS website reporting that they did hundreds of EAs for these kinds of oil and gas exploration and development wells in the central and western Gulf, and none of the EAs identified the need to prepare an EIS and, therefore, they established a list of categorical exclusions applying to that.

That categorical exclusion, as the best I'm able to tell, was established actually in the early 1980s, so I'm not familiar with the EA and public review process that might have gone into that. In speaking with the litigants who are currently suing over this, they have a hard time putting their hands on that *Federal Register* document that even established it. This was before the CEQ started urging people to make more categorical exclusions. They went ahead and did it.

The other thing that as a litigator I asked myself when I read that sentence was—I asked one of my law clerks to go and find me the cases that surrounded those EAs and FONSIs. Certainly, you couldn't have a lot of oil and gas exploration and development in the Gulf of Mexico, a large marine body of water, and continually finding no significant impact again and again and again and have nobody sue over it. But guess what? No cases that we've been able to find, which I think points to one of the reasons that this categorical exclusion exists is that there hasn't been a lot of attention paid to the environmental impacts. It's kind of self-reinforcing that the environmental community hasn't focused a lot on this area and there is a categorical exclusion there.

To give an idea of how widespread this practice is, by our calculations, last year there were 174 exploration plans filed in the Gulf of Mexico; 134 received no more NEPA analysis than a categorical exclusion review; 28 resulted in a supplemental EA; and 12 are still awaiting determination as far as the proper NEPA development.

When I'm listening to the other presentations, I feel like a little bit of a dinosaur, because I'm referring back to the regulatory language as though that's the standard that should be applied. There are a lot of documentation and issues surrounding this that, as far as I can tell, weren't applied here.

So, I did something similar to what Tom did, which was to review the list of DOI categorical exclusions, which, as we talked about, include routine financial transactions; routine maintenance, renovation, and replacement activities; and approval of an offshore lease or unit exploration development production plan in the central or western Gulf of Mexico except in areas of high seismic risk, relatively untested deepwater or remote areas within the boundary of a marine sanctuary—that was a relief to me—or areas of high biological sensitivity and areas of hazardous natural bottom conditions or utilizing new or unusual technology. This was actually not on the slide of MMS categorical exclusions, but as far as I can tell, and I believe the plaintiffs on the litigation surrounding this categorical exclusion have determined that that is the categorical exclusion that applied here. It obviously has within it its own set of limitations, i.e., high seismic risk, relatively untested deepwater—that sounds familiar—and of course, there is the list of extraordinary circumstances that Tom identified, a couple of which having to do with uncertain and potentially significant environmental effects you could think might have applied in this circumstance. So, perhaps the existence of a categorical exclusion is not so much the issue. It's more that it was inappropriately applied in this circumstance.

This is an exhibit that's attached to a complaint filed by the Southern Environmental Law Center on behalf of the Defenders of Wildlife.[21] These are categorical exclusions that have been applied to exploration plans in the central and western Gulf—I think it was about less than a month following the explosion on the Deepwater Horizon. So, between April 22 and May 17, this many categorical exclusions were applied, including three exploration plans covering 11 wells that are in better than 4,300 feet of water. So again, these things do not fall within the limitations of the categorical exclusions. They are not usually considered to have extraordinary circumstances. They have continued to be granted, even after the explosion.

So, for me, there is sort of a lack of plausibility here that these could be considered to have cumulatively, collectively no potential effect on the human environment. It doesn't really work for me, but maybe when we look at what actually occurred in terms of a NEPA analysis, were there any actual effects that didn't get considered, that got glossed over in the process? I think there were, and the two that I'd like to focus on are water quality and fisheries.

The NEPA process for this particular development project started—well, it started with a five-year plan EIS.[22] My review doesn't include that. That's such a national level of detail that I didn't look at it. Starting at the multisale EIS, which covered a pretty significant area of the ocean, specifically 87.3 million acres; it's an area that's significantly larger than the state of New Mexico that's covered by this EIS. On its face, it's hard to see how you would be able to do any kind of site-specific analysis at this level of detail, and in fact, there were, as I say, a number of potential impacts that received little analysis that I'd like to talk some more about: water quality and fisheries.

The EIS acknowledges that loss of well-control events, which includes blowouts, can happen during exploratory drilling. However, since loss of well-control events and blowouts are rare events and of short duration, potential

20. Juliet Eilperin, *U.S. Exempted BP's Gulf of Mexico Drilling From Environmental Impact Study*, Wash. Post (May 5, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/05/04/AR2010050404118.html.

