CONTRACTOR REPORT

SAND95-1648
Unlimited Release
UC-630

National Environmental Policy Act (NEPA) Compliance Guide Sandia National Laboratories

Roger P. Hansen
Hansen Environmental Consultants
6439 B. South Havana Street
Englewood, Colorado 80111

Prepared by
Sandia National Laboratories
Albuquerque, New Mexico 87185 and Livermore, California 94550
for the United States Department of Energy
under Contract DE-AC04-94AL85000

Approved for public release; distribution is unlimited.

Printed August 1995

Issued by Sandia National Laboratories, operated for the United States Department of Energy by Sandia Corporation.

NOTICE: This report was prepared as an account of work sponsored by an agency of the United States Government. Neither the United States Government nor any agency thereof, nor any of their employees, nor any of their contractors, subcontractors, or their employees, makes any warranty, express or implied, or assumes any legal liability or responsibility for the accuracy, completeness, or usefulness of any information, apparatus, product, or process disclosed, or represents that its use would not infringe privately owned rights. Reference herein to any specific commercial product, process, or service by trade name, trademark, manufacturer, or otherwise, does not necessarily constitute or imply its endorsement, recommendation, or favoring by the United States Government, any agency thereof or any of their contractors or subcontractors. The views and opinions expressed herein do not necessarily state or reflect those of the United States Government, any agency thereof or any of their contractors.

Printed in the United States of America. This report has been reproduced directly from the best available copy.

Available to DOE and DOE contractors from
Office of Scientific and Technical Information
PO Box 62
Oak Ridge, TN 37831

Prices available from (615) 576-8401, FTS 626-8401

Available to the public from
National Technical Information Service
US Department of Commerce
5285 Port Royal RD
Springfield, VA 22161

NTIS price codes
Printed copy: A12
Microfiche copy: A01

DISCLAIMER

Portions of this document may be illegible in electronic image products. Images are produced from the best available original document.

SAND95-1648
Unlimited Release
Printed August 1995

Distribution
Category UC-630

National Environmental Policy Act (NEPA) Compliance Guide Sandia National Laboratories

Roger P. Hansen
Hansen Environmental Consultants
6439B South Havana Street
Englewood, Colorado 80111

Task Leader: Theodore A. Wolff, Ph.D.

Sandia Contract AM-7825

Abstract

This report contains a comprehensive National Environmental Policy Act (NEPA) Compliance Guide for the Sandia National Laboratories. It is based on the Council on Environmental Quality (CEQ) NEPA regulations in 40 CFR Parts 1500 through 1508; the U.S. Department of Energy (DOE) NEPA implementing procedures in 10 CFR Part 1021; DOE Order 5440.1E; the DOE "Secretarial Policy Statement on the National Environmental Policy Act" of June 1994; Sandia NEPA compliance procedures; and other CEQ and DOE guidance. The Guide includes step-by-step procedures for preparation of Environmental Checklists/Action Descriptions Memoranda (ECL/ADMs), Environmental Assessments (EAs), and Environmental Impact Statements (EISs). It also includes sections on "Dealing With NEPA Documentation Problems" and "Special NEPA Compliance Issues."

MASTER

Preface

The National Environmental Policy Act (NEPA) applies to "all agencies of the Federal Government." The U.S. Department of Energy (DOE) is a federal agency which must comply with NEPA. The Sandia National Laboratories (SNL) provide NEPA compliance support to DOE for numerous SNL-related projects and activities.

This SNL NEPA Compliance Guide is intended for the use of Line Organization managers, project managers, NEPA professionals, and those with NEPA compliance responsibilities at SNL offices and facilities in New Mexico (SNL/NM), Nevada (SNL/NV), California (SNL/CA), and Hawaii (SNL/HI). It supplements, but is not a substitute for, DOE orders, regulations, and guidance documents on NEPA compliance.

The Guide addresses the requirements of NEPA, the Council on Environmental Quality (CEQ) regulations, DOE implementing procedures, and DOE policy and guidance. Detailed guidance is provided for preparation of Environmental Checklists/Action Description Memoranda (ECL/ADMs), categorical exclusion (CX) procedures, Environmental Assessments (EAs), Findings of No Significant Impact (FONSI), and Environmental Impact Statements (EISs). The Guide also provides guidance for dealing with various NEPA documentation problems and discusses NEPA compliance issues that are particularly complex.

