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VIA REGULATIONS.GOV
FEDERAL E-RULEMAKING PORTAL

U.S. Department of Energy
Office of NEPA Policy and Compliance (GC-54)
1000 Independence Avenue, S.W.
Washington, DC 20585

**Re: COLUMBIA RIVERKEEPER'S COMMENTS ON THE U.S. DEPARTMENT OF ENERGY'S CATEGORICAL EXCLUSION FOR ADVANCED NUCLEAR REACTORS Docket ID: DOE-HQ-2025-0405**

U.S. Department Energy

Please see enclosed comments of Columbia Riverkeeper in response to the U.S. Department of Energy's Federal Register notice regarding "Categorical Exclusions for Advanced Reactors," 90 Fed. Reg. 4550 (Feb. 2, 2026).

Columbia Riverkeeper strongly opposes the U.S. Department of Energy's categorical exclusion for advanced nuclear reactors. We urge Energy to withdraw this notice and maintain full NEPA review for any and all nuclear reactor proposals.

Sincerely,

Simone Anter
Senior Attorney & Hanford Program Director
Columbia Riverkeeper

## I. Introduction

The following comments are submitted to the U.S. Department of Energy ("Energy) by Columbia Riverkeeper. Columbia Riverkeeper is a non-profit organization with a mission to restore and protect the water quality of the Columbia River and all life connected to it, from the headwaters to the Pacific Ocean. Columbia Riverkeeper has over 16,000 members and supporters who live, work, and recreate throughout the Columbia River Basin, including thousands of members and supporters in Washington state.

For over two decades, Columbia Riverkeeper has worked with Tribal Nations and people in communities throughout the Northwest who rely on a cold, clean Columbia to address toxic and radioactive waste at the Hanford Nuclear Site. Based on this experience, our organization has seen firsthand the complex challenges, and unanswered questions, when it comes to long-term management of nuclear waste.

A legacy of the Cold War, Hanford is the nation's most contaminated site and continues to leach radioactive and chemical pollution into the Columbia River. Hanford's nuclear and chemical contamination threatens the Pacific Northwest's people, animals and fish, river communities, the health of the Hanford Reach, and countless other cultural and natural resources. The public and Columbia Riverkeeper members continue to catch and consume fish from the Columbia River, drink water from the river, irrigate farms with the river water, and recreate in the Hanford Reach and downstream of Hanford. The federal government has an obligation to ensure that Hanford's nuclear legacy does not compromise current and future generations' use and enjoyment of the Columbia River.

Hanford, home to the first nuclear reactor of its kind built in the world now, contains over 500 contaminated facilities and structures. Many of these structures, such as underground tanks, cribs, and trenches, were used to contain some of Hanford's most dangerous radioactive and toxic waste. Now, more than 30 years after Hanford transitioned away from plutonium production to cleanup, the aging infrastructure at Hanford poses increased risk of failure, continues to leach toxic and radioactive contamination into soils and groundwater, and sits atop of dozens of square miles of groundwater that is too polluted to use.

Despite the significant cleanup challenges onsite, companies, such as X-Energy, are planning to develop novel Small Modular Nuclear Reactors (SMNRs) at Hanford. The proposed location of these SMNRs directly impacts cleanup operations, threatens worker and community safety, burdens future generations with increased nuclear waste, and holds the potential to

mobilize highly radioactive and toxic waste. Any and all proposals to build nuclear infrastructure and increase nuclear waste must undergo rigorous environmental review.

Energy's Federal Register notice regarding the "Categorical Exclusions for Advanced Reactors" ("CX Notice"),[1] violates at a minimum the National Environmental Policy Act and the Administrative Procedure Act for the reasons detailed below. Columbia Riverkeeper respectfully requests that Energy rescind the CX Notice and conduct full environmental reviews of any new advanced reactor proposals.

