

# 10 CFR PART 1021 – NATIONAL ENVIRONMENTAL POLICY ACT IMPLEMENTING PROCEDURES DEPARTMENT OF ENERGY

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## **Authority:**

[42 U.S.C. 7101](#) *et seq.*; [42 U.S.C. 4321](#) *et seq.*; [50 U.S.C. 2401](#) *et seq.*

## **Subpart A—General**

### **§ 1021.100 Purpose.**

The purpose of this part is to establish procedures that the Department of Energy (DOE) shall use to comply with section 102(2) of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4332(2)) and the Council on Environmental Quality (CEQ) regulations for implementing the procedural provisions of NEPA (40 CFR parts 1500-1508). This part supplements, and is to be used in conjunction with, the CEQ Regulations.

### **§ 1021.101 Policy.**

It is DOE's policy to follow the letter and spirit of NEPA; comply fully with the CEQ Regulations; and apply the NEPA review process early in the planning stages for DOE proposals.

### **§ 1021.102 Applicability.**

- (a) This part applies to all organizational elements of DOE except the Federal Energy Regulatory Commission.
- (b) This part applies to any DOE action affecting the quality of the environment of the United States, its territories or possessions. DOE actions having environmental effects outside the United States, its territories or possessions are subject to the provisions of Executive Order 12114, "Environmental Effects Abroad of Major Federal Actions" (3 CFR, 1979 Comp., p. 356; 44 FR 1957, January 4, 1979), DOE guidelines implementing that Executive Order (46 FR 1007, January 5, 1981), and the Department of State's "Unified Procedures Applicable to Major Federal Actions Relating to Nuclear Activities Subject to Executive Order 12114" (44 FR 65560, November 13, 1979).

### **§ 1021.103 Adoption of CEQ NEPA regulations.**

DOE adopts the regulations for implementing NEPA published by CEQ at 40 CFR parts 1500 through 1508.

### **§ 1021.104 Definitions.**

- (a) The definitions set forth in 40 CFR part 1508 are referenced and used in this part.
- (b) In addition to the terms defined in 40 CFR part 1508, the following definitions apply to this part:

***Action***

means a project, program, plan, or policy, as discussed at 40 CFR 1508.18, that is subject to DOE's control and responsibility. Not included within this definition are purely ministerial actions with regard to which DOE has no discretion. For example, ministerial actions to implement congressionally mandated funding for actions not proposed by DOE and as to which DOE has no discretion (i.e., statutorily mandated, congressionally initiated "passthroughs").

***Advance NOI***

means a formal public notice of DOE's intent to prepare an EIS, which is published in advance of an NOI in order to facilitate public involvement in the NEPA process.

***American Indian tribe***

means any Indian tribe, band, nation, pueblo, or other organized group or community, including any Alaska native entity, which is recognized as eligible for the special programs or services provided by the United States because of their status as Indians.

***Categorical exclusion***

means a category of actions, as defined at 40 CFR 1508.4 and listed in appendix A or B to subpart D of this part, for which neither an EA nor an EIS is normally required.

***CEQ***

means the Council on Environmental Quality as defined at 40 CFR 1508.6.

***CEQ Regulations***

means the regulations issued by CEQ (40 CFR parts 1500-1508) to implement the procedural provisions of NEPA.

***CERCLA-excluded petroleum and natural gas products***

means petroleum, including crude oil or any fraction thereof, that is not otherwise specifically listed or designated as a hazardous substance under section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C. 9601.101(14)) and natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel or of pipeline quality (or mixtures of natural gas and such synthetic gas).

***Contaminant***

means a substance identified within the definition of contaminant in section 101(33) of CERCLA (42 U.S.C. 9601.101(33)).

***Day***

means a calendar day.

***DOE***

means the U.S. Department of Energy.

***DOE proposal (or proposal)***

means a proposal, as discussed at 40 CFR 1508.23 (whether initiated by DOE, another Federal agency, or an applicant), for an action, if the proposal requires a DOE decision.

***EA***

means an environmental assessment as defined at 40 CFR 1508.9.

***EIS***

means an environmental impact statement as defined at 40 CFR 1508.11, or, unless this part specifically provides otherwise, a Supplemental EIS.

***EPA***

means the U.S. Environmental Protection Agency.

***FONSI***

means a Finding of No Significant Impact as defined at 40 CFR 1508.13.

***Hazardous substance***

means a substance identified within the definition of hazardous substances in section 101(14) of CERCLA (42 U.S.C. 9601.101(14)). Radionuclides are hazardous substances through their listing under section 112 of the Clean Air Act (42 U.S.C. 7412) (40 CFR part 61, subpart H).

***Host state***

means a state within whose boundaries DOE proposes an action at an existing facility or construction or operation of a new facility.

***Host tribe***

means an American Indian tribe within whose tribal lands DOE proposes an action at an existing facility or construction or operation of a new facility. For purposes of this definition, tribal lands means the area of "Indian country," as defined in 18 U.S.C. 1151, that is under the tribe's jurisdiction. That section defines Indian country as:

- (i) All land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation;

- (ii) All dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and
- (iii) All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

***Interim action***

means an action concerning a proposal that is the subject of an ongoing EIS and that DOE proposes to take before the ROD is issued, and that is permissible under 40 CFR 1506.1: Limitations on actions during the NEPA process.

***Mitigation Action Plan***

means a document that describes the plan for implementing commitments made in a DOE EIS and its associated ROD, or, when appropriate, an EA or FONSI, to mitigate adverse environmental impacts associated with an action.

***NEPA***

means the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq. ).

***NEPA document***

means a DOE NOI, EIS, ROD, EA, FONSI, or any other document prepared pursuant to a requirement of NEPA or the CEQ Regulations.

***NEPA review***

means the process used to comply with section 102(2) of NEPA.

***NOI***

means a Notice of Intent to prepare an EIS as defined at 40 CFR 1508.22.

***Notice of Availability***

means a formal notice, published in the Federal Register, that announces the issuance and public availability of a draft or final EIS. The EPA Notice of Availability is the official public notification of an EIS; a DOE Notice of Availability is an optional notice used to provide information to the public.

***Pollutant***

means a substance identified within the definition of pollutant in section 101(33) of CERCLA (42 U.S.C. 9601.101(33)).

***Program***

means a sequence of connected or related DOE actions or projects as discussed at 40 CFR 1508.18(b)(3) and 1508.25(a).

***Programmatic NEPA document***

means a broad-scope EIS or EA that identifies and assesses the environmental impacts of a DOE program; it may also refer to an associated NEPA document, such as an NOI, ROD, or FONSI.

***Project***

means a specific DOE undertaking including actions approved by permit or other regulatory decision as well as Federal and federally assisted activities, which may include design, construction, and operation of an individual facility; research, development, demonstration, and testing for a process or product; funding for a facility, process, or product; or similar activities, as discussed at 40 CFR 1508.18(b)(4).

***ROD***

means a Record of Decision as described at 40 CFR 1505.2.

***Scoping***

means the process described at 40 CFR 1501.7; “public scoping process” refers to that portion of the scoping process where the public is invited to participate, as described at 40 CFR 1501.7 (a)(1) and (b)(4).

***Site-wide NEPA document***

means a broad-scope EIS or EA that is programmatic in nature and identifies and assesses the individual and cumulative impacts of ongoing and reasonably foreseeable future actions at a DOE site; it may also refer to an associated NEPA document, such as an NOI, ROD, or FONSI.

***Supplement Analysis***

means a DOE document used to determine whether a supplemental EIS should be prepared pursuant to 40 CFR 1502.9(c), or to support a decision to prepare a new EIS.

***Supplemental EIS***

means an EIS prepared to supplement a prior EIS as provided at 40 CFR 1502.9(c).

***The Secretary***

means the Secretary of Energy.

[57 FR 15144, Apr. 24, 1992, as amended at 61 FR 36239, July 9, 1996]

## **§ 1021.105 Oversight of Agency NEPA activities.**

The General Counsel, or his/her designee, is responsible for overall review of DOE NEPA compliance. Further information on DOE's NEPA process and the status of individual NEPA reviews may be obtained upon request from the Office of NEPA Policy and Compliance, GC-20, Office of the General Counsel, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585-0103.

[71 FR 68736, Nov. 28, 2006]

## **Subpart B—DOE Decisionmaking**

### **§ 1021.200 DOE planning.**

- (a) DOE shall provide for adequate and timely NEPA review of DOE proposals, including those for programs, policies, projects, regulations, orders, or legislation, in accordance with 40 CFR 1501.2 and this section. In its planning for each proposal, DOE shall include adequate time and funding for proper NEPA review and for preparation of anticipated NEPA documents.
- (b) DOE shall begin its NEPA review as soon as possible after the time that DOE proposes an action or is presented with a proposal.
- (c) DOE shall determine the level of NEPA review required for a proposal in accordance with § 1021.300 and subpart D of this part.
- (d) During the development and consideration of a DOE proposal, DOE shall review any relevant planning and decisionmaking documents, whether prepared by DOE or another agency, to determine if the proposal or any of its alternatives are considered in a prior NEPA document. If so, DOE shall consider adopting the existing document, or any pertinent part thereof, in accordance with 40 CFR 1506.3.

### **§ 1021.210 DOE decisionmaking.**

- (a) For each DOE proposal, DOE shall coordinate its NEPA review with its decisionmaking. Sections 1021.211 through 1021.214 of this part specify how DOE will coordinate its NEPA review with decision points for certain types of proposals (40 CFR 1505.1(b)).
- (b) DOE shall complete its NEPA review for each DOE proposal before making a decision on the proposal (e.g., normally in advance of, and for use in reaching, a decision to proceed with detailed design), except as provided in 40 CFR 1506.1 and §§ 1021.211 and 1021.216 of this part.
- (c) During the decisionmaking process for each DOE proposal, DOE shall consider the relevant NEPA documents, public and agency comments (if any) on those documents, and DOE responses to those comments, as part of its consideration of the proposal (40 CFR 1505.1(d)) and shall include such documents, comments, and responses as part of the administrative record (40 CFR 1505.1(c)).
- (d) If an EIS or EA is prepared for a DOE proposal, DOE shall consider the alternatives analyzed in that EIS or EA before rendering a decision on that proposal; the decision on the proposal shall be within the range of alternatives analyzed in the EA or EIS (40 CFR 1505.1(e)).

- (e) When DOE uses a broad decision (such as one on a policy or program) as a basis for a subsequent narrower decision (such as one on a project or other site-specific proposal), DOE may use tiering (40 CFR 1502.20) and incorporation of material by reference (40 CFR 1502.21) in the NEPA review for the subsequent narrower proposal.

#### **§ 1021.211 Interim actions: Limitations on actions during the NEPA process.**

While DOE is preparing an EIS that is required under § 1021.300(a) of this part, DOE shall take no action concerning the proposal that is the subject of the EIS before issuing an ROD, except as provided at 40 CFR 1506.1. Actions that are covered by, or are a part of, a DOE proposal for which an EIS is being prepared shall not be categorically excluded under subpart D of these regulations unless they qualify as interim actions under 40 CFR 1506.1.

#### **§ 1021.212 Research, development, demonstration, and testing.**

- (a) This section applies to the adoption and application of programs that involve research, development, demonstration, and testing for new technologies (40 CFR 1502.4(c)(3)). Adoption of such programs might also lead to commercialization or other broad-scale implementation by DOE or another entity.
- (b) For any proposed program described in paragraph (a) of this section, DOE shall begin its NEPA review (if otherwise required by this part) as soon as environmental effects can be meaningfully evaluated, and before DOE has reached the level of investment or commitment likely to determine subsequent development or restrict later alternatives, as discussed at 40 CFR 1502.4(c)(3).
- (c) For subsequent phases of development and application, DOE shall prepare one or more additional NEPA documents (if otherwise required by this part).

#### **§ 1021.213 Rulemaking.**

- (a) This section applies to regulations promulgated by DOE.
- (b) DOE shall begin its NEPA review of a proposed rule (if otherwise required by this part) while drafting the proposed regulation, and as soon as environmental effects can be meaningfully evaluated.
- (c) DOE shall include any relevant NEPA documents, public and agency comments (if any) on those documents, and DOE responses to those comments, as part of the administrative record (40 CFR 1505.1(c)).
- (d) If an EIS is required, DOE will normally publish the draft EIS at the time it publishes the proposed rule (40 CFR 1502.5(d)). DOE will normally combine any public hearings required for a proposed rule with the public hearings required on the draft EIS under § 1021.313 of this part. The draft EIS need not accompany notices of inquiry or advance notices of proposed rulemaking that DOE may use to gather information during early stages of regulation development. When engaged in rulemaking for the purpose of protecting the public health and safety, DOE may issue the final rule simultaneously with publication of the EPA Notice of Availability of the final EIS in accordance with 40 CFR 1506.10(b).

- (e) If an EA is required, DOE will normally complete the EA and issue any related FONSI prior to or simultaneously with issuance of the proposed rule; however, if the EA leads to preparation of an EIS, the provisions of paragraph (d) of this section shall apply.

#### **§ 1021.214 Adjudicatory proceedings.**

- (a) This section applies to DOE proposed actions that involve DOE adjudicatory proceedings, excluding judicial or administrative civil or criminal enforcement actions.
- (b) DOE shall complete its NEPA review (if otherwise required by this part) before rendering any final adjudicatory decision. If an EIS is required, the final EIS will normally be completed at the time of or before final staff recommendation, in accordance with 40 CFR 1502.5(c).
- (c) DOE shall include any relevant NEPA documents, public and agency comments (if any) on those documents, and DOE responses to those comments, as part of the administrative record (40 CFR 1505.1(c)).

#### **§ 1021.215 Applicant process.**

- (a) This section applies to actions that involve application to DOE for a permit, license, exemption or allocation, or other similar actions, unless the action is categorically excluded from preparation of an EA or EIS under subpart D of this part.
- (b) The applicant shall:
  - (1) Consult with DOE as early as possible in the planning process to obtain guidance with respect to the appropriate level and scope of any studies or environmental information that DOE may require to be submitted as part of, or in support of, the application;
  - (2) Conduct studies that DOE deems necessary and appropriate to determine the environmental impacts of the proposed action;
  - (3) Consult with appropriate Federal, state, regional and local agencies, American Indian tribes and other potentially interested parties during the preliminary planning stages of the proposed action to identify environmental factors and permitting requirements;
  - (4) Notify DOE as early as possible of other Federal, state, regional, local or American Indian tribal actions required for project completion to allow DOE to coordinate the Federal environmental review, and fulfill the requirements of 40 CFR 1506.2 regarding elimination of duplication with state and local procedures, as appropriate;
  - (5) Notify DOE of private entities and organizations interested in the proposed undertaking, in order that DOE can consult, as appropriate, with these parties in accordance with 40 CFR 1501.2(d)(2); and
  - (6) Notify DOE if, before DOE completes the environmental review, the applicant plans to take an action that is within DOE's jurisdiction that may have an adverse environmental impact or limit the choice of alternatives. If DOE determines that the action would have an adverse environmental impact or would limit the choice of reasonable alternatives under 40 CFR 1506.1(a), DOE will promptly notify the applicant that DOE will take appropriate action to ensure that the objectives and procedures of NEPA are achieved in accordance with 40 CFR 1506.1(b).



- (c) For major categories of DOE actions involving a large number of applicants, DOE may prepare and make available generic guidance describing the recommended level and scope of environmental information that applicants should provide.
- (d) DOE shall begin its NEPA review (if otherwise required by this part) as soon as possible after receiving an application described in paragraph (a) of this section, and shall independently evaluate and verify the accuracy of information received from an applicant in accordance with 40 CFR 1506.5(a). At DOE's option, an applicant may prepare an EA in accordance with 40 CFR 1506.5(b). If an EIS is prepared, the EIS shall be prepared by DOE or by a contractor that is selected by DOE and that may be funded by the applicant, in accordance with 40 CFR 1506.5(c). The contractor shall provide a disclosure statement in accordance with 40 CFR 1506.5(c). DOE shall complete any NEPA documents (or evaluation of any EA prepared by the applicant) before rendering a final decision on the application and shall consider the NEPA document in reaching its decision, as provided in § 1021.210 of this part.

[57 FR 15144, Apr. 24, 1992, as amended at 76 FR 63787, Oct. 13, 2011]

**§ 1021.216 Procurement, financial assistance, and joint ventures.**

- (a) This section applies to DOE competitive and limited-source procurements, to awards of financial assistance by a competitive process, and to joint ventures entered into as a result of competitive solicitations, unless the action is categorically excluded from preparation of an EA or EIS under subpart D of this part. Paragraphs (b), (c), and (i) of this section apply as well to DOE sole-source procurements of sites, systems, or processes, to noncompetitive awards of financial assistance, and to sole-source joint ventures, unless the action is categorically excluded from preparation of an EA or EIS under subpart D of this part.
- (b) When relevant in DOE's judgment, DOE shall require that offeror's submit environmental data and analyses as a discrete part of the offeror's proposal. DOE shall specify in its solicitation document the type of information and level of detail for environmental data and analyses so required. The data will be limited to those reasonably available to offerors.
- (c) DOE shall independently evaluate and verify the accuracy of environmental data and analyses submitted by offerors.
- (d) For offers in the competitive range, DOE shall prepare and consider an environmental critique before the selection.
- (e) The environmental critique will be subject to the confidentiality requirements of the procurement process.
- (f) The environmental critique will evaluate the environmental data and analyses submitted by offerors; it may also evaluate supplemental information developed by DOE as necessary for a reasoned decision.
- (g) The environmental critique will focus on environmental issues that are pertinent to a decision on proposals and will include:
  - (1) A brief discussion of the purpose of the procurement and each offer, including any site, system, or process variations among the offers having environmental implications;

- (2) A discussion of the salient characteristics of each offeror's proposed site, system, or process as well as alternative sites, systems, or processes;
  - (3) A brief comparative evaluation of the potential environmental impacts of the offers, which will address direct and indirect effects, short-term and long-term effects, proposed mitigation measures, adverse effects that cannot be avoided, areas where important environmental information is incomplete and unavailable, unresolved environmental issues and practicable mitigating measures not included in the offeror's proposal; and
  - (4) To the extent known for each offer, a list of Federal, Tribal, state, and local government permits, licenses, and approvals that must be obtained.
- (h) DOE shall prepare a publicly available environmental synopsis, based on the environmental critique, to document the consideration given to environmental factors and to record that the relevant environmental consequences of reasonable alternatives have been evaluated in the selection process. The synopsis will not contain business, confidential, trade secret or other information that DOE otherwise would not disclose pursuant to 18 U.S.C. 1905, the confidentiality requirements of the competitive procurement process, 5 U.S.C. 552(b) and 41 U.S.C. 423. To assure compliance with this requirement, the synopsis will not contain data or other information that may in any way reveal the identity of offerors. After a selection has been made, the environmental synopsis shall be filed with EPA, shall be made publicly available, and shall be incorporated in any NEPA document prepared under paragraph (i) of this section.
- (i) If an EA or EIS is required, DOE shall prepare, consider and publish the EA or EIS in conformance with the CEQ Regulations and other provisions of this part before taking any action pursuant to the contract or award of financial assistance (except as provided at 40 CFR 1506.1 and § 1021.211 of this part). If the NEPA process is not completed before the award of the contract, financial assistance, or joint venture, then the contract, financial assistance, or joint venture shall be contingent on completion of the NEPA process (except as provided at 40 CFR 1506.1 and § 1021.211 of this part). DOE shall phase subsequent contract work to allow the NEPA review process to be completed in advance of a go/no-go decision.

## **Subpart C—Implementing Procedures**

### **§ 1021.300 General requirements.**

- (a) DOE shall determine, under the procedures in the CEQ Regulations and this part, whether any DOE proposal:
  - (1) Requires preparation of an EIS;
  - (2) Requires preparation of an EA; or
  - (3) Is categorically excluded from preparation of either an EIS or an EA.

DOE shall prepare any pertinent documents as required by NEPA, the CEQ Regulations, or this part.

- (b) Notwithstanding any other provision of these regulations, DOE may prepare a NEPA document for any DOE action at any time in order to further the purposes of NEPA. This may

be done to analyze the consequences of ongoing activities, support DOE planning, assess the need for mitigation, fully disclose the potential environmental consequences of DOE actions, or for any other reason. Documents prepared under this paragraph shall be prepared in the same manner as DOE documents prepared under paragraph (a) of this section.

**§ 1021.301 Agency review and public participation.**

- (a) DOE shall make its NEPA documents available to other Federal agencies, states, local governments, American Indian tribes, interested groups, and the general public, in accordance with 40 CFR 1506.6, except as provided in § 1021.340 of this part.
- (b) Wherever feasible, DOE NEPA documents shall explain technical, scientific, or military terms or measurements using terms familiar to the general public, in accordance with 40 CFR 1502.8.
- (c) DOE shall notify the host state and host tribe of a DOE determination to prepare an EA or EIS for a DOE proposal, and may notify any other state or American Indian tribe that, in DOE's judgment, may be affected by the proposal.
- (d) DOE shall provide the host state and host tribe with an opportunity to review and comment on any DOE EA prior to DOE's approval of the EA. DOE may also provide any other state or American Indian tribe with the same opportunity if, in DOE's judgment, the state or tribe may be affected by the proposed action. At DOE's discretion, this review period shall be from 14 to 30 days. DOE shall consider all comments received from a state or tribe during the review period before approving or modifying the EA, as appropriate. If all states and tribes afforded this opportunity for preapproval review waive such opportunity, or provide a response before the end of the comment period, DOE may proceed to approve or take other appropriate action on the EA before the end of the review period.
- (e) Paragraphs (c) and (d) of this section shall not apply to power marketing actions, such as rate-setting, in which a state or American Indian tribe is a customer, or to any other circumstances where DOE determines that such advance information could create a conflict of interest.

**§ 1021.310 Environmental impact statements.**

DOE shall prepare and circulate EISs and related RODs in accordance with the requirements of the CEQ Regulations, as supplemented by this subpart. DOE shall include in draft and final EISs a disclosure statement executed by any contractor (or subcontractor) under contract with DOE to prepare the EIS document, in accordance with 40 CFR 1506.5(c).

[61 FR 36239, July 9, 1996]

**§ 1021.311 Notice of intent and scoping.**

- (a) DOE shall publish an NOI in the Federal Register in accordance with 40 CFR 1501.7 and containing the elements specified in 40 CFR 1508.22 as soon as practicable after a decision is made to prepare an EIS. However, if there will be a lengthy period of time between its decision to prepare an EIS and the time of actual preparation, DOE may defer publication of the NOI until a reasonable time before preparing the EIS, provided that DOE allows a reasonable opportunity for interested parties to participate in the EIS process. Through the NOI, DOE shall invite comments and suggestions on the scope of the EIS. DOE shall disseminate the NOI in accordance with 40 CFR 1506.6.

- (b) If there will be a lengthy delay between the time DOE has decided to prepare an EIS and the beginning of the public scoping process, DOE may publish an Advance NOI in the Federal Register to provide an early opportunity to inform interested parties of the pending EIS or to solicit early public comments. This Advance NOI does not serve as a substitute for the NOI provided for in paragraph (a) of this section.
- (c) Publication of the NOI in the Federal Register shall begin the public scoping process. The public scoping process for a DOE EIS shall allow a minimum of 30 days for the receipt of public comments.
- (d) DOE shall hold at least one public scoping meeting as part of the public scoping process for a DOE EIS. DOE shall announce the location, date, and time of public scoping meetings in the NOI or by other appropriate means, such as additional notices in the Federal Register, news releases to the local media, or letters to affected parties. Public scoping meetings shall not be held until at least 15 days after public notification. Should DOE change the location, date, or time of a public scoping meeting, or schedule additional public scoping meetings, DOE shall publicize these changes in the Federal Register or in other ways as appropriate.
- (e) In determining the scope of the EIS, DOE shall consider all comments received during the announced comment period held as part of the public scoping process. DOE may also consider comments received after the close of the announced comment period.
- (f) A public scoping process is optional for DOE supplemental EISs (40 CFR 1502.9(c)(4)). If DOE initiates a public scoping process for a supplemental EIS, the provisions of paragraphs (a) through (e) of this section shall apply.

[57 FR 15144, Apr. 24, 1992, as amended at 61 FR 36239, July 9, 1996; 76 FR 63787, Oct. 13, 2011]

**§ 1021.312 [Reserved]**

**§ 1021.313 Public review of environmental impact statements.**

- (a) The public review and comment period on a DOE draft EIS shall be no less than 45 days (40 CFR 1506.10(c)). The public comment period begins when EPA publishes a Notice of Availability of the document in the Federal Register .
- (b) DOE shall hold at least one public hearing on DOE draft EISs. Such public hearings shall be announced at least 15 days in advance. The announcement shall identify the subject of the draft EIS and include the location, date, and time of the public hearings.
- (c) DOE shall prepare a final EIS following the public comment period and hearings on the draft EIS. The final EIS shall respond to oral and written comments received during public review of the draft EIS, as provided at 40 CFR 1503.4. In addition to the requirements at 40 CFR 1502.9(b), a DOE final EIS may include any Statement of Findings required by 10 CFR part 1022, "Compliance with Floodplain and Wetland Environmental Review Requirements," or a Statement of Findings may be issued separately.
- (d) DOE shall use appropriate means to publicize the availability of draft and final EISs and the time and place for public hearings on a draft EIS. The methods chosen should focus on reaching persons who may be interested in or affected by the proposal and may include the methods listed in 40 CFR 1506.6(b)(3).

**§ 1021.314 Supplemental environmental impact statements.**

- (a) DOE shall prepare a supplemental EIS if there are substantial changes to the proposal or significant new circumstances or information relevant to environmental concerns, as discussed in 40 CFR 1502.9(c)(1).
- (b) DOE may supplement a draft EIS or final EIS at any time, to further the purposes of NEPA, in accordance with 40 CFR 1502.9(c)(2).
- (c) When it is unclear whether or not an EIS supplement is required, DOE shall prepare a Supplement Analysis.
  - (1) The Supplement Analysis shall discuss the circumstances that are pertinent to deciding whether to prepare a supplemental EIS, pursuant to 40 CFR 1502.9(c).
  - (2) The Supplement Analysis shall contain sufficient information for DOE to determine whether:
    - (i) An existing EIS should be supplemented;
    - (ii) A new EIS should be prepared; or
    - (iii) No further NEPA documentation is required.
  - (3) DOE shall make the determination and the related Supplement Analysis available to the public for information. Copies of the determination and Supplement Analysis shall be provided upon written request. DOE shall make copies available for inspection in the appropriate DOE public reading room(s) or other appropriate location(s) for a reasonable time.
- (d) DOE shall prepare, circulate, and file a supplement to a draft or final EIS in the same manner as any other draft and final EISs, except that scoping is optional for a supplement. If DOE decides to take action on a proposal covered by a supplemental EIS, DOE shall prepare a ROD in accordance with the provisions of § 1021.315 of this part.
- (e) When applicable, DOE will incorporate an EIS supplement, or the determination and supporting Supplement Analysis made under paragraph (c) of this section, into any related formal administrative record on the action that is the subject of the EIS supplement or determination (40 CFR 1502.9(c)(3)).

**§ 1021.315 Records of decision.**

- (a) No decision may be made on a proposal covered by an EIS during a 30-day “waiting period” following completion of the final EIS, except as provided at 40 CFR 1506.1 and 1506.10(b) and § 1021.211 of this part. The 30-day period starts when the EPA Notice of Availability for the final EIS is published in the Federal Register .
- (b) If DOE decides to take action on a proposal covered by an EIS, a ROD shall be prepared as provided at 40 CFR 1505.2 (except as provided at 40 CFR 1506.1 and § 1021.211 of this part).

- (c) DOE RODs shall be published in the Federal Register and made available to the public as specified in 40 CFR 1506.6, except as provided in 40 CFR 1507.3(c) and § 1021.340 of this part.
- (d) No action shall be taken until the decision has been made public. DOE may implement the decision before the ROD is published in the Federal Register if the ROD has been signed and the decision and the availability of the ROD have been made public by other means (e.g., press release, announcement in local media).
- (e) DOE may revise a ROD at any time, so long as the revised decision is adequately supported by an existing EIS. A revised ROD is subject to the provisions of paragraphs (b), (c), and (d) of this section.

[57 FR 15144, Apr. 24, 1992, as amended at 61 FR 36239, July 9 1996]

#### **§ 1021.320 Environmental assessments.**

DOE shall prepare and circulate EAs and related FONSI in accordance with the requirements of the CEQ Regulations, as supplemented by this subpart.

#### **§ 1021.321 Requirements for environmental assessments.**

- (a) *When to prepare an EA.* As required by 40 CFR 1501.4(b), DOE shall prepare an EA for a proposed DOE action that is described in the classes of actions listed in appendix C to subpart D of this part, and for a proposed DOE action that is not described in any of the classes of actions listed in appendices A, B, or D to subpart D, except that an EA is not required if DOE has decided to prepare an EIS. DOE may prepare an EA on any action at any time in order to assist agency planning and decisionmaking.
- (b) *Purposes.* A DOE EA shall serve the purposes identified in 40 CFR 1508.9(a), which include providing sufficient evidence and analysis for determining whether to prepare an EIS or to issue a FONSI. If appropriate, a DOE EA shall also include any floodplain/wetlands assessment prepared under 10 CFR part 1022 and may include analyses needed for other environmental determinations.
- (c) *Content.* A DOE EA shall comply with the requirements found at 40 CFR 1508.9. In addition to any other alternatives, DOE shall assess the no action alternative in an EA, even when the proposed action is specifically required by legislation or a court order.

#### **§ 1021.322 Findings of no significant impact.**

- (a) DOE shall prepare a FONSI only if the related EA supports the finding that the proposed action will not have a significant effect on the human environment. If a required DOE EA does not support a FONSI, DOE shall prepare an EIS and issue a ROD before taking action on the proposal addressed by the EA, except as permitted under 40 CFR 1506.1 and § 1021.211 of this part.
- (b) In addition to the requirements found at 40 CFR 1508.13, a DOE FONSI shall include the following:

- (1) Any commitments to mitigations that are essential to render the impacts of the proposed action not significant, beyond those mitigations that are integral elements of the proposed action, and a reference to the Mitigation Action Plan prepared under § 1021.331 of this part;
  - (2) Any "Statement of Findings" required by 10 CFR part 1022, "Compliance with Floodplain/Wetlands Environmental Review Requirements";
  - (3) The date of issuance; and
  - (4) The signature of the DOE approving official.
- (c) DOE shall make FONSIIs available to the public as provided at 40 CFR 1501.4(e)(1) and 1506.6; DOE shall make copies available for inspection in the appropriate DOE public reading room(s) or other appropriate location(s) for a reasonable time.
- (d) DOE shall issue a proposed FONSI for public review and comment before making a final determination on the FONSI if required by 40 CFR 1501.4(e)(2); DOE may issue a proposed FONSI for public review and comment in other situations as well.
- (e) Upon issuance of the FONSI, DOE may proceed with the proposed action subject to any mitigation commitments expressed in the FONSI that are essential to render the impacts of the proposed action not significant.
- (f) DOE may revise a FONSI at any time, so long as the revision is supported by an existing EA. A revised FONSI is subject to all provisions of this section.

[57 FR 15144, Apr. 24, 1992, as amended at 61 FR 36239, July 9, 1996; 76 FR 63787, Oct. 13, 2011]

**§ 1021.330 Programmatic (including site-wide) NEPA documents.**

- (a) When required to support a DOE programmatic decision (40 CFR 1508.18(b)(3)), DOE shall prepare a programmatic EIS or EA (40 CFR 1502.4). DOE may also prepare a programmatic EIS or EA at any time to further the purposes of NEPA.
- (b) A DOE programmatic NEPA document shall be prepared, issued, and circulated in accordance with the requirements for any other NEPA document, as established by the CEQ Regulations and this part.
- (c) As a matter of policy when not otherwise required, DOE shall prepare site-wide EISs for certain large, multiple-facility DOE sites; DOE may prepare EISs or EAs for other sites to assess the impacts of all or selected functions at those sites.
- (d) DOE shall evaluate site wide NEPA documents prepared under § 1021.330(c) at least every five years. DOE shall evaluate site-wide EISs by means of a Supplement Analysis, as provided in § 1021.314. Based on the Supplement Analysis, DOE shall determine whether the existing EIS remains adequate or whether to prepare a new site-wide EIS or supplement the existing EIS, as appropriate. The determination and supporting analysis shall be made available in the appropriate DOE public reading room(s) or in other appropriate location(s) for a reasonable time.

- (e) DOE shall evaluate site-wide EAs by means of an analysis similar to the Supplement Analysis to determine whether the existing site-wide EA remains adequate, whether to prepare a new site-wide EA, revise the FONSI, or prepare a site wide EIS, as appropriate. The determination and supporting analysis shall be made available in the appropriate DOE public reading room(s) or in other appropriate location(s) for a reasonable time.

#### **§ 1021.331 Mitigation action plans.**

- (a) Following completion of each EIS and its associated ROD, DOE shall prepare a Mitigation Action Plan that addresses mitigation commitments expressed in the ROD. The Mitigation Action Plan shall explain how the corresponding mitigation measures, designed to mitigate adverse environmental impacts associated with the course of action directed by the ROD, will be planned and implemented. The Mitigation Action Plan shall be prepared before DOE takes any action directed by the ROD that is the subject of a mitigation commitment.
- (b) In certain circumstances, as specified in § 1021.322(b)(1), DOE shall also prepare a Mitigation Action Plan for commitments to mitigations that are essential to render the impacts of the proposed action not significant. The Mitigation Action Plan shall address all commitments to such necessary mitigations and explain how mitigation will be planned and implemented. The Mitigation Action Plan shall be prepared before the FONSI is issued and shall be referenced therein.
- (c) Each Mitigation Action Plan shall be as complete as possible, commensurate with the information available regarding the course of action either directed by the ROD or the action to be covered by the FONSI, as appropriate. DOE may revise the Plan as more specific and detailed information becomes available.
- (d) DOE shall make copies of the Mitigation Action Plans available for inspection in the appropriate DOE public reading room(s) or other appropriate location(s) for a reasonable time. Copies of the Mitigation Action Plans shall also be available upon written request.

[57 FR 15144, Apr. 24, 1992, as amended at 76 FR 63787, Oct. 13, 2011]

#### **§ 1021.340 Classified, confidential, and otherwise exempt information.**

- (a) Notwithstanding other sections of this part, DOE shall not disclose classified, confidential, or other information that DOE otherwise would not disclose pursuant to the Freedom of Information Act (FOIA) (5 U.S.C. 552) and 10 CFR 1004.10(b) of DOE's regulations implementing the FOIA, except as provided by 40 CFR 1506.6(f).
- (b) To the fullest extent possible, DOE shall segregate any information that is exempt from disclosure requirements into an appendix to allow public review of the remainder of a NEPA document.
- (c) If exempt information cannot be segregated, or if segregation would leave essentially meaningless material, DOE shall withhold the entire NEPA document from the public; however, DOE shall prepare the NEPA document, in accordance with the CEQ Regulations and this part, and use it in DOE decisionmaking.

#### **§ 1021.341 Coordination with other environmental review requirements.**



- (a) In accordance with 40 CFR 1500.4(k) and (o), 1502.25, and 1506.4, DOE shall integrate the NEPA process and coordinate NEPA compliance with other environmental review requirements to the fullest extent possible.
- (b) To the extent possible, DOE shall determine the applicability of other environmental requirements early in the planning process, in consultation with other agencies when necessary or appropriate, to ensure compliance and to avoid delays, and shall incorporate any relevant requirements as early in the NEPA review process as possible.

#### **§ 1021.342 Interagency cooperation.**

For DOE programs that involve another Federal agency or agencies in related decisions subject to NEPA, DOE will comply with the requirements of 40 CFR 1501.5 and 1501.6. As part of this process, DOE shall cooperate with the other agencies in developing environmental information and in determining whether a proposal requires preparation of an EIS or EA, or can be categorically excluded from preparation of either. Further, where appropriate and acceptable to the other agencies, DOE shall develop or cooperate in the development of interagency agreements to facilitate coordination and to reduce delay and duplication.

#### **§ 1021.343 Variances.**

- (a) *Emergency actions.* DOE may take an action without observing all provisions of this part or the CEQ Regulations, in accordance with 40 CFR 1506.11, in emergency situations that demand immediate action. DOE shall consult with CEQ as soon as possible regarding alternative arrangements for emergency actions having significant environmental impacts. DOE shall document, including publishing a notice in the Federal Register, emergency actions covered by this paragraph within 30 days after such action occurs; this documentation shall identify any adverse impacts from the actions taken, further mitigation necessary, and any NEPA documents that may be required.
- (b) *Reduction of time periods.* On a case-by-case basis, DOE may reduce time periods established in this part that are not required by the CEQ Regulations. If DOE determines that such reduction is necessary, DOE shall publish a notice in the Federal Register specifying the revised time periods and the rationale for the reduction.
- (c) *Other.* Any variance from the requirements of this part, other than as provided by paragraphs (a) and (b) of this section, must be soundly based on the interests of national security or the public health, safety, or welfare and must have the advance written approval of the Secretary; however, the Secretary is not authorized to waive or grant a variance from any requirement of the CEQ Regulations (except as provided for in those regulations). If the Secretary determines that a variance from the requirements of this part is within his/her authority to grant and is necessary, DOE shall publish a notice in the Federal Register specifying the variance granted and the reasons.

### **Subpart D—Typical Classes of Actions**

SOURCE: 76 FR 63787, Oct. 13, 2011, unless otherwise noted.

#### **§ 1021.400 Level of NEPA review.**

- (a) This subpart identifies DOE actions that normally:

- (1) Do not require preparation of either an EIS or an EA (are categorically excluded from preparation of either document) (appendices A and B to this subpart D);
  - (2) Require preparation of an EA, but not necessarily an EIS (appendix C to this subpart D); or
  - (3) Require preparation of an EIS (appendix D to this subpart D).
- (b) 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.
- (c) If a DOE proposal is encompassed within a class of actions listed in the appendices to this subpart D, DOE shall proceed with the level of NEPA review indicated for that class of actions, unless there are extraordinary circumstances related to the specific proposal that may affect the significance of the environmental effects of the proposal.
- (d) If a DOE proposal is not encompassed within the classes of actions listed in the appendices to this subpart D, or if there are extraordinary circumstances related to the proposal that may affect the significance of the environmental effects of the proposal, DOE shall either:
- (1) Prepare an EA and, on the basis of that EA, determine whether to prepare an EIS or a FONSI; or
  - (2) Prepare an EIS and ROD.

**§ 1021.410 Application of categorical exclusions (classes of actions that normally do not require EAs or EISs).**

- (a) The actions listed in appendices A and B to this subpart D are classes of actions that DOE has determined do not individually or cumulatively have a significant effect on the human environment (categorical exclusions).
- (b) To find that a proposal is categorically excluded, DOE shall determine the following:
- (1) The proposal fits within a class of actions that is listed in appendix A or B to this subpart D;
  - (2) There are no extraordinary circumstances related to the proposal that may affect the significance of the environmental effects of the proposal. Extraordinary circumstances are unique situations presented by specific proposals, including, but not limited to, scientific controversy about the environmental effects of the proposal; uncertain effects or effects involving unique or unknown risks; and unresolved conflicts concerning alternative uses of available resources; and
  - (3) The proposal has not been segmented to meet the definition of a categorical exclusion. Segmentation can occur when a proposal is broken down into small parts in order to avoid the appearance of significance of the total action. The scope of a proposal must include the consideration of connected and cumulative actions, that is, the proposal is not connected to other actions with potentially significant impacts (40 CFR 1508.25(a)(1)), is not related to other actions with individually insignificant but cumulatively significant impacts (40 CFR 1508.27(b)(7)), and is not precluded by 40

CFR 1506.1 or § 1021.211 of this part concerning limitations on actions during EIS preparation.

- (c) All categorical exclusions may be applied by any organizational element of DOE. The sectional divisions in appendix B to this subpart D are solely for purposes of organization of that appendix and are not intended to be limiting.
- (d) A class of actions includes activities foreseeably necessary to proposals encompassed within the class of actions (such as award of implementing grants and contracts, site preparation, purchase and installation of equipment, and associated transportation activities).
- (e) Categorical exclusion determinations for actions listed in appendix B shall be documented and made available to the public by posting online, generally within two weeks of the determination, unless additional time is needed in order to review and protect classified information, “confidential business information,” or other information that DOE would not disclose pursuant to the Freedom of Information Act (FOIA) (5 U.S.C. 552). Posted categorical exclusion determinations shall not disclose classified information, “confidential business information,” or other information that DOE would not disclose pursuant to FOIA. (See also 10 CFR 1021.340.)
- (f) Proposed recurring activities to be undertaken during a specified time period, such as routine maintenance activities for a year, may be addressed in a single categorical exclusion determination after considering the potential aggregated impacts.
- (g) The following clarifications are provided to assist in the appropriate application of categorical exclusions that employ the terms or phrases:
  - (1) “Previously disturbed or developed” refers to land that has been changed such that its functioning ecological processes have been and remain altered by human activity. The phrase encompasses areas that have been transformed from natural cover to non-native species or a managed state, including, but not limited to, utility and electric power transmission corridors and rights-of-way, and other areas where active utilities and currently used roads are readily available.
  - (2) DOE considers terms such as “small” and “small-scale” in the context of the particular proposal, including its proposed location. In assessing whether a proposed action is small, in addition to the actual magnitude of the proposal, DOE considers factors such as industry norms, the relationship of the proposed action to similar types of development in the vicinity of the proposed action, and expected outputs of emissions or waste. When considering the physical size of a proposed facility, for example, DOE would review the surrounding land uses, the scale of the proposed facility relative to existing development, and the capacity of existing roads and other infrastructure to support the proposed action.

## **Appendix A to Subpart D of Part 1021—Categorical Exclusions Applicable to General Agency Actions Back to Top**

### **A1 Routine DOE Business Actions**

Routine actions necessary to support the normal conduct of DOE business limited to administrative, financial, and personnel actions.

### **A2 Clarifying or Administrative Contract Actions**

Contract interpretations, amendments, and modifications that are clarifying or administrative in nature.

**A3 Certain Actions by Office of Hearings and Appeals**

Adjustments, exceptions, exemptions, appeals and stays, modifications, or rescissions of orders issued by the Office of Hearings and Appeals.

**A4 Interpretations and Rulings for Existing Regulations**

Interpretations and rulings with respect to existing regulations, or modifications or rescissions of such interpretations and rulings.

**A5 Interpretive Rulemakings With no Change in Environmental Effect**

Rulemakings interpreting or amending an existing rule or regulation that does not change the environmental effect of the rule or regulation being amended.

**A6 Procedural Rulemakings**

Rulemakings that are strictly procedural, including, but not limited to, rulemaking (under 48 CFR chapter 9) establishing procedures for technical and pricing proposals and establishing contract clauses and contracting practices for the purchase of goods and services, and rulemaking (under 10 CFR part 600) establishing application and review procedures for, and administration, audit, and closeout of, grants and cooperative agreements.

**A7 [Reserved]**

**A8 Awards of Certain Contracts**

Awards of contracts for technical support services, management and operation of a government-owned facility, and personal services.

**A9 Information Gathering, Analysis, and Dissemination**

Information gathering (including, but not limited to, literature surveys, inventories, site visits, and audits), data analysis (including, but not limited to, computer modeling), document preparation (including, but not limited to, conceptual design, feasibility studies, and analytical energy supply and demand studies), and information dissemination (including, but not limited to, document publication and distribution, and classroom training and informational programs), but not including site characterization or environmental monitoring. (See also B3.1 of appendix B to this subpart.)

**A10 Reports and Recommendations on non-DOE Legislation**

Reports and recommendations on legislation or rulemaking that are not proposed by DOE.

**A11 Technical Advice and Assistance to Organizations**

Technical advice and planning assistance to international, national, State, and local organizations.

**A12 Emergency Preparedness Planning**

Emergency preparedness planning activities, including, but not limited to, the designation of onsite evacuation routes.

#### **A13 Procedural Documents**

Administrative, organizational, or procedural Policies, Orders, Notices, Manuals, and Guides.

#### **A14 Approval of Technical Exchange Arrangements**

Approval of technical exchange arrangements for information, data, or personnel with other countries or international organizations (including, but not limited to, assistance in identifying and analyzing another country's energy resources, needs and options).

#### **A15 International Agreements for Energy Research and Development**

Approval of DOE participation in international "umbrella" agreements for cooperation in energy research and development activities that would not commit the U.S. to any specific projects or activities.