21. Defenders of Wildlife v. MMS, C.A. No. 10254 (S.D. Ala. 2010).

22. U.S. DOI, MMS, Gulf of Mexico OCS Oil and Gas, Final Environmental Impact Statement (2003), http://www.gomr.boemre.gov/homepg/regulate/environ/nepa/epa2003and2005.html.

impacts to marine water quality are not expected to be significant. As we're seeing here, some measuring of the water quality effects of the blowout from the exploratory plan, it wasn't terribly surprising that this turned out to be wrong, because the EIS notes that the evaluation of impacts from a large spill on water quality is based on qualitative and speculative information.

I should say that large spills are not the same thing as blowouts. Blowouts first; there's a blowout, and then a spill is actually a more common occurrence, so there is more analysis of what happens when you have an oil spill. So, some of this stuff overlaps a little bit. To my mind, I'm giving them the benefit of the doubt, because at least there was some analysis of a potential of oil spill.

Having identified the fact that the evaluation of impacts from a large spill on water quality is based on qualitative and speculative information, I would make the argument that there is a CEQ regulation addressing what you do with missing and incomplete information. One of the things you do is identify the fact that there is incomplete or unavailable information and then evaluate impacts that have catastrophic consequences, even if their probability is low. One of those might be a very large oil spill or a blowout that involved a very large oil spill in addition. But that didn't happen.

Fisheries: there is a combined discussion of the commercial and recreational fisheries impacts that occur, and there are two paragraphs devoted to a blowout. It states that a blowout event, though highly unlikely, could cause damage to the nearby bottom and render the affected area closed to bottom commercial fisheries, such as a bottom long-lining for a particular group or for some period of time. So again, focusing on the immediate effects from the explosion on the bottom, a subsurface blowout would have a negligible effect on Gulf of Mexico fish resources or commercial fishing. The proposed action could have temporary or minor adverse effects on recreational fishing. And the EIS has more or less no analysis of a large oil spill on fisheries generally.

After the EIS analysis, there was an EA relating to the lease sale.[23] The lease-sale area was somewhat smaller, only the central planning area with a couple of carve-outs on the eastern side. Again, noting just for those of us who are political science majors, which states are surrounding the central and western Gulf and which states are on the eastern Gulf side that aren't subject to this categorical exclusion and weren't subject to this NEPA analysis. You have Louisiana and Texas, states that you don't have to be a political science major to acknowledge are more involved in oil production as a means of supporting the economy than other states.

The central planning area was the area for the EA, still not too shabby, 58.7 million acres, that's the area. And obviously, water depth going from quite close there, the first one I think is 60 meters and then going out to 2,400 meters, which is pretty deep. The EA notes that it tiers off the multisale EIS and incorporates much of it by reference, which doesn't inspire a lot of confidence.[24]

As for water quality, there is a summary of the impact analysis incorporated from the EIS, and there is a page and a half of analysis in the EA. There is an interesting language that we'll come back to, the extent of impact for a spill depends on the behavior and fate of the oil and the water column, which, in turn, depends on oceanographic and meteorological conditions at the time. True enough. Again, when you're looking at that much space, it doesn't really allow you to consider how those conditions might affect a spill when you're talking about site-specific action. Larger spills could impact water quality, especially in coastal areas. That's about it. It's brief, conclusory, and no discussion of the potential differences between exploration and development activities located near the shore, far from shore, during hurricane season—although there is a fair discussion, I will say, of how they are going to withstand hurricanes. This is something that the oil and gas industries have given a lot of thought to. Or I should say, the MMS.

As for fisheries, there is a cursory discussion in very similar language on the impact of accidental effects on marine mammals, sea turtles, Gulf sturgeon, and fisheries. With respect to the last, they quote the EIS, stating: "A subsurface blowout would have a negligible effect on Gulf of Mexico fish resources because fish can swim away and otherwise cope with the negative effects of a spill."[25] This slide shows the closure, the fisheries' closure resulting from—the little star there is the Deepwater Horizon, I believe. The red line encompasses roughly one-third of the Gulf of Mexico federal waters, which are all closed to commercial and recreational fishing as a result of the disaster because it's not just a spill. It's a blowout as well. So, that's through the EA.

A categorical exclusion was applied. As part of the application process, BP submitted an exploration plan in March 2009.[26] They include an environmental impact analysis that's required by regulation. On water quality, there was a one-paragraph discussion.

> It is unlikely that an accidental oil spill release would occur from the proposed activities. In the event of such an accidental release, the water quality would be temporarily affected by dissolved components and small droplets. Currents and microbial degradation would remove the oil from the water column or dilute the constituents to background levels.[27]

That's not quite what happened.

Now, this is the site-specific stage. We're now at the exploration plan stage. So, maybe you could have looked at the issues that were raised in the EA, the extent of the impact depending on the behavior and fate in the oil and the water column and so forth. One of the things you might have wanted to consider at that stage is the Loop Current, which

23. U.S. DOI, MMS, Gulf of Mexico Deepwater Operations and Activities: Environmental Assessment (2000), http://www.gomr.boemre.gov/homepg/regulate/environ/deepenv.html.