A list of abbreviations and acronyms, a glossary, and a detailed index are provided to make the Guide more "user friendly." A list of references is included for those who wish to research source documents.

Table of Contents

List of Figures	iv
List of Attachments	v
List of Abbreviations and Acronyms	vi
1.0 Introduction	1-1
1.1 Purpose and Objectives	1-2
1.2 The "NEPA Process"	1-3
2.0 NEPA Requirements	2-1
2.1 National Environmental Policy Act (NEPA)	2-2
2.2 Council on Environmental Quality (CEQ) Regulations	2-3
2.2.1 Background	2-3
2.2.2 CEQ Regulations Highlights	2-4
2.3 U.S. Department of Energy (DOE) Regulations, Policy, and Guidance	2-7
2.3.1 DOE NEPA Implementing Procedures (10 CFR Part 1021)	2-7
2.3.2 Secretary of Energy's Policy Statement on NEPA	2-9
2.3.3 DOE Order 5440.1E and DOE Draft Order 491	2-12
2.3.4 DOE May 1993 EA/EIS Preparation Guidance (The "Green Book") ...	2-12
2.3.5 DOE Floodplains/Wetlands Review Requirements	2-13
2.3.6 DOE-AL Environmental Assessment Quality Assurance Plan (QAP) ...	2-14
2.4 Other Federal Laws	2-15
2.5 Other Federal Agency NEPA Requirements	2-16
3.0 NEPA Document Preparation Guidance	3-1
3.1 Environmental Checklist (ECL)/Action Description Memorandum (ADM)	3-1
3.1.1 ECL/ADM Role in the NEPA Process	3-3
3.1.2 ECL/ADM Step-By-Step Process	3-3
3.1.3 ECL/ADM Format and Content	3-7
3.1.4 ECL/ADM Review and Determination Time Requirements	3-8
3.1.5 Public Participation/Disclosure	3-9
3.2 Categorical Exclusion (CX) Determination	3-9
3.2.1 CX Step-By-Step Procedure	3-10
3.2.2 Required Findings and Eligibility Criteria for a CX	3-11
3.2.3 Time Requirements	3-13
3.2.4 Public Participation/Disclosure	3-13
3.3 Environmental Assessment (EA)	3-13
3.3.1 EA Role in the NEPA Process	3-14

Table of Contents (Continued)

3.3.2	Proposed Actions "Normally" Requiring an EA	3-14
3.3.3	Step-By-Step Preparation and Review	3-16
3.3.4	EA Format and Content	3-21
3.3.5	Page Limits	3-24
3.3.6	Public Participation/Disclosure	3-24
3.3.7	Time Requirements	3-26
3.4	Finding of No Significant Impact (FONSI)	3-27
3.4.1	FONSI Role in the NEPA Process	3-29
3.4.2	The "Mitigated" FONSI and MAP	3-30
3.4.3	Format and Content	3-31
3.4.4	Public Participation/Disclosure	3-31
3.4.5	Time Requirements	3-32
3.5	Environmental Impact Statement (EIS)	3-32
3.5.1	EIS Role in the NEPA Process	3-33
3.5.2	Proposed Actions "Normally" Requiring an EIS	3-34
3.5.3	Step-By-Step Preparation and Review	3-34
3.5.4	Notice of Intent (NOI)	3-40
3.5.5	Public Scoping and Implementation Plan (IP)	3-40
3.5.6	EIS Format and Content	3-43
3.5.7	EIS Page Limits	3-47
3.5.8	Programmatic and Sitewide EIS	3-47
3.5.9	Supplemental EIS and Supplement Analysis	3-49
3.5.10	Public Participation/Disclosure	3-49
3.5.11	Record of Decision (ROD)	3-52
3.5.12	Time Requirements	3-52
3.5.13	Recommendations for Increasing EIS Preparation Efficiency	3-53
4.0	Dealing With NEPA Documentation Problems	4-1
4.1	Document Writing and Preparation	4-1
4.2	Major EA and/or EIS Sections	4-4
4.2.1	Purpose and Need for Action	4-4
4.2.2	Proposed Action and Alternatives	4-5
4.2.3	Affected Environment	4-6
4.2.4	Environmental Consequences (Impact Analysis)	4-7
4.2.5	Cumulative Impacts	4-12