## II. The National Environmental Policy Act

The National Environmental Policy Act (NEPA) establishes the environmental policy of the nation. Since its passing in 1970, NEPA has tasked the federal government with fully analyzing the reasonably foreseeable environmental consequences of its actions.[2] Specifically, section 102(2)(C) of NEPA establishes an "action-forcing" mechanism to ensure "that environmental concerns will be integrated into the very process of agency decisionmaking."[3]

NEPA has two fundamental purposes: (1) to guarantee that agencies take a "hard look" at the consequences of their actions before the actions occur by ensuring that "the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impact,"[4] and (2) to ensure that "the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision."[5] NEPA "emphasize[s] the importance of coherent and comprehensive up-front environmental analysis to ensure informed decision making to the end that 'the agency will not act on incomplete information, only to regret its decision after it is too late to correct.'"[6]

### A. Changes to NEPA's Implementation Regulations

Since reassuming office in 2025, President Trump has signed a slew of executive orders targeting energy development and nuclear regulatory mechanisms. In January of 2025, Trump signed Executive Order 14154, "Unleashing American Energy."[7] Section 5 of the Executive Order directed the Council on Environmental Quality ("CEQ") to repeal NEPA implementation

[1] 91 Fed. Reg. 4550 (Feb. 2, 2026).
[2] 42 U.S.C § 4332.
[3] *Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979).
[4] *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 349 (1989).
[5] *Id.* at 349.
[6] *Blue Mountains Biodiversity Project v. Blackwood,* 161 F.3d 1208, 1216 (9th Cir. 1998).
[7] 90 Fed. Reg. 8353 (Jan. 20, 2025).

regulations.[8] Executive Order 14154 also rescinded Nixon and Carter-era executive orders which directed the CEQ to implement NEPA.[9] Additionally, on February 3, 2025, a North Dakota district court vacated Biden's Phase 2 NEPA implementation rule, ruling that the CEQ does not have the authority to issue binding rules to implement NEPA.[10] To implement Executive Order 14154 and comply with the court's ruling, on February 25, 2025, CEQ issued an interim-final rule repealing NEPA regulations.[11]

On June 30, 2025, Energy published its own implementation procedures for NEPA.[12] Subsequently, on February 2, 2026, Energy published a notice of a categorical exclusion for advanced nuclear reactors and simultaneously published more details for the categorical

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[8] 90 Fed. Reg. 8353 §5. During the first Trump administration on July 16, 2020, CEQ published its final rule to revise the NEPA regulations ("2020 Rule"), which went into effect on September 14, 2020. The 2020 Rule immediately drew five lawsuits challenging the 2020 Rule on a variety of grounds, including under the Administrative Procedures Act, NEPA, and the Endangered Species Act, contending that the 2020 Rule exceeded CEQ's authority and that the related rulemaking process was procedurally and substantively defective. *Wild Va. v. Council on Env't Quality*, No. 3:20cv45 (W.D. Va. 2020); *Envtl. Justice Health All. v. Council on Env't Quality*, No. 1:20cv06143 (S.D.N.Y. 2020); *Alaska Cmty. Action on Toxics v. Council on Env't Quality*, No. 3:20cv5199 (N.D. Cal. 2020); *California v. Council on Env't Quality*, No. 3:20cv06057 (N.D. Cal. 2020); *Iowa Citizens for Cmty. Improvement v. Council on Env't Quality*, No 1:20cv02715 (D.D.C. 2020).

Following the inauguration of President Biden in January 2021, CEQ moved the courts to stay this litigation pending the new administration's review of the 2020 Rule. In response to CEQ and joint motions, the district courts have issued temporary stays in each of the cases, except for *Wild Virginia v. Council on Environmental Quality*, which the district court dismissed without prejudice on June 21, 2021, was appealed to the U.S. Court of Appeals for the Fourth Circuit, where the district court's dismissal was upheld.

On April 20, 2022, the CEQ published its final Phase 1 NEPA Rule to amend the 2020 Rule, restoring core regulatory provisions and directing agencies to apply the same meaning as corresponding provisions in effect from 1978. 87 Fed. Reg. 23453 (April 20, 2022). In order to comply with the directive in Secretarial Order 3399, as well as employing consistency in the NEPA planning criteria applied in the two planning areas at issue here, FERC should apply the CEQ NEPA regulations that were in effect prior to the 2020 Rule or, to the extent consistent with law, apply the finalized and effective CEQ NEPA regulations promulgated under the Biden Administration.