24. *Id.*
25. *Id.*
26. BP Initial Exploration Plan, Mississippi Canyon Block 252 (Mar. 10, 2009), http://media.washingtonpost.com/wp-srv/nation/documents/initial_exploration_plan050410.pdf.
27. *Id.* §14.2.1.5.

you may have heard discussed somewhat in the media, which swoops by where the Deepwater Horizon was located further out to sea and comes all the way around the Keys and up the East Coast.

As I understand it, tar balls from the Deepwater Horizon explosion and fire and spill have already been found on the east coast of Florida. This is an example of the kind of analysis that might have been done at the site-specific stage but might not have been appropriate at the EA. However, it might have been here, had a categorical exclusion not been applied.

As to fisheries, there was another single paragraph.

> [I]t is unlikely that an accidental surface or subsurface oil spill would occur from the proposed activities. If such a spill were to occur in open waters . . . the effects would likely be sub-lethal and the extent of damage would be reduced by the capability of adult fish and shellfish to avoid a spill, to metabolize hydrocarbons, and to excrete both metabolites and parent compounds. No adverse activities [what they mean is effects] to fisheries are anticipated as a result of the proposed activities.[28]

So, at each stage of the process, I'm just going back to the punch line. At each stage, perhaps, I should have started out by saying a little bit about the leasing process, but you probably inferred it from the discussion of the NEPA process. It starts with a five-year leasing plan. It proceeds to a lease sale, and then it proceeds to exploration and development on the site-specific matter.

The way this is working is that at the five-year plan, we're talking about a nationwide program and looking at very broadly what's going on, in the case of the central and western Gulf of Mexico. We had a multisale EIS, so not just the really large tracts of land that are put out for lease sale, but even more than that, by multisale EIS, and then tier to it. And that's again much too large an area to do any site-specific analysis and in practice, as indicated, does not result in a lot of deep analysis of what could happen. Then, they usually will do an EIS for the lease sale, but here didn't even do that, an EA tiers to the EIS. Which again was so general that they couldn't really be tiering unless you were going to do a substantive evaluation at the lease-sale stage. Lease sale again being extremely large, hard to do that. Then, at the exploration plan stage, you got a categorical exclusion, so you do have to go through and check the boxes if you are under extraordinary circumstances, but these don't apparently lead to a conclusion that a categorical exclusion should not be applied here.

I should also note that once the exploration plan is deemed submitted by the MMS, they have 30 days to approve it or disapprove it. The way that the MMS is currently interpreting it, that 30 days has to encompass their environmental review. So, it's almost impossible to do an EA in that length of time, and that encourages the use of a categorical exclusion. The problem is that the EA ahead of it wasn't detailed enough to really justify that categorical exclusion, in my view, and also that the MMS could interpret the statute to say that they could do their NEPA analysis first, then deem the exploration plan submitted and run the 30 days after the NEPA review had already been occurred. But that's not what's happening.

So, how do we fix this? I think my prediction is that there won't be very many more categorical exclusions for this kind of activity. Either judicially they'll be reversed under one of at least two lawsuits that are challenging this right now,[29] or Congress will act. The draft bills that I'm familiar with require at least an EA at the exploration plan and development plan stages.

More broadly the CEQ, as Ted mentioned, is undertaking or has more or less concluded, I believe, a review of the MMS NEPA procedures and we're excited to see what comes out of that.[30] Hopefully, a suggestion that the MMS should, at the very least, review this determination to establish a categorical exclusion, which they say, I believe, dates from the early 1980s.

And we also are seeking amendments to the OCSLA itself, the Outer Continental Shelf Lands Act, which would allow for consideration of more environmental issues, which we believe will motivate better environmental analysis through NEPA, as well as the involvement of other agencies in these decisions. We think NOAA Director Dr. Jane Lubchenco should have a more direct role in making leasing decisions, and smaller lease sales should be undertaken to provide better analysis at that stage.

So, in conclusion, would complying with NEPA have prevented this disaster? Obviously, there is no way to know. It's a procedural statute, as we all say, and it doesn't require the environmentally beneficial outcome. That's certainly true. But it's not really that hard to imagine how taking really a hard look at impacts that have catastrophic consequences even if their probability of occurrence is low might have resulted in proposals to change this particular proposed action in a way—this one and other ones like it to incorporate additional safety considerations or other limitations that might have made this less likely. I think, as we're going forward, we need to look forward, but we need to learn from what happened to determine what we really need to do. It really behooves us to take a close look at these potential effects ahead of time, so we can have the kind of informed decisionmaking that NEPA was designed to test.

