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DEPARTMENT OF ENERGY

10 CFR Part 1021

National Environmental Policy Act Implementing Procedures

AGENCY: Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE) is revising the existing rule at 10 CFR part 1021, titled "Compliance with the National Environmental Policy Act," to incorporate revised provisions of DOE's Guidelines for Implementing the Procedural Provisions of the National Environmental Policy Act (NEPA). DOE is also revoking its existing NEPA guidelines. This rule incorporates changes required by certain policy initiatives instituted by the Secretary of Energy to facilitate participation of the public and affected states in the NEPA process for proposed DOE actions. The rule also includes a revised and expanded list of typical classes of actions, including categorical exclusions. Categorical exclusions are classes of actions that normally do not require the preparation of either an environmental impact statement or an environmental assessment.

EFFECTIVE DATE: This rule will become effective May 26, 1992.

FOR FURTHER INFORMATION CONTACT: Carol Borgstrom, Director, Office of NEPA Oversight, EH-25, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-4600 or (800) 472-2756.

SUPPLEMENTARY INFORMATION:

I. Background

On November 2, 1990 (55 FR 46444), DOE published a proposed rule that would revise 10 CFR part 1021, revoke the DOE NEPA Guidelines (52 FR 47662, December 15, 1987, as amended), and adopt the Council on Environmental Quality (CEQ) regulations

implementing NEPA (40 CFR parts 1500-1508). Publication of the Notice of Proposed Rulemaking began a 45-day public comment period, ending December 17, 1990. As part of the notice and comment process, DOE held a public hearing on the proposed rule on December 5, 1990. Comments were received from 19 sources, including private individuals, state and Federal agencies, public interest groups, and other organizations. Copies of all written comments and the transcript of the public hearing have been provided to CEQ and are available for public inspection at the DOE Freedom of Information Reading Room, room 1E-190, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-6020.

Today's notice adopts the revisions proposed at that time, with certain changes discussed below, and codifies them at 10 CFR Part 1021. A separate notice published today revokes the existing Guidelines on the date that these regulations become effective.

Copies of the final rule are available upon request to the information contact listed above.

In accordance with 40 CFR 1507.3, DOE has consulted with CEQ regarding this rule. CEQ has found that this regulation conforms with NEPA and the CEQ regulations and has no objection to its promulgation.

II. Statement of Purpose

The purpose of the rule is to revise the provisions of DOE's NEPA Guidelines, based on DOE's experience in the implementation of NEPA and on the directives of Secretary of Energy Notice 15-90 (SEN-15-90), to provide more specificity and detail than the Guidelines and to enhance public review opportunities. (For further information on SEN-15-90, issued February 5, 1990, see the Notice of Proposed Rulemaking (55 FR 46445, November 2, 1990); copies are available from the information contact listed above.) The rule is to be codified at 10 CFR part 1021. By issuing its NEPA Guidelines as regulations published in the Code of Federal Regulations, DOE will ensure that its NEPA procedures are more accessible to the public.

III. Comments Received and DOE's Responses

DOE has considered and evaluated the comments received during the public comment period. Many revisions suggested in these comments have been incorporated into the final rule. The following discussion describes the comments received, provides DOE's position on the comments, and describes any resulting changes to the

rule. Section references, unless otherwise indicated, are to those in the proposed rule rather than the final rule; changed section designations are noted below, in response to corresponding comments.

Many of the commenters expressed overall support for DOE's efforts to improve its NEPA procedures, especially in the areas of increased public participation and requirements for programmatic and site-wide NEPA documentation and mitigation action plans. Because these comments are general in nature and do not require consideration of any changes to the proposed rule, they will not be discussed individually.

In addition to revisions made in response to comments and other revisions already discussed, DOE has made a number of editorial, stylistic, and format revisions. DOE also has made certain technical changes for clarity and consistency, which are described below under corresponding subject headings.

A. Procedural Comments

Several commenters addressed the procedural aspects of this rulemaking. One commenter requested that DOE hold public hearings on the proposed rule in the vicinity of its nuclear weapons facilities. DOE provided an opportunity for both oral and written comment on this rule. Written comments were given the same consideration as oral comments. For this reason, DOE determined that additional public hearings in the vicinity of its nuclear weapons facilities were not necessary.

One commenter disagreed with DOE's position-stated in the November 2, 1990, Preamble, regarding NEPA review requirements for the proposed rule-that the promulgation of this rule does not require an environmental assessment (EA) or environmental impact statement (EIS). The commenter asserted that, in light of the absence of documentary support for the many decisions made in the rule, especially the identification of classes of categorically excluded actions, not only is NEPA review required, but an EA or EIS would help to provide a basis for these decisions. Issuance of this rule complies fully with NEPA's review requirements. DOE's NEPA Guidelines (52 FR 47662, December 15, 1987) list a categorical exclusion for "promulgation of rules and regulations which are clarifying in nature, or which do not substantially change the effect of the regulations being amended." The regulations adopted today will revise 10 CFR part 1021, which simply adopts the CEQ regulations. The amendment clarifies the previous rule by adding specificity, and contains only procedural requirements. Therefore, this action is categorically excluded from further NEPA review. (Also see section V, below.)

A number of commenters addressed the effective date of the final rule. One supported DOE's intention to have the rule become effective immediately upon publication. Another asserted that the rule should not become effective immediately upon publication because "good cause" does not exist within the meaning of the Administrative Procedure Act, 5 U.S.C. 535(d), to waive the standard 30-day period between publication and effective dates. Two commenters asserted that because their comments suggested such substantial revisions to the proposed rule, the rule should be reissued as a proposed rule.

As indicated earlier in this Notice of Final Rulemaking, the effective date of the rule will be 30 days from the date of publication. DOE does not agree that the rule should be reproposed for further public comment. The revisions are a logical outgrowth of the Notice of Proposed Rulemaking published on November 2, 1990, reflecting responses to public comments and limited technical changes in the proposed rule.

B. General Comments on Subparts A Through C

Two commenters were concerned about the length of time needed to complete NEPA documentation. One commenter suggested that DOE establish time periods for internal DOE review and decisions. The other commenter suggested establishing limits on the total time allowed for the completion of each NEPA document process, as many states have done in connection with state processes under NEPA-equivalent laws. Although DOE is aware of the advantages of being able to predict the time the NEPA process will take for proposed actions, the variety of the type and complexity of DOE actions precludes establishing a single time period that would be practical for all actions. Therefore, DOE does not believe that establishing time limits for NEPA review is feasible.

One commenter was concerned in particular about the duplication of effort that might arise from the need to meet both Federal and state NEPA requirements and asserted that guidance on this issue should be provided in DOE's NEPA procedures. One of the goals of these regulations is to implement the CEQ regulation encouraging Federal agencies to cooperate with state agencies to the fullest extent possible to reduce duplication between NEPA and state requirements (see 40 CFR 1506.2). In the past, DOE has been successful in attaining that goal, and, in nearly all cases, a single document has sufficed for both NEPA and state requirements. Under this rule, DOE will continue to work to minimize duplication and to maximize coordination and cooperation. Should the unusual situation arise where there is a conflict between NEPA and state requirements, however, DOE is bound by

the requirements of NEPA. Accordingly, DOE believes that no revisions to the proposed rule are necessary as a result of this comment.

There were three comments regarding DOE internal procedures related to the proposed rule. One commenter requested a discussion of the future role of the Action Description Memorandum (ADM). An ADM is an internal DOE document used to assist DOE in determining the appropriate level of NEPA review-EA or EIS-for a proposed action that is not listed in the classes of actions in the appendices to Subpart D of the rule or for which the appropriate initial level of review is unclear. The role of the ADM will not change with the promulgation of this rule.

One commenter requested clarification of how the final rule would be applied to NEPA documents that had been initiated before its effective date. DOE intends to apply the rule to ongoing activities and to environmental documents begun before the effective date of the rule to the fullest extent practicable. The rule will not apply to an EIS if the draft EIS was filed before the rule's effective date, and completed environmental documents will not be required to be redone as a result of this rule.

Two commenters stated that the proposed rule contains an overabundance of imprecise, subjective, and discretionary language, sometimes in provisions where discretionary language is inconsistent with NEPA and the CEQ regulations. The commenters urged DOE to eliminate such language from the proposed rule. DOE generally agrees with these comments and has removed the phrase "in DOE's judgment" from the following sections of the proposed rule: 1021.200(b), 212(b), 213(b), 301(d), 311(a), 332(a) and (c), 340(b), and 341(a) and (b). Similarly, the phrase "at its [or DOE's] discretion" has been removed from the following sections: 1021.300(b), 301(c) and (d), 311(b) and (e), 312(d), 313(d), 314(d)(3), 322(d), and 330(a). The phrase "at its option" has been removed from 1021.312(a).

C. Comments on Subpart A-General

Section 1021.102 Applicability

One commenter suggested that the phrase "any DOE action affecting the environment" be changed to the language in NEPA: "major Federal actions significantly affecting the quality of the human environment." Because DOE is required to examine all actions that affect the environment to determine whether they are major Federal actions that may significantly affect the human environment, the commenter's suggested change was not adopted.

Another commenter suggested that DOE follow the lead of other

agencies with overseas activities (e.g., the U.S. Agency for International Development and the National Oceanic and Atmospheric Administration) and analyze all the environmental impacts of proposed activities, not just impacts within U.S. territory. Executive Order 12114, "Environmental Effects Abroad of Major Federal Actions," states in section 1-1 that the Order "represents the United States government's exclusive and complete determination of the procedural and other actions to be taken by Federal agencies to further the purpose of [NEPA], with respect to the environment outside the United States, its territories and possessions." As explained in the proposed rule, DOE has adopted procedures (46 FR 1007, January 5, 1981) implementing E.O. 12114, pursuant to section 2-1 of that Order. As long as the Order is in effect, DOE will use these procedures in addressing the extraterritorial environmental effects of DOE actions, and no change is needed in this final rule.

Section 1021.104 Definitions

Section 1021.104(b). In addition to the comments discussed below, other comments that nominally relate to definitions are addressed elsewhere, in the discussion of sections of the rule where the comment has more substantive relevance.
Definition: Action and DOE decision. One commenter stated that the failure of officials to act was reviewable and thus should be included in DOE's definition of action. The commenter suggested that DOE should simply reference the CEQ definition at 40 CFR 1508.18. The proposed rule did reference §1508.18 of the CEQ Regulations, and DOE's paraphrasing of that section in the proposed rule was not intended to exclude any activity covered by 40 CFR 1508.18, including the failure to act. In response to the comment, however, the final rule has been modified to more closely parallel 40 CFR 1508.18. (As a result of this change and a related comment on the definition of "DOE decision," DOE has deleted the definition of "DOE decision" from the final rule.) The definition of "action" has also been changed to make clear that these regulations do not apply to "ministerial actions," such as congressionally mandated funding passthroughs, which DOE does not propose and over which it has no discretion. (Also see the discussion of appendix Al .5, below.)
Definition: Adjacent state. One commenter stated that the requirement that a state must have a common boundary with a host state in order to be an adjacent state was too limiting. Specifically, they asserted that states may be downwind or downstream from the location of a proposed action or have vital social or economic interests in a proposed action without sharing a

common boundary. In response to the comment, the definition of "adjacent state" has been deleted, and in corresponding provisions of the rule, DOE has replaced "adjacent state" with the concept of a state or American Indian tribe that may be affected by a proposed action.

Definition: American Indian tribe. This definition has been added to accommodate changes made in §§1021.301(c) and (d) in response to comments and the addition of §1021.301(e).

Definition: Contaminant and hazardous substance. One commenter objected to defining these words by reference to their definitions under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) because this would potentially exclude actions involving petroleum and natural gas products from NEPA review. DOE has addressed the commenter's concern by adding a definition for "CERCLA-excluded petroleum and natural gas products" and incorporating this phrase in appropriate parts of the final rule.

Definition: Documentation. One commenter stated that the proposed definition would supplant the environmental assessment that CEQ requires as the basis for determining the significance of the environmental effects of a proposed action. DOE agrees with the commenter's basic assertion that the purpose of "documentation" should be to have a record of a decision that categorical exclusion from environmental analysis is appropriate. This was DOE's intention, but comments on the definition of "documentation" and related parts of the proposed rule suggest that the intended purpose was not well understood. The CEQ regulations do not require documentation of the application of a categorical exclusion, and DOE is withdrawing the proposed regulatory requirement for such documentation. DOE believes that internal procedural and recordkeeping requirements for overseeing the application of categorical exclusions are more appropriate, and therefore has deleted the proposed definition and related provisions of the proposed rule.

Definition: EIS Implementation Plan. One commenter suggested that the definition be altered by adding "schedule" so as to read "that explains and supports the scope, schedule, and approach * * *" DOE accepts the comment, but has also added the qualifying word "target" because schedules are subject to change.

Definition: Host tribe. This definition has been added to accommodate changes made in 1021.301(c) and (d).

Definition: Interim action. One commenter thought that this definition would be more instructive if it cited the CEQ definition rather than referring to it. The commenter's suggested change, however, would include only one of the limitations from 40 CFR 1506.1. The proposed language that was the source of confusion

has been rewritten.
Definition: NEPA document. One commenter would expand this definition by adding "Supplement Analysis," "Environmental Critique," and "Environmental Synopsis." DOE disagrees because these documents are not required by NEPA or the CEQ regulations. DOE has deleted "documentation of a categorical exclusion" from this definition because listing it was inappropriate at the outset, and the final rule does not require such documentation.
Definition: Pollutant. This definition has been affected indirectly by the addition of a new definition-"CERCLA-excluded petroleum and natural gas products"-in response to comments.
Definition: Project. DOE has modified this definition to more explicitly comport with CEQ's corresponding language, as a commenter suggested.
Definition: Site-wide NEPA document. The definition in the final rule acknowledges the programmatic nature of a site-wide NEPA document, in response to a commenter's request for clarification.

Section 1021.105 Oversight of Agency NEPA Activities

One commenter interpreted DOE's proposed offer to provide information on procedures and the status of NEPA reviews as an offer to provide written guidance and reports, and suggested that the rule make further provisions regarding such materials. DOE does not prepare written reports on individual NEPA reviews. The rule has been changed to clarify the original intent that DOE will make every effort to respond to public inquiries and to provide timely information regarding the status of NEPA review of specific projects.

D. Comments on Subpart B-DOE Decisionmaking

Section 1021.200 DOE Planning

Section 1021.200(a). A commenter stated that many DOE orders issued under the Department's Atomic Energy Act authority govern critical environmental, health, and safety matters with the potential for significant impacts on the human environment, and suggested that promulgation of DOE orders be included as an activity that may require NEPA review. DOE accepts the suggestion and §1021.200(a) has been modified accordingly. Another commenter requested that the rule clearly state the criteria DOE will use in deciding when to initiate a NEPA review in order to ensure a consistent approach to the NEPA process. The commenter was concerned that DOE might begin NEPA review after committing to a course of action. Section 1021.210(b) has been modified

to emphasize DOE's intention to complete NEPA review before committing to a course of action. However, DOE believes that specific criteria for individual types of actions can be more effectively administered through internal procedures.
Section 1021.200(b). One commenter suggested the addition of, or a reference to, the CEQ requirement (40 CFR 1501.2) to integrate the NEPA process with other planning as early as possible. In §1021.200(a), DOE commits to performing an adequate and timely NEPA review in accordance with 40 CFR 1501.2. Section 1021.200(b) only amplifies the general directive for a proposed action and is not intended to eliminate that commitment.