[9] 90 Fed. Reg. 8353 §5(b).

[10] *Iowa v. Council on Envtl. Quality*, 1:24-cv-089 (D.N.D. Feb. 3, 2025).

[11] 90 Federal Register 10610.

[12] U.S. 90 Fed. Reg. 29676, *See also* Dept. of Energy National Environmental Policy Act (NEPA) *Implementing Procedures* June 30, 2025 available at https://www.energy.gov/sites/default/files/2025-06/2025-06-30-DOE-NEPA-Procedures.pdf. Energy's implementation procedures reflect NEPA amendments made by the Fiscal Responsibility Act in 2023, Executive Orders 14154 and 14031, the above mentioned rescission of CEQ NEPA implementation regulations, and the Supreme Court ruling in *Seven Cnty. Infrastructure Coal. et. al. v. Eagle Cnty. Colorado.,* 605 U.S. 168 (May 29, 2025) (Granting significant deference to agency NEPA determinations and holding that NEPA is a purely procedural statute.)

exclusion in an updated Appendix B of the June 30, 2025 implementation procedures ("Implementation Procedures").[13]

## III. Energy's Categorical Exclusion for Advanced Nuclear Reactors Violates NEPA and the Administrative Procedure Act.

### A. Energy's Issuance of the Categorical Exclusion Violates the Administrative Procedures Act Because Energy Fails to Adequately Explain its Decision.

Under NEPA, a categorical exclusion is defined as, "a category of actions that a Federal agency has determined normally does not significantly affect the quality of the human environment within the meaning of section 102(2)(C)."[14] Under Energy's Implementation Procedures, to make this determination, Energy shall:

> (1) Develop a written record containing information to substantiate its determination;
> (2) Consult with CEQ on its proposed new or revised categorical exclusion, including the written record, for a period not to exceed 30 days prior to providing public notice as described in subparagraph (3); and
> (3) Provide public notice in the Federal Register of DOE's establishment or revision of any categorical exclusion, including the address of the website where the written record is available (energy.gov/nepa).[15]

When an agency creates a categorical exclusion to allow actions to proceed without environmental review, the agency must adequately explain its decision.[16]

Here, Energy did not adequately explain its decision to issue the categorical exclusion and failed to develop a sufficient written record with information substantiating its determination that the "authorization, siting, construction, operation, reauthorization, and decommissioning of advanced nuclear reactors" should be excluded from federal environmental review.[17]

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[13] *See* 91 Fed. Reg. 4550 ("CX Notice") and Energy NEPA Implementing Procedures (Feb. 2, 2026) ("Implementation Procedures"), available at https://www.energy.gov/sites/default/files/2026-01/DOE-NEPA-Implementing-Procedures-2026-02-02.pdf.).
[14] 42 U.S. Code § 4336(e)(1).
[15] Implementation Procedures at 21.
[16] *See Sierra Club v. Bosworth*, 510 F.3d 1016, 1026 (9th Cir. 2007) (quoting *Jones v. Gordon*, 792 F.2d 821, 828 (9th Cir. 1986)).
[17] 91 Fed. Reg. 4550, *See also* U.S. Dept. of Energy Categorical Exclusion for Advanced Nuclear Reactors Written Record of Support (Feb. 2, 2026)[hereinafter "Written Record"].

Under the Administrative Procedure Act (APA), a court may set aside an agency's action if the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[18] "An agency action is arbitrary and capricious if the agency fails to articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[19]

The 11-page Written Record does not make a rational connection between the facts presented and the decision to issue a broad sweeping categorical exclusion for advanced nuclear reactors.[20] Energy's Written Record explains that "[a]dvanced nuclear reactors have key attributes such as safety features, fuel type, and fission product inventory that limit adverse consequences from releases of radioactive or hazardous material from construction, operation, and decommissioning."[21] However, in the CX Energy fails to define what those key attributes are. The second half of the Written Record contains reference to eight NEPA reviews, but fails to connect how these NEPA reviews demonstrate or lay out the key attributes that a project would need in order to qualify for the categorical exclusion. Nowhere in the CX Notice, Implementation Procedures, or Written Record does Energy rationally explain what information led them to believe that these key attributes render advanced nuclear reactors as having no significant environmental impacts.