Jim McElfish: It seems to me that the process that Monica has just described is one in which the categorical exclusion has moved over its 30-year history from one that was aimed at fairly small routine sorts of actions, like the greeting of visitors or restriping the parking lot, to something that fit more directly into the concept of "tiering" going from the broad general environmental analysis to the more specific to

28. *Id.* §14.2.1.6.

29. *See, e.g.*, Defenders of Wildlife v. MMS, C.A. No. 10254 (S.D. Ala. 2010).

30. The report, *Report Regarding the Minerals Management Service's National Environmental Policy Act Policies, Practices, and Procedures as They Relate to Outer Continental Shelf Oil and Gas Exploration and Development*, was issued August 16, 2010. It is available at http://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa/mms-review.

the more specific still. And while we're used to tiering from the EA to [a prior] EIS,[31] it's pretty clear that in this MMS categorical exclusion, essentially, it was tiering a categorical exclusion to an approved development plan and lease sale that had undergone its own NEPA analysis. So, the question I would like to pose to Tom and Ted is whether you think that tiering of categorical exclusions is something relatively new and different, and is it something that has an appropriate place in NEPA practice, regardless of the particular application here?

Tom Simpson: Well, I can say from experience, to be honest with you, out of 30 years of being involved in NEPA programs, I've seen very, very few Cat Exes, because developers don't usually come to a consulting firm to ask for help with the Cat Ex. I'm involved with a program right now, however, where the client has over 400 activities that are all very, very minor. Most of them involve electronic shifts and minor activities involving computer changes and data transfers and things of that type, which clearly should be Cat Exes, and clearly we don't want to do over 400 EAs dealing with those kinds of activities.

Now, the tiering process, as you say, is one that has evolved into more than what it probably began to be early on. There has been, as we know, a desire by the CEQ and others to facilitate the NEPA process. The natural way to do that is to find ways to take repetitive actions that have been occurring over and over again without any kind of an impact as recognizable and say: "I've done this 400 times, and every time I've done it, it always ends up with the same answer, that there's no impact." So, when you have hundreds of a specific action that has had no impact of a magnitude to be concerned about, then a Cat Ex would seem to be an appropriate decision. I think it's understandable how you would get to that decision.

What is often not done, even in EISs, is necessarily the full assessment of a catastrophic event. We have a lot of EISs that show a remote chance of an event, but a very high impact if the events occur. We transport nuclear fuel across the country. We put things in planes that have potential hazards if they were to drop something or crash in an urban area. But those aren't driven to the level that somebody says" "Well, you just can't fly a plane over large cities because it might carry hazardous materials." We just acknowledge it could occur, but we don't stop it from occurring.

Ted Boling: Tom does a good job of tracing the evolution. Certainly, the premise of categorical exclusions as a category of activities has its own integrity. The whole chain defining what is the appropriate category is sort of a tried-and-true approach. Now, one of the points of the CEQ guidance is that you can't just rely on a chain of findings without some verification that the effects analysis actually showed no significant impact intended. But the other aspect of the CEQ guidance is to emphasize that this process of further refinement of categories—ecosystems, particular geographies, or particular actions conditioned and in increasingly complex ways both in extraordinary circumstances as well as also just the definition of the category—is part of the process of making sure that we are appropriately tailored to what we know, and not using categories in areas where we really don't know enough to substantiate the categorical exclusion.

As Monica noted, the MMS' categorical exclusions dating back to the early 1980s were created—MMS was created by combining functions of BLM and the U.S. Geological Survey and taking some of their categories and combining them into the successor agency. But at that time, deepwater drilling was nascent, and there was this sort of learning process. That fits, or is supposed to fit, well within the tiered process of programmatic EISs where the big issues, the incomplete nonavailable information requirements are satisfied at the level of an EIS, such that you don't have to do that sort of reanalysis down to the site-specific level.

Jim McElfish: The MMS had a process where during a 30-day period they reviewed or purported to review the categorical exclusions to make sure they really applied and that they didn't use just the language of extraordinary circumstances but they had sort of an environmental review process with the acronym REC, which I forget what that stands for.[32] How does that fit into your analysis of sort of the sequence of specificity? Did that provide a backstop or could that have provided a backstop for the site-specificity you think was lacking in the categorical exclusion?

Monica Goldberg: I think as long as they are interpreting it that they have such a limited amount of time to do this and they are looking at it as such a routine process, I think it's hard for it to do that. I'm not familiar with the details of it in this particular case, I have to say. [The Categorical Exclusion Review (CER) undertaken for the exploration plan that led to the Macondo Well was a simple checklist without additional analysis.]

