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## Easing the Way for More Renewable Energy: DOE's Draft Environmental Act Exclusions

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*Updating regulations that reflected 20<sup>th</sup>-century U.S. energy priorities and technology, the Department of Energy (DOE) has taken a helpful step to streamline its National Environmental Policy Act (NEPA) requirements. In a recently issued notice of proposed rulemaking to amend its regulations implementing NEPA, 76 Fed. Reg. 214 (Jan. 3, 2011), DOE proposes 20 new categorical exclusions, many of which will permit a more accelerated process for the renewable energy initiatives that are critical to DOE's agenda.*

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### Background on NEPA and DOE Regulations

Under NEPA, federal agencies must consider the potential environmental impacts of any "major federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (2006). Since this may include certain actions taken by a state, local, or private entity with federal involvement, DOE is required to analyze environmental impacts of privately owned and operated projects for which it grants permits and awards loan guarantees.

If NEPA applies to a proposed action, the federal agency must prepare an environmental impact statement (EIS), unless it elects to prepare an environmental assessment (EA) or determines that a categorical exclusion applies to the proposed action. Categorical exclusions are defined as "actions which do not individually or cumulatively have a significant impact on the human environment," and therefore, do not require preparation of a full EIS or of a less onerous EA, absent extraordinary circumstances. Thus, the effect of a categorical exclusion is to eliminate the need for any NEPA process.

NEPA mandates that each federal agency adopt its own regulations implementing NEPA, consistent with the regulations adopted by the Council on Environmental Quality. DOE's regulations include two lists of categorical exclusions as appendices to 10 C.F.R. Part 1021, Subpart D: Appendix A, which lists those exclusions applicable to general agency actions, such as routine administrative, financial, and personnel actions; and Appendix B, which lists those applicable to specific agency actions.

## Why Is DOE Amending Its NEPA Regulations?

Last revised in 1996, DOE's list of categorical exclusions fails to reflect the department's current activities and experience, or capture newer technologies, such as those focusing on energy efficiency or renewable energy sources. Having received thousands of applications from private entities seeking grants and loans 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 (ARRA)—and given DOE's current role in fostering the development of these newer technologies—it was critical to revisit the rules to ensure that the NEPA requirements do not obstruct or unreasonably delay DOE's efforts to accomplish its objectives.

Since many of the activities described in these applications have limited environmental impact, the new categorical exclusions will allow DOE to both fulfill its mandate under NEPA and eliminate the applications backlog by providing a speedier route to approval and therefore accelerate the implementation of newer technologies. In addition, consistent with the purposes of the ARRA, the new exclusions will permit the authorized stimulus funds to be infused into the economy more quickly.

## What Are the New Categorical Exclusions?

There are 20 new categorical exclusions being proposed by DOE. They include:

- solar photovoltaic systems;
- solar thermal systems;
- wind turbines;
- biomass power plants;
- electric vehicle charging stations;
- combined heat and power or cogeneration systems;
- research activities in salt water and freshwater environments;
- experimental wells for injection of small quantities of carbon dioxide; and
- small-scale renewable energy research and development and pilot projects.<sup>1</sup>

DOE had previously made categorical exclusion determinations for many of these types of projects based on existing exclusion B5.1, which covers "actions to conserve energy, demonstrate potential energy conservation, and promote energy-efficiency that do not increase the indoor concentrations of potentially harmful substances." However, these proposed new categorical exclusions will apply more explicitly and unambiguously to installation, modification, operation, and removal of small-scale, commercially available renewable energy technologies. For example:

- solar photovoltaic systems and solar thermal systems if they are located on a building or, if located on land, then on less than 10 acres within a previously disturbed or developed area;<sup>1</sup>



<sup>1</sup> Also included, although less relevant to renewable energy projects, are methane gas recovery and utilization systems; alternative fuel vehicle fueling stations; small-scale renewable energy research and development and pilot projects in salt water and freshwater environments; 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; ground source heat pumps; and drop-in hydroelectric systems.

- wind turbines if they are less than 200 feet high and do not have the potential to cause significant impacts on birds, bats, or people (through noise or visual impairments such as shadow flicker);
- biomass power plants with a capacity of less than 10 megawatts that do not have the potential to significantly impact air quality or water resources; and
- electric vehicle charging stations.

In addition to the new categorical exclusions, DOE proposes to make corresponding changes to existing categorical exclusion B5.1 to make it consistent with the new categorical exclusions for renewable energy technologies, to include more examples of the type of energy conservation actions that fall within the scope of this exclusion (reflecting its experience with such actions), and to add actions to conserve water (an important policy objective). The proposal would also add a new exclusion for rulemakings that establish energy conservation standards.

DOE also proposes revisions to many other categorical exclusions in Appendix B, some simply for clarification or consistency and others to address more substantive issues. Besides the changes to B5.1 discussed above, DOE has asked for comments on its proposed modifications to some of the existing categorical exclusions, including those for contracts, policies, and marketing and allocation plans for electric power; electric power substations and interconnection facilities; and constructing, upgrading and rebuilding transmission lines.

## Conclusion

In this alert, we have focused on some of the more significant changes that could impact renewable energy projects and initiatives. There are many other changes that could be relevant to your business. Parties seeking to develop a project should consult the full notice of proposed rulemaking to determine whether the proposed rules, if adopted, would affect the NEPA requirements. DOE is soliciting comments on its proposal, which are due on February 17, 2011. DOE will also hold a public hearing in Washington, DC, on February 4, 2011.

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