Table of Contents *(Continued)*

4.2.6 "Tiering" and "Bounding"	4-14
4.2.7 Incomplete or Unavailable Information	4-15
4.2.8 Mitigation Measures	4-17
5.0 Special NEPA Compliance Issues	5-1
5.1 The NEPA Threshold Question: "Federalization" and "Defederalization"	5-1
5.2 NEPA/CERCLA/RCRA Document Integration	5-4
5.3 Environmental Justice	5-5
5.4 Pollution Prevention	5-8
5.5 Air Conformity	5-10
5.6 Biodiversity	5-13
5.7 NEPA Exemptions	5-16
5.8 Extraterritorial Applications of NEPA	5-19
5.9 Segmentation	5-23

List of References

Glossary

Index

List of Figures

<i>Figure</i>	<i>Title</i>	
1-1	NEPA Process Elements	1-6
2-1	NEPA Regulatory Hierarchy	2-1
2-2	DOE "Sliding Scale" Approach	2-13
3-1	NEPA Documentation Decision Process	3-2
3-2	Environmental Checklist/Action Description Memorandum Process Flow Chart	3-4
3-3	Categorical Exclusion (CX) "Screening" Process	3-12
3-4	Environmental Assessment (EA) Decision Process	3-14
3-5	Environmental Assessment (EA) Preparation and Review Build- ing Blocks	3-17
3-6	Recommended Environmental Assessment (EA) Elements	3-22
3-7	Generic Schedule, Environmental Assessment (EA)	3-27
3-8	Environmental Impact Statement (EIS) Process	3-35
3-9	CEQ Definition of Scope	3-41
3-10	NEPA Pyramid	3-48
3-11	Generic 15-Month Environmental Impact Statement (EIS) Sched- ule	3-56
4-1	Environmental Impacts: Cause and Effect Relationships	4-11
4-2	"Bounding" Environmental Impacts	4-16

List of Attachments

Attachment Title

- I National Environmental Policy Act (NEPA)
- II Council on Environmental Quality (CEQ) Regulations on Implementing NEPA
Procedures (40 CFR Parts 1500 to 1508)
- III Department of Energy (DOE) NEPA Implementing Procedures (10 CFR
Part 1021)
- IV Cultural Resources and Historic Preservation Compliance
- V Threatened/Endangered Species Consultation

List of Abbreviations and Acronyms

ADM	Action Description Memorandum
AFI	Air Force Instruction
ANOI	Advance Notice of Intent
B/R	budget and reporting
BLM	Bureau of Land Management
CAA	Clean Air Act
CEQ	Council on Environmental Quality
CERCLA	Comprehensive Environmental Response, Compensation and Liability Act
CFR	Code of Federal Regulations
CO	carbon monoxide
CRADA	cooperative research and development agreement
CX	categorical exclusion
DEIS	Draft EIS
DoD	Department of Defense
DOE	U.S. Department of Energy
DOE-AL	DOE Albuquerque Operations Office
DOE-HQ	DOE Headquarters
DOE-LAAO	DOE Los Alamos Area Office
DOT	Department of Transportation
DRA	Disaster Relief Act
E.O.	Executive Order
EA	Environmental Assessment
ECL	Environmental Checklist
EIAP	Environmental Impact Analysis Process
EIR	Environmental Impact Report
EIS	Environmental Impact Statement
EPCRA	Emergency Planning and Community Right-to-Know Act
EPD	Environmental Protection Division
ER	environmental restoration
ERWM	environmental restoration and waste management
ES&H	Environment, Safety, and Health
ESA	Endangered Species Act
FEIS	Final EIS
FHA	Federal Highway Administration