Audience Member: What is the status of the DOI and the CEQ's review of MMS' use of categorical exclusions? What is the timing of the review, and how do you anticipate it moving forward?

Ted Boling: In a word, "pending." We've done our review in consultation with the DOI. Of course, the DOI is also undertaking a fair amount of reorganization, as the MMS has been broken up into three entities, with the Management functions, the BOEMRE, an Enforcement Agency, and then the Royalties has spun off to yet another entity. So, there is some ongoing review, and we're in a coordination time

31. The CEQ regulations define "tiering" as "the coverage of general matters in broader environmental impact statements . . , with subsequent narrower statements or environmental analyses . . . incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared." 40 C.F.R. §1508.28.

32. Actually, Categorical Exclusion Reviews (CERs). The MMS listed specific categorically excluded actions for which this review is required "to ensure that individual MMS approvals falling within each category do not represent exceptions to the exclusion." *See* http://www.boemre.gov/eppd/compliance/nepa/policy/ce/review.htm.

frame. I can't give you any particular time frame as to when all this will be made public.

Jim McElfish: Any predictions?

Ted Boling: No. No. Adamantly, no.

Jim McElfish: Can you give us some ideas about what offices within the DOI have been directly involved in the review?

Ted Boling: Well, the BOEMRE and the regulatory entity are both within the Office of the Assistant Secretary for Land and Minerals Management. But it's a matter that's gotten widespread attention.

Monica Goldberg: I think for the environmental community, it's a difficult line to walk, because on the one hand, you don't want NEPA to be an albatross around agencies' necks where they have to do a 500-page report every time they change a light bulb. But at the same time, we get sort of so far out onto the end of this branch of categorical exclusions, where if you don't question them routinely, which doesn't sound like these have been questioned at least recently, it sort of overcorrects.

So, for example, and this may also go to looking at the different context in which these activities take place, some of our folks who are active in the Arctic are adamant that you need to have an EIS for every exploration plan, and that's because it's a very rare occurrence in the Arctic. They're currently—I'm not sure how many they have even approved up there. And anything they do will be groundbreaking and precedent-setting, and so they feel an EIS is necessary at every level, for every exploration plan an EIS is necessary. If you have 134 a year being filed in the Gulf of Mexico, is that as realistic goal? I think it's important that we recognize if you're saying you're going to do an EIS for every single one of those, does that mean you're just saying there has to be a whole lot less drilling in the Gulf of Mexico and acknowledge that that's what you're saying and get ready for the repercussions of that?

So, I think as a community, we are in a position of saying that there hasn't been the kind of site-specific careful analysis of some of these potential outcomes as there should have been so far. And so, how do we redo that? Do we restructure the leasing process? Getting rid of the 30-day deadline is going to happen most likely in the energy bill, and that will help.

And I think personally, I feel that if you improve the requirements of the OCSLA itself, the substantive statute itself, you're going to get closer evaluation of environmental effects across the board, because however you constitute the agency, if you don't give it a different job to do, you're going to end up with very similar outcomes, especially once the television cameras leave the Gulf.

Jim McElfish: There is some concern with the documents that you cited, Monica, that the worst case was not really explored thoroughly at any level of the documents, because the probability was so remote based on 30 years of operating history in the Gulf. And the question arises that should we consider, as some have suggested, a return to or a revisitation of the CEQ's former requirement that there be a worst-case analysis done in the context of NEPA—so that those implications could be understood? The regulations are among the few that have ever been changed among the CEQ regulations.[33] I recall from my own history representing a company siting an oil refinery 30 years ago, we did go through a worst-case analysis, and it took us a long time to get that refinery permit. In fact, it was never built. So, my question is, is it time to reopen the worst-case analysis, Monica and Tom?

Monica Goldberg: Well, I hesitate here, because I know there are a lot of people in the environmental community who strongly feel that it does need to be reinstituted. From what I can see, just applying the law and regulations as they exist now would get us a long way to where these impacts would have been considered. As I said, they freely acknowledge that they were more or less guessing what the water quality impacts would be of a large spill, so under those circumstances, you would consider a catastrophic event, even if it was a low probability. Blowout events were not considered likely, but they were anticipated as something that could occur. If you combine that with a good-sized spill, you would get the kind of analysis that could have occurred.

And as Tom said, there are risky things that happen every day. The issue is that what are the safety limitations you put on the transport of nuclear waste? When you look at the fact that there were three exploration plans covering 11 deepwater exploratory wells issued in the three weeks following the Deepwater Horizon explosion, these things are going through very quickly, pretty routinely without that careful analysis. So, I think just following your basic NEPA principles would get you a long way, even without having to do worst-case analysis specifically.