### **Appendix B to Subpart D of Part 1021—Categorical Exclusions Applicable to Specific Agency Actions**

#### **B. Conditions That Are Integral Elements of the Classes of Actions in Appendix B**

The classes of actions listed below include the following conditions as integral elements of the classes of actions. To fit within the classes of actions listed below, a proposal must be one that would not:

- (1) Threaten a violation of applicable statutory, regulatory, or permit requirements for environment, safety, and health, or similar requirements of DOE or Executive Orders;
- (2) Require siting and construction or major expansion of waste storage, disposal, recovery, or treatment facilities (including incinerators), but the proposal may include categorically excluded waste storage, disposal, recovery, or treatment actions or facilities;
- (3) 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; or
- (4) Have the potential to cause significant impacts on environmentally sensitive resources. An environmentally sensitive resource is typically a resource that has been identified as needing protection through Executive Order, statute, or regulation by Federal, State, or local government, or a Federally recognized Indian Tribe. An action may be categorically excluded if, although sensitive resources are present, the action would not have the potential to cause significant impacts on those resources (such as construction of a building with its foundation well above a sole-source aquifer or upland surface soil removal on a site that has wetlands). Environmentally sensitive resources include, but are not limited to:
  - (i) Property (such as sites, buildings, structures, and objects) of historic, archeological, or architectural significance designated by Federal, State, or local governments, or a

Federally recognized Indian Tribe, or property determined to be eligible for listing on the National Register of Historic Places;

- (ii) Federally-listed threatened or endangered species or their habitat (including critical habitat) or Federally-proposed or candidate species or their habitat (Endangered Species Act); State-listed endangered or threatened species or their habitat; and Federally-protected marine mammals and Essential Fish Habitat (Marine Mammals Protection Act; Magnuson-Stevens Fishery Conservation and Management Act);
- (iii) Floodplains and wetlands (as defined in 10 CFR 1022.4, "Compliance with Floodplain and Wetland Environmental Review Requirements: Definitions," or its successor);
- (iv) Areas having a special designation such as Federally- and State-designated wilderness areas, national parks, national monuments, national natural landmarks, wild and scenic rivers, State and Federal wildlife refuges, scenic areas (such as National Scenic and Historic Trails or National Scenic Areas), and marine sanctuaries;
- (v) Prime or unique farmland, or other farmland of statewide or local importance, as defined at 7 CFR 658.2(a), "Farmland Protection Policy Act: Definitions," or its successor;
- (vi) Special sources of water (such as sole-source aquifers, wellhead protection areas, and other water sources that are vital in a region); and
- (vii) Tundra, coral reefs, or rain forests.

## **B1. Categorical Exclusions Applicable to Facility Operation**

### **B1.1 Changing Rates and Prices**

Changing rates for services or prices for products marketed by parts of DOE other than Power Marketing Administrations, and approval of rate or price changes for non-DOE entities, that are consistent with the change in the implicit price deflator for the Gross Domestic Product published by the Department of Commerce, during the period since the last rate or price change.

### **B1.2 Training Exercises and Simulations**

Training exercises and simulations (including, but not limited to, firing-range training, small-scale and short-duration force-on-force exercises, emergency response training, fire fighter and rescue training, and decontamination and spill cleanup training) conducted under appropriately controlled conditions and in accordance with applicable requirements.

### **B1.3 Routine Maintenance**

Routine maintenance activities and custodial services for buildings, structures, rights-of-way, infrastructures (including, but not limited to, pathways, roads, and railroads), vehicles and equipment, and localized vegetation and pest control, during which operations may be suspended and resumed, provided that the activities would be conducted in a manner in accordance with applicable requirements. Custodial services are activities to preserve facility appearance, working conditions, and sanitation (such as cleaning, window washing, lawn mowing, trash collection, painting, and snow removal). Routine maintenance activities, corrective (that is, repair), preventive, and predictive, are required to maintain and preserve buildings, structures, infrastructures, and equipment in a condition

suitable for a facility to be used for its designated purpose. Such maintenance may occur as a result of severe weather (such as hurricanes, floods, and tornados), wildfires, and other such events. Routine maintenance may result in replacement to the extent that replacement is in-kind and is not a substantial upgrade or improvement. In-kind replacement includes installation of new components to replace outmoded components, provided that the replacement does not result in a significant change in the expected useful life, design capacity, or function of the facility. Routine maintenance does not include replacement of a major component that significantly extends the originally intended useful life of a facility (for example, it does not include the replacement of a reactor vessel near the end of its useful life). Routine maintenance activities include, but are not limited to:

- (a) Repair or replacement of facility equipment, such as lathes, mills, pumps, and presses;
- (b) Door and window repair or replacement;
- (c) Wall, ceiling, or floor repair or replacement;
- (d) Reroofing;
- (e) Plumbing, electrical utility, lighting, and telephone service repair or replacement;
- (f) Routine replacement of high-efficiency particulate air filters;
- (g) Inspection and/or treatment of currently installed utility poles;
- (h) Repair of road embankments;
- (i) Repair or replacement of fire protection sprinkler systems;
- (j) Road and parking area resurfacing, including construction of temporary access to facilitate resurfacing, and scraping and grading of unpaved surfaces;
- (k) Erosion control and soil stabilization measures (such as reseeding and revegetation);
- (l) Surveillance and maintenance of surplus facilities in accordance with DOE Order 435.1, "Radioactive Waste Management," or its successor;
- (m) Repair and maintenance of transmission facilities, such as replacement of conductors of the same nominal voltage, poles, circuit breakers, transformers, capacitors, crossarms, insulators, and downed transmission lines, in accordance, where appropriate, with 40 CFR part 761 (Polychlorinated Biphenyls Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions) or its successor;
- (n) Routine testing and calibration of facility components, subsystems, or portable equipment (such as control valves, in-core monitoring devices, transformers, capacitors, monitoring wells, lysimeters, weather stations, and flumes);
- (o) Routine decontamination of the surfaces of equipment, rooms, hot cells, or other interior surfaces of buildings (by such activities as wiping with rags, using strippable latex, and minor vacuuming), and removal of contaminated intact equipment and other material (not including spent nuclear fuel or special nuclear material in nuclear reactors); and

- (p) Removal of debris.

#### **B1.4 Air Conditioning Systems for Existing Equipment**

Installation or modification of air conditioning systems required for temperature control for operation of existing equipment.

#### **B1.5 Existing Steam Plants and Cooling Water Systems**

Minor improvements to existing steam plants and cooling water systems (including, but not limited to, modifications of existing cooling towers and ponds), provided that the improvements would not: (1) Create new sources of water or involve new receiving waters; (2) have the potential to cause significant impacts on water withdrawals or the temperature of discharged water; or (3) increase introductions of, or involve new introductions of, hazardous substances, pollutants, contaminants, or CERCLA-excluded petroleum and natural gas products.

#### **B1.6 Tanks and Equipment To Control Runoff and Spills**

Installation or modification of retention tanks or small (normally under one acre) basins and associated piping and pumps for existing operations to control runoff or spills (such as under 40 CFR part 112). Modifications include, but are not limited to, installing liners or covers. (See also B1.33 of this appendix.)

#### **B1.7 Electronic Equipment**

Acquisition, installation, operation, modification, and removal of electricity transmission control and monitoring devices for grid demand and response, communication systems, data processing equipment, and similar electronic equipment.

#### **B1.8 Screened Water Intake and Outflow Structures**

Modifications to screened water intake and outflow structures such that intake velocities and volumes and water effluent quality and volumes are consistent with existing permit limits.

#### **B1.9 Airway Safety Markings and Painting**

Placement of airway safety markings on, painting on electrical transmission lines and antenna structures, wind turbines, and similar structures in of, and repair and in-kind replacement of lighting accordance with applicable requirements (such as Federal Aviation Administration standards).

#### **B1.10 Onsite Storage of Activated Material**

Routine, onsite storage at an existing facility of activated equipment and material (including, but not limited to, lead) used at that facility, to allow reuse after decay of radioisotopes with short half-lives.

#### **B1.11 Fencing**

Installation of fencing, including, but not limited to border marking, that would not have the potential to cause significant impacts on wildlife populations or migration or surface water flow.

#### **B1.12 Detonation or Burning of Explosives or Propellants After Testing**



Outdoor detonation or burning of explosives or propellants that failed (duds), were damaged (such as by fracturing), or were otherwise not consumed in testing. Outdoor detonation or burning would be in areas designated and routinely used for those purposes under existing applicable permits issued by Federal, State, and local authorities (such as a permit for a RCRA miscellaneous unit (40 CFR part 264, subpart X)).

#### **B1.13 Pathways, Short Access Roads, and Rail Lines**

Construction, acquisition, and relocation, consistent with applicable right-of-way conditions and approved land use or transportation improvement plans, of pedestrian walkways and trails, bicycle paths, small outdoor fitness areas, and short access roads and rail lines (such as branch and spur lines).

#### **B1.14 Refueling of Nuclear Reactors**

Refueling of operating nuclear reactors, during which operations may be suspended and then resumed.

#### **B1.15 Support Buildings**

Siting, construction or modification, and operation of support buildings and support structures (including, but not limited to, trailers and prefabricated and modular buildings) within or contiguous to an already developed area (where active utilities and currently used roads are readily accessible). Covered support buildings and structures include, but are not limited to, those for office purposes; parking; cafeteria services; education and training; visitor reception; computer and data processing services; health services or recreation activities; routine maintenance activities; storage of supplies and equipment for administrative services and routine maintenance activities; security (such as security posts); fire protection; small-scale fabrication (such as machine shop activities), assembly, and testing of non-nuclear equipment or components; and similar support purposes, but exclude facilities for nuclear weapons activities and waste storage activities, such as activities covered in B1.10, B1.29, B1.35, B2.6, B6.2, B6.4, B6.5, B6.6, and B6.10 of this appendix.

#### **B1.16 Asbestos Removal**

Removal of asbestos-containing materials from buildings in accordance with applicable requirements (such as 40 CFR part 61, "National Emission Standards for Hazardous Air Pollutants"; 40 CFR part 763, "Asbestos"; 29 CFR part 1910, subpart I, "Personal Protective Equipment"; and 29 CFR part 1926, "Safety and Health Regulations for Construction"; and appropriate State and local requirements, including certification of removal contractors and technicians).

#### **B1.17 Polychlorinated Biphenyl Removal**

Removal of polychlorinated biphenyl (PCB)-containing items (including, but not limited to, transformers and capacitors), PCB-containing oils flushed from transformers, PCB-flushing solutions, and PCB-containing spill materials from buildings or other aboveground locations in accordance with applicable requirements (such as 40 CFR part 761).

#### **B1.18 Water Supply Wells**

Siting, construction, and operation of additional water supply wells (or replacement wells) within an existing well field, or modification of an existing water supply well to restore production, provided that there would be no drawdown other than in the immediate vicinity of the pumping well, and the covered

actions would not have the potential to cause significant long-term decline of the water table, and would not have the potential to cause significant degradation of the aquifer from the new or replacement well.

#### **B1.19 Microwave, Meteorological, and Radio Towers**

Siting, construction, modification, operation, abandonment, and removal of microwave, radio communication, and meteorological towers and associated facilities, provided that the towers and associated facilities would not be in a governmentally designated scenic area (see B(4)(iv) of this appendix) unless otherwise authorized by the appropriate governmental entity.

#### **B1.20 Protection of Cultural Resources, Fish and Wildlife Habitat**

Small-scale activities undertaken to protect cultural resources (such as fencing, labeling, and flagging) or to protect, restore, or improve fish and wildlife habitat, fish passage facilities (such as fish ladders and minor diversion channels), or fisheries. Such activities would be conducted in accordance with an existing natural or cultural resource plan, if any.

#### **B1.21 Noise Abatement**

Noise abatement measures (including, but not limited to, construction of noise barriers and installation of noise control materials).

#### **B1.22 Relocation of Buildings**

Relocation of buildings (including, but not limited to, trailers and prefabricated buildings) to an already developed area (where active utilities and currently used roads are readily accessible).

#### **B1.23 Demolition and Disposal of Buildings**

Demolition and subsequent disposal of buildings, equipment, and support structures (including, but not limited to, smoke stacks and parking lot surfaces), provided that there would be no potential for release of substances at a level, or in a form, that could pose a threat to public health or the environment.

#### **B1.24 Property Transfers**

Transfer, lease, disposition, or acquisition of interests in personal property (including, but not limited to, equipment and materials) or real property (including, but not limited to, permanent structures and land), provided that under reasonably foreseeable uses (1) there would be no potential for release of substances at a level, or in a form, that could pose a threat to public health or the environment and (2) the covered actions would not have the potential to cause a significant change in impacts from before the transfer, lease, disposition, or acquisition of interests.

#### **B1.25 Property Transfers for Cultural Resources Protection, Habitat Preservation, and Wildlife Management**

Transfer, lease, disposition, or acquisition of interests in land and associated buildings for cultural resources protection, habitat preservation, or fish and wildlife management, provided that there would be no potential for release of substances at a level, or in a form, that could pose a threat to public health or the environment.

### **B1.26 Small Water Treatment Facilities**

Siting, construction, expansion, modification, replacement, operation, and decommissioning of small (total capacity less than approximately 250,000 gallons per day) wastewater and surface water treatment facilities whose liquid discharges are externally regulated, and small potable water and sewage treatment facilities.

### **B1.27 Disconnection of Utilities**

Activities that are required for the disconnection of utility services (including, but not limited to, water, steam, telecommunications, and electrical power) after it has been determined that the continued operation of these systems is not needed for safety.

### **B1.28 Placing a Facility in an Environmentally Safe Condition**

Minor activities that are required to place a facility in an environmentally safe condition where there is no proposed use for the facility. These activities would include, but are not limited to, reducing surface contamination, and removing materials, equipment or waste (such as final defueling of a reactor, where there are adequate existing facilities for the treatment, storage, or disposal of the materials, equipment or waste). These activities would not include conditioning, treatment, or processing of spent nuclear fuel, high-level waste, or special nuclear materials.

### **B1.29 Disposal Facilities for Construction and Demolition Waste**

Siting, construction, expansion, modification, operation, and decommissioning of small (less than approximately 10 acres) solid waste disposal facilities for construction and demolition waste, in accordance with applicable requirements (such as 40 CFR part 257, "Criteria for Classification of Solid Waste Disposal Facilities and Practices," and 40 CFR part 61, "National Emission Standards for Hazardous Air Pollutants") that would not release substances at a level, or in a form, that could pose a threat to public health or the environment.

### **B1.30 Transfer Actions**

Transfer actions, in which the predominant activity is transportation, provided that (1) the receipt and storage capacity and management capability for the amount and type of materials, equipment, or waste to be moved already exists at the receiving site and (2) all necessary facilities and operations at the receiving site are already permitted, licensed, or approved, as appropriate. Such transfers are not regularly scheduled as part of ongoing routine operations.

### **B1.31 Installation or Relocation of Machinery and Equipment**

Installation or relocation and operation of machinery and equipment (including, but not limited to, laboratory equipment, electronic hardware, manufacturing machinery, maintenance equipment, and health and safety equipment), provided that uses of the installed or relocated items are consistent with the general missions of the receiving structure. Covered actions include modifications to an existing building, within or contiguous to a previously disturbed or developed area, that are necessary for equipment installation and relocation. Such modifications would not appreciably increase the footprint or height of the existing building or have the potential to cause significant changes to the type and magnitude of environmental impacts.

### **B1.32 Traffic Flow Adjustments**

Traffic flow adjustments to existing roads (including, but not limited to, stop sign or traffic light installation, adjusting direction of traffic flow, and adding turning lanes), and road adjustments (including, but not limited to, widening and realignment) that are within an existing right-of-way and consistent with approved land use or transportation improvement plans.

### **B1.33 Stormwater Runoff Control**

Design, construction, and operation of control practices to reduce stormwater runoff and maintain natural hydrology. Activities include, but are not limited to, those that reduce impervious surfaces (such as vegetative practices and use of porous pavements), best management practices (such as silt fences, straw wattles, and fiber rolls), and use of green infrastructure or other low impact development practices (such as cisterns and green roofs).

### **B1.34 Lead-based Paint**

Containment, removal, and disposal of lead-based paint in accordance with applicable requirements (such as provisions relating to the certification of removal contractors and technicians at 40 CFR part 745, "Lead-Based Paint Poisoning Prevention In Certain Residential Structures").

### **B1.35 Drop-off, Collection and Transfer Facilities for Recyclable Materials**

Siting, construction, modification, and operation of recycling or compostable material drop-off, collection, and transfer stations on or contiguous to a previously disturbed or developed area and in an area where such a facility would be consistent with existing zoning requirements. The stations would have appropriate facilities and procedures established in accordance with applicable requirements for the handling of recyclable or compostable materials and household hazardous waste (such as paint and pesticides). Except as specified above, the collection of hazardous waste for disposal and the processing of recyclable or compostable materials are not included in this class of actions.

### **B1.36 Determinations of Excess Real Property**

Determinations that real property is excess to the needs of DOE and, in the case of acquired real property, the subsequent reporting of such determinations to the General Services Administration or, in the case of lands withdrawn or otherwise reserved from the public domain, the subsequent filing of a notice of intent to relinquish with the Bureau of Land Management, Department of the Interior. Covered actions would not include disposal of real property.

## **B2. Categorical Exclusions Applicable to Safety and Health**

### **B2.1 Workplace Enhancements**

Modifications within or contiguous to an existing structure, in a previously disturbed or developed area, to enhance workplace habitability (including, but not limited to, installation or improvements to lighting, radiation shielding, or heating/ventilating/air conditioning and its instrumentation, and noise reduction).

### **B2.2 Building and Equipment Instrumentation**

Installation of, or improvements to, building and equipment instrumentation (including, but not limited to, remote control panels, remote monitoring capability, alarm and surveillance systems, control systems to provide automatic shutdown, fire detection and protection systems, water consumption monitors and flow control systems, announcement and emergency warning systems, criticality and radiation monitors and alarms, and safeguards and security equipment).

### **B2.3 Personnel Safety and Health Equipment**

Installation of, or improvements to, equipment for personnel safety and health (including, but not limited to, eye washes, safety showers, radiation monitoring devices, fumehoods, and associated collection and exhaust systems), provided that the covered actions would not have the potential to cause a significant increase in emissions.

### **B2.4 Equipment Qualification**

Activities undertaken to (1) qualify equipment for use or improve systems reliability or (2) augment information on safety-related system components. These activities include, but are not limited to, transportation container qualification testing, crane and lift-gear certification or recertification testing, high efficiency particulate air filter testing and certification, stress tests (such as “burn-in” testing of electrical components and leak testing), and calibration of sensors or diagnostic equipment.

### **B2.5 Facility Safety and Environmental Improvements**

Safety and environmental improvements of a facility (including, but not limited to, replacement and upgrade of facility components) that do not result in a significant change in the expected useful life, design capacity, or function of the facility and during which operations may be suspended and then resumed. Improvements include, but are not limited to, replacement/upgrade of control valves, in-core monitoring devices, facility air filtration systems, or substation transformers or capacitors; addition of structural bracing to meet earthquake standards and/or sustain high wind loading; and replacement of aboveground or belowground tanks and related piping, provided that there is no evidence of leakage, based on testing in accordance with applicable requirements (such as 40 CFR part 265, “Interim Status Standards for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities” and 40 CFR part 280, “Technical Standards and Corrective Action Requirements for Owners and Operators of Underground Storage Tanks”). These actions do not include rebuilding or modifying substantial portions of a facility (such as replacing a reactor vessel).

### **B2.6 Recovery of Radioactive Sealed Sources**

Recovery of radioactive sealed sources and sealed source-containing devices from domestic or foreign locations provided that (1) the recovered items are transported and stored in compliant containers, and (2) the receiving site has sufficient existing storage capacity and all required licenses, permits, and approvals.

## **B3. Categorical Exclusions Applicable to Site Characterization, Monitoring, and General Research**

### **B3.1 Site Characterization and Environmental Monitoring**

Site characterization and environmental monitoring (including, but not limited to, siting, construction, modification, operation, and dismantlement and abandonment of characterization and monitoring devices, and siting, construction, and associated operation of a small-scale laboratory building or renovation of a room in an existing building for sample analysis). Such activities would not have the potential to cause significant impacts from ground disturbance. Covered activities include, but are not limited to, site characterization and environmental monitoring under CERCLA and RCRA. (This class of actions excludes activities in salt water and freshwater. See B3.16 of this appendix for salt water and freshwater activities.) Specific activities include, but are not limited to:

- (a) Geological, geophysical (such as gravity, magnetic, electrical, seismic, radar, and temperature gradient), geochemical, and engineering surveys and mapping, and the establishment of survey marks. Seismic techniques would not include large-scale reflection or refraction testing;
- (b) Installation and operation of field instruments (such as stream-gauging stations or flow-measuring devices, telemetry systems, geochemical monitoring tools, and geophysical exploration tools);
- (c) Drilling of wells for sampling or monitoring of groundwater or the vadose (unsaturated) zone, well logging, and installation of water-level recording devices in wells;
- (d) Aquifer and underground reservoir response testing;
- (e) Installation and operation of ambient air monitoring equipment;
- (f) Sampling and characterization of water, soil, rock, or contaminants (such as drilling using truck- or mobile-scale equipment, and modification, use, and plugging of boreholes);
- (g) Sampling and characterization of water effluents, air emissions, or solid waste streams;
- (h) Installation and operation of meteorological towers and associated activities (such as assessment of potential wind energy resources);
- (i) Sampling of flora or fauna; and
- (j) Archeological, historic, and cultural resource identification in compliance with 36 CFR part 800 and 43 CFR part 7.

### **B3.2 Aviation Activities**

Aviation activities for survey, monitoring, or security purposes that comply with Federal Aviation Administration regulations.

### **B3.3 Research Related to Conservation of Fish, Wildlife, and Cultural Resources**

Field and laboratory research, inventory, and information collection activities that are directly related to the conservation of fish and wildlife resources or to the protection of cultural resources, provided that such activities would not have the potential to cause significant impacts on fish and wildlife habitat or populations or to cultural resources.

### **B3.4 Transport Packaging Tests for Radioactive or Hazardous Material**

Drop, puncture, water-immersion, thermal, and fire tests of transport packaging for radioactive or hazardous materials to certify that designs meet the applicable requirements (such as 49 CFR 173.411 and 173.412 and 10 CFR 71.73).

### **B3.5 Tank Car Tests**

Tank car tests under 49 CFR part 179 (including, but not limited to, tests of safety relief devices, pressure regulators, and thermal protection systems).

### **B3.6 Small-Scale Research and Development, Laboratory Operations, and Pilot Projects**

Siting, construction, modification, operation, and decommissioning of facilities for small-scale research and development projects; conventional laboratory operations (such as preparation of chemical standards and sample analysis); and small-scale pilot projects (generally less than 2 years) frequently conducted to verify a concept before demonstration actions, provided that construction or modification would be within or contiguous to a previously disturbed or developed area (where active utilities and currently used roads are readily accessible). For purposes of this category, “demonstration actions” means actions that are undertaken at a scale to show whether a technology would be viable on a larger scale and suitable for commercial deployment. Demonstration actions frequently follow research and development and pilot projects that are directed at establishing proof of concept.

### **B3.7 New Terrestrial Infill Exploratory and Experimental Wells**

Siting, construction, and operation of new terrestrial infill exploratory and experimental (test) wells in a locally characterized geological formation in a field that contains existing operating wells, properly abandoned wells, or unminable coal seams containing natural gas, provided that the site characterization has verified a low potential for seismicity, subsidence, and contamination of freshwater aquifers, and the actions are otherwise consistent with applicable best practices and DOE protocols, including those that protect against uncontrolled releases of harmful materials. Such wells may include those for brine, carbon dioxide, coalbed methane, gas hydrate, geothermal, natural gas, and oil. Uses for carbon sequestration wells include, but are not limited to, the study of saline formations, enhanced oil recovery, and enhanced coalbed methane extraction.

### **B3.8 Outdoor Terrestrial Ecological and Environmental Research**

Outdoor terrestrial ecological and environmental research in a small area (generally less than 5 acres), including, but not limited to, siting, construction, and operation of a small-scale laboratory building or renovation of a room in an existing building for associated analysis, provided that such activities would not have the potential to cause significant impacts on the ecosystem. These actions include, but are not limited to, small test plots for energy-related biomass or biofuels research. Such research may include the use of genetically engineered plants where the test plot of such plants and associated activities have been authorized by the U.S. Department of Agriculture, in accordance with applicable requirements (such as 7 CFR part 340), including the use of any required confinement measures and buffer zones.

### **B3.9 Projects To Reduce Emissions and Waste Generation**

Projects to reduce emissions and waste generation at existing fossil or alternative fuel combustion or utilization facilities, provided that these projects would not have the potential to cause a significant increase in the quantity or rate of air emissions. For this category of actions, “fuel” includes coal, oil, natural gas, hydrogen, syngas, and biomass. Neither “fuel” nor “alternative fuel” herein includes nuclear fuels. Covered actions include, but are not limited to:

- (a) Test treatment of the throughput product (solid, liquid, or gas) generated at an existing and fully operational fuel combustion or utilization facility;
- (b) Addition or replacement of equipment for reduction or control of sulfur dioxide, oxides of nitrogen, or other regulated substances that requires only minor modification to the

existing structures at an existing fuel combustion or utilization facility, for which the existing use remains essentially unchanged;

- (c) Addition or replacement of equipment for reduction or control of sulfur dioxide, oxides of nitrogen, or other regulated substances that involves no permanent change in the quantity or quality of fuel burned or used and involves no permanent change in the capacity factor of the fuel combustion or utilization facility; and
- (d) Addition or modification of equipment for capture and control of carbon dioxide or other regulated substances, provided that adequate infrastructure is in place to manage such substances.

### **B3.10 Particle Accelerators**

Siting, construction, modification, operation, and decommissioning of particle accelerators, including electron beam accelerators, with primary beam energy less than approximately 100 million electron volts (MeV) and average beam power less than approximately 250 kilowatts (kW), and associated beamlines, storage rings, colliders, and detectors, for research and medical purposes (such as proton therapy), and isotope production, within or contiguous to a previously disturbed or developed area (where active utilities and currently used roads are readily accessible), or internal modification of any accelerator facility regardless of energy, that does not increase primary beam energy or current. In cases where the beam energy exceeds 100 MeV, the average beam power must be less than 250 kW, so as not to exceed an average current of 2.5 milliamperes (mA).

### **B3.11 Outdoor Tests and Experiments on Materials and Equipment Components**

Outdoor tests and experiments for the development, quality assurance, or reliability of materials and equipment (including, but not limited to, weapon system components) under controlled conditions. Covered actions include, but are not limited to, burn tests (such as tests of electric cable fire resistance or the combustion characteristics of fuels), impact tests (such as pneumatic ejector tests using earthen embankments or concrete slabs designated and routinely used for that purpose), or drop, puncture, water-immersion, or thermal tests. Covered actions would not involve source, special nuclear, or byproduct materials, except that encapsulated sources that contain source, special nuclear, or byproduct materials may be used for nondestructive actions such as detector/sensor development and testing and first responder field training.

### **B3.12 Microbiological and Biomedical Facilities**

Siting, construction, modification, operation, and decommissioning of microbiological and biomedical diagnostic, treatment and research facilities (excluding Biosafety Level-3 and Biosafety Level-4), in accordance with applicable requirements or best practices (such as Biosafety in Microbiological and Biomedical Laboratories, 5th Edition, Feb. 2007, U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, and the National Institutes of Health) including, but not limited to, laboratories, treatment areas, offices, and storage areas, within or contiguous to a previously disturbed or developed area (where active utilities and currently used roads are readily accessible). Operation may include the purchase, installation, and operation of biomedical equipment (such as commercially available cyclotrons that are used to generate radioisotopes and radiopharmaceuticals, and commercially available biomedical imaging and spectroscopy instrumentation).

### **B3.13 Magnetic Fusion Experiments**



Performing magnetic fusion experiments that do not use tritium as fuel, within existing facilities (including, but not limited to, necessary modifications).

#### **B3.14 Small-Scale Educational Facilities**

Siting, construction, modification, operation, and decommissioning of small-scale educational facilities (including, but not limited to, conventional teaching laboratories, libraries, classroom facilities, auditoriums, museums, visitor centers, exhibits, and associated offices) within or contiguous to a previously disturbed or developed area (where active utilities and currently used roads are readily accessible). Operation may include, but is not limited to, purchase, installation, and operation of equipment (such as audio/visual and laboratory equipment) commensurate with the educational purpose of the facility.

#### **B3.15 Small-Scale Indoor Research and Development Projects Using Nanoscale Materials**

Siting, construction, modification, operation, and decommissioning of facilities for indoor small-scale research and development projects and small-scale pilot projects using nanoscale materials in accordance with applicable requirements (such as engineering, worker safety, procedural, and administrative regulations) necessary to ensure the containment of any biohazardous materials. Construction and modification activities would be within or contiguous to a previously disturbed or developed area (where active utilities and currently used roads are readily accessible).

#### **B3.16 Research Activities in Salt Water and Freshwater Environments**

Small-scale, temporary surveying, site characterization, and research activities in salt water and freshwater environments, limited to:

- (a) Acquisition of rights-of-way, easements, and temporary use permits;
- (b) Data collection, environmental monitoring, and nondestructive research programs;
- (c) Resource evaluation activities including surveying and mapping, but excluding seismic activities other than passive techniques;
- (d) Collection of geological, paleontological, mineralogical, geochemical, biological, and geotechnical data and samples, but excluding large-scale vibratory coring techniques;
- (e) Installation of monitoring and recording devices;
- (f) Installation of equipment for flow testing of existing wells including equipment for fluid analysis; and
- (g) Ecological and environmental research provided that such activities would not have the potential to cause significant impacts on the ecosystem.

These activities would be conducted in accordance with, where applicable, an approved spill prevention, control, and response plan and would incorporate appropriate control technologies and best management practices. None of the above activities would occur within the boundary of an established marine sanctuary or wildlife refuge, a governmentally proposed marine sanctuary or wildlife refuge, or a governmentally recognized area of high biological sensitivity (such as protected areas and other areas of known ecological importance, whale and marine mammal mating and calving/pupping areas, and fish and invertebrate spawning and nursery areas recognized as being

limited or unique and vulnerable to perturbation; these areas can occur in bays, estuaries, near shore, and far offshore, and may vary seasonally), or outside those areas if the activities would have the potential to cause significant impacts within those areas. No permanent facilities or devices would be constructed or installed. Covered actions do not include drilling of resource exploration or extraction wells.

#### **B4. Categorical Exclusions Applicable to Power Resources**

##### **B4.1 Contracts, Policies, and Marketing and Allocation Plans for Electric Power**

Establishment and implementation of contracts, policies, and marketing and allocation plans related to electric power acquisition or transmission that involve only the use of the existing transmission system and existing generation resources operating within their normal operating limits.

##### **B4.2 Export of Electric Energy**

Export of electric energy as provided by Section 202(e) of the Federal Power Act over existing transmission systems or using transmission system changes that are themselves categorically excluded.

##### **B4.3 Electric Power Marketing Rate Changes**

Rate changes for electric power, power transmission, and other products or services provided by a Power Marketing Administration that are based on a change in revenue requirements if the operations of generation projects would remain within normal operating limits.

##### **B4.4 Power Marketing Services and Activities**

Power marketing services and power management activities (including, but not limited to, storage, load shaping, seasonal exchanges, and other similar activities), provided that the operations of generating projects would remain within normal operating limits.

##### **B4.5 Temporary Adjustments to River Operations**

Temporary adjustments to river operations to accommodate day-to-day river fluctuations, power demand changes, fish and wildlife conservation program requirements, and other external events, provided that the adjustments would occur within the existing operating constraints of the particular hydrosystem operation.

##### **B4.6 Additions and Modifications to Transmission Facilities**

Additions or modifications to electric power transmission facilities that would not have the potential to cause significant impacts beyond the previously disturbed or developed facility area (including, but not limited to, switchyard rock grounding upgrades, secondary containment projects, paving projects, seismic upgrading, tower modifications, load shaping projects (such as the installation and use of flywheels and battery arrays), changing insulators, and replacement of poles, circuit breakers, conductors, transformers, and crossarms).

##### **B4.7 Fiber Optic Cable**

Adding fiber optic cables to transmission facilities or burying fiber optic cable in existing transmission line or pipeline rights-of-way. Covered actions may include associated vaults and pulling and tensioning sites outside of rights-of-way in nearby previously disturbed or developed areas.

#### **B4.8 Electricity Transmission Agreements**

New electricity transmission agreements, and modifications to existing transmission arrangements, to use a transmission facility of one system to transfer power of and for another system, provided that no new generation projects would be involved and no physical changes in the transmission system would be made beyond the previously disturbed or developed facility area.

#### **B4.9 Multiple Use of Transmission Line Rights-of-Way**

Granting or denying requests for multiple uses of a transmission facility's rights-of-way (including, but not limited to, grazing permits and crossing agreements for electric lines, water lines, natural gas pipelines, communications cables, roads, and drainage culverts).

#### **B4.10 Removal of Electric Transmission Lines and Substations**

Deactivation, dismantling, and removal of electric transmission facilities (including, but not limited to, electric transmission lines, substations, and switching stations) and abandonment and restoration of rights-of-way (including, but not limited to, associated access roads).

#### **B4.11 Electric Power Substations and Interconnection Facilities**

Construction or modification of electric power substations or interconnection facilities (including, but not limited to, switching stations and support facilities) that are not for the interconnection of a new generation resource into a Power Marketing Administration's transmission system, unless: (1) The new generation resource would be eligible for categorical exclusion under this part and (2) the new generation resource would be equal to or less than 50 average megawatts.

#### **B4.12 Construction of Transmission Lines**

Construction of electric transmission lines approximately 10 miles in length or less inside or outside of previously disturbed or developed transmission line or pipeline rights-of-way, or approximately 20 miles in length or less inside of previously disturbed or developed transmission line or pipeline rights-of-way, that are not for the interconnection of a new generation resource into a Power Marketing Administration's transmission system, unless: (1) The new generation resource would be eligible for categorical exclusion under this part and (2) the new generation resource would be equal to or less than 50 average megawatts.

#### **B4.13 Upgrading and Rebuilding Existing Transmission Lines**

Upgrading or rebuilding approximately 20 miles in length or less of existing electric transmission lines, which may involve minor relocations of small segments of the transmission lines, that is not for the interconnection of a new generation resource into a Power Marketing Administration's transmission system, unless: (1) The new generation resource would be eligible for categorical exclusion under this part and (2) the new generation resource would be equal to or less than 50 average megawatts.

### **B5. Categorical Exclusions Applicable to Conservation, Fossil, and Renewable Energy Activities**

## **B5.1 Actions To Conserve Energy or Water**

- (a) Actions to conserve energy or water, demonstrate potential energy or water conservation, and promote energy efficiency that would not have the potential to cause significant changes in the indoor or outdoor concentrations of potentially harmful substances. These actions may involve financial and technical assistance to individuals (such as builders, owners, consultants, manufacturers, and designers), organizations (such as utilities), and governments (such as State, local, and Tribal). Covered actions include, but are not limited to weatherization (such as insulation and replacing windows and doors); programmed lowering of thermostat settings; placement of timers on hot water heaters; installation or replacement of energy efficient lighting, low-flow plumbing fixtures (such as faucets, toilets, and showerheads), heating, ventilation, and air conditioning systems, and appliances; installation of drip-irrigation systems; improvements in generator efficiency and appliance efficiency ratings; efficiency improvements for vehicles and transportation (such as fleet changeout); power storage (such as flywheels and batteries, generally less than 10 megawatt equivalent); transportation management systems (such as traffic signal control systems, car navigation, speed cameras, and automatic plate number recognition); development of energy-efficient manufacturing, industrial, or building practices; and small-scale energy efficiency and conservation research and development and small-scale pilot projects. Covered actions include building renovations or new structures, provided that they occur in a previously disturbed or developed area. Covered actions could involve commercial, residential, agricultural, academic, institutional, or industrial sectors. Covered actions do not include rulemakings, standard-settings, or proposed DOE legislation, except for those actions listed in B5.1(b) of this appendix.
- (b) Covered actions include rulemakings that establish energy conservation standards for consumer products and industrial equipment, provided that the actions would not: (1) Have the potential to cause a significant change in manufacturing infrastructure (such as construction of new manufacturing plants with considerable associated ground disturbance); (2) involve significant unresolved conflicts concerning alternative uses of available resources (such as rare or limited raw materials); (3) have the potential to result in a significant increase in the disposal of materials posing significant risks to human health and the environment (such as RCRA hazardous wastes); or (4) have the potential to cause a significant increase in energy consumption in a State or region.

## **B5.2 Modifications to Pumps and Piping**

Modifications to existing pump and piping configurations (including, but not limited to, manifolds, metering systems, and other instrumentation on such configurations conveying materials such as air, brine, carbon dioxide, geothermal system fluids, hydrogen gas, natural gas, nitrogen gas, oil, produced water, steam, and water). Covered modifications would not have the potential to cause significant changes to design process flow rates or permitted air emissions.

## **B5.3 Modification or Abandonment of Wells**

Modification (but not expansion) or plugging and abandonment of wells, provided that site characterization has verified a low potential for seismicity, subsidence, and contamination of freshwater aquifers, and the actions are otherwise consistent with best practices and DOE protocols, including those that protect against uncontrolled releases of harmful materials. Such wells may include, but are not limited to, storage and injection wells for brine, carbon dioxide, coalbed methane, gas hydrate, geothermal, natural gas, and oil. Covered modifications would not be part of site closure.

#### **B5.4 Repair or Replacement of Pipelines**

Repair, replacement, upgrading, rebuilding, or minor relocation of pipelines within existing rights-of-way, provided that the actions are in accordance with applicable requirements (such as Army Corps of Engineers permits under section 404 of the Clean Water Act). Pipelines may convey materials including, but not limited to, air, brine, carbon dioxide, geothermal system fluids, hydrogen gas, natural gas, nitrogen gas, oil, produced water, steam, and water.

#### **B5.5 Short Pipeline Segments**

Construction and subsequent operation of short (generally less than 20 miles in length) pipeline segments conveying materials (such as air, brine, carbon dioxide, geothermal system fluids, hydrogen gas, natural gas, nitrogen gas, oil, produced water, steam, and water) between existing source facilities and existing receiving facilities (such as facilities for use, reuse, transportation, storage, and refining), provided that the pipeline segments are within previously disturbed or developed rights-of-way.

#### **B5.6 Oil Spill Cleanup**

Removal of oil and contaminated materials recovered in oil spill cleanup operations and disposal of these materials in accordance with applicable requirements (such as the National Oil and Hazardous Substances Pollution Contingency Plan).

#### **B5.7 Import or Export Natural Gas, With Operational Changes**

Approvals or disapprovals of new authorizations or amendments of existing authorizations to import or export natural gas under section 3 of the Natural Gas Act that involve minor operational changes (such as changes in natural gas throughput, transportation, and storage operations) but not new construction.

#### **B5.8 Import or Export Natural Gas, With New Cogeneration Powerplant**

Approvals or disapprovals of new authorizations or amendments of existing authorizations to import or export natural gas under section 3 of the Natural Gas Act that involve new cogeneration powerplants (as defined in the Powerplant and Industrial Fuel Use Act of 1978, as amended) within or contiguous to an existing industrial complex and requiring generally less than 10 miles of new natural gas pipeline or 20 miles within previously disturbed or developed rights-of-way.

#### **B5.9 Temporary Exemptions For Electric Powerplants**

Grants or denials of temporary exemptions under the Powerplant and Industrial Fuel Use Act of 1978, as amended, for electric powerplants.

#### **B5.10 Certain Permanent Exemptions For Existing Electric Powerplants**

For existing electric powerplants, grants or denials of permanent exemptions under the Powerplant and Industrial Fuel Use Act of 1978, as amended, other than exemptions under section 312(c) relating to cogeneration and section 312(b) relating to certain State or local requirements.

#### **B5.11 Permanent Exemptions Allowing Mixed Natural Gas and Petroleum**

For new electric powerplants, grants or denials of permanent exemptions from the prohibitions of Title II of the Powerplant and Industrial Fuel Use Act of 1978, as amended, to permit the use of certain fuel mixtures containing natural gas or petroleum.

#### **B5.12 Workover of Existing Wells**

Workover (operations to restore production, such as deepening, plugging back, pulling and resetting lines, and squeeze cementing) of existing wells (including, but not limited to, activities associated with brine, carbon dioxide, coalbed methane, gas hydrate, geothermal, natural gas, and oil) to restore functionality, provided that workover operations are restricted to the existing wellpad and do not involve any new site preparation or earthwork that would have the potential to cause significant impacts on nearby habitat; that site characterization has verified a low potential for seismicity, subsidence, and contamination of freshwater aquifers; and the actions are otherwise consistent with best practices and DOE protocols, including those that protect against uncontrolled releases of harmful materials.

#### **B5.13 Experimental Wells for Injection of Small Quantities of Carbon Dioxide**

Siting, construction, operation, plugging, and abandonment of experimental wells for the injection of small quantities of carbon dioxide (and other incidentally co-captured gases) in locally characterized, geologically secure storage formations at or near existing carbon dioxide sources to determine the suitability of the formations for large-scale sequestration, provided that (1) the characterization has verified a low potential for seismicity, subsidence, and contamination of freshwater aquifers; (2) the wells are otherwise in accordance with applicable requirements, best practices, and DOE protocols, including those that protect against uncontrolled releases of harmful materials; and (3) the wells and associated drilling activities are sufficiently remote so that they would not have the potential to cause significant impacts related to noise and other vibrations. Wells may be used for enhanced oil or natural gas recovery or for secure storage of carbon dioxide in saline formations or other secure formations. Over the duration of a project, the wells would be used to inject, in aggregate, less than 500,000 tons of carbon dioxide into the geologic formation. Covered actions exclude activities in salt water and freshwater environments. (See B3.16 of this appendix for activities in salt water and freshwater environments.)

#### **B5.14 Combined Heat and Power or Cogeneration Systems**

Conversion to, replacement of, or modification of combined heat and power or cogeneration systems (the sequential or simultaneous production of multiple forms of energy, such as thermal and electrical energy, in a single integrated system) at existing facilities, provided that the conversion, replacement, or modification would not have the potential to cause a significant increase in the quantity or rate of air emissions and would not have the potential to cause significant impacts to water resources.

#### **B5.15 Small-Scale Renewable Energy Research and Development and Pilot Projects**

Small-scale renewable energy research and development projects and small-scale pilot projects located within a previously disturbed or developed area. Covered actions would be in accordance with applicable requirements (such as local land use and zoning requirements) in the proposed project area and would incorporate appropriate control technologies and best management practices.

#### **B5.16 Solar Photovoltaic Systems**

The installation, modification, operation, and removal of commercially available solar photovoltaic systems located on a building or other structure (such as rooftop, parking lot or facility, and mounted to signage, lighting, gates, or fences), or if located on land, generally comprising less than 10 acres

within a previously disturbed or developed area. Covered actions would be in accordance with applicable requirements (such as local land use and zoning requirements) in the proposed project area and would incorporate appropriate control technologies and best management practices.

#### **B5.17 Solar Thermal Systems**

The installation, modification, operation, and removal of commercially available small-scale solar thermal systems (including, but not limited to, solar hot water systems) located on or contiguous to a building, and if located on land, generally comprising less than 10 acres within a previously disturbed or developed area. Covered actions would be in accordance with applicable requirements (such as local land use and zoning requirements) in the proposed project area and would incorporate appropriate control technologies and best management practices.

#### **B5.18 Wind Turbines**

The installation, modification, operation, and removal of commercially available small wind turbines, with a total height generally less than 200 feet (measured from the ground to the maximum height of blade rotation) that (1) are located within a previously disturbed or developed area; (2) are located more than 10 nautical miles from an airport or aviation navigation aid; (3) are located more than 1.5 nautical miles from National Weather Service or Federal Aviation Administration Doppler weather radar; (4) would not have the potential to cause significant impacts on bird or bat species; and (5) are sited or designed such that the project would not have the potential to cause significant impacts to persons (such as shadow flicker and other visual impacts, and noise). Covered actions would be in accordance with applicable requirements (such as local land use and zoning requirements) in the proposed project area and would incorporate appropriate control technologies and best management practices.

#### **B5.19 Ground Source Heat Pumps**

The installation, modification, operation, and removal of commercially available small-scale ground source heat pumps to support operations in single facilities (such as a school and community center) or contiguous facilities (such as an office complex) (1) only where major associated activities (such as drilling and discharge) are regulated, and appropriate leakage and contaminant control measures would be in place; (2) that would not have the potential to cause significant changes in subsurface temperature; and (3) would be located within a previously disturbed or developed area. Covered actions would be in accordance with applicable requirements (such as local land use and zoning requirements) in the proposed project area and would incorporate appropriate control technologies and best management practices.

#### **B5.20 Biomass Power Plants**

The installation, modification, operation, and removal of small-scale biomass power plants (generally less than 10 megawatts), using commercially available technology (1) intended primarily to support operations in single facilities (such as a school and community center) or contiguous facilities (such as an office complex); (2) that would not affect the air quality attainment status of the area and would not have the potential to cause a significant increase in the quantity or rate of air emissions and would not have the potential to cause significant impacts to water resources; and (3) would be located within a previously disturbed or developed area. Covered actions would be in accordance with applicable requirements (such as local land use and zoning requirements) in the proposed project area and would incorporate appropriate control technologies and best management practices.