Section 1021.211 Interim Actions

One commenter supported the intent of the section but was concerned that DOE commitment of resources to an action before completing NEPA review might bias the consideration of alternatives. This commenter also requested that criteria for determining whether future actions fall within the bounds of permissible interim actions under the CEQ regulations (40 CFR 1506.1) be proposed for public review and comment. The commenter expressed concern that DOE will interpret this section too loosely. The commenter did not offer additional criteria. DOE believes that the criteria in the CEQ regulations are adequate, and, therefore, no additional criteria are included in the final rule. The title and language of this section have been modified editorially, however, to more closely parallel the CEQ regulations.
Another commenter was concerned that ongoing and planned environmental restoration actions would be delayed until records of decision for larger "umbrella" EISs or supplemental EISs are issued. DOE believes that many such actions would satisfy the criteria of 40 CFR 1506.1 and, therefore, could proceed while "umbrella" NEPA reviews are being prepared.

Section 1021.212 Research, Development, Demonstration, and Testing

Section 1021.212(b). One commenter requested that criteria be added for DOE to use in determining when to begin a NEPA review, but did not suggest additional criteria. DOE believes that the criteria in this section, in 40 CFR 1501.2, and elsewhere in this rule are sufficient for that purpose.
In the final rule DOE has moved the last part of proposed §1021.212(b), which concerned completion of NEPA review before a decision to proceed with detailed design, to §1021.210(b) in the final rule. This was done to emphasize that this aspect of timing has general applicability.

Section 1021.212(c). One commenter was concerned that this section might be read to allow improper segmentation of the NEPA review of a project. DOE's rule, at §1021.212(b), provides for subsequent NEPA reviews to evaluate those environmental impacts that could not be meaningfully evaluated at the time the initial review was prepared. Accordingly, the rule does not sanction improper segmentation. In the event that there are legitimate phases to an action, each successive EA or EIS considers cumulative impacts as required under 40 CFR 1508.25.

Section 1021.213 Rulemaking

Section 1021.213(b). One commenter objected to the "internal, subjective" decisionmaking process for determining when to begin NEPA review, but did not offer specific suggestions for more objective criteria. DOE believes that the criteria contained in §1021.213(b) are adequate and consistent with 40 CFR 1501.2, in that they emphasize conducting NEPA review early in the process.

Section 1021.214 Adjudicatory Proceedings

Sections 1021.214(a) and 1021.214(c). One commenter questioned the meaning of "adjudicatory proceeding" and how it is distinguished from "administrative action." The comma inadvertently placed after "administrative" has been deleted to clarify the provision and to be consistent with 40 CFR 1508.18(a). Also, the phrase "for formal adjudicatory proceedings" has been deleted from §1021.214(c) to eliminate confusion.

Section 1021.215 Applicant Process

Section 1021.215(b)(6). In response to a comment, and to clarify DOE's original intent, language has been added indicating that DOE would take appropriate action if an applicant were about to take an action that would not satisfy the criteria in 40 CFR 1506.1(a) before DOE completes the NEPA process.
Section 1021.215(c). One commenter believed that the generic guidelines mentioned in this section should be proposed under the Administrative Procedure Act with adequate public notice and opportunity for comment. DOE has modified the section to clarify that any guidance issued to assist preparation of applications would be nonbinding on the applicants. Such guidance need not be subjected to public notice and comment.

Section 1021.216 Procurement and Financial Assistance

This section has been modified to clarify that it applies to DOE joint ventures entered into as a result of a competitive solicitation. Such joint ventures are authorized pursuant to the Renewable Energy and Energy Efficiency Technology Competitiveness Act of 1989 (Pub. L. 101-218).

E. Comments on Subpart C-Implementing Procedures

Section 1021.300 General Requirements

Section 1021.300(b). One commenter requested that this section be clarified to reflect the mandatory nature of NEPA review for ongoing activities. DOE agrees that NEPA applies to ongoing activities in appropriate circumstances; however, this section addresses preparation of NEPA documents that are not required by law or regulations. DOE has made clarifying changes.

Section 1021.301 Agency Review and Public Participation

Section 1021.301(a). The term "interested groups" has been added to the list of entities to which DOE will make its NEPA documents available, in response to a comment. In response to another commenter's general concern about the public's information and involvement opportunities regarding DOE's activities, DOE notes that the rule enhances such opportunities and exceeds CEQ's minimum requirements.

Section 1021.301(c). (Section 1021.301(d) of the final rule). Commenters addressed several aspects of this section, including to whom the proposed opportunity for pre-approval review of EAs should be offered, the length of the review period, and the fact that states may vary in making DOE's documents available to the public.

DOE accepts several commenters' suggestions that American Indian tribes be accorded the same pre-approval review opportunities as similarly situated states. The opportunity will not be extended to the public generally or to citizen groups, however, as several commenters also suggested. The pre-approval review opportunity implements the Secretary of Energy's policy to closely coordinate DOE's NEPA actions with host and potentially affected states and American Indian tribes. The courtesy established by this policy is consistent with the special relationship between the Federal Government and the sovereign states and American Indian tribes. The rule exceeds and does not detract from CEQ's public review requirements.

In regard to the length of the review period, two commenters stated that the proposed 14- to 30-day period was inadequate,

and one commenter thought the proposed period was adequate. DOE believes that the proposed period is adequate, and notes that this period is a minimum that may be extended as appropriate. DOE believes that the phrase "[a]t DOE's discretion" regarding the review period is necessary to provide flexibility in tailoring the review process to the circumstances of an individual action. One commenter questioned the meaning of the proposed language explaining how DOE will proceed after giving the opportunity for pre-approval review. DOE has clarified that it may take any appropriate action on the EA before the end of the review period if the states and American Indian tribes have already waived the opportunity or have responded.

Finally, as previously noted regarding the definition of "adjacent state," this definition has been replaced with the concept of a state or American Indian tribe that may be "affected" by a proposed action. DOE believes that it is necessary to maintain the phrase "in DOE's judgment," however, when determining which states or American Indian tribes may be affected by a proposed action, contrary to several commenters. In many cases, this determination will depend on subjective evaluations of multiple factors. Therefore, DOE believes that the rule should state that DOE retains the discretion to exercise judgment in these matters.

Section 1021.301(d). (Section 1021.301(c) of the final rule). Two commenters recommended that, in addition to adjacent (now "affected") states, Indian tribes should also be notified of DOE's determination to prepare an EA or EIS for a DOE action. DOE agrees. One of the commenters further suggested that interested agencies, citizen groups, and the general public should be notified. This comment was not accepted for the same reasons described in the response to comments on proposed §1021.301(c).

Section 1021.301(e). In considering the comments opposing the early notification and review and comment provisions of §§1021.301 (c) and (d), DOE concluded that there are circumstances when this process would be inappropriate. Therefore, DOE added this section to the final rule so that these provisions would not apply where providing such advance information to a state or American Indian tribe could create a conflict of interest. The rule specifically cites power marketing actions, such as rate-setting, in which a state or Indian tribe is a customer.

Section 1021.311 Notice of Intent and Scoping

Section 1021.311(a). One commenter suggested that a Notice of Intent (NOI) should include at least a brief discussion of potential alternatives. DOE agrees, and a reference to 40 CFR

1508.22, which includes potential alternatives within the NOI contents, has been added to the section.

One commenter objected to the lack of criteria on which DOE will base its decisions on publishing an NOI or an Advance NOI, and also suggested that the rule should allow for maximum public notice of any opportunity for public comment. DOE notes that the wording of the first portion of this subsection is almost a direct quotation of the CEQ regulations, and it is not intended to limit public notice and comment.

The same commenter also stated that the section could be interpreted to mean that DOE has a choice whether or not to provide a reasonable opportunity for public participation regarding a proposed action. DOE believes that this would not be a reasonable interpretation of the section. The provision allowing an NOI to be deferred is intended to ensure that scoping comments are timely, not to limit public participation.

Section 1021.311(b). Two commenters recommended that criteria be established for requiring the publication of an Advance NOI; one suggested that an Advance NOI should be required if the delay between the time DOE has decided to prepare an EIS and the beginning of the public scoping process will be longer than three months. DOE disagrees. The purpose of an Advance NOI is to enhance public involvement, not to restrict it. It is neither necessary nor practical to establish fixed criteria for providing this opportunity. Issuance of an Advance NOI exceeds the requirements of the CEQ regulations, and, therefore, no change is necessary to this section.

Section 1021.311(c). Three commenters suggested that the minimum scoping period should be at least 45 days; another commenter objected to extending the minimum scoping period from the current 20 days to 30 days. DOE has retained the proposed 30-day period as a minimum that can be extended when appropriate, commensurate with the importance, size, and complexity of an individual project and other factors (see 40 CFR 1501.8(b)(1)). Late comments may also be considered when practicable (see §1021.311(e)). DOE believes that the rule provides an adequate opportunity for informed participation without risking significant project delay as a result of the NEPA process.

Section 1021.311(d). Three commenters suggested that there should be at least 30 days between the announcement of the scoping meeting and the meeting itself and that DOE should provide notice of meetings and schedule changes in the Federal Register and in other ways. DOE has retained the 15-day notice period as a minimum. DOE believes that a 15-day notice will generally provide adequate opportunity for informed public participation without risking significant project delay. The notice period

may be extended when appropriate, commensurate with the importance, size, complexity of an individual project and other factors.
Regarding the request that DOE provide notice of meetings and schedule changes by publication in the Federal Register and through other means, DOE believes that the proposed rule reflects the Department's commitment to aggressively promote use of the most effective means of publicizing the details of public meetings, including schedule changes. As noted in §1021.311(d), DOE intends to use various means of announcements, including the Federal Register, news releases, or letters to affected parties, to ensure that the public has adequate notification.
Section 1021.311(g). A commenter noted that the rule did not establish any criteria for determining the need for a scoping period for a supplemental EIS or any reason why such a scoping period should be optional. DOE believes that there is no need to repeat the public scoping process if the scope of the proposed action has not changed. This provision is consistent with 40 CFR 1502.9, which does not require public scoping for a supplemental EIS. When the scope has changed, however, or when the importance, size, or complexity of the proposal warrants, DOE may elect to have a scoping process.

Section 1021.312 EIS Implementation Plan

Section 1021.312(c). A commenter objected to the proposed rule's categorization of target schedules and anticipated consultations with other agencies in an EIS Implementation Plan as discretionary. DOE has modified the rule to include target schedules and anticipated consultations with other agencies in the list of required items (§1021.312(b)).
Section 1021.312(d). Several commenters objected to the provision in the proposed rule for making copies of the EIS Implementation Plan available in DOE public reading rooms. To enhance public access to EIS Implementation Plans, DOE has modified the rule to remove the discretionary language and to require that all EIS Implementation Plans be made available in the appropriate DOE public reading rooms or other appropriate locations.

Section 1021.313 Public Review of Environmental Impact Statements

Section 1021.313(a). Several commenters suggested that the minimum public review and comment period for a draft EIS should be 60 to 90 days or more, except under documented extraordinary circumstances. One commenter objected to the establishment of a minimum period and said that if a minimum is established, it should be no more than 30 days. DOE will retain the minimum

comment period of 45 days, consistent with CEQ's minimum requirement (40 CFR 1506.10(c)). DOE may specify a longer comment period for an individual proposal, and often does.

Section 1021.313(b). Two commenters suggested that the minimum notice for a public hearing on a draft EIS should be 30 rather than 15 days. DOE does not agree. As noted in responses to comments at §1021.311 (c) and (d), DOE believes that a 15-day notice will generally provide adequate opportunity for informed public participation without risking significant project delay due to the NEPA process. DOE may provide a longer period of notice before a hearing when the circumstances warrant, and often does.

Section 1021.313(d). Two commenters stated that DOE should be required to publicize the availability of draft and final EISs and the time and place for public hearings, and to announce the availability of these documents through additional methods beyond a Federal Register notice. DOE agrees and has modified the section by removing discretionary language and clarifying that DOE shall use other appropriate means to publicize the availability of such events.

Section 1021.314 Supplemental Environmental Impact Statements

Section 1021.314(a). A commenter questioned why the phrase "new circumstances," which appears in the CEQ regulations (40 CFR 1502.9(c)(1)), was omitted from DOE's proposed rule. The omission in the proposed rule was inadvertent, and "new circumstances" has been added to the final rule.

Section 1021.314(c)(1). (Not included in the final rule).

A commenter suggested that a supplemental EIS might be required even though the impacts may not change, such as when the need for the proposed action, the range of reasonable alternatives, or available mitigation measures may have changed. The commenter suggested that the proposed provision at §1021.314(c)(1) was inconsistent with CEQ provisions at 40 CFR 1502.9(c) regarding when a supplemental EIS is required. DOE has deleted the proposed subsection from the final rule, and other provisions of the section have been redesignated as appropriate.

Section 1021.314(c)(2). (Not included in the final rule).

No comments were received on this section, which provided that DOE could revise an existing Record of Decision (ROD) if a decision were subsequently made to proceed with an alternative that was evaluated in the EIS but was not part of the initial decision.

The proposed provision has been deleted, however, because the circumstances under which it would apply are adequately addressed by §1021.315(d) of the final rule (which was §1021.315(f) of the proposed rule).

Section 1021.314(d). (Section 1021.314(c) of the final rule). Two commenters stated that DOE should provide a public notice and comment opportunity concerning its intent to prepare an EIS Supplement Analysis (SA) and publish a Notice of Availability of the SA and the resulting determination. One commenter further suggested treating an SA like an EA (i.e., providing the same review and comment opportunities as for an EA). An EA, in contrast to an SA, is a NEPA document required by the CEQ regulations. DOE does not believe parallel procedures for the two documents are appropriate, and does not believe it is necessary to seek public input prior to a determination whether a supplemental EIS is required. DOE will follow the criteria at 40 CFR 1502.9(c)(1) when determining whether to supplement an EIS. If a supplement is required, the public will be fully involved in the NEPA process per the requirements at 40 CFR 1502.9(c)(4) and §1021.314(d) of these rules. In response to the comments, however, DOE has modified §1021.314(d)(3) to provide that SAs shall be placed in the appropriate DOE public reading rooms or other appropriate locations.

Section 1021.314(d)(1). (Section 1021.314(c)(1) of the final rule). DOE modified this section in accordance with a commenter's suggestion that the content of an SA be described more specifically.

Section 1021.314(d)(2). (Section 1021.314(c)(2) of the final rule). Language in the proposed rule regarding revision of an existing ROD has been deleted from this subsection of the final rule to eliminate potential confusion regarding the basis for revising an ROD. As provided for in §1021.315(d) of the final rule, DOE may revise an ROD only when it is adequately supported by an existing EIS.

Section 1021.314(d)(3). (Section 1021.314(c)(3) of the final rule). A commenter thought that it should be required, not discretionary, for the SA and the determination resulting from it to be provided to the public in relevant DOE reading rooms. Another commenter suggested that DOE should establish an affirmative system for providing access to SAs. (See response under §1021.314(d)).

Section 1021.314(e). (Section 1021.314(d) of the final rule). Language of the proposed rule regarding revision of an ROD has been deleted to be consistent with changes made at §1021.314(d)(2). Additionally, a reference to §1021.315 of the final rule has been added to this section to clarify and emphasize provisions associated with issuing RODs.

Section 1021.315 Records of Decision

Section 1021.315(b). (Section 1021.313(c) of the final rule). DOE has moved the requirements in this proposed subsection to

§1021.313(c) of the final rule in order to be consistent with the requirements of 10 CFR part 1022. Part 1022 requires that a Statement of Findings for floodplain actions shall be noted in a final EIS.

Section 1021.315(d). (Not included in the final rule). A commenter objected to having the date of issuance of an ROD be the date of signature rather than the date it is published in the Federal Register because that could mean that the action might proceed before the public becomes aware of the decision. DOE has modified §1021.315(b) of the final rule (§1021.315(a) of the proposed rule) to clarify that no action may be taken until the decision has been "made public"; proposed §1021.315(d) has been deleted. Section 1021.315(c) of the proposed and final rule provide a requirement that RODs be published in the Federal Register, which exceeds CEQ's requirement. DOE may also provide initial public notification by a press release, for example, announcing the availability of the ROD in appropriate DOE public reading rooms.