Ted Boling: I would argue that worst-case analysis still needs representation in that regulation to a certain extent. The purpose in revising that regulation in 1986 was to address a line of cases where the courts were increasingly requiring agencies to undertake a wholly speculative analysis that really wasn't supported by any recent environmental documentation. And so §1502.22, as you can tell, is my favorite regulation; it requires the agencies to disclose incomplete and unavailable information that is significant to a choice of alternatives and, as it says, for purposes of that section, reasonably foreseeable impacts include impacts that have catastrophic consequences, even if their probability of occurrence is low.[34]

Basically, the concern about that regulation needs to be separated from the after-the-fact review of the robustness of the oil spill analysis the MMS relied on in its programmatic EISs. And say that the regulation itself has largely met its goal in ensuring transparency on the agency's assessment

33. Referencing former requirements at 40 C.F.R. §1502.22, removed by 51 Fed. Reg. 15625 (Apr. 25, 1986).
34. 40 C.F.R. §1505.22.

of incomplete and unavailable information, and how did it approach the issue, and what are reasonable opposing points of view.

Audience Member: How is environmental justice incorporated into the NEPA process?

Ted Boling: Well, by virtue of Executive Order and CEQ guidance on environmental justice considerations.[35] And frankly, if you look at the definition of effects, the environmental effects that NEPA is concerned with sweep broadly to all manner of health effects, cultural effects, historic effects, community interests, and, really, it goes back to the definition of the human environment. It's all aspects of the human environment as underscored by the CEQ environmental justice guidance. It's on the web at NEPA.gov. The CEQ EJ guidance is alive and well and used by agencies.

Audience Member: Is attention being given to other agencies' use of and promulgation of categorical exclusions? Does it take a catastrophe like this to focus on a particular agency?

Ted Boling: I just note the promulgation of categorical exclusions has to go through the *Federal Register* notice process and receive public comment, and certainly, categorical exclusions may be underappreciated at the time that they're promulgated. There are many categorical exclusions that get very few or no comments on them. But the approach of the CEQ guidance is to put a spotlight on what Tom noted. A really good practice within agencies, and particularly DOE, is making its use of categorical exclusions very transparent, so that you don't have to wander around trying to figure out how often has an agency used a particular categorical exclusion and even allows access to the underlying documentation. And it seems to be increasingly a trend as the agencies are using their web resources to make their decision documents, including their categorical exclusion determinations, increasingly available.

Audience Member: If an EIS has already been performed for a proposed action, e.g. drilling in the Gulf of Mexico, aren't the subsequent actions of the agency implementing the EIS-studied action, such as permitting a specific well in the Gulf of Mexico, exempt from further NEPA review absent new information calling for a supplemental EIS? And if this is the case, I'm not sure why the MMS would even need a categorical exclusion to grant a permit for a specific well that is within the scope of the original EIS.

Ted Boling: All right. I was tracking that up until the word "exempt," because no federal agency actions, unless there's a congressional grant of exemption, are exempt from NEPA. Its subsequent implementing actions have to have some form of verification, that the environmental impact analysis that was done is still valid and adequate for NEPA purposes. The MMS actually created the FONNSI, the Finding of No New Significant Impacts, which the Ninth Circuit endorsed, which is new and was designed to get at the problem of how to document their decision that the environmental analysis remains valid in the EIS and that they don't need to do a supplement, and there is nothing new or significant about changes in the action changes in the environment that have occurred subsequent to the record of decision.

Jim McElfish: Well, I think this question also goes to the issue of what if there were no categorical exclusions, such as the one Monica referred to, and simply having done a lease-sale EIS, would drilling a particular well require any additional NEPA review?

Ted Boling: Well, you do have the subsequent decision, exploration plan, and application of permit to drill, so you've got a decision there that needs some decision documentation.

Audience Member: My question is about how to modernize the cooperating agency process and how NEPA can be strengthened to allow for better relationships across the agencies.

Tom Simpson: To start, more funding, more money. That's the biggest problem I find in projects where we have cooperating agencies. They don't have the time to dedicate to it. I have a challenge when I'm working with a client who's got a tight schedule and I've got 12 or 13 cooperating agencies, which is nothing uncommon for a big EIS, and you're trying to set up a meeting, a conference call, or a decision-tree workshop and you cannot get them all there. You can't do it, and so you end up having either multiple meetings or you say: "Well, sorry you couldn't attend, but we're moving forward." So, I think a lot of it has to do with really making available the time and resources to do that.

The other is developing some very clear agreements at the outset on what the cooperating agencies' obligations are. So, when we set up an Memorandum of Understanding for the cooperating agency, we say: "Here are the rules. We're going to meet this many times during the year. We're going to also provide a time for you to modify your schedule to possibly get there, so you know about them early enough to be there or participate and do your reviews as scheduled. And if you can't do it, then you'll find out what happened, but we can't hold everything else up for you."