List of Abbreviations and Acronyms (Continued)_____

FOIA	Freedom of Information Act
FONSI	Finding of No Significant Impact
FS	feasibility study
Guide	NEPA Compliance Guide
HEPA	high-efficiency particulate air
HSWA	Hazardous and Solid Waste Amendments
IP	Implementation Plan
KAFB	Kirtland Air Force Base
KAO	Kirtland Area Office
KTF	Kauai Test Facility
LANL	Los Alamos National Laboratory
LLNL	Lawrence Livermore National Laboratory
M&O	Maintenance and Operations
M&R	Management and Review
MAP	Mitigation Action Plan
NAA	nonattainment area
NAAQS	National Ambient Air Quality Standards
NCO	NEPA Compliance Officer
NDM	NEPA Document Manager
NEPA	National Environmental Policy Act of 1969
NHPA	National Historic Preservation Act
NO ₂	nitrogen dioxide
NOA	Notice of Availability
NOI	Notice of Intent
NORML	National Organization for Reform of Marijuana Laws
NO _x	nitrogen oxides
NPDES	National Pollutant Discharge Elimination System
NRC	Nuclear Regulatory Commission
NSR	New Source Review
NTS	Nevada Test Site
O ₃	ozone
OGC	Office of General Counsel
PEIS	programmatic EIS
PM-10	particulate matter $\leq 10 \mu$

List of Abbreviations and Acronyms (Continued)

PPA	Pollution Prevention Act of 1990
PPE	personal protective equipment
PRMF	Pacific Missile Range Facility
PSD	Prevention of Significant Deterioration
QA/QC	quality assurance/quality control
QAP	Quality Assurance Plan
R&D	research and development
RCRA	Resource Conservation and Recovery Act
RFP	Request for Proposal
RI	remedial investigation
ROD	Record of Decision
SCRAP	Students Challenging Regulatory Agency Procedures
SEIS	supplemental DEIS or FEIS
SIP	state implementation plan
SMCRA	Surface Mining Control and Reclamation Act
SNL	Sandia National Laboratories
SNL/CA	SNL/California
SNL/HI	SNL/Hawaii
SNL/NV	SNL/Nevada
SO ₂	sulfur dioxide
SOW	Scope of Work
SWMU	solid waste management unit
TAS	Technical Advisory Subcommittee
TBD	to be done
TSD	treatment, storage, and disposal
USAF	U.S. Air Force
USFS	U.S. Forest Service
USFWS	U.S. Fish and Wildlife Service
VOC	volatile organic compound
WFO	work for others
WIPP	Waste Isolation Pilot Plant

1.0 Introduction

The National Environmental Policy Act of 1969 ("NEPA") has been in effect for over 25 years. It is the nation's most comprehensive legislative and public policy statement on protection of the environment (see Guide Attachment I). The Act has been referred to by some authors as an "environmental Magna Carta" that creates a new "right" for the American people—a right to an attractive, liveable, and healthful environment. Section 2 of NEPA provides as follows:

The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and the biosphere and stimulate the health and welfare of man; to enrich the understanding of ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

Senator Henry "Scoop" Jackson, NEPA's chief sponsor, saw the Act serving as "a constitutional function in that people may refer to it for guidance in making decisions where environmental values are found to be in conflict with other values" (U.S. Senate 1969).

U.S. Department of Energy (DOE) Secretary Hazel O'Leary issued a *"Secretarial Policy on the National Environmental Policy Act"* in June 1994 (DOE 1994a). The transmittal memorandum stated:

Full compliance with the letter and spirit of [NEPA], our national charter for protection of the environment, is an essential priority for the Department of Energy, consistent with our core values. We are fully committed to pursuing excellence in all areas of environment, safety, and health, including NEPA activities The NEPA process is a valuable planning tool and an opportunity to improve the quality of the Department's decisions and build public trust We must approach NEPA as a team—ensuring quality and improving efficiency and thereby making NEPA work better and cost less.

The policy statement is intended to "streamline" the NEPA process, minimize cost and time expended on document preparation, emphasize teamwork, and make the NEPA process more useful to decisionmakers and the public. It covers process changes, delegations of

authority, and public involvement which, along with many other topics, are addressed in this NEPA Compliance Guide ("Guide").