Section 1021.315(e). (Section 1021.315(a) of the final rule). DOE agrees with the commenters that the CEQ regulations allow for situations when comments on a final EIS may be appropriate. The phrase leading to confusion regarding this subject has been deleted.

Section 1021.315(f). (Section 1021.315(d) of the final rule). One commenter stated that revision of the preferred alternative would only be appropriate if all of the alternatives had received the same level of analysis and discussion of mitigation. DOE acknowledges the general correctness of this comment, but believes strict equality of treatment among alternatives may not be necessary in all cases. Rather, each alternative must be analyzed to a degree commensurate with its potential for environmental impact, and sufficient information must be provided for all alternatives to allow a proper basis for comparison among them. Rather than making the rule more specific, as the commenter further suggested, DOE has added language to the final rule to assure that revisions of the ROD will only take place if the EIS "adequately" supports the revised decision.

Section 1021.321. Requirements for Environmental Assessments.

Section 1021.321(a). One commenter expressed concern about the breadth of DOE's proposal to prepare an EA for all proposed actions not listed in appendices A, B, or D to subpart D. No change has been made to the final rule. DOE will prepare an EA for such actions unless it has already decided to prepare an EIS. This is consistent with 40 CFR 1501.4(b). DOE may add

classes of actions to the lists in appendices A, B, or D in accordance with the CEQ regulations (40 CFR 1507.3).
Section 1021.321(b). One commenter thought the proposed focus of an EA was too limited, in comparison with the CEQ requirements. The discussion in the proposed rule focused on the major purpose of an EA but was not intended to be limiting. DOE has added clarifying language to indicate that an EA shall serve all the purposes identified in 40 CFR 1508.9(a).
Section 1021.321(c). One commenter suggested that DOE withdraw the requirement to analyze the no action alternative in an EA when a proposed action is required by law or court order. DOE believes that it is appropriate to retain this provision. Presentation of the impacts of the no action alternative establishes a "baseline" for judging the impacts of the proposed action. The purpose served by this requirement (i.e., informing Congress and the public, as well as the decisionmaker, of the implications of not taking the action) is consistent with the reasoning behind the judicial interpretations and the CEQ regulation requiring consideration of the no action alternative in EISs.

Section 1021.322 Findings of no Significant Impact

Section 1021.322(a). DOE accepts a commenter's suggestions regarding clarification of when it is appropriate to issue a Finding of No Significant Impact (FONSI). DOE has modified this section editorially to clarify that a FONSI will be issued only if the related EA supports the finding that the proposed action will not have a significant effect on the human environment.
Section 1021.322(b)(2). A commenter requested that DOE clarify this section to distinguish the types of environmental impacts that may be mitigated consistent with issuance of a FONSI from those warranting preparation of an EIS. Because of the varied nature of DOE's projects, it is not practical to define with precision the types of mitigation that would support the issuance of a FONSI. However, DOE does not view activities that are routine parts of proposed actions, such as routine erosion control, as "mitigation commitments" in the context of §1021.322(b)(2). Rather, §1021.322(b)(2) refers to mitigation actions over and above the proposed action that are necessary to render the impacts of the action insignificant. DOE agrees with the commenter's suggestion that actions requiring relocation of endangered species habitat or reconstruction of major wetlands are EIS candidates. DOE believes such determinations should be made case by case, however, taking account of all the pertinent circumstances. DOE has revised the appropriate parts of §1021.322 to make these distinctions clearer.

Section 1021.322(c). One commenter suggested that DOE should add a commitment to the final rule to provide a notice of availability of FONSIs to interested state and Federal agencies, tribal governments, citizen groups, and members of the general public. The procedure proposed by DOE and retained in the final rule is in accordance with CEQ regulations for distribution of a FONSI. It includes options such as those proposed by the commenter. DOE believes this is adequate, but will accommodate the commenter's further suggestion to make FONSIs available in the appropriate DOE public reading rooms or other appropriate locations. The section is modified accordingly.

Section 1021.330 Programmatic NEPA Documents

A commenter requested clarification of the distinction between programmatic NEPA documents and site-wide NEPA documents as discussed in proposed §1021.331, especially in view of DOE having proposed periodic review only for the latter. DOE considers site-wide NEPA documents to be programmatic in nature and, accordingly, has merged proposed §1021.331 into §1021.330 of the final rule. Many DOE sites contain facilities that support diverse and unrelated missions and activities. Site-wide NEPA documents are programmatic in the sense that they review the collective potential environmental effects of such facilities on a single geographic location, and in the sense that these facilities are operated under a single management. However, DOE has retained the requirement for periodic review of site-wide NEPA documents without extending it to programmatic NEPA documents in general. A site-wide NEPA review evaluates the potential individual and cumulative environmental impacts of ongoing and reasonably foreseeable activities at a DOE site (including potential mitigations of any environmental problems); periodic review of those evaluations is appropriate. Periodic review of programmatic NEPA documents (other than site-wide NEPA documents) would not be useful if the proposed program has been implemented, as often is the case.
Section 1021.330(a). A commenter observed that a programmatic EIS is required not only for "connected actions," but also for "cumulative actions" and "similar actions." DOE did not intend to limit the circumstances that require a programmatic EIS. The section has been revised to delete the reference to connected actions and to refer instead to the CEQ Regulations (40 CFR 1508.18(b)(3)), which define a program to include a group of concerted actions and systematic and connected agency decisions.

Section 1021.331 Site-wide NEPA Documents (Included in Section 1021.330 of the Final Rule)

Section 1021.331(a). A commenter maintained that DOE's requirement in the proposed rule to prepare site-wide EISs for certain large, multiple-facility sites is inconsistent with the definition of an EIS, would not significantly further the purposes of NEPA, and would mainly provide information that is already available from other sources. DOE believes, however, that site-wide NEPA review will serve to improve and coordinate agency plans, functions, programs, and resource utilization. A site-wide EIS provides an overall NEPA baseline for a site that is particularly useful for tiering or as a reference when preparing project-specific NEPA documents for new proposals. The requirement is retained.
Another commenter stated that inclusion of the phrase "as a matter of policy" was inappropriate because site-wide EISs may be required under NEPA in certain circumstances. DOE will prepare site-wide EISs when required, but may also, "as a matter of policy," prepare site-wide EISs for a number of reasons including, for example, to improve site planning efforts, to consolidate activities, and to maximize cost-saving efficiencies.
As discussed at §1021.330, DOE considers site-wide NEPA documents to be programmatic in nature and, accordingly, has merged proposed §1021.331 into §1021.330 of the final rule.
Section 1021.331(b). Several commenters suggested public participation opportunities for the proposed periodic evaluation of site-wide NEPA documents. DOE does not believe it necessary to require public notice of its intent to conduct such evaluations and will evaluate case by case whether such notice is appropriate. DOE has modified the rule, however, so that analyses and determinations resulting from such reviews will be made available in the appropriate DOE public reading rooms or other appropriate locations.
One commenter requested that DOE define the starting time of the cycle for the five-year reviews. DOE does not agree that specifying procedural starting times in this regulation is necessary or appropriate.
Finally, DOE has modified this section of the final rule to delete an unintended reference in the proposed rule to supplementing an EA.

Section 1021.332 Mitigation Action Plans (Section 1021.331 of the Final Rule)

One commenter stated that DOE must narrow the scope of this section, which allows for mitigation in support of a FONSI, citing the answer to Question 40 of CEQ's "Forty Most Asked Questions" (46 FR 18038, March 23, 1981), which addresses the circumstances under which a FONSI based on mitigation is appropriate.

DOE has not modified the rule in this regard because it believes that the rule, as proposed, is consistent with CEQ's guidance. The answer to Question 40 focuses on the principle that a FONSI cannot be based only on the possibility of mitigation. However, DOE action under a FONSI supported by mitigation would be based on a commitment to perform the mitigation, not the possibility. This section has been modified to clarify this point; in doing so, DOE separated the discussion of EISs and EAs into different subsections. The discussion regarding Mitigation Action Plans (MAPs) for EISs and EAs/FONSIs can now be found at §1021.331(a) and (b), respectively.

Two commenters suggested that MAPs be made available for public review and comment. DOE believes that public review of the MAP is not necessary because commitments to perform the subject actions would be included in the FONSI or EIS and associated ROD. The MAP is an internal DOE document that describes the plan for implementing and monitoring mitigation commitments made in these documents. DOE, however, will make copies of MAPs available in the appropriate DOE public reading rooms or other appropriate locations (see §1021.331(d) of the final rule).

Section 1021.332(a) (Section 1021.331(b) of the Final Rule)

One commenter suggested that the phrase "in significant part" was inappropriate and should be deleted because, no matter how small the mitigation, its accomplishment would be critical to avoid the need for an EIS. The phrase "in significant part" has been deleted from the final rule, and the section has been changed to clarify that DOE commits to performing all mitigations "essential to render the impacts of the proposed action not significant." However, as discussed under and clarified in §1021.322(b)(2), DOE does not intend the term "commitments to mitigations" to apply to actions that are routinely taken as part of or are integral elements of a proposed action.

Section 1021.340 Classified, Confidential, and Otherwise Exempt Information

A commenter suggested that DOE exercise greater restraint in deciding which information to withhold from the public. DOE believes that this rule in many ways enhances public access to information. With respect to confidential or classified documents, however, DOE must comply with applicable laws and regulations. Procedures for classifying information are beyond the scope of this rule.

Although no comments were received to this effect, DOE has

deleted the reference to disclosure of interagency memoranda transmitting comments on EISs. This modification was made to avoid the possible misconception that DOE intended to disclose classified comments. For unclassified comments, the provisions of the CEQ Regulations at 40 CFR 1506.6(f) would apply. Additionally, DOE has deleted from the final rule the inadvertent and unnecessary reference to "restricted" information made in the proposed rule.

Section 1021.340(a). A commenter expressed a concern that unless this section is limited, inappropriate material will be made available to the public, especially draft comments and attorney work product. The provision at issue addresses interagency memoranda transmitting comments. By their nature, such documents are final and become public comments (40 CFR 1506.6(f)). No exception in the requirement is made for the case where the agency's responding unit is its legal counsel. DOE legal counsel's comments (intraagency), like other internal deliberative documents, are exempt from release. The section is not changed.

Section 1021.340(b). One commenter suggested that the phrase "wherever possible" should be deleted because it might lead to a determination that the release of information was not "possible" because of costs or inconvenience. This section addresses the preparation of a document in the context of §1021.340(c), in which cost and inconvenience are not issues. The final rule has been modified, however, to indicate that DOE will, to the fullest extent possible, segregate any information that is exempt from disclosure into an appendix to facilitate public review of the remainder of the document.

Another commenter suggested that the rule acknowledge that classified portions of documents will undergo an independent review by other Federal agencies whenever appropriate. This comment refers to the responsibilities of the Environmental Protection Agency under section 309 of the Clean Air Act. This rule need not restate review responsibilities that are otherwise provided for by law.

Section 1021.341 Coordination With Other Environmental Review Requirements

Section 1021.341(a). One commenter suggested that the rule provide for integrating NEPA with CERCLA requirements in order to preclude delays and unnecessary duplication of effort. Another expressed a concern that this rule should not prejudice an ongoing, broader discussion of the applicability of NEPA to the environmental restoration activities conducted by Federal agencies other than EPA. It is DOE's policy to integrate NEPA values into activities undertaken pursuant to CERCLA wherever practical. DOE's implementation

of this policy is not intended to represent a statement on the legal applicability of NEPA to environmental restoration activities conducted under CERCLA or other legal authority, and DOE believes that this policy will not prejudice any subsequent resolution of the applicability issue.

Section 1021.341(b). DOE agrees with a comment noting that the determination of applicability of other environmental requirements (e.g., those of the Endangered Species Act, section 106 of the Historic Preservation Act, and section 404 of the Clean Water Act) is not always left to the agency proposing an action, but sometimes to other agencies with given program responsibilities. DOE did not intend to imply in the proposed rule that it could unilaterally determine the applicability of such requirements. The final rule has been modified from the proposed rule to state that DOE will determine the applicability of other environmental requirements in consultation with other agencies when necessary or appropriate.

Section 1021.342 Interagency Cooperation

One commenter requested clarification of DOE's procedures for the designation of a lead office within DOE and the designation of cooperating offices and agencies within and without DOE, including entities other than Federal agencies. Another commenter thought that the provisions for involvement of cooperating agencies should be expanded and improved to reference or acknowledge the CEQ regulations. DOE has reinforced its general obligation, acknowledged in §1021.103, to comply with all CEQ requirements, including those for lead and cooperating agencies, by establishing in §1021.342 an affirmative policy to cooperate with other agencies, including the development of interagency agreements. The final rule cites specific CEQ requirements (i.e., 40 CFR 1501.5 and 1501.6) for greater clarity. DOE's internal procedures for carrying out its responsibilities are beyond the scope of this rulemaking, however.

Section 1021.343 Variances

Section 1021.343(a). DOE has modified the rule in response to a commenter's request to make the rule more clearly consistent with the CEQ regulation regarding consultation with CEQ about "alternative arrangements." The final rule also requires DOE to publish a notice in the Federal Register after taking an emergency action, which exceeds CEQ requirements.

Section 1021.343(b). A commenter suggested that DOE limit its reduction of time periods established in the rule to extraordinary

situations that demand immediate attention. The only time periods that DOE has discretion to change are those established by DOE that exceed CEQ's requirements. DOE does not believe it is appropriate to establish criteria for reducing these time periods, because it is not possible to foresee all possible circumstances under which reductions may be needed. However, in no case would the time periods resulting from application of this subsection be less than the minimums established by CEQ.

Section 1021.343(c). One commenter suggested that the variance provision should be deleted, describing it as a "catch-all." Another suggested that a Federal Register notice be required for such variances. DOE believes the variance provision is reasonable and appropriate, and consistent with 40 CFR 1506.11. The rule has been modified, however, to require that a notice of variance be published in the Federal Register, as the commenter suggested. Editorial modifications were also made to clarify responsibilities of the Secretary of Energy.

F. General Comments on Subpart D-Typical Classes of Actions

DOE received extensive comments on the approach to NEPA compliance reflected in the proposed regulations and appendices of Subpart D, with the major focus of these comments on the classes of actions proposed in appendices A and B to be categorically excluded from the preparation of an EA or EIS.

Commenters pointed out that DOE failed in the proposed rule to make the finding required by the CEQ regulations (at 40 CFR 1508.4) that the classes of actions categorically excluded from the requirement to prepare an EA or EIS do not individually or cumulatively have a significant effect on the human environment. Two commenters further asserted that DOE must, for each class of action included in appendices A and B, make an explicit finding with an articulated basis, supported by documentation, that the actions encompassed by the class never, except in extraordinary circumstances, have a significant effect on the human environment. DOE agrees that the CEQ regulations do require DOE to find that the classes of actions in appendices A and B will not individually or cumulatively have a significant effect on the human environment and that this finding be made in procedures adopted in implementing the CEQ regulations. Accordingly, DOE has included such a finding at §1021.410(a) of the final rule. However, DOE does not believe that it is required to set forth in the preamble a detailed, individualized explanation for such finding for each of the classes of actions in appendices A and B. In finding that the classes of actions categorically excluded in the final rule will not individually or cumulatively have a significant effect

on the human environment, DOE has considered, among other things, its own experiences with these classes of actions, other agencies' experiences as reflected in their NEPA procedures, and the comments received on the proposed rule.