The other thing that can happen, and some agencies have done this to some extent, is when you, as a cooperating agency, cannot provide the time and resources to meet your obligations, then there are scenarios where an applicant is able to provide a fund for you to select someone to do it on your behalf. It's been done in Florida and California. So, for example, if NOAA was a cooperating agency for a project and did not have the staff needed and it's really important that NOAA participates in this process, even though they're not the lead agency, then establish a process where the

35. *See* Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 11, 1995). *See also* CEQ, Environmental Justice, Guidance Under NEPA (1997), http://ceq.hss.doe.gov/nepa/regs/ej/justice.pdf.

applicant would make available X amount of dollars through some kind of a third-party process, so the applicant does not control the staffer that is hired to support the cooperating agency. You, as the agency, hire them, control them, do what you want to do with them. Your only obligation is they meet on a schedule that is required and they report to you. So, that's one way to do it, is to let the applicant cover that cost to expedite the decision process—because to be honest with you, for a large project, that fee is a very small fee, if it means that they're getting the process to move forward.

Now, there may be other things that could be done, but what I find in the real world is that they just don't have the time to participate. They want to participate. They want to be there, but they can't, and so you have to make sure what the agreements are upfront as to what that participation means as a cooperating agency. And then, if they can't do it, see if there are some alternative processes to get their participation.

Monica Goldberg: I was just going to say that part of the advocacy surrounding amendments to the OCSLA and other legislation that's going forward right now is trying to create dedicated funding sources. It has more to do with, well, kind of both, because there have been some efforts to put NEPA-specific language into the OCSLA amendments and requiring or positing that NOAA will be involved in particular ways.

To me, it's always been clear that with sufficient resources, there are ways that an agency that's interested can get involved in the process, but there is also the issue of establishing a substantive role for the agency. For example, allowing the Under Secretary of Commerce [NOAA Administrator] to impose conditions on lease-sale areas and other things that would bind the Secretary of the Interior. And I think if you had those kinds of substantive links, you would find that people make the meetings. But it is all conditioned on the fact that resources are a critical part, and we've been pushing for a trust fund.

Jim McElfish: I would note, as a reminder, that states and tribes can be cooperating agencies. There is bound to be additional interest in that, particularly as we look at issues like renewable energy offshore on the Atlantic as well as the Virginia lease sale, which is on hold, for oil and gas. But states that have their own NEPA processes, robust NEPA process like California or Washington, have some familiarity with the cooperating agency. However, many other states and tribes have not. I think some of the Alaska native communities have engaged in that enterprise, but many of them have the same funding issues that were just alluded to.

Audience Member: Are there any steps being taken to prevent agency capture by the regulated community in the future?

Ted Boling: I'd note, without taking any position one way or the other, as to whether that's actually in any way responsible; the reorganization of the MMS into these agencies with that separation of functions is designed in part to address concerns that you need to have different level, different analytical skills, and also rigor and coordination between different offices, so that you've got multiple eyes looking at the problem at different stages. You've got a leasing office that looks long-range at standards, but then in terms of the actual enforcement, and the application of the standards adopted by the agencies. You have another office, and there is an intent behind that design to have a more robust regulatory framework, if you will.

Monica Goldberg: I would just add to that, we think it's a very positive step to separate those functions. At the same time, there are remaining concerns that the way the OCSLA is set up, there is not much in the way of prescriptive standards setting forth what the real job of the Secretary is going to be in selling these lease sales; there is a sort of list of considerations that he or she can consider. That results in a lot of flexibility and discretion on the part of the Secretary. You put that under the circumstances of very high-value resources being extracted and the company and local pressure that is just going to happen. They sort of have no backstop legally. This would never have happened when Ted and I were at the DOI, but sometimes, it can be helpful if you're a regulatory agency and say we'd love to let you just run rampant over our resources, but you can see this statutory provision and we'll get sued and we'll lose if we do that so, no, we're not going to let you do that.

We would like to see more of that in the OCSLA, prescriptive standards along the lines of "you won't allow drilling unless the risks are known and minimal and putting environmental considerations on a par with resource extraction." And again, involving other agencies in the development of these lease sales and other things, so that it's not a sort of an in-house subject to so much discretion, and we think that will help.

Audience Member: I just wanted to get your comment on the tension between what you just articulated with respect to the rigor of analytical analysis undertaken by the agencies, the tension between that standard and congressionally imposed deadlines.