#### **B5.21 Methane Gas Recovery and Utilization Systems**

The installation, modification, operation, and removal of commercially available methane gas recovery and utilization systems installed within a previously disturbed or developed area on or contiguous to an existing landfill or wastewater treatment plant that would not have the potential to cause a significant increase in the quantity or rate of air emissions. Covered actions would be in accordance with applicable requirements (such as local land use and zoning requirements) in the proposed project area and would incorporate appropriate control technologies and best management practices.

#### **B5.22 Alternative Fuel Vehicle Fueling Stations**

The installation, modification, operation, and removal of alternative fuel vehicle fueling stations (such as for compressed natural gas, hydrogen, ethanol and other commercially available biofuels) on the site of a current or former fueling station, or within a previously disturbed or developed area within the boundaries of a facility managed by the owners of a vehicle fleet. Covered actions would be in accordance with applicable requirements (such as local land use and zoning requirements) in the proposed project area and would incorporate appropriate control technologies and best management practices.

#### **B5.23 Electric Vehicle Charging Stations**

The installation, modification, operation, and removal of electric vehicle charging stations, using commercially available technology, within a previously disturbed or developed area. Covered actions are limited to areas where access and parking are in accordance with applicable requirements (such as local land use and zoning requirements) in the proposed project area and would incorporate appropriate control technologies and best management practices.

#### **B5.24 Drop-In Hydroelectric Systems**

The installation, modification, operation, and removal of commercially available small-scale, drop-in, run-of-the-river hydroelectric systems that would (1) involve no water storage or water diversion from the stream or river channel where the system is installed and (2) not have the potential to cause significant impacts on water quality, temperature, flow, or volume. Covered systems would be located up-gradient of a natural anadromous fish barrier and where there would not be the potential for significant impacts to threatened or endangered species. Covered actions would involve no major construction or modification of stream or river channels, and the hydroelectric systems would be placed and secured in the channel without the use of heavy equipment. Covered actions would be in accordance with applicable requirements (such as local land use and zoning requirements) in the proposed project area and would incorporate appropriate control technologies and best management practices.

#### **B5.25 Small-Scale Renewable Energy Research and Development and Pilot Projects in Salt Water and Freshwater Environments**

Small-scale renewable energy research and development projects and small-scale pilot projects located in salt water and freshwater environments. Activities would be in accordance with, where applicable, an approved spill prevention, control, and response plan, and would incorporate appropriate control technologies and best management practices. Covered actions would not occur (1) within areas of hazardous natural bottom conditions or (2) within the boundary of an established marine sanctuary or wildlife refuge, a governmentally proposed marine sanctuary or wildlife refuge, or a governmentally recognized area of high biological sensitivity (such as protected areas and other areas of known ecological importance, whale and marine mammal mating and calving/pupping areas, and fish and invertebrate spawning and nursery areas recognized as being limited or unique and vulnerable to perturbation; these areas can occur in bays, estuaries, near shore, and far offshore, and may vary seasonally), or outside those areas if the activities would have the potential to cause



significant impacts within those areas. No permanent facilities or devices would be constructed or installed. Covered actions do not include drilling of resource exploration or extraction wells, use of large-scale vibratory coring techniques, or seismic activities other than passive techniques.

## **B6. Categorical Exclusions Applicable to Environmental Restoration and Waste Management Activities**

### **B6.1 Cleanup Actions**

Small-scale, short-term cleanup actions, under RCRA, Atomic Energy Act, or other authorities, less than approximately 10 million dollars in cost, to reduce risk to human health or the environment from the release or threat of release of a hazardous substance other than high-level radioactive waste and spent nuclear fuel, including treatment (such as incineration, encapsulation, physical or chemical separation, and compaction), recovery, storage, or disposal of wastes at existing facilities currently handling the type of waste involved in the action. These actions include, but are not limited to:

- (a) Excavation or consolidation of contaminated soils or materials from drainage channels, retention basins, ponds, and spill areas that are not receiving contaminated surface water or wastewater, if surface water or groundwater would not collect and if such actions would reduce the spread of, or direct contact with, the contamination;
- (b) Removal of bulk containers (such as drums and barrels) that contain or may contain hazardous substances, pollutants, contaminants, CERCLA-excluded petroleum or natural gas products, or hazardous wastes (designated in 40 CFR part 261 or applicable State requirements), if such actions would reduce the likelihood of spillage, leakage, fire, explosion, or exposure to humans, animals, or the food chain;
- (c) Removal of an underground storage tank including its associated piping and underlying containment systems in accordance with applicable requirements (such as RCRA, subtitle I; 40 CFR part 265, subpart J; and 40 CFR part 280, subparts F and G) if such action would reduce the likelihood of spillage, leakage, or the spread of, or direct contact with, contamination;
- (d) Repair or replacement of leaking containers;
- (e) Capping or other containment of contaminated soils or sludges if the capping or containment would not unduly limit future groundwater remediation and if needed to reduce migration of hazardous substances, pollutants, contaminants, or CERCLA-excluded petroleum and natural gas products into soil, groundwater, surface water, or air;
- (f) Drainage or closing of man-made surface impoundments if needed to maintain the integrity of the structures;
- (g) Confinement or perimeter protection using dikes, trenches, ditches, or diversions, or installing underground barriers, if needed to reduce the spread of, or direct contact with, the contamination;
- (h) Stabilization, but not expansion, of berms, dikes, impoundments, or caps if needed to maintain integrity of the structures;
- (i) Drainage controls (such as run-off or run-on diversion) if needed to reduce offsite migration of hazardous substances, pollutants, contaminants, or CERCLA-excluded

petroleum or natural gas products or to prevent precipitation or run-off from other sources from entering the release area from other areas;

- (j) Segregation of wastes that may react with one another or form a mixture that could result in adverse environmental impacts;
- (k) Use of chemicals and other materials to neutralize the pH of wastes;
- (l) Use of chemicals and other materials to retard the spread of the release or to mitigate its effects if the use of such chemicals would reduce the spread of, or direct contact with, the contamination;
- (m) Installation and operation of gas ventilation systems in soil to remove methane or petroleum vapors without any toxic or radioactive co-contaminants if appropriate filtration or gas treatment is in place;
- (n) Installation of fences, warning signs, or other security or site control precautions if humans or animals have access to the release; and
- (o) Provision of an alternative water supply that would not create new water sources if necessary immediately to reduce exposure to contaminated household or industrial use water and continuing until such time as local authorities can satisfy the need for a permanent remedy.

## **B6.2 Waste Collection, Treatment, Stabilization, and Containment Facilities**

The siting, construction, and operation of temporary (generally less than 2 years) pilot-scale waste collection and treatment facilities, and pilot-scale (generally less than 1 acre) waste stabilization and containment facilities (including siting, construction, and operation of a small-scale laboratory building or renovation of a room in an existing building for sample analysis), provided that the action (1) supports remedial investigations/feasibility studies under CERCLA, or similar studies under RCRA (such as RCRA facility investigations/corrective measure studies) or other authorities and (2) would not unduly limit the choice of reasonable remedial alternatives (such as by permanently altering substantial site area or by committing large amounts of funds relative to the scope of the remedial alternatives).

## **B6.3 Improvements to Environmental Control Systems**

Improvements to environmental monitoring and control systems of an existing building or structure (such as changes to scrubbers in air quality control systems or ion-exchange devices and other filtration processes in water treatment systems), provided that during subsequent operations (1) any substance collected by the environmental control systems would be recycled, released, or disposed of within existing permitted facilities and (2) there are applicable statutory or regulatory requirements or permit conditions for disposal, release, or recycling of any hazardous substance or CERCLA-excluded petroleum or natural gas products that are collected or released in increased quantity or that were not previously collected or released.

## **B6.4 Facilities for Storing Packaged Hazardous Waste for 90 Days or Less**

Siting, construction, modification, expansion, operation, and decommissioning of an onsite facility for storing packaged hazardous waste (as designated in 40 CFR part 261) for 90 days or less or for longer periods as provided in 40 CFR 262.34(d), (e), or (f) (such as accumulation or satellite areas).

## **B6.5 Facilities for Characterizing and Sorting Packaged Waste and Overpacking Waste**

Siting, construction, modification, expansion, operation, and decommissioning of an onsite facility for characterizing and sorting previously packaged waste or for overpacking waste, other than high-level radioactive waste, provided that operations do not involve unpacking waste. These actions do not include waste storage (covered under B6.4, B6.6, B6.10 of this appendix, and C16 of appendix C) or the handling of spent nuclear fuel.

## **B6.6 Modification of Facilities for Storing, Packaging, and Repacking Waste**

Modification (excluding increases in capacity) of an existing structure used for storing, packaging, or repacking waste other than high-level radioactive waste or spent nuclear fuel, to handle the same class of waste as currently handled at that structure.

## **B6.7 [Reserved]**

## **B6.8 Modifications for Waste Minimization and Reuse of Materials**

Minor operational changes at an existing facility to minimize waste generation and for reuse of materials. These changes include, but are not limited to, adding filtration and recycle piping to allow reuse of machining oil, setting up a sorting area to improve process efficiency, and segregating two waste streams previously mingled and assigning new identification codes to the two resulting wastes.

## **B6.9 Measures To Reduce Migration of Contaminated Groundwater**

Small-scale temporary measures to reduce migration of contaminated groundwater, including the siting, construction, operation, and decommissioning of necessary facilities. These measures include, but are not limited to, pumping, treating, storing, and reinjecting water, by mobile units or facilities that are built and then removed at the end of the action.

## **B6.10 Upgraded or Replacement Waste Storage Facilities**

Siting, construction, modification, expansion, operation, and decommissioning of a small upgraded or replacement facility (less than approximately 50,000 square feet in area) within or contiguous to a previously disturbed or developed area (where active utilities and currently used roads are readily accessible) for storage of waste that is already at the site at the time the storage capacity is to be provided. These actions do not include the storage of high-level radioactive waste, spent nuclear fuel or any waste that requires special precautions to prevent nuclear criticality. (See also B6.4, B6.5, B6.6 of this appendix, and C16 of appendix C.)

## **B7. Categorical Exclusions Applicable to International Activities**

### **B7.1 Emergency Measures Under the International Energy Program**

Planning and implementation of emergency measures pursuant to the International Energy Program.

### **B7.2 Import and Export of Special Nuclear or Isotopic Materials**

Approval of import or export of small quantities of special nuclear materials or isotopic materials in accordance with applicable requirements (such as the Nuclear Non-Proliferation Act of 1978 and the "Procedures Established Pursuant to the Nuclear Non-Proliferation Act of 1978" (43 FR 25326, June 9, 1978)).

## **Appendix C to Subpart D of Part 1021—Classes of Actions That Normally Require EAs But Not Necessarily EISs**

**C1** [Reserved]

**C2** [Reserved]

**C3** **Electric Power Marketing Rate Changes, Not Within Normal Operating Limits**

Rate changes for electric power, power transmission, and other products or services provided by Power Marketing Administrations that are based on changes in revenue requirements if the operations of generation projects would not remain within normal operating limits.

**C4** **Upgrading, Rebuilding, or Construction of Electric Transmission Lines**

Upgrading or rebuilding more than approximately 20 miles in length of existing electric transmission lines; or construction of electric transmission lines (1) more than approximately 10 miles in length outside previously disturbed or developed transmission line or pipeline rights-of-way or (2) more than approximately 20 miles in length within previously disturbed or developed transmission line or pipeline rights-of-way.

**C5** **Vegetation Management Program**

Implementation of a Power Marketing Administration system-wide vegetation management program.

**C6** **Erosion Control Program**

Implementation of a Power Marketing Administration system-wide erosion control program.

**C7** **Contracts, Policies, and Marketing and Allocation Plans for Electric Power**

Establishment and implementation of contracts, policies, and marketing and allocation plans related to electric power acquisition or transmission that involve (1) the interconnection of, or acquisition of power from, new generation resources that are equal to or less than 50 average megawatts and that would not be eligible for categorical exclusion under this part; (2) changes in the normal operating limits of generation resources equal to or less than 50 average megawatts; or (3) service to discrete new loads of less than 10 average megawatts over a 12-month period.

**C8** **Protection of Cultural Resources and Fish and Wildlife Habitat**

Large-scale activities undertaken to protect cultural resources (such as fencing, labeling, and flagging) or to protect, restore, or improve fish and wildlife habitat, fish passage facilities (such as fish ladders and minor diversion channels), or fisheries.

**C9** **Wetlands Demonstration Projects**

Field demonstration projects for wetlands mitigation, creation, and restoration.

**C10** [Reserved]

**C11** **Particle Acceleration Facilities**

Siting, construction or modification, operation, and decommissioning of low- or medium-energy (when the primary beam energy exceeds approximately 100 million electron volts and the average beam power exceeds approximately 250 kilowatts or where the average current exceeds 2.5 milliamperes) particle acceleration facilities, including electron beam acceleration facilities, and associated beamlines, storage rings, colliders, and detectors for research and medical purposes, within or contiguous to a previously disturbed or developed area (where active utilities and currently used roads are readily accessible).

#### **C12 Energy System Demonstration Actions**

Siting, construction, and operation of energy system demonstration actions (including, but not limited to, wind resource, hydropower, geothermal, fossil fuel, biomass, and solar energy, but excluding nuclear). For purposes of this category, “demonstration actions” means actions that are undertaken at a scale to show whether a technology would be viable on a larger scale and suitable for commercial deployment. Demonstration actions frequently follow research and development and pilot projects that are directed at establishing proof of concept.

#### **C13 Import or Export Natural Gas Involving Minor New Construction**

Approvals or disapprovals of authorizations to import or export natural gas under section 3 of the Natural Gas Act involving minor new construction (such as adding new connections, looping, or compression to an existing natural gas or liquefied natural gas pipeline, or converting an existing oil pipeline to a natural gas pipeline using the same right-of-way).

#### **C14 Water Treatment Facilities**

Siting, construction (or expansion), operation, and decommissioning of wastewater, surface water, potable water, and sewage treatment facilities with a total capacity greater than approximately 250,000 gallons per day, and of lower capacity wastewater and surface water treatment facilities whose liquid discharges are not subject to external regulation.

#### **C15 Research and Development Incinerators and Nonhazardous Waste Incinerators**

Siting, construction (or expansion), and operation of research and development incinerators for any type of waste and of any other incinerators that would treat nonhazardous solid waste (as designated in 40 CFR 261.4(b)).

#### **C16 Large Waste Packaging and Storage Facilities**

Siting, construction, modification to increase capacity, operation, and decommissioning of packaging and unpacking facilities (such as characterization operations) and large storage facilities (greater than approximately 50,000 square feet in area) for waste, except high-level radioactive waste, generated onsite or resulting from activities connected to site operations. These actions do not include storage, packaging, or unpacking of spent nuclear fuel. (See also B6.4, B6.5, B6.6, and B6.10 of appendix B.)

### **Appendix D to Subpart D of Part 1021—Classes of Actions That Normally Require EISs**

#### **D1 Strategic Systems**

Strategic Systems, as defined in DOE Order 430.1, “Life-Cycle Asset Management,” or its successor, and designated by the Secretary.

**D2 Nuclear Fuel Reprocessing Facilities**

Siting, construction, operation, and decommissioning of nuclear fuel reprocessing facilities.

**D3 Uranium Enrichment Facilities**

Siting, construction, operation, and decommissioning of uranium enrichment facilities.

**D4 Reactors**

Siting, construction, operation, and decommissioning of power reactors, nuclear material production reactors, and test and research reactors.

**D5 [Reserved]****D6 [Reserved]****D7 Contracts, Policies, and Marketing and Allocation Plans for Electric Power**

Establishment and implementation of contracts, policies, and marketing and allocation plans related to electric power acquisition or transmission that involve (1) the interconnection of, or acquisition of power from, new generation resources greater than 50 average megawatts; (2) changes in the normal operating limits of generation resources greater than 50 average megawatts; or (3) service to discrete new loads of 10 average megawatts or more over a 12-month period.

**D8 Import or Export of Natural Gas Involving Major New Facilities**

Approvals or disapprovals of authorizations to import or export natural gas under section 3 of the Natural Gas Act involving construction of major new natural gas pipelines or related facilities (such as liquefied natural gas terminals and regasification or storage facilities) or significant expansions and modifications of existing pipelines or related facilities).

**D9 Import or Export of Natural Gas Involving Major Operational Change**

Approvals or disapprovals of authorizations to import or export natural gas under section 3 of the Natural Gas Act involving major operational changes (such as a major increase in the quantity of liquefied natural gas imported or exported).

**D10 Treatment, Storage, and Disposal Facilities for High-Level Waste and Spent Nuclear Fuel**

Siting, construction, operation, and decommissioning of major treatment, storage, and disposal facilities for high-level waste and spent nuclear fuel, including geologic repositories, but not including onsite replacement or upgrades of storage facilities for spent nuclear fuel at DOE sites where such replacement or upgrade would not result in increased storage capacity.

**D11 Waste Disposal Facilities for Transuranic Waste**

Siting, construction or expansion, and operation of disposal facilities for transuranic (TRU) waste and TRU mixed waste (TRU waste also containing hazardous waste as designated in 40 CFR part 261).

## **D12 Incinerators**

Siting, construction, and operation of incinerators, other than research and development incinerators or incinerators for nonhazardous solid waste (as designated in 40 CFR 261.4(b)).

[FR Doc. [2010-32316](#) Filed 12-30-10; 8:45 am]

## **SUPPLEMENTARY INFORMATION – Response to Comments on Proposed Changes to 10 CFR 1021 (FR**

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### **I. Background**

DOE promulgated its regulations entitled “National Environmental Policy Act Implementing Procedures” (**10 CFR part 1021**) on April 24, 1992 (57 FR 15122), and revised these regulations on July 9, 1996 (**61 FR 36222**), December 6, 1996 (**61 FR 64603**), and August 27, 2003 (**68 FR 51429**). The DOE NEPA regulations at **10 CFR part 1021** contain procedures that DOE shall use to comply with section 102(2) of the National Environmental Policy Act (NEPA) of 1969 (**42 U.S.C. 4332(2)**) and the Council on Environmental Quality (CEQ) regulations for implementing the procedural provisions of NEPA (**40 CFR parts 1500-1508**). DOE published a Notice of Proposed Rulemaking on January 3, 2011 (**76 FR 214**), to solicit public comments on its proposal to further revise these regulations by adding new categorical exclusions, revising existing categorical exclusions, and making certain other changes.

Publication of the Notice of Proposed Rulemaking began a 45-day public comment period, scheduled to end on February 17, 2011, which included a public hearing on February 4, 2011, at DOE headquarters in Washington, DC. On February 23, 2011, in response to a request from the National Wildlife Federation, on behalf of itself and 9 other organizations, for additional time to review the proposed rule and submit comments, DOE re-opened the comment period until March 7, 2011 (**76 FR 9981**).

DOE received comments from private citizens, trade associations, nongovernmental organizations, Federal agencies, and a tribal government agency. The transcript of the public hearing, a request to extend the comment period, and the 29 comment documents received by DOE, including two documents received after the close of the comment period, are available on the DOE NEPA Web site (<http://energy.gov/nepa>) and on the Regulations.gov Web site (<http://www.regulations.gov>) at docket ID: DOE-HQ-2010-0002.

DOE considered all comments received, including those comments on categorical exclusions for which DOE did not propose any changes. DOE's response to the comments is contained in section IV, Comments Received and DOE's Responses, below.

The revisions DOE is making are consistent with guidance issued by CEQ on establishing, applying, and revising categorical exclusions under NEPA (CEQ, “Final Guidance for Federal Departments and Agencies on Establishing, Applying, and Revising Categorical Exclusions Under the National Environmental Policy Act”; hereafter, CEQ Categorical Exclusion Guidance) (**75 FR 75628**; December 6, 2010). On December 29, 2009, DOE initiated its periodic review by publishing a Request for



Information in the Federal Register (**74 FR 68720**) (<http://www.gpo.gov/fdsys/pkg/FR-2009-12-29/pdf/E9-30829.pdf>) that sought input from interested parties to help identify activities that should be considered for new or revised categorical exclusions. Moreover, DOE evaluated each of its existing categorical exclusions in preparing these revisions, and this rulemaking satisfies CEQ's recommendation for periodic review of an agency's categorical exclusions.

This document adopts the revisions proposed in the Notice of Proposed Rulemaking, with certain changes discussed below, and amends DOE's existing regulations at **10 CFR part 1021**. In accordance with **40 CFR 1507.3**, CEQ reviewed this final rule and concluded that the proposed amendment of DOE's NEPA implementing regulations is in conformance with NEPA and the CEQ regulations. The Secretary of Energy has approved this final rule for publication.

Within this document, "existing rule" refers to DOE's current NEPA implementing regulations (as last modified in 2003, before the revisions announced in this document); "proposed rule" refers to changes identified in DOE's Notice of Proposed Rulemaking published on January 3, 2011; and "new rule" or "final rule" refers to the changes identified in this document, which will become effective on November 14, 2011.

## **II. Statement of Purpose**

The Department last revised the categorical exclusions in its NEPA implementing regulations in 1996. Since that time, the range of activities in which DOE is involved has changed and expanded. For example, in recent years, DOE has reviewed thousands of applications from private entities requesting financial support for projects to develop new or improved energy technologies, including for renewable energy sources. This experience highlighted the potential for new and revised categorical exclusions and helped DOE identify appropriate limits to include in these categorical exclusions to ensure that the activities described normally would not have the potential for significant environmental impact.

The purpose of this rulemaking is to revise certain provisions of DOE's NEPA implementing regulations to better align DOE's categorical exclusions with its current activities and its experience and to bring the provisions up-to-date with current technology, operational practices, and regulatory requirements. The changes will facilitate compliance with NEPA by providing for more efficient review of actions (for example, helping the Department meet the goals set forth in the Energy Policy Act of 2005), and allowing the Department to focus its resources on evaluating proposed actions that have the potential for significant environmental impacts. The changes will also increase transparency by providing the public more specific information as to the circumstances in which DOE is likely to invoke a categorical exclusion.

### **What kinds of changes is DOE making?**

DOE is amending **10 CFR part 1021**, subparts B, C, and D. Most of the changes affect the categorical exclusion provisions at **10 CFR part 1021**, subpart D, appendices A and B.

DOE is adding 20 new categorical exclusions. These categorical exclusions address stormwater runoff control; lead-based paint containment, removal, and disposal; drop-off, collection, and transfer facilities for recyclable material; determinations of excess real property; small-scale educational facilities; small-scale indoor research and development projects using nanoscale materials; research activities in aquatic environments; experimental wells for injection of small quantities of carbon dioxide; combined heat and power or cogeneration systems; small-scale renewable energy research and development and pilot projects; solar photovoltaic systems; solar thermal systems; wind turbines; ground source heat pumps; biomass power plants; methane gas recovery and utilization systems; alternative fuel vehicle fueling stations; electric vehicle charging stations; drop-in hydroelectric systems; and small-scale renewable energy research and development and pilot projects in aquatic environments. These new categorical exclusions include criteria (*e.g.*, acreage, location, and height limitations), based on DOE and other agency experience and regulatory requirements, that limit the covered actions to those that normally would not have the potential to cause significant impacts. DOE is removing two categorical exclusion categories, one environmental assessment category, and three environmental impact statement categories.

DOE also is modifying many of the existing categorical exclusions. These revisions include substantive changes, changes to update regulatory or statutory references and requirements, and editorial changes. By “substantive” changes, DOE means a change that is more than a clarifying or consistency change; this term includes changes that alter the scope or meaning of a provision or that result in the addition or deletion of a provision.

DOE is making several minor technical and organizational changes in the final rule, four of which were not identified at the time of the Notice of Proposed Rulemaking. First, after issuing the Notice of Proposed Rulemaking, DOE noted that **10 CFR 1021.215(d)** includes an outdated reference to § 1021.312. In the DOE NEPA regulations promulgated in 1992, § 1021.312 addressed environmental impact statement implementation plans. In 1996, DOE removed this requirement, and the section number was reserved. Therefore, DOE is deleting the reference to § 1021.312 from § 1021.215. Second, in the Notice of Proposed Rulemaking, DOE proposed two changes to correct cross-references within § 1021.311. After further consideration, DOE is modifying the proposed change to § 1021.311(d) to improve clarity by deleting the introductory clause, rather than only correcting the cross-reference in that clause. (As described in the Notice of Proposed Rulemaking, DOE is also revising § 1021.311(f) (*i.e.*, correcting one cross-reference).) Third, in the Notice of Proposed Rulemaking, DOE proposed to change the title for the group of categorical exclusions from B4.1 through B4.13. After further consideration, DOE is further modifying the title to “Categorical Exclusions Applicable to Electric Power and Transmission.” Fourth, a comment from Tri-Valley CAREs (at page 1)

requested that DOE not remove the table of contents from its NEPA regulations (as proposed in the Notice of Proposed Rulemaking), explaining that the table of contents is “extremely useful.” In response, DOE is retaining a table of contents in each appendix. These changes have no regulatory effect.

### **III. Overview of Categorical Exclusions**

#### **What is a categorical exclusion?**

A categorical exclusion is a category (class) of actions that a Federal agency has determined normally do not, individually or cumulatively, have a significant impact on the human environment and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. See **40 CFR 1508.4**. A categorical exclusion determination is made when an agency finds that a particular proposed action fits within a categorical exclusion and meets other applicable requirements, including the absence of extraordinary circumstances (*i.e.*, circumstances in which a normally excluded action may have a significant environmental effect).

DOE establishes categorical exclusions pursuant to a rulemaking, such as this one, for defined classes of actions that the Department determines are supported by a record showing that they normally will not have significant environmental impacts, individually or cumulatively. This record is based on DOE's experience, the experience of other agencies, completed environmental reviews, professional and expert opinion, and scientific analyses. DOE also considers public comment received during the rulemaking, as detailed in section IV, Comments Received and DOE's Responses, below.

As CEQ states in its Categorical Exclusion Guidance, “Categorical exclusions are not exemptions or waivers of NEPA review; they are simply one type of NEPA review \* \* \*. Once established, categorical exclusions provide an efficient tool to complete the NEPA environmental review process for proposals that normally do not require more resource-intensive EAs [environmental assessments] or EISs [environmental impact statements]. The use of categorical exclusions can reduce paperwork and delay, so that EAs or EISs are targeted toward proposed actions that truly have the potential to cause significant environmental effects” (75 FR at 75631).

#### **How does DOE use a categorical exclusion in its decisionmaking?**

As part of its environmental review responsibilities under NEPA, a DOE NEPA Compliance Officer examines an individual proposed action to determine whether it qualifies for a categorical exclusion. DOE's process is consistent with that described in CEQ's Categorical Exclusion Guidance: “When determining whether to use a categorical exclusion for a proposed activity, a Federal agency must carefully review the description of the proposed action to ensure that it fits within the category of actions described in the categorical exclusion. Next, the agency must consider the specific

circumstances associated with the proposed activity, to rule out any extraordinary circumstances that might give rise to significant environmental effects requiring further analysis and documentation” in an environmental assessment or environmental impact statement (75 FR at 75631).

DOE's existing and new regulations ensure that the NEPA Compliance Officer follows the steps described by CEQ. Before DOE may apply a categorical exclusion to a particular proposed action, DOE must determine in accordance with 10 CFR 1021.410(b) that: (1) The proposed action fits within an established categorical exclusion as listed in appendix A or B to subpart D, (2) there are no extraordinary circumstances related to the proposal that may affect the significance of the environmental impacts of the proposed action, and (3) the proposal is not “connected” to other actions with potentially significant impacts and is not related to other actions with cumulatively significant impacts, and the proposed action is not precluded as an impermissible interim action pursuant to 40 CFR 1506.1 and 10 CFR 1021.211.

To fit within a categorical exclusion listed in appendix B, a proposed action also must satisfy certain conditions known as “integral elements” (appendix B, paragraphs (1) through (5)). Briefly, these conditions require that a categorical exclusion listed in appendix B not be applied to a proposed action with the potential to cause significant environmental impacts due to, for example, threatening a violation of applicable environmental, safety, and health requirements; requiring siting and construction, or major expansion, of a new waste storage, disposal, recovery, or treatment facility; disturbing hazardous substances such that there would be uncontrolled or unpermitted releases; having the potential to cause significant impacts on environmentally sensitive resources; or involving genetically engineered organisms, unless the proposed activity would be contained in a manner to prevent unauthorized release into the environment and conducted in accordance with applicable requirements.

The level of detail necessary to evaluate the potential for extraordinary circumstances and otherwise to determine whether a categorical exclusion is appropriate for a particular proposed action varies. For example, appendix A to subpart D lists categorical exclusions for several routine administrative actions, studies, and planning activities. A NEPA Compliance Officer normally can determine whether a categorical exclusion listed in appendix A is appropriate by reviewing a description of the proposed project. However, to determine whether a categorical exclusion from appendix B applies, in addition to the project description, a NEPA Compliance Officer also would consider information about a proposed project site and the result of reviews by other agencies (such as of historic properties or threatened and endangered species), as well as other related information.

#### **IV. Comments Received and DOE's Responses**

DOE has considered the comments on the proposed rulemaking received during the public comment period as well as all late comments. DOE has incorporated some revisions suggested in these comments into the final rule. The following discussion describes the comments received, provides DOE's response to the comments, and describes changes to the rule resulting from public comments and from DOE's further consideration of its proposal. DOE does not repeat discussion of topics in this final rule that have not changed relative to what was described in the Notice of Proposed Rulemaking. Thus, the Notice of Proposed Rulemaking may be consulted for further explanation regarding changes in the final rule.

DOE received no comments or only supportive comments on the following sections of the rule and is not making any changes beyond those discussed in the Notice of Proposed Rulemaking: In subpart C, sections 1021.322 and 1021.331; in subpart D, sections 1021.400; all of appendix A; in appendix B, paragraphs (1) through (2), and categorical exclusions B1.1, B1.2, B1.4, B1.6 through B1.8, B1.10, B1.12, B1.13, B1.15 through B1.17, B1.20 through B1.23, B1.27, B1.28, B1.30 through B1.32, B1.35, B1.36, B2.1, B2.2, B2.4 through B2.6, B3.2 through B3.5, B3.10, B3.13, B4.2, B4.3, B4.5, B4.8, B5.1, B5.2, B5.6, B5.7, B5.9 through B5.12, B5.14, B5.21 through B5.23, B6.2 through B6.10, B7.1, B7.2; in appendix C, C1 through C3, C5, C6, C9 through C11, C13, C14, C16; and in appendix D, D2 through D6, D8 through D12. In the final rule, therefore, these sections remain as discussed in the Notice of Proposed Rulemaking and are not discussed further. In addition, this final rule does not further discuss editorial changes described in the Notice of Proposed Rulemaking or in section II, Statement of Purpose, above.

#### **A. General Comments on Proposed Amendments**

The U.S. Environmental Protection Agency stated that the “proposed changes will enhance the efficiency of DOE's environmental review process while maintaining appropriate consideration of environmental effects pursuant to NEPA” and, accordingly, did not object to the proposed rulemaking.

In addition, several comments expressed support for the establishment of particular new categorical exclusions, especially for renewable energy technologies. DOE received comments expressing support for the following categorical exclusions as proposed: B1.7 (electronic equipment) from Edison Electric Institute (at page 2); B3.9 (projects to reduce emissions and waste generation) from Edison Electric Institute (at page 2) and National Wildlife Federation (at page 1); B3.16 (research activities in aquatic environments) from Biotechnology Industry Organization (at page 3) and Pacific Northwest National Laboratory, a DOE government research laboratory (at page 1); B5.13 (experimental wells for injection of small quantities of carbon dioxide) from Pacific Northwest National Laboratory (at page 1); B5.14 (combined heat and power or cogeneration systems) from Pacific Northwest National Laboratory (at page 1); B5.15 (small-scale renewable energy research and development and pilot projects) from Biotechnology Industry Organization (at page 3), Defenders of Wildlife (at page 2), and

Pacific Northwest National Laboratory (at page 1); B5.16 (solar photovoltaic systems) from Pacific Northwest National Laboratory (at page 1); B5.17 (solar thermal systems) from Pacific Northwest National Laboratory (at page 1); B5.18 (wind turbines) from Granite Construction Company (at page 2) and Pacific Northwest National Laboratory (at page 1); B5.19 (ground source heat pumps) from Pacific Northwest National Laboratory (at page 1); B5.20 (biomass power plants) from Pacific Northwest National Laboratory (at page 1); B5.21 (methane gas recovery and utilization systems) from Pacific Northwest National Laboratory (at page 1); B5.22 (alternative fuel vehicle fueling stations) from Pacific Northwest National Laboratory (at page 1); B5.23 (electric vehicle charging stations) from National Electrical Manufacturers Association (at page 1), National Wildlife Federation (at page 1), and Pacific Northwest National Laboratory (at page 1); B5.24 (drop-in hydroelectric systems) from Pacific Northwest National Laboratory (at page 1); and B5.25 (small-scale renewable energy research and development and pilot projects in aquatic environments) from Biotechnology Industry Organization (at page 3), Ocean Renewable Power Company (at page 1), and Pacific Northwest National Laboratory (at page 1). DOE received a comment from the Biotechnology Industry Organization (at pages 1 and 3) in support of the use of algal biomass for renewable energy production, stating that the existing regulatory framework was sufficient to protect human health and the environment. The comment supported the use of categorical exclusions for related small-scale and laboratory research and pilot projects. Finally, DOE received a comment from the Blue Ridge Environmental Defense League (at page 1) indicating general support for solar photovoltaic and solar thermal facilities and wind turbines, but cautioned that the public may see categorical exclusions as loopholes, which could undermine support for these technologies. DOE notes these comments. Section 1021.410 describes the process for applying a categorical exclusion.

Several comments expressed general objections to or concerns regarding DOE's proposed revision of its NEPA regulations. A comment from an anonymous individual (at pages 1-2) rejected all proposed changes, and a comment from the Blue Ridge Environmental Defense League (at page 1) opposed the addition of any categorical exclusions. DOE notes these comments. A comment from Jean Public (at page 1) listed wildlife, birds, reptiles, and mammals as environmental resources to be protected and stated that environmental assessments should never be allowed or used. DOE responds that DOE's NEPA regulations provide for the consideration of potential impacts on environmentally sensitive resources, and the provisions relating to environmental assessments are consistent with NEPA and the requirements of the CEQ NEPA regulations. A comment from Joyce Dillard (at page 1) stated that public health and safety should be a consideration first and foremost; DOE notes that public health and safety are among the key considerations in all NEPA reviews, including the establishment and application of categorical exclusions.

DOE received a comment from the Chesapeake Bay Foundation (at page 2) asking that DOE provide "a clear explanation and evidential support," in accordance with the CEQ Categorical Exclusion Guidance, when proposing categorical exclusions. DOE establishes categorical exclusions based on

Departmental experience, the experience of other agencies, completed environmental reviews, professional and expert opinion, and scientific analyses. For example, some of DOE's proposed categorical exclusions are supported by existing comparable categorical exclusions from other Federal agencies and their related experience. DOE prepared a Technical Support Document to provide analysis and identify reference documents supporting the revisions described in the Notice of Proposed Rulemaking. In preparation of this final rule, DOE updated and expanded the Technical Support Document. The Technical Support Document is available at <http://energy.gov/nepa/downloads/technical-support-document-supplement-department-energys-notice-final-rulemaking>.

A comment from the Biotechnology Industry Organization (at page 2) expressed support for science-based regulation that “focuses on reducing and eliminating actual risks to the natural and human environment” and applauded DOE's goals of removing barriers toward the adoption of innovative research on renewable energy.

A comment from the Kaibab Band of Paiute Indians (at page 1), citing the April 2010 Gulf oil spill, expressed opposition to the use of categorical exclusion determinations for experimental and research and development projects because of their unpredictability, and recommended that DOE analyze experimental or unproven techniques in environmental assessments or environmental impact statements. The comment recommends a similar approach for proven techniques employed in extreme situations. In response to this and other comments related to research and development activities, DOE reviewed its categorical exclusions and revised some of the listed actions and associated limits, such as described for categorical exclusions below. Limits on the size, scope, and other aspects (such as containment), combined with other criteria, restrict the application of categorical exclusions for research and development activities to projects that normally would not have a potential for significant environmental impacts. For proposed projects involving proven techniques in extreme situations, DOE would evaluate whether extraordinary circumstances are present such that application of a categorical exclusion is not appropriate.

DOE received a comment from Brian Musser (at page 2) regarding the regulation of coal combustion residue under Resource Conservation and Recovery Act Subtitle C. DOE considers this comment to be out of scope because it does not relate to the DOE NEPA regulations. However, DOE would consider potential impacts associated with coal combustion residue where relevant to NEPA review of a specific proposal.

## **B. Comments on DOE's NEPA Process**

A comment from the Ocean Renewable Power Company (at pages 1-2), referring to a pilot project for which DOE provides funding and another agency has licensing authority, stated that the NEPA

process involves duplicative and unnecessary reviews by multiple agencies, which increases costs for both the agencies and the applicant and imposes delays that can jeopardize private financing. This comment does not propose specific changes to DOE's NEPA regulations, but suggests that coordination with other environmental review requirements could be improved. DOE's NEPA regulations state, in § 1021.341, that "DOE shall integrate the NEPA process and coordinate NEPA compliance with other environmental review requirements to the fullest extent possible." DOE appreciates the concern expressed by the comment and will continue to seek ways to improve coordination of environmental review requirements.

A comment from the Chesapeake Bay Foundation (at page 2) supported the recommendation in the CEQ Categorical Exclusion Guidance that an agency such as DOE develop a schedule for the periodic review of its categorical exclusions at least every 7 years. DOE also agrees with the recommendation for periodic review and considers this rulemaking to satisfy the CEQ recommendation for the near term. DOE intends to review its categorical exclusions periodically, consistent with CEQ guidance, to ensure that DOE's categorical exclusions "remain current and appropriate," as stated in the CEQ guidance.

### **C. Comments on Amendments to Subpart D**

#### **1. Placement of Categorical Exclusions in Appendix A vs. Appendix B**

A comment from Pacific Northwest National Laboratory (at page 3) asked DOE to evaluate moving several categorical exclusions from appendix B, for which determinations are documented and made publicly available, to appendix A, for which determinations are not required to be documented. For example, the comment stated that requiring documentation for routine maintenance (categorical exclusion B1.3) that is performed many times daily is an inefficient use of resources and results in gaps in compliance. DOE decided not to move any categorical exclusion from appendix B to appendix A because such a change would reduce transparency in the Department's NEPA compliance program. To address the potential inefficiency identified by the comment, DOE is adding a new paragraph (**10 CFR 1021.410(f)**) to the final rule that describes current practice to address proposed recurring activities to be undertaken during a specified time period, such as routine maintenance activities for a year, in a single categorical exclusion determination after considering the potential aggregated impacts.

Another comment from Sandy Beranich (at page 1) stated that many categorical exclusions in appendix A are for routine activities, and NEPA should not be required for routine activities. The comment stated that, if some level of scale is not provided to indicate when an appendix A review is triggered, then DOE should post such appendix A categorical exclusion determinations online to inform the public how DOE uses its resources. DOE responds that the application of categorical



exclusions listed in appendix A normally is a simple matter that entails minimal cost. DOE has not found use of these categorical exclusions to be problematic and has not identified any need to establish a level of activity below which NEPA normally would not apply. Some DOE offices choose to post to the Web their determinations for categorical exclusions listed in appendix A, but DOE does not require this practice.

A comment from Sandy Beranich (at page 3) stated that NEPA “is all about ground-disturbing actions—not routine activities.” DOE disagrees that NEPA is limited to ground-disturbing activities (for example, activities could also have air or water impacts that would be appropriate for NEPA review), and is not making any change in response to this comment.

Another comment from Sandy Beranich (at page 3) provided an example of a proposed action, the components of which, in her opinion, fell within six different appendix A and appendix B categorical exclusions. DOE agrees that it is possible for a project to be covered by more than one categorical exclusion. Furthermore, as stated in DOE's NEPA regulations (10 CFR 1021.410(d)), a class of actions includes activities foreseeably necessary to proposals encompassed within the class of actions (such as associated transportation activities and award of implementing grants and contracts). Where an action might fit within multiple categorical exclusions, a NEPA Compliance Officer should use the categorical exclusion(s) that best fits the proposed action.

## **2. Previously Disturbed or Developed Area**

DOE received comments (e.g., from Chesapeake Bay Foundation (at page 4), Defenders of Wildlife (at page 2), and National Wildlife Federation (at pages 1, 4-5)) on the use of the phrase “previously disturbed or developed,” which appears in several categorical exclusions. In the Notice of Proposed Rulemaking, DOE explained that the phrase referred to “land that has been changed such that the former state of the area and its functioning ecological processes have been altered.” Comments (e.g., from Defenders of Wildlife (at page 2), National Wildlife Federation (at page 5)) expressed concern that the phrase was too vague to provide a useful limit and suggested, for example, including in the condition a requirement for the existence of infrastructure; further clarification is necessary, comments said. A comment from Sandy Beranich (at page 3) pointed out that land disturbed or developed in the past could, if abandoned, have reverted to a natural state and, therefore, suggested that “previously disturbed or developed” should be bounded by a timeframe. Comments (e.g., from Defenders of Wildlife (at page 2) and National Wildlife Federation (at page 4)) also suggested that DOE mention the many brownfield, Superfund, and abandoned mine locations that have been identified through the Environmental Protection Agency's Repowering America Program, in partnership with DOE. In response, DOE clarifies that the phrase “previously disturbed or developed” refers to land that has been changed such that its functioning ecological processes have been and remain altered by human activity. The phrase encompasses areas that have been transformed from natural cover to

non-native species or a managed state, including, but not limited to, utility and electric power transmission corridors and rights-of-way, and other areas where active utilities and currently used roads are readily available. This clarification applies to all uses of the phrase “previously disturbed or developed.” This clarification has been added to § 1021.410(g).

In addition, DOE notes that two definitions offered in a public comment may help readers understand the meaning of previously disturbed and developed. A comment from the Chesapeake Bay Foundation (at page 4) suggested that “previously disturbed” should refer to land that has largely been transformed from natural cover to a managed state and that has remained in that managed state (rather than reverted back to largely natural cover). The comment (at page 4) also suggested that “developed area” should refer to land that is largely covered by man-made land uses and activities (residential, commercial, institutional, industrial, and transportation).

A few comments (e.g., from the Chesapeake Bay Foundation (at page 4) and Defenders of Wildlife (at page 2)) pointed out that the interpretation of the phrase depends on the context, and that, in some contexts, there is a potential for significant impacts when a particular action is taken, even if it occurs in a disturbed area. Although DOE agrees with this possibility, the potential for such impacts would be unlikely and would constitute an “extraordinary circumstance,” where application of a categorical exclusion would be inappropriate. Before applying a categorical exclusion, a NEPA Compliance Officer will evaluate the context of the proposed action to determine whether it complies with the integral elements of the categorical exclusion (listed in appendix B, paragraphs (1) through (5)) and whether there are any associated extraordinary circumstances that would affect the significance of impacts.

### **3. Small or Small-Scale**

Several comments (e.g., DOI (at page 3), Ocean Renewable Energy Coalition (at page 2)) asserted that DOE's use of “small” and “small-scale” was too vague to adequately define the scope of classes of actions and asked DOE to more narrowly define or clarify its use of these terms. Comments (e.g., Chesapeake Bay Foundation (at page 5), Defenders of Wildlife (at page 4), Sandy Beranich (at page 2)) requested that DOE add a physical limitation such as acreage or a megawatt limitation or number of turbines (in categorical exclusion B5.18) to further define “small” or “small-scale.” A comment from the Chesapeake Bay Foundation (at page 5) asked DOE to impose a 5-acre or smaller limit for small-scale educational facilities in categorical exclusion B3.14 and expressed concern regarding the potential size (footprint) of a facility for nanoscale research in categorical exclusion B3.15. A comment from the Chesapeake Bay Foundation (at page 3) noted that determining what is a small size is influenced by the location of a proposed action on the landscape. In response, DOE provides a general discussion of “small” and “small-scale” below and also discusses the use of these terms in the context of specific classes of actions (B1.26, B1.29, B3.14, B3.15, B5.18, B5.25, B6.1, C8 (distinguishing small scale and large scale)) later in this preamble.

In determining whether a particular proposed action qualifies for a categorical exclusion, DOE considers terms such as “small” and “small-scale” in the context of the particular proposal, including its proposed location. In assessing whether a proposed action is small, in addition to the actual magnitude of the proposal, DOE considers factors such as industry norms, the relationship of the proposed action to similar types of development in the vicinity of the proposed action, and expected outputs of emissions or waste. When considering the physical size of a proposed facility, for example, a DOE NEPA Compliance Officer would review the surrounding land uses, the scale of the proposed facility relative to existing development, and the capacity of existing roads and other infrastructure to support the proposed action. This clarification has been added to § 1021.410(g).