1.1 Purpose and Objectives

The overall purpose of this Guide is to provide Sandia National Laboratories (SNL) NEPA practitioners with practical assistance in complying with NEPA requirements while minimizing costs, avoiding needless delay, increasing document preparation efficiency, and assuring credibility to other governmental agencies and the public. The Guide's objectives are to:

- *Provide procedural and technical guidance for complying fully with the letter and spirit of NEPA.*
- *Develop an understanding and appreciation of the "NEPA process" and how it impacts SNL activities.*
- *Provide an understanding of NEPA-related laws, regulations, Executive Orders, and DOE Orders and guidance.*
- *Supply guidance on preparing various types of NEPA documentation as appropriate for certain proposed actions.*
- *Furnish insights regarding special NEPA compliance issues of interest to SNL NEPA professionals.*

The Guide closely follows DOE requirements and practice as expressed in Secretarial policy statements, DOE Orders and regulations, DOE guidance documents, and SNL practice and procedure. Where appropriate, the Guide recommends new or modified approaches to make NEPA compliance more responsive to environmental requirements, more efficient, and more cost-effective. The Guide does not supersede NEPA compliance guidance contained in the SNL "ES&H Manual" (Sandia 1995a).

The Guide extensively references the CEQ regulations on NEPA implementation in 40 CFR Parts 1500 to 1508 as well as the DOE NEPA regulations in 10 CFR Part 1021. In all cases, the references are to section number only—omitting reference to Title 40 or Title 10 of the *Code of Federal Regulations* (CFR). The CEQ and DOE regulations are contained in Guide Attachments II and III, respectively.

1.2 The "NEPA Process"

The term "NEPA process" is used liberally throughout the NEPA literature to describe the multiple procedures and protocols federal agencies must follow to achieve compliance.

According to the CEQ regulations:

"NEPA process" means all measures necessary for compliance with the requirements of Section 2 and Title 1 of NEPA (§1508.21).

The test of compliance is that CEQ and other federal agency procedures be followed in making decisions on proposed actions, rather than that "environmentally preferable" decisions be made. In other words, the environment must be "considered" in all federal agency decisionmaking but not necessarily given priority over all other values.

The focus of the NEPA process since the Act was signed by the President on January 1, 1970, has been on what courts refer to as the "*action forcing*" requirements of NEPA Title 1, under which all federal agencies are mandated to:

1. *Utilize a systematic, interdisciplinary approach* which will ensure the integrated use of the natural and social sciences and the environmental design arts in planning and decisionmaking which may impact the environment.
2. *Identify and develop methods and procedures which will ensure that unquantified environmental amenities and values are given appropriate consideration along with economic and technical considerations.*
3. *Include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment a "detailed statement" on the environmental impact of the proposed action.* (See Guide Section 3.5 on EIS preparation.)
4. *Consult with and obtain comments of federal, state, and local agencies and the public with respect to any environmental impact.*
5. *Study, develop, and describe appropriate alternatives to recommended courses of action.*
6. *Recognize the worldwide and long-range character of environmental problems.*
7. Make environmental advice and information available to states, counties, municipalities, institutions, and individuals information on restoring, maintaining, and enhancing environmental quality.

8. *Utilize ecological information in planning and development of resource-oriented projects.*

The CEQ regulations on preparation of environmental impact statements (EIS) and environmental assessments (EA) discussed in this Guide provide detailed instructions on how these action-forcing requirements are to be implemented by DOE and other federal agencies.

Depending on the nature of the "proposed action," most of these requirements can be implemented during the EA or EIS preparation process.

The "NEPA process" has been evolving since 1970. This process reflects not only the requirements of §102 of the Act, the CEQ regulations, and the procedures of federal agencies like DOE, but also the more than 2,000 published federal court opinions on NEPA-generated conflicts. The NEPA process is not some mysterious ritual with which only a few elite specialists are acquainted. Simply, it is a set of interrelated activities and events that serve to focus and define a federal agency decisionmaking process that gives appropriate consideration to "unquantified environmental amenities and values . . . along with economic and technical considerations" [NEPA §102(2)(B)].