The Written Record continues on, stating that "[t]he potential significance of environmental impacts from advanced nuclear reactors is primarily related to local environmental conditions rather than the status of the proposed site for the reactor.[22] This claim does not make sense. It's unclear what Energy means when it says local environmental conditions versus status of the proposed site. In both the CX Notice and the Written Record it is unclear what specific sites Energy is referring to. The CX Notice states that the categorical exclusion is established "for the construction of advanced nuclear reactor technologies on *certain Federal sites within the United States*."[23] (emphasis added). What sites would these be? It seems like Energy has specific sites in mind but failed to include them in the record and failed to describe how the department's rationale applies broadly to all specified sites.

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[18] 5 U.S.C. § 706(2)(A).
[19] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983).
[20] See below for a discussion on the vagueness of this term.
[21] Written Record at 2.
[22] *Id.*
[23] 91 Fed. Reg. 4550.

The Written Record continues to explain without reasoning that "[f]ission product inventory is the primary factor in the source term that determines the potential radiological risk to the public and environment in the event of an accident."[24] This statement fails to include any citation to back up the claim and is not true for all federal sites. One such federal site, the Hanford Nuclear Site in Eastern Washington where companies have preemptively declared their intent to construct Small Modular Nuclear Reactors (SMNRs) has many other radiological risks that could arise from construction and adding additional high level waste to the site.

For example, the proposed location for the SMNR's is dangerously close to a tritium contaminated groundwater plume, emanating from the highly radioactive 618-11 burial ground. This plume shows tritium concentrations 50 times higher than EPA's drinking water standard. Currently, the burial ground cannot be addressed because of the presence of the nearby Columbia Generating Station, the Northwest's only operating nuclear power plant. In this case, the operating nuclear plant stands in the path of cleanup, and the burial ground continues to cause high levels of tritium in the groundwater near the Columbia Generating Station and near where X-Energy wants to build its SMNRs. This is but one brief example of how radiological risk of new nuclear reactors extends beyond fission inventory.

The second half of Energy's Written Record refers to eight NEPA reviews conducted by Energy, Dept. of Defense, and the Nuclear Regulatory Commission ("NRC") resulting in Findings of No Significant Impact ("FONSI").[25] The inclusion of these NEPA reviews further renders Energy's decision to issue a categorical exclusion for new nuclear reactors as arbitrary and capricious, as they lead to more questions than reasoned conclusions.

First, of the eight reviews, six are located at the Idaho National Laboratory. Energy fails to explain how these environmental reviews are relevant to any other federal site.[26] Second, it seems that each environmental review is looking at a different type of reactor ranging significantly in energy output[27], fuel use type[28], and reactor type.[29] It's unclear how a reader is supposed to interpret this information to conclude that *all* new

[24] Written Record at 2
[25] *Id.* at 5-11.
[26] The other two locations are: Abilene Christian University in Abilene, Texas and Oakridge, Tennessee.
[27] Energy outputs range from 1-2 kilowatts to 300 megawatts.
[28] Fuel types range from uranium-plutonium-zirconium metal fuel to High-Assay, Low-Enriched Uranium (HALEU) to tristructural isotropic (TRISO) fuel.
[29] Reactor types ranged from Thermal test reactors to sodium-potassium-cooled thermal micro reactor to advanced gas cooled reactors.

nuclear reactors should be exempted from environmental review or understand in which situation the CX Notice would even apply.