DOE has reviewed the proposed categorical exclusions and classes of action on a case-by-case basis to further consider size or scale issues in response to comments received on the Notice of Proposed Rulemaking. Among other factors, DOE considered that these terms appear in its existing categorical exclusions and have been applied by NEPA Compliance Officers for more than 15 years. As a result of this review, DOE concludes that the terms “small” and “small-scale” remain appropriate for describing the types of activities contemplated by categorical exclusions. The provisions of the individual categorical exclusions using these terms, together with the integral elements at appendix B, paragraphs (1) through (5), the general restrictions on the application of categorical exclusions at 10 CFR 1021.410, and extraordinary circumstances, provide the necessary safeguards to ensure that categorical exclusions are not applied to activities that could result in significant environmental impacts. Therefore, DOE is retaining its proposed use of “small” and “small-scale” in its final rule.

#### **4. Would Not Have the Potential To Cause Significant Impacts**

DOE received comments (e.g., from Columbia Riverkeeper (at page 6), National Wildlife Federation (at page 3)) on its proposed use of the phrase “would not have the potential for significant impact” in both the integral element provision (at appendix B, paragraph (4)) of appendix B categorical exclusions and a number of specific categorical exclusions (categorical exclusions B1.11, B1.18, B1.24, B2.3, and B5.18). In response to these comments, DOE reviewed each use of the phrase in the Notice of Proposed Rulemaking. After further consideration, DOE is revising related text in several categorical exclusions. See discussion of categorical exclusions B1.5, B1.11, B3.1, B3.8, and B4.6 below. DOE is continuing to use the phrase in other categorical exclusions and related text.

A comment from Tri-Valley CAREs (at pages 2-3) expressed concern that DOE was expanding the categorical exclusions “without providing an analysis of whether there was actually a potential for significant environmental impact.” A comment from Sandy Beranich (at page 1) stated that use of “significant” would leave the degree of impact open to interpretation, whereas, the use of “adversely affect” was clearer. DOE's support for its categorical exclusions is provided in this preamble and in the

Technical Support Document. For a description of how DOE creates and applies its categorical exclusions, please see Section III above.

To understand why DOE is changing some conditions in categorical exclusions that previously used the phrase “not adversely affect” or that required no change in a particular parameter, it is helpful to understand that it was never DOE’s intent or practice that identification of any adverse impact or change whatsoever—no matter how small—would disqualify the use of a categorical exclusion for a particular proposed project. Also, the changes are consistent with the purpose of categorical exclusions, which is to define a set of activities that normally pose no potential for significant environmental impacts, and with the CEQ NEPA regulations and its Categorical Exclusion Guidance.

One change DOE is making, for example, is in the integral elements applicable to all categorical exclusions in appendix B. The existing regulation states that a proposed action “must not adversely affect environmentally sensitive resources.” DOE is changing this to state that a proposed action must not “have the potential to cause significant impacts on environmentally sensitive resources.” This is consistent with the CEQ Categorical Exclusion Guidance, which states that an agency may define its extraordinary circumstances “so that a particular situation, such as the presence of a protected resource, is not considered an extraordinary circumstance per se, but a factor to consider when determining if there are extraordinary circumstances, such as a significant impact to that resource.”

In the case of individual categorical exclusions, use of the term “significant” helps to highlight a type of potential impact that a NEPA Compliance Officer must consider when reviewing a particular proposed action. This is consistent with the CEQ Categorical Exclusion Guidance, which suggests that it may be useful for agencies to “identify additional extraordinary circumstances and consider the appropriate documentation when using certain categorical exclusions.”

## **5. Definition of “State”**

DOE uses the phrase “Federal, state, or local government” (and similar phrases) in 10 CFR part 1021. Unless otherwise specified, the term “state” refers broadly to any of the states that comprise the United States, any territory or possession of the United States (such as Puerto Rico, Guam, and American Samoa), and the District of Columbia. This definition is a clarification of, not a change in, DOE practice because DOE always has applied, and continues to apply, this meaning to the word “state” in 10 CFR part 1021.

## **6. Comments on Section 1021.410**

Comments (e.g., from Tri-Valley CAREs (at pages 2-4)) asked how DOE would meet the CEQ requirement that an agency’s categorical exclusion procedures “provide for extraordinary circumstances in which a normally [categorically] excluded action may have a significant

environmental effect” (**40 CFR 1508.4**). DOE’s regulations require that, before a categorical exclusion may be applied to a proposed action, a determination must be made that there are no extraordinary circumstances related to a proposal that may affect the significance of the proposal’s environmental effects (**10 CFR 1021.410(b)(2)**). In the final rule, DOE describes extraordinary circumstances as “unique situations presented by specific proposals, including, but not limited to, scientific controversy about the environmental effects of the proposal; uncertain effects or effects involving unique or unknown risks; and unresolved conflicts concerning alternative uses of available resources” (**10 CFR 1021.410(b)(2)**). If DOE identifies an extraordinary circumstance that would result in a potentially significant impact, then it would not apply a categorical exclusion to that proposed action. Further, under DOE’s NEPA regulations, before a categorical exclusion from appendix B of subpart D may be applied, DOE must determine that the proposed action satisfies all of the conditions known as “integral elements” (appendix B, paragraphs (1) through (5)). These conditions ensure that a categorical exclusion is not applied to any proposed action that would have the potential to cause significant environmental impacts due to, for example, a threatened violation of applicable environmental, safety, and health requirements, or by disturbing hazardous substances such that there would be uncontrolled or unpermitted releases. Together, DOE’s extraordinary circumstances and integral elements provisions require the Department to consider whether there are conditions surrounding a proposal that may affect the significance of the proposal’s environmental effects.

Another comment (from Columbia Riverkeeper (at page 5)) expressed concern that DOE’s extraordinary circumstances are not consistent with CEQ guidance and asserted that DOE’s examples of extraordinary circumstances set a “higher bar” than CEQ’s examples. The comment suggested that, to be consistent with CEQ guidance, DOE’s extraordinary circumstances be based on the “presence of an endangered or threatened species or a historic resource.” DOE based its approach to extraordinary circumstances on the definitions of categorical exclusion and significance in the CEQ regulations. See **40 CFR 1508.4** and 1508.27. DOE finds its approach to be consistent with the CEQ Categorical Exclusion Guidance, which states (II.C), “An extraordinary circumstance requires the agency to determine how to proceed with the NEPA review. For example, the presence of a factor, such as a threatened or endangered species or a historic resource, could be an extraordinary circumstance, which, depending on the structure of the agency’s NEPA implementing procedures, could either cause the agency to prepare an EA or an EIS, or cause the agency to consider whether the proposed action’s impacts on that factor require additional analysis in an EA or an EIS. In other situations, the extraordinary circumstance could be defined to include both the presence of the factor and the impact on that factor. Either way, agency NEPA implementing procedures should clearly describe the manner in which an agency applies extraordinary circumstances and the circumstances under which additional analysis in an EA or an EIS is warranted” (75 FR at 75633). Under DOE’s categorical exclusion process, therefore, it is an action’s potential for significant impacts, for example, on a sensitive resource, and not simply the presence of a sensitive resource, that is the basis for determining the need for an environmental assessment or environmental impact statement. It is the responsibility of

the DOE NEPA Compliance Officer to consider this potential for significant impacts and to consult with other agencies as necessary when considering a proposed action. This is expressly addressed in an integral element at appendix B, paragraph (4).

DOE received a comment from Columbia Riverkeeper (at page 4) referring to CEQ's guidance that agencies: Consider cumulative effects; define physical, temporal, and environmental factors that would constrain the use of a categorical exclusion; and consider extraordinary circumstances. The comment cited the CEQ provisions, but did not recommend any particular change to DOE's regulations. DOE considered each of the cited issues in formulating its rule, and the rule is consistent with the CEQ Categorical Exclusion Guidance. Further, DOE consulted with CEQ throughout the rulemaking process in accordance with 40 CFR 1507.3.

DOE is codifying at 10 CFR 1021.410(e) its policy to document and post online appendix B categorical exclusion determinations. As stated in the Notice of Proposed Rulemaking, such postings will not include information that DOE would not disclose pursuant to the Freedom of Information Act (FOIA). A comment from Tri-Valley CAREs (at page 2) expressed concern that the public would be deprived of a right to challenge such withholdings under FOIA. Further, the comment asked DOE to explain the process by which the public can challenge potentially improper withholdings related to an online posting of a categorical exclusion determination. DOE is committed to openness, as is evidenced by its decision to post appendix B categorical exclusion determinations online. The procedures for requesting information related to a categorical exclusion determination are the same as for any other DOE document. If applicable, DOE will apply FOIA exemptions to a categorical exclusion determination—as it would with any document—to appropriately limit the release of particular types of information (e.g., classified or confidential business information). To the fullest extent possible, DOE will segregate information that is exempt from release under FOIA to allow public review of the remainder of the document. See 10 CFR 1021.340. For further information on FOIA processes at DOE, see DOE's FOIA resources posted at <http://energy.gov/management/office-management/operational-management/freedom-information-act>, including a handbook on procedures for filing a request at <http://energy.gov/sites/prod/files/maprod/documents/Handbook.pdf>.

The addition of paragraphs (f) and (g) to 10 CFR 1021.410 is discussed in section IV.C.1-3, above.

## **7. Integral Elements**

### **Federally Recognized Indian Tribe**

In its Notice of Proposed Rulemaking, DOE proposed adding “Federally recognized Indian tribe” to its list of entities that designate property as historically, archeologically, or architecturally significant in

appendix B, paragraph (4)(i). In addition, in the final rule, to be consistent with the Advisory Council on Historic Preservation implementing regulations (**36 CFR part 800**) for the National Historic Preservation Act, DOE has added “Native Hawaiian organization” to the list of entities that may designate such properties. The Advisory Council on Historic Preservation regulations provide consultative roles to both Indian tribes and Native Hawaiian organizations in the Section 106 process under the National Historic Preservation Act. The Advisory Council's regulations define a Native Hawaiian organization as “any organization which serves and represents the interests of Native Hawaiians; has as a primary and stated purpose the provision of services to Native Hawaiians; and has demonstrated expertise in aspects of historic preservation that are significant to Native Hawaiians”; and the regulations define Native Hawaiian as “any individual who is a descendent of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii” (**36 CFR 800.16(s)**).

Further, DOE clarifies that use of “Federally recognized Indian tribe” in subpart D, appendix B of **10 CFR part 1021**, is intended to include Indian and Alaska Native tribes that the Secretary of the Interior recognizes as eligible for programs and services provided by the United States to Indians because of their status as Indians. (**25 U.S.C. 479a-1**). Each year, the Bureau of Indian Affairs (BIA) publishes a list in the Federal Register of the recognized tribal entities. For purposes of appendix B to subpart D of **10 CFR part 1021**, Federally recognized Indian tribes are those entities included on the BIA list. (A link to the list and a supplement, current at the time of this final rule's publication, can be found on the BIA Web site at <http://www.bia.gov/DocumentLibrary/index.htm>.) DOE would refer to the most current BIA list when considering the integral element.

### **Environmentally Sensitive Resources**

DOE received comments (e.g., from the Chesapeake Bay Foundation (at page 3), the Ocean Renewable Energy Coalition (at page 5), and Pacific Northwest National Laboratory (at page 1)) suggesting further modifications or clarifications to the list of environmentally sensitive resources that are part of the integral elements applicable to appendix B categorical exclusions (appendix B, paragraph (4)). DOE does not intend the examples in B(4) to be an exhaustive list of environmentally sensitive resources, but agrees that additional examples would be helpful. DOE is adding the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act to B(4)(ii). In addition, DOE is correcting a typographical error in the reference to the Marine Mammal Protection Act in B(4)(ii). Another comment (from the Chesapeake Bay Foundation (at page 4)) asked DOE to expand its listing of environmentally sensitive resources to “recognize and protect \* \* \* resources of high local, state, or federal value and concern that may not enjoy, or may not yet have received, specific regulatory or statutory protection.” Specifically, the comment (at page 3) asserted that DOE's clarification of environmentally sensitive resources was too limited because it would not include “riparian stream buffers \* \* \* large forest or contiguous woodland assemblages, locally specified high value farmland \* \*

\* `candidate' state or federal threatened or endangered species or their habitat \* \* \* drinking water supply streams or reservoirs \* \* \* or \* \* \* headwater streams.” In response to the comment, DOE is adding “state-proposed endangered or threatened species or their habitat” to the description of environmentally sensitive resources listed in integral element B(4)(ii), which already explicitly provides for consideration of “Federally-proposed or candidate species or their habitat.” DOE is not adding the other resources described in the comment because they are not generally resources that have been identified as needing protection through Executive Order, statute, or regulation by Federal, state, or local government, or a Federally recognized Indian tribe. However, DOE acknowledges that the resource examples contained in the comment may be considered as extraordinary circumstances in making an individual categorical exclusion determination.

Similarly, another comment (from Joyce Dillard (at page 1)) expressed general concern regarding destruction of wetlands and aquifers and salt water intrusion. DOE's existing integral elements B(4)(iii) and (vi) provide for consideration of wetlands as well as special sources of water (including sole source aquifers) as environmentally sensitive resources. With respect to salt water intrusion, DOE would consider the potential for salt water intrusion, including whether it constitutes an extraordinary circumstance, before making a categorical exclusion determination. Also, see discussion of “would not have the potential to cause significant impacts” in section IV.C.4 of this preamble.

#### **Genetically Engineered Organisms, Synthetic Biology, Governmentally Designated Noxious Weeds, and Invasive Species**

DOE received several comments (in reference to categorical exclusions B3.6, B3.8, B3.12, B3.15, B5.15, B5.20, and B5.25; *e.g.*, from Center for Food Safety on behalf of itself and 3 other organizations (at pages 3-5) and National Wildlife Federation (at page 2)) regarding the use of genetically engineered organisms, noxious weeds, and invasive non-native species, such as non-native algae. These comments suggested that the development and use of such organisms could affect entire ecosystems. The comments expressed concern that these organisms could not be contained and could escape into the environment and potentially cause a variety of environmental and human health impacts.

DOE received similar comments (*e.g.*, from Center for Food Safety on behalf of itself and 3 other organizations (at pages 2 and 3)) regarding “synthetic biology,” suggesting that the impacts of developing and releasing genetically engineered organisms, using man-made DNA sequences, were largely unknown and that such organisms could interact with native species and adversely affect the environment and entire ecosystems.

In addition, a comment from Center for Food Safety on behalf of itself and 3 other organizations (at page 2) asserted that DOE has provided more than \$700 million in funding for synthetic biology



research since 2006 and that this level of funding amounts to a programmatic research program that should be analyzed in an environmental impact statement. The comment also asserted that DOE is attempting to segment the potential environmental impacts of this research by seeking categorical “exemptions” from NEPA for individual research projects. As an initial matter, DOE disagrees with the comment's funding estimate. For example, almost all the funding is attributed to the Genomics Science Program and the Joint Genomics Institute, both of which are ongoing initiatives (begun in the 1980s and 1990s, respectively) that support research in several areas, only some of which can be referred to as synthetic biology. Moreover, DOE disagrees with the assertion that an amount of funding is sufficient to define a programmatic research program for which DOE should prepare an environmental impact statement. In determining whether an environmental impact statement is required or would be beneficial to its decisionmaking, DOE considers the nature of decisions to be made and the relationships among proposed actions and potential environmental impacts, among other factors. DOE has determined that, at this time, its activities related to synthetic biology do not constitute a programmatic research program and do not require an environmental impact statement.

DOE received several comments regarding research into bioenergy technologies, either performed or funded by DOE. Some of the comments (e.g., from the Biotechnology Industry Organization (at page 3)) were supportive of this research and encouraged the use of categorical exclusions to remove barriers to the adoption of these technologies. Some comments (e.g., from Center for Food Safety on behalf of itself and 3 other organizations (at page 5), National Wildlife Federation (at pages 2 and 4)) expressed concern about bioenergy research and the harvest of biomass involving invasive and non-native species, including non-native and genetically engineered algal species, specifically citing categorical exclusions B3.6, B3.8, and B5.25. The comments suggested that intentional or inadvertent release of invasive or non-native species, especially in aquatic environments, could have unanticipated consequences, including threats to local ecosystems, and the National Wildlife Federation (at page 2) suggested that categorical exclusions were appropriate only for plant species that “successfully pass[ed] an established weed risk assessment.” Another comment (from the Biotechnology Industry Organization (at page 2)) requested that any regulations regarding biotechnology reflect the principles laid out in the Coordinated Framework for the Regulation of Biotechnology (51 FR 23302; June 26, 1986) and articulated by the White House Emerging Technologies Interagency Policy Coordination Committee.

To address these comments, DOE considered the addition of further restrictions to individual categorical exclusions, but opted instead to add a new integral element that will be applicable to all appendix B categorical exclusions. This integral element requires that, to fit the classes of actions in appendix B, a proposal must be one that would not “[i]nvolve genetically engineered organisms, synthetic biology, governmentally designated noxious weeds, or invasive species, unless the proposed activity would be contained or confined in a manner designed and operated to prevent unauthorized release [that is, a release not subject to an experimental use permit issued by the Environmental

Protection Agency (EPA), a permit or notification issued by the Department of Agriculture (USDA), or a granting of nonregulated status by the USDA] into the environment and conducted in accordance with applicable requirements, such as those of the Department of Agriculture, the Environmental Protection Agency, and the National Institutes of Health.” Examples of applicable guidelines and requirements include National Institutes of Health “Guidelines for Research Involving Recombinant DNA Molecules” ([http://oba.od.nih.gov/rdna/nih\\_guidelines\\_oba.html](http://oba.od.nih.gov/rdna/nih_guidelines_oba.html)); USDA “Noxious Weed Regulations” (**7 CFR part 360**) and regulations for the “Introduction of Organisms and Products Altered or Produced Through Genetic Engineering Which Are Plant Pests or Which There Is Reason to Believe Are Plant Pests” (**7 CFR part 340**); and EPA Reporting Requirements and Review Processes for Microorganisms (**40 CFR part 725**, particularly **40 CFR 725.200-470**). These regulations impose appropriate containment and confinement measures to address the risk of inadvertent release of experimental organisms. In order to qualify for a categorical exclusion, a proposed action would have to prevent unauthorized releases into the environment, comply with all applicable requirements, and meet other conditions of the applicable categorical exclusion.

This new integral element obviates the need for the last sentence in categorical exclusion B3.8, as proposed, and that sentence is removed in the final rule. This integral element limits the activities that can receive a categorical exclusion determination to those that will not be released into the environment without proper authorization and will be conducted in accordance with applicable requirements, which include containment, confinement, or other requirements for working with these organisms. The new integral element takes into account both the principles laid out in the Coordinated Framework for the Regulation of Biotechnology and by the White House Emerging Technologies Interagency Policy Coordination Committee.

A comment relating to categorical exclusion B3.8 (from the National Wildlife Federation (at page 2) and also from Center for Food Safety on behalf of itself and 3 other organizations (at page 4)) stated that USDA approval of a genetically engineered crop does not guarantee environmental safety. DOE believes that, in general, it is reasonable to consider compliance with applicable regulations as a factor in determining whether a proposed action would have the potential to cause significant environmental impacts. In the case of genetically engineered plants regulated by USDA, its regulations require the agency to perform independent NEPA analysis before the plants may be grown outdoors (**7 CFR part 372**). When grown for research purposes, USDA regulations further require that field trials of genetically engineered plants are conducted with sufficient confinement methods in place such that the plants will not persist in the environment or pose the risk for significant environmental impacts (**7 CFR part 340**).

DOE is generally limiting categorical exclusions involving the activities mentioned in the comments to small-scale, as opposed to commercial-scale, actions. In DOE's experience, small-scale research and

development activities normally do not have the potential to cause significant environmental impacts (see section IV.C.3).

A few comments (*e.g.*, Center for Food Safety on behalf of itself and 3 other organizations (at page 4)) suggested that genetically engineered crops grown for biofuels production might cause environmental impacts different from genetically engineered plants grown for other purposes, but the comments did not indicate what those differential impacts would be. DOE foresees no difference in environmental impacts from a small research plot of genetically engineered plants grown for the purpose of food or fiber as compared to the impacts from the same plants grown for biomass.

Another comment from the National Wildlife Federation (at page 2) and the Center for Food Safety (on behalf of itself and 3 other organizations; at page 4) suggested that, once DOE provided funding to a researcher to perform work with non-genetically engineered organisms under a categorical exclusion, the researcher could switch to the use of a genetically engineered organism without incurring further NEPA review. Under the terms of DOE funding agreements, the scope of work is disclosed by the researcher, and fundamental changes such as those suggested in the comment would require further NEPA analysis.

## **8. Powerlines**

In the Notice of Proposed Rulemaking DOE proposed to change “electric powerlines” to “electric transmission lines” in several categorical exclusions to update technology-specific vocabulary. DOE received a general comment from Edison Electric Institute (at page 2) requesting that it further revise the proposed phrase to include distribution lines and related facilities to ensure that the relevant categorical exclusions are not limited to just transmission lines, but apply to energy delivery facilities more generally. Upon further consideration, DOE is using the term “powerlines” to be inclusive of both transmission and distribution lines (see categorical exclusions B1.3(m), B1.9, B4.7, B4.10, B4.12, B4.13, and class of actions C4).

## **9. Appendix B—Categorical Exclusions**

### **Categorical Exclusions Applicable to Facility Operations (B1)**

#### **B1.3 Routine Maintenance**

DOE received comments (*e.g.*, from Pacific Northwest National Laboratory (at page 3)) suggesting that categorical exclusion B1.3 covers minor types of activities that are of a sufficiently small scale not to warrant the documentation required of an appendix B categorical exclusion and, therefore, such actions should be listed in appendix A. DOE is committed to increasing the transparency of its NEPA implementing regulations and practices, and DOE decided not to move this categorical exclusion from

appendix B, for which a public document is prepared and posted on DOE's NEPA Web site (<http://energy.gov/nepa/doe-nepa-documents/categorical-exclusion-determinations>), to appendix A, for which no documentation is required. Further, the actions under categorical exclusion B1.3 include physical activities in contrast to the more administrative functions covered by categorical exclusions in appendix A. Thus, DOE is not making any changes based on these comments.

DOE also received a comment from Sandy Beranich (at page 1) regarding item (k) in categorical exclusion B1.3. The comment suggested DOE insert additional examples of erosion control and soil stabilization measures, specifically “gabions” and “grading.” The examples already provided in the proposed B1.3(k), reseeding and revegetation, were not meant to serve as an exhaustive list, and other measures could qualify for categorical exclusion under B1.3(k). Nonetheless, DOE is adding the two examples suggested in the comment because they will help illustrate the types of erosion control and soil stabilization measures that are encompassed by B1.3(k).

### **B1.5 Existing Steam Plants and Cooling Water Systems**

In its Notice of Proposed Rulemaking, DOE proposed modifying the second condition of this categorical exclusion from would not “adversely affect water withdrawals or the temperature of discharged water” to would not “have the potential to cause significant impacts on water withdrawals or the temperature of discharged water.” After further consideration, DOE is revising the language in this categorical exclusion to further specify the conditions. DOE is changing these provisions to: “Improvements would not: \* \* \* (2) have the potential to significantly alter water withdrawal rates; (3) exceed the permitted temperature of discharged water \* \* \*.”

### **B1.11 Fencing**

After further consideration, DOE is modifying this categorical exclusion to better focus on the types of impacts to wildlife that might be caused by fencing. DOE is replacing “would not have the potential to cause significant impacts on wildlife populations or migration \* \* \*” with “would not have the potential to significantly impede wildlife population movement (including migration) \* \* \*.” Also, see discussion of “would not have the potential to cause significant impacts” in section IV.C.4 of this preamble.

### **B1.14 Refueling of Nuclear Reactors**

DOE received a comment from Sandy Beranich (at page 2) asking which section of the DOE NEPA regulations addresses the disposition of spent nuclear fuel. Management and disposition of spent nuclear fuel would typically be the subject of the NEPA review for the facility (e.g., an environmental impact statement is required under class of action D4, for “siting, construction, operation, and decommissioning of power reactors, nuclear material production reactors, and test and research

reactors”). The comment does not propose a change to this categorical exclusion, and DOE is retaining the proposed language in the final categorical exclusion.

#### **B1.18 Water Supply Wells**

For DOE's response to comments on this categorical exclusion, see discussion of “would not have the potential to cause significant impacts” in section IV.C.4 of this preamble.

#### **B1.19 Microwave, Meteorological, and Radio Towers**

In its Notice of Proposed Rulemaking, DOE proposed adding “abandonment” to the list of activities included in this class of actions in order to encompass the complete life cycle of the towers addressed by the categorical exclusion. After further consideration, DOE acknowledges that abandonment could be misconstrued so as to absolve DOE of all responsibility for a tower, including for maintenance. This was not DOE's intent. Thus, DOE is removing “abandonment” from the list of activities in this categorical exclusion (but is keeping “modification” and “removal”). For towers that are no longer used, DOE's normal practice would be to remove the tower or transfer responsibility to another party.

As noted elsewhere in this preamble, DOE received public comments related to potential impacts on bird populations that could be associated with the use of categorical exclusions. Though none of the public comments was specific to categorical exclusion B1.19, DOE nonetheless considered the comments in the context of the activities addressed in this categorical exclusion and reviewed current information related to the potential impacts of relevant towers on bird populations. DOE concluded that its existing provisions, including for determining whether a proposal meets the integral elements of the categorical exclusion (particularly appendix B, paragraph (4)) and whether there are any associated extraordinary circumstances that would affect the significance of impacts, ensure appropriate consideration of proposed tower design (height, use of guy wires, lighting) and location. Therefore, DOE is not further revising categorical exclusion B1.19.

In addition, a comment from Edison Electric Institute (at page 2) asked DOE to add individual electric transmission towers and distribution poles to the scope of this categorical exclusion. Because electric transmission towers and distribution poles are already included in the scope of DOE's existing B4 categorical exclusions, DOE is not making any changes to categorical exclusion B1.19 in response to this comment.

#### **B1.24 Property Transfers**

A comment from Natural Resources Defense Council and Committee to Bridge the Gap (at page 2) expressed concern that the reference to contamination was being removed from the categorical exclusion. DOE's existing categorical exclusion is limited to property that is uncontaminated, which is

defined to mean that there “would be no potential for release of substances at a level, or in a form, that would pose a threat to public health or the environment.” A comment from Columbia Riverkeeper (at page 5) stated that this categorical exclusion is not warranted. DOE is not changing the scope of the categorical exclusion but is merely re-wording the categorical exclusion to incorporate the definition of “uncontaminated” in a different way. Thus, DOE is making no change to the categorical exclusion in response to this comment. A separate comment stated that a categorical exclusion for the transfer, lease, or disposition of contaminated property is not warranted. DOE agrees, and, as described above, the categorical exclusion is limited to property for which there would be no potential for release of substances at a level, or in a form, that would pose a threat to public health or the environment. Therefore, DOE is not making a change to the categorical exclusion based on this comment.

A comment from Columbia Riverkeeper (at page 6) stated that DOE's approach does not account for the environmental impacts of future operations after the transfer. DOE responds that the second limitation proposed for the categorical exclusion states that “under reasonably foreseeable uses \* \* \* the covered actions would not have the potential to cause a significant change in impacts from before the transfer \* \* \*” This limitation would require the NEPA Compliance Officer to consider the significance of potential environmental impacts of reasonably foreseeable future uses (including during operations, as indicated by the comment) of the transferred property.

Several comments (e.g., from Columbia Riverkeeper (at page 6) and Natural Resources Defense Council/Committee to Bridge the Gap (at page 1)) questioned how DOE can assess whether an action is appropriately covered by this categorical exclusion without preparing an environmental assessment or environmental impact statement. The process DOE uses for making a categorical exclusion determination is described in this notice under section III, Overview of Categorical Exclusions, above.

A comment from Columbia Riverkeeper (at page 6) stated that there would be no pathway for public involvement or comment on DOE's review under categorical exclusion B1.24. DOE is increasing public involvement and comment opportunities with regard to categorical exclusion A7, transfers of personal property, by combining it into categorical exclusion B1.24. The result is that the scope of B1.24 includes both personal and real property, and since it is an appendix B categorical exclusion, it is subject to the online posting requirement of **10 CFR 1021.410(e)**. Under this new rule, DOE is codifying its policy to document and post online appendix B categorical exclusion determinations at **10 CFR 1021.410(e)**, consistent with the policy established by the Deputy Secretary of Energy's *Memorandum to Departmental Elements on NEPA Process Transparency and Openness*, October 2, 2009. This process provides an opportunity for public review of the categorical exclusion determination. In addition, see discussion of “would not have the potential to cause significant impacts” in section IV.C.4 of this preamble.

#### **B1.25 Real Property Transfers for Cultural Protection, Habitat Preservation, and Wildlife Management**

A comment from Edison Electric Institute (at page 2) encouraged DOE to stipulate in the categorical exclusion that any permit holders and owners of facilities on land involved in the transfers must be given advance notice so they can protect their rights. This comment raises concerns unrelated to environmental review under NEPA, which is the scope of this regulation. For this reason, DOE is retaining the proposed language in the final categorical exclusion. Separately, DOE is adding the word “Real” to the title of this categorical exclusion to clarify that the scope of the categorical exclusion does not include personal property.

#### **B1.26 Small Water Treatment Facilities**

Although DOE did not propose to substantively change this categorical exclusion, a comment from the Chesapeake Bay Foundation (at page 4) disagreed with the existing categorical exclusion's characterization that a “small” surface water or wastewater treatment facility is one with “a total capacity less than approximately 250,000 gallons per day,” and stated that an environmental assessment might be appropriate if the context of a facility so warrants. DOE's experience over many years is that a water or wastewater treatment facility processing 250,000 gallons or less per day is of a size that normally would not have the potential for significant impacts. For further information, see discussion of “small” and “small-scale” in section IV.C.3 of this preamble. A NEPA Compliance Officer would consider location and context in determining whether a proposal meets the integral elements of the categorical exclusion (listed in appendix B, paragraph (4)) and whether there are any associated extraordinary circumstances that would affect the significance of impacts. In accordance with integral element B(1) of the DOE NEPA regulations, DOE would ensure that water treatment facilities under this categorical exclusion would not threaten a violation of applicable statutory, regulatory, or permit requirements. For example, a wastewater treatment facility would comply with the National Pollutant Discharge Elimination System permit issued by the cognizant regulatory authority, which would ensure that pollutant loads are consistent with applicable water quality standards. For these reasons, DOE is retaining the proposed language in the final categorical exclusion.

#### **B1.29 Disposal Facilities for Construction and Demolition Waste**

A comment from the Chesapeake Bay Foundation (at page 5) recommended that the existing limitation of less than approximately 10 acres be reduced to less than approximately 5 acres; the comment did not provide the basis or any support for this recommendation. DOE is retaining the existing limitation of less than 10 acres. The comment also referred to consideration of context and intensity, including the location, landscape setting, and other resources present, in determining whether a given project is “small.” DOE agrees. For further information, see discussion of “small” and

“small-scale” in section IV.C.3 of this preamble. Under DOE's NEPA regulations, a NEPA Compliance Officer would evaluate the considerations cited in determining whether a proposal meets the integral elements of the categorical exclusion (listed in appendix B, paragraphs (1) through (5)) and whether there are any associated extraordinary circumstances that would affect the significance of impacts. For these reasons, DOE is retaining the proposed language in the final categorical exclusion.

### **B1.33 Stormwater Runoff Control**

DOE received a comment from Joyce Dillard (at page 1) stating that stormwater control is another potential money maker for local policymakers and the danger is high. DOE notes this comment and is not making any changes to this categorical exclusion in response.

### **B1.34 Lead-Based Paint Containment, Removal, and Disposal**

DOE is adding “containment, removal, and disposal” to the title of this categorical exclusion for clarification.

## **Categorical Exclusions Applicable to Safety and Health**

### **B2.3 Personal Safety and Health Equipment**

For DOE's response to comments on this categorical exclusion, see discussion of “would not have the potential to cause significant impacts” in section IV.C.4 of this preamble.

## **Categorical Exclusions Applicable to Site Characterization, Monitoring and General Research (B3)**

### **B3.1 Site Characterization and Environmental Monitoring**

After further consideration, DOE is clarifying the means by which to address potential impacts from ground disturbance. DOE is replacing the second sentence of the categorical exclusion (as proposed in the Notice of Proposed Rulemaking) with the following: “Such activities would be designed in conformance with applicable requirements and use best management practices to limit the potential effects of any resultant ground disturbance.”

A comment from Sandy Beranich (at page 2) requested clarification of the size of certain projects covered by this categorical exclusion, saying that the difference between small and large-scale projects is subject to interpretation. DOE's discussion of “small” and “small-scale” appears in section IV.C.3 of this preamble.



In its Notice of Proposed Rulemaking, DOE included “abandonment” in the list of potential activities included in this categorical exclusion and in categorical exclusion B1.19 in order to encompass the complete life cycle of the characterization and monitoring devices in B3.1 and the towers in B1.19. As described with respect to B1.19, after further consideration, DOE acknowledges that abandonment could be misconstrued so as to absolve DOE of all responsibility for such devices or facilities, including for maintenance. This was not DOE’s intention. Therefore, DOE is removing “abandonment” (and adding “removal or otherwise proper closure (such as of a well)”) in the text describing the life cycle of characterization and monitoring devices and facilities addressed by the categorical exclusion.

To simplify the categorical exclusion, DOE is changing “salt water and freshwater” to “aquatic environments.” Aquatic, as used herein, may refer to salt water, freshwater, or areas with shifting delineation between the two; this is not a substantive change.

### **B3.6 Small-Scale Research and Development, Laboratory Operations, and Pilot Projects**

Categorical exclusion B3.6 does not include demonstration actions, as stated in the Notice of Proposed Rulemaking. However, after reviewing public comments and further internal consideration, DOE is revising the text to state this condition more clearly. Separately, a comment (*e.g.*, from Friends of the Earth and from Center for Food Safety on behalf of itself and 3 other organizations (at page 1)) stated that this categorical exclusion should be rejected, because its use could cause significant impacts; DOE has determined that this categorical exclusion, by its terms and in light of the integral element and extraordinary circumstances requirements, is appropriate and would not have the potential for significant impacts.

DOE received comments regarding the use of genetically engineered organisms, synthetic biology, noxious weeds, and non-native species, such as non-native algae in projects that may be categorically excluded under this section of the rule. For further information, see discussion of “Genetically engineered organisms, synthetic biology, governmentally designated noxious weeds, or invasive species” in section IV.C.7 of this preamble.

DOE received a comment from Center for Food Safety on behalf of itself and 3 other organizations (at page 3) that the difference between a pilot study and a demonstration action, which could require an environmental assessment or environmental impact statement, is unclear and suggested that this categorical exclusion could be applied to large-scale, open-pond projects involving genetically engineered algae or algae altered through synthetic biology without review of environmental risks. DOE disagrees. This categorical exclusion applies only to small-scale projects, such as those performed for proof of concept purposes. For further information, see discussion of “small” and “small-scale” in section IV.C.3 of this preamble. Further, before a categorical exclusion determination can be

made, the proposed action undergoes review, for example, to determine whether it is consistent with the integral elements and the conditions of the particular categorical exclusion.

### **B3.7 New Terrestrial Infill Exploratory and Experimental Wells**

DOE received a comment from Joyce Dillard (at page 1) regarding the risks associated with injection wells. Categorical exclusion B3.7 requires that the well be sited within an existing, characterized well field and requires that the site characterization has verified a low potential for seismicity. DOE has experience in the construction and operation of exploratory and experimental wells and, in DOE's experience, these conditions are appropriate. Therefore, DOE is retaining the proposed language in the final categorical exclusion. (The issue is also relevant to categorical exclusions B5.3, B5.12, and B5.13.)

DOE intended this categorical exclusion to include both extraction and injection wells. After further consideration, DOE is adding "for either extraction or injection use" to clarify the scope of new terrestrial infill exploratory and experimental well activities under this categorical exclusion.

### **B3.8 Outdoor Terrestrial Ecological and Environmental Research**

After further consideration, DOE is clarifying the means by which to address potential impacts from ground disturbance. DOE is deleting the following words from the end of the first sentence of the categorical exclusion: "provided that such activities would not have the potential to cause significant impacts on the ecosystem" (as proposed in the Notice of Proposed Rulemaking). The following new second sentence is being inserted: "Such activities would be designed in conformance with applicable requirements and use best management practices to limit the potential effects of any resultant ground disturbance."

DOE is deleting the following sentence to avoid confusion: "These actions include, but are not limited to, small test plots for energy related biomass or biofuels research." Although this categorical exclusion is appropriate for small biomass or biofuels research, it is only one example of a variety of research projects that could be included in the class of actions described by categorical exclusion B3.8. Another comment (from Friends of the Earth and from Center for Food Safety on behalf of itself and 3 other organizations (at page 1)) stated that this categorical exclusion should be rejected because its use could cause significant impacts; DOE has determined that this categorical exclusion, by its terms and in light of the integral element and extraordinary circumstances requirements, is appropriate and would not have the potential for significant impacts.

DOE received comments regarding the use of genetically engineered organisms, synthetic biology, noxious weeds, and non-native species, such as non-native algae in projects that may be categorically excluded under this section of the rule. For further information, see discussion of "Genetically

engineered organisms, synthetic biology, governmentally designated noxious weeds, or invasive species” in section IV.C.7 of this preamble. DOE is deleting the last sentence of the categorical exclusion (as proposed in the Notice of Proposed Rulemaking), because the use of genetically engineered organisms is now addressed by the new integral element.

### **B3.9 Projects To Reduce Emissions and Waste**

DOE received a comment from Edison Electric Institute (at page 2) expressing concern that the list of fuels provided in this categorical exclusion did not encompass all fuels with the potential to reduce emissions and waste. It was DOE's intention that the list be illustrative, rather than exhaustive, so DOE is replacing the second and third sentences of the categorical exclusion with the following sentence: “For this category of actions, ‘fuel’ includes, but is not limited to, coal, oil, natural gas, hydrogen, syngas, and biomass; but ‘fuel’ does not include nuclear fuel.”

### **B3.11 Outdoor Tests and Experiments on Materials and Equipment Components**

DOE received a comment from Tri-Valley CAREs (at page 4) regarding the use of encapsulated source, special nuclear, or byproduct materials for nondestructive tests and experiments. The comment expressed concern that the encapsulation could be accidentally destroyed, releasing the contents into the environment. The comment also noted that the categorical exclusion did not limit the amount of encapsulated materials that could be used. DOE responds that capsules for source, special nuclear, and byproduct material are designed using technologies and materials to enable their safe transport and use. These capsules are tested to withstand extremes of temperature and pressure and to resist severe impacts, puncture, and vibration without allowing their contents to escape. Such encapsulation can readily withstand the types of handling that would occur during the nondestructive tests and experiments covered by the categorical exclusion. Performance requirements for such testing are based on factors such as the type and amount of radioactive material involved and intended use of the source. Therefore, there is minimal risk that encapsulated materials will be inadvertently released into the environment. Because encapsulation addresses the risk of environmental release, DOE is not including a limit on the amount of encapsulated source, special nuclear, or byproduct material that could be used in the nondestructive tests and experiments covered by the categorical exclusion. Any such limit would be part of the design of a nondestructive test or experiment, which would include appropriate protocols to protect participants and the environment. DOE is retaining the proposed language and adding a reference to applicable standards to the categorical exclusion in the final rule.

### **B3.12 Microbiological and Biomedical Facilities**

Comments (e.g., from Friends of the Earth and Center for Food Safety on behalf of itself and 3 other organizations (at page 1)) stated that this categorical exclusion should be rejected, because its use could cause significant impacts; DOE has determined that this categorical exclusion, by its terms and in light of the integral element and extraordinary circumstances requirements, is appropriate and would not have the potential for significant impacts. DOE received comments from Center for Food Safety on behalf of itself and 3 other organizations (at page 4) raising concerns that the environmental release of genetically engineered organisms or synthetic organisms (including genetically engineered algae or synthetic biology) from a microbiological or biomedical facility (including facilities to house such organisms for the production of biofuels) could pose risks to local ecosystems, during both the operation and decommissioning of these facilities. In response, DOE points out that facilities covered by this categorical exclusion must be constructed and maintained in accordance with all applicable regulations, including provisions (e.g., the use of biological safety cabinets and chemical fume hoods) to ensure the containment of organisms that may pose environmental risks as well as the destruction of these organisms when they are no longer needed. Generally, these regulations and practices have been effective in preventing unintended releases of research organisms and thereby prevented impacts to the environment from these organisms. Further, DOE received comments regarding the use of genetically engineered organisms, synthetic biology, noxious weeds, and non-native species, such as non-native algae in projects that may be categorically excluded under this section of the rule. For further information, see discussion of “Genetically engineered organisms, synthetic biology, governmentally designated noxious weeds, or invasive species” in section IV.C.7 of this preamble.

In addition, DOE is updating the reference to the manual on Biosafety in Microbiological and Biomedical Laboratories to the most current version.

#### **B3.14 Small-Scale Educational Facilities**

A comment from the Chesapeake Bay Foundation (at page 5) stated that a specific small size limitation should be added for the facilities under the proposed categorical exclusion or the categorical exclusion should be eliminated from the rulemaking. The comment suggested that DOE consider including a limit of 5 acres or smaller, and be restricted to placement in a developed area. When considering the physical size and location of a proposed educational facility, a DOE NEPA Compliance Officer would review the surrounding land uses, the scale of the proposed facility relative to existing development, and the capacity of existing roads and other infrastructure. The NEPA Compliance Officer would have to determine that the size of the proposed facility, in the context of its location and surroundings, was sufficiently small that it would not have the potential to cause significant environmental impacts. Thus, DOE is not proposing any modifications to this categorical exclusion. For further information, see discussion of “small” and “small-scale” in section IV.C.3 of this preamble.

In addition, DOE received a comment from Joyce Dillard (at page 1) that states, rather than the Federal government, are responsible for education and its related facilities. DOE acknowledges this comment and notes that the categorical exclusion is intended to address small facilities that are generally educational in nature, such as visitor centers, small museums, libraries, and similar facilities. Such facilities may be part of a school or university. Therefore, DOE is retaining the proposed language in the final categorical exclusion.

### **B3.15 Small-Scale Indoor Research and Development Projects Using Nanoscale Materials**

A comment from Center for Food Safety on behalf of itself and 3 other organizations (at page 1) stated that this categorical exclusion should be rejected, because its use could cause significant impacts; DOE has determined that this categorical exclusion, by its terms and in light of the integral element and extraordinary circumstances requirements, is appropriate and would not have the potential for significant impacts. Additionally, DOE received comments (e.g., from Friends of the Earth (in attachment titled Nanotechnology, Climate and Energy), and Center for Food Safety on behalf of itself and 3 other organizations (at page 4)) expressing a wide range of environmental and human health concerns regarding a potential release of nanoscale materials into the environment or commercial-scale use of nanoscale materials. DOE reiterates that this categorical exclusion may be used only for facilities for indoor small-scale research activities and not involving the environmental release, or commercial-scale production, of nanoscale materials. For further information, see discussion of “small” and “small-scale” in section IV.C.3 of this preamble. Covered facilities employing nanoscale materials would be constructed and operated in accordance with applicable requirements to ensure worker safety and to prevent environmental releases. Therefore, DOE is retaining the proposed language in the final categorical exclusion, with one exception. DOE is changing “biohazardous materials” to “hazardous materials,” in the final categorical exclusion. Hazardous materials is a broader category that includes biohazardous materials, and thus better reflects the range of materials that would need to be safely managed for this type of research and development work.

### **B3.16 Research Activities in Aquatic Environments**

To simplify the categorical exclusion, DOE is changing “salt water and freshwater” to “aquatic.” Aquatic, as used herein, may refer to salt water, freshwater, or areas with shifting delineation between the two; this is not a substantive change. In addition, DOE is clarifying in the preamble that passive seismic techniques in item (c) refers to activities (e.g., use of seismometers) that do not involve the introduction of energy or vibration that would have the potential for significant environmental impacts.

A comment from Pacific Northwest National Laboratory (at page 2) suggested that many of the activities described in this categorical exclusion, such as sample collection, installation of environmental monitoring devices, and other ecological research, should be allowed within the

boundary of a marine sanctuary or wildlife refuge, if conducted in a manner consistent with sanctuary goals and objectives. DOE agrees that, if the listed activities are authorized by the government agency responsible for the management of the sanctuary or refuge, or after consultation with such responsible agency when authorization is not applicable, then the activity may be categorically excluded under B3.16. Therefore, DOE is modifying categorical exclusion B3.16 (and B5.25) to now allow covered actions within, or having effects on, existing or proposed marine sanctuaries, wildlife refuges, or governmentally recognized areas of high biological sensitivity, if the action receives authorization from, or after consultation with, the responsible agency. The DOE NEPA Compliance Officer would take concerns from the responsible agency into account when considering whether to apply this categorical exclusion.