The major *NEPA process elements* are prescribed by the Act and the CEQ regulations which note that the "provisions of the Act and of [the] regulations must be read together as a whole in order to comply with the spirit and letter of the law" (§1500.3). They include:

- *Agency Planning. Agencies are mandated to "integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values" (§1501.2).* Agency planning elements include utilizing an interdisciplinary approach, identifying environmental effects and values in adequate detail, developing appropriate alternatives, and consulting early with state and local agencies, Indian tribes, and the public (§1501.2).
- *Coordination and Cooperation With Other Agencies. This involves consultation with other agencies which have "jurisdiction by law" or "special expertise" at the "earliest possible time" and to the "maximum extent possible" (§1501.6).* Because of interagency rivalry, jurisdictional conflicts, and refusal to share information, this part of the NEPA process is sometimes ignored or given token compliance.
- *Scoping of the EIS or EA. The CEQ regulations require an "early and open process" for determining the scope of the issues to be addressed and for identifying the significant issues related to a proposed action (§1501.7).* But whether external or internal, the scoping process is critical to separating signifi-

cant issues to be analyzed in depth in an EA or EIS and issues that are either insignificant or that have been covered in previous NEPA documents.

- **Document Preparation.** *Preparation of an EA, EIS, or other NEPA document (guidance for which is provided in this Guide) is part of the NEPA process, but it is also the product or result. Concentrating only on document preparation means that other elements of the NEPA process are given inadequate attention.*
- **Commenting and Document Review.** *Copies of EISs and the comments and views of "appropriate Federal, State, and local agencies" are required by the Act to be made available to the public. The CEQ regulations contain a detailed section on commenting and responding to comments in Part 1503. Agencies are required to actively solicit comments and respond to comments in a prescribed manner.*
- **Public Involvement.** *NEPA has frequently been referred to as a "public disclosure" law. Federal agencies are to make "diligent efforts to involve the public in preparing and implementing their NEPA procedures" [§1506.6(a)]. There are numerous "sunshine" provisions in the CEQ regulations, from scoping of NEPA documents to publication of agency decisions. Public disclosure is the centerpiece of the NEPA process.*
- **Agency Decisionmaking.** *The CEQ regulations specify the procedures federal agencies must follow in making decisions on projects that involve NEPA compliance. Agencies themselves are to adopt procedures to "ensure that decisions are made in accordance with the policies and purposes of the Act" (§1505.1).*

These and corresponding elements of the NEPA process are discussed throughout the Guide, as they relate to CEQ, DOE, and SNL requirements. A conceptual framework for thinking about the NEPA process is provided in Figure 1-1. The NEPA process cannot be likened to an inflexible instruction manual which, if not scrupulously followed, will result in environmental disaster. Rather, it allows room for imagination, innovation, creativity, and both individual and agency initiative. Following the *letter and spirit* of the NEPA process as required by DOE rewards "good faith" efforts through greater compliance efficiencies and avoidance of needless delays and expenditure of resources.

In order to carry out the NEPA process at SNL, the Risk Management and NEPA Department (7258) NEPA Compliance Group provides guidance regarding NEPA issues and provides technical support to Line Organizations responsible for NEPA compliance. The NEPA Compliance Group also reviews and transmits to appropriate DOE offices NEPA-related

Figure 1-1
NEPA Process Elements

documents prepared by SNL/NM, SNL/Nevada (SNL/NV), and SNL/Hawaii (SNL/HI). For SNL/California (SNL/CA) actions, the SNL/CA Environmental Operations Department (8644) performs the same function. Thus, all NEPA-related communications between DOE and SNL are conducted by Departments 7258 and 8644 NEPA specialists.

The ultimate responsibility for compliance with NEPA rests with DOE, not SNL. Thus, all statements and references pertaining to SNL NEPA compliance activities apply only to support of DOE NEPA-related functions.

2.0 NEPA Requirements

This section summarizes the major NEPA compliance elements or regulatory "drivers."

Section 2.1 provides a brief introduction to the Act and its mandates. Section 2.2 highlights the CEQ regulations which implement NEPA. DOE requirements, including the April 1992 implementing procedures in 10 CFR Part 1021 and the Secretary of Energy's policy statement of June 1994, are discussed in Section 2.3. DOE Order 5440.1E on NEPA compliance and the DOE May 1993 guidance on preparation of EAs and EISs are summarized in Sections 2.3.3 and 2.3.4, respectively. DOE floodplains/wetlands review requirements are described in Section 2.3.5. The NEPA regulatory hierarchy is shown in Figure 2-1.

