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Transportation Institutional Considerations of NEPA Implementation

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TRANSPORTATION INSTITUTIONAL CONSIDERATIONS OF NATIONAL
ENVIRONMENTAL POLICY ACT IMPLEMENTATION

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ABSTRACT

The U.S. Department of Energy's Transportation Management Division (TMD) is considering the need for additional environmental analysis of radioactive material transportation to meet the National Environmental Policy Act (NEPA) requirements and support needed for preparation of NEPA documentation. This overview was prepared to provide background material on institutional requirements and support needed preparation of NEPA documentation. The Transportation Institutional Program can and should be responsive to the public interest and regulatory requirements through the NEPA process. Public involvement, particularly through the NEPA scoping process, is a key means of identifying transportation issues that must be addressed. The TMD Institutional Program is responsible for establishing and maintaining relationships with the public to resolve these issues. The NEPA process calls for various forms of public involvement at different points. Continuing safe technical performance and the ability to demonstrate fast, open, and competent response to problems will be vitally important to program credibility. Public confidence is also created by drawing them into the program and offering them a sense of meaningful participation in the decisions about transportation that most closely impact their lives.

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TRANSPORTATION INSTITUTIONAL CONSIDERATIONS OF NATIONAL ENVIRONMENTAL POLICY ACT IMPLEMENTATION

1.0 SUMMARY

The U.S. Department of Energy's (DOE) Transportation Management Division (TMD) is considering the need for additional environmental analysis of radioactive materials transportation to meet the National Environmental Policy Act (NEPA) requirements. At the request of TMD, this overview was prepared by Westinghouse Hanford Company to provide background material on institutional requirements and to support needed preparation of NEPA documentation. A brief overview of the NEPA process, identification of institutional and outreach activities required to implement NEPA, and recommendations for the Institutional Program to support such an effort are provided.

The process of conducting a NEPA evaluation of the DOE national transportation program will be complicated and will require significant effort. The issue facing DOE is whether to prepare an Environmental Assessment (EA) to provide a basis on which DOE can determine if its transportation program is a major Federal action significantly affecting the human environment and then prepare an Environmental Impact Statement (EIS) if required, or to proceed directly to an EIS. The Institutional Program should be prepared to accommodate either of these eventualities with plans for its compliance with NEPA. In keeping with the intent to provide background material, both types of documents are discussed here.

The Transportation Institutional Program can and should be responsive to the public interest and regulatory requirements throughout the NEPA process. Public involvement, particularly through the NEPA scoping process, is a key means of identifying transportation issues that must be addressed. As this background material makes clear, the requirements for scoping and other public comments during the course of EIS preparation are greater than that for preparation of an EA.

The considerations for TMD are as follows.

- NEPA compliance requires a carefully considered public involvement component.
- The nature of the agency's public involvement activities is significantly shaped by the type of document to be prepared: either an EA or a generic, programmatic, or site-specific EIS.
- It is important that the Institutional Program ensures that issues addressed in the EA/EIS are responsive to concerns of the public and other members of the transportation network.

- The host and adjacent States have the opportunity to comment on a draft EA. All interested parties have the opportunity to comment on the draft EIS. The comment process and responses must be carefully conducted and documented.
- Public scoping and hearing meetings are two important approaches that can be used in preparing EISs to facilitate the public involvement process.

The discussions presented here also draw on a number of conclusions that may be useful in guiding the Transportation Institutional Program in meeting NEPA's public involvement requirements. These conclusions include the following.

- A significant benefit of the scoping process could be enhanced public confidence and trust.
- Council on Environmental Quality Guidelines are not very specific regarding the scoping process, leaving TMD with substantial latitude. This places the important responsibility of providing a scoping process that is well-considered and responsive to the needs of its widespread audiences on TMD.
- Scoping for an EIS should occur as early as practical in the process. The TMD will need to be responsive to the full range of public concerns and issues identified in the scoping process.
- All issues raised through the scoping process, or through any form of public involvement, should be fully attended to and responded to in some form, whether or not a decision is made to include them in the EIS.
- The TMD should demonstrate that its outreach efforts are linked to a willingness to make changes in those technical and operational aspects of the program that are of concern to the public.
- Public involvement in general, and scoping in particular, needs to acknowledge the unique components of the public, and recognize that their views of and reactions to TMD plans can differ substantially. Different approaches and strategies will be required. An analysis of issues can lead to a more effective public involvement plan.
- The TMD's program is not site-specific; therefore, the challenge will be in communicating a clear, concise description of the program to a lay public audience. Such a description is a critical part of the scoping process.
- It will be especially important to involve the public in determining the relevance of prior environmental assessments to the scope of a

contemplated EIS. Public involvement and communication should be approached as a two-way process, with each party learning from the other.

