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NEPA Rulemaking Comments
Office of NEPA Policy and Compliance (GC–54)
U.S. Department of Energy
1000 Independence Avenue, SW.,
Washington, DC 20585

February 3, 2011

Re: Docket ID: DOE–HQ–2010–0002: Comment on DOE Rulemaking Change Regarding Regulations Governing Compliance with the National Environmental Policy Act

To the U.S. Department of Energy's Office of NEPA Policy and Compliance,

Tri-Valley CAREs (TVC) is a non-profit organization founded in 1983 by Livermore, California area residents to research and conduct public education and advocacy regarding the potential environmental, health and proliferation impacts of the Department of Energy (DOE) nuclear weapons complex, including the nearby Lawrence Livermore National Laboratory.

Since its inception, TVC has participated in numerous National Environmental Policy Act (NEPA) administrative review processes being done by DOE. We comment during scoping for DOE NEPA documents and on drafts of its Environmental Assessments and Environmental Impact Statements. The group has also participated in federal litigation to uphold NEPA when the DOE violated statutory requirements or ignored concerns expressed in comments.

The proposed rule change to 10 CFR 1021 contains some alterations to the statute that we believe could expand the use of categorical exclusions in a manner that could result in violations of NEPA and other statutes. Our concerns include the following;

1) Generally, the decision to add "headings" to each section is a good one. However, it is unclear as to why the addition of headings to the sections negates the need for a table of contents. The table of contents for these sections is extremely useful for non-agency users and for lawyers conducting legal research. We urge the Agency to add revised tables of contents to these regulations rather than removing them entirely. Can the Agency explain why it can not continue to provide a table of contents for these sections and also provide section headings?

2) § 1021.410 (e) – This new section provides that "Categorical exclusion determinations for actions listed in appendix B shall be documented and made available to the public by

posting online." It is a welcome development that the Department is taking steps towards increased transparency. However, because these postings will withhold "information that DOE would not disclose pursuant to the Freedom of Information Act (FOIA)," we are concerned that the public will be deprived of a right to challenge these withholdings that it would have if it the information was requested using FOIA and there were withholdings. Can the Agency please explain the process by which the public can challenge potentially improper withholdings in an online posting of a categorical exclusion determination under this rule change?

3) Appendix B to Subpart D of part 1021. B (4) - This section defines the conditions that must not be "integral elements of the classes of action," for a proposal to be categorically excluded. Part (4) was changed from "*a proposal must be one that would not: (4) Adversely affect environmentally sensitive resources*," to "*a proposal must be one that would not: (4) Have the potential to cause significant impacts on environmentally sensitive resources*." The Agency explains that its reasoning for making this type of change is to ensure the regulations are "*clearly aligned with the regulatory standard in NEPA,"* and points to, 40 CFR 1508.4[1]. Additionally, by this proposed change, DOE seeks to clarify the affected provisions and to facilitate consistent application. However, we are concerned that this specific change will allow for an expansion of the categorical exclusion without providing an analysis of whether there was actually a potential for significant environmental impact. For example, under the older language, if an action had any adverse affect on the environment, the agency would have to perform a more extensive study as to whether that adverse affect would be "significant" under NEPA. Under the new rule change even if there is an adverse effect on the environment, if the agency makes the determination (without doing any in depth study) that that "adverse" impact could never "potentially" become a "significant impact" on the environment, the agency could exempt the project under this categorical exclusion. Can the Agency explain how this change will prevent a violation of NEPA? Additionally, 40 CFR 1508.4 requires the Agency to provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect. Can the agency explain how this requirement is met? Will the Agency explain whether this change will, in its opinion, expand the use of this categorical exclusion, and if so, how much?

4) Appendix B to Subpart D of part 1021. B1.11- This section defines the "Facility Operations" that can be categorically excluded from NEPA. B1.11 explains that "Fencing" can be excluded. It was changed from excluding "Fencing" that "*will not adversely affect wildlife…*," to excluding "Fencing" that "*would not have the potential to cause significant impacts on wildlife*." The Agency explains that its reasoning for making this type of change is to ensure the regulations are "*clearly aligned with the regulatory standard in NEPA,"* and points to, 40 CFR 1508.4. Additionally, by this proposed change, DOE seeks to clarify the affected provisions and to facilitate consistent application. However, we are concerned that this specific change will allow for an expansion of the categorical exclusion without providing an analysis of whether there was actually a potential for significant environmental impact. For example, under the

[1] 40 CFR 1508.4 reads: "Categorical exclusion" means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (Sec. 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in Sec. 1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

older language, if an action had any adverse affect on the wildlife or surface water flow, the agency would have to perform a more extensive study as to whether that adverse affect would be "significant" under NEPA. Under the new rule change even if there is an adverse effect on wildlife or surface water flow, if the agency makes the determination (without doing any in depth study) that that "adverse" impact could never "potentially" become a "significant impact" on the environment, the agency could exempt the project under this categorical exclusion. Can the Agency explain how this change will prevent a violation of NEPA? Additionally, 40 CFR 1508.4 requires the Agency to provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect. Can the agency explain how this requirement is met? Will the Agency explain whether this change will, in its opinion, expand the use of this categorical exclusion, and if so, how much?

