

 **Columbia Law School** | COLUMBIA CLIMATE SCHOOL
SABIN CENTER FOR CLIMATE CHANGE LAW

December 28, 2023

Office of NEPA Policy and Compliance
U.S. Department of Energy
1000 Independence Avenue S.W.
Washington, DC 20585

Submitted Via *Regulations.gov*

Re: National Environmental Policy Act Implementing Procedures (DOE-HQ-2023-0063-0001)

To whom it may concern:

The Sabin Center for Climate Change Law (Sabin Center) at Columbia Law School submits these comments in response to the Notice of Proposed Rulemaking for the Department of Energy’s (DOE) National Environmental Policy Act (NEPA) implementing procedures related to categorical exclusions.¹ The Sabin Center supports adoption of the Proposed Rule, which is consistent with the Council on Environmental Quality’s (CEQ) NEPA implementing regulations, and which contains numerous provisions that would streamline the review and permitting of projects that pose minimal environmental risks. In particular, we commend DOE for proposing to remove project size limitations that do not serve as meaningful proxies for a project’s environmental impacts, and instead focus on more relevant, site-specific factors for determining whether a categorical exclusion applies to a solar, power line, or storage project. For example, as DOE has recognized, the impacts of power line projects are “more related to local environmental conditions than to the length of the powerline.”² The same is true of solar and storage projects, the environmental impacts of which are “more related to local environmental conditions than to

¹ 88 Fed. Reg. 78681 (2023) (“National Environmental Policy Act Implementing Procedures”).

² *Id.* at 78684.

acreage.”³ DOE’s proposed changes would allow environmentally-beneficial clean energy projects to undergo streamlined environmental review, regardless of project size, while still ensuring that projects undergo more rigorous review if site-specific factors would exacerbate a project’s impacts. This proposal would bring real benefits, because large-scale clean energy projects,⁴ including all three categories of projects included in the proposal—solar, transmission, and storage—are necessary to meet the United States’ goal of 100% clean electricity by 2035.⁵

The proposal is also legally justified under NEPA and the CEQ’s NEPA implementing regulations. CEQ’s regulations require agencies to identify types of actions that “normally do not require either an environmental impact statement or an environmental assessment and do not have a significant effect on the human environment.”⁶ Agencies must also “provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.”⁷ As reflected in DOE’s current categorical exclusions encompassing solar PV, power lines, and battery and flywheel energy storage, DOE has already determined that these projects do not typically cause significant negative environmental impacts, assuming that certain conditions are met.⁸ These conditions include the land on which the project is being developed: typically,

³ *Id.* at 78686.

⁴ See Michael Gerrard, *Legal Pathways for a Massive Increase in Utility-Scale Renewable Generation Capacity*, 47 ENVTL. L. REP. 10591 (2017). Available at: https://scholarship.law.columbia.edu/faculty_scholarship/2045.

⁵ See Denholm, Paul, Patrick Brown, Wesley Cole, et al. 2022. *Examining Supply-Side Options to Achieve 100% Clean Electricity by 2035*. Golden, CO: National Renewable Energy Laboratory. NREL/TP6A40-81644. <https://www.nrel.gov/docs/fy22osti/81644.pdf>.

⁶ 40 C.F.R. § 1507.3 (e)(ii). See also 42 U.S.C. § 4336 (b)(2); 40 C.F.R. § 1508.1 (d).

⁷ 40 C.F.R. § 1507.3 (e)(ii).

⁸ 10 CFR § 1021 Subpart D, Appendix B (Exclusions B5.16, C4, and B5.1).

developed or disturbed land, defined as “land that has been changed such that its functioning ecological processes have been and remain altered by human activity,”⁹ or areas contiguous to that land. Before applying any categorical exclusion, DOE also considers whether there are any “extraordinary circumstances related to the proposal that may affect the significance of the environmental effects of the proposal,” including:

- “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

These factors encompass site-specific considerations, such as whether the presence of certain species or environmentally-sensitive resources presents unique environmental risks. DOE’s technical support document demonstrates that, once these specific, local conditions at or near the project site are accounted for, the size of the project does not independently threaten to create significant environmental impacts.¹¹

While the Proposed Rule contains many important reforms, we wish to highlight one potential addition to the proposed rule. DOE’s categorical exclusion (Exclusion B5.18) for onshore wind turbines currently applies only to “[t]he installation, modification, operation, and removal of a small number (generally not more than 2) of commercially available wind turbines, with a total height of less than 200 feet)” that are located on previously developed or disturbed land more than

⁹ 10 CFR § 1021.410 (g)(1).

¹⁰ 10 CFR § 1021.410 (b)(2).