One commenter also questioned DOE's exclusive reliance on experience to support its identification of categorical exclusions and the use of memoranda-to-file as a part of this experience record because, the commenter asserted, DOE has determined that memoranda-to-file do not constitute acceptable NEPA documentation. Although DOE stopped using the memorandum-to-file as part of its NEPA process on September 30, 1990, DOE believes that memoranda-to-file prepared before that date are valid documents that should be considered as part of DOE's experience with particular actions. The purpose of memoranda-to-file was to determine whether proposed actions, not included in the list of categorical exclusions, would have clearly insignificant impacts, and therefore not require either an EA or an EIS. This is precisely the type of document that is relevant for the finding required by 40 CFR 1508.4.

Some commenters stated that DOE's extensive list of categorical exclusions suggested a DOE position that classes of actions can be categorically excluded if, some of the time, they would not have significant impacts. The commenters compared this to the CEQ regulations, which clearly limit categorical exclusions to those classes of actions that have significant impacts only in extraordinary circumstances. DOE believes its categorical exclusions comply with the CEQ regulations and agrees that to be eligible for categorical exclusion, a class of actions must not individually or cumulatively have significant effects on the human environment except in extraordinary circumstances. DOE has determined that the classes of actions included in appendices A and B of the final rule meet this standard.

One commenter noted that if the individual actions encompassed by a categorical exclusion have the potential for significant impact on a cumulative basis, then the categorical exclusion is invalid. DOE agrees that it must find that classes of actions categorically excluded do not individually or cumulatively have a significant effect on the human environment. The commenter further noted that if a proposal encompasses actions within multiple categorical exclusions and cumulatively the actions have the potential for significant impacts, then the categorical exclusions encompassed are invalid. DOE agrees that such a proposal could not be categorically excluded but believes that the individual categorical exclusions would still be valid. DOE has added §1021.410(b)(3) to address this concern and to preclude the segmentation of a proposal into component parts, which as discrete proposals

are categorically excluded, to avoid preparation of an EA or EIS.

Commenters, expressing the view that DOE's proposed categorical exclusions are too broad, asserted that DOE should prepare more EAs and that DOE's extensive list of categorical exclusions results from a reluctance on DOE's part to prepare EAs because its internal EA requirements are so burdensome. Commenters asserted that the approach represented by the expanded list of categorical exclusions is not consistent with the requirements of NEPA and the CEQ regulations. One commenter noted that an increased reliance on EAs would not necessarily require vast new commitments of time and resources if DOE would take heed of CEQ regulations and guidance that intend the EA to be a concise and expeditious analysis. Other commenters criticized DOE for presenting a confusing and illogical mix of activities, ranging from the payment of salaries to the restart of nuclear facilities, and for not having a de minimis level for actions to be subject to a NEPA review.

The extensive list of categorical exclusions results primarily from the fact that DOE is engaged in many different types of activities. DOE's extensive list of categorical exclusions also reflects DOE's policy that some NEPA review is required for all DOE actions potentially affecting the environment, even if there is no apparent potential for any significant effect.

DOE believes the extensive list of categorically excluded actions in the final rule is consistent with NEPA and the CEQ regulations. The CEQ regulations require agencies to reduce excessive paper work and avoid delays by using categorical exclusions (40 CFR 1500.4(p) and 1500.5(k)). DOE will prepare EAs when necessary-that is, when the class of actions has not been excluded and/or when DOE is uncertain whether the proposed action would have significant environmental impacts. DOE believes it will serve environmental concerns best if it focuses its efforts on analyzing those actions that may or do have potential for significant impact.

One commenter stated that the categorical exclusions in proposed appendix B were inappropriate because they were vaguely drafted and were entirely without reference to size, volume, or significance in a way that would encompass major Federal actions that were likely to have significant environmental impacts. Others expressed concern about the broad scope of the classes of actions categorically excluded. DOE has reevaluated all categorical exclusions in the proposed rule to determine the appropriateness of more precise language, adding limiting factors or otherwise narrowing the scope of the categorical exclusions, and has modified several accordingly. DOE has decided not to categorically exclude some classes of actions that were included on the list in the proposed

rule. These deletions and changes are described in more detail in the discussion under section III G below.

One commenter suggested that DOE delete proposed appendix B in its entirety, and instead add explicit limits on the size of each class of actions proposed in that appendix and move the classes of actions to proposed appendix A. The commenter further suggested that DOE prepare EAs or EISs for all proposed activities beyond the expressed size limit of the classes of action in the resulting appendix A.

DOE believes it is reasonable to retain two appendices for categorical exclusions but has revised the distinction between the types of classes of actions included in appendices A and B. Appendix A in the final rule lists categorical exclusions applicable to general agency actions and includes those classes of actions with impacts so remote or conjectural as to preclude meaningful consideration. Appendix A includes some classes of actions to which NEPA probably does not apply but that DOE has listed to clarify that neither an EA nor EIS is needed and to avoid any potential misunderstanding associated with the absence of such listing. Appendix B in the final rule lists categorical exclusions that are applicable to specific agency actions and have conditions specified as integral elements of the classes of actions. The conditions that are integral elements of the classes of actions in appendix B of the final rule were the eligibility criteria in §1021.410(b) of the proposed rule. Even though originally proposed to apply to all categorical exclusions as eligibility criteria, DOE believes that inclusion of the conditions specified in appendix B would be meaningless for the categorical exclusions DOE retained in appendix A in the final rule. This is because appendix A is limited to classes of actions with impacts that cannot be meaningfully evaluated. DOE moved the classes of actions with impacts that are not so remote or conjectural as to preclude meaningful analysis that were included in appendix A of the proposed rule to appendix B in the final rule so that the conditions specified in appendix B would be integral elements of these classes of actions. Categorical exclusions in appendices A and B have been found by DOE not to individually or cumulatively have a significant effect on the human environment.

Two commenters were concerned that, while DOE's proposed rule purports to abolish the memorandum-to-file, DOE has merely substituted a new system, "documentation," which also would not be made available to the public. One commenter considered the documented categorical exclusions as "phantom" EAs that would reinsert into DOE's NEPA process the very subjectivity, discretion, and secrecy that SEN 15-90 was intended to eliminate.

Another commenter viewed DOE's creation of the proposed Appendix B as indicating a lower level of certainty about those categorical exclusions and noted that, when an analysis is required to decide whether an action meets the criteria for a categorical exclusion, then the proper format for that analysis is an EA subject to public review, not documentation behind closed doors.

DOE has eliminated the requirements for documentation of categorical exclusions from its regulations. It was not DOE's intent that any categorical exclusion in appendix B be supported by an analysis of environmental effects ("phantom" EAs) or that the documented categorical exclusion be equivalent to the memorandum-to-file, which DOE has eliminated from its NEPA procedures. The documentation that DOE referred to for these categorical exclusions in the proposed rule was to be a record of the determination that the action was appropriately categorically excluded and was to be used for internal oversight purposes. Although the CEQ regulations require public review of categorical exclusions proposed for listing, the regulations do not require documentation, public review, or notification when categorical exclusions are applied.

One commenter was concerned that proper documentation is needed to ensure that an established process has been followed, and suggested that DOE use a checklist to demonstrate why an action has been excluded from further NEPA review. DOE is evaluating the need for internal recordkeeping procedures and, if such procedures are established, will consider the use of a checklist.

In contrast to the commenters who believed that the classes of actions proposed to be categorically excluded were too broad, some commenters believed the classes of actions to be categorically excluded should be broader than those proposed. One commenter thought that rather than listing specific classes of actions, DOE should establish "guiding criteria." Some commenters suggested that certain classes of actions, in addition to those in the proposed rule, should be categorically excluded in the final rule. DOE believes that the classes of actions categorically excluded in the final rule are appropriate and does not believe that it could make the necessary findings at this time for any broader classes of actions. As to the comments suggesting the categorical exclusion of classes of actions not proposed by DOE, DOE cannot categorically exclude in the final rulemaking any classes of actions not included in the proposed categorical exclusions. The CEQ regulations require that categorical exclusions be established only after public notice and the opportunity for public comment. DOE will consider the suggestions of the commenters in determining whether to propose new or broader classes of actions for categorical exclusion in a future rulemaking.

The comment was made that because many of the classes of actions proposed to be categorically excluded in appendices A and B entail activities that could affect the character or use of historic properties, DOE should make absolutely clear in its final rule that the categorical exclusion of an action does not exempt it from the requirements of other environmental regulations. DOE's NEPA rule addresses NEPA compliance only, not other environmental requirements. Coordination with other environmental review requirements is addressed in §1021.341; in addition, condition B.(4)(i) in appendix B of the final rule precludes a proposed action from categorical exclusion if the action would have an adverse effect on historic properties.

Four commenters expressed concern about the lack of public participation in, and public scrutiny of, the process of determining whether particular proposed actions are appropriately categorically excluded. One commenter suggested that records of determinations that proposed actions are categorically excluded be placed in public reading rooms. Another commenter felt that in view of the breadth of the classes of actions on the list of categorical exclusions and the discretion to be exercised in applying eligibility criteria to proposed actions, there should be public participation in the process.

The CEQ regulations do not provide for public participation in determinations that particular proposed actions are categorically excluded, nor do they require that records of such determinations be kept or made public. DOE believes that requiring public participation in categorical exclusion determinations or that documentation of categorical exclusion determinations be made available in public reading rooms would be contrary to the purposes of categorical exclusions, as stated in the CEQ regulations-reducing paperwork and avoiding delays.

G. Comments on Specific Sections of Subpart D-Typical Classes of Actions

Section 1021.400 Level of NEPA Review

A commenter suggested that §1021.400 as proposed should address proposed actions covered by "memoranda-to-file." DOE does not believe a reference in the rule to memoranda-to-file is needed or appropriate because such documents are no longer part of DOE's NEPA procedures. To clarify the effect of this rulemaking on completed NEPA reviews and documents, DOE has changed §1021.400(b) in the final rule to state that "any completed, valid NEPA review does not have to be repeated, and no completed NEPA documents need to be redone by reasons of these regulations, except as

provided in §1021.314" (which concerns supplemental EISs). Because a memorandum-to-file issued before September 30, 1990, is a valid NEPA document, §1021.400(b) would apply. (See additional discussion under section III B above.)

A commenter suggested that clarification be provided in §1021.400(b), as proposed, on the use of existing site-wide EAs or EISs during the evaluation of those documents or the preparation of new site-wide documents for continuing or new actions. DOE believes that this issue is generally addressed by §1021.400(b) and that any further clarification is better addressed in internal guidance than in this rulemaking because of site-specific issues and circumstances. Accordingly, DOE did not provide the requested clarification in the final rule.

Another commenter was concerned that the language in §1021.400(c), as proposed, did not make it sufficiently clear that the application of a categorical exclusion to a particular DOE proposal depends on the proposal meeting the eligibility criteria of proposed §1021.410(b). DOE agrees with respect to those classes of actions listed in appendix B of the final rule. However, rather than modifying §1021.400(c) in the final rule, DOE has included the eligibility criteria in §1021.410(b) of the proposed rule in appendix B of the final rule as conditions that are integral elements of the classes of actions listed in appendix B. DOE has not included the proposed eligibility criteria in §1021.410 of the final rule. DOE believes that this provides the clarification requested by the commenter.

A commenter expressed concern that the proposed rule did not provide for instances where actions falling within a category of categorically excluded actions might have significant environmental effects because of extraordinary circumstances. DOE intended to provide for such instances in §1021.400(c) as proposed. In light of the commenter's concern, DOE has modified §1021.400(c) in the final rule and added §1021.410(b) (2) to clarify that DOE will not proceed with the level of review indicated in the appendices if there are extraordinary circumstances related to the proposal that may affect the significance of its environmental effects. DOE has included a circumstance cited by the commenter (i.e., the unresolved conflicts concerning alternative uses of available resources within the meaning of §102(2)(E) of NEPA) as an example of an extraordinary circumstance in §1021.410(b) (2) of the final rule. DOE also modified §1021.400(d) in the final rule to be consistent with the revisions to §1021.400(c).

Section 1021.410 Application of Categorical Exclusions (Classes of Actions That Normally Do Not Require EAs or EISs)

Section 1021.410(a) General. In the final rule, DOE has expanded this section to clarify the application of categorical exclusions and has divided the proposed section into four parts. DOE has incorporated §1021.410(b) of the proposed rule into appendix B in the final rule. Therefore, §1021.410(a) of the proposed rule as modified is §1021.410 in the final rule, as explained below.

Section 1021.410(a) states DOE's required finding that the classes of actions listed in appendices A and B of subpart D are classes of actions that DOE has determined do not individually or cumulatively have a significant effect on the human environment.

Section 1021.410(b)(1) clarifies that to be eligible for categorical exclusion, the proposal must be determined by DOE to fit within a class of actions listed in appendix A or B. For a proposal to fit within a class of actions in appendix B, it must meet the conditions specified in B.(1)-(4) in appendix B.

Section 1021.410(b)(2) clarifies that to find that a proposal is categorically excluded, DOE must determine that there are no extraordinary circumstances related to the proposal that may affect the significance of the environmental effects of the proposal. This section identifies three examples of extraordinary circumstances that could exclude actions within a class of actions in appendix A or B from eligibility for categorical exclusions. These examples are unresolved conflicts concerning alternative uses of available resources, scientific controversy about the environmental effects of the proposal, and uncertain effects or effects involving unique or unknown risks.

Section 1021.410(b)(3) clarifies that DOE, in determining that a proposal is categorically excluded, shall find that the proposal is not connected to other actions with potentially significant impacts, is not related to other proposed actions with cumulatively significant impacts (following 40 CFR 1508.25(a)(1) and (2)), and is not precluded by 40 CFR 1506.1 or §1021.211 of these regulations. Section 1021.410(b)(3) was included in response to comments concerning cumulative impacts, as discussed above.

Section 1021.410(c) includes the statements contained in proposed §1021.410(a) concerning the application of the classes of action by any element of DOE and the division of appendices A and B only for organizational purposes. In the final rule the word "organizational" was added before "element of DOE" to be consistent with §1021.102(a).

Section 1021.410(d) modifies §1021.410(a) as proposed to clarify that, to avoid segmentation, the classes of actions are intended to include all activities necessary to implement

a proposal, such as transportation activities and award of implementing grants and contracts.

A commenter recommended that §1021.410(a) as proposed be revised to provide for a case-by-case determination that a proposed action, not included within classes of actions listed in appendices A and B, be categorically excluded if the action meets the eligibility criteria set forth in §1021.410(b). DOE has not made the requested revision because, as discussed above, the CEQ regulations require that categorically excluded classes of actions be identified in an agency's published procedures. The proposed eligibility criteria and the appendix B conditions in the final rule are not classes of actions.

Section 1021.410(b) Eligibility criteria for categorical exclusions (Appendix B of the final rule). One commenter expressed concern that DOE used as eligibility criteria for categorical exclusions some of the factors in 40 CFR 1508.27 intended for evaluating the intensity or severity of impacts and for determining the significance of the environmental impacts of proposed actions. The commenter pointed out that the analysis of such factors is more appropriately accomplished in an EA. The commenter acknowledged, however, that the use of these factors as eligibility criteria is better than no requirement for screening and suggested that, if such a screening mechanism is developed, it include several additional critical factors found in 40 CFR 1508.27. Another commenter also recommended that other factors in 40 CFR 1508.27 be added to DOE's list of eligibility criteria.

DOE agrees that subjective evaluation of the intensity or severity of an impact as prescribed in 40 CFR 1508.27 is not appropriate in a determination that an action fits within a categorically excluded class of actions. The conditions specified as integral elements of the classes of actions in appendix B in the final rule, which were the eligibility criteria in proposed §1021.410(b)(1), require a factual determination. That is, the presence, not the severity, of the factor would make a proposed action ineligible for categorical exclusion. For example, 40 CFR 1508.27(b)(8) requires an evaluation of "(t)he degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places." On the other hand, condition B.(4)(i) of DOE's final rule screens from categorical exclusion status proposed actions that "adversely affect environmentally sensitive resources," which include property listed on the National Register.