It's even murkier how Energy rationalizes issuing its categorical exclusion when it's arguable that all of these varied types of reactors with vastly different water uses, fuel types and volumes, and waste outputs can even be considered a category.[30] To issue a categorical exclusion the subject of that exclusion must be a category.[31]

Lastly, it's unclear how Energy reached a conclusion that nuclear reactors would not have cumulative impacts, particularly when siting would be at specific (undisclosed) federal sites. How does siting numerous nuclear reactors impact the environment at Idaho National Laboratory, for example, what are cumulative radiation doses to nearby population centers? What are the cumulative water uses of clustering numerous SMNRs or micro reactors together? Again, Energy's Written Record lacks the rationale to adequately explain its conclusion.

The Written Record is meant to substantiate Energy's finding that the category of action does not significantly affect the quality of the human environment, under the APA this finding must be articulated with a satisfactory rational connection between the facts found and the choice made. Energy's Written Record for the reasons discussed above fail to do this. Energy's categorical exclusion is so vague and undefined that its only function seems to be exempting new nuclear reactor projects from the traditional NEPA process and the accompanying public involvement.

### B. Energy's Categorical Exclusion is too Vague to Satisfy NEPA.

NEPA requires and advances the goal of informed decision making.[32] NEPA's 2023 amendments regarding the adoption of categorical exclusions require agencies to, "identify to the public the categorical exclusion that the agency plans to use for its proposed actions."[33] This requires that a categorical exclusion provides enough information and details so that the public may understand its scope, namely what projects would be considered under the categorical

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[30] *See* Edward Lyman, "Advanced" Isn't Always Better- Assessing the Safety, Security, and the Environmental Impacts of Non-Light-Water Nuclear Reactors, Union of Concerned Scientists (Mar. 2021).
[31] *See generally Safari Club Int'l v. Haaland*, 31 F.4th 1157, 1179 (9th Cir. 2022) ("By definition, CEs are categories of actions that have been predetermined not to involve significant environmental impacts[.]"
[32] *See generally Robertson v. Methow Valley Citizens Council,* 490 U.S. 349 (1989)(stating that "the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.")
[33] 42 U.S.C. § 4336(c).

exclusion. This understanding is essential so that the public may provide meaningful feedback on categorical exclusion determinations in line with the heart of NEPA. Here, Energy's categorical exclusion is too vague and lacking in sufficient detail to provide the public with even a basic understanding of when it could potentially apply.

Appendix B(5) of Energy's Implementation Procedures provides the "Categorical Exclusions Applicable to Conservation, Fossil, and Renewable Energy Activities," which includes "Advanced Nuclear Reactors" at B5.26.[34] This section supposedly describes the "integral elements" for Energy to use in determining whether the categorical exclusion may apply.[35]

Nowhere, in either Appendix B, the Implementation Procedures, the CX Notice, or the Written Record does Energy define the term 'Advanced Nuclear Reactor,' or what would qualify as such. In the CX Notice, Energy cites to multiple executive orders, all of which have conflicting and different definitions.[36] The CX Notice refers to Executive Order 14301 defining "advanced reactors" by reference to 42 U.S.C. 16271(b)(1) definition of "advanced nuclear reactors" which describes fission reactors (with improvements), fusion reactors, and radioisotope systems. Ultimately, the CX Notice does not include any reference to this definition, it only goes on to describe additional nuclear energy systems. Failing to define the central term of the categorical exclusion renders it far too vague for the public to be able to understand when and how it will apply and to what projects.

### C. Energy's CX Notice and Implementation Procedures Create an Unlawful Case-by-Case Exception to NEPA

Under NEPA, some sort of environmental analysis is always required.[37] Categorical exclusions allow for agencies to skip an EIS or EA for federal actions that fall within a specific category when it's pre-determined that the actions in that category have no significant effect on the environment. Outside of this, NEPA requires a case-by-case determination of whether an EA or EIS applies, by definition a categorical exclusion should not be a case-by-case determination. Here, Energy's CX Notice and Implementation Procedures is a de facto case-by-case