¹¹ See Dep’t of Energy, Technical Support Document, Notice of Proposed Rulemaking, National Environmental Policy Act Implementing Procedures (Nov. 2023), <https://downloads.regulations.gov/DOE-HQ-2023-0063-0002/content.pdf>.

10 nautical miles from any airport or aviation navigation aids and more than 1.5 miles from weather radar equipment, and are found not to cause significant impacts to persons (including through shadow flicker and noise), or birds and bats.¹² We encourage DOE to consider removing the size limit in this categorical exclusion. In recent environmental assessments for wind projects, DOE has regularly concluded¹³ that significantly larger wind farms would present no significant environmental impacts. As just one example, in May 2023, DOE published a finding of no significant impact¹⁴ after conducting an environmental assessment for the North Bend Wind Project, which is set to include seventy-one wind turbines, each with a hub height of 292 feet and a blade tip height of 501 feet.¹⁵

Although wind turbine projects—like any development—can have local environmental impacts, those impacts can be mitigated or eliminated through careful siting, design, and operational practices. For example, as with solar farms, wind farms can be sited on contaminated lands, therefore avoiding degradation of open spaces and viewsheds, as well as conflicts with alternative land uses.¹⁶ Furthermore, potential avian impacts are closely tied to the location of wind

¹² 10 CFR 1021 Subpart D, Appendix B.

¹³ While the technical support document for this proposed rule does not include environmental assessments for wind turbine projects, a review of DOE’s environmental assessments for such projects reveals that DOE regularly finds no significant environmental impacts for projects exceeding the two turbine, 200 foot threshold. *See DOE Environmental Assessments*, ENERGY.GOV, <https://www.energy.gov/nepa/doe-environmental-assessments> (last visited Dec. 22, 2023).

¹⁴ *See* John D. Russell (Western Area Power Administration Environmental Manager), Letter Regarding the North Bend Wind Project Environmental Assessment (May 11, 2023), <https://www.energy.gov/sites/default/files/2023-05/public-letter-final-ea-2161-north-bend-wind-2023-05-11.pdf>.

¹⁵ Western Area Power Administration, Department of Energy, Draft Environmental Assessment for the North Bend Wind Project (DOE/EA-2161) (March 2023), <https://www.energy.gov/sites/default/files/2023-03/draft-ea-2161-north-bend-wind-2023-03.pdf>.

¹⁶ *See What Is RE-Powering*, Env’t Protection Agency, <https://www.epa.gov/re-powering/what-re-powering> (last visited Dec. 22, 2023).

projects,¹⁷ and DOE separately considers those impacts before applying Exclusion B5.18. And while the construction of wind turbines generates small amounts of greenhouse gas emissions, DOE has recognized that—like solar PV—wind energy significantly reduces greenhouse gas emissions and air pollution emissions in the long term.¹⁸ For all of these reasons, DOE has regularly issued findings of no significant impact after conducting environmental assessments of large wind turbine projects.

DOE should consider applying the logic of its current proposal to its categorical exclusion for wind turbines by removing the project size limitation in Exclusion B5.18 and instead basing its application solely on site-specific factors. Removing the project size limitation in Exclusion B5.18 is justified under CEQ’s NEPA regulations, because, after accounting for the other factors listed in Exclusion B5.18, wind projects do not typically have a significant effect on the human environment.¹⁹ If DOE does not remove the project size limitation completely, DOE should consider amending the categorical exclusion to encompass projects that are larger than two turbines and 200 cumulative feet, based on an updated accounting of the size of wind turbine projects that DOE considers to cause significant environmental impacts.²⁰ If this change were made, DOE would still be required to conduct a detailed environmental review when site-specific

¹⁷ See *Wind Risk Assessment Map*, American Bird Conservancy, <https://abcbirds.org/program/wind-energy-and-birds/wind-risk-assessment-map/> (Dec. 22, 2023).

¹⁸ Chapter 3 (Impacts of the *Wind Vision*), WIND VISION: A NEW ERA FOR WIND POWER IN THE UNITED STATES, DEP’T OF ENERGY (2015).

¹⁹ 40 C.F.R. § 1507.3 (e)(ii).

²⁰ The average height of wind turbines has increased, and DOE has recently calculated the average hub height of a single utility-scale onshore turbine to be 322 feet. *Wind Turbines: The Bigger, the Better*; DEP’T OF ENERGY (Aug. 24, 2023), <https://www.energy.gov/eere/articles/wind-turbines-bigger-better>.

factors could lead to elevated environmental risks, but it would allow DOE to streamline review when such factors are absent, regardless of project size.

We appreciate this opportunity to comment on the Proposed Rule for DOE's NEPA implementing regulations. We believe that the proposal contains many important provisions that will enhance the utility of DOE's categorical exclusions for clean energy projects, and that it could be further strengthened through the adoption of parallel amendments to Exclusion B5.18.

Sincerely,

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