Figure 2-1
NEPA Regulatory Hierarchy

2.1 National Environmental Policy Act (NEPA)

Title I of NEPA on Policies and Goals (Guide Attachment I) enlarges on the national policy needed to "fulfill the social, economic, and other requirements of present and future generations of Americans." It states that the federal government (meaning federal agencies) has a "continuing responsibility" to use "all practicable means" to achieve *six specific goals* which include:

- Fulfilling the responsibility of each generation as "trustee" of the environment
- Assuring for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings
- Attaining the "widest range of beneficial uses" of the environment without degradation
- Preserving important historic, cultural, and natural aspects of the national heritage
- Achieving a "balance" between population and resource use
- Enhancing the quality of renewable resources.

Although these are laudable and somewhat idealistic goals, the NEPA focus since the Act was passed has not been on fulfilling national policy goals and objectives but on the EIS action-forcing requirement (see Guide Section 1.2). *NEPA §102(2)(C) requires that agencies prepare a "detailed statement" on proposals for "major Federal actions significantly affecting the quality of the human environment."* (See Guide Sections 3.3 and 3.5 for detailed guidance on preparing EAs and EISs.)

The CEQ regulations command federal agencies to "interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies set forth in the Act" [§1500.2(a)]. However, the majority of federal court decisions have consistently held that NEPA is a *procedural* rather than a *substantive* statute. *Black's Law Dictionary* distinguishes procedural and substantive law in this manner:

As a general rule, laws which fix duties, establish rights and responsibilities among and for persons, natural or otherwise, are "substantive laws" . . . while those which merely prescribe the manner in which such rights and responsibilities may be exercised and enforced in court are "procedural laws." (Black 1990)

Viewing NEPA as merely procedural and incapable of leading to more environmentally responsible decisionmaking has often resulted in a gross misunderstanding of the NEPA process. Many agencies have viewed EAs, EISs, and other NEPA documents only as "add ons" to technical, economic, and engineering decisionmaking procedures already in place. They would agree with some observers who have characterized the NEPA process as "squandering massive amounts of time, talent, and public and private moneys" (Friesema and Culhane 1976). *Failure to recognize the NEPA process as a valuable decisionmaking tool has led to a "barrage of monotonous, nonanalytic tomes" (Bausch 1992) that are mistakenly equated with NEPA compliance.*

In order to realize the Secretary of Energy's desire that *"NEPA work better and cost less"* (DOE 1994a), the following admonition is appropriate:

Environmental documents need to be improved so that they fulfill their purpose—influencing a wide variety of programs without unnecessarily adding to the administrative burden or disrupting the effectiveness of agency functions. Radical departures from "accepted" NEPA procedures are neither necessary nor, in all probability, likely to be achieved It remains for federal agencies to boldly exercise their discretion and respond imaginatively and resourcefully to the present-day planning and management challenges of integrating environmental and non-environmental policies (Bausch 1992).

2.2 Council on Environmental Quality (CEQ) Regulations

Although each federal agency has its own NEPA compliance procedures, implementing the Act's requirements is the primary responsibility of the CEQ. For example, the *DOE regulations discussed in Guide Section 2.3.1 adopt and supplement the CEQ regulations; they are not a substitute.* The CEQ does not assess penalties for noncompliance or administer other enforcement mechanisms. Instead, enforcement of the NEPA process has relied on the thousands of federal court opinions that have been handed down since 1970. *The principal court sanction for failure to comply with NEPA is stopping the project until compliance is achieved.*

2.2.1 Background

The CEQ was established under Title II of NEPA to, among other things: assist and advise the President; gather authoritative information on environmental quality trends; develop and recommend national policies to promote environmental quality; and document changes in the

natural environment. The Council consists of three members appointed by the President with the advice and consent of the Senate.