DOE also received a comment from DOI (at page 1) stating that it has initiated the process of reviewing and potentially revising or deleting some of its own categorical exclusions. DOE had relied on some of these DOI categorical exclusions, as well as categorical exclusions from the Department of the Navy and the National Oceanic and Atmospheric Administration, when developing this categorical exclusion. In response to the DOI comment, DOE is revising categorical exclusion B3.16 in the final rule to remove certain research activities adapted from DOI's categorical exclusions. The remaining activities are consistent with other Federal agencies' existing categorical exclusions, as well as activities included in other DOE categorical exclusions, such as flow measurements (see categorical exclusion B3.1).

DOE received a comment from DOI (at page 2) expressing concern that DOE would categorically exclude proposed actions located in unsurveyed areas of the seafloor under categorical exclusions B3.16 and B5.25. The comment suggested that DOE should perform an assessment of survey data within the area of potential effect or complete an assessment of potential seafloor impacts from the proposed activities before DOE makes a categorical exclusion determination. In response, DOE notes that a NEPA Compliance Officer, when considering a proposed action in an unsurveyed area, would gather additional information about the proposed project site needed to support a categorical exclusion determination under B3.16 and B5.25. It is the responsibility of the DOE NEPA Compliance Officer to consider the potential for significant impacts and to consult with other agencies as necessary when considering a proposed action.

DOE received comments regarding the use of genetically engineered organisms, synthetic biology, noxious weeds, and non-native species, such as non-native algae, in projects that may be categorically excluded under this section of the rule. For further information, see discussion of "Genetically engineered organisms, synthetic biology, governmentally designated noxious weeds, or invasive species" in section IV.C.7 of this preamble.

DOE received a comment from National Wildlife Federation (at page 4) expressing strong support for “removing unnecessary barriers to the commercialization of deepwater offshore wind technology,” and stating that “[w]ith siting screens, research and demonstration projects in these technologies will not have significant impacts.” DOE does not currently have the experience to support expanding the categorical exclusion to include such projects, but this may change as DOE gains experience over time.

#### **Categorical Exclusions Applicable to Electrical Power and Transmission (B4)**

DOE is changing the title of this group of categorical exclusions to state that they are applicable to “electrical power and transmission,” rather than to “power resources,” as used in the existing regulations and the Notice of Proposed Rulemaking. This change better identifies the subject of this group of categorical exclusions.

##### **B4.1 Contracts, Policies, and Marketing and Allocation Plans for Electric Power**

In the Notice of Proposed Rulemaking, DOE proposed to clarify the scope of this categorical exclusion by stating that the contracts, policies, and marketing and allocation plans are “related to electric power acquisition or transmission.” After further consideration, DOE will not explicitly refer to transmission in this categorical exclusion; transmission activities are included in the contracts, policies, and marketing plans, or are covered primarily in other classes of actions, such as categorical exclusion B4.11.

##### **B4.4 Power Marketing Services and Activities**

Upon further consideration, DOE is changing the example of “load shaping” to “load shaping and balancing.” Load balancing helps ensure system reliability by managing energy resources to be equal with load.

##### **B4.6 Additions and Modifications to Transmission Facilities**

After further consideration, DOE will not adopt its proposal to apply this categorical exclusion to facilities that “would not have the potential to cause significant impacts beyond the previously disturbed or developed facility area” and instead this categorical exclusion will be limited to actions “within a previously disturbed or developed facility area.” DOE is making this change to conform the categorical exclusion to others that relate to proposed actions in a previously disturbed or developed area. In addition, after further consideration, DOE is making a clarifying improvement by moving the activity examples to a separate sentence. For further information, see discussion of “Previously disturbed or developed area” in section IV.C.2 of this preamble.

##### **B4.9 Multiple Uses of Transmission Line Rights-of-Way**

A comment from Edison Electric Institute (at page 3) on this categorical exclusion, for granting or denying requests for multiple uses of a transmission facility's rights-of-way, requested that DOE specify that multiple uses need to accommodate technical and other concerns that may be raised by the owners of the transmission facilities involved. This categorical exclusion is used by DOE entities, for example Power Marketing Administrations, in responding to a request regarding their own transmission facility rights-of-way, not those owned by other parties. Therefore, DOE is retaining the proposed language in the categorical exclusion in the final rule.

#### **B4.10 Removal of Electric Transmission Facilities**

A comment from Edison Electric Institute (at page 3) expressed agreement with the proposed changes to the categorical exclusion, but requested that DOE stipulate that any permit holders and owners of facilities affected by the abandonment must be given advance notice so they can protect their rights. This comment raises concerns unrelated to environmental review under NEPA, which is the scope of this regulation. For this reason, DOE is retaining its proposed categorical exclusion as the final categorical exclusion.

DOE is changing the title of this categorical exclusion to more closely reflect the wording of the categorical exclusion.

#### **B4.11 Electric Power Substations and Interconnection Facilities**

DOE is simplifying the wording of this categorical exclusion. In the Notice of Proposed Rulemaking, DOE proposed that actions under this categorical exclusion be restricted to interconnecting new generation resources that meet two conditions—that the new generation resource would be eligible for a categorical exclusion and that it would be equal to or less than 50 average megawatts. DOE determined that these limitations on the generation resource were more limiting than necessary to ensure appropriate application of this categorical exclusion. The appropriate limit is that the generation resource not pose the potential for significant environmental impacts. This limit already is addressed in DOE's existing NEPA regulations, which state, in part, that before applying a categorical exclusion, DOE must determine that the proposed action is not “connected” (**40 CFR 1508.25(a)(1)**) to other actions with potentially significant impacts (**10 CFR 1021.410(b)(3)**).

DOE received a comment from the Chesapeake Bay Foundation (at page 5) stating that “a categorical exclusion without any limitations or conditions on what can be fairly substantial development is inappropriate” and that DOE should consider context and size to ensure that actions with significant impacts are not categorically excluded. In applying this categorical exclusion, a NEPA Compliance Officer considers context and size, along with other factors associated with potential for significant



impacts, and DOE prepares an environmental assessment or environmental impact statement if a categorical exclusion determination is not appropriate.

#### **B4.12 Construction of Powerlines**

DOE is simplifying the wording of this categorical exclusion with respect to activities not in previously disturbed or developed rights-of-way. Upon further consideration, DOE is removing the limitation on interconnection of new generation resources proposed for this categorical exclusion for the same reason described above for categorical exclusion B4.11.

#### **B4.13 Upgrading and Rebuilding Existing Powerlines**

DOE is simplifying the wording of this categorical exclusion by removing the limitation on interconnection of new generation resources. The existing categorical exclusion B4.13 does not include a condition regarding interconnections, and DOE has determined that it is not necessary to add one. Also, any proposed upgrade or rebuild of existing powerlines would be subject to the same consideration regarding connected actions as described above for categorical exclusion B4.11.

### **Categorical Exclusions Applicable to Conservation, Fossil, and Renewable Energy Activities (B5)**

#### **B5.3 Modification or Abandonment of Wells**

DOE received a comment from the Chesapeake Bay Foundation (at page 6) that well abandonment should be accompanied by revegetation and rehabilitation of the area. In response, DOE notes that abandonment of a well normally includes actions such as plugging, welding, or crimping and backfilling to ensure safety and prevent contamination from entering the well. DOE's proposed language adds new conditions, including that this categorical exclusion could only apply if the well abandonment were to be conducted "consistent with best practices and DOE protocols," such as those to address revegetation and rehabilitation, among other issues. Therefore, DOE is retaining the proposed language in the categorical exclusion in the final rule. DOE notes, however, that revegetation and rehabilitation may not always be part of a proposed abandonment, where, for example, continued maintenance of cleared areas may be necessary because of ongoing operations near the abandoned well.

#### **B5.4 Repair or Replacement of Pipelines, B5.5 Short Pipeline Segments, and B5.8 Import or Export Natural Gas, With New Cogeneration Powerplant**

A comment from an anonymous individual (at page 2) objected to the categorical exclusions for pipelines because "major pipelines blow up" and asserted that DOE has allowed major oil firms to fail

to maintain pipelines and has failed to adequately punish these companies for oil spills. DOE's experience is that the types of pipeline projects addressed by these categorical exclusions do not pose significant risk of accident and, indeed, repair, replacement, and similar activities can reduce such risks. DOE is retaining the proposed language in the categorical exclusions in the final rule.

#### **B5.13 Experimental Wells for the Injection of Small Quantities of Carbon Dioxide**

A comment from Sandy Beranich (at page 2) expressed concern that the injection of carbon dioxide into experimental wells should be allowed only after completing an environmental assessment. The comment also inquired as to DOE experience with these wells and their potential impacts. DOE has identified, in the Technical Support Document, multiple environmental assessments and findings of no significant impact and the results of field projects that demonstrate DOE experience with wells of a scale covered by this categorical exclusion. These environmental assessments and findings of no significant impact demonstrate that the operation of such wells normally does not result in significant environmental impacts.

To simplify the categorical exclusion, DOE is changing "salt water and freshwater" to "aquatic environments." Aquatic, as used herein, may refer to salt water, freshwater, or areas with shifting delineation between the two; this is not a substantive change.

#### **B5.15, B5.16, B5.17, B5.18, and B5.25 Renewable Energy**

Certain of DOE's proposed categorical exclusions for small-scale renewable energy projects include a condition that a proposed project "would incorporate appropriate control technologies and best management practices." DOE received a comment from Defenders of Wildlife (at pages 2-5) recommending that the control technologies and best management practices for five categorical exclusions (B5.15, B5.16, B5.17, B5.18, and B5.25) include pre-development surveys, mitigation measures, continued monitoring, and decommissioning/reclamation. In response, DOE notes that it normally would consider these and other practices during its NEPA review, including when determining whether to apply one of the categorical exclusions referenced by the comment.

The comment first recommended inclusion of pre-development surveys for endangered and threatened species and other sensitive resources. DOE already evaluates the likelihood of potential impacts to threatened and endangered species and sensitive ecological resources through the integral elements applicable to all appendix B categorical exclusions, as well as the consideration of extraordinary circumstances. Furthermore, predevelopment surveys may be required as part of compliance with other regulations (e.g., those pertaining to the Endangered Species Act, Bald and Golden Eagle Protection Act) and would be considered by DOE in its decision whether to apply a categorical exclusion to a particular proposed action.

The second recommendation in the comment was to include mitigation measures to compensate for impacts to ecological resources. In response, compensating for impacts to biological resources is not required by NEPA for application of a categorical exclusion, and DOE declines to adopt such a requirement. However, DOE considers all mitigation measures and best management practices that are incorporated into a proposed action as part of its decision whether to apply any categorical exclusion. This approach is supported by the CEQ final guidance on the “Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact” (CEQ Mitigation and Monitoring Guidance) (76 FR 3843; January 14, 2011). In its guidance, CEQ noted that “[m]any Federal agencies rely on mitigation to reduce adverse environmental impacts as part of the planning process for a project, incorporating mitigation as integral components of a proposed project design before making a determination about the significance of the project’s environmental impacts. Such mitigation can lead to an environmentally preferred outcome and in some cases reduce the projected impacts of agency actions to below a threshold of significance. An example of mitigation measures that are typically included as part of the proposed action are agency standardized best management practices such as those developed to prevent storm water runoff or fugitive dust emissions at a construction site” (CEQ Mitigation and Monitoring Guidance).

The comment also recommended continued monitoring of environmental impacts resulting from categorically excluded actions. In response, ongoing monitoring is a part of many DOE programs, often in conjunction with an environmental management system, and private project proponents may include such monitoring (e.g., for compliance with environmental protection requirements). However, when DOE is providing funding, its ability to require or oversee ongoing monitoring may be limited. In sum, DOE supports the objective of monitoring, but is not able to ensure that monitoring occurs in all circumstances.

The fourth recommendation in the comment was to include decommissioning/reclamation plans that restore impacted areas. DOE considers available information on decommissioning/reclamation plans as part of its decision whether to apply a categorical exclusion. Decommissioning and reclamation plans are not prerequisites for application of a categorical exclusion and, while they may be appropriate in some instances, DOE does not elect to require them in every situation.

DOE is not making any changes to categorical exclusions B5.15, B5.16, B5.17, B5.18, and B5.25 in response to the comments discussed above.

#### **B5.15 Small-Scale Renewable Energy Research and Development and Pilot Projects**

A comment from DOI (at page 3) asked for clarification regarding whether actions covered under the proposed categorical exclusion included both research and development projects and pilot projects located in previously disturbed or developed areas. DOE is modifying the categorical exclusion to

more clearly state that both types of projects must be located in a previously disturbed or developed area. Therefore, DOE is changing the first sentence to read: “Small-scale renewable energy research and development projects and small-scale pilot projects, provided that the projects are located within a previously disturbed or developed area.” For further information, see discussion of “Previously disturbed or developed area” in section IV.C.2. of this preamble. Another comment requested that the term “small-scale” be defined. For further information, see discussion of “small” and “small-scale” in section IV.C.3 of this preamble.

DOE received comments regarding the use of genetically engineered organisms, synthetic biology, noxious weeds, and non-native species, such as non-native algae, in projects that may be categorically excluded under this section of the rules. For further information, see discussion of “Genetically engineered organisms, synthetic biology, governmentally designated noxious weeds, or invasive species” in section IV.C.7 of this preamble.

For discussion of additional comments on this categorical exclusion, see “B5.15, B5.16, B5.17, B5.18, and B5.25—Renewable energy” above in this preamble.

#### **B5.16 Solar Photovoltaic Systems**

DOE received a comment from William Kirk Williams (at page 1) objecting to DOE's proposed categorical exclusion for solar photovoltaic projects because of the potentially large amount of land involved, associated impacts on ecosystems, and the economic interests of local communities who might be restricted from existing economic uses of Federal lands. The comment said that such projects should not be built without preparation of an environmental impact statement to consider alternatives. DOE agrees that some solar projects are large and appropriately analyzed in an environmental assessment or environmental impact statement. However, DOE is not making any changes in response to this comment because the categorical exclusion could only be applied to projects “on a building or other structure” or on land “generally less than 10 acres within a previously disturbed or developed area.” At this scale, solar photovoltaic projects normally would not have the potential to cause significant impacts. For further information, see discussion of “Previously disturbed or developed area” in section IV.C.2 of this preamble.

Two comments (from Granite Construction Company (at pages 1-2) and Amonix (at pages 1-2)) asked DOE to increase the allowable footprint (acreage) for actions under this categorical exclusion to 100 acres when the projects would be located on heavily developed land such as mine or quarry sites. However, DOE does not have an adequate record to support a conclusion that larger photovoltaic systems, including up to 100 acres, normally would not have the potential for significant environmental impacts. For all proposed projects, including those at the mine and quarry locations, DOE would need to consider numerous site-specific factors, including the current state of animal and plant systems,

reclamation, and alternative uses (e.g., grazing). The scale of construction activities and the potential impacts for systems on 100 acres of land could be significantly different than those for a project located on 10 acres or less. DOE will continue to collect and review data and could revise or add a new categorical exclusion at a future time, if warranted. At a minimum, DOE would consider this during the next periodic review of its categorical exclusions.

A comment from William Kirk Williams (at page 1) also expressed concerns regarding negative impacts to species such as the sage grouse from activities under this categorical exclusion. Under integral element B(4)(ii), a provision applicable to all categorical exclusions in appendix B, DOE would not categorically exclude an action with the potential for significant impacts on threatened and endangered species, including Federal and state- listed and proposed species and otherwise Federally protected species.

For discussion of additional comments on this categorical exclusion, see “B5.15, B5.16, B5.17, B5.18, and B5.25—Renewable energy” above in this preamble.

#### **B5.17 Solar Thermal Systems**

For DOE's response to comments on this categorical exclusion, see discussion of “B5.15, B5.16, B5.17, B5.18, and B5.25 Renewable energy” above in this preamble.

#### **B5.18 Wind Turbines**

In response to comments, DOE is making three changes to the categorical exclusion. A comment from Pacific Northwest National Laboratory (at page 2) asked for exclusionary wording stating that wind turbines would not be located in an established marine sanctuary or wildlife refuge. In response to the comment, DOE is limiting the categorical exclusion to land activities by adding the following sentence to the end of the categorical exclusion: “Covered actions include only those related to wind turbines to be installed on land.” DOE also received a comment supporting the use of categorical exclusions for deepwater floating offshore wind energy projects. DOE does not currently have the experience to support expanding the categorical exclusion to include such projects, but this may change as DOE gains experience over time. Second, DOE received comments (e.g., from Defenders of Wildlife (at page 4), Sandy Beranich (at page 2)) expressing uncertainty or concern as to the scope or size of a proposed action to which this categorical exclusion may apply, asking whether this categorical exclusion could cover the establishment of a wind farm. In order to clarify that DOE intends the categorical exclusion to apply to proposals for a limited number of wind turbines, DOE is changing the first sentence of the categorical exclusion to refer to a small number of wind turbines (generally not more than 2), which is the number of turbines generally analyzed in the environmental assessments and findings of no significant impact identified in the Technical Support Document. Third, DOE

identified distances for siting turbines from air safety and navigational devices in nautical miles in its Notice of Proposed Rulemaking. DOE is adding the conversion to miles to ensure the limitation is readily understood by both experts and the general public.

In addition, upon further consideration, DOE is clarifying the examples of significant impacts to persons, so that the examples now read “(such as from shadow flicker and other visual effects, and noise).” DOE also is changing a condition that a proposed action “would not have the potential to cause significant impacts on bird or bat species” to “would not have the potential to cause significant impacts on bird or bat populations.” The appropriate context for considering potential impacts is the local populations of birds and bats (including those nesting or foraging in, or flying through, the vicinity of the proposed project site).

DOE also received several other comments in response to which DOE is not making changes to the categorical exclusion. As noted previously (section IV.C.4), DOE received comments on its proposed use of “would not have the potential for significant impact” in a number of its categorical exclusions, including B5.18. In the context of categorical exclusion B5.18, comments asserted that the phrase would be open to interpretation or was too vague. DOE is including the limitations “would not have the potential to cause significant impacts on bird or bat populations” and “would not have the potential to cause significant impacts to persons (such as from shadow flicker and other visual effects, and noise)” in categorical exclusion B5.18 to highlight the types of potential impacts that a NEPA Compliance Officer must consider when reviewing a proposed action specific to wind turbines. As explained in section IV.C.4, this is consistent with CEQ's NEPA regulations and its Categorical Exclusion Guidance.

DOE received comments that expressed concern that the phrase “previously disturbed or developed area” was too vague and prone to interpretation. As indicated in its Notice of Proposed Rulemaking, DOE is limiting categorical exclusion B5.18 to actions located within previously disturbed or developed areas to avoid potential impacts to resources. For further information, see discussion of “Previously disturbed or developed area” in section IV.C.2 of this preamble.

DOE received a comment from William Kirk Williams (at page 1) that expressed concern over the scale of wind farms as too large and consuming too much land. Other comments (e.g., from DOI (at page 3), Defenders of Wildlife (at page 4), Sandy Beranich (at page 2)) suggested limiting this categorical exclusion to a single turbine or specifying the scale in terms of acres. DOE is changing the categorical exclusion to limit covered actions to those that involve only “a small number of (generally not more than 2) \* \* \*.” This restriction, along with the condition that wind turbines must have a total height generally less than 200 feet and be sited within a previously disturbed or developed area, limits the potential scale of actions under this categorical exclusion to those that would not require large parcels of land. DOE has identified, in the Technical Support Document, multiple environmental

assessments and findings of no significant impact that demonstrate DOE experience with wind turbine projects of the scale covered by this categorical exclusion. These environmental assessments and findings of no significant impact demonstrate that the construction of a small number of wind turbines normally does not result in large parcels of land being affected or significant environmental impacts. For further information, see discussion of “small” and “small-scale” in section IV.C.3 of this preamble.

Another comment (from National Wildlife Federation (at page 3)) suggested that DOE had not taken into consideration the “non-footprint” and potential cumulative impacts of wind turbines on bird, bat and wildlife behavior, migration pathways or habitat. A DOE NEPA Compliance Officer would consider potential direct, indirect, and cumulative impacts, as well as extraordinary circumstances when reviewing a proposed action and making a NEPA determination.

DOE received a comment from DOI (at page 3) asking for the basis for the limitation, as stated in the Notice of Proposed Rulemaking, that covered actions would be for commercially available wind turbines “with a total height generally less than 200 feet.” This limitation is based on several considerations. DOE is choosing to limit this categorical exclusion to actions that are small-scale (*i.e.*, a small number of small turbines). The “generally less than 200 feet” limitation is intended to avoid potential conflicts with airports and aviation navigation aids, and to avoid potential commercial and military air safety issues.

The nature of potential impacts related to turbine height on visual or biological resources for any proposed action will vary depending on the nature of the site. DOE is including other limitations in B5.18 (*e.g.*, “would not have the potential to cause significant impacts on bird or bat populations”) that better address issues related to visual, biological, and other resources in order to highlight the types of potential impacts that a NEPA Compliance Officer must consider when reviewing a proposed action specific to wind turbines.

DOE also received a comment from Defenders of Wildlife (at page 4) focused on best management practices and monitoring measures associated with categorical exclusion B5.18. A comment from William Kirk Williams (at page 1) expressed concern that B5.18 lacks a mechanism for requiring that actions covered under this categorical exclusion would incorporate best management practices. Both of these comments were related to using best management practices to reduce impacts to birds and bats under categorical exclusion B5.18. DOE considers all mitigation measures and best management practices that are incorporated into a proposed action as part of its decision whether to apply any categorical exclusion. This approach is supported by the CEQ Mitigation and Monitoring Guidance. DOE supports the objective of better design and planning to limit impacts to birds and bats and has therefore included a limitation in B5.18 that covered actions would “incorporate appropriate control technologies and best management practices.” Whether or not such practices are included in the

design of a wind turbine proposed action would be evident at the time that a DOE NEPA Compliance Officer considers the specific details of a proposed action.

The comment from Defenders of Wildlife (at page 5) also recommended continued monitoring of environmental impacts resulting from categorically excluded actions. In response, ongoing monitoring is a part of many DOE programs, often in conjunction with an environmental management system, and private project proponents may include such monitoring (e.g., for compliance with environmental protection requirements). However, when DOE is providing funding, its ability to require or oversee ongoing monitoring may be limited, due to factors such as the terms of the financial award and the extent of Federal control over the lifetime of the project. In sum, DOE supports the objective of monitoring but is not able to ensure that monitoring occurs in all circumstances.

Several comments (e.g., from DOI (at page 3), William Kirk Williams (at page 1)) raised issues related to impacts to biological resources, namely on impacts to bird and bat species. A comment from DOI (at page 3) asked DOE to describe “how the determination [would be] made that a significant number of birds or bats would not be affected.” Because a determination of significance under NEPA depends on the context and intensity of an individual proposal, potential significance of the impacts from wind turbines on birds and bats is site-specific. At the time that a NEPA Compliance Officer considers applying this categorical exclusion to a proposed action, DOE would determine significance of impacts on birds and bats based on the specific site conditions of the proposed wind turbine(s).

A second comment (from William Kirk Williams (at page 1)) pointed out that wind turbines kill birds, and therefore, constitute a violation of the Migratory Bird Treaty Act. DOE agrees that impacts to birds are an important concern associated with this renewable technology, and DOE is modifying the integral elements applicable to appendix B categorical exclusions by adding that a proposal must be in compliance with the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act. As indicated in its Notice of Proposed Rulemaking, DOE is also including a limitation that the action not have the potential to cause significant impacts on bird or bat populations, so that a NEPA Compliance Officer must consider the impact on these populations specifically when reviewing a proposed action to determine whether it fits this categorical exclusion.

Another comment (from Sandy Beranich (at page 2)) requested that DOE include a requirement that a covered action under categorical exclusion B5.18 would require agreement from the U.S. Fish and Wildlife Service for the size and location. Under integral element B(4)(ii), applicable to all categorical exclusions in appendix B, DOE would not categorically exclude an action with the potential for significant impacts on threatened and endangered species, including Federal and state-listed and proposed species and otherwise Federally protected species. Further, DOE consults with other agencies, as required. While the U.S. Fish and Wildlife Service has some authority related to the protection of such species, it does not have statutory or regulatory authority for siting wind turbines



generally. The authority for siting wind turbines typically rests with state and/or local governments that make decisions with regard to land use, zoning, or other natural resource uses. Thus, DOE is not making any changes to categorical exclusion B5.18 based on this comment.

A comment from National Wildlife Federation (at page 3) requested that DOE include a specific requirement that wind turbines must not be sited in migration corridors or pathways, habitat areas, or areas where birds concentrate, such as wetlands or lakes. As indicated in its Notice of Proposed Rulemaking, DOE is including a limitation that covered actions “would be in accordance with applicable requirements (such as local land use and zoning requirements) in the proposed project area.” DOE clarifies that this could include, but is not limited to, State, local or other requirements regarding the protection of special or sensitive species, migration pathways, and habitats. Therefore, DOE is not making a change based on this comment.

Another comment from National Wildlife Federation (at page 3) suggested that DOE include a requirement that the actions covered be in accordance with a municipal, state, or Federal wind turbine siting guideline such as the U.S. Fish and Wildlife Service, *Draft Land-Based Wind Energy Guidelines* (April 2011). The U.S. Fish and Wildlife Service has since issued revised draft guidelines (July 2011) and continues related discussions with the interested public and other Federal agencies. DOE will continue following the development of these guidelines and considering how to most appropriately apply them to its activities. However, DOE does not find it appropriate to make conformance to the guidelines a condition of applying a categorical exclusion. The guidelines are still being developed, and the U.S. Fish and Wildlife Service does not consider them mandatory at this time. Thus, DOE is not making any changes to categorical exclusion B5.18 based on this comment.

For discussion of additional comments on this categorical exclusion, see “B5.15, B5.16, B5.17, B5.18, and B5.25—Renewable energy” above in this preamble.

#### **B5.19 Ground Source Heat Pumps**

After further consideration, DOE is making two changes to the categorical exclusion. The first is to address the potential for a ground source heat pump system to allow cross-contamination between aquifers, during the construction or operation of the heat pump system. The second is to correct a typographical error; DOE intended to say “school or community center” rather than “school and community center.” Therefore, DOE is changing the first sentence of the categorical exclusion to read: “The installation, modification, operation, and removal of commercially available small-scale ground source heat pumps to support operations in single facilities (such as a school or community center) or contiguous facilities (such as an office complex) (1) only where (a) major associated activities (such as drilling and discharge) are regulated, and (b) appropriate leakage and contaminant control measures would be in place (including for cross-contamination between aquifers) \* \* \*.”

## **B5.20 Biomass Power Plants**

DOE received comments (e.g., from National Wildlife Federation (at page 4) and Center for Food Safety on behalf of itself and 3 other organizations (at page 5)) expressing concern about the impacts of biomass used in energy production. These concerns included impacts to wildlife habitat from the conversion of natural forests to monocultures for biomass production and the use of experimental biomass technologies employing genetically engineered organisms. DOE received a comment from Center for Food Safety on behalf of itself and 3 other organizations (at page 5) stating that biomass harvesting (or sourcing) could result in widespread forest destruction and soil degradation. Another comment (from National Wildlife Federation (at page 4)) suggested that biomass be certified by the Forest Stewardship Council or the Council for Sustainable Biomass Production to address the impact of biomass sourcing on forest stewardship and sustainability. Comments from Center for Food Safety on behalf of itself and 3 other organizations (at page 5) expressed concern about significant air pollution that could result from biomass combustion, when compared to other fuels. Another comment (from Friends of the Earth (at pages 1-2) and Center for Food Safety on behalf of itself and 3 other organizations (at page 1)) stated that this categorical exclusion should be rejected, because its use could cause significant impacts; DOE has determined that this categorical exclusion is appropriate, in part, because of the requirement to consider extraordinary circumstances.

A DOE NEPA Compliance Officer would evaluate the size and output of proposed biomass power plants to determine whether the proposals meet the integral elements of the categorical exclusion (listed in appendix B, paragraph (4)) and whether there are any associated extraordinary circumstances that would affect the significance of impacts, including impacts to wildlife and habitat. In DOE's experience, the limitations on the size and energy output of covered biomass power plants ensure that any covered action would not consume quantities of biomass that could foreseeably impact soil quality or forest sustainability, nor would such small-scale projects result in the conversion of natural forests to monocultures of biomass crops. Therefore, DOE is not adding specific restrictions on biomass sourcing, although an applicant's use of biomass certified as sustainable could be considered by the NEPA Compliance Officer in determining whether a categorical exclusion is appropriate. Regarding pollution that could result from biomass combustion, the categorical exclusion requires that any covered biomass power plant not affect the air quality attainment status of the area, not have the potential to cause a significant increase in the quantity or rate of air emissions, and not have the potential to cause significant impacts to water resources. For these reasons, DOE is retaining the proposed language in the categorical exclusion in the final rule.

A comment from Center for Food Safety on behalf of itself and 3 other organizations (at page 5) expressed concern about potential impacts on global climate change, stating that burning biomass can emit almost 1.5 times as much global warming pollution per unit of energy as coal, and that harvesting and transporting biomass would add to greenhouse gas emissions. A comment from the Blue Ridge

Environmental Defense League (at page 1) stated that biomass energy source impacts are large, and that labeling such projects as “carbon neutral” is a mistaken concept without scientific basis. DOE considered these issues when developing the categorical exclusion. For example, DOE reviewed the Environmental Protection Agency's *Call for Information* regarding greenhouse gas emissions from bioenergy and other biogenic sources (75 FR 4117; July 15, 2010), which noted that the issue is complex and requested comments on analytical approaches that would apply to biomass facilities. Partly because of these issues, the categorical exclusion explicitly limits covered actions to those that would not have the potential to cause a significant increase in the quantity or rate of air emissions. DOE intends that “emissions” includes greenhouse gas emissions. Further, the small-scale biomass plants under this categorical exclusion would have correspondingly small-scale greenhouse gas emissions, and would produce power that may offset energy that otherwise might have been produced by fossil energy facilities, resulting in a potential for net beneficial impacts on climate change. Impacts from harvesting fuel would be limited by the size of the facility (and thus the total fuel needs) and consideration of factors such as existing land use plans.

DOE received comments regarding the use of genetically engineered organisms, synthetic biology, noxious weeds, and non-native species, such as non-native algae, in projects that may be categorically excluded under this section of the rules. For further information, see discussion of “Genetically engineered organisms, synthetic biology, governmentally designated noxious weeds, or invasive species” in section IV.C.7 of this preamble.

#### **B5.21 Methane Gas Recovery and Utilization System**

DOE received a comment from the Blue Ridge Environmental Defense League (at page 1) stating that methane gas recovery and utilization systems are either negative or associated with negative impacts. A DOE NEPA Compliance Officer would evaluate the size and output of proposed methane gas systems to determine whether the proposals meet the integral elements of the categorical exclusion (listed in appendix B, paragraph (4)) and whether there are any associated extraordinary circumstances that would affect the significance of impacts, including impacts to wildlife and habitat. The categorical exclusion also requires that any covered methane gas system not have the potential to cause a significant increase in the quantity or rate of air emissions, be in accordance with applicable requirements, and incorporate appropriate control technologies and best management practices. Because these measures would address potential significant impacts from these facilities, DOE is retaining the proposed language in the final categorical exclusion.

#### **B5.24 Drop-in Hydroelectric Systems**

A comment from Pacific Northwest National Laboratory (at page 2) suggested that limiting this categorical exclusion to stream and river areas upgradient of “natural” fish barriers is unduly restrictive

because it excludes, for example, a small-scale hydroelectric system in an irrigation canal that uses existing fish screens or in a river system above an existing dam. DOE agrees that it is the effectiveness of the fish barrier—not whether the barrier is natural or man-made—that is relevant to the potential environmental impacts. Two important indicators of future effectiveness of an existing fish barrier are whether it is planned for removal (as are man-made barriers in several river systems) and whether it is to be modified to facilitate fish moving upstream past the barrier. Thus, DOE is revising the categorical exclusion to remove the word “natural” and to include a condition that the system “be located up-gradient of an existing anadromous fish barrier that is not planned for removal and where fish passage retrofit is not planned. \* \* \*”

Another comment from Pacific Northwest National Laboratory (at page 2) asked DOE to restrict this categorical exclusion to activities that would “not have the potential to cause impacts to threatened or endangered species” or significant impacts to fish or wildlife. Before making a categorical exclusion determination, a NEPA Compliance Officer must assess whether the proposed action will have the potential to cause significant impacts to listed or proposed threatened and endangered species. See integral element B(4)(ii). Thus, potential significant impacts to threatened and endangered species and fish and wildlife will be considered. The comment seeks inclusion of a higher standard—any potential impact to threatened and endangered species—which is not the correct standard required under NEPA. However, in response DOE is adding a reference to the integral element listed at B(4)(ii), which requires consideration of the impacts on threatened and endangered species, including Federal and state-listed and proposed species and otherwise Federally protected species.

DOE also received a comment from the Blue Ridge Environmental Defense League (at page 1) expressing concern with the proposed categorical exclusion for drop-in hydroelectric systems. DOE has concluded that such systems meeting the requirements of the categorical exclusion (*i.e.*, they would involve no storage or diversion of stream or river water, they would be located up-gradient of an existing anadromous fish barrier, and installation would be accomplished without use of heavy equipment and would involve no major construction or modification of stream or river channels) normally would not have the potential to cause significant impacts.

#### **B5.25 Small-Scale Renewable Energy Research and Development and Pilot Projects in Aquatic Environments**

To simplify the categorical exclusion, DOE is changing “salt water and freshwater” to “aquatic.” Aquatic, as used herein, may refer to salt water, freshwater, or areas with shifting delineation between the two; this is not a substantive change. A comment from Pacific Northwest National Laboratory (at page 2) asked that additional restrictions be added to the categorical exclusion to preclude the installation of a small-scale renewable energy research and development or pilot project device, if the installation of the device would require significant dredging or if the device itself could interfere with

shipping navigation. Under integral element B(1) (appendix B, paragraph (1)) to **10 CFR part 1021**, to fit within the classes of actions under appendix B categorical exclusions, the proposed action must be one that would not “threaten a violation of applicable, statutory, or permit requirements for environment, safety, and health.” Actions covered by this categorical exclusion would be subject to, and would often require permits under, Section 10 of the Rivers and Harbors Act, which regulates structures placed in “navigable waters of the United States,” and Section 404 of the Clean Water Act, which regulates the discharge of dredged or fill material into waters of the United States. These regulations and statutes are expected to address the comment; therefore, DOE is not making any changes based on this comment.

A comment from the Ocean Renewable Energy Coalition (at page 4) asked if a transmission line connecting the proposed generation device to the grid would be covered under this categorical exclusion. Any action subject to a NEPA determination, whether an environmental impact statement, environmental assessment, or categorical exclusion, must include all necessary components of that action. In this case, the inclusion of one or more transmission lines connecting the generation device to the electrical grid as part of the proposed action would not prevent the application of the categorical exclusion, unless some aspect of the installation, character, or path of the line was inconsistent with one or more of the limitations described in the categorical exclusion or the integral elements, or if extraordinary circumstances were present.

Several comments (e.g., from DOI (at page 3) and the Ocean Renewable Energy Coalition (at page 4)) asked that the term “small-scale” be defined, and one comment (from the Ocean Renewable Energy Coalition (at page 4)) suggested that a power limit of 5 megawatts be added to the categorical exclusion. Whether a proposal is small-scale would be determined by the NEPA Compliance Officer based on the context and intensity of the proposed action, which would be determined by the site conditions and nature of the proposal. Such limitations are more meaningful than a megawatt limit, as there is not necessarily a direct correlation between generation capacity and potential environmental impacts for the various technologies that could be addressed under this categorical exclusion. For additional discussion on the term “small-scale,” see DOE’s discussion of “small” and “small-scale” that appears in section IV.C.3 of this preamble.

A comment from the Ocean Renewable Energy Coalition (at page 5) suggested that DOE provide guidance as to the meaning of “biologically sensitive.” Areas of high biological sensitivity are defined in the categorical exclusion to include “areas of known ecological importance, whale and marine mammal mating and calving/pupping areas, and fish and invertebrate spawning and nursery areas recognized as being limited or unique and vulnerable to perturbation; these areas can occur in bays, estuaries, near shore, and far offshore, and may vary seasonally.” Information regarding areas of high biological sensitivity is available from local, state, and Federal regulatory and natural resource management agencies. It is not uncommon for a categorical exclusion determination to require some

analysis to determine whether any extraordinary circumstances exist that would render the categorical inapplicable to a particular proposal. Determining the presence of conditions that would constitute an area of high biological sensitivity would be the responsibility of the DOE NEPA Compliance Officer, in consultation with the project proponent, and would necessarily occur before a categorical exclusion was granted.

A comment from Sandy Beranich (at page 2) noted that marine areas are too fragile for a variety of projects that could include the use of chemicals or invasive work and suggested that actions under this categorical exclusion warrant an environmental assessment level of analysis. Further, the comment requested that DOE limit the scale of projects under this categorical exclusion to allow only small projects in very specific areas. As indicated in its Notice of Proposed Rulemaking, DOE is limiting the scope and location of activities under this categorical exclusion to ensure that renewable energy research is conducted in a manner that would not have the potential to cause significant impacts.

DOE received a comment from the Ocean Renewable Energy Coalition (at page 5) noting that an offshore wave pilot project identified in a document cited in DOE's Technical Support Document for the Notice of Proposed Rulemaking was located in a marine sanctuary, yet was still deemed to have minimal impacts. In addition, a comment from Pacific Northwest National Laboratory (at page 2) suggested that many of the activities described in categorical exclusion B3.16—a related categorical exclusion for activities in aquatic environments—should be allowed within the boundary of a marine sanctuary or wildlife refuge if conducted in a manner consistent with sanctuary goals and objectives. Therefore, DOE is modifying categorical exclusion B5.25 (and B3.16) to now allow covered actions within, or having effects on, existing or proposed marine sanctuaries, wildlife refuges, or governmentally recognized areas of high biological sensitivity, if the action receives authorization from, or after consultation with, the responsible agency. The DOE NEPA Compliance Officer would take concerns from the responsible agency into account when considering whether to apply this categorical exclusion. For further discussion, see discussion of categorical exclusion B3.16, above.

Show citation box

DOE received a comment from National Wildlife Federation (at page 4) expressing strong support for “removing unnecessary barriers to the commercialization of deepwater offshore wind technology,” and stating that “with siting screens, research and demonstration projects in these technologies will not have significant impacts.” DOE does not currently have the experience to support expanding the categorical exclusion to include such projects, but this may change as DOE gains experience over time and will be considered when DOE conducts its next periodic review of its categorical exclusions. Another comment (from Friends of the Earth (at page 2) and Center for Food Safety on behalf of itself and 3 other organizations (at page 1)) stated that this categorical exclusion should be rejected, because its use could cause significant impacts; DOE has determined that this categorical exclusion is appropriate, in part, because of the requirement to consider extraordinary circumstances.

DOE received a comment from DOI (at page 2) suggesting that it discuss or consider impacts related to decommissioning of authorized temporary structures or devices under categorical exclusion B5.25. The comment expressed concern regarding impacts from both planned decommissioning and unplanned “cessation of operation” or failure. DOE agrees that potential impacts associated with decommissioning and similar activities would be appropriate to consider when determining whether a particular proposed action qualifies for a categorical exclusion. Another comment (from DOI (at page 3)) asked for clarification on what happens if a proposed action does not meet the conditions outlined in categorical exclusion B5.25. In response, if a condition is not met, then the DOE NEPA Compliance Officer would not apply this categorical exclusion and would prepare an environmental assessment or environmental impact statement, as appropriate. Another comment (from DOI (at page 3)) requested that DOE clarify the meaning of “the construction of permanent devices.” DOE also received a comment from DOI (at page 2) expressing concern that it would categorically exclude proposed actions located in unsurveyed areas of the seafloor under categorical exclusions B3.16 and B5.25. See explanation under categorical exclusion B3.16, above.

DOE received comments regarding the use of genetically engineered organisms, synthetic biology, noxious weeds, and non-native species, such as non-native algae, in projects that may be categorically excluded under this section of the rules. For further information, see discussion of “Genetically engineered organisms, synthetic biology, governmentally designated noxious weeds, or invasive species” in section IV.C.7 of this preamble.

For discussion of additional comments on this categorical exclusion, see “B5.15, B5.16, B5.17, B5.18, and B5.25—Renewable energy” above in this preamble.

## **Categorical Exclusions Applicable to Environmental Restoration and Waste Management Activities (B6)**

### **B6.1 Cleanup Actions**

DOE received a comment from Tri-Valley CAREs (at page 4) that questioned the basis for finding that the proposed increase in the cost limitation (from approximately \$5 million to approximately \$10 million) and the proposed removal of the time limitation (5 years) from this categorical exclusion will not result in potentially significant impacts to the environment. In DOE's experience, in light of other limitations on the scope of this categorical exclusion and the integral elements, increasing the cost limit would not add greatly to the types of projects that would be covered by this categorical exclusion. The time for project implementation is indirectly affected by the cost limit; *e.g.*, a container removal operation would be limited by its total cost even without an explicit time limit. Further, based on DOE's experience, the amount of time that a cleanup action requires is not a reliable indicator of its potential environmental impacts.

DOE received a comment from Sandy Beranich (at page 2) that acknowledged that cleanup costs have increased since the categorical exclusion was first established, but questioned whether a \$10 million cleanup could appropriately be considered “small-scale.” The size of typical small-scale cleanup actions with which DOE has experience has not changed, nor have the environmental impacts resulting from these actions increased. However, the costs of completing these actions have increased due to inflation. Projects meeting the \$10 million limit, along with the other limitations on the scope of the categorical exclusion, normally would not have the potential for significant impacts. For further information, see discussion of “small” and “small-scale” in section IV.C.3 of this preamble.

After further consideration, to clarify the cost limitation by accounting for inflation over time, DOE is inserting “(in 2011 dollars)” after “10 million dollars.”

## **10. Appendix C and Appendix D**

### **C7 Contracts, Policies, and Marketing and Allocation Plans for Electric Power**

After further consideration, DOE will not explicitly refer to transmission in this class of actions; transmission activities are included in the contracts, policies, and marketing plans, or are covered primarily in other classes of actions, such as the group of categorical exclusions under B4. In addition, to improve clarity, DOE is removing the previously proposed condition that the new generation resource “would not be eligible for categorical exclusion under this part.” DOE normally would not prepare an environmental assessment when a categorical exclusion would apply. Therefore, the condition is unnecessary and potentially confusing.

### **C8 Protection of Cultural Resources and Fish and Wildlife Habitat**

DOE received a comment from Sandy Beranich (at page 2) asking what DOE means by “large-scale,” a term that distinguishes this environmental assessment category from categorical exclusion B1.20 for “small-scale” proposals of this type. DOE NEPA Compliance Officers use their professional expertise and judgment to determine whether a proposal meets a categorical exclusion for “small-scale” activities when no additional limitation is specified. A proposal that a NEPA Compliance Officer does not consider small-scale under such an evaluation would fit within this environmental assessment category. For further information, see discussion of “small” and “small-scale” in section IV.C.3 of this preamble. In addition, under the DOE NEPA regulations ([10 CFR 1021.321](#)), DOE may prepare an environmental assessment on any action at any time in order to assist agency planning and decisionmaking. DOE is retaining the proposed language in this class of action in the final rule.

### **C12 Energy System Demonstration Actions**



DOE received a comment from the Chesapeake Bay Foundation (at page 6) that the scale of the project should be specified to clarify whether a project is covered in this “limited exclusion.” The comment is noted, but classes of actions in appendix C are not categorical exclusions; they are categories for which an environmental assessment is normally prepared to provide a basis for determining whether to prepare an environmental impact statement or issue a finding of no significant impact. DOE is retaining the proposed language in this class of actions in the final rule.

Upon further consideration, DOE is adding decommissioning to the list of actions. For proposed new facilities, DOE normally would address siting construction, operation, and decommissioning in the same review under NEPA.

In addition, DOE has determined that the final sentence of C12 is unnecessary and, thus, is deleting the sentence. This deletion does not change the meaning or scope of the paragraph.

#### **C15 Research and Development Incinerators and Nonhazardous Waste Incinerators**

Upon further consideration, DOE is adding decommissioning to the list of actions. For proposed new facilities, DOE normally would address siting construction, operation, and decommissioning in the same review under NEPA.

#### **D1 [Reserved: Strategic Systems]**

After further consideration, DOE is removing this class of actions because the term “strategic systems” is no longer in use and the referenced Order no longer defines it. The term previously referred to “a single, stand-alone effort within a program mission area that is a primary means to advance the Department's strategic goals.”

#### **D7 Contracts, Policies, and Marketing and Allocation Plans for Electric Power**

After further consideration, DOE will not explicitly refer to transmission in this class of actions; transmission activities are included in the contracts, policies, and marketing plans, or are covered primarily in other classes of actions, such as the group of categorical exclusions under B4.