The final rule retains the eligibility criteria proposed for classes of actions in appendix B as conditions that are integral elements of the classes of actions in appendix B in

the final rule. DOE did not include, however, additional conditions based on the CEQ factors in 40 CFR 1508.27. DOE believes that controversial environmental effects (40 CFR 1508.27(b)(4)) and uncertain effects or effects that involve unique or unknown risks (40 CFR 1508.27(b)(5)) would not, except in extraordinary circumstances, be associated with any of the categorically excluded classes of actions included in the final rule. As explained earlier, DOE has identified these factors as possible extraordinary circumstances in §1021.410(b)(2) of the final rule. The other CEQ criteria of establishing a precedent for future actions with significant effects (40 CFR 1507.28(b)(6)) or relation to other actions with individually insignificant but cumulatively significant impacts (40 CFR 1507.28(b)(7)) are included in §1021.400(b)(3) of the final rule, discussed above.

In the final rule, DOE has added a condition that is an integral element of the classes of actions listed in Appendix B: a proposal must be one that would not disturb hazardous substances, pollutants, contaminants, or CERCLA-excluded petroleum and natural gas products that preexist in the environment such that there would be uncontrolled or unpermitted releases (B.(3)). This condition is similar to an element of several categorical exclusions in the proposed rule (proposed A1.34, A3.1, A3.5, B3.3, B6.2, and B6.7) that concerned inadvertent or uncontrolled movement of hazardous substances, pollutants, contaminants, or non-native organisms.

In response to comments that many of the proposed categorical exclusions were too broad, DOE believes that condition B.(3) in the final rule, along with other changes described herein, will appropriately narrow the scope of categorical exclusions in appendix B. Proposed disturbance with subsequent unpermitted or uncontrolled releases of hazardous substances, pollutants, contaminants, or CERCLA-excluded petroleum and natural gas products warrants analysis to determine if there is potential for significant impact. DOE is concerned that such an action, otherwise without potential for significant impact, may have the side-effect of spreading preexisting contamination in the environment.

As a consequence of adding condition B.(3) to the final rule, the corresponding restricting phrase proposed as part of several categorical exclusions is not included in those categorical exclusions in the final rule. With regard to proposed A1.34 (final B1.3) that concerns component testing (generally an indoor activity), condition B.(1) of the final rule (i.e., proposals cannot threaten applicable environment, safety, and health requirements) would provide the assurance that emissions are controlled. With regard to the condition in proposed A3.1 (site characterization/environmental monitoring) and proposed A3.5 (research related to conservation of fish and wildlife) that the proposals not result in the uncontrolled

movement of non-native organisms, DOE now believes that these actions (final B3.1 and B3.3, respectively) will not foreseeably involve non-native organisms.

In response to a suggestion by a commenter that §1021.410(b)(1)(i) should have a disjunctive effect, the word "and" in the phrase "applicable statutory, regulatory, and permit requirements" has been changed to "or" in condition B.(1) in appendix B in the final rule. DOE also added the phrase "for environment, safety, and health" to the condition in appendix B.(1) in the final rule to clarify its intent that the term "requirements" applies to safety and health as well as environment in response to a comment in this regard.

DOE has revised the proposed eligibility criterion in §1021.410(b)(1)(ii) of the proposed rule as condition B.(2) in appendix B in the final rule, and that condition includes waste storage facilities because DOE believes the siting, construction, or major expansion of waste storage facilities cannot be categorically excluded.

DOE has revised proposed §§1021.410(b)(1)(iii) and (b)(2) of the proposed rule as condition B.(4) in the final rule, and that condition refers to "environmentally sensitive resources" rather than "environmentally sensitive areas" in light of a comment that the proposed criteria reflected the sensitivity of the habitat of protected species but not the species themselves. Condition B.(4) also includes the protected species as well as its habitat as examples of environmentally sensitive resources.

In response to another comment on §1021.410(b)(2) of the proposed rule, DOE added the phrase "but not limited to" after the word "include" in condition B.(4) in appendix B in the final rule to clarify that the listing of environmentally sensitive resources is not intended to be inclusive.

H. Comments on Appendices

In the following discussion of the comments on the appendices, the headings are those used in the table of contents of the appendices in the proposed rule. The conversion table on the following page shows which proposed classes of actions have not been included in the final rule and also refers the reader to the appropriate headings in the final rule for those proposed classes of actions that are included in the final rule. There were many numbering changes between the proposed and final rule because some classes of actions were deleted, combined with other classes of actions, or reordered to group similar classes of actions. As explained above, many classes of actions in proposed appendix A of the proposed rule were moved to appendix B in the final rule so that the conditions specified in appendix

B would be integral elements of these classes of actions.

Proposed A1.1 Administrative Procurements (Final A1)

Proposed A1.2 Routine Financial Transactions (Final A1)

Proposed A1.16 Personnel Actions/Personal Service Contracts (Final A1 and A8)

Proposed A1.25 Business Support Activities (Final A1)

DOE consolidated these four separate categorical exclusions into one inclusive categorical exclusion in the final rule. DOE believes that there was overlap among the four and that combining them into one categorical exclusion avoids segmentation. (See also discussion of proposed A1. 16 below.) A1 in the final rule categorically excludes routine actions necessary to support the normal conduct of business, which are those actions that are encompassed in the four proposed categorical exclusions.

Proposed A1.3 Grant/Contracts for Categorically-Excluded and Some Interim Actions (Not Included in the Final Rule)

DOE has not included this proposed categorical exclusion in the final rule because grants and contracts are merely elements of a proposed action rather than separate actions, as indicated in §1021.410(d) of the final rule. Separating the award of grants or contracts to implement the proposed action from the proposed action for purposes of determining the level of NEPA review would constitute inappropriate segmentation.

Conversion Table

Subpart D-Typical Classes of Actions

Designation of Classes of Action in Subpart D

Proposed	Final
A1.1	A1.
A1.2	A1.
A1.3	Not included.{1}
A1.4	A2.
A1.5	Not included.{2}
A1.6	B1.1.

A1.7 ..... | Not included.{2}
A1.8 ..... | A3.
A1.9 ..... | A4.
A1.10 ..... | A5.
A1.11 ..... | A6.
A1.12 ..... | A6.
A1.13 ..... | Not included.
A1.14 ..... | A6.
A1.15 ..... | A7.
A1.16 ..... | A1, A8.
A1.17 ..... | A9.
A1.18 ..... | A9.
A1.19 ..... | A10.
A1.20 ..... | A11.
A1.21 ..... | A9.
A1.22 ..... | A12.
A1.23 ..... | B1.2.
A1.24 ..... | A13.
A1.25 ..... | A1.
|
A1.26 ..... | B1.3, B2.5.
A1.27 ..... | B1.15, B4.11.
A1.28 ..... | B1.3, B2.5.
A1.29 ..... | B1.4.
A1.30 ..... | B1.5.
A1.31 ..... | B1.6.
A1.32 ..... | B1.7.
A1.33 ..... | B1.8.
A1.34 ..... | B1.3.
A1.35 ..... | B1.3.
A1.36 ..... | B1.9.
A1.37 ..... | B1.10.
A1.38 ..... | B1.11.
A1.39 ..... | B5.1.
A1.40 ..... | B1.12.
A1.41 ..... | B1.13.
A1.42 ..... | Not included.{1}
A1.43 ..... | Not included.{1}
A1.44 ..... | Not included.{1}
A1.45 ..... | B1.14.
A1.46 ..... | Not included.{1}
A2.1 ..... | B2.1.
A2.2 ..... | B2.2.
A2.3 ..... | A12, B1.3, B2.2, B2.5.
A2.4 ..... | B2.3.
A2.5 ..... | B2.4.

A3.1 ..... | B3.1.
A3.2 ..... | B3.1.
A3.3 ..... | B3.1.
A3.4 ..... | B3.2.
A3.5 ..... | B3.3.
A3.6 ..... | B3.4.
A3.7 ..... | B3.5.
A3.8 ..... | B3.6.
A4.1 ..... | B4.1.
A4.2 ..... | A7.
A4.3 ..... | B4.2.
A4.4 ..... | B4.3.
A4.5 ..... | B4.4.
A4.6 ..... | Not included.
A4.7 ..... | B4.11.
A4.8 ..... | B4.5.
A4.9 ..... | B4.6.
A4.10 ..... | B4.7.
A5.1 ..... | B5.2.
A5.2 ..... | B5.3.
A5.3 ..... | B5.4.
A5.4 ..... | Not included.
A6.1 ..... | A14.
A6.2 ..... | A15.
A6.3 ..... | B7.1.
B1.1 ..... | B1.15.
B1.2 ..... | B1.3.
B1.3 ..... | B1.16.
B1.4 ..... | B1.17.
B1.5 ..... | B1.18.
B1.6 ..... | B1.19.
B1.7 ..... | B5.1.
B1.8 ..... | B1.20.
B1.9 ..... | Not included.{1}
B2.1 ..... | B2.5.
|
B3.1 ..... | B3.1, B3.8, B6.2.
B3.2 ..... | B3.7.
B3.3 ..... | B3.8, B6.2.
B3.4 ..... | B3.9.
B3.5 ..... | B3.10.
B3.6 ..... | B3.11.
|
B4.1 ..... | B4.8.
B4.2 ..... | B4.9.
B4.3 ..... | B4.10.

B4.4 ..... | B4.11.
B4.5 ..... | B4.12.
B4.6 ..... | B4.13.
B4.7 ..... | B1.21.
B5.1 ..... | B5.5.
B5.2 ..... | B5.6.
B5.3 ..... | B5.7.
B5.4 ..... | B5.8.
B5.5 ..... | B5.9.
B5.6 ..... | B5.10.
B5.7 ..... | B5.11.
B5.8 ..... | B5.12.
B5.9 ..... | B5.13.
B5.10 ..... | B5.14.
B5.11 ..... | B5.15.
B5.12 ..... | B5.16.
|
B6.1 ..... | B6.1.
B6.2 ..... | B6.2.
B6.3 ..... | B6.3.
B6.4 ..... | C16, B6.4, B6.5, B6.6.
B6.5 ..... | B6.6.
B6.6 ..... | B6.7.
B6.7 ..... | B1.22.
B6.8 ..... | B6.8.
B7.1 ..... | B7.2.
B7.2 ..... | Not included.
C1 ..... | C1.
C2 ..... | C8.
C3 ..... | C2.
C4 ..... | C3.
C5 ..... | C10, C11.
C6 ..... | C12.
C7 ..... | C4.
C8 ..... | C5.
C9 ..... | C6.
C10 ..... | C7.
C11 ..... | C13.
C12 ..... | C14.
C13 ..... | C15.
C14 ..... | C16.
C15 ..... | Not included.
C16 ..... | C9.
D1 ..... | D1.
D2 ..... | D2.
D3 ..... | D3.

D4 ..... | D4.
D5 ..... | D5.
D6 ..... | D6.
D7 ..... | D8.
D8 ..... | D9.
D9 ..... | D10.
D10 ..... | D11.
D11 ..... | Not included.
D12 ..... | D12.

{1}In scope of broader proposals.
{2}CEQ definition of action excludes this classification.

Proposed A1.5 Pass-throughs (Not Included in the Final Rule)

DOE has not included this proposed categorical exclusion in the final rule because congressionally mandated funding pass-throughs are "ministerial actions," which DOE does not propose and over which it has no discretion. Therefore, these are not DOE actions as discussed above under "action" in III C.

Proposed A1.7 Administrative Enforcement Actions (Not Included in the Final Rule)

DOE has not included this proposed categorical exclusion in the final rule because the CEQ definition of a "major Federal action" at 40 CFR 1508.18(a) specifically excludes administrative enforcement actions.

Proposed A1.11 Rulemaking for Technical and Pricing Proposals (Final A6)

Proposed A1.12 Rulemaking for Grants and Cooperative Agreements (Final A6)

Proposed A1.14 Procedural Rulemakings (Final A6)

DOE has consolidated these proposed categorical exclusions into one categorical exclusion in the final rule because rulemakings that are strictly procedural include those described in proposed A1.11 and A1.12.

Proposed A1.13 Rulemaking for Categorically-excluded Actions (Not Included in the Final Rule)

DOE has not included this categorical exclusion in the final rule. Specific classes of rulemakings that are categorically excluded are specified in appendix A of the final rule; other types of rulemaking will require an EA or EIS.

Proposed A1.15 Transfer of Property, Use Unchanged or Categorically Excluded (Final A7)

DOE has modified the wording of this categorical exclusion in the final rule. The phrase referring to proposed uses that are "categorically excluded in this subpart" has been deleted because DOE believes that transfers, leases, dispositions, or acquisitions of property that are part of a broader proposed action must be reviewed for NEPA purposes in the context of the broader proposed action. Separating these property transfers from the proposed new use would constitute inappropriate segmentation. DOE also deleted the phrase referring to disposition through the General Services Administration because the phrase was unnecessary.

Proposed A1.16 Personnel Actions/Personal Service Contracts (Final A1 and A8)

One commenter was concerned that technical support contracts and management and operating (M&O) contracts should not be categorically excluded because hiring certain contractors or using ineffective contracting practices and procedures might have environmental impacts that could require an EA or EIS. DOE does not believe that contracts for technical services, management and operation of DOE facilities, or personal services, or even contracting procedures in general, have potential for significant environmental effects because they are merely arrangements to perform future actions, yet to be assigned. Subsequent actions carried out under such contracts, however, may have environmental consequences and will be the subject of NEPA review. Furthermore, Federal procurement policy requires that contracts be awarded only to responsible contractors (48 CFR part 9), and based on this standard, DOE will not knowingly contract with an environmentally irresponsible party. DOE believes that discussion of the purported environmental merits of potential contractors in a NEPA document would be extremely speculative and not amenable to meaningful analysis. The commenter also mentioned that DOE's proposed "Alternate Contracting System" would benefit from NEPA analysis. DOE believes that this reference is to the alternate business strategy for environmental restoration (Notice of Intent to develop an environmental restoration alternate business strategy, 55 FR 48544, October 31, 1990). This strategy would establish environmental restoration

management contractors at certain DOE field offices, separate from the M&O contractors that otherwise manage DOE facilities. DOE believes that establishing the framework for these contracts does not have the potential for significant environmental impact. Specific restoration activities carried out under the contracts will be subject to separate NEPA review.
DOE has revised the categorical exclusion in the final rule to refer only to the award of contracts (final A8) and has rephrased it to clarify that contracts for technical support services and for management and operation of a government-owned facility are not subsets of contracts for personal services. In the final rule, personnel actions are included in the categorical exclusion for actions necessary to support the normal conduct of business (Final A1). (See also discussion of proposed A1.1, A1.2, A1.16, and A1.25, above.)

Proposed A1.17 Document Preparation (Final A9)

Proposed A1.18 Information Gathering/Analysis/Dissemination (Final A9)

Proposed A1.21 Classroom Training and Informational Programs (Final A9)

DOE has consolidated these categorical exclusions into one covering information gathering, analysis, documentation preparation, and dissemination of information. DOE believes that these proposed categorical exclusions are interrelated, and combining them into one categorical exclusion avoids segmentation. One commenter suggested that the list of documents given as examples should be expanded to include monitoring reports, permit applications, project scope, and cost estimating. DOE does not believe that additional examples are necessary to ensure that the scope of the consolidated categorical exclusion is clearly understood to be paperwork activities.

Proposed A1.19 Reports or Recommendations on non-DOE Legislation (Final A10)

One commenter suggested that the proposed categorical exclusion be expanded to include reports or recommendations on legislation or rulemaking proposed by DOE. This change was not made because DOE-proposed legislation and rulemaking that is not categorically excluded in the final rule may require preparation of an EA or an EIS.