From 1970 to 1978, the CEQ implemented NEPA through a series of "guidelines." President Carter issued Executive Order 11991 which resulted in the CEQ revising the guidelines and publishing them as regulations on November 28, 1978 (43 *FR* 55990). Unlike the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), which have had numerous revisions, there has been only one substantive revision of the CEQ regulations since 1978.

2.2.2 CEQ Regulations Highlights

The CEQ regulations, which occupy nearly 30 pages of the *CFR*, are highlighted below and included in Guide Attachment II. They are fully adopted by the DOE NEPA regulations in §1021.101 (Guide Attachment III). The regulations are subdivided into nine parts as follows:

- ***Part 1500: Purpose, Policy, and Mandate.*** The *purpose* of the regulations is to "tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act" (§1500.1). It is also to ensure that environmental information is made available to government agencies and the public and that actions are taken to protect, restore, and enhance environmental quality. The *policy* is that federal agencies comply with NEPA by implementing procedures to make the NEPA process more useful to decisionmakers and the public. The *mandate* is that the CEQ regulations are binding on all federal agencies and that they be read together with NEPA "as a whole in order to comply with the spirit and letter of the law" (§1500.3). There are also requirements for reducing paperwork and reducing delay.
- ***Part 1501: NEPA and Agency Planning.*** *Federal agencies are to integrate the NEPA process in planning "at the earliest possible time to ensure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts"* (§1501.2). Guidance is provided on "when" to prepare an EA and "whether" to prepare an EIS. Procedures to be followed by "lead" and "cooperating" agencies are detailed. Requirements for the "scoping process," described in Guide Sections 3.3.3 and 3.5.5, are provided in §1501.7.
- ***Part 1502: Environmental Impact Statement (EIS).*** The primary purpose of an EIS is to ensure that NEPA policies and goals are "infused" into federal governmental actions. Such topics as timing, page limits, writing, and recommended EIS format are covered. Detailed requirements are spelled out for the major elements of an EIS (or EA): purpose and need; proposed action and alternatives; affected environment; and environmental consequences (see Guide Sections 3.3.4

and 3.5.6). Instructions are also provided on how to deal with incomplete or unavailable information, a common problem.

- **Part 1503: Commenting.** This includes requirements for "inviting" comments on draft EISs (DEIS) from governmental agencies, "affirmatively soliciting" comments from persons affected by a proposal, and the duty of agencies to comment. Detailed requirements are listed for how to respond to comments when preparing a final EIS (FEIS) (see Guide Section 3.5.3, Step 14).
- **Part 1504: Predecision Referrals to CEQ.** This part discusses mechanisms for referring interagency disagreements over proposed actions that may have unsatisfactory environmental effects. These provisions have been used only rarely.
- **Part 1505: NEPA and Agency Decisionmaking.** Agencies are required to adopt *their own procedures* for implementing NEPA requirements, e.g., DOE procedures in 10 CFR Part 1021. Specifications for Records of Decision (ROD) are provided in §1505.2 (see Guide Section 3.5.11).
- **Part 1506: Other Requirements of NEPA.** This presents a potpourri of NEPA requirements such as eliminating duplication of effort, combining documents, timing of agency action, and emergencies. Extremely important requirements are contained in §1506.6 on public involvement (see Guide Sections 3.3.6 and 3.5.10).
- **Part 1507: Agency Compliance.** Agencies are allowed "*flexibility*" in adapting their NEPA procedures to the requirements of other laws and regulations (e.g., RCRA and CERCLA). Agencies must maintain "sufficient capability" to comply with CEQ requirements. This part also mandates that agencies identify *classes of actions* requiring an EA, an EIS, or neither [categorical exclusion (CX)].
- **Part 1508: Terminology and Index.** Twenty-seven terms are defined in this part, ranging from "cumulative impact" to "human environment" to "major federal action" and "significantly." Many inaccuracies and misunderstandings can be avoided by understanding the meaning of key NEPA terms.

Although requirements of the CEQ regulations are referenced throughout this Guide, the following merit special emphasis.

Document Scoping: §§1501.7 and 1508.25. Preparation of an EIS requires an "early and open" scoping process that begins with publication of a "Notice of Intent" (NOI) in the *Federal Register* (Guide Section 3.5.4