5) Appendix B to Subpart D of part 1021. B1.18- This section defines the "Facility Operations" that can be categorically excluded from NEPA. B1.18 explains that "Water Supply Wells" can be excluded. It was changed from excluding "Water Supply Wells" that "*will have no resulting long-term decline of the water table, and no degradation of the aquifer"* to excluding "Water Supply Wells" that "*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* ." The Agency explains that its reasoning for making this type of change is to ensure the regulations are "*clearly aligned with the regulatory standard in NEPA,"* and points to, 40 CFR 1508.4. Additionally, by this proposed change, DOE seeks to clarify the affected provisions and to facilitate consistent application. However, we are concerned that this specific change will allow for an expansion of the categorical exclusion without providing an analysis of whether there was actually a potential for significant environmental impact. For example, under the older language, if a water supply well caused any long term decline of the water table or degradation of the aquifer, the agency would have to perform a more extensive study as to whether that adverse affect would be "significant" under NEPA. Under the new rule change even if there is long term decline of the water table or degradation of the aquifer, if the agency makes the determination (without doing any in depth study) that that "adverse" impact could never "potentially" become a "significant impact" on the environment, the agency could exempt the project under this categorical exclusion. Can the Agency explain how this change will prevent a violation of NEPA? Additionally, 40 CFR 1508.4 requires the Agency to provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect. Can the agency explain how this requirement is met? Will the Agency explain whether this change will, in its opinion, expand the use of this categorical exclusion, and if so, how much?

6) Appendix B to Subpart D of part 1021. B2.3- This section defines the "Categorical Exclusions Applicable to Safety and Health." B2.3 explains that certain installation of, and improvements to "Personal safety and health equipment" can be excluded. It was changed from allowing exclusion of these items "*provided that emissions would not increase"* to excluding them "*provided that the covered actions would not have the potential to cause significant increase in emissions*." The Agency explains that its reasoning for making this type of change is to ensure the regulations are "*clearly aligned with the regulatory standard in NEPA,"* and points to, 40 CFR 1508.4. Additionally, by this proposed change, DOE seeks to clarify the affected provisions and to facilitate consistent application. However, we are concerned that this specific change will allow for an expansion of the categorical exclusion without providing an analysis of whether there was actually a potential for significant environmental impact. For example, under the

older language, if the installation or improvement caused any increase in emissions, the agency would have to perform a more extensive study as to whether that increase would be "significant" under NEPA. Under the new rule change even if there is an increase in emissions, if the agency makes the determination (without doing any in depth study) that that new emissions could never "potentially" become a "significant impact" on the environment, the agency could exempt the project under this categorical exclusion. Can the Agency explain how this change will prevent a violation of NEPA? Additionally, 40 CFR 1508.4 requires the Agency to provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect. Can the agency explain how this requirement is met? Will the Agency explain whether this change will, in its opinion, expand the use of this categorical exclusion, and if so, how much?

7) Appendix B to Subpart D of part 1021. B3.11- This section establishes categorical exclusions for certain outdoor tests and experiments on materials and equipment components. While the section maintains that "covered actions would not involve source, special nuclear, or byproduct materials," it is changed to include an exception for "encapsulated sources that contain source, special nuclear or byproduct materials" stating that they "may be used for nondestructive actions such as detector/sensor development and testing and first responder field training." We are concerned that this exemption could allow for potentially "nondestructive actions" involving encapsulated source, special nuclear or byproduct materials in outdoor tests and experiments on materials and equipment components where those materials could get accidentally "destroyed" or somehow spread into the environment during the tests or experiments. We are also concerned that there is no mention of a limit on how much encapsulated source, special nuclear or byproduct materials can be used in these tests and experiments. Can the Agency explain how this exemption will not result in potentially significant impacts to the environment?

8) Appendix B to Subpart D of part 1021. B6.1 - This section establishes categorical exclusions for certain cleanup actions. The change expands the clean up actions that can be exempt from those that cost less then "approximately 5 million dollars" and last "5 years" in duration, to exempting those that cost less then "approximately 10 million dollars" without any time restriction. This has the potential to expand the types of clean up actions that DOE believes are exempt from NEPA greatly. For example, a clean up action that involves 10 years of container removal could potentially be exempt. Can the Agency explain how this increased exemption will not result in potentially significant impacts to the environment?

Thank you for your consideration.

Sincerely,

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