[34] Implementation Procedures at 48.
[35] 91 Fed. Reg. 4550 (In deciding whether to apply this categorical exclusion to a particular project, DOE would consider each of the conditions in the categorical exclusion itself, *the integral elements listed in appendix B of DOE's NEPA implementing procedures*, and other conditions contained in DOE's NEPA implementing procedures.")
[36] The CX Notice refers to Executive Order 14301 defining "advanced reactors" by reference to 42 U.S.C. 16271(b)(1) definition of "advanced nuclear reactors" which describes fission reactors (with improvements), fusion reactors, and radioisotope systems.
[37] *See generally,* 42 U.S.C. §4321.

determination exempt from NEPA because it fails to identify any pre-determined actions that would fit into its category.[38]

As stated in the Federal Register notice, a project will qualify for a categorical exclusion if Energy determines that

> (1) the project's attributes, including potential fission product inventory, fuel type, reactor design, and operational plans, reduce sufficiently the risk of adverse offsite consequences from the release of radioactive or hazardous materials, and (2) the project demonstrates that any hazardous waste, radioactive waste, or spent nuclear fuel generated by the project can be managed in accordance with applicable requirements.[39]

The notice also incorporates more details in Appendix B of Energy's Implementation Procedures. As stated in the CX Notice

> In deciding whether to apply this categorical exclusion to a particular project, DOE would consider each of the conditions in the categorical exclusion itself, *the integral elements listed in appendix B of DOE's NEPA implementing procedures*, and other conditions contained in DOE's NEPA implementing procedures, including whether extraordinary circumstances exist such that a normally excluded action may have a significant environmental effect.[40] (emphasis added).

Implementation Procedures §5.4(b), in turn, provides the "clarifications" to "assist in the appropriate application of categorical exclusions that employ these terms or phrases."[41] In addition, the Implementation Procedures §5.4(c) provides additional factors for Energy to affirmatively determine.[42]

Notably, the clarifications and factors above create guidance for Energy to make case-by-case determinations of whether a project may be granted a categorical exclusion. Yet, neither the CX Notice, nor the Implementation Procedures provide any instances for which the categorical exclusion would or even could apply. Functionally, this creates an unlawful framework, which would require case-by-case analysis, not for whether there is a significant

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[38] As stated in the previous section, it's arguable that "new nuclear reactors" can even be considered a category.
[39] 91 Fed. Reg. 4550.
[40] *Id.* at 4551.
[41] Implementation Procedures at 23.
[42] *Id.* at 23-24.

impact to the environment, the threshold question of NEPA, but whether or not the categorical exclusion applies to a vague and undefined category. The CX Notice is nothing more than a predetermined conclusion without the necessary underlying data to support it, something courts have found unlawful.

For example, in *Sierra Club v. Bosworth*, the Sierra Club challenged the Forest Service's Fuels Categorical Exemption on several grounds, including that data underlying the categorical exclusion did not support its promulgation.[43] There, the Forest Service issued the categorical exclusion and then proceeded with a data call for information to use with the categorical exclusion.[44] The court held that "[p]ost-hoc examination of data to support a pre-determined conclusion is not permissible because '[t]his would frustrate the fundamental purpose of NEPA.'[45] The court further explained that, "[p]ostdecision information [ ] may not be advanced as a new rationalization either for sustaining or attacking an agency's decision."[46]

Here, Energy fails to support its own conclusion, admitting in the CX Notice that Energy is unsure if the categorical exclusion can apply to any actions listed in the notice, i.e. "[a]uthorization, siting, construction, operation, reauthorization, and decommissioning of advanced nuclear reactors."[47] Instead, those determinations will be made on a case-by-case basis after the fact. This impermissibly puts the conclusion before the reasoning. Like in *Bosworth*, Energy will rely on post-hoc data and case-by-case determinations to eventually support its own conclusion that nuclear reactors do not have significant environmental impacts, but currently this data does not exist. This violates NEPA, "because the 'threshold question in a NEPA case is whether a proposed project will 'significantly affect' the environment, thereby triggering the requirement for an EIS."'[48]

Interestingly, the 9th Circuit in *Bosworth* determined that it need not address the Sierra Club's argument that the current approach created an unlawful case-by-case exception to NEPA, because "[f]urther specification and definition of what actions are permitted under the Fuels CE … will reduce reliance on the current case-by-case approach necessitated by the Fuels CE."[49] This statement by the court suggests that a categorical exemption relying on case-by-case determinations, such as Energy's CX Notice, would be unlawful.