### **V. Procedural Requirements**

#### **Review Under Executive Order 12866**

Today's final rule has been determined not to be a significant regulatory action under Executive Order 12866, “Regulatory Planning and Review,” 58 FR 51735 (October 4, 1993). Accordingly, this action

was not subject to review under that Executive Order by the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB).

### **Review Under National Environmental Policy Act**

In this rule, DOE establishes, modifies, and clarifies procedures for considering the environmental effects of DOE actions within DOE's decisionmaking process, thereby enhancing compliance with the letter and spirit of NEPA. The Council on Environmental Quality regulations do not direct agencies to prepare a NEPA analysis or document before establishing Agency procedures that supplement the CEQ regulations for implementing NEPA. Agencies are required to adopt NEPA procedures that establish specific criteria for, and identification of, three classes of actions: those that normally require preparation of an environmental impact statement; those that normally require preparation of an environmental assessment; and those that are categorically excluded from further NEPA review (40 CFR 1507.3(b)). Categorical exclusions are one part of those agency procedures, and therefore establishing categorical exclusions does not require preparation of a NEPA analysis or document. Agency NEPA procedures are procedural guidance to assist agencies in the fulfillment of agency responsibilities under NEPA, but are not the agency's final determination of what level of NEPA analysis is required for a particular proposed action. The requirements for establishing agency NEPA procedures are set forth at 40 CFR 1505.1 and 1507.3. The determination that establishing categorical exclusions does not require NEPA analysis and documentation has been upheld in *Heartwood, Inc. v. U.S. Forest Service*, 73 F. Supp. 2d 962, 972-73 (S.D. Ill. 1999), *aff'd*, 230 F.3d 947, 954-55 (7th Cir. 2000).

### **Review Under Regulatory Flexibility Act**

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking" (67 FR 53461; August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process (68 FR 7990). DOE has made its procedures and policies available on the Office of the General Counsel's Web site: <http://energy.gov/gc> under GC Guidance/Opinions, Rulemaking Policy.

DOE reviewed today's final rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. This final rule revises DOE's categorical exclusions, and makes certain other changes, that will help reduce the cost and time associated with completing the environmental review for certain proposed actions.

In the Notice of Proposed Rulemaking, DOE tentatively certified that this rule would not have a significant economic impact on a substantial number of small entities and did not prepare a regulatory flexibility analysis for this rulemaking. DOE received no comments on the certification, and the factual basis for DOE's certification is unchanged. Thus, DOE maintains its certification that this rule would not have a significant economic impact on a substantial number of small entities. DOE transmitted the certification and supporting statement of factual basis to the Chief Counsel for Advocacy of the Small Business Administration pursuant to 5 U.S.C. 605(b).

#### **Review Under Paperwork Reduction Act**

This rulemaking will impose no new information or record-keeping requirements. Accordingly, OMB clearance is not required under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

#### **Review Under Unfunded Mandates Reform Act of 1995**

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) generally requires Federal agencies to examine closely the impacts of regulatory actions on state, local, and tribal governments. Subsection 101(5) of title I of that law defines a Federal intergovernmental mandate to include any regulation that would impose upon state, local, or tribal governments an enforceable duty, except a condition of Federal assistance or a duty arising from participating in a voluntary Federal program. Title II of that law requires each Federal agency to assess the effects of Federal regulatory actions on state, local, and tribal governments, in the aggregate, or to the private sector, other than to the extent such actions merely incorporate requirements specifically set forth in a statute. Section 202 of that title requires a Federal agency to perform a detailed assessment of the anticipated costs and benefits of any rule that includes a Federal mandate which may result in costs to state, local, or tribal governments, or to the private sector, of \$100 million or more in any one year (adjusted annually for inflation). Section 204 of that title requires each agency that proposes a rule containing a significant Federal intergovernmental mandate to develop an effective process for obtaining meaningful and timely input from elected officers of state, local, and tribal governments.

This rule would amend DOE's existing regulations governing compliance with NEPA to better align DOE's regulations, particularly its categorical exclusions, with its current activities and recent experiences, and update the provisions with respect to current technologies and regulatory requirements. This rule would not result in the expenditure by state, local, and tribal governments in the aggregate, or by the private sector, of \$100 million or more in any one year. Accordingly, no assessment or analysis is required under the Unfunded Mandates Reform Act of 1995.

#### **Review Under Treasury and General Government Appropriations Act, 1999**

Section 654 of the Treasury and General Government Appropriations Act, 1999 (**Pub. L. 105-277**) requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule that may affect family well being. This rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

#### **Review Under Executive Order 13132**

**Executive Order 13132**, "Federalism" (**64 FR 43255**; August 4, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt state law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the states and carefully assess the necessity for such actions. DOE has examined this rule and has determined that it would not preempt state law and would not have a substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. No further action is required by **Executive Order 13132**.

#### **Review Under Executive Order 12988**

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of **Executive Order 12988**, "Civil Justice Reform" (**61 FR 4729**; February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of **Executive Order 12988** specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of **Executive Order 12988** requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or if it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, the rule meets the relevant standards of **Executive Order 12988**.

#### **Review Under Treasury and General Government Appropriations Act, 2001**

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB.

OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed this rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

#### **Review Under Executive Order 13211**

Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355; May 22, 2001), requires Federal agencies to prepare and submit to OMB a Statement of Energy Effects for any proposed significant energy action. A "significant energy action" is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1)(i) Is a significant regulatory action under Executive Order 12866, or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits for energy supply, distribution, and use. This rule would not have a significant adverse effect on the supply, distribution, or use of energy, and is therefore not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

#### **Review Under Executive Order 12630**

DOE has determined pursuant to Executive Order 12630, "Governmental Actions and Interference with Constitutionally Protected Property Rights" (53 FR 8859; March 18, 1988), that this rule would not result in any takings which might require compensation under the Fifth Amendment to the United States Constitution.

#### **Congressional Notification**

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule prior to its effective date. The report will state that it has been determined that the rule is not a "major rule" as defined by 5 U.S.C. 804(2).

#### **Approval of the Office of the Secretary**

The Secretary of Energy has approved publication of today's final rule.



# SUPPLEMENTARY INFORMATION – Request for Comment on Proposed Changes to 10 CFR 1021 (FR)

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## I. Introduction and Background

### What is NEPA?

The National Environmental Policy Act of 1969 ([42 U.S.C. 4321](#) *et seq.*) requires Federal agencies to consider the potential environmental impacts of their “proposed actions” before taking action. (Please note the terms “effects” and “impacts” as used in this proposed rule are synonymous. See [40 CFR 1508.8](#).) Proposed actions include actions directly undertaken by a Federal agency, as well as certain actions undertaken by a State, local, or private entity with Federal involvement, e.g., certain projects that may receive Federal funding, permits, or other support.

### What is environmental review under NEPA?

The Council on Environmental Quality's (CEQ's) NEPA implementing regulations ([40 CFR parts 1500-1508](#)) establish three levels of review for proposed actions—EIS, EA, and categorical exclusion determinations—each involving different levels of information and analysis. An EIS is a detailed analysis of the potential environmental impacts of a proposed action (and alternatives) that may have a significant impact on the environment. See NEPA Section 102(2)(C), [42 U.S.C. 4332\(2\)\(C\)](#); [40 CFR 1508.11](#). An EA is a briefer analysis conducted to determine whether a proposed action may have a significant impact on the environment and thus whether an EIS is required. See [40 CFR 1508.9](#). A categorical exclusion is a class of actions that a Federal agency has determined do not, absent extraordinary circumstances, individually or cumulatively have a significant impact on the human environment and for which, therefore, neither an EA nor an EIS is required. See [40 CFR 1508.4](#). A categorical exclusion determination is made when an agency finds that a proposed action fits within a categorical exclusion and meets other applicable requirements, such as the absence of extraordinary circumstances.

### How does DOE establish categorical exclusions?

DOE establishes categorical exclusions pursuant to a rulemaking, such as this one, for defined classes of actions that the Department determines are supported by a record showing that they normally will not have significant environmental impacts, individually or cumulatively. DOE establishes categorical exclusions based on its experience, the experience of other agencies, and information provided by the public.

A complete list of DOE's current categorical exclusions can be found at [10 CFR part 1021](#), subpart D, appendices A and B. Appendix A lists categorical exclusions applicable to general agency actions (for example, routine administrative, financial, and personnel actions). Appendix B lists categorical exclusions that are applicable to specific agency actions.

### How does DOE make a categorical exclusion determination?

Under the regulations, before a proposed action may be categorically excluded, DOE must determine in accordance with [10 CFR 1021.410\(b\)](#) that: (1) The proposed action fits within a class of actions listed in appendix A or B to subpart D, (2) there are no extraordinary circumstances related to the proposal that may affect the significance of the environmental impacts of the proposed action, and (3) there are no connected or related actions with cumulatively significant

impacts and, as appropriate, the proposed action is not precluded as an impermissible interim action ([40 CFR 1506.1](#) and [10 CFR 1021.211](#)).

In addition, to fit within a class of actions in appendix B, a proposed action must satisfy certain conditions known as “integral elements” (appendix B, paragraphs (1) through (4)). Briefly, these conditions ensure that an excluded action would not have the potential to cause significant environmental impacts due to, for example, a threatened violation of applicable environmental, safety, and health requirements, or by disturbing hazardous substances such that there would be uncontrolled or unpermitted releases.

### **What does DOE propose to change in its NEPA regulations?**

With this proposed rule, DOE proposes to update its NEPA regulations ([10 CFR part 1021](#)), primarily with changes to subpart D and with a few changes to subpart C. Most changes are to categorical exclusions (subpart D, appendices A and B, discussed in Sections IV.D and IV.E below, respectively), including establishing new categorical exclusions and modifying existing categorical exclusions. DOE also proposes to make changes to its classes of actions that normally require an EA (appendix C, discussed in Section IV.F) or EIS (appendix D, discussed in Section IV.G). In addition, DOE proposes to change several procedural provisions of the Department's regulations (Section IV.C) and modify wording for consistency and clarity (Section IV.B).

## **II. Purpose and Development of the Proposed Changes**

### **Why does DOE propose to amend its NEPA implementing procedures?**

The Department last updated its categorical exclusions in 1996. Since that time, the range of activities in which DOE is involved has changed and expanded. For example, in recent years, DOE has received more applications for financial support from private applicants for actions that promote energy efficiency and energy independence. DOE has received thousands of applications under grant and loan programs established by the Energy Policy Act of 2005, the Energy Independence and Security Act of 2007, and the American Recovery and Reinvestment Act of 2009. Another change since 1996 is the growth and development of new technologies in the private and public sectors, including energy efficient and renewable energy technologies, and DOE's experience with those technologies. Through this proposed rulemaking, DOE proposes to update its categorical exclusions to address the Department's current activities and its experience and bring the provisions up-to-date with current technology and regulatory requirements.

### **How did DOE seek input on the proposed changes?**

DOE has sought input from a number of different sources. First, DOE issued an internal memorandum on December 7, 2009, soliciting suggestions for new categorical exclusions or revisions from DOE Program and Field Offices, including DOE's network of NEPA Compliance Officers. Second, DOE Office of NEPA Policy and Compliance staff identified additional candidates for new or expanded categorical exclusions by reviewing the archive of DOE EAs that led to findings of no significant impact (FONSI), researched the existing categorical exclusions established by approximately 50 Federal agencies, and reviewed existing DOE categorical exclusions to identify potential new categorical exclusions or revisions. Third, on December 29, 2009, DOE published a Request for Information in the Federal Register ([74 FR 68720](#)) seeking suggestions from interested parties. Eleven entities responded to the Request for Information: Endicott Biofuels, LLC; Golder Associates, Inc.; INFORM (Information Network for Responsible Mining); Johnson Controls, Inc.; Nuclear Watch New Mexico; Presco Energy, LLC; Sierra Geothermal Power Corp.; Solar Energy Industries Association; State of Oregon's Department of



Energy; U.S. Chamber of Commerce; and a contractor for DOE's Golden Field Office. The Request for Information and these comments are available at <http://www.regulations.gov>.

The comments included proposals for new categorical exclusions and suggested revisions to limit or expand existing categorical exclusions or other related provisions. DOE addresses these comments in its discussion of specific classes of actions in Section IV. Comments of a more general nature that were not associated with a particular provision are addressed below in Section V.

### **How did DOE develop the proposed changes?**

As described above, DOE reviewed and evaluated each of the proposed revisions, reviewed past DOE NEPA analyses and other agencies' NEPA analyses and categorical exclusions, and drafted proposed categorical exclusions and revisions. DOE created a Technical Support Document that presents proposed changes and information that supplements the Preamble discussion of the supporting basis for the changes. (See <http://www.regulations.gov>, Docket ID: DOE-HQ-2010-0002.) The proposed changes were developed in consultation with CEQ (see **40 CFR 1507.3**), and are now, through this notice of proposed rulemaking, published for public review and comment. Instructions for how to provide comments are provided in Section III. DOE is also scheduling a public hearing to accept comments on the proposed rule. Details regarding the public hearing are provided in the DATES and ADDRESSES section and in Section III.B below. DOE will review the comments received during the public comment period, including those presented at the public hearing, and revise its proposal as appropriate. The final rule with DOE responses to comments would then be published in the Federal Register.

### **What kinds of changes does DOE propose?**

DOE proposes to amend **10 CFR part 1021**, subparts C and D. The majority of changes are proposed for the categorical exclusion provisions at **10 CFR part 1021**, subpart D, appendices A and B, with a small number of related changes proposed for other provisions within subparts C and D.

DOE proposes to add 20 new categorical exclusions. These categorical exclusions (in the order in which they appear in appendix B) address: Stormwater runoff control; lead-based paint removal; recycling stations; determinations of excess real property; small-scale educational facilities; small-scale indoor research and development projects using nanoscale materials; research activities in salt water and freshwater environments; experimental wells for injection of small quantities of carbon dioxide; combined heat and power or cogeneration systems; small-scale renewable energy research and development and pilot projects; solar photovoltaic systems; solar thermal systems; wind turbines; ground source heat pumps; biomass power plants; methane gas recovery and utilization systems; alternative fuel vehicle fueling stations; electric vehicle charging stations; drop-in hydroelectric systems; and small-scale renewable energy research and development and pilot projects in salt water and freshwater environments. DOE proposes to remove two categorical exclusion categories, one EA category, and two EIS categories.

DOE also proposes to modify many of the existing categorical exclusions. These revisions include substantive changes, as well as changes to reflect current regulatory or statutory references and requirements, and punctuation and grammatical changes to improve readability, clarity, and internal consistency. (By "substantive" changes DOE means a change that is more than a clarifying or consistency change; this term includes changes that alter the scope or meaning of a provision or that result in the addition or deletion of a provision.)

### **What would result from DOE's proposed changes?**

The proposed changes would better align DOE's categorical exclusions with its current activities and its experience and bring the provisions up-to-date with current technology and regulatory requirements. The changes would also facilitate compliance with NEPA by providing for more efficient review of actions (helping the Department meet the goals set forth by Congress, for example, in the Energy Policy Act of 2005), and allowing the Department to focus its resources on proposed actions that have the potential for significant environmental impacts.

### **III. Invitation To Comment**

DOE invites interested persons to participate in this rulemaking by submitting comments on the proposed rule and on the supporting information for proposed changes set forth in the Preamble and the Technical Support Document. Comments would be particularly useful to DOE if those comments: (1) Provide information to support or oppose a proposed change (for example, describing experience with similar actions that did or did not have significant environmental impacts or providing references to such experience); (2) justify increased or lessened limitations on the application of a categorical exclusion; or (3) explain recommended changes in addition to those that DOE proposes and provide the rationale for such additional changes. As appropriate, comments should refer to the specific section of the proposed rule to which the comment applies, identify a comment as a general comment, or identify a comment as a new proposal.

DOE will consider all timely comments received in response to this notice of proposed rulemaking, whether presented orally at the public hearing or written and submitted electronically or by mail.

#### **A. Written Comments**

Comments may be submitted by one of the methods in the ADDRESSES section of this proposed rule. Comments received will be included in the administrative record and will be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information specifically identified as Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider to be CBI or otherwise protected should be submitted by mail, not through <http://www.regulations.gov>. If you submit information that you believe to be exempt by law from public disclosure, you should mail one complete copy, as well as one copy from which the information claimed to be exempt by law from public disclosure has been redacted. Please include written justification as to why the redacted information is exempt from disclosure. DOE is responsible for the final determination with regard to disclosure or nondisclosure of the information and for treating it accordingly under the DOE Freedom of Information Act regulations at **10 CFR 1004.11**.

The <http://www.regulations.gov> Web site is an "anonymous access" system, which means DOE will not know your contact information unless you provide it. If you choose not to provide contact information and DOE cannot read your comment due to technical difficulties, DOE may not be able to consider your comment. Electronic files should avoid the use of special characters and any form of encryption, and be free of any defects or viruses.

#### **B. Public Hearing**

##### ***Attendance***

The time, date, and location of the public hearing are listed in the DATES and ADDRESSES sections at the beginning of this proposed rule. Persons wishing to attend the public hearing must present government-issued identification and pass through security screening upon entering the building. Foreign nationals are subject to advance security screening procedures. Any foreign national wishing to participate or attend the public hearing should advise DOE promptly in order to

initiate the necessary procedures as soon as possible; see FOR FURTHER INFORMATION CONTACT, above.

### ***Registering To Speak***

Any person who has an interest in the topics addressed in this proposed rule may speak at the public hearing, either as an individual or as a representative of a group or organization of interested persons. Persons wishing to speak should register in advance, as described in FOR FURTHER INFORMATION CONTACT. After registered speakers have made their presentations, other persons may speak to the extent that time allows.

### ***Conduct of Public Hearing***

DOE will designate an official or facilitator to preside at the public hearing. The public hearing will be informal and not a judicial or evidentiary-type hearing. DOE reserves the right to schedule the order of speakers and to establish the procedures governing the conduct of the hearing. To ensure that all persons wishing to make a presentation can be heard, DOE may limit each presentation to 10 minutes or less. The presiding official or facilitator will announce any further procedural rules needed for the proper conduct of the public hearing. After the public hearing, interested persons may submit further comments until the end of the comment period.

A transcript of the hearing will be made and posted at <http://www.regulations.gov>.

## **C. Issues on Which DOE Seeks Comment**

DOE is particularly interested in receiving comments and views of interested parties on several topics. As discussed in more detail in Section IV.B below, DOE seeks comments on its use of the phrases “including, but not limited to,” and “such as” to introduce lists of examples. Unless otherwise specified, DOE’s lists of examples are not intended to be exhaustive of all possible actions that fit within a categorical exclusion. DOE also seeks comments on its use of the phrase “would not have the potential to cause significant impacts” (or a similar construct) in lieu of the use of terms such as “adverse” or “substantial” as modifiers for potential impacts. DOE believes that the proposed phrase more accurately reflects NEPA and the CEQ NEPA regulations.

DOE is particularly interested in receiving comments and views of interested parties on the proposals relating to the following classes of actions:

- B3.7 New Terrestrial Infill Exploratory and Experimental Wells
- B3.15 Small-Scale Indoor Research and Development Projects Using Nanoscale Materials
- B3.16 Research Activities in Salt Water and Freshwater Environments
- B4.1 Contracts, Policies, and Marketing and Allocation Plans for Electric Power
- B4.11 Electric Power Substations and Interconnection Facilities
- B4.12 Construction of Transmission Lines
- B4.13 Upgrading and Rebuilding Existing Transmission Lines
- B5.1(b) Actions To Conserve Energy or Water

- B5.13 Experimental Wells for Injection of Small Quantities of Carbon Dioxide
- B5.15 Small-Scale Renewable Energy Research and Development and Pilot Projects
- B5.16 Solar Photovoltaic Systems
- B5.17 Solar Thermal Systems
- B5.18 Wind Turbines
- B5.19 Ground Source Heat Pumps
- B5.20 Biomass Power Plants
- B5.24 Drop-in Hydroelectric Systems
- B5.25 Small-Scale Renewable Energy Research and Development and Pilot Projects in Salt Water and Freshwater Environments
- B6.1 Cleanup Actions
- C7 Contracts, Policies, and Marketing and Allocation Plans for Electric Power
- D5 [Removed and Reserved: Main Transmission System Additions]
- D6 [Removed and Reserved: Integrating Transmission Facilities]
- D7 Contracts, Policies, and Marketing and Allocation Plans for Electric Power

DOE also welcomes comments on those categorical exclusions for classes of actions for which DOE has not proposed any revisions at this time.

#### **IV. Description of Proposed Changes**

##### **A. Overview**

This section describes and explains the proposed amendments to the existing DOE NEPA regulations at 10 CFR part 1021, subparts C and D.

In subpart C, Implementing Procedures, the proposed amendments are minor technical changes. Specifically, to correct internal references, DOE proposes changes to three sections in subpart C: (1) 10 CFR 1021.311—Notice of intent and scoping; (2) 10 CFR 1021.322—Findings of no significant impact; and (3) 10 CFR 1021.331—Mitigation action plans. These proposed minor technical changes to subpart C are not discussed further below.

In subpart D, DOE proposes extensive substantive and clarifying changes. Recurring proposals for subpart D are described in Section IV.B and then unique proposed changes to subpart D are described in Sections IV.C through IV.G. Support for the proposed revisions is summarized below, and more information regarding the supporting basis for certain provisions is provided in the Technical Support Document.

### ***What is subpart D of the DOE NEPA regulations?***

DOE's NEPA regulations at **10 CFR part 1021** include subpart D, which lists classes of actions and the typical level of NEPA review required for those classes of actions. Subpart D appendices A and B describe DOE's categorical exclusions. Appendix C describes classes of actions that normally require preparation of an EA, but not necessarily an EIS, and appendix D describes classes of actions that normally require preparation of an EIS.

Listing a class of actions in these appendices does not constitute a conclusive determination regarding the appropriate level of NEPA review for a proposed action. Rather, the listing creates an initial assumption that the defined level of review is appropriate for the listed actions. As indicated in the existing **10 CFR 1021.400**(c) and (d), this assumption does not apply when there are extraordinary circumstances related to the proposed action that may affect the significance of the environmental effects of the action.

### ***What types of changes does DOE propose to subpart D?***

DOE proposes to make several types of changes to its subpart D regulations: these revisions include substantive changes, as well as changes to reflect current regulatory or statutory references and requirements, and punctuation and grammatical changes to improve readability, clarity, and internal consistency. A proposed change does not imply that any previous application of these regulations was inappropriate. See **10 CFR 1021.400**(b).

DOE also proposes to delete the tables of contents for the classes of actions in subpart D, and instead to precede each section or paragraph with a short title. These short titles are included merely to guide the reader and do not have any regulatory effect.

Some of the proposed changes apply multiple times throughout the provisions; others are made in the context of a specific provision. Section IV.B of this proposed rule contains an explanation of proposals that recur, that is, that affect more than one class of actions, instead of duplicating the explanation for multiple individual classes of actions. Descriptions of specific individual proposed changes and support for such changes begin with Section IV.C. With respect to certain proposed changes, a more detailed explanation of the supporting basis is provided in the Technical Support Document. (The Technical Support Document and the "redline/strikeout" markup of DOE's existing regulations that show the proposed changes are available at <http://www.regulations.gov>.)

## **B. Recurring Proposals, Technology Updates, and Minor Changes**

DOE proposes certain changes to its regulations that recur throughout subpart D. Seven recurring proposals are described below and are followed by a listing of the existing provisions where the recurring proposals occur. Discussion of these recurring proposals is not repeated in the discussion of classes of actions in Section IV below.

DOE also proposes to modify certain technology-specific vocabulary to reflect current usage, updates to references, and minor changes to punctuation and grammar to improve internal consistency. For example, to update technology-specific vocabulary, DOE proposes to change "electric powerlines" to "electric transmission lines" in several categorical exclusions. DOE also proposes to update references, as in categorical exclusion B3.12, which would reference the latest edition of a Centers for Disease Control manual. DOE is proposing to correct typographical errors (for example, changing "with" to "within" in categorical exclusion B1.13). Also, for certain classes of actions, DOE is proposing the addition of cross-references to related classes of actions. For example, DOE is proposing to add a cross-reference to the proposed new categorical exclusion B1.33 into the existing categorical exclusion B1.6.

### ***B.1. Adjacent/Contiguous/Nearby***

To clarify use of terms reflecting proximity, and to promote consistency in its categorical exclusions, DOE is proposing to delete the word “adjacent” from its categorical exclusions and use “contiguous” and “nearby,” as appropriate. DOE proposes to use the word “contiguous,” where the intended application is “touching along a boundary or at a point” or “being in actual contact.” In contrast, DOE is proposing to use the word “nearby,” where the intended application is “not distant” or “in proximity, but not necessarily touching.” In order to facilitate consistent understanding and application of this concept, DOE, therefore, proposes changes to the following provisions: B1.31, B2.1, B4.7, B5.8, B5.12.

### ***B.2. Including, But Not Limited to/Including/Such as***

DOE proposes to use the phrases “including, but not limited to,” “including,” and “such as” to introduce lists of examples. DOE considers the phrases to be synonymous. Unless otherwise specified, DOE’s lists of examples are not intended to be exhaustive of all possible actions that fit within a class of actions. DOE proposes generally to use “including, but not limited to,” the first time that examples are introduced in a provision and “such as” for any needed clarification of the examples. In order to facilitate consistent understanding and application of this concept, DOE, therefore, proposes changes to the following provisions: 1021.410(b)(2), A1, A6, A9, A12, B(4), B1.3, B1.5, B1.9, B1.10, B1.11, B1.12, B1.13, B1.15, B1.16, B1.17, B1.20, B1.21, B1.24, B1.27, B1.29, B1.31, B1.32, B2.4, B2.5, B3.1, B3.4, B3.6, B3.7, B3.8, B3.9, B3.10, B3.11, B3.12, B3.13, B4.4, B4.6, B4.7, B4.9, B4.10, B4.11, B5.1, B5.2, B5.3, B5.4, B5.5, B5.6, B5.12, B6.1, B6.2, B6.3, B6.4, B7.2, C8, C16.

### ***B.3. In Accordance With Applicable Requirements***

DOE proposes to use the phrase “in accordance with applicable requirements” in several of its categorical exclusions for emphasis. DOE recognizes that all actions must be conducted in accordance with all applicable requirements. However, with certain categorical exclusions, DOE finds it appropriate to refer specifically to this requirement, and, further, in some cases also to provide one or more examples of applicable requirements. By referring to a specific requirement, DOE does not imply that the requirement is relevant to all actions to which the categorical exclusion may apply, or that the referenced requirement is the only one that applies to a proposed action. DOE’s proposed wording is intended to allow for the evolution of the requirements over time. In order to facilitate consistent understanding and application of this concept, DOE, therefore, proposes changes to the following provisions: B1.2, B1.3, B1.9, B1.16, B1.17, B1.29, B2.5, B3.8, B3.12, B5.4, B5.6, B6.1, B7.2.

### ***B.4. Would Not Have the Potential To Cause Significant Impacts***

Appendices A and B contain a number of provisions that contain the word “adverse,” or the use of “any” or “no” as descriptors of, or surrogates for, impacts. Through this proposed rulemaking, DOE proposes to replace these terms with “would not have the potential to cause significant impacts” or a similar construct (for example, describing a physical change that serves as a surrogate for impacts, such as in categorical exclusions B1.18, B3.4, B3.9, and B5.2). By the proposed changes, DOE’s implementing regulations are now clearly aligned with the regulatory standard in NEPA. See 40 CFR 1508.4. Additionally, by this proposed change, DOE seeks to clarify the affected provisions and to facilitate consistent application. See also 40 CFR 1508.27 (addressing the meaning of “significantly” as used in NEPA).

DOE’s review of the existing provisions demonstrated the need for clarification and consistency. For example, the existing categorical exclusion B3.8 requires that the action “would not result in

any permanent change to the ecosystem.” A literal reading of this categorical exclusion would bar its use if there were any permanent change to the ecosystem, even a change that would not have the potential to cause significant impacts. DOE acknowledges that this is not what NEPA requires and thus DOE proposes to rephrase the categorical exclusion to incorporate the appropriate NEPA standard, phrased as “would not have the potential to cause significant impacts on the ecosystem.” In order to facilitate consistent understanding and application of this concept, DOE, therefore, proposes changes to the following provisions: B(4), B1.5, B1.11, B1.18, B1.24, B1.31, B2.3, B3.1, B3.3, B3.8, B3.9, B4.6, B5.1, B5.2, B5.12, C8.

#### ***B.5. On DOE Sites/Onsite/Employee***

In recent years, DOE's proposed actions have included more applicant proposals, including those for DOE loan guarantees, grants, cooperative agreements, and other forms of financial assistance, particularly for programs created under the Energy Policy Act of 2005, the Energy Independence and Security Act of 2007, and the American Recovery and Reinvestment Act of 2009. In an applicant situation, DOE's proposed action normally would not be located on a DOE site, but rather on private property or land administered by other agencies (e.g., Bureau of Land Management). In recognition of DOE's recently expanded activities, DOE is proposing, where appropriate, to delete references to “DOE site,” “onsite,” or “employee” from its classes of actions. For example, DOE is proposing to amend existing categorical exclusion B1.13, Pathways, short access roads, and rail lines, by deleting “onsite” and instead inserting the condition that the construction, acquisition, and relocation of these linear features be “consistent with applicable right-of-way conditions and approved land use or transportation improvement plans.” The significance of environmental impacts resulting from a class of actions does not depend on whether they occur at DOE sites.

In order to facilitate consistent understanding and application of this concept, DOE, therefore, proposes changes to the following provisions: B1.13, B1.15, B1.29, B1.32, B3.1, B6.10, C7, D7.

#### ***B.6. Previously Disturbed or Developed Area***

In DOE's experience, the potential for certain types of actions to have significant impacts on the human environment is generally avoided when that action takes place within a previously disturbed or developed area, *i.e.*, land that has been changed such that the former state of the area and its functioning ecological processes have been altered. Thus, DOE includes a requirement in several of its proposed provisions that actions be located within previously disturbed or developed areas. In other instances, the existing provision contains a similar requirement, and DOE proposes to replace the existing language with the phrase “previously disturbed or developed area” for purposes of internal consistency. In order to facilitate consistent understanding and application of this concept, DOE, therefore, proposes changes to the following provisions: B1.31, B2.1, B3.6, B3.10, B3.12, B4.6, B4.7, B4.8, B4.12, B5.1, B5.5, B5.8, B6.10, C4, C11.

#### ***B.7. Small/Small-Scale/Minor/Negligible/Short/Short-Term***

DOE uses adjectives (such as “small,” “small-scale,” “minor,” “negligible,” “short,” and “short-term”) as limitations in a variety of its existing and proposed provisions and recognizes that these descriptors are subjective. In general, DOE did not and does not propose to define these terms, and DOE would apply a reasonable interpretation to such terms within the context of individual proposals. The CEQ regulations state that “significantly,” as used in NEPA, requires consideration of context and intensity. See **40 CFR 1508.27**. Likewise, consideration of context and intensity is useful when interpreting descriptors such as small, small-scale, minor, short, and short-term, in making categorical exclusion determinations for proposals. (DOE proposes to discontinue the use of the word “negligible.”)

For example, in considering whether the use of 5-10 acres of land is “small” for a particular proposal, it is reasonable to conclude that 5-10 acres of land at a large DOE site would likely be considered “small,” but 5-10 acres of land might not be considered “small” in an urban environment. In some instances, however, the Department has quantified these descriptors because the size is more directly linked to impacts. For example, DOE categorizes a “small” area for outdoor ecological and other environmental research as generally less than 5 acres in its existing categorical exclusion B3.8. Additionally, DOE defines “small” water treatment facilities as those that have a total capacity of less than 250,000 gallons/day in existing categorical exclusion B1.26.

In order to facilitate consistent understanding and application of this concept, DOE, therefore, proposes changes to the following provisions: B1.2, B1.13, B1.15, B3.6, B3.8, B4.13, B5.1, B5.4, B5.7, C8.

### **C. Proposed Changes to Subpart D (Other Than Appendices)**

#### ***10 CFR 1021.410 - Application of Categorical Exclusions (Classes of Actions That Normally Do Not Require EAs or EISs)***

DOE proposes to clarify four requirements in 10 CFR 1021.410. First, DOE proposes to remove the reference to Section 102(2)(E) of NEPA to clarify that DOE's consideration of unresolved conflicts concerning alternative uses of available resources is independent of the need to evaluate alternatives in an EA as indicated in Section 102(2)(E) of NEPA.

Second, in 10 CFR 1021.410(b)(3), DOE proposes to refer explicitly to the requirement that a categorically excludable project has not been segmented. DOE also proposes to change its references to the CEQ regulations to clarify consideration of potential cumulative impacts (40 CFR 1508.27(b)(7)), and to clarify that its references to 40 CFR 1506.1 and 10 CFR 1021.211 concern limitations on actions during EIS preparation.

Third, DOE proposes to add site preparation and purchase and installation of equipment to 10 CFR 1021.410(d) as examples of activities foreseeably necessary to implement proposals that are encompassed within the class of actions.

Fourth, DOE proposes to codify its policy to document and post online appendix B categorical exclusion determinations at 10 CFR 1021.410(e), consistent with the policy established by the Deputy Secretary of Energy's *Memorandum to Departmental Elements on NEPA Process Transparency and Openness*, October 2, 2009.

### **D. Proposed Changes to Appendix A—General Agency Actions**

For an explanation of recurring proposals applicable to the appendix A categorical exclusions, please see Section IV.B, Recurring Proposals, above, where these proposed revisions are discussed and where the particular provisions affected are listed. The short titles listed below for particular categorical exclusions reflect DOE's proposed titles.

#### **A1 Routine DOE Business Actions**

DOE proposes to replace “agency” with “DOE” to clarify that this categorical exclusion applies only to DOE business actions. DOE also proposes to limit such actions to administrative, financial, and personnel actions.



#### **A7     *[Removed and Reserved: Transfer of Property, Use Unchanged]***

To increase transparency of DOE's NEPA processes, DOE proposes to delete this categorical exclusion and to incorporate its key components within B1.24, which also addresses property transfers, so that any categorically excluded property transfers are documented and made available to the public. (See proposed changes to **10 CFR 1021.410**(e) concerning documentation and public availability of DOE's appendix B categorical exclusion determinations.)

In response to DOE's December 2009 Request for Information, a commentor expressed concern that DOE, in making land transfer decisions under existing categorical exclusion A7, would be "circumventing local authority" and "normal land use planning and zoning processes." See the discussion of categorical exclusion B1.24 for DOE's response.

#### **A9     *Information Gathering, Analysis, and Dissemination***

DOE proposes to clarify this categorical exclusion by providing site visits as an additional example of an action included within the category.

#### **A13    *Procedural Documents***

DOE proposes to clarify this categorical exclusion by providing additional examples of actions included within the class of actions (e.g., Policies and Manuals within the DOE Directives System).

### **E. Proposed Changes to Appendix B**

For an explanation of recurring proposals applicable to the appendix B categorical exclusions, please see Section IV.B, Recurring Proposals, above, where these proposed revisions are discussed and the particular categorical exclusions affected are listed. The short titles listed below for particular categorical exclusions reflect DOE's proposed titles.

#### ***Integral Elements of the Classes of Actions in Appendix B***

In appendix B(4), DOE proposes to clarify its use of "environmentally sensitive resource," defining it as "typically a resource that has been identified as needing protection through Executive Order, statute, or regulation by Federal, State, or local government, or a Federally recognized Indian Tribe." This definition is not intended to, and does not, grant, expand, create, or diminish any legally enforceable rights, benefits, or responsibilities, substantive or procedural, not otherwise granted or created under existing law. Nor shall this language be construed to alter, amend, repeal, interpret, or modify Tribal sovereignty, any treaty rights of any Indian Tribes, or to preempt, modify, or limit the exercise of any such rights.

In appendix B(4)(i), DOE proposes to add "Federally recognized Indian Tribe" to its list of entities that designate property as historically, archeologically, or architecturally significant. DOE also proposes to redefine other environmentally sensitive properties as "determined to be eligible" for listing on the National Register of Historic Places (rather than the phrase "eligible for listing," which is used in the existing provision, but is not the proper characterization of an official listing). In appendix B(4)(iii), DOE proposes to apply the same definition of floodplains and wetlands in its NEPA regulations as that used in DOE's floodplain and wetland environmental review regulations (**10 CFR part 1022.4**). In appendix B(4)(iv), DOE proposes to supplement the list of areas having special designation with additional examples (national monuments and scenic areas). In appendix B(4)(v), DOE proposes changes to the prime agricultural lands listing to conform to the

terminology of the applicable regulation (7 CFR 658.2(a), “Farmland Protection Policy Act: Definitions”).

In response to the Department's December 2009 Request for Information, one commentor addressed DOE's list of “environmentally sensitive resources” in appendix B(4). First, the commentor indicated that DOE must recognize State and Tribal protected or candidate species and habitat as equal to Federally designated or considered species and habitats. Currently, appendix B(4)(ii) includes consideration of State-listed endangered and threatened species and their habitats, and DOE is proposing to add Federally-protected marine mammals and Essential Fish Habitat to the list of environmentally sensitive resources. DOE is not proposing to include Tribal protected or candidate species and habitat because it is DOE's understanding that Tribes do not have the authority to designate species or habitat for protection outside of Tribal lands.

Second, the commentor stated that “groundwater and aquifers are State, not Federal resources” and indicated that DOE's regulations must protect and preserve all aquifers, and not just sole-source aquifers. The commentor further stated that adverse impacts to rivers, lakes, and bays, among other bodies of water, should not be allowed “unless they are specifically covered by a State and/or Tribal discharge permit under appropriate authority.” DOE is not proposing a change to the existing appendix B(4)(vi), which lists “special sources of water (such as sole source aquifers, wellhead protection areas, and other water sources that are vital in a region)” in its list of environmentally sensitive resources, because those resources are listed as examples and are not the only water sources to be considered in applying a categorical exclusion. Further, the existing appendix B(4) includes States and Federally recognized Tribes as entities with jurisdiction to identify water sources needing protection.

## **Categorical Exclusions Applicable to Facility Operation (B1)**

### ***B1.1 Changing Rates and Prices***

DOE proposes to change this categorical exclusion to encompass the setting of “prices” as well as “rates” (prices apply to products, and rates apply to services) and to consider price and rate changes instead of only increases. DOE proposes to change the measure of inflation specified in this categorical exclusion from the Gross National Product fixed weight price index, which the Department of Commerce no longer publishes, to the implicit price deflator for Gross Domestic Product. (See the Technical Support Document.)

### ***B1.2 Training Exercises and Simulations***

DOE proposes to provide additional examples of training actions (namely, small-scale and short-duration force-on-force exercises, and decontamination and spill cleanup training), and has added the condition that all training exercises and simulations be conducted under appropriately controlled conditions and in accordance with applicable requirements. The term “force-on-force” as used in this categorical exclusion refers to activities such as assault and defensive team exercises conducted by security forces or military units, often on parcels of DOE property not in use. Exercises that test the ability of security forces to defend a facility are one common example of this type of training. DOE's experience with these types of security force and military training actions and emergency response training at its sites indicates that they fit within the class of actions. (See the Technical Support Document.)

### ***B1.3 Routine Maintenance***

DOE proposes to clarify that routine maintenance actions may occur as a result of nonroutine events (e.g., severe weather, such as hurricanes, floods, and tornadoes, and wildfires) by adding

a sentence to that effect in its description of routine maintenance. Normally, maintenance following a nonroutine event would qualify as routine maintenance; however, for a nonroutine event, the potential for extraordinary circumstances is higher (e.g., increased exposure to pesticides due to extreme runoff).

DOE proposes to clarify the scope of the categorical exclusion by providing additional examples of activities. Specifically, DOE is proposing to clarify that replacement is included in the categorical exclusion's scope under items (a), (c), and (e), as well as the existing example of repair; to add "lighting" to those items that can be repaired or replaced (item (e)); to add "scraping and grading of unpaved surfaces" to the example of road and parking area resurfacing (item (j)); and to add the additional example of "removal of debris" under item (p). DOE's experience with these activities has demonstrated that they properly fit within this class of actions.

In response to the Department's December 2009 Request for Information, one commentor stated that use of pesticides for outdoor or aquatic use should not be the subject of a categorical exclusion; instead an EA should be prepared. The commentor expressed a specific concern about the possibility for environmental impacts beyond the intended application. In existing categorical exclusion B1.3, DOE has described routine maintenance activities including localized vegetation and pest control. DOE now proposes to clarify that any routine maintenance activities would be conducted in a manner in accordance with applicable requirements. In the case of pesticides and other chemicals, for example, the proposed change would provide that the application would be in accordance with the registered and approved uses established by appropriate authorities to minimize the possibility of environmental impacts beyond the product's intended application.

#### ***B1.5 Existing Steam Plants and Cooling Water Systems***

DOE proposes to delete the words "within an existing building or structure," so as to include modifications to ponds, which may be outdoor components of cooling water systems. This proposed expansion of the scope of this categorical exclusion would address the need for improvements to an entire cooling water system, rather than only those parts of a system associated with structures. Based on DOE experience, minor improvements would not have the potential to cause significant impacts, provided the three limitations placed on the scale and type of improvements listed in the categorical exclusion are met.

DOE also proposes to add minor improvements of existing steam plants in the scope of the categorical exclusion. DOE's experience is that these actions, when subject to the three limitations placed on the scale and type of such improvements, fit appropriately within this class of actions and would not have the potential to cause significant impacts.

#### ***B1.7 Electronic Equipment***

DOE proposes to update the existing categorical exclusion by adding examples of current technology and equipment that improve operational efficiency and stability of the nation's power grid, commonly referred to as "smart grid" technologies. Based on DOE's experience, such technology and equipment (*i.e.*, electricity transmission control and monitoring devices for grid demand and response) fit within the scope of this categorical exclusion.

#### ***B1.9 Airway Safety Markings and Painting***

DOE proposes to include repair and in-kind replacement of lighting within the scope of this categorical exclusion. Within the context of this categorical exclusion, in-kind replacement is defined as replacement that does not result in a significant change in the expected useful life, design capacity (for example, energy output in lumens), function, or shielding of existing lighting.

The initial installation of such lighting would remain ineligible for categorical exclusion. In addition, DOE proposes to add wind turbines as structures similar to transmission lines and antenna structures to which the exclusion applies. DOE has determined that these proposed changes would not have the potential to cause significant impacts.

#### ***B1.11 Fencing***

DOE proposes to clarify that the limitation in this categorical exclusion applies to fencing that would have the potential to cause significant impacts to surface water flow or wildlife populations or migration, as opposed to individual animal movements. Fencing can and probably often does affect individual movements, but such impacts on individual animals would not be considered significant unless the context and intensity of the impacts would have the potential to cause significant impacts to wildlife populations or migration.

#### ***B1.12 Detonation or Burning of Explosives or Propellants After Testing***

DOE proposes to delete the restriction that explosives or propellants must have failed in outdoor tests and thus to expand the categorical exclusion to include explosives or propellants that failed in indoor tests. Whether the explosives or propellants were tested indoors or outdoors, the outdoor detonation or burning of those explosives or propellants would not have the potential to cause significant impacts. The phrase “otherwise not consumed in testing” refers to excess or residual explosive or propellant materials that remain after a test is completed. DOE also proposes to specify one type of permit under the Resource Conservation and Recovery Act that could be applicable.

In response to DOE's December 2009 Request for Information, one commentor requested that DOE specify the amount, types, and methods allowed for the activities included in this categorical exclusion. DOE has determined that the limits contained in this categorical exclusion do not require quantification and is not proposing any changes to the categorical exclusion in response to this comment.

#### ***B1.13 Pathways, Short Access Roads, and Rail Lines***

DOE proposes to expand the scope of the categorical exclusion to include more projects related to transportation, recreation, and fitness (e.g., pedestrian walkways and trails, bicycle paths, and small outdoor fitness areas). Other Federal agencies that have categorical exclusions for comparable projects are the Bureau of Indian Affairs, the Federal Highway Administration, and the Department of Homeland Security, and the experience of these agencies supports DOE's proposed expansion of this categorical exclusion.

DOE also proposes to include a condition in the categorical exclusion that the actions be consistent with existing rights-of-way and approved land use or transportation improvement plans. In addition, DOE proposes to replace “railroads” with the term “rail lines,” adding branch or spur lines as examples. DOE's experience is that the construction of rail access to or within an existing site has generally occurred at a scale that is better characterized by these small-scale activities—branch line (a secondary rail line which may branch off a main line) and spur (a rail track on which cars are left for loading, unloading, or rail car storage).

In response to the DOE's December 2009 Request for Information, a commentor stated that road construction or expansion should not be the subject of a categorical exclusion. Further, the commentor expressed a concern about the potential for damage to “high quality, high priority habitat” as a result of constructing and operating roads and that use of such a categorical exclusion would limit or circumvent consideration of appropriate mitigation for habitat disturbance

or loss. As outlined above, DOE's proposed amendments to categorical exclusion B1.13 require the construction, acquisition, and relocation of short access roads and rail lines to be consistent with applicable right-of-way conditions and approved land use or transportation improvement plans. Furthermore, consideration of the integral elements in applying this categorical exclusion addresses the possibility of damage to "high quality, high priority habitat" because, among other things, one of the "environmentally sensitive resources" to consider in those integral elements is habitat for Federally or State-listed species. (See the Technical Support Document.)