- A challenge for the Institutional Program in dealing with public issues is to effectively convey the message that TMD is very much aware of these issues and is taking specific steps to effectively manage them. This will require close coordination with the transportation research and development and operations programs.
- Much of the public's concerns regarding TMD programs are likely to be related to its views on the technical risks involved and the agency's perceived ability to safely manage those risks.
- Public response strategies and products need to be developed that push creatively beyond those in common use today.

2.0 NATIONAL ENVIRONMENTAL POLICY ACT COMPLIANCE-- ENVIRONMENTAL ASSESSMENT OR ENVIRONMENTAL IMPACT STATEMENT AND TIERING

The DOE has adopted the Council on Environmental Quality Regulations for implementing its NEPA compliance responsibilities. Much of the information presented in this paper comes from these regulations. The discussion is limited to the TMD decision at hand of whether to proceed with an EA or an EIS. The decision to prepare an EIS is somewhat more complicated and involves deciding whether to conduct an individual, site-specific EIS, or a more comprehensive programmatic, or generic EIS.

2.1 ENVIRONMENTAL ASSESSMENT

An EA is a concise public document; its purpose is to provide sufficient evidence and analysis to determine whether a proposed action is a major Federal action that significantly affects the quality of the natural and human environments. An EA includes a brief discussion of the need for the proposed action; alternatives to the proposed action that will accomplish the DOE's goals; the incremental impacts of the proposed action and alternatives; and a listing of the agencies, accident scenarios, and persons consulted. Determination from an EA of significant effect to the environment triggers a recommendation to prepare an EIS. Based on the EA, if the actions are determined to cause insignificant impacts, then a finding of no significant impact (FONSI) is prepared. The EA is provided to the host and adjacent States for a minimum 14-day comment period.

2.2 ENVIRONMENTAL IMPACT STATEMENT

There are no commonly accepted, clear definitions that distinguish the specific differences in the purpose, content, and scope of generic, programmatic, and individual-action or site-specific EIS's.

A generic EIS can be used to analyze the impacts of one or more Federal actions that are illustrative of a wide range of actions that the agency plans to take. Generic EIS's have been used to predict the range of impacts that may be caused by a group of actions and to determine the data needs and develop the methodologies for impact assessment that can be later used in EIS's or other NEPA documentation prepared for similar, proposed site-specific actions. The Final Environmental Statement on The Transportation of Radioactive Material by Air and Other Modes (NUREG-0170) (NRC 1977) is an example of a generic EIS. The NUREG-0170 assesses the expected environmental impacts resulting from the transportation of radioactive materials within the United States and from export and import shipments. All radioactive materials shipments exclusive of weapons, weapons components, and shipments in military vehicles are considered by this document. The analysis is based upon the levels and mix of radioactive materials shipments that occurred in 1975, although the radiological impacts that were then expected in 1985 are also evaluated by making projections of the 1975 shipment data. This EIS was issued by the U.S. Nuclear Regulatory Commission (NRC) in December 1977.

A programmatic EIS can be used to evaluate the effects of a proposed series of actual, separate actions and determine their cumulative impacts over a large geographic area or extended period of time. The EIS's for individual, site-specific Federal actions describe expected impacts of discrete, clearly defined actions.

2.3 TIERING

The DOE can often fulfill its NEPA compliance responsibilities associated with routine transportation of radioactive materials through the use of tiering that builds on existing NEPA documentation. The DOE must determine whether prior NEPA documentation, in some form (normally an EIS), addresses the environmental consequences of shipping the specific materials under specific conditions that have been chosen for shipment. If such an EIS or other NEPA documentation does exist, that document's conclusions as to the environmental consequences of such shipments can essentially be incorporated, by reference, in whatever specific NEPA documents are prepared for the identified shipment campaigns.