Proposed A1.26 Routine Maintenance/Custodial Services for Building Structures and Equipment (Final B1.3 and B2.5)

Proposed A1.34 Routine Testing/Calibration of Facility Components (Final B1.3)

Proposed A1.35 Routine Decontamination, not part of Decommissioning (Final B1.3)

Proposed B1.2 Removal of Contamination, not Decommissioning Project (Final B1.3)

DOE has revised the definition and scope of proposed A1.26 to clarify that the scope includes work on infrastructures (such as roads), maintenance work of a predictive nature (i.e., continuous or periodic monitoring or diagnosis to forecast component degradation), and suspension of operations to perform maintenance and subsequent resumption of operations. In addition, DOE has included custodial services in the general description and scope paragraph in the final rule (rather than as an example of routine maintenance, as proposed).

DOE has added two examples of routine maintenance. One example (example B1.3(n) in the final rule) concerns predictive maintenance and incorporates proposed A1.34 (discussed below under that heading). The other example (example B1.3(o) in the final rule) concerns routine decontamination of the interior surfaces of buildings and removal of contaminated equipment and other material. This last example incorporates activities in proposed A1.35 and proposed B1.2, as discussed below under those headings.

One commenter objected to categorically excluding the repair and maintenance of transmission facilities (example (m) of proposed A1.26 and final B1.3) because of the potential for polychlorinated biphenyl (PCB) contamination, noting that maintenance of transformers at many DOE facilities has resulted in environmental contamination. The routine maintenance procedure referred to by the commenter (i.e., draining a small amount, about one quart, of transformer oil into the ground to flush out impurities before sampling) was common practice before regulations controlling PCBs were established in 1979 (40 CFR part 761). This practice has now been discontinued. DOE believes that maintenance activities involving PCBs carried out in compliance with applicable regulations are appropriate for a categorical exclusion. For purposes of clarity, DOE has added a stipulation to the example that the activities be conducted in accordance with 40 CFR part 761.

The commenter was concerned that cumulative maintenance activities involving PCBs would have significant impact and stated that

an EA or EIS might be a valuable means of demonstrating long-term benefits of a systematic phaseout of PCB-containing equipment. In establishing this categorical exclusion, DOE has determined, based on its experience, that the class individually and cumulatively has no potential for significant environmental effect.
In response to two commenters' requests that applicable statutory and regulatory requirements be added to the example concerning removal and replacement of tanks and piping (example (n) of proposed A1.26), DOE has included citations of applicable statutory and regulatory requirements. As one commenter also requested, DOE has added a requirement that there be no evidence of leakage based on regulatory performance requirements. On further analysis, DOE determined that removal and replacement of tanks and piping form an example of an upgrade rather than routine maintenance. Accordingly, DOE has deleted it as an example of routine maintenance and included it as an example in B2.5 in the final rule (B2.1 in the proposed rule), which addresses safety and environmental improvements and facility upgrades.

Proposed A1.27 Siting/Construction/Operation of Storage Area for Maintenance/Administrative Supplies/Equipment (Final B1.15 and B4.11)

To avoid inappropriate segmentation, DOE has not included this categorical exclusion as a separate class of actions in the final rule but incorporated this categorical exclusion into proposed B1.1 (B1.15 of the final rule) as one of several categorically excluded support facilities and into proposed B4.4 (B4.11 of the final rule). (See the discussion under proposed B1.1, below.)

Proposed A1.28 Replacement/Extension of Existing Utility Systems for Categorically-Excluded Actions (Final B1.3 and B2.5)

Commenters requested that the concepts of repair, modification, and upgrade be added to this categorical exclusion. DOE has not included this categorical exclusion in the final rule because it duplicates activities (e.g., replacement of existing utility systems) in both proposed A1.26 (B1.3 of the final rule) and B2.1 (B2.5 of the final rule). DOE also now recognizes that extension of utility systems required as a result of categorically excluded actions is part of the larger action and the exclusion would have resulted in inappropriate segmentation.

Proposed A1.31 Installation of/Improvements to Liquid Retention Tanks, Small Basins (Final B1.6)

DOE has narrowed the scope of this categorical exclusion by limiting the size of basins installed or modified to generally less than one acre. One commenter felt that the term "liquid retention" implied the exclusion of holding tanks for gas and other materials and suggested that the term be deleted. DOE intended the categorical exclusion to apply to a facility's improved handling of materials (such as sludges, wastewater, or stormwater) to control spills and runoff. DOE deleted the term "liquid" and otherwise modified the categorical exclusion to clarify this intent.

Proposed A1.32 Acquisition/Installation/Operation of Communication Systems, Data Processing Equipment (Final B1.7)

In response to a comment on this categorical exclusion, DOE has added "removal" to the stated activities.

Proposed A1.34 Routine Testing/Calibration of Facility Components (Final B1.3)

In response to a comment, DOE has added portable equipment in the list of proposed items. Because testing and calibration of equipment is predictive maintenance, DOE has incorporated this proposed categorical exclusion as an example (example (n)) in the categorical exclusion for routine maintenance (proposed A1.26 and final B1.3).

Proposed A1.35 Routine Decontamination, not Part of Decommissioning (Final B1.3)

One commenter objected to categorically excluding decontamination activities, even if they are not part of a decommissioning project. At many DOE facilities, decontamination of equipment, rooms, hot cells, and the interior of buildings is a daily or weekly activity, which includes wiping with rags, using strippable latex, and minor vacuuming. These activities are part of routine maintenance. The commenter interpreted a much broader scope to this proposed categorical exclusion than DOE intended. Therefore, DOE incorporated the categorical exclusion as an example (along with proposed B1.2) into the categorical exclusion for routine maintenance (proposed A1.26, final B1.3, example (o)). Another commenter suggested that exterior decontamination activities should be categorically excluded as well. Exterior decontamination is addressed in categorical exclusion B6.1, CERCLA removals/similar actions under RCRA or other authorities.

Proposed A1.37 On-site Storage of Activated Material at Existing Facility (Final B1.10)

One commenter suggested that this categorical exclusion be deleted because it allowed too broad a range of actions, given the risks of storing any radionuclides. DOE has revised this categorical exclusion in the final rule to emphasize that its scope is the routine storage of activated equipment and construction materials to allow radionuclides with short halflives (days or weeks) to decay sufficiently before reuse. The activation-produced radioisotopes are in the matrix of the material and are not likely to leak out.

Proposed A1.40 Detonation of High Explosives in Reserved Areas (Final B1.12)

One commenter objected to this categorical exclusion because, based on its vague wording, it could be interpreted to apply broadly to all high explosive detonations. DOE has revised the categorical exclusion to clarify that it applies only to the detonation or burning of failed or damaged explosives or propellants under an existing permit issued by state or local authorities.

Proposed A1.42 Routine Transportation of Nonhazardous Materials and Nonradioactive, Nonwaste Hazardous Materials (Not included in the final rule)

Proposed A1.43 Routine Transportation of Waste (Not Transuranic, not High Level) (Not Included in the final rule)

One commenter objected to the broad scope of proposed A1.42, based on concern about the transport of hazardous substances (including CERCLA-excluded petroleum and natural gas products), uncertainty regarding DOE's adoption of the Nuclear Regulatory Commission's Below Regulatory Concern level, and the lack of eligibility criteria to screen for potential impacts on public health and safety and for cumulative impacts. DOE believes that reviewing transportation for proposals separately from the proposals themselves would be inappropriate segmentation. DOE will consider the transportation impacts of proposed actions in EAs and EISs, as appropriate. As indicated in §1021.410(d) of the final rule, DOE views classes of actions as including all activities necessary to implement a proposal within the class of actions, such as associated transportation activities. DOE has not adopted the Nuclear Regulatory Commission's Below Regulatory Concern level. DOE has revised the proposed eligibility criterion concerning

statutory, regulatory, and permit requirements and, as explained above, included it as condition B.(1) in appendix B of the final rule to clearly indicate that public health and safety issues are covered. DOE also has added §1021.410(b)(3) to address cumulative impacts.

Proposed A1.44 Temporary Shutdown/Restart of a Facility for Inventory, Routine Maintenance (Not Included in the Final Rule)

Proposed A1.46 Shutdown of an Operating Facility (Not Included in the Final Rule)

DOE now recognizes that in proposing these two categorical exclusions, it inappropriately identified suspension and resumption of operations as separate and distinct actions. These exclusions identified activities that are part of ongoing routine operations of an existing facility and thus by themselves are not subject to NEPA. The final rule has been revised to focus on the activities to be performed while operations are suspended. (See, e.g., proposed A1.26 (final B1.3), proposed A1.45 (final B1.14), and proposed B1.9 (final B2.5). See also the discussion below for proposed A1.45 (final B1.14) and proposed B1.9 (final B2.5).) Therefore, DOE has not included proposed A1.44 and A1.46 in the final rule.

One commenter, in reference to proposed A1.44, was concerned about the vagueness of the terms related to maintenance and about the potential for DOE to carry out substantial work to correct safety or environmental concerns through repeated shutdowns. The categorical exclusion for routine maintenance (proposed A1.26, final B1.3) provides many examples that describe and limit the nature and scope of these activities.

Another commenter, in reference to proposed A1.44 and A1.46, stated that it was unreasonable for DOE to predetermine that a shutdown for up to two years would not require an EA or EIS and expressed concern, in reference to proposed A1.44, that the magnitude of problems at DOE facilities can easily be underestimated. DOE agrees that it cannot predetermine the length of time that activities appropriately categorically excluded might take, and has not included a time period in those categorical exclusions that may involve a suspension and resumption of operations. DOE must determine the appropriate level of NEPA review and complete it before taking the proposed action. If a proposed action changes as a result of initial activities, DOE will complete a new NEPA review before taking further action.

One commenter, in reference to proposed A1.46, was concerned that this categorical exclusion would exempt shutdown of facilities

intended primarily for environmental mitigation or improvement (e.g., a wastewater treatment plant or a renewable energy facility), and that such a shutdown could have potential for significant adverse impacts. DOE believes that temporary suspension of operation and subsequent resumption (e.g., for routine maintenance) would not have potential for significant impacts except in extraordinary circumstances. This commenter also requested clarification that permanent shutdown may require additional NEPA review if decontamination and decommissioning activities are proposed. DOE agrees and notes the lack of a categorical exclusion for facility decommissioning, as well as the inclusion of decommissioning in several of the classes of actions found in appendix D to Subpart D of the rule, which normally require an EIS.

Proposed A1.45 Temporary Shutdown/Restart of a Nuclear Reactor for Refueling (Fina1 B81.14)

DOE has retained this categorical exclusion, but it is revised to focus on the refueling activity, while acknowledging that operations may be suspended and resumed for such activity.

Proposed A2.3 Establishment of/Improvements to Warning Systems Monitors, Evacuation Routes (Final A12, B1.3, B2.2, and B2.5)

DOE has not included this proposed categorical exclusion in the final rule because DOE believes the actions are encompassed by proposed A2.2 (final B2.2), which addresses building instrumentation, and proposed A1.22, A1.26, and B2.1 (final A12, B1.3, and B2.5, respectively), which cover emergency evacuation road designation, repair, and improvement. DOE clarified the scope of B2.2 and A12 in the final rule.

Proposed A2.4 Promotion/Maintenance of Employee Health (Final B2.3)

One commenter requested that radiation monitoring devices and fumehoods with associated collection and exhaust systems be added to the list of examples in this categorical exclusion and that a reference be made to applicable regulations. DOE has added the additional example to the categorical exclusion in the final rule (B2.3), but has not provided the requested reference to applicable regulations because there are no regulations specifically applicable to this categorical exclusion.

Proposed A3.1 Site Characterization/Environmental Monitoring (Final B3.1)

Proposed B3.1 Siting/Construction/Operation of Small-Scale Laboratory Building or Renovation of Room for Sample Analysis for Site Characterization/Environmental Monitoring (Final B3.1, B3.8, and B6.2)

In response to a comment, DOE has modified proposed A3.1 to clarify that site characterization and environmental monitoring activities for remedial investigation and feasibility studies are within the scope of the categorical exclusion.
Another commenter stated that proposed A3.1 should be limited to existing waste site cleanups and should not apply to site characterization for the construction of new facilities. DOE has not limited the categorical exclusion in this way because it believes that the environmental impacts of activities covered by this categorical exclusion are insignificant whether performed for possible restoration or construction. Site characterization may be necessary before formulating a proposal involving new construction and for which preparation of an EA or EIS is necessary, as the data may be needed for conceptual design and to evaluate impacts of construction, operation, and, as appropriate, eventual decommissioning. DOE believes that §1021.410(b)(3), which clarifies that DOE's categorically excluded actions will not be connected to other actions with potentially significant impacts or otherwise be related to actions with cumulatively significant impacts, addresses the commenter's concern that the site characterization activities not establish a precedent for future actions with significant impacts or represent a decision in principle about a future consideration.
DOE has included the scope of activities of proposed B3.1 into proposed A3.1 (final B3.1), proposed B3.3 (final B3.8 and B6.2) and proposed B6.2 (final B6.2) to avoid inappropriate segmentation.

Proposed A3.2 Geochemical Surveys/Geological Mapping/Geophysical Investigation (Final B3.1)

DOE has not included this categorical exclusion in the final rule because DOE believes the categorical exclusion is encompassed by proposed A3.1, which is B3.1 in the final rule. In the final rule, example (a) in B3.1 was modified accordingly to clarify the scope of that categorical exclusion.

Proposed A3.3 Archeological/Cultural Resource Identification (Final B3.1)

DOE has included this proposed categorical exclusion as an example of a site characterization activity in the final rule (B3.1(j)).

Proposed A3.5 Research Related to Conservation of Fish and Wildlife Conservation (Final B3.3)

In response to a comment that categorically excluded research should not significantly reduce the study populations of non-nuisance species, DOE has narrowed this proposed categorical exclusion. In the final rule, the categorical exclusion is limited to research activities that would involve only negligible population reduction.
Another commenter asserted that this categorical exclusion was inconsistent with 40 CFR 1506.1, proposed §1021.410, and proposed appendix C2 to subpart D. In the final rule under §1021.410(b)(3), all categorically excluded actions must meet the criteria in 40 CFR 1506.1 (limitations on actions during NEPA process). Because the categorically excluded research activities in this class of actions might directly involve fish and wildlife resources that are not environmentally sensitive (section 1021.410(b)(2)(ii) in the proposed rule, condition B.(4) in Appendix B in the final rule), the categorical exclusion emphasizes minimization of animal mortality, population reduction, or habitat destruction regardless of whether these resources are protected by other statutes. The class of actions in proposed C2 (Protection of fish and wildlife habitat), which is final C8, and in proposed B1.8 (Protect/restore/improve fish and wildlife habitat), which is final B1.20, concern habitat modification, rather than research as in this categorical exclusion.

Proposed A3.8 Indoor Bench-Scale Research Projects/Conventional Operation (Final B3.6)

One commenter asserted that this proposed categorical exclusion might be used to exempt laboratory operations that are conducted with radioactive and hazardous materials as part of a larger development project. The commenter had specific concerns that categorically excluded research could lead to violations of National Pollutant Discharge Elimination System permits and larger programs with significant environmental impacts. DOE had proposed an eligibility criterion for categorical exclusions (section 1021.410(b)(1)(i) in the proposed rule) that the proposed actions would not threaten a violation of applicable permit requirements. In the final rule, DOE has revised this criterion to be condition B.(1), which is an integral element of all the

classes of actions in appendix B. DOE has also added §1021.410(b)(3) to this final rule to clarify that DOE's categorically excluded proposals will not involve segmentation. DOE believes that this type of laboratory work, even involving radioactive and hazardous materials, does not have potential for significant impact.
Another commenter suggested expanding the list of examples of conventional laboratory operations and adding the restriction that operations be in accordance with applicable requirements, permits, and DOE orders. This restriction was covered in DOE's proposed eligibility criteria at proposed §1021.410(b)(1) and is in condition B.(1) in appendix B in the final rule. DOE does not believe it is necessary to augment the list of examples but has revised the categorical exclusion to explicitly state that the activities will be conducted within existing laboratory facilities. Establishing a laboratory facility is a separate action, for which DOE will prepare an EA or EIS to address, among other issues, overall wastewater treatment and pollution prevention and the impacts from discharges related to research performed therein.

