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DOE Proposes Rule for More Efficient Environmental Review of Clean Energy Projects



The U.S. Department of Energy (DOE) proposed to amend its National Environmental Policy Act (NEPA) procedures on November 16, 2023, to include a new categorical exclusion for certain energy storage systems and to expand its categorical exclusions for certain transmission lines and solar photovoltaic systems.

The general purpose of DOE's proposal is to accelerate the deployment of clean infrastructure in the United States.^[1]

Role of Categorical Exclusions in Clean Energy Transition

The Biden administration has set a goal of reaching 100% clean electricity by 2035 in the power sector. The [Infrastructure Investment and Jobs Act](#) and the [Inflation Reduction Act](#) include funding for DOE programs designed to drive strategic investment in critical electric infrastructure to make the U.S. power grid more resilient to the impacts of climate change and increase access to affordable and reliable clean energy.^[2] One critical means of accelerating infrastructure delivery and decreasing project costs is to increase the efficiency of the environmental review and permitting process through the strategic use of categorical exemptions.

NEPA (42 U.S.C. 4321 et seq.) requires federal agencies to review the environmental impacts of proposals for major federal actions significantly affecting the quality of the human environment.^[3] Preparing these environmental analyses can be expensive and time-consuming. A 2020 study by the Council on Environmental Quality (CEQ) found that the median time to complete an environmental impact statement (EIS) across all federal agencies is 3.5 years, while the average completion time is even longer, at 4 1/2 years. Of the 1,276 EISs reviewed by CEQ, 1/2 took longer than 3 1/2 years to complete, and 1/4 took more than six years.^[4] Lengthy completion times for project environmental review and authorization, as well as the associated litigation risk, create uncertainty that discourages private investment and can jeopardize the financial viability of critical projects.

In contrast, actions that are categorically excluded from detailed analysis normally do not have a significant effect on the human environment and, therefore, do not require preparation of an environmental assessment (EA) or EIS.[5] Maximizing the use of categorical exclusions for much-needed infrastructure projects is an important way for agencies to accelerate the deployment of clean infrastructure.

DOE Expands its Categorical Exclusions Related to Clean Energy Infrastructure

DOE has established and maintained categorical exclusions for defined classes of actions that it has determined are supported by a record showing that the actions normally do not have significant environmental impacts, individually or cumulatively.[6]

DOE last made changes to its categorical exclusions in these areas in 2011.[7] DOE is the first agency to propose amendments to its NEPA procedures via rulemaking in the Biden administration. The agency's proposal appears to be part of a broader trend to increase use of categorical exclusions to further the administration's clean energy agenda. For example, the U.S. Department of Homeland Security (DHS) and U.S. Department of Transportation (DOT) are adopting the DOE electric vehicle charging stations categorical exclusion pursuant to section 109 of NEPA, 42 U.S.C. §4336c, to use for proposed DHS and DOT actions.[8]

DOE's proposed rule would add a categorical exclusion for certain energy storage programs and expand its existing categorical exclusions for transmission lines and solar photovoltaic systems.

- **Upgrading and rebuilding transmission lines.** DOE's current categorical exclusion B4.13 applies to upgrading or rebuilding transmission lines that are "approximately 20 miles in length or less." DOE is proposing to broaden this categorical exclusion by removing the mileage limitation. DOE indicated that its experience with power line upgrades and rebuilds does not suggest that a particular mileage limit is a reliable threshold for whether a project has significant effects. Instead, the potential significance of environmental impacts from upgrading or rebuilding power lines more often depends on local environmental conditions.

Currently, categorical exclusion B4.13 also allows "minor relocations of small segments of the powerlines." DOE is proposing to further expand this categorical exclusion by deleting the term "minor." DOE asserts that it is unnecessary to qualify the phrase "relocations of small segments" with the term "minor." DOE also proposes to specify that segments of power lines may be relocated "within an existing right of way or within otherwise previously disturbed or developed lands." This change would provide additional flexibility without increasing adverse environmental impacts.

In addition, in response to questions from industry groups, DOE confirmed that it interprets categorical exclusion B4.13 to cover all types of power lines, including "gen-tie lines" and "powerlines that feed into a federal electric transmission system (e.g., Tennessee Valley Authority)" and related project elements, such as access roads.

- **Solar photovoltaic systems.** DOE's current categorical exclusion B5.16, solar photovoltaic systems, covers the installation, modification, operation, and removal of solar PV systems located on a building or other structure or, if located on land, within a previously disturbed or developed area generally comprising fewer than 10 acres. DOE proposes to change this categorical exclusion by replacing the word "removal" with the word "decommissioning." According to the proposed rule, "decommissioning" is intended to be broader and would encompass recycling and other types of actions that occur when a facility is taken out of service. DOE also proposes to remove the acreage limitation for proposed projects because, in DOE's

experience, acreage is not a reliable indicator of whether a project will have significant environmental impacts.

- **Energy storage systems.** Finally, DOE proposes to establish a new categorical exclusion (B4.14) for the construction, operation, upgrade, or decommissioning of an electrochemical-battery or flywheel energy storage system within a previously disturbed or developed area or within a small area contiguous to a previously disturbed or developed area.

The proposed rule does not define what constitutes a "small area." However, the rule explains that DOE will consider whether a contiguous area is "small" on a case-by-case basis in the context of each particular proposal, by looking at its proposed location, its size in relation to industry norms, the relationship of the proposed action to similar types of development in the vicinity of the proposed action, and the expected waste or emissions output.

DOE is proposing that new categorical exclusion B4.14 be limited to electrochemical-battery and flywheel energy storage systems because it does not have sufficient information to conclude that compressed air energy storage, thermal energy storage (e.g., molten salt storage), or other storage technologies normally do not present the potential for significant environmental impacts. In the proposed rule, DOE asks for comments that provide analytic support for whether these other energy storage technologies meet the requirements for a categorical exclusion and suggests that, if the DOE identifies sufficient support, it may revise the categorical exclusion in the final rule to include additional energy storage technologies.

Next Steps

DOE is accepting comments on the proposed rule through January 2, 2024.

Endnotes

[1] 88 Fed. Reg. 78681 (Nov. 16, 2023).

[2] *See e.g.*, Infrastructure Investment and Jobs Act, H.R. 3684, Section 40001 et seq.; Inflation Reduction Act, H.R. 5376, Section 13001 *et. seq.*

[3] 42 U.S.C. 4332(2)(C).

[4] *See* Council on Environmental Quality, EIS Timeline Data Excel Workbook, (June 12, 2020)

[5] 40 C.F.R. § 1501.4(a) ("For efficiency, agencies...identify in their agency NEPA ... categories of actions that normally do not have a significant effect on the human environment, and therefore do not require preparation of an environmental assessment or environmental impact statement.").

[6] 10 C.F.R. Ch. X, Subchapter D.

[7] DOE, National Environmental Policy Act Implementing Procedures, 76 Fed. Reg. 63764 (October 13, 2011).

[8] 88 Fed. Reg. 72525 (October 20, 2023) ("This notice describes the categories of proposed actions for which DHS intends to use DOE's electric vehicle charging stations CE and details the consultation between the agencies."); 88 Fed. Reg. 64972 (September 20, 2023) ("The U.S. Department of Transportation (DOT) is adopting the Department of Energy's (DOE's) Electric Vehicle Charging Stations Categorical Exclusion (CE) under the National Environmental Policy Act to use in DOT programs and funding opportunities administered

by DOT.").

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