2.4 SECRETARY OF ENERGY NOTICE 15-90

All NEPA documentation processes within the DOE are subject to change. Secretary of Energy Notice SEN-15-90, dated February 5, 1990 (DOE 1990), states that the DOE's line organizations, which have the responsibility for preparation of NEPA documents, have not sufficiently incorporated the

requirements of NEPA into the planning process for new projects at the various DOE sites. To correct these deficiencies, SEN-15-90 directs that several revisions be made to DOE Order 5440.1C, dated April 9, 1985 (DOE 1985), and in the DOE NEPA Guidelines, last published in the Federal Register on December 15, 1987 (52 FR 47662) (DOE 1987). The revisions to these two major DOE NEPA guidance documents will generally require the DOE's NEPA processes to produce more and higher level NEPA documentation and engage more public involvement in NEPA documentation processes.

2.5 ACTION DESCRIPTION MEMORANDUM

If a proposed DOE action is found to be not categorically excluded nor already adequately treated in existing NEPA documentation, the appropriate DOE-Headquarters (DOE-HQ) Program or Field Operations Office could prepare an Action Description Memorandum (ADM) for a determination by Environmental Safety and Health. The purpose of an ADM is to identify areas of environmental concern and make a preliminary determination of the severity of the action's environmental impact. The ADM contains a concise description of the proposed action, its environmental setting, and a discussion of the potential environmental issues. This document enables DOE-HQ to decide what level of NEPA documentation they propose to prepare for the proposed action. The ADM will result in determination that an EA or an EIS should be prepared. Recommendations are forwarded to EH-1 for all EA and or EIS determinations.

3.0 THE SCOPING PROCESS

To effectively manage the preparation of an EIS, a Federal agency must first determine the scope of the document. That is, the agency must determine what issues the EIS will cover and in what detail these issues will be discussed. To accomplish this task, the Council on Environmental Quality Regulations direct Federal agencies that have decided to prepare an EIS to engage in a public "scoping" process.

Specifically, Section 1501.7 of the regulations requires that: "There shall be an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action." Much of the following information regarding EIS scoping is taken from that guidance.

3.1 PURPOSE OF SCOPING

An EIS scoping process has specific and fairly limited objectives. The most important objective is to identify the concerns of the affected public and other interested agencies about the proposed Federal action. The scoping process should also enable the agency responsible for preparing the EIS to

define the issues that will be examined in detail, while, at the same time, determining what issues may be of lesser importance and can, therefore, have less or no effort devoted to them. Likewise, the scoping process should enable the agency to discuss the various alternatives it is considering to accomplish its program goals and to obtain from the public and interested agencies their suggestions about other feasible alternatives.

Because it is often the interested public's first contact with an agency proposing an action or program, the scoping process can be a useful means to gather information, reinforce understanding of objectives, and promote public confidence and trust. A thorough scoping process enables the agency to prepare a draft EIS that will include, from the beginning, a discussion, or at least an acknowledgment, of cooperating agencies' and the public's concerns. This should reduce the chance of a successful challenge of the draft EIS on the grounds of insufficient coverage of important environmental issues and the consequent expenditure of additional time and effort on supplementing the draft EIS. When Federal agencies have conducted a comprehensive scoping process rather than treating the interaction simply as a public relations exercise, they have also gained increased public confidence in their decision-making processes. They have found that the public responds positively when its views are taken seriously, even though all publicly stated concerns cannot necessarily be entirely accommodated. This enhanced public confidence reduces potential delays in the long run, such as those resulting from litigation, as the agency implements the decisions made in the NEPA process.

3.2 GENERAL REQUIREMENTS OF SCOPING

To accomplish scoping goals, the Council on Environmental Quality Regulations require an open process that does the following:

- Invites the participation of affected Federal, State, and local agencies; affected Indian tribes; and other interested parties
- Provides adequate public notice to the various parties
- Identifies both significant and insignificant issues
- Allocates EIS preparation assignments
- Identifies any related environmental analyses that have been or may be prepared
- Creates a schedule for EIS preparation.