Proposed A4.1 Contracts/Marketing Plans/Policies for the Short Term (Final B4.1)

Proposed A4.5 Power Marketing Services Within Normal Operating Limits (Final B4.4).

Proposed A4.8 Temporary Adjustments to River Operations (Final B4.5)

One commenter strongly objected to these categorical exclusions because of concern for cumulative impacts as well as immediate, direct effects from changes in the timing and flow of rivers.
The commenter stated that marketing plans and contracts have the potential for significant environmental effects and pointed out the ambiguity in timeframes in proposed A4.1. The same commenter thought that the use of hydropower resources to meet peak demands may tend to displace oil- and gas-fired thermal generation.
Another commenter stated that proposed A4.1 should not apply when there is increased emissions from fossil-fueled powerplants or major changes in reservoir levels or streamflows.
After consideration of the comments, DOE has determined that the three proposed categorical exclusions do not individually or cumulatively have a significant effect on the human environment. Repeatedly and consistently, DOE has found no significant impacts associated with actions by the power marketing agencies that are within the existing constraints of a particular hydrosystem

operation, including past decisions concerning actions that would be beyond the parameters of the proposed categorical exclusions.
DOE considers a five-year limit for categorical exclusion (proposed A4.1, final B4.1) of disposition, allocation, or acquisition of excess power appropriate because it is consistent with (1) the delineation of a "major" resource in the Northwest Power Act (that is, sections 3(12) and 6(c) of the act define resources of more than 50 average megawatts acquired for more than 5 years as "major" and impose special procedures for such acquisitions) and (2) the Bonneville Power Administration's normal multiyear planning process (promulgated, in accordance with the Pacific Northwest Coordination Agreement, to effect short-term marketing actions to optimize the system economically or short-term power acquisitions to avoid power shortages).
Excess power refers to nonfirm power or surplus firm power derived from existing resources. Proposed A4.1 (final B4.1) would not apply to transactions enabling the construction of new resources. (See the discussion of proposed C10, below.)
In response to the commenter's concern regarding the subjectivity of proposed A4.5 (final B4.4) and proposed A4.8 (final B4.5), including the use of such terms as "temporary" and "minor," DOE believes that the limitations within the final categorical exclusions, while not eliminating, will minimize the need for subjective judgment.
DOE agrees that the establishment of basic hydrosystem operating parameters is appropriately addressed through means other than categorical exclusions. (See discussion below under proposed C10.) The Bonneville Power Administration, for example, is preparing the Columbia River System Operation Review EIS to consider the balance of uses on the Columbia River.
One commenter indicated that the categorical exclusion for temporary river adjustments (proposed A4.8, final B4.5) should not be applied if the changes would reduce instream flows below minimum requirements. This categorical exclusion would not apply in this situation because such changes would exceed the existing constraints of a particular hydrosystem operation and would not be regarded as a minor change to reservoir levels or streamflows.

Proposed A4.2 Leasing of Existing Transmission Facilities (Final A7)

DOE has not included this categorical exclusion in the final rule. This categorical exclusion is unnecessary because the leasing of existing transmission facilities is encompassed by proposed A1.15, which is A7 in the final rule.

Proposed A4.6 Buffer Rights-of-Way at Existing Transmission Facilities (Not included in the final rule)

DOE has not included this categorical exclusion in the final rule. DOE recognizes that there is potential for significant impact from acquisition of rights-of-way because of possible changes in land use related to establishing buffer zones; therefore, a categorical exclusion is inappropriate. If land use in the buffer zone will not change, proposed A1.15 (A7 in the final rule) may apply to the action.

Proposed A4.7 Minor Substation Modifications/Expansions (Final B4.11)

In the final rule, DOE included the scope of this proposed categorical exclusion into the scope of proposed B4.4 (final B4.11), which concerns construction and modification of substations, to avoid segmentation.

Proposed A5.4 Removal of Oil Field Waste to Permitted Disposal Facility (Not Included in the Final Rule)

One commenter strongly objected to this categorical exclusion, stating that research conducted by EPA had indicated that there are significant environmental impacts from disposal practices used for oil field wastes. DOE reconsidered its proposal of this categorical exclusion and, because of uncertainty as to the potential for significant impacts, has not included it in the final rule.

Proposed A6.2 Umbrella Agreements for Cooperation in Energy Research and Development (Final A15)

DOE has not included phrase (b) in proposed A6.2 (that referred to categorically excluded projects and activities) in the categorical exclusion in the final rule (A15). The phrase was unnecessary because specific energy research and development projects that are categorically excluded are specified in Appendix B of the final rule.

Proposed B1.1 Siting/Construction/Operation of Support Structures (Final B1.15)

Proposed A1.27 Siting/Construction/Operation of Storage Area for Maintenance/Administrative Supplies, Equipment (Final B1.15 and B4.11)

One commenter stated that the scope of proposed B1.1 was too broad; it would essentially exempt all construction and operation of service and support buildings regardless of size, soil contamination, resuspended dust from construction, environmental and energy impacts of operation, and alternative designs and locations that could minimize impacts.

In response to the comment, DOE has narrowed the scope of proposed B1.1 in the final rule (B1.15). The siting and construction of structures covered by the categorical exclusion are limited to small-scale support buildings and structures within or contiguous to an already developed area where site utilities and roads are available. DOE has added a condition in the final rule, B.(3), that is an integral element of the classes of actions in appendix B: Construction activities that would disturb hazardous substances, pollutants, contaminants, CERCLA-excluded petroleum and natural gas products that preexist in the environment such that there would be uncontrolled or unpermitted releases would not be categorically excluded. (See additional discussion under section III F, above.)

In addition, DOE incorporated proposed A1.27 into this categorical exclusion for support buildings and structures as an example (as noted above in the discussion of proposed A1.27) because small-scale storage areas for maintenance and administrative supplies are support facilities.

In the final rule, DOE has added the phrase "and similar support purposes" to the list of support functions for which buildings and structures may be constructed because DOE believes that siting, construction, and operation of any small-scale support structure will not individually or cumulatively have a significant impact on the human environment and that it is appropriate to categorically exclude these activities. DOE had not intended this categorical exclusion to be limited to only those support buildings and structures for the purposes listed in the proposed rule. DOE has also added the phrase "but excluding facilities for waste storage activities" to clarify that it does not consider these to be support activities for which construction may necessarily be categorically excluded except as provided in the final rule. (See the discussion of proposed B6.4 for categorically excluded waste storage facilities.)

Proposed B1.2 Removal of Contamination, Not Decommissioning Project (Final B1.3)

Two commenters suggested that this categorical exclusion

be deleted because they did not believe that the only test for deciding whether to prepare an EA or EIS is whether the action is part of a decommissioning project. One of the commenters was concerned that certain activities at the Rocky Flats Plant and at the Portsmouth and Paducah Uranium Enrichment Plants might inappropriately come under this exclusion.

DOE intended the proposed categorical exclusion to cover routine actions where intact equipment (e.g., labware) and other materials (such as gloves) that are radioactive or otherwise contaminated are removed from a facility for disposal. The comment implied a much broader scope to the categorical exclusion than DOE intended. Therefore, DOE combined the categorical exclusion with proposed A1.35 as an example under routine maintenance (B1.3(o) in the final rule).

DOE is conducting a program to remove plutonium from contaminated ducts at the Rocky Flats Plant. The current activities include routine decontamination techniques commonly used to maintain facility operations (e.g., wiping with rags, vacuuming, and stripping with latex). These limited activities are encompassed within the existing routine maintenance categorical exclusion under DOE's NEPA guidelines (52 FR 47662, December 15, 1987) and would be encompassed by the categorical exclusion for routine maintenance in this final rule (B1.3). Removal of plutonium from ducts at the Rocky Flats Plant that are more difficult to access or are impossible to clean using routine maintenance techniques may require dismantling and replacement. DOE is currently preparing an EA to evaluate these types of proposed activities for the Rocky Flats Plant. Similarly, if DOE were to propose large equipment replacement actions, such as the Cascade Improvement and Cascade Upgrading Programs at the Paducah and Portsmouth Uranium Enrichment Plants in the 1970s to which the commenter referred, those large programs would not be categorically excluded.

Proposed B1.5 Construction/Operation of Additional/Replacement Water Supply Wells (Final B1.18)

One commenter stated that the proposed categorical exclusion should be limited to those circumstances where DOE can demonstrate that a steady-state drawdown occurs (i.e., the withdrawal from the supply wells is compensated by the recharge from the surrounding area). Another commenter was concerned that although the construction and operation of a few additional water supply wells might not be a major Federal action, construction and operation of a substantial well field could be. In response to these comments, DOE has added to the categorical exclusion in the final rule the additional stipulation that new wells must be within an existing well field

and that there can be no resulting long-term decline of the water table. DOE has also added "siting" to the list of activities for completeness.

Proposed B1.6 Construction/Operation of Microwave/Radio Communication Towers (Final B1.19)

In response to a comment that construction of microwave or radio communications towers in areas considered to be of great visual value could have potential for significant impacts, the categorical exclusion in the final rule has been limited to areas that are not of great visual value. In the final rule, DOE did not include the restrictive phrase concerning prejudice of future site selection decisions for substations and other facilities that was in this categorical exclusion in the proposed rule because the final rule sets forth the restriction in §1021.410(b)(3) that categorical exclusions may not involve inappropriate segmentation.

Proposed B1.9 Restart of Facility After Categorically Excluded Safety/Environmental Improvements (Not Included in the Final Rule)

Several commenters strongly objected to this categorical exclusion. One commenter viewed it as an attempt to allow DOE to "jump-start" problem-plagued facilities and stated that facilities that have been closed for modifications (particularly safety modifications) should be subject to an EA or EIS before restart. Another commenter noted that DOE has already had one court require an EIS for restart of a nuclear reactor at the Savannah River Site, and believed that the magnitude of DOE's work at the Rocky Flats Plant is also a major Federal action with significant impacts. A third commenter stated that the categorical exclusion was overly broad.

A fourth commenter said that this categorical exclusion was one of the most troubling of all the proposed categorical exclusions, stating that it conflicts directly with DOE decisions to prepare EISs on such facilities as the Savannah River reactors, the N Reactor, and the PUREX plant at Hanford and with various court decisions. The commenter stated that the effects of both accidental and routine releases from nuclear reactors or chemical processing plants are both highly controversial and involve uncertain risks (factors highlighted by the CEQ regulations as bearing on significance). The commenter asserted that the limitation in the proposed categorical exclusion (that restart would only be categorically excluded after categorically excluded improvements) was meaningless because virtually any improvement to a facility could fit into one of

the other proposed categorical exclusions. This commenter noted the elaborate and complex standards and practices for the restart of reactors and chemical processing plants and that these warrant at least an EA. The commenter stated that DOE must eliminate this categorical exclusion and adopt a regulation requiring NEPA analysis of a reactor or chemical processing plant that has been shut down for safety/environmental modifications. DOE has not included this categorical exclusion in the final rule. DOE recognizes that it inappropriately focused on the resumption of operations rather than the proposed action in proposing this categorical exclusion. DOE has not established a categorical exclusion for resumption of operations after shutdown for safety or environmental improvements, because DOE believes such shutdown is part of routine, ongoing operations.

Proposed B2.1 Improvement of a Facility, Replacement/Upgrade of Facility Components (Final B2.5)

One commenter stated that this categorical exclusion was much too broad; many DOE facilities require significant improvements to even approach current design and operating parameters. Another commenter, referring to this categorical exclusion as "frightfully wide open," asserted that it could cover major initiatives aimed at rebuilding a nuclear reactor. This commenter referred to the CEQ regulations, which state that a significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial. The commenter stated that DOE must substantially narrow this categorical exclusion or eliminate it altogether. Another commenter asserted that given the age and condition of some DOE facilities, these actions have potential for significant impact. The commenter further stated that DOE cannot predetermine the degree of impacts because of the absence of current, adequate NEPA documentation.
DOE has narrowed the scope of this categorical exclusion in the final rule to emphasize that the activities cannot result in a substantial change in function of a facility and that the categorical exclusion does not apply to rebuilding or modifying substantial portions of a facility. These modifications, along with §1021.410(b)(3) in the final rule, which addresses segmentation, should ensure that improvements with significant impacts (beneficial or adverse) are not categorically excluded. The categorical exclusion was also modified to acknowledge that operations may be suspended while the action takes place and then be resumed.
In accordance with the CEQ regulations, DOE has procedures (section 1021.410(b)(2) in the final rule) for review of individual proposals to determine whether there are extraordinary circumstances that

would indicate that a categorical exclusion is not appropriate.
DOE has added an example to this categorical exclusion for an environmental improvement (removal and replacement of underground storage tanks); DOE proposed the example as part of A1.26 (example (n)) but believes it is more appropriately considered as an upgrade. (See the discussion under proposed A1.26.)

Proposed B3.1 Siting/Construction/Operation of Small-Scale Laboratory Building or Renovation of Room for Sample Analysis for Site Characterization/Environmental Monitoring (Final B3.1, B3.8, and B6.2)

Proposed B3.3 Outdoor Ecological/Environmental Research Activities (Final B3.8 and B6.2)

In the final rule, DOE has incorporated the scope of activities in proposed B3.1 (construction and renovation activities related to sample analysis) into the scope of proposed A3.1 (final B3.1) (discussed above under proposed A3.1), proposed B3.3 (final B3.8), and proposed B6.2 (final B6.2) to avoid inappropriate segmentation.
DOE has narrowed the scope of proposed B3.3 in the final rule (final B3.8) to outdoor ecological and other environmental research activities, none of which could result in any permanent change to the ecosystem. Some environmental restoration experiments concerned with waste, originally in the scope of this categorical exclusion, are now included in the scope of proposed B6.2 (final B6.2) where they are limited by size (further discussion below under proposed B6.2). The restriction concerning release or movement of hazardous and other substances proposed as part of proposed B3.3 was not included in these categorical exclusions in the final rule because the condition that proposals not disturb hazardous substances, pollutants, contaminants, or CERCLA-excluded petroleum and natural gas products such that there would be uncontrolled or unpermitted releases is now an integral element of the classes of actions in appendix B under condition B.(3). (See additional discussion under section III F, above.)

Proposed B3.5 Research and Development Activities/Small Scale Testing at Existing Facility, Preceding Demonstration (Final B3.10)

One commenter asserted that this categorical exclusion, because of the inadequacy of proposed eligibility criteria, would exempt activities that have the potential to establish a precedent for future actions with significant effects or that represent

a decision in principle about a future consideration. In response to this comment (and similar comments on other categorical exclusions), DOE has added section 1021.410(b)(3) to the final rule that clarifies that the Department will not categorically exclude a proposal if it involves segmentation.

The commenter noted that DOE has prepared EAs for research and development projects involving nonradioactive and nonhazardous materials, and was concerned that this categorical exclusion represented a step backward for DOE. DOE has modified this categorical exclusion in the final rule (B3.10) to clarify its intent (i.e., to include small-scale research and development projects and small-scale pilot projects) and has also narrowed the scope of the categorical exclusion to projects generally less than two years in duration.