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[43] *Sierra Club v. Bosworth*, 510 F.3d 1016, 1026 (9th Cir. 2007).
[44] *Id.* at 1026.
[45] *Id.*
[46] *Id. See also Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996).
[47] 91 Fed. Reg. at 4551.
[48] *Bosworth*, 510 F.3d 1027, *See also Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998) (citing 42 U.S.C. § 4332(2)(C)).
[49] *Bosworth*, 510 F.3d 1033.

### D. Energy's CX Notice and Implementation Procedures Violate the APA by Failing to Provide Adequate Notice and Public Comment on Determinations.

Energy must give adequate public notice and opportunity to comment on each and every determination made under the categorical exclusion. Energy's CX Notice contains no provisions for adequate public notice and opportunity to comment. In addition, the Implementing Procedures (which are contemporaneous with the CX Notice and were not promulgated as part of the Code of Federal Regulations) give only the vague assurance that:

> 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).[50] (emphasis added).

While Energy's Implementation Procedures state that Energy might provide some sort of public notice of its determination, it fails to provide that notice at a point where the public can participate.

Public engagement is vital in realizing NEPA's policy goals

> [P]ublic comment procedures, including both public notice and public participation, 'are at the heart of the NEPA review process,' reflecting 'the paramount Congressional desire to internalize opposing viewpoints into the decisionmaking process to ensure that an agency is cognizant of all the environmental trade-offs that are implicit in a decision' before it makes that decision.[51]

Courts have consistently recognized NEPA's goals of including public input in the decisionmaking process. The Supreme Court affirmed this again in 2025

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[50] Implementation Procedures at 24.
[51] *Ritidian v. United States Dep't of the Airforce*, 128 F.4th 1089, 1102-3 (9th Cir. 2025) citing *California v. Block*, 690 F.2d 753, 770-71 (9th Cir. 1982).

> The law ensures that the agency and the public are aware of the environmental consequences of proposed projects. Properly applied, NEPA helps agencies to make better decisions and to ensure good project management.[52]

Here, Energy's CX Notice and Implementation Procedures fail to make clear whether or not the public will know when a determination is made to apply the categorical exclusion, let alone provide the opportunity for public comment to inform the decisionmaking process. Violating both the spirit and the letter of NEPA.

### E. Energy's Failure to Provide its Determinations Contemporaneous with its Decision is Arbitrary and Capricious Under the APA.

Courts have held that "[a]n agency satisfies NEPA if it applies its categorical exclusions and determines that neither an EA or an EIS is required, so long as the application of the exclusions to the facts of the particular action is not arbitrary and capricious."[53] Subsequent decisions have made clear that they are unable to determine if the application of an exclusion is arbitrary and capricious "where there is no contemporaneous documentation to show that the agency considered the environmental consequences of its action and decided to apply a categorical exclusion to the facts of a particular decision."[54]

Vague assurances from Energy that determinations will be posted after the fact do not suffice. In *Norton* the court stated bluntly that "[p]ost hoc invocation of a categorical exclusion does not provide assurance that the agency actually considered the environmental effects of its action before the decision was made.[55] Energy's failure in the CX Notice and Implementation Procedures to require contemporaneous public notice of its determination violates NEPA and the APA.

## IV. Conclusion

For at least these reasons Energy's categorical exclusion is unlawful. Columbia Riverkeeper, requests that Energy rescind both the categorical exclusion and Implementation Procedures.

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[52] *Seven County Infrastructure Coal. v. Eagle County.,*
[53] *Bicycle Trails,* 82 F.3d 1445.
[54] *California v. Norton,* 311 F.3d 1162 (9th Cir. 2002).
[55] *Id.*