While the regulations require that agencies conduct a scoping process to prepare for writing EIS's, they do not require scoping as part of an EA or

supplemental EIS preparation.¹ Federal agencies have, however, sometimes found it valuable to conduct a scoping process as part of an EA preparation. Scoping for an EA can serve the same purposes as it does in the EIS process. Important issues to be analyzed can be discovered and refined, and a beneficial working relationship can be established with other participating agencies and the interested public. Scoping at this early stage of the NEPA process normally cannot substitute for the EIS scoping as required by the Council on Environmental Quality Regulations.

3.3 IDENTIFY THE PROPOSED ACTION OR PROGRAM

For scoping to be useful, the agency must have an accurate and reasonably detailed understanding and description of the action or program before starting the scoping process. This is necessary for the agency to be able to identify the potentially interested public and to be able to adequately explain the program to that public. Also, an agency must have a good understanding of what it proposes to do to be able to suggest an initial list of environmental issues and alternative ways of accomplishing its programmatic purposes. The first step in the scoping process, therefore, is to develop a clear, concise description of the action or program that will be the subject of the EIS.

3.4 PREPARE AN INFORMATION PACKET

The TMD should prepare a brief information packet to be distributed to interested parties. The packet can consist of a description of the proposed action, including the alternative means of accomplishing its purposes; a list of the impacts that the agency initially envisions resulting from the proposal; and maps, drawings, and any other material that would help the interested public understand what is being proposed. This information should enable participants to make a useful contribution to scoping the EIS. If the scoping has been preceded by preparation of an EA, much of this preliminary information should be available in that document.

The effectiveness of the information packet is especially important in the case of a generic transportation EIS, where the TMD is proposing a generalized program of activities of national scope as opposed to a confined, site-specific action. A complex program that will be carried out over time may be more difficult for interested parties to readily understand. If that is the case, the TMD must be sure that its informational materials explain the complexity of the program with sufficient detail that will enable interested parties to participate effectively in scoping.

¹A supplemental EIS can be prepared when an agency makes substantial changes in a proposed action that are relevant to environmental concerns or when there are significant new circumstances or information relevant to the proposed action or its impacts.

3.5 DESIGN THE SCOPING PROCESS

The Council on Environmental Quality Regulations require that a scoping process be used in preparation of an EIS but do not prescribe any particular content or procedures for such a process. Therefore, TMD has substantial latitude to design the scoping process to fit its own needs. Normally, the means, timing, and locations used for gathering public comments largely depend upon the nature of the proposed action or program being considered. The process can gather public comments and suggestions regarding the content of the EIS through meetings, telephone conversations, written comments, or a combination of all three.

While public scoping meetings are not required by the regulations, they are now required for all DOE EIS's by SEN-15-90. Many Federal agencies have found that the personal contact among interested parties at scoping meetings has been useful both for gaining an understanding of the public's opinions as well as for explaining the agency's own approach to accomplishing its goals. Federal agencies have found that some of the most positive effects of scoping stem from the fact that all parties have the opportunity to meet and to listen to the concerns of others. Even in very contentious situations, agencies have found that the interested public has responded positively when treated as a legitimate participant in the review process. If the TMD can show that the views of interested parties are being seriously considered, those parties may be more satisfied that the decision-making process is fair, even when they disagree with the outcome.

A complex program of national scope may involve policy issues and alternative means of accomplishing program goals that are of interest to public groups all across the nation and to agencies headquartered in Washington, D.C. The physical impacts of the proposed action, on the other hand, might be expected to occur most strongly in a particular region or regions of the country. In the case of a transportation EIS, the TMD may choose to hold several scoping meetings in various parts of the country, but particularly in the affected regions (e.g., corridors of high shipping activity) and in Washington, D.C. The TMD should consider whether to hold a few large scoping meetings or to convene several smaller meetings to accommodate different interest groups that may be spread throughout the country. The decision of whether to hold scoping meetings, and how many and where to hold them, should be based on what would best promote the effective participation of the interested public in the scoping process.