The commenter misinterpreted the example for research to improve the capability or efficiency of existing accelerators as applying to accelerator upgrades, for which DOE would prepare an EA or EIS. The commenter also requested a change in the example concerning accelerator beams with insufficient energy to produce reactions. DOE believes the broad examples were misleading and has deleted them.

Proposed B4.1 New Electricity Transmission Agreements, System Operation Within Normal Operation Limits (Final B4.8)

DOE has modified this categorical exclusion in the final rule to clarify that the use of a transmission facility of one system to transfer power of and for another system is the only scope for categorically excluded new or modified transmission agreements. DOE deleted the phrase referring to normal operating limits because it was not necessary, and comments on other categorical exclusions (proposed A4.5 and A4.8) indicated its subjectivity.

Proposed B6.1 CERCLA Removals/Similar Actions Under RCRA or Other Authorities (Final B6.1)

A commenter requested that this categorical exclusion be explicitly restricted to situations involving small-scale removal operations or where there is a threat of a release. The categorical exclusion in the final rule states that DOE's categorically excluded removal actions will meet CERCLA regulatory cost and time limits (currently $2 million or 1 year from the time activities begin on site) or will satisfy one of two regulatory exemptions. Neither CERCLA nor EPA has set cost or time limits for exempted actions.

The same commenter also recommended that DOE include a period

of time (e.g., one year) within which some exposure is expected to occur to qualify for the categorical exclusion. DOE does not believe that the timing of potential exposure from a release is a measure of the significance of impacts expected from cleaning up the release. EPA's National Contingency Plan and written guidance for removal actions do not present a limitation based on the period of time within which some exposure is likely.

Two other commenters requested that DOE address in Subpart D the level of NEPA review required for final corrective or remedial actions and other typical restoration activities, such as waste packaging and repackaging, onsite waste stabilization/ treatment, and bioremediation techniques. As DOE gains experience in remediation, DOE may propose additions to the listings in subpart D.

A commenter stated that the removal of underground storage tanks (example (c) in the proposed and final rule) should not be categorically excluded, except in the case of the threat of a release, because tank removals are typically large actions and tanks are often used to store petroleum and its byproducts, which are exempted from RCRA review. DOE believes that tank removal that meets the criteria for this categorical exclusion can be appropriately excluded. DOE believes that its phrase concerning reduction of "the likelihood of spillage, leakage, or the spread of, or direct contact with, contamination" is essentially the same as removing "the threat of a release." DOE will review individual activities to determine whether they present extraordinary circumstances such that there is potential for significant impacts on the human environment. (The commenter noted that DOE had removed "tanks" from the list of excluded containers in proposed example (b) (removal of bulk containers); DOE removed "tanks" to avoid overlap and confusion with proposed example (c), not to limit the scope of the categorical exclusion. DOE has not changed this terminology in the final rule.) In the final rule, however, DOE has included citations of applicable statutory and regulatory requirements in this example in response to a comment.

DOE has moved proposed example (p) (transportation, treatment, recovery, storage, or disposal of wastes at existing facilities) to the lead statement of the categorical exclusion to emphasize that these activities (part of any removal action) must occur at existing facilities. DOE did not include transportation in the lead statement of the categorical exclusion because the Department considers it an activity necessary to and included in the categorical exclusion (as discussed under §1021.410(d)).

A commenter was confused by a phrase in this example that concerned reducing the likelihood of human, animal, or food chain exposure,

thinking that there would either be only rare opportunities for applying this categorical exclusion, or DOE would have to perform more extensive investigation of the potential exposures from its activities to qualify for the exemption. DOE did not include this confusing and unnecessary phrase in the lead statement of the categorical exclusion in the final rule.

Proposed B6.2 Siting/Construction/Operation of Temporary Pilot-Scale Waste Collection/Treatment Facilities (Final B6.2)

DOE has modified this categorical exclusion in the final rule to include other temporary pilot-scale waste management systems (i.e., stabilization and containment) that were proposed in B3.3 of the proposed rule. This categorical exclusion in the final rule has a one acre size restriction, rather than five acres, as in proposed B3.3. DOE has also modified this categorical exclusion in the final rule to include the scope of activities in proposed B3.1 (construction or renovation of facilities for sample analysis) to avoid inappropriate segmentation. (Also see the discussion under proposed B3.3.)

Proposed B6.3 Improvements to Environmental Control Systems (Final B6.3)

In response to a comment requesting clarification on whether work on outdoor systems was within the scope of the categorical exclusion, DOE has rewritten this categorical exclusion in the final rule for clarity and in so doing included a reference to systems "of" an existing building or structure rather than "within" a building or structure. Categorically excluded activities could include work on piping or duct work leading to a building or structure, but could not include new construction.

Proposed B6.4 Siting/Construction/Operation of Waste Storage Facility (not Transuranic, High Level) (Final C16, B6.4, B6.5 and B6.6)

Proposed B6.5 Modification (not expansion) of Existing Transuranic Waste Storage Facility (Final B6.6)

A commenter was concerned about the potential for long-term storage of waste under proposed B6.4. Two other commenters believed that there was no reasonable basis for DOE's distinction between waste storage facilities for transuranic (TRU) and non-TRU waste (other than high-level waste or spent nuclear fuel). One commenter noted that there are very likely certain hazardous or non-TRU

mixed wastes that pose equal or greater dangers than TRU or TRU-mixed wastes. The commenter urged DOE to eliminate this unprincipled distinction and to prepare an EA for storage facilities for all the wastes listed in proposed B6.4 as well as for TRU wastes.

In response to these comments and the general comments that appendix B categorical exclusions are too broad, DOE has included in the final rule two categorical exclusions for waste storage and staging activities that are smaller in scope and that represent subsets of the originally proposed categorical exclusion (i.e., 90-day hazardous waste storage (final B6.4) and characterizing and sorting previously packaged waste or overpacking waste (final B6.5)).

DOE believes that it is appropriate to analyze the environmental impacts from waste handling (mainly worker exposure), the deterioration of containers during extended storage (which could result in environmental releases), and the establishment of and increases in storage capacity (because of, for example, general radiation from a given volume of waste or the potential for release of hazardous fumes, including explosive fumes, especially if there are accidental releases). Therefore, DOE has categorically excluded only those activities that do not involve direct handling of waste (packaging waste or opening waste containers) or establishing or increasing storage capacity, unless the storage time is quite limited (e.g., 90 days) or the volume of waste generated is very small (e.g., less than 1,000 kilograms in a calendar month).

DOE has modified proposed B6.5 (final B6.6) to address modification of existing structures for storage of wastes proposed to be categorically excluded in proposed B6.4. DOE also has modified proposed C10 (final C7) to address new structures for storage of wastes that had been proposed to be categorically excluded in proposed B6.4.

DOE did not follow another commenter's suggestion that the definition of hazardous waste also refer to applicable state and local regulations because DOE's citation is to a definition or designation of hazardous waste, not to regulations applicable to handling the waste.

Proposed B6.7 Relocation/Demolition/Disposal of Buildings (Final B1.22)

In the final rule, DOE has moved this categorical exclusion to section B1.22 (categorical exclusions applicable to facility operation). This was in response to a request to clarify whether the scope of the categorical exclusion was limited to environmental restoration and waste management, although DOE's division of

appendix B is only for purposes of organization and is not limiting. DOE narrowed the scope of the categorical exclusion in the final rule by restricting the relocation of buildings to an already developed area where site utilities and roads are available.

Proposed B7.2 Retransfers of source, special nuclear, and byproduct materials (Not Included in the Final Rule)

DOE has not included proposed B7.2 in the final rule. As proposed the categorical exclusion did not involve transport within the United States or its territorial seas, and therefore these NEPA regulations would not apply to the retransfer actions. DOE actions having environmental effects outside the United States, its territories or possessions are subject to, as set forth in §1021.102 of the final rule, Executive Order 12114, DOE's guidelines implementing that Order, and Department of State procedures.

Appendix C to Subpart D-Classes of Actions That Normally Require EAs but Not Necessarily EISs

Appendix D to Subpart D-Classes of Actions That Normally Require EISs

A commenter suggested that an item be added relating to research on the conservation of endangered, threatened, or proposed to be listed species. Another commenter requested that DOE consider including chemical, thermal, and other types of process pilot plants in appendix C.

DOE had listed only those classes of actions that are typical classes of actions for DOE (i.e., DOE proposes the type of action frequently) and for which DOE has enough experience to be reasonably confident that an EA will normally be the required level of NEPA review. Therefore, DOE has not added typical classes of actions to appendix C for research on endangered species or for additional process pilot plants.

Substantial changes to proposed Appendix C involved three classes of actions, two of which were modified in response to comments (C10 and C14) and one of which was not included in the final rule (C15) (discussed above under proposed B6.4 and below under proposed C10 and C15). Other minor changes were made in response to comments (discussed below under proposed C8 and C9) or for clarity.

Substantial changes to proposed appendix D involved two classes of action, one of which was not included in the final rule (discussed below under proposed D11) and one of which is new (in response

to comments, as discussed below under proposed C10).
C8 Implementation of System-wide vegetation management program (Power Marketing Administrations) (Final C5).
C9 Implementation of System-wide Erosion control program (Power Marketing Administrations) (Final C6).
In response to a commenter's request, DOE clarified that the term "system-wide" in these classes of actions in the final rule refers to a program of general application regarding all the facilities of a power marketing administration.
C10 Long-term allocation of power (Final C7 and D7).
One commenter believes that long-term (five years or longer) power marketing contracts, policies, marketing plans, or allocation plans should normally be subject to review in an EIS. The commenter noted that two courts that have addressed this issue have determined that EISs were indeed necessary before implementing long-term marketing plans for major river basins. The commenter noted wide-ranging effects, from direct riverine effects (resulting from peak power generation to meet capacity commitments) to indirect effects on air quality and greenhouse gas emissions (that may result from Federal hydropower displacement of different forms of thermal power generation). This commenter added that, because Federal hydropower is generally inexpensive, its availability can reduce incentives for energy conservation. The commenter noted that Federal hydropower dams are some of the largest sources of hydropower generation in the country, contributing substantially to the overall mix of power generation in some regions, and that the long-term marketing plans for these facilities are usually developed on a comprehensive basis for many facilities in an entire river basin.
In response to this comment and comments on proposed A4.1, DOE has added conditions to the various power marketing agreements (i.e., contracts, policies, marketing plans, or allocation plans) to distinguish those that would normally require EAs but not necessarily EISs (final C7) from those that would normally require EISs, and has added a class of actions that normally requires an EIS (final D7). DOE normally will prepare an EIS for long-term (five years or longer) contracts, policies, marketing plans, or allocation plans when the DOE proposal involves adding a major new generation resource or service to a major new load or causes major changes in the operating parameters of power generation resources; otherwise, DOE normally will prepare an EA.
DOE does not consider power marketing actions with durations of five years or longer appropriate for a categorical exclusion because such actions have a duration exceeding the Bonneville Power Administration's normal multiyear planning process (promulgated

in accordance with the Pacific Northwest Coordination Agreement), and, in the case of resource acquisitions, they would be inconsistent with the delineation of a "major" resource in the Northwest Power Act (that is, sections 3(12) and 6(c) of the act define resources of more than 50 megawatts acquired for more than 5 years as "major" and impose special procedures for such acquisitions). The Northwest Power Act also contains a size limit (50 average megawatts) above which a resource acquisition would be considered "major" if acquired for more than five years. This size limit is what DOE determined should differentiate between an EA and EIS relative to resource acquisitions.

C15 Siting/construction/operation of waste disposal facility in contaminated area (not TRU or high-level waste) (Not included in the final rule).

D11 Siting/construction/expansion of waste disposal facility in uncontaminated area (not transuranic or high-level waste) (Not included in the final rule).

Four commenters did not understand how DOE distinguished between EA and EIS levels of review on the basis of the presence or absence of previous contamination. One commenter pointed out that a disposal facility located in a contaminated area may not only add to existing contamination but could actually exacerbate its spread through physical means or its toxicity through synergistic chemical reactions. This commenter noted that impacts from the actual construction of a disposal site in a contaminated area are far more likely to be significant than at an uncontaminated site. This commenter urged DOE to include all siting, construction, and operation of waste disposal sites in appendix D.

Another commenter stated that to proceed as suggested by DOE's proposed rule provides an unwarranted "credit" for prior DOE environmental degradation and does not permit a true evaluation of significant environmental impacts and alternatives of the proposed action. Another commenter believed that nonhazardous solid waste disposal should be a class of action normally requiring an EA but not necessarily an EIS.

DOE has withdrawn the proposed listings and will determine the level of NEPA review required (EA or EIS level) on a case-by-case basis. DOE recognizes that there are many action- and site-specific circumstances that raise questions about the reasonableness of general listings at this time.

IV. Revocation of Existing Guidelines and Replacement of Regulations

On the effective date of this rule, May 26, 1992, DOE revokes the existing DOE NEPA Guidelines and revises the existing regulations

at 10 CFR part 1021 by striking the current text and replacing it with this rule.

V. Environmental Review

Section D of the DOE NEPA Guidelines categorically excludes "promulgation of rules and regulations which are clarifying in nature, or which do not substantially change the effect of the regulations being amended." This rule establishes and clarifies procedures for considering the environmental effects of DOE actions within its decisionmaking process, thereby enhancing compliance with the letter and spirit of NEPA, and therefore fits within this categorical exclusion. DOE has determined that promulgation of this rule is not a major Federal action significantly affecting the quality of the human environment within the meaning of NEPA. Consequently, neither an EIS nor an EA is required for this rule. DOE will continue to examine individual actions to determine the appropriate level of NEPA review.

VI. Review Under Executive Order 12291

This rule has been reviewed in accordance with Executive Order 12291, which directs that all regulations achieve their intended goals without imposing unnecessary burdens on the economy, individuals, public or private organizations, or state and local governments. The Executive Order also requires that a regulatory impact analysis be prepared for a "major rule." The Executive Order defines "major rule" as any regulation that is likely to result in: (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, state, and local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, or innovation or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets.

This rule amends and codifies already existing policies and procedures for compliance with NEPA. The rule contains no substantive changes in the requirements imposed on applicants for a DOE license, financial assistance, permit, or other similar actions, which are the areas where one might anticipate an economic effect. Therefore, DOE has determined that the incremental effect of today's rule will not have the magnitude of effects on the economy to bring this rule within the definition of a "major rule." Pursuant to the Executive Order, this rule was submitted to the Office of Management and Budget for regulatory review.

VII. Review Under Executive Order 12612

Executive Order 12612 requires that rules be reviewed for Federalism effects on the institutional interest of states and local governments. If the effects are sufficiently substantial, preparation of a Federalism assessment is required to assist senior policymakers. The rulemaking to revoke DOE's NEPA Guidelines and revise 10 CFR part 1021 will not have any substantial direct effects on state and local governments within the meaning of the Executive Order. It will, however, allow states the opportunity to play a more significant role in DOE's NEPA process. This final rule will affect Federal NEPA compliance procedures, which are not subject to state regulation.

VIII. Regulatory Flexibility Act

The Regulatory Flexibility Act, Pub.L. 96-345 (5 U.S.C. 601-612), requires that an agency prepare an initial regulatory flexibility analysis to be published at the time the proposed rule is published. The requirement (which appears in section 603 of the act) does not apply if the agency "certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." This rule modifies existing policies and procedural requirements for DOE compliance with NEPA. It makes no substantive changes to requirements imposed on applicants for DOE licenses, permits, financial assistance, and similar actions as related to NEPA compliance. Therefore, DOE certifies that this rule will not have a "significant economic impact on a substantial number of small entities."

IX. List of Subjects in 10 CFR Part 1021

Environmental assessment, environmental impact assessment, National Environmental Policy Act.

Issued in Washington, DC, April 16, 1992.

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