Monica Goldberg: It really depends. I think there is some momentum behind getting rid of the 30-day time limit on exploration plans. In that particular instance also, it's the point of view of a lot of folks that the NEPA review could occur before the exploration plan was deemed submitted, so that you could already have a NEPA analysis in hand when the 30 days start to run. I'm not familiar about the specific other statutes. I am somewhat familiar in the fisheries context. For example, there are fisheries management plans that are supposed to get approved in time for the fishing year to start somewhere. What we propose in those situations is that you front-load the analysis and try to do programmatic EISs and tier from them but not in a way where you, at the broad stage, say: "This is too broad for us to really get down into the weeds," and then once you get to a specific stage, say: "Sorry,

we don't have time to think about it." But it is a tension that agencies are put into all the time, and it takes some creative thinking about how best to do it.

Ted Boling: I'll just add that in my experience with the Deepwater Ports Act and circumstances where you've got a deadline-driven process, the agencies really do try to adhere to those deadlines. They try to give and enforce an effect, but at some point, you get to a realization, both on the part of the agency and the applicant, that the process is not well served if you don't have a high-quality environmental analysis. For instance, you'll have in the Deepwater Ports Act where it's not deemed submitted until we're ready to go.

We've got an underlying analysis necessary to start that one-year clock. Even then, if we find that we started the clock prematurely and there are new circumstances that there are ways to deal with, you have that sort of tension in line to give real force and effect to the deadline. That's what Congress intended, to get the decision made. But on the other hand, you can't take it to the point where it just ransacks the process.

Audience Member: As categorical exclusions are actions that do not individually or cumulatively have a significant effect on the human environment, is there a need to review existing categorical exclusions for their cumulative climate effects?

Ted Boling: Well, that's an entirely different guidance document. There may be, depending on the category, but that's in the CEQ draft climate change guidance. We attempted to address the problem of at what threshold and when should we be concerned with the greenhouse gas emissions of individually insignificant but perhaps cumulatively worthy of consideration actions? And we've taken a shot at that. We have taken many shots in response, and we're working on finalizing that guidance document too and look forward to the ELI forum on that.

Audience Member: Given that NEPA is primarily procedural, should there be substantive provisions incorporated to modernize it?

Monica Goldberg: Jim, you have a view on this, as I recall.

Jim McElfish: I do have a view. You can read about it on the ELI website, *Rediscovering NEPA*.[36]

Monica Goldberg: I think that firstly, my understanding is that there are actually provisions in NEPA that can be read to impose the substantive standard, but that as a practical matter, the way that it's been interpreted in the courts, it's strictly procedural, and we're stuck with it. So, in order to get a substantive standard in there, we'd have to open NEPA up, and that gives me the heebie-jeebies. No, thank you. I would rather let it stand. I'm afraid of what would happen if we opened up NEPA and really got in there and started mucking around. I would rather put the substantive standards in the topical statutes and say that you have to prevent overfishing, you have to preserve endangered species, topic-by-topic area. In an ideal world, yes, I would, but, and again, this is just me, not The Ocean Conservancy, it would make me very nervous to open it up for that purpose. I'm not sure we could get it.

Tom Simpson: I would agree. I can just see this being one more layer of a process that's going to be litigated and delayed forever. I just don't know that that would—that at the current state we're in right now, I just don't think that would be viable to do that, personally.

Ted Boling: All right. Well, to close it out, let's see, in *Vermont Yankee*, the Supreme Court said that NEPA was essentially procedural.[37] And by *Public Citizen v. DOT*, or *DOT v. Public Citizen*, the Supreme Court had dropped the word "essentially;" let's just say NEPA is procedural and that is the state of the law.[38] But in NEPA's 40th anniversary, I'd encourage you to read Jim McElfish's article and reread the statute and look at §101. Its broad statements of congressional purpose, how they remain timely, remain prescient, and also §105, where it provides that the authorities of NEPA are supplemental to agency authority. Congress intended §§101 et seq. to be used by agencies. It doesn't mean you can run into court and sue them for not using it, but it's 40 years into the statute, and we need to rethink how we're implementing it.

Monica Goldberg: I think it's also just as important, even if you call it just a procedural statute. It has improved decisionmaking by ventilating issues and pointing out things. Especially if we're paying attention. It doesn't really help to raise public awareness if there is no public willing to call people on it politically. So, I think, hopefully, this disaster will have that outcome of people will focus on this particular development activity and others; as the question was raised, what about other categorical exclusions? So, it's a good time for the CEQ guidance. It's a good time for everyone to remember that this is ultimately a public policy tool for us to see what's happening around us and participate and hopefully improve the decisionmaking and outcome.

36. *Rediscovering the National Environmental Policy Act: Back to the Future* (Envtl. L. Inst. Sept. 1995), http://www.elistore.org/reports_detail.asp?ID=376.

37. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 8 ELR 20288 (1978).

38. *Dep't of Transp. v. Public Citizen*, 54 U.S. 752, 34 ELR 20033 (2004).