3.6 PUBLIC SCOPING NOTICE

Section 1501.7 of the Council on Environmental Quality Regulations requires that the lead agency publish a notice of intent (NOI) in the Federal Register to inform the public that the agency intends to prepare an EIS. This notice must be given as soon as practicable after the agency decision to prepare an EIS and before the scoping process begins. When the action or program would be of national concern, Section 1506.6 of the Regulations suggests that the agency also give notice by mail to national organizations

reasonably expected to be interested in the matters. In all cases, the agency should invite the participation of affected Federal, State, and local agencies; affected Indian tribes; and other interested persons. A generic program that could impact a large area of the country may not lend itself as readily as would a project-specific EIS process to identifying specific, potentially affected parties. It may require more prolonged investigation by TMD to identify the particular national groups that could fairly represent all the various people that could be affected.

The NOI should be published within a reasonable time in advance of preparation of the EIS. The time that will be needed for scoping for a generic EIS may be somewhat unclear due to the potential difficulty in identifying the proper parties that should receive notice and determining the best means of communicating with them. The time for publishing the NOI should, therefore, be considered carefully.

For a generic EIS, the NOI should explicitly ask commenters to focus on generic issues related to the project because specific actions will most likely not be undertaken until later. If possible, the NOI should tell people when, in the future, the agency will determine what specific actions will be carried out and, if necessary, the EIS will be supplemented to deal with those specific actions.

3.7 PUBLIC SCOPING MEETINGS

If TMD holds public scoping meetings, several decisions regarding those meetings must be made. As noted above, TMD could hold one meeting or a series of meetings in Washington, D.C., if most of the participants were national organizations from that area. Alternatively, a series of smaller meetings at several locations around the country or in particularly affected areas should be considered. Many smaller meetings allow input from the general public.

Many agencies have found that a series of informal meetings in relatively small groups the most satisfactory means of eliciting issues and information. Relatively smaller meetings have been found to be more conducive to genuine communication between the various participants regarding the real substance of the Federal proposal and the concerns of the interested public. In this regard, several agency staff members should be fully prepared to discuss the proposed action or program at various levels of detail. Separate meetings for other Federal agencies that will be cooperating in the EIS process may also be considered. Such meetings may be the best way to establish effective working relationships with all other agencies that will be involved in the preparation of the EIS.

If the nature of the proposed Federal action or program is particularly complex, it may be difficult for scoping meeting participants to grasp what is expected of them. Because the nature of the issues in a generic EIS are not as well defined as in a project-specific EIS, public participants may find it more difficult to form well-considered, specific comments and suggestions. In such a case, the lead agency should be ready to enter into a dialogue with public

participants to explain the generic program so that public participants can better focus their comments. Public participants should also be encouraged and helped to refine their broad issues into specific comments relevant to environmental matters.

Various logistical concerns must be addressed when preparing for scoping meetings. Meeting rooms must be reserved sufficiently in advance and should be of a size that will be conducive to meeting the scoping objectives. Meeting facilitators should be engaged to keep meetings on course and deal with confrontational situations if they arise. It is important that meeting facilitators as well as any agency staff that will take part in scoping meetings be trained in risk communication. The agency must be able to explain the risks involved in its proposal in ways that are both understandable and believable to the general public. A means of recording the discussions at the meetings should also be provided. Court reporters or recording equipment can be used for this purpose.

3.8 USING THE SCOPING PROCESS COMMENTS

After scoping comments have been received from cooperating agencies and the general public, the lead agency must evaluate them and determine which issues are significant and which are not. Making these decisions, which establish what issues will be addressed in depth in the EIS and which issues can be de-emphasized, is within the discretion of the lead agency. Every issue that is raised during the scoping process must be addressed in the EIS in some way. If, in the agency's judgment, particular issues do not merit in-depth analysis, the EIS should contain at least a short explanation of why the issues were not considered significant.

While it is not required, some agencies send out postscoping documents to make public the decisions they have made concerning issues to be covered in the EIS. These agencies have found such documentation to be useful because it assures scoping participants that their comments were heard and addressed. A postscoping document can be merely a listing of the impacts and alternatives selected for analysis, or it can go as far as to describe all the issues and explain the agency's decisions on how they will be addressed.