#### ***B1.15 Support Buildings***

DOE proposes to expand the list of examples of support buildings and support structures to include those for "small-scale fabrication (such as machine shop activities and modular buildings), assembly, and testing of non-nuclear equipment or components." Such structures are comparable to, or smaller in scale than, other structures given as examples in the categorical exclusion, and DOE's experience at DOE sites is that siting, construction, and operation of these activities normally fit within the class of actions. Also, DOE proposes to further clarify the scope of the categorical exclusion by specifying that it excludes facilities for nuclear weapon activities.

#### ***B1.19 Microwave, Meteorological, and Radio Towers***

DOE proposes to add "modification," "abandonment," and "removal" to the list of activities included in this class of actions in order to describe the complete life cycle of categorically excluded towers. In DOE's experience, modification, abandonment, and removal of these towers and associated facilities, when subject to the restrictions in this categorical exclusion, would have fewer impacts than construction and would not have the potential to cause significant impacts.

DOE proposes to include meteorological towers as an additional example of applicable facilities within this categorical exclusion because DOE has determined that the environmental impacts resulting from siting, construction, modification, operation, abandonment, and removal of meteorological towers would be similar to the impacts from these activities relating to microwave and radio towers already contained in the scope of the existing categorical exclusion.

DOE proposes to clarify the restriction in the existing categorical exclusion, by replacing "great visual value" with a more objective criteria of "governmentally designated scenic area" and cross-referencing to the relevant integral element (appendix B(4)(iv)).

#### ***B1.20 Protection of Cultural Resources, Fish and Wildlife Habitat***

DOE proposes to add to the scope of this categorical exclusion by referencing activities taken to protect cultural resources and by including examples of those activities (fencing, labeling, or flagging). DOE's Power Marketing Administrations often engage in such activities for cultural and wildlife protection purposes, and these activities would not have the potential to cause significant impacts. DOE also proposes to include a condition in the categorical exclusion that the activities would be conducted in accordance with an existing natural or cultural resource plan, if any.

#### ***B1.23 Demolition and Disposal of Buildings***

In response to DOE's December 2009 Request for Information, one commentor questioned whether there should be a size limitation for the activities under this categorical exclusion. Further, the commentor asked how DOE takes into consideration possible contamination when applying this categorical exclusion. In response to these comments, DOE proposes to modify this categorical exclusion by adding a limitation that these activities could be categorically excluded

only if there would be no potential for release of substances at a level, or in a form, that could pose a threat to public health or the environment.

The application of this categorical exclusion is intended to be based on existing data and knowledge about historical uses of the area, including chemical and other processes employed. DOE has extensive experience (former Rocky Flats Site, Hanford Site, Idaho National Laboratory, and other sites) in determining the potential for release of harmful substances from activities through modeling and safety basis authorization documentation. Potential hazards are considered before taking action (for example, demolition actions), and monitoring is conducted, as appropriate, to verify that there are no harmful releases of radiological or hazardous materials. Potential for releases can reliably be determined through site inventories, the use of well-established release models, and established best practices.

#### ***B1.24 Property Transfers***

As discussed under categorical exclusion A7 (above), DOE proposes to delete A7 and incorporate its key components, including transfers of personal property (equipment and materials), within B1.24. By doing this, DOE makes categorical exclusion determinations for property transfers subject to documentation and online posting. DOE proposes to remove the reference to “uncontaminated” as unnecessary given the incorporation of the substance of this limitation in the revised categorical exclusion.

DOE proposes to delete the phrases “there would not be any lessening in quality or increases in volumes, concentrations, or discharge rates, of wastes, air emissions, or water effluents” and “environmental impacts would generally be similar to those before the transfer” as potentially inconsistent. DOE proposes to replace these phrases with “there would be no potential for release of substances at a level, or in a form, that could pose a threat to public health or the environment” and “would not have the potential to cause a significant change in impacts from the transfer.” Such terminology will, in DOE's experience, ensure that any property transfers under this categorical exclusion would not have the potential to cause significant impacts.

In response to DOE's December 2009 Request for Information, a commentor expressed concern that DOE, in making land transfer decisions under existing categorical exclusion A7, would be “circumventing local authority” and “normal land use planning and zoning processes.” The potential applicability of such authority and processes to a potential land transfer would be addressed on a case-by-case basis.

#### ***B1.25 Property Transfers for Cultural Resources Protection, Habitat Preservation, and Wildlife Management***

DOE proposes to include in B1.25 actions undertaken to protect cultural resources. DOE's Power Marketing Administrations often engage in property transfers for cultural protection purposes. Based on this experience, DOE finds property transfers intended for protecting cultural resources normally would not have the potential to cause significant impacts. Further, DOE proposes to remove the limitation that only associated buildings supporting certain purposes are to be transferred with property under this categorical exclusion, because the existing purpose of structures present on a property to be transferred for wildlife or cultural resource purposes is unrelated to environmental impacts associated with such transfer.

Also, for the reasons discussed for categorical exclusion B1.24, above, DOE proposes to eliminate the references to “uncontaminated,” but include a limitation on actions subject to categorical exclusion B1.25, that there would be no potential for release of a substance at a level or in a form, that could pose a threat to public health or the environment.

### ***B1.29 Disposal Facilities for Construction and Demolition Waste***

DOE proposes to add “expansion” and “modification” to the list of activities included in this categorical exclusion in order to include all aspects of the life cycle of the disposal facilities. In DOE’s experience, expansion and modification actions, when subject to the limitations expressed in this categorical exclusion, would have fewer impacts than construction, and would not have the potential to cause significant impacts.

### ***B1.30 Transfer Actions***

DOE proposes to modify this categorical exclusion (based on its experience transferring materials and equipment) to remove the condition that the amounts of materials, equipment, or waste being transferred must be “small and incidental” to the amount of such material at the receiving site. Instead, DOE proposes to add a condition that the receiving site has existing storage capacity and management capability for the material.

In addition, DOE proposes to limit use of the categorical exclusion to, as appropriate, facilities and operations that are already permitted, licensed, and approved. That is, this proposed categorical exclusion would not apply to circumstances where the receiving site requires a permit or license amendment or variance from its existing approvals in order to receive or manage the materials, and it also would not apply to circumstances where the receiving facilities are not yet completed and operational.

DOE has decades of experience transporting materials, including various types of radioactive materials and waste, and has completed NEPA reviews of such transportation under many different scenarios. DOE NEPA reviews of such transfers consistently show that these actions would not have the potential to cause significant impacts. Nevertheless, DOE will continue to analyze transportation impacts in EAs and EISs where the scope of the proposed action presents the potential for significant impacts or where the proposed action fails to meet the conditions contained in this categorical exclusion. (See the Technical Support Document.)

### ***B1.31 Installation or Relocation of Machinery and Equipment***

DOE proposes several changes to this categorical exclusion. DOE proposes to add “installation” to the list of actions, which is now limited to the “relocation” of machinery and equipment; explicitly include “operation” of installed or relocated machinery and equipment; add “manufacturing machinery” in the list of examples of machinery and equipment; and clarify that the scope of the categorical exclusion includes modifications to an existing building, within or contiguous to a previously disturbed or developed area, provided that the modifications do not appreciably increase the footprint or height of the existing building or have the potential to cause significant changes to the type and magnitude of environmental impacts. DOE also proposes to delete the restriction that uses of the installed or relocated equipment be similar to their former uses, because it is duplicative of the limitation that the actions be consistent with the general missions of the receiving structure. DOE has determined that these proposed changes would not have the potential to cause significant impacts.

In response to DOE’s December 2009 Request for Information, one commentor suggested that DOE categorically exclude projects (e.g., residential, commercial, and industrial) that involve retrofitting or retooling of existing structures, provided that the projects do not include new construction, disturb previously undisturbed areas, or require new or significantly modified environmental permits. Further, the commentor explained that such a categorical exclusion would help facilitate alternative energy manufacturing projects (e.g., batteries, solar equipment, and wind turbines) that are proposed to be located in existing manufacturing/industrial facilities and

complexes. As described above, DOE has proposed several changes to this categorical exclusion that address these comments.

#### ***B1.32 Traffic Flow Adjustments***

Because DOE proposes to broaden the scope of this categorical exclusion to include actions off DOE sites (see Recurring Proposals, Section IV.B), DOE proposes to require that the activities in this categorical exclusion occur within an existing right-of-way and be consistent with approved land use or transportation improvement plans. A “traffic flow adjustment” is a change to the flow of traffic on an existing street or road. Statewide and Metropolitan Transportation Planning processes are regulated by the U.S. Department of Transportation (23 CFR part 450, subparts B and C, respectively) and result in approved, legally-binding, multiyear plans that stipulate transportation actions that may be carried out in a given area and over a given length of time.

#### ***B1.33 Stormwater Runoff Control***

DOE proposes a new categorical exclusion for stormwater runoff control practices that reduce stormwater runoff and maintain natural hydrology. The actions included in the proposed categorical exclusion are found in Environmental Protection Agency's Guidance No. EPA 841-B-09-001, Technical Guidance on Implementing the Stormwater Runoff Requirements for Federal Projects under Section 438 of the Energy Independence and Security Act (December 2009). Based on the experience of Federal agencies, the opinions of subject matter experts, and private sector experience developing and deploying stormwater runoff control and low impact development practices, the types of actions included in this categorical exclusion are, in most cases, mitigation or best management practices commonly employed to protect surface water quality and to reduce erosion associated with runoff. DOE has concluded that such activities would not have the potential to cause significant environmental impacts. (See the Technical Support Document.)

#### ***B1.34 Lead-Based Paint***

DOE proposes a new categorical exclusion for the containment, removal, and disposal of lead-based paint. This proposed categorical exclusion is based on laws and regulations governing such activities for buildings and other structures. Use of the proposed categorical exclusion would require adherence to applicable laws and regulations. Further, the creation of this categorical exclusion is supported by existing lead paint removal categorical exclusions from the Environmental Protection Agency and the Department of the Army. DOE has determined that such paint removal actions would not have the potential to cause significant impacts. (See the Technical Support Document.)

#### ***B1.35 Drop-Off, Collection and Transfer Facilities for Recyclable Materials***

DOE proposes a new categorical exclusion for the siting, construction, modification, and operation of a recycling or compostable material drop-off, collection, and transfer station on or contiguous to developed or previously disturbed land and in an area where such a facility would be consistent with existing zoning requirements. The Department of Homeland Security and the Department of Agriculture's Rural Utilities Service have existing categorical exclusions for similar facilities. Specifically, Homeland Security has a categorical exclusion for the recycling of non-hazardous materials from routine/operational activities, and the Rural Utilities Service has a categorical exclusion for the construction of facilities for the transfer of waste that will be recycled or stored. DOE has determined that the limitations placed on recycling stations proposed in this new categorical exclusion would ensure that such actions would not have the potential to cause significant impacts. (See the Technical Support Document.)



### ***B1.36 Determinations of Excess Real Property***

DOE proposes a new categorical exclusion for determinations that real property is excess to the needs of the Department. This proposed categorical exclusion includes associated reporting of such determinations to the General Services Administration and the Bureau of Land Management, as appropriate. DOE would allow the categorical exclusion of reporting of excess property, but the actual disposal of real property is not included in the scope of this proposed categorical exclusion.

Other Federal agencies (e.g., Department of Homeland Security) have existing categorical exclusions for determinations of excess real property and, based on a review of these categorical exclusions, DOE has determined that it would be conducting the same or similar activities under similar circumstances. Accordingly, DOE has concluded that its activities under this proposed categorical exclusion would not have the potential to cause significant impacts. (See the Technical Support Document.)

## **Categorical Exclusions Applicable to Safety and Health (B2)**

### ***B2.1 Workplace Enhancements***

DOE proposes to clarify that improvements to enhance workplace habitability may include installation of equipment necessary for the improvements by adding “installation” before its examples of improvements. DOE has determined that installation and subsequent operation of equipment necessary for improvements to workplace habitability would not have the potential for significant environmental impacts.

### ***B2.2 Building and Equipment Instrumentation***

DOE proposes clarifying the scope of the existing categorical exclusion by providing additional examples of instrumentation (water consumption monitors and controls).

### ***B2.4 Equipment Qualification***

DOE proposes to delete the reference to DOE Order 5480.6 (“Safety of DOE owned Nuclear Reactors”) because it has been cancelled. Actions previously encompassed by the Order are still performed by DOE and other organizations to qualify equipment for use and are still appropriate for a categorical exclusion, and DOE proposes to provide examples of such actions. Calibration of sensors and diagnostic equipment, crane and lift-gear certifications, and high efficiency particulate air (“HEPA”) filter testing and certifications, to name a few, are activities that DOE proposes to list as examples in the categorical exclusion. These types of actions have been performed routinely by DOE, other Federal agencies, and private entities. In DOE's experience, these activities would not have the potential to cause significant impacts.

### ***B2.6 Recovery of Radioactive Sealed Sources***

DOE proposes changes to this categorical exclusion to better reflect the current scope of DOE's sealed source recovery activities. At the time the existing categorical exclusion was established, the focus of DOE's efforts was primarily the recovery of DOE-owned radioactive materials that had been loaned or leased, such as to universities for research, and a small number of sealed sources. DOE later established the Off-Site Source Recovery Project (OSRP) to reflect an increased emphasis on recovery of sealed sources from Nuclear Regulatory Commission (NRC) and Agreement State licensees in response to requests from the NRC and other Federal or State agencies. After 2001, DOE further expanded the scope of OSRP to focus on the recovery of sources with a wider variety of radioisotopes of concern from a public health, safety, or national

security perspective. Due to their high activity and portability, many sealed sources could be used either individually or in aggregate in radiological dispersal devices commonly referred to as “dirty bombs.” DOE prioritizes the recovery of radioactive sealed sources based on threat reduction criteria developed in coordination with the NRC. DOE's experience with the recovery of more than 25,000 radioactive sealed sources since 1979 demonstrates that these activities are routinely conducted and do not have the potential to cause significant environmental impact.

DOE proposes to simplify the existing categorical exclusion to address the recovery of radioactive sealed sources and sealed source-containing devices from domestic or foreign locations provided that (1) the recovered items are transported and stored in compliant containers, and (2) the receiving site has sufficient existing storage capacity and all required licenses, permits, and approvals.

These proposed changes would reflect changes in DOE's source recovery activities since the existing categorical exclusion was formulated. First, recovery activities are no longer limited to requests from NRC or other Federal or State agencies. DOE also considers requests for source recovery from foreign governments and private parties, including private parties in foreign countries. Also, DOE provides financial and technical support to third parties (principally the Conference of Radiation Control Program Directors) for source recovery activities. Second, the scope of DOE activities is not limited to materials or licensees addressed in 10 CFR 51.22(14).

The proposed changes also would remove the reference to certain items that are not sealed sources (such as uranium shielding material and packaged radioactive waste not exceeding 50 curies). DOE has determined that the packaging, transportation, and storage of these types of materials normally would fit within categorical exclusion B1.30, Transfer actions. (See the Technical Support Document.)

## **Categorical Exclusions Applicable to Site Characterization, Monitoring, and General Research (B3)**

### ***B3.1 Site Characterization and Environmental Monitoring***

DOE proposes several changes to categorical exclusion B3.1. DOE proposes to limit the scope of this categorical exclusion to terrestrial characterization and monitoring, as DOE is proposing a new categorical exclusion for such actions in salt water and freshwater environments (categorical exclusion B3.16 below). DOE also proposes to limit categorically excluded activities to those that would not have the potential to cause significant impacts from ground disturbance. Based on a project description for seismic surveying submitted by a commentor in response to DOE's December 2009 Request for Information, and after considering the potential scale of seismic surveying projects, DOE proposes to also limit the scope of the categorical exclusion so as not to include large-scale reflection or refraction testing with regard to seismic techniques.

One commentor responding to DOE's Request for Information suggested that DOE's list of categorical exclusions match all the categorical exclusions currently being used by the Bureau of Land Management and the U.S. Forest Service, particularly for geophysical surveys for exploration of geothermal resources. Another commentor suggested that DOE include a categorical exclusion for terrestrial seismic survey activities. In response to both comments, DOE notes that item (a) of the existing B3.1 categorical exclusion lists geological, geophysical, and geochemical surveying and mapping, including seismic surveying, as examples of actions in the scope of the categorical exclusion. Thus DOE determined that it was not necessary to propose new categorical exclusions in response to these comments.

DOE proposes to clarify the scope of the existing categorical exclusion, however, by providing additional examples of actions that DOE's experience has demonstrated properly fit within this

class of actions. In response to the suggestion above and from another commentor concerning geothermal resources, DOE proposes to include temperature gradient surveying as an example of geophysical surveying activities encompassed within item (a). DOE also proposes to add underground reservoir response testing for item (d). The potential impacts of aquifer and reservoir response testing are well-known and normally insignificant; underground reservoir response testing could help determine, for example, whether further study of a reservoir for carbon sequestration purposes is warranted. DOE also proposes to add drilling using truck or mobile-scale equipment and modification, use, and plugging of boreholes as representative examples of small-scale drilling activities under item (f). DOE experience indicates that these changes would not have the potential to cause significant impacts. (See the Technical Support Document.)

### ***B3.3 Research Related to Conservation of Fish, Wildlife, and Cultural Resources***

DOE proposes to modify this categorical exclusion to include actions undertaken to protect cultural resources. These types of actions (such as walking a site, visually surveying, and digging small, shallow test holes with hand tools) are similar to types of actions undertaken for wildlife protection and would not have the potential to cause significant impacts.

### ***B3.6 Small-Scale Research and Development, Laboratory Operations, and Pilot Projects***

DOE proposes changes to this categorical exclusion for clarity. First, DOE proposes to delete the phrase “indoor bench-scale research,” which DOE views as encompassed within “small-scale research and development,” which is more easily understood. DOE also proposes to define “demonstration actions” in the context of this categorical exclusion and the related EA class of actions C12 as “actions that are undertaken at a scale to show whether a technology would be viable on a larger scale and suitable for commercial deployment. Demonstration actions frequently follow research and development and pilot projects that are directed at establishing proof of concept.” This definition reflects DOE's understanding of the delineation between pilot projects and demonstration projects that would be relevant to the scope of this categorical exclusion.

### ***B3.7 New Terrestrial Infill Exploratory and Experimental Wells***

DOE proposes to modify the scope of the categorical exclusion. DOE proposes to expand the categorical exclusion by providing additional examples of resources (brine, carbon dioxide, coalbed methane, gas hydrate) for which exploratory or experimental wells may be drilled. For carbon sequestration wells, DOE proposes to list examples of possible uses, including, but not limited to, the study of saline formations, enhanced oil recovery, and enhanced coalbed methane extraction. DOE also proposes to expand the locations where the infill wells may be drilled (now only in fields with operating wells) to fields with properly abandoned wells or unminable coal seams.

DOE proposes to limit this categorical exclusion to the terrestrial environment and to require that characterization has verified a low potential for seismicity, subsidence, and contamination of freshwater aquifers.

DOE experience with new infill exploratory and experimental (test) oil, gas, and geothermal wells continues to show that they would not have the potential to cause significant impacts. DOE experience also shows that the potential impacts of infill exploratory and test wells for substances such as brine, carbon dioxide, coalbed methane, and gas hydrate would be similar and would not have the potential to cause significant impacts under the limitations of this proposed categorical exclusion. Based on DOE's experience, the proposal to expand the scope of this categorical exclusion, subject to the proposed additional limitations, would not have the potential to cause significant impacts.

DOE is particularly interested in receiving comments on the proposed revisions to this categorical exclusion.

### ***B3.8 Outdoor Terrestrial Ecological and Environmental Research***

DOE is proposing two new categorical exclusions covering small-scale research activities in salt water and freshwater environments, and those two categorical exclusions limit the types of activities and their location specifically to protect aquatic environments. (See B3.16 for research activities in salt water and freshwater environments and B5.25 for small-scale renewable energy research and development and pilot projects in salt water and freshwater environments.) DOE is therefore proposing to clarify that the types of covered actions included in B3.8 are solely limited to terrestrial environments.

DOE is also proposing to clarify that this categorical exclusion includes small-scale biomass and biofuels research. Given the current focus on the development of biomass and biofuel production and the need for proof of concept research in this area, DOE proposes to state explicitly that small test plots for energy-related biomass or biofuels research (including the use of genetically engineered plants) are within the scope of this categorical exclusion.

Research using genetically engineered plants to be grown specifically for biomass production has reached the point where field tests are being performed outdoors for proof of concept purposes. At the same time, residues from biotechnology crops such as corn and soybeans are being tested as feedstocks for biofuel production. Such plants are currently regulated by the U.S. Department of Agriculture and these existing regulatory regimes have analyzed the environmental impacts resulting from the experimental and commercial growth of these crops, so there is no need for DOE to analyze separately these impacts to show their insignificance. DOE has determined that a categorical exclusion would be appropriate for small field tests, provided that the applicant already has all the necessary authorizations from the U.S. Department of Agriculture and received all necessary permissions to proceed with the trial. (See the Technical Support Document.)

### ***B3.9 Projects To Reduce Emissions and Waste Generation***

This categorical exclusion was initially created for demonstration actions under DOE's Clean Coal Technology Demonstration Program. However, after many years of experience with projects that reduce emissions and waste generation at existing fossil fuel facilities and, more recently, at alternative energy facilities, DOE is proposing modifications to the categorical exclusion for these activities regardless of whether or not they are part of DOE's Clean Coal Technology Demonstration Program. Specifically, DOE is proposing to expand the scope of this categorical exclusion to include projects to reduce emissions and waste generation at alternative fuel (e.g., biomass) facilities, in addition to fossil fuel facilities. As a result, DOE is proposing conforming revisions throughout this categorical exclusion (e.g., replacing "coal" with "fuel"). Further, DOE proposes to define fuel to include "coal, oil, natural gas, hydrogen, syngas [synthesis gas], and biomass," and specifically to exclude nuclear fuels.

Based on its experience with these activities, DOE has found that projects that demonstrate ways to reduce emissions and waste generation at existing fossil or alternative fuel combustion or utilization facilities would not have the potential to cause significant impacts. (See the Technical Support Document.) DOE also proposes to remove from categorical exclusion B3.9(a) the 20 percent limitation on test treatment of the throughput product (solid, liquid, or gas) generated at existing, fully operational fuel combustion or utilization facilities. Although test treatment on a fraction of the throughput product (sometimes referred to as "slipstream testing") may be helpful in evaluating new treatment technologies, DOE experience shows that test treatment of the entire throughput product stream may be needed to provide an adequate demonstration of the commercial viability of technologies that could reduce emissions from existing facilities. DOE

analyses and experience show that such test treatment normally would not have the potential to cause significant impacts under the limitations of this categorical exclusion.

Further, DOE proposes to remove from B3.9(c) the two-year limitation on the addition or replacement of equipment for reduction or control of sulfur dioxide, oxides of nitrogen, or other regulated substances at existing facilities. In DOE's experience, the potential for significant impacts of such projects does not depend on the duration of the demonstration. Moreover, two years may be too short a period of time for an adequate demonstration of equipment whose continued use is likely to be beneficial.

In addition to the provisions of B3.9(c), DOE proposes explicitly to include the addition or modification of equipment for capture and control of carbon dioxide or other regulated substances, provided that adequate infrastructure is in place to manage such substances. The use of such equipment offers the potential for environmental benefits by providing needed information on the costs, operability, and reliability of capture technologies that could enable their future deployment in existing conventional coal and other fuel utilization facilities. DOE's knowledge and experience with the physical or chemical unit processes that could capture carbon dioxide at existing facilities show such processes would not have the potential to cause significant impacts under the conditions specified in the proposed modification of this categorical exclusion.

#### ***B3.10 Particle Accelerators***

DOE proposes to modify this categorical exclusion by more clearly specifying the operating parameters for particle accelerators. This categorical exclusion currently has only one limiting parameter (primary beam energy less than approximately 100 million electron volts (MeV)). DOE's proposed modification would provide two additional limiting parameters (average beam power less than approximately 250 kilowatts (kW) and average current of 2.5 milliamperes (mA)). The voltage would be allowed to increase, as long as the resulting average current was 2.5 mA. Such result could be accomplished by lowering the power (wattage). Alternately, the wattage could increase if voltage decreased to result in an average current of 2.5 mA. DOE has determined that the use of three parameters will provide flexibility in the application of the categorical exclusion, but the actions still would not have the potential to cause significant impacts. (See the Technical Support Document.)

#### ***B3.11 Outdoor Tests and Experiments on Materials and Equipment Components***

The existing categorical exclusion precludes DOE from categorically excluding outdoor burn, impact, drop, puncture, and similar tests involving radiological sources, whether or not they were encapsulated. Because encapsulated sources can be used safely in these types of tests, DOE proposes to expand the scope of the categorical exclusion to cover their use under certain conditions. Specifically, DOE is proposing that nondestructive actions such as detector/sensor development and testing and first responder field training, using encapsulated sources that contain source, special nuclear, or byproduct materials, be included in the scope of this categorical exclusion. DOE experience demonstrates that such activities can be done safely and would not have the potential to cause significant impacts.

#### ***B3.14 Small-Scale Educational Facilities***

DOE proposes a new categorical exclusion for the siting, construction or modification, operation, and decommissioning of small-scale educational facilities, including, but not limited to, conventional teaching laboratories, libraries, classroom facilities, auditoriums, museums, visitors centers, exhibits, and associated offices within or contiguous to a previously disturbed or developed area (where active utilities and currently used roads are readily accessible). Based on

DOE's experience, and supported by past NEPA analyses, such activities, under the limitations provided, would not have the potential to cause significant impacts. (See the Technical Support Document.)

### ***B3.15 Small-Scale Indoor Research and Development Projects Using Nanoscale Materials***

DOE proposes a new categorical exclusion for the siting, construction, or modification, operation, and decommissioning of facilities for indoor small-scale research and development and small-scale pilot projects using nanoscale materials, in accordance with applicable requirements necessary to ensure the containment of any biohazardous materials. Construction or modification would be within or contiguous to an already developed area (where active utilities and currently used roads are readily accessible). This proposed categorical exclusion includes activities that are already in the scope of B3.6 (Small-scale research and development, laboratory operations, and pilot projects); however, as part of its rulemaking effort, DOE finds it appropriate to propose a categorical exclusion that specifically addresses nanoscale activities.

DOE has extensive small-scale or laboratory-scale experience working with engineered (intentionally created, rather than natural or incidentally formed) nanoscale materials. For example, DOE is participating in interagency workgroups, such as the National Nanotechnology Initiative ([http://www.nano.gov/html/about/home\\_about.html](http://www.nano.gov/html/about/home_about.html)), that seek to promote responsible research and development of nanotechnology, ensure that the important benefits to environmental protection that nanotechnology may offer are realized, and better understand any potential risks from exposure to nanomaterials in the environment. DOE conducts basic research and development that supports the National Nanotechnology Initiative at its nanoscale research centers, in accordance with DOE Policy 456.1 (DOE P 456.1, Secretarial Policy Statement on Nanoscale Safety), and best management practices and policies that ensure protection of workers and the environment, such as DOE Nanoscale Science Research Centers: Approach to Nanomaterials ES&H, (Rev3a, May 2008) ("Approach to Nanomaterial ES&H") ([http://orise.orau.gov/iros/Nanotechnology/nanotech\\_DOE\\_Nanoscale\\_SC.html](http://orise.orau.gov/iros/Nanotechnology/nanotech_DOE_Nanoscale_SC.html)). As explained in "Approach to Nanomaterial ES," "laboratory-scale" research excludes those activities whose function is to produce commercial quantities of materials, as defined in **29 CFR 1910.1450(b)(2)**, "Occupational Exposure to Hazardous Chemicals in Laboratories, Definitions."

Laboratory-scale experimentation with nanoscale materials has been the subject of four DOE EAs, in which the Department has analyzed the construction and operation of nanomaterials facilities. DOE has determined that, with appropriate controls in place (as specified in the proposed categorical exclusion and described above), these activities would not have the potential to cause significant impacts. (See the Technical Support Document.)

DOE is particularly interested in receiving comments on this proposed categorical exclusion.

### ***B3.16 Research Activities in Salt Water and Freshwater Environments***

DOE proposes a new categorical exclusion for small-scale, temporary surveying, site characterization, and research actions to be performed in salt water and freshwater environments. DOE proposes limiting the actions covered by this categorical exclusion to the acquisition of rights-of-way, easements, and temporary use permits; data collection, environmental monitoring, and nondestructive research programs; resource evaluation activities; collection of various types of data and samples; installation of monitoring and recording devices; installation of equipment for flow testing of existing wells; and ecological and environmental research in a small area.

DOE proposes specifically to exclude the construction or installation of permanent facilities or devices and to exclude the drilling of resource exploration or extraction wells. In addition, DOE

has included several limits on the type, scope, and location of covered actions to protect the aquatic environment from potential significant impacts.

DOE proposes to limit the covered actions in this categorical exclusion through the following conditions. Covered actions under this categorical exclusion would be conducted in accordance with, where applicable, an approved spill prevention, control, and response plan, and would incorporate appropriate control technologies and best management practices. Furthermore, none of the above activities would occur within the boundary of an established marine sanctuary or wildlife refuge, a governmentally proposed marine sanctuary or wildlife refuge, or a recognized area of high biological sensitivity, or outside those areas if the activities would have the potential to cause significant impacts within those areas. Additionally, no permanent facilities or devices would be constructed or installed. The categorical exclusion also lists other factors, specific to aquatic environments, to be considered by proponents of covered actions before applying this categorical exclusion to ensure that the activities would not have the potential to cause significant impacts.

DOE has determined that, subject to the proposed limitations, the activities would not have the potential to cause significant impacts. DOE is particularly interested in receiving comments on this categorical exclusion due to heightened sensitivity to activities in the salt water environment in light of recent oil-related incidents. (See the Technical Support Document.)

#### **Categorical Exclusions Applicable to Power Resources (B4)**

DOE proposes to make a number of recurring changes to the categorical exclusion provisions applicable to power resources. In reference to adding electric power resources (such as wind farms) into an electric power system, DOE proposes to use the term “interconnection” rather than the term “integration” now used in its existing classes of actions. “Interconnection” is the current term used in the electric transmission field for such actions. DOE, therefore, proposes changes to the following provisions: B4.1, B4.11, B4.12, B4.13.

DOE proposes to delete references to “main transmission system” in its existing classes of actions as unnecessary because DOE actions would only apply to its own transmission system. DOE, therefore, proposes changes to the following provisions: B4.11, B4.12.

DOE proposes to add pipeline rights-of-way as locations where actions could occur that are now categorically excluded or proposed for categorical exclusion in previously developed or disturbed transmission line rights-of-way. The impacts from siting, constructing, operating, or decommissioning actions in these linear rights-of-way are essentially similar. DOE, therefore, proposes changes to the following provisions: B4.7, B4.12. (DOE also proposes a similar change to EA class of actions C4.)

##### ***B4.1 Contracts, Policies, and Marketing and Allocation Plans for Electric Power***

DOE proposes to simplify the description of the scope of this categorical exclusion, without changing the scope. The categorical exclusion would still apply to electric power contracts, policies, and plans that do not involve a new generation resource and do not involve changes in the normal operating limits of existing generation resources. DOE proposes to delete the existing reference to “excess electric power” as unnecessary as it simply applies to power that is available for transmission. DOE is proposing changes to its corresponding classes of actions for EAs (C7) and EISs (D7), as discussed below in Section IV.F and IV.G, respectively.

DOE is particularly interested in receiving comments on the proposed revisions to this categorical exclusion.

#### ***B4.4 Power Marketing Services and Activities***

DOE proposes to clarify this categorical exclusion by adding “power management activities” to its existing categorical exclusion for power marketing services to indicate that the activities that are appropriately categorically excluded do not necessarily need to be taken in the context of marketing power. The existing categorical exclusion was established based on the experience of DOE’s power marketing administrations, but has been appropriately applied recently by other elements of the Department, for example, in evaluating actions under the American Recovery and Reinvestment Act. The proposed change would provide transparency to DOE’s application of this categorical exclusion, and DOE has determined that the covered actions would not have the potential to cause significant impacts.

#### ***B4.6 Additions and Modifications to Transmission Facilities***

DOE proposes to add “load shaping projects (such as the installation and use of flywheels and battery arrays)” to the list of example actions in this categorical exclusion. With the wider deployment and accompanying improvement in load shaping technologies, DOE’s experience indicates that these actions fit within the scope of this categorical exclusion.

#### ***B4.7 Fiber Optic Cable***

DOE proposes that certain actions associated with adding fiber optic cable to transmission facilities (such as vaults and pulling and tensioning sites) be within the scope of this categorical exclusion with certain limitations. DOE has found that it is often necessary to place vaults and pulling and tensioning sites outside of rights-of-way. DOE has determined that, if vaults or such sites are in nearby previously disturbed or developed areas, they would not have the potential to cause significant environmental impact.

#### ***B4.9 Multiple Use of Transmission Line Rights-of-Way***

DOE proposes to add examples of crossing agreements affecting a transmission facility’s rights-of-way that DOE has determined are in the scope of this categorical exclusion, namely natural gas pipelines, communications cables, and roads.

#### ***B4.10 Removal of Electric Transmission Lines and Substations***

DOE proposes to add “abandonment” and “restoration” of rights-of-way to the list of activities in this categorical exclusion, because DOE has determined that these actions, which generally follow the removal of electric transmission lines and substations, would not have the potential to cause significant impacts.

#### ***B4.11 Electric Power Substations and Interconnection Facilities***

DOE proposes to add interconnection facilities to its categorical exclusion for construction or modification of electric power substations because the facilities have similar equipment and function. Substations switch, step down, or regulate voltage of electricity being transmitted, and may serve as controls and transfer points on a transmission system; interconnection facilities add electric power resources to transmission systems through similar functions.

DOE proposes that actions under this categorical exclusion, instead of being limited to those that do not interconnect a new generation resource (under the existing categorical exclusion), be limited to interconnecting new generation resources that meet two conditions: The new generation



resource (1) would be eligible for categorical exclusion under the DOE NEPA regulations (that is, under proposed categorical exclusions for combined heat and power or cogeneration systems (B5.14), solar energy (B5.16 and B5.17), wind energy (B5.18), biomass power plants (B5.20), methane gas recovery and utilization systems (B5.21) and drop-in hydroelectric systems (B5.24)), and (2) would be equal to or less than 50 average megawatts (which is considered a major resource under the Northwest Power Act).

DOE is also proposing to delete actions regarding construction, upgrading, or rebuilding transmission lines from this categorical exclusion because substation actions do not necessarily involve transmission line actions. Categorically excluded transmission line actions are addressed in proposed B4.12 and B4.13.

DOE is proposing to delete the restriction that facilities under this categorical exclusion be limited to no more than 230 kilovolts because DOE has determined that voltage of a substation or interconnection facility is not a determinant of the potential for significant environmental impacts.

In response to the Department's December 2009 Request for Information, one commentor suggested that DOE categorically exclude modifications and upgrades to existing substations to accommodate electricity generated from renewable energy sources, to the extent that an upgrade does not increase the overall capacity of the substation or the disturbed areas associated with the substation, noting that additional capacity is needed at substations throughout the electric grid. DOE notes that it is proposing to delete the restriction that facilities under this categorical exclusion be limited to no more than 230 kilovolts.

DOE is particularly interested in receiving comments on the proposed revisions to this categorical exclusion.

#### ***B4.12 Construction of Transmission Lines***

DOE proposes to incorporate within the scope of categorical exclusion B4.12 an action currently addressed in the existing categorical exclusion B4.11, that is "relocation of existing electric transmission lines approximately 20 miles in length or less." By doing so, transmission line construction and rebuilding activities will be consolidated in categorical exclusions B4.12 and B4.13, rather than also included in categorical exclusion B4.11, which predominantly relates to substations and interconnection facilities. DOE's long-term experience with electric transmission line construction indicates that the approximately 10-mile limit for categorical exclusion of transmission line construction outside of a previously disturbed or developed right-of-way, and the approximately 20-mile limit for categorical exclusion of transmission line in a previously disturbed right-of-way, have been reliable guides to the appropriate level of NEPA review for the actions.

DOE proposes that actions under this categorical exclusion, instead of being limited to those that do not interconnect a new generation resource (as under the existing categorical exclusion), be limited to interconnecting new generation resources that meet the two conditions discussed with respect to categorical exclusion B4.11.

In response to the Department's December 2009 Request for Information, one commentor suggested that the addition of transmission lines to existing transmission line or pipeline rights-of-way be categorically excluded. The commentor noted that additional transmission capacity is required to move electricity generated by renewable resources to population centers and that adding that capacity in an existing right-of-way will have very little environmental impact. DOE agrees and does not restrict the addition of transmission lines to an existing transmission or pipeline right-of-way if the limitations specified in the categorical exclusion are met.

DOE is particularly interested in receiving comments on the proposed revisions to this categorical exclusion.

#### ***B4.13 Upgrading and Rebuilding Existing Transmission Lines***

DOE proposes to continue to categorically exclude the upgrading and rebuilding of existing transmission lines of approximately 20 miles in length or less (including minor relocations of small segments of such lines), as under the existing categorical exclusion B4.13. DOE also proposes to categorically exclude the use of the upgraded or rebuilt lines for the interconnection of new generation resources that meet the two conditions discussed with respect to categorical exclusion B4.11. Further, DOE proposes to delete the purposes for which minor relocations of the existing line may occur.

DOE is particularly interested in receiving comments on the proposed revisions to this categorical exclusion.

### **Categorical Exclusions Applicable to Conservation, Fossil, and Renewable Energy Activities (B5)**

#### ***B5.1 Actions To Conserve Energy or Water***

In B5.1, DOE proposes four types of changes to the existing categorical exclusion: (1) Adding examples to better represent the type of energy conservation actions, including those for which DOE provides financial assistance, that fall within the scope of this categorical exclusion, (2) adding actions to conserve water, (3) deleting reference to renewable energy research and development because DOE is proposing separate categorical exclusions for those actions (under B5.15 and B5.25 below), and (4) including new B5.1(b).

In B5.1(a), DOE proposes to clarify the scope of the categorical exclusion by providing additional examples of conservation actions similar in nature to the existing examples, such as weatherization, energy efficiency for vehicles and transportation (such as fleet change out), power storage (such as flywheels and batteries, generally less than 10 MW), and transportation management systems (such as traffic signal control systems). DOE's experience with these proposed covered actions demonstrate that they fit within the scope of the categorical exclusion. In addition, to ensure that the categorical exclusion would not encompass actions with potentially significant impacts on the human environment, DOE proposes to clarify that the actions include building renovations or new structures, provided that they occur in a previously disturbed or developed area. Also, DOE proposes to clarify that the categorical exclusion could also involve actions in the academic or institutional sectors.

In B5.1(b), DOE proposes to include rulemakings that establish energy conservation standards in the scope of this categorical exclusion. DOE has prepared numerous EAs and FONSI for rulemakings that establish energy conservation standards for consumer products and industrial equipment and has determined that, within the limitations on the scope of actions that could be taken under the proposed categorical exclusion, establishment of such standards would not have the potential to cause significant impacts. The limitations on scope of actions concern changes in manufacturing infrastructure, uses of available resources, disposal, and energy consumption. (See the Technical Support Document.)

DOE is particularly interested in receiving comments on B5.1(b) of this categorical exclusion.

#### ***B5.2 Modifications to Pumps and Piping***

DOE proposes to broaden the scope of this categorical exclusion by not limiting it to oil, gas, and geothermal facilities, but by providing examples of materials that could be conveyed by pump and piping configurations (that is, by adding as examples, air, brine, carbon dioxide, produced water, steam, and water to the currently listed materials). DOE also proposes to clarify that the existing reference to “gas” includes natural gas, hydrogen gas, and nitrogen gas. DOE has determined that the environmental impacts resulting from modifications to pump and piping configurations on systems conveying such materials would be similar to impacts from modifications to the pump and piping configurations on systems carrying the existing categorically excluded materials. DOE's experience with these materials has demonstrated that modifying such pump and piping configurations would not have the potential to cause significant impacts.

### ***B5.3 Modification or Abandonment of Wells***

DOE proposes to broaden the scope of this categorical exclusion for storage and injection wells by not limiting the wells to those for oil, brine, geothermal, and gas wells, but by adding these wells as examples: Carbon dioxide, coalbed methane, and gas hydrate wells. DOE's experience has demonstrated that actions associated with the modification and abandonment (including plugging) of carbon dioxide and similar wells normally do not have the potential to cause significant impacts. DOE is proposing to limit use of the categorical exclusion to situations where there is low potential for seismicity, subsidence, and contamination of freshwater aquifers and where the actions are otherwise consistent with best practices and DOE protocols, including those that protect against uncontrolled releases of harmful materials. DOE is also proposing to clarify that “gas” in the existing categorical exclusion refers to natural gas.

### ***B5.4 Repair or Replacement of Pipelines***

DOE proposes to broaden the scope of this categorical exclusion by not limiting it to actions including oil, produced water, brine, and geothermal pipelines, but also to exclude repair and replacement actions on pipelines carrying materials similar in nature (such as air, carbon dioxide, hydrogen gas, natural gas, nitrogen gas, steam, and water). In DOE's experience, the conveyance of the proposed additional materials similar to those currently categorically excluded normally does not pose a potential to cause significant impacts. DOE also proposes to clarify that upgrading, rebuilding, and minor relocation may be involved in repair or replacement of pipelines. Further, DOE proposes to list Army Corps of Engineer permits as one type of requirement that may apply to these actions, while also acknowledging that there may be others.

### ***B5.5 Short Pipeline Segments***

DOE proposes to broaden the scope of this categorical exclusion by not limiting it to oil, steam, geothermal or natural gas resources, but by providing additional examples (air, brine, carbon dioxide, hydrogen gas, nitrogen gas, produced water, and water) of materials potentially conveyed by pipeline segments under this categorical exclusion. The potential impacts resulting from pipelines conveying the additional materials would be similar to those from the existing categorically excluded materials. DOE's experience conveying these materials has demonstrated that they would not have the potential to cause significant impacts.

DOE further proposes to remove the limitation that pipelines must be within a single industrial complex. DOE proposes to remove that limitation because potential impacts do not depend on whether the action is conducted within an arbitrary boundary. DOE is therefore proposing to replace the reference to “DOE facilities” with references to “existing source facilities” and “existing receiving facilities.” Categorically excluded actions are limited to short pipelines, which DOE proposes be generally less than 20 miles in length in previously developed or disturbed areas.

#### ***B5.6 Oil Spill Cleanup***

DOE is proposing to clarify that the National Oil and Hazardous Substances Pollution Contingency Plan is not necessarily the only applicable requirement for oil spill cleanup by making this an example of an applicable requirement.

#### ***B5.7 Import or Export Natural Gas, With Operational Changes***

DOE proposes to add disapprovals to the current scope (approvals) for consistency with existing classes of actions C13, D8, and D9.

#### ***B5.8 Import or Export Natural Gas, With New Cogeneration Powerplant***

DOE proposes to add disapprovals to the current scope (approvals) for consistency with existing classes of actions C13, D8, and D9. DOE proposes to include in the scope of this categorical exclusion pipelines generally less than 20 miles in length in previously disturbed or developed rights-of-way.

#### ***B5.10 Certain Permanent Exemptions for Existing Electric Powerplants***

DOE proposes to delete two references to provisions of the Powerplant and Industrial Fuel Use Act as those provisions have been deleted from the Act.

#### ***B5.12 Workover of Existing Wells***

DOE proposes to broaden the scope of this categorical exclusion by not limiting it to oil, gas, and geothermal wells, but by providing additional examples (brine, carbon dioxide, coalbed methane and gas hydrate) of wells that could be restored to functionality. DOE's experience with these materials has demonstrated that the potential impacts would be similar in nature to the impacts of wells using materials named in the existing categorical exclusion and that workover of such wells would not have the potential to cause significant impacts. In addition, DOE is proposing to limit use of the categorical exclusion to situations where there is low potential for seismicity, subsidence, and contamination of freshwater aquifers, and where the actions are otherwise consistent with best practices and DOE protocols, including those that protect against uncontrolled releases of harmful materials. DOE is also proposing to clarify that "gas" in the existing categorical exclusion refers to "natural gas."

#### ***B5.13 Experimental Wells for the Injection of Small Quantities of Carbon Dioxide***

DOE proposes a new categorical exclusion for experimental wells for the injection of small quantities of carbon dioxide in locally characterized geologically secure storage formations at or near existing carbon dioxide sources. The activities encompassed in the new proposed categorical exclusion are intended to help determine the suitability of geological formations for large-scale sequestration, as information from small-scale projects can be used to ensure that commercial-scale projects can be conducted safely and in an environmentally sound manner.