4.0 INSTITUTIONAL PROGRAM INVOLVEMENT IN THE NATIONAL ENVIRONMENTAL POLICY ACT PROCESS

The TMD Institutional Program is responsible for establishing and maintaining relationships with organizations external to TMD that have a programmatic or policy interest in DOE transportation issues. The outreach program addresses transportation issues raised by members of the public and focuses on improving communications and information exchange with the public to resolve these issues. The broad objectives of the institutional and outreach components are to promote public and organizational involvement in the

transportation program and to seek resolution of issues challenging the program through the following:

- Providing information about the program
- Identifying public issues and program needs
- Fostering public participation in decision processes
- Supporting institutional interactions.

The NEPA process calls for various forms of public involvement at different points of time in the evaluation of the potential environmental impacts of transportation program activities. For maximum effectiveness, public involvement activities should be implemented according to a carefully developed plan and in conjunction with established DOE-HQ, field office, and contractor public involvement actions.

4.1 PREPARE PUBLIC INVOLVEMENT PLAN

Public involvement has received particular attention throughout the DOE with the recent DOE emphasis on a "new culture" of openness in all Department program activities.

The NEPA scoping process would be a key extension of TMD's institutional and outreach programs. Both scoping and hearing meetings provide the forum for exchanging information that can make the NEPA document a useful vehicle for decision making. Well in advance of scoping, which itself occurs early in the NEPA process, the TMD needs to be prepared to address the following kinds of questions:

When should scoping meetings be held?

Who should be invited to participate?

How should the sites for scoping be selected?

How many scoping meetings should be held?

How much advance notice is needed, and how should it be disseminated?

What is the best format for addressing generic program elements?

What logistical arrangements are most conducive to a productive meeting?

What kinds of advanced training and preparation should be provided to presenters?

What forms of information are most effective in communicating successfully with the public?

How should the public be informed of the results of scoping?

The TMD program faces a range of transportation issues from emergency response, to cask design and testing, to highway routing, to prenotification and liability. The public has concerns focused on each of these issue areas and can be expected to raise these concerns during the NEPA scoping process. In fact, most of these issues have already been raised in the context of the Waste Isolation Pilot Project (WIPP) hearings. Frequently the public will express their perception that emergency response procedures or cask designs are not adequate to protect public health and safety. Or they may claim that no amount of technical quality control can overcome the certain occurrence of human error, such as driver error, that may result in a serious accident.

Although TMD technicians may seek to demonstrate that even in a worst-case scenario a cask will retain its structural integrity and will not release toxic contents to the environment, people will be concerned that a catastrophe could occur, however remote the probability. In short, technicians may concentrate on probability, and the public will focus on consequences. Such divergent perceptions of risk must be addressed by the Institutional Program with care and sensitivity, and new approaches to communicating risk information must be sought in order to counteract public skepticism. The key challenge is to convey the message that TMD is very much aware of transportation issues and can point to specific steps being taken to manage them. This will require close coordination with the operations and research and development efforts of all DOE transportation programs.

The TMD has a number of information products that can be used to reinforce informed public participation throughout the scoping process. Two notable examples are the booklet about radioactive materials shipment response (in preparation) and the scale model of a transportation cask and accompaniment materials, including display board, touch-screen computer, and fact-sheets designed to demonstrate the integrity of a cask used to ship high-level radioactive material (being constructed). The immensity of the full-scale cask model will help to demonstrate the strength of the high-level radioactive casks. Exhibits and videos are also available to provide graphic demonstration of the DOE programs to ensure safe transportation. In addition, the DOE Office of Civilian Radioactive Waste Management and the WIPP Project Office have developed excellent information products that can be used to explain DOE transportation objectives and activities.

Continuing safe technical performance and the ability to demonstrate fast, open, and competent response to problems will be vitally important to program credibility. Public confidence is also created by drawing the public into the program and offering them a sense of meaningful participation in the decisions about transportation that most closely impact their lives. Public acceptance for DOE programs and policies is likely to be in direct relation to the measure of control over the program the public is allowed. Finally, with respect to TMD response to issues raised in the NEPA process, a clear willingness to consider changes in those technical aspects of the program that are of greatest concern to the public must be demonstrated.

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