The proposed categorical exclusion is supported by DOE's National Energy Technology Laboratory's experience with carbon sequestration wells, through DOE-directed research projects and collaboration with the nationwide network of regional carbon sequestration partnerships tasked with determining the best technologies for carbon capture, storage, and sequestration. Through this work, DOE has gained substantial experience with small-scale carbon sequestration, showing that these projects can be managed safely and would not have the potential to cause

significant impacts. In addition, the proposed categorical exclusion is supported by FONSI for three DOE EAs for projects with scales ranging up to one million tons of carbon dioxide over the lifetime of the project (typically one to four years).

Based on experience with small-scale projects, DOE proposes that the injection of carbon dioxide under this categorical exclusion be limited to, in aggregate, less than 500,000 tons over the duration of a project. In addition, DOE also proposes a number of conditions that the project must meet in order for the activity to be categorically excluded. For example, the proposed categorical exclusion would require that characterization has verified a low potential for seismicity, subsidence, and contamination of freshwater aquifers. DOE's proposed limitations will ensure that injection of carbon dioxide at this scale would not have significant impacts. (See the Technical Support Document.)

DOE is particularly interested in receiving comments on this categorical exclusion, including the limit of 500,000 tons of carbon dioxide over the duration of the project.

#### ***B5.14 Combined Heat and Power or Cogeneration Systems***

DOE proposes a new categorical exclusion for the conversion to, and replacement or modification of, combined heat and power or cogeneration systems at existing facilities provided that the action would not have the potential to cause a significant increase in the quantity or rate of air emissions and would not have the potential to cause significant impacts to water resources.

DOE has determined that combined heat and power or cogeneration system activities under this categorical exclusion, when subject to the proposed limitations, would not have the potential to cause significant impacts because (1) these systems would be modifications to existing systems, and thus generally would not involve more than minor changes to facility footprints and do not involve major new construction, and (2) these systems would improve operating efficiency (such as making use of otherwise waste heat) and thus would be designed to lessen potential impacts.

#### ***B5.15 Small-Scale Renewable Energy Research and Development and Pilot Projects***

As part of DOE's proposal to clarify and focus existing categorical exclusion B5.1 on energy efficiency and conservation actions (including research and development-related actions), DOE proposes a separate categorical exclusion for small-scale renewable energy research and development and pilot projects. In doing so, DOE proposes to limit the covered actions to those in previously disturbed and developed areas and to emphasize that such actions would be in accordance with applicable requirements and incorporate appropriate controls and practices. See also B5.25 for small-scale renewable energy research and development and pilot projects in salt water and freshwater environments.

In addition, this proposal is responsive to a commentor's suggestion to have a categorical exclusion for small-scale pilot projects for renewable energy generation, modeled on DOE's existing categorical exclusion B6.2 for pilot-scale waste collection and treatment facilities.

DOE is particularly interested in receiving comments on this categorical exclusion.

#### ***B5.16-B5.24***

As part of DOE's proposal to clarify and focus existing categorical exclusion B5.1 on energy efficiency and conservation actions, and in response to commentors' suggestions to include more explicitly renewable energy technologies, DOE is proposing several new categorical exclusions. DOE proposes eight new categorical exclusion classes of actions involving renewable energy

technologies, as described below. The proposed categorical exclusions apply to the installation, modification, operation, and removal of small-scale, commercially available renewable energy technologies. DOE proposes to specify conditions by technology (e.g., wind) to ensure appropriate limitations, but does not generally set limits on energy output because DOE experience and data review suggest that the potential for significant impacts is more closely related to the site selected for a renewable energy project and the interaction of resources at a selected site with the renewable technology. DOE has proposed specific limitations for these categorical exclusions to ensure that any renewable energy technology project that would have the potential to cause significant impacts to particular resources would be identified as outside the scope of the categorical exclusion. Further, DOE proposes one new class of actions involving electric vehicle charging stations.

The proposed categorical exclusions in B5.16-B5.24 identify many of the types of projects for which DOE has made categorical exclusion determinations based on existing categorical exclusion B5.1. The actions listed in these proposed categorical exclusions are also consistent with categorical exclusions promulgated by other Federal agencies, EAs and FONSI's prepared by DOE and other Federal agencies, the opinions of subject matter experts, and private sector experience developing and deploying renewable energy technologies. DOE has determined that the activities under these categorical exclusions, when subject to the proposed limitations, would not have the potential to cause significant impacts because the categorical exclusions apply specifically to systems that are: (1) Located on or adjacent to existing structures, or on previously developed or disturbed land, (2) sited in accordance with local land use and zoning requirements, and (3) designed to incorporate appropriate control technologies and best management practices to lessen potential impacts.

The proposed categorical exclusions are responsive to the numerous suggestions that DOE received, both from within DOE and in response to its December 2009 Request for Information, to include explicitly renewable energy technologies and associated equipment in its categorical exclusions. Several commentors also suggested that DOE categorically exclude actions intended to "co-locate renewables" or to support "distributed generation projects." These suggestions describe similar actions that: (1) Support the operation of an existing facility by providing a renewable energy source on-site, (2) would be compatible with existing land use, and (3) would require minimal to no expansion of the footprint of an existing facility. As a result, DOE's review of available data led it to propose to exclude select small-scale, renewable energy technology projects, under specified proposed conditions, for the purpose of providing a renewable energy generation capability to existing facilities (specifically, B5.16-B5.21).

#### ***B5.16 Solar Photovoltaic Systems***

The actions listed in categorical exclusion B5.16 apply to the installation, modification, operation, and removal of commercially available solar photovoltaic systems located on a building or other existing structure (e.g., covered parking facility), or on land generally comprising less than 10 acres. The actions listed are consistent with DOE and other Federal agency experience with "co-located" solar photovoltaic energy projects generally comprising less than 10 acres within a previously disturbed or developed area, categorical exclusion determinations DOE has made based on existing regulations, categorical exclusions promulgated by other Federal agencies, EAs and FONSI's prepared by DOE and other Federal agencies, and the opinions of subject matter experts. (See the Technical Support Document.)

DOE has determined that the solar photovoltaic system activities under this categorical exclusion, when subject to proposed limitations, would not have the potential to cause significant impacts because (1) these are systems located on or adjacent to existing structures, or on previously developed or disturbed land, and thus generally involve no more than minor changes to facility footprints and do not involve major new construction, and (2) these systems generally would

support the operation of an existing facility (e.g., providing an on-site, renewable electricity generation source). Such activities also may serve to lessen potential air emissions impacts when compared to electricity generated by fossil fuel (e.g., coal) sources.

DOE is particularly interested in receiving comments on this categorical exclusion.

#### ***B5.17 Solar Thermal Systems***

DOE proposes a new categorical exclusion for the installation, modification, operation, and removal of commercially available small-scale solar thermal systems (e.g., solar hot water systems) at an existing facility or on land generally comprising less than 10 acres within a previously disturbed or developed area. These actions are consistent with categorical exclusion determinations DOE has made based on existing regulations and EAs and FONSI prepared by DOE. (See the Technical Support Document.)

DOE has determined that the solar thermal system activities under this categorical exclusion, when subject to proposed limitations, would not have the potential to cause significant impacts because (1) these are small-scale systems located on or contiguous to an existing building, or in a previously developed or disturbed area, and thus generally involve no more than minor changes to facility footprints and do not involve major new construction, and (2) these systems generally would support the operation of an existing building (e.g., providing an on-site, renewable source of energy for heat). Such activities also may serve to lessen potential air emissions impacts when compared to electricity generated by fossil fuel (e.g., coal) sources.

DOE is particularly interested in receiving comments on this categorical exclusion.

#### ***B5.18 Wind Turbines***

DOE proposes a new categorical exclusion for the installation, modification, operation, and removal of small (*i.e.*, generally 200 feet in height or less when measured from ground to maximum vertical blade rotation), commercially available wind turbines. Such turbines must be located within previously disturbed or developed areas; more than 10 miles from an airport or aviation navigation aid; and more than 1.5 nautical miles from National Weather Service or Federal Aviation Administration Doppler weather radar. Also such turbines must not have the potential to cause significant impacts to bird or bat species and must be appropriately designed and located so as to not cause significant impacts to persons (e.g., noise or shadow flicker). These actions are consistent with categorical exclusion determinations DOE has made based on existing regulations, EAs and FONSI prepared by DOE and other Federal agencies, and the opinions of subject matter experts. (See the Technical Support Document.)

DOE has determined that the activities under this categorical exclusion, when subject to proposed limitations, would not have the potential to cause significant impacts because (1) these are small-scale wind turbines located within a previously developed or disturbed area, and thus generally involve no more than minor changes to an existing footprint and do not involve major new construction, and (2) these systems generally would support improved operation of an existing facility (e.g., providing an on-site, renewable source of energy for electricity). Such activities also may serve to lessen potential air emissions impacts when compared to electricity generated by fossil fuel (e.g., coal) sources.

DOE is particularly interested in receiving comments on this categorical exclusion.

#### ***B5.19 Ground Source Heat Pumps***

DOE proposes a new categorical exclusion for commercially available, small-scale ground source heat pumps, designed to include appropriate leakage and contaminant control measures (e.g., grouting) to support the operation of single facilities (e.g., a school) or contiguous facilities (e.g., an office complex), and sited only in previously disturbed and developed areas where associated activities (e.g., drilling or geothermal water discharge) are regulated by a local, regional, or State authority. The actions listed in this proposed categorical exclusion are consistent with categorical exclusion determinations DOE has made based on existing regulations, categorical exclusions promulgated by other Federal agencies, and EAs and FONSI prepared by DOE. (See the Technical Support Document.)

DOE has determined that the ground source heat pump system activities under this categorical exclusion, when subject to the proposed limitations, would not have the potential to cause significant impacts because (1) these are systems located within or adjacent to existing structures, or on previously developed or disturbed land, and thus generally involve no more than minor changes to facility footprints and do not involve major new construction, and (2) these systems generally would support the operation of an existing facility (e.g., providing an on-site, renewable heating or cooling source) that would serve to lessen potential air emissions impacts when compared to energy provided by traditional fossil fuel (e.g., coal) sources. DOE has proposed limitations for this categorical exclusion to ensure that any project that may result in a significant change in subsurface temperature would be outside the scope of the categorical exclusion.

DOE is particularly interested in receiving comments on this categorical exclusion.

#### ***B5.20 Biomass Power Plants***

DOE proposes a new categorical exclusion for small-scale biomass power plants, designed using commercially available technologies for an average energy output of 10 megawatts, to support the operation of single facilities (e.g., a school) or contiguous facilities (e.g., an office complex), and sited within previously disturbed and developed areas. The actions listed in this proposed categorical exclusion are consistent with EAs and FONSI prepared by DOE. (See the Technical Support Document.)

DOE has determined that the activities covered by this categorical exclusion, when subject to the proposed limitations, would not have the potential to cause significant impacts because (1) these are systems located within or adjacent to existing structures, or within previously developed or disturbed areas, and thus generally involve no more than minor changes to facility footprints or land use, and (2) these systems generally would support the operation of an existing building or contiguous facilities (e.g., providing an on-site, renewable electricity generation source). Such activities also may serve to lessen potential air emissions impacts when compared to electricity generated by fossil fuel (e.g., coal) sources. DOE has proposed limitations for this categorical exclusion to ensure that any project that may result in a significant increase in the quantity or rate of air emissions or have the potential to cause significant impacts to water resources would be outside the scope of the categorical exclusion.

DOE is particularly interested in receiving comments on this categorical exclusion.

#### ***B5.21 Methane Gas Recovery and Utilization Systems***

DOE proposes a new categorical exclusion for the installation, modification, operation, and removal of commercially available methane gas recovery and utilization systems on or contiguous to an existing landfill or wastewater treatment plant, or within a previously disturbed and developed area. The actions listed in this proposed categorical exclusion are consistent with



categorical exclusion determinations for methane gas recovery and utilization technologies that DOE has made based on existing regulations.

DOE has determined that the methane recovery and utilization system activities under this categorical exclusion, when subject to the proposed limitations, would not have the potential to cause significant impacts because (1) these are modifications to existing waste disposal or treatment facilities, and thus generally involve no more than minor changes to facility footprints and do not involve major new construction, and (2) these modifications generally would improve operating efficiency (e.g., making use of otherwise waste gas for energy production at existing facilities) and thus would be designed to lessen potential impacts. Such activities also may serve to lessen potential air emissions impacts when compared to electricity generated by fossil fuel (e.g., coal) sources. DOE has proposed limitations for this categorical exclusion to ensure that any project that may result in a significant increase in quantity or rate of air emissions would be outside the scope of the categorical exclusion.

#### ***B5.22 Alternative Fuel Vehicle Fueling Stations***

DOE proposes a new categorical exclusion for the installation, modification, operation, and removal of fueling stations for compressed natural gas, hydrogen, ethanol or other commercially available biofuels that are located on the site of a current or former fueling station, or in a previously disturbed or developed area controlled by the owner of the existing facility and vehicle fleet the station is meant to service. The actions listed in this proposed categorical exclusion are consistent with categorical exclusion determinations DOE has made based on existing regulations for alternative fuel vehicle fueling technologies and an EA and FONSI prepared by DOE. (See the Technical Support Document.)

DOE has determined that the alternative vehicle fueling system activities under this categorical exclusion, when subject to proposed limitations, would not have the potential to cause significant impacts because these are systems located at existing stations, or on previously developed or disturbed land, and thus generally involve no more than minor changes to facility footprints and do not involve major new construction. These systems would support the operation and use of alternative fuel vehicles (e.g., providing the fueling infrastructure necessary to support the use of vehicles run on alternative fuels). Such activities also may serve to lessen potential air emissions impacts when compared to traditional fossil fuel combustion engine vehicles.

#### ***B5.23 Electric Vehicle Charging Stations***

DOE proposes a new categorical exclusion for the installation, modification, operation, and removal of electric vehicle stations within a previously disturbed or developed area. The actions listed in this proposed categorical exclusion are consistent with categorical exclusion determinations DOE has made based on existing regulations.

DOE has determined that the electric vehicle charging station activities under this categorical exclusion, when subject to proposed limitations, would not have the potential to cause significant impacts because these are systems located on previously developed or disturbed land, and thus generally do not involve major new construction. These systems would support the use of electric vehicles (e.g., providing infrastructure necessary to support current and future use of electric vehicles). Such activities also may serve to lessen potential air emissions impacts when compared to traditional fossil fuel combustion engine vehicles.

#### ***B5.24 Drop-in Hydroelectric Systems***

DOE proposes a new categorical exclusion for the installation, modification, operation, and removal of commercially available small-scale, drop-in, run-of-the-river hydroelectric systems where there would not be the potential for significant impacts to threatened and endangered species or significant impacts on water quality, temperature, flow, or volume.

The term “run-of-the-river” as used in this categorical exclusion refers to hydroelectric systems that would be fully dependent on the natural flow of the river or stream at the point of system installation; would have no water storage, such as in an impoundment; and would involve no water diversion from the stream or river. The term “drop-in” refers to prefabricated systems that are placed in a river or stream, not systems that are constructed in a river or stream such as a dam. Under this categorical exclusion, DOE envisions small turbines placed in a stream or river for small operations, where all energy would likely be consumed on-site (e.g., for a home, ranch, or other small commercial operation) and unlikely to be put on the commercial grid. Hydroelectric systems capable of producing electricity for the commercial grid would likely be secured in a channel (requiring the use of heavy equipment), may require channel modification, and may have a potential to significantly affect fish, wildlife, habitat, and water flow and quality; these systems would be excluded from the scope of this categorical exclusion. The actions listed in this proposed categorical exclusion are consistent with the opinions of subject matter experts, including fish biologists with regulatory and fisheries management experience. (See the Technical Support Document.)

DOE has determined that the activities under this categorical exclusion would not have the potential to cause significant impacts when subject to the proposed limitations: involve no water storage or water diversion; be located only in areas upstream of a natural anadromous fish barrier (such as a waterfall that has historically prevented anadromous fish passage); and involve no major construction, modification of stream or river channels, or the use of heavy equipment. Projects in the scope of this categorical exclusion generally support adjacent uses with a renewable source of direct electricity production. Such activities also may serve to lessen potential air emissions impacts when compared to traditional systems where electrical energy is generated by fossil fuel sources.

DOE is particularly interested in receiving comments on this categorical exclusion.

#### ***B5.25 Small-Scale Renewable Energy Research and Development and Pilot Projects in Salt Water and Freshwater Environments***

DOE proposes to create a new categorical exclusion for small-scale renewable energy research and development and pilot projects in salt water and freshwater environments. Research with respect to wave or tidal energy or the growth and harvest of algae as biomass for proof of concept purposes would be appropriate projects in this class of actions. However, as with B3.16, DOE proposes to impose similar limits on the scope and location of the activities to ensure that renewable energy research is conducted in a manner that would not have the potential to cause significant impacts. These actions are consistent with categorical exclusion determinations DOE has made based on existing regulations, EAs and FONSIIs prepared by other Federal agencies, and the opinions of subject matter experts. (See the Technical Support Document.)

DOE proposes specifically to exclude the construction or installation of permanent facilities or devices and to exclude the drilling of wells for resource exploration or extraction. In addition, DOE has included several limits on the type, scope, and location of covered actions to protect the aquatic environment from potential significant impacts.

DOE proposes to limit the covered actions in this categorical exclusion through the following conditions. Covered actions under this categorical exclusion would be conducted in accordance with, where applicable, an approved spill prevention, control, and response plan, and would

incorporate appropriate control technologies and best management practices. Furthermore, none of the above activities would occur (1) within areas of hazardous natural bottom conditions, or (2) within the boundary of an established marine sanctuary or wildlife refuge, a governmentally proposed marine sanctuary or wildlife refuge, or a recognized area of high biological sensitivity, or outside those areas if the activities would have the potential to cause significant impacts within those areas. Additionally, no permanent facilities or devices would be constructed or installed. The categorical exclusion also lists other factors, specific to aquatic environments, to be considered by proponents of covered actions before applying this categorical exclusion to ensure that the activities would not have the potential to have significant impacts.

DOE is particularly interested in receiving comments on this categorical exclusion.

## **Categorical Exclusions Applicable to Environmental Restoration and Waste Management Activities (B6)**

### ***B6.1 Cleanup Actions***

DOE proposes to remove the specified limit of 5 years duration for categorically excluded short-term, small-scale cleanup actions because in DOE's experience that duration has not been representative of the potential for significant environmental impacts. DOE proposes to retain a specified limit to cost, but to raise the limit from approximately \$5 million to approximately \$10 million, in light of the fact that this cost limitation has not been revised since 1996. DOE also proposes to add encapsulation, physical or chemical separation, and compaction to the examples of treatment methods. DOE proposes to change the text of the categorical exclusion from "would not affect future groundwater remediation" to "would not unduly limit future groundwater remediation" because a literal reading of the existing categorical exclusion would bar its use if there were any affect on future groundwater remediation.

DOE is particularly interested in receiving comments on the proposed revisions to this categorical exclusion.

### ***B6.7 [Removed and Reserved: Granting/Denying Petitions for Allocation of Commercial Disposal Capacity]***

Existing B6.7 refers to a DOE regulation that was repealed in 1995. That regulation implemented a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985, which is no longer in effect. Therefore, DOE proposes deleting this categorical exclusion, marking B6.7 as "removed and reserved" in the regulations.

### ***B6.10 Upgraded or Replacement Waste Storage Facilities***

DOE proposes to identify "expansion" as within the scope of this categorical exclusion, which limits total facility size to 50,000 square feet.

## **F. Proposed Changes to Appendix C**

For an explanation of recurring proposals applicable to the appendix C classes of actions, please see Section IV.B, Recurring Proposals, above, where they are discussed and the particular classes of actions affected are listed. The short titles listed below for particular classes of actions reflect DOE's proposed titles.

### ***C2 [Removed and Reserved: Rate Increases More Than Inflation, Not Power Marketing]***

DOE proposes to delete EA class of actions C2 because DOE has not prepared an EA and FONSI under C2.

#### ***C4 Upgrading, Rebuilding, or Construction of Electric Transmission Lines***

DOE proposes changes to this class of actions to conform to the changes DOE is proposing for categorical exclusions B4.12 and B4.13. Proposed changes to C4 would address electric transmission lines of lengths greater than those to which categorical exclusions might apply.

#### ***C7 Contracts, Policies, and Marketing and Allocation Plans for Electric Power***

DOE proposes changes to this class of actions to conform to the changes DOE has proposed for categorical exclusion B4.1. This provision addresses the establishment and implementation of contracts, policies, and marketing and allocation plans related to electric power acquisition or transmission that involve (1) the interconnection of, or acquisition of power from, new generation resources that are equal to or less than 50 average megawatts and that would not be eligible for categorical exclusion under **10 CFR part 1021**; (2) changes in the normal operating limits of generation resources equal to or less than 50 average megawatts; or (3) service to discrete new loads of less than 10 average megawatts over a 12-month period. DOE also proposes to delete the description that implies that this class of actions applies only to DOE power marketing operations and facilities at DOE sites.

DOE is particularly interested in receiving comments on the proposed revisions to this provision.

#### ***C8 Protection of Cultural Resources and Fish and Wildlife Habitat***

DOE proposes changes to this class of actions to conform to the changes DOE is proposing for categorical exclusion B1.20. Proposed changes to C8 would address large-scale activities undertaken to protect cultural resources.

#### ***C11 Particle Acceleration Facilities***

DOE proposes to change the parameters for when an EA would normally be required to conform to the changes DOE is proposing for categorical exclusion B3.10. Whether an EA would normally be required would depend upon the energy associated with the particle acceleration facility.

#### ***C12 Energy System Demonstration Actions***

DOE proposes changes to this class of actions to conform to the changes DOE is proposing for categorical exclusion B3.6. Proposed changes to C12 would address “demonstration actions,” which are outside the scope of B3.6.

#### ***C13 Import or Export Natural Gas Involving Minor New Construction***

DOE proposes changes for consistency with categorical exclusions B5.7 and B5.8.

### **G. Proposed Changes to Appendix D**

For an explanation of recurring proposals applicable to the appendix D classes of actions, please see Section IV.B, Recurring Proposals, above, where they are discussed and the particular

classes of actions affected are listed. The short titles listed below for particular classes of actions reflect DOE's proposed titles.

***D5 [Removed and Reserved: Main Transmission System Additions]***

***D6 [Removed and Reserved: Integrating Transmission Facilities]***

DOE proposes deleting D5, Main transmission system additions, and D6, Integrating transmission facilities, because there is redundancy and ambiguity between D5 and D6 that makes them of limited utility. Furthermore, there is overlap between D5 (addition of new lines) and C4 (construction of new lines) in the current regulations, which makes it difficult to discern which category is appropriate for a specific project. DOE also proposes not to have EIS categories that correspond to the categorical exclusions and the EA class of actions that address the level of NEPA review for electric transmission facilities and lines (B4.11, B4.12, B4.13, and C4). Based on DOE experience, the level of NEPA review for transmission facilities and lines that are not categorically excluded is at least at an EA level, but does not necessarily warrant an EIS level. DOE has found that the determination whether an EA or an EIS is appropriate is project-specific (e.g., type and size of facility) and site-specific (e.g., site conditions, other facilities and lines in the area, or the proximity of residences). Working with its stakeholders, DOE has often successfully mitigated potentially significant impacts so that an EA level of review is often adequate. In those cases where an EA is not applicable, DOE completes an EIS, and the lack of an EIS category in this proposed rulemaking does not preclude such action in the future. (See the Technical Support Document.)

DOE is particularly interested in receiving comments on these provisions.

***D7 Contracts, Policies, and Marketing and Allocation Plans for Electric Power***

DOE proposes changes to this class of actions to conform to changes that DOE is proposing for both categorical exclusion B4.1 and the EA class of actions C7. This provision addresses establishment and implementation of contracts, policies, and marketing and allocation plans related to electric power acquisition or transmission that involve (1) the interconnection of, or acquisition of power from, new generation resources greater than 50 average megawatts; (2) changes in the normal operating limits of generation resources greater than 50 average megawatts; or (3) service to discrete new loads of 10 average megawatts or more over a 12-month period. DOE also proposes to delete the description that implies that this class of actions applies only to its power marketing operations and facilities at its sites.

DOE is particularly interested in receiving comments on the proposed revisions to this provision.

***D8 Import or Export of Natural Gas Involving Major New Facilities***

DOE proposes changes for consistency with categories B5.7, B5.8, and C13.

***D9 Import or Export of Natural Gas Involving Major Operational Change***

DOE proposes changes for consistency with categories B5.7, B5.8, and C13.

**V. General Comments Received in Response to the December 2009 Request for Information**

DOE reviewed and evaluated each of the suggestions provided by the 11 respondents to its December 2009 Request for Information, as discussed above in Section II. Many of the comments

included proposals for new categorical exclusions and revisions to limit or expand existing categorical exclusions, or were related to other existing provisions in subpart D of the DOE NEPA regulations. In addition to comments related to specific provisions, which are discussed above in Section IV.C through IV.G, DOE received comments of a more general nature, not associated with a particular provision. These comments and DOE's responses are presented below.

*Categorical exclusions, generally.* In its Request for Information, DOE described categorical exclusions as categories of actions that normally do not have the potential, individually or cumulatively, to have a significant effect on the "human environment." One commentor expressed a concern that DOE focused too narrowly on the human environment and "seems to miss the true purpose of the NEPA process." In addition, a commentor stated that the DOE categorical exclusion process should "explicitly include recognition of the Department's trust and trustee duties and responsibilities that ensure actions evaluated for categorical exclusion do not adversely impact the environment or violate these responsibilities." DOE's characterization of a categorical exclusion in its Request for Information is consistent with the definition of categorical exclusion in the CEQ NEPA regulations (40 CFR 1508.4), and DOE applies the comprehensive interpretation of "human environment" as defined in the CEQ NEPA regulations (40 CFR 1508.14) "to include the natural and physical environment and the relationship of people with that environment."

*Land transfers.* A commentor stated that DOE should not use a categorical exclusion when land transfers have the potential to impact Tribal Nations' rights, uses, or historical, religious or cultural assets, or DOE should ensure that those rights are preserved and that there is adequate government-to-government consultation.

DOE conducts its government-to-government consultations with Tribal Nations in accordance with its American Indian Tribal Government Policy, as outlined in DOE Order 1230.2. With respect to Federally recognized Indian Tribe interests, also see Section IV.E for a discussion of appendix B(4) conditions that are integral elements of appendix B categorical exclusions.

*Land and water contaminated with radioactive and/or hazardous materials.* A commentor noted that many of DOE's facilities, and the land and water beneath these facilities, are contaminated with radioactive and/or hazardous materials. The commentor stated that DOE should not allow for the transfer or lease of contaminated facilities and land through a categorical exclusion. DOE is proposing changes to DOE's land transfer-related categorical exclusions. Proposed categorical exclusions B1.24 and B1.25 pertain to the transfer, lease, disposition, or acquisition of interests (personal property and real property). Both proposed B1.24 and B1.25 contain limitations such that they may not be applied if there is a "potential for release of substances at a level, or in a form, that could pose a threat to public health and the environment." For further information, see the detailed discussion of proposed changes to A7, B1.24, and B1.25 in Section IV.D and IV.E, above.

*Construction and operation of facilities.* A commentor stated that "most construction of facilities (even temporary)" should not be performed under a categorical exclusion. Construction and operation under the Department's existing and proposed categorical exclusions are limited to certain types of small-scale facilities that DOE has determined would not have potential to cause significant impacts when the conditions specified in the categorical exclusion and the integral elements in appendix B(4) are considered. Under DOE's existing NEPA regulations these include, for example, support buildings (such as cafeterias), small-scale wastewater and surface water treatment facilities, and microwave and communications towers. DOE is now proposing to add recycling drop-off stations and small-scale educational facilities to that list. DOE has determined that, absent extraordinary circumstances, these types of actions are appropriately categorically excluded.

*Mitigation actions.* A commentor stated that mitigation actions, such as reseeding and revegetation, should not conflict with existing mitigation, restoration, and preservation activities or exacerbate environmental contamination, and that DOE's procedures for categorical exclusion determinations should include a checklist to ensure that the potential for such conflicts is considered in applying a categorical exclusion. DOE's existing and proposed categorical exclusion regulations require determinations that there are no extraordinary circumstances related to the proposal that may affect the significance of the proposal's environmental effects. The regulations also require that the proposal not be connected to other actions with significant impacts or related to other actions with cumulatively significant impacts. DOE believes that these existing procedures adequately address this concern.

*Rulemaking process.* A commentor stated that DOE should distribute draft categorical exclusion determinations and supporting documents to those who have specific interests or oversight responsibilities for DOE sites, providing a 30-day comment period. DOE respectfully disagrees with this proposal. Such a process would be counter to the purpose of a categorical exclusion, which is to expedite the environmental review process for proposed actions that normally do not require more resource intensive EAs or EISs. Before an agency can establish a categorical exclusion, however, an agency is required to provide an opportunity for public review of those actions that it intends to exclude. Through the publication of this notice of proposed rulemaking, DOE is providing its proposed changes to the public and providing an opportunity for public review and comment. Additionally, DOE is required to consult with CEQ on conformity of the proposed categorical exclusions with NEPA and the CEQ NEPA implementing procedures.

A commentor requested that DOE's December 2009 Request For Information "not be used to remove types of projects that are currently required to perform an EA or EIS." As discussed further in Section IV.G, DOE is proposing to remove two classes of actions that are now listed as normally requiring an EIS, D5, Main transmission system additions, and D6, Integrating transmission facilities. DOE has found that, for the most part, it has been able to mitigate impacts such that those impacts are not significant. DOE is proposing to remove one EA class of actions (C2, Rate increases more than inflation, not power marketing). DOE has not been able to identify any proposed action that has been included in that class of actions.

*New technologies.* A commentor requested that "if the effects of new technologies in the private and public sectors are going to influence" the proposed categorical exclusions, the technologies and their impacts must be fully explained. DOE has based its proposed categorical exclusions on its previous NEPA reviews, expert advice, categorical exclusions of other Federal agencies, and private sector experience, and it has explained the basis for its proposed decisions both here and in the Technical Support Document.

*Geothermal.* A commentor requested that no further regulations be promulgated that would make it more difficult to obtain permitting for the installation of geothermal wells. The commentor also emphasized the "tremendous energy savings" provided by geothermal heat pumps for heating and cooling buildings.

DOE currently has an existing categorical exclusion, B3.7, for the siting, construction, and operation of new infill exploratory and experimental (test) wells, including geothermal wells, drilled in a geological formation that has existing operating wells. Although DOE is proposing to add certain restrictions, DOE does not believe these changes would make the permitting process for geothermal wells more difficult. In addition, DOE is proposing a new categorical exclusion, B5.19, for the installation, modification, operation, and removal of commercially available small-scale ground source heat pumps to support operations in single facilities or contiguous facilities. (See discussion of B3.7 and B5.19 in Section IV.E, above.)

*Renewable energy projects.* A commentator suggested that DOE adopt a “fast-track” review process for renewable energy projects, similar to a process that the Bureau of Land Management, an agency within the Department of the Interior, has adopted. DOE is a cooperating agency with the Bureau of Land Management on several of its EISs for renewable energy proposals (for example, for proposals for which an application for a loan guarantee has been submitted to DOE), and is familiar with the Bureau's process. In other cases, DOE's Program Offices (for example, the Office of Electricity Delivery and Energy Reliability, the Loan Program Office, and Bonneville Power Administration) work as expeditiously as possible on NEPA and other necessary reviews (such as electric system reliability review and financial review) needed before project approval. Part of DOE's aim in proposing updates to its categorical exclusions is to expedite the environmental review process for proposals that normally do not require more resource intensive EAs or EISs. DOE's proposed new categorical exclusions include (1) eight specifically for installation, modification, operation, and removal of commercially available renewable energy technologies (as listed in the proposed categorical exclusions B5.16 to B5.22, inclusive, and B5.24) and (2) small-scale renewable energy research and development and pilot projects (B5.15 and B5.25). DOE expects that the use of these categorical exclusions will allow for more expeditious NEPA review for projects that fit within the classes of actions.

*Biofuels production projects.* A commentator suggested that DOE categorically exclude new biofuels production projects, “provided that certain conditions are met with respect to air and water emissions, water consumption and other high-level considerations.” At this time, DOE is not proposing a categorical exclusion for commercial-scale biofuels production projects. First, the Department conducted a survey of Federal agencies' NEPA regulations and did not identify existing (or proposed) categorical exclusions for new commercial biofuels projects that could guide DOE in proposing an appropriate scope for such a category. Second, a Notice of Funds Availability published by the U.S. Department of Agriculture's Rural Business Cooperative Service regarding new construction and retrofitting of advanced biofuels facilities (non-corn ethanol) concluded that such facilities would not meet the classification of a categorical exclusion ([75 FR 25076](#); May 6, 2010). DOE, nevertheless, is requesting input from the public as to whether a categorical exclusion for commercial-scale biofuel production projects would be appropriate, and, if so, what limits might be applicable (for example, throughput and operation parameters).

*Consistency among Federal and State categorical exclusions.* A commentator suggested that DOE should work with States to create consistency among Federal and State categorical exclusions because there is a disconnect between what the Federal government categorically excludes under NEPA and what States exclude under their environmental review provisions. DOE develops its categorical exclusions based on classes of actions it has identified that do not individually or cumulatively have a significant effect on the environment based on actions it has considered nationwide. DOE does not have any involvement in how a State assigns particular classes of actions to a particular level of environmental review. However, States have the opportunity to comment on an agency's proposed categorical exclusions and associated administrative records and also to consider whether to change their own categorical exclusions or other implementing procedures based on a Federal agency's exclusions. DOE welcomes comments from States on DOE's categorical exclusions and, in particular, as to a State's experience with similar exclusions.

*Evaluation of greenhouse gases.* A commentator noted that CEQ had stated that it sees no basis for excluding greenhouse gases from NEPA jurisdiction. The commentator suggested that DOE have additional categorical exclusions “to protect against abuse of this expansive new jurisdiction by entities seeking to stop or stall projects.” In proposing 20 new categorical exclusions and modifying others to promote efficiency in the NEPA process while ensuring protection of the environment, DOE has considered the potential for significant environmental impacts, including potential impacts from greenhouse gas emissions. DOE's approach in this regard is consistent with draft guidance issued in February 2010 by CEQ, Consideration of the Effects of Climate Change and Greenhouse Gas Emissions ([http://ceq.hss.doe.gov/nepa/regs/Consideration\\_of\\_Effects\\_of\\_GHG\\_Draft\\_NEPA\\_Guidance\\_FIN](http://ceq.hss.doe.gov/nepa/regs/Consideration_of_Effects_of_GHG_Draft_NEPA_Guidance_FIN))



[AL\\_02182010.pdf](#)). The draft guidance states, “In many cases, the [greenhouse gas] emissions of the proposed action may be so small as to be a negligible consideration. Agency NEPA procedures may identify actions for which [greenhouse gas] emissions and other environmental effects are neither individually or cumulatively significant. **40 CFR 1507.3**.” The draft guidance further states that, in proposing that the NEPA process incorporate consideration of both the impact of an agency action on the environment through the mechanism of greenhouse gas emissions and the impact of changing climate on that agency action, “This is not intended as a ‘new’ component of NEPA analysis, but rather as a potentially important factor to be considered within the existing NEPA framework.”

*Level of involvement necessary to require a NEPA review (or “Federal handle”).* A commentor requested that DOE provide guidance on the level of Federal involvement necessary to categorize a project as “Federal,” thereby triggering an environmental review under NEPA. Specifically, the commentor suggested that DOE consider setting a minimum threshold of 10% of the overall project budget as a funding level that would trigger NEPA, and further, that only Federal funds actually allocated to the project should be counted (that is, budgeted or anticipated funds should be excluded in determining the level of Federal financing). The commentor requested that factors be specified to help determine what level of Federal control or involvement is needed for NEPA to be triggered.

In determining whether an action constitutes a major Federal action for purposes of NEPA, DOE considers the degree of Federal control over or involvement in a project. As part of this consideration, DOE examines the total amount and percentage of Federal funding among other factors. In many cases, the fact that Federal government funding is in the range of 10 percent (or less) of total project costs will make the percentage of Federal funding an important factor in finding that an action is not a major Federal action. These are essentially the same factors suggested by the commentor. DOE also may consider other factors specific to the proposed action at issue. DOE finds this case-by-case approach workable and consistent with applicable precedent and does not propose to establish specific criteria through this proposed rulemaking for determining whether a proposed action constitutes a major Federal action.

*Uranium mineral activities.* A commentor, noting interest in uranium mineral exploration, development, and reclamation activities on DOE uranium leases in Western Colorado, stated that “activities related to mining and mineral exploration on Department of Energy mineral leases should remain barred from categorical exclusion.” DOE’s proposed revisions to the Department’s NEPA regulations would not allow categorical exclusion of uranium mineral development. However, under certain conditions, some exploration and reclamation actions could be categorically excluded under DOE’s existing and proposed categorical exclusions, such as, categorical exclusion B3.1, Site characterization and environmental monitoring, and categorical exclusion B6.1, Cleanup actions.

*Cost parameters for environmental review under NEPA.* A commentor suggested that the estimated cost of a project be factored into the categorical exclusion process. Specifically, the commentor suggested that DOE establish an upper limit of \$25 million (estimated cost) for a proposed action that can be categorically excluded and a lower limit of \$100 million (estimated cost) over which a proposed action requires an EIS. DOE has determined that cost is generally not a reliable indicator of environmental impacts and is not proposing to establish general cost parameters to dictate the level of NEPA review in its regulations. One exception is categorical exclusion B6.1, which contains a cost limit for small-scale, short-term cleanup actions. See discussion of B6.1 in Section IV.E above.

## **VI. Procedural Requirements**

### **A. Review Under Executive Order 12866**

Today's proposed rule has been determined to be a significant regulatory action under Executive Order 12866, "Regulatory Planning and Review," 58 FR 51735 (October 4, 1993). Accordingly, this action was subject to review under that Executive Order by the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB).

## **B. Review Under National Environmental Policy Act**

In this proposed rule, DOE proposes amendments that establish, modify, and clarify procedures for considering the environmental effects of DOE actions within DOE's decisionmaking process, thereby enhancing compliance with the letter and spirit of NEPA. DOE has determined that this proposed rule qualifies for categorical exclusion under **10 CFR part 1021**, subpart D, appendix A6, because it is a strictly procedural rulemaking and no extraordinary circumstances exist that require further environmental analysis. Therefore, DOE has determined that promulgation of these amendments is not a major Federal action significantly affecting the quality of the human environment within the meaning of NEPA, and does not require an EA or an EIS.

## **C. Review Under Regulatory Flexibility Act**

The Regulatory Flexibility Act ([5 U.S.C. 601](#) *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by [Executive Order 13272](#), "Proper Consideration of Small Entities in Agency Rulemaking," [67 FR 53461](#) (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process ([68 FR 7990](#)). DOE has made its procedures and policies available on the Office of General Counsel's Web site: <http://gc.doe.gov>.

DOE has reviewed today's proposed rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. The proposed revisions to **10 CFR part 1021** streamline the environmental review for proposed actions, resulting in a decrease in burdens associated with carrying out such reviews. For example, the proposed revisions are expected to reduce in aggregate the number of EAs that DOE is required to prepare, thus reducing the burden on applicants to prepare an EA for DOE's consideration, pay for the preparation of an EA, and/or provide environmental information for DOE's use in preparing an EA. During the past 10 years, DOE has completed approximately 30 EAs per year. The number of EAs completed each year has not varied significantly. However, in 2010, DOE expects to complete more than 75 EAs which reflect an increase in the number of proposed projects as a result of the American Recovery and Reinvestment Act. DOE expects the number of EAs it prepares after 2010 will be closer to historical norms. The cost per EA has ranged from \$3,000 to \$630,000; the average and median cost has been \$100,000 and \$65,000, respectively. DOE expects that although the number of EAs it prepares annually could increase in response to recent emphasis on certain program areas, such as renewable energy technologies, proposed new categorical exclusions in these areas would reduce the number of EAs that might otherwise be required. In addition, the costs of making a categorical exclusion determination are less than those to prepare an EA. DOE estimates that DOE's administrative costs for research, staff time, and Web-posting for a categorical exclusion determination would most likely be less than \$2,000 on average. Applicants may sometimes incur costs in providing environmental information DOE requires when making a categorical exclusion determination. While DOE does not have data on such applicant costs, DOE estimates that such costs would be similar to DOE's costs for a categorical exclusion determination, and much less than the cost of a typical EA. Although the number of EAs that would be avoided and the associated costs saved by applicants is uncertain, the proposed revisions are expected to result in a net decrease in environmental review costs and thus, are expected to have a beneficial cost impact. DOE estimates that approximately 15 percent of the

EAs prepared in the last 10 years were funded by applicants, while the other 85 percent were funded by DOE. Although DOE does not have data on what percentage of those applicants qualified as small entities, a beneficial cost impact is expected to be felt by entities of all sizes.

On the basis of the foregoing, DOE tentatively certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared a regulatory flexibility analysis for this proposed rulemaking. DOE's certification and supporting statement of factual basis will be provided to the Chief Counsel for Advocacy of the Small Business Administration pursuant to [5 U.S.C. 605\(b\)](#).

#### **D. Review Under Paperwork Reduction Act**

This proposed rulemaking will impose no new information or record-keeping requirements. Accordingly, OMB clearance is not required under the Paperwork Reduction Act. ([44 U.S.C. 3501 et seq.](#))

#### **E. Review Under Unfunded Mandates Reform Act of 1995**

The Unfunded Mandates Reform Act of 1995 ([Pub. L. 104-4](#)) generally requires Federal agencies to examine closely the impacts of regulatory actions on State, local, and Tribal governments. Subsection 101(5) of title I of that law defines a Federal intergovernmental mandate to include any regulation that would impose upon State, local, or Tribal governments an enforceable duty, except a condition of Federal assistance or a duty arising from participating in a voluntary Federal program. Title II of that law requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments, in the aggregate, or to the private sector, other than to the extent such actions merely incorporate requirements specifically set forth in a statute. Section 202 of that title requires a Federal agency to perform a detailed assessment of the anticipated costs and benefits of any rule that includes a Federal mandate which may result in costs to State, local, or Tribal governments, or to the private sector, of \$100 million or more in any one year (adjusted annually for inflation). [2 U.S.C. 1532\(a\)](#) and (b). Section 204 of that title requires each agency that proposes a rule containing a significant Federal intergovernmental mandate to develop an effective process for obtaining meaningful and timely input from elected officers of State, local, and Tribal governments. [2 U.S.C. 1534](#).

The proposed rule would amend DOE's existing regulations governing compliance with NEPA to better align DOE's regulations, particularly its categorical exclusions, with its current activities and recent experiences, and update the provisions with respect to current technologies and regulatory requirements. The proposed rule would not result in the expenditure by State, local, and Tribal governments in the aggregate, or by the private sector, of \$100 million or more in any one year. Accordingly, no assessment or analysis is required under the Unfunded Mandates Reform Act of 1995.

#### **F. Review Under Treasury and General Government Appropriations Act, 1999**

Section 654 of the Treasury and General Government Appropriations Act, 1999 ([Pub. L. 105-277](#)) requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule that may affect family well being. The proposed rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

#### **G. Review Under [Executive Order 13132](#)**

[Executive Order 13132](#), "Federalism," [64 FR 43255](#) (August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. DOE has examined this proposed rule and has determined that it would not preempt State law and would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by [Executive Order 13132](#).

#### **H. Review Under [Executive Order 12988](#)**

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of [Executive Order 12988](#), "Civil Justice Reform," [61 FR 4729](#) (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of [Executive Order 12988](#) specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of [Executive Order 12988](#) requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, the proposed rule meets the relevant standards of [Executive Order 12988](#).

#### **I. Review Under Treasury and General Government Appropriations Act, 2001**

The Treasury and General Government Appropriations Act, 2001 ([44 U.S.C. 3516](#) note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB.

OMB's guidelines were published at [67 FR 8452](#) (February 22, 2002), and DOE's guidelines were published at [67 FR 62446](#) (October 7, 2002). DOE has reviewed today's proposed rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

#### **J. Review Under [Executive Order 13211](#)**

[Executive Order 13211](#), "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," [66 FR 28355](#) (May 22, 2001) requires Federal agencies to prepare and submit to OMB a Statement of Energy Effects for any proposed significant energy action. A "significant energy action" is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1)(i) Is a significant regulatory action under Executive Order 12866, or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. Today's regulatory action would not have a significant

adverse effect on the supply, distribution, or use of energy, and is therefore not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

#### **K. Review Under Executive Order 12630**

DOE has determined pursuant to Executive Order 12630, "Governmental Actions and Interference with Constitutionally Protected Property Rights," 53 FR 8859 (March 18, 1988), that this proposed rule would not result in any takings which might require compensation under the Fifth Amendment to the United States Constitution.

#### ***Approval of the Office of the Secretary***

The Secretary of Energy has approved publication of this notice of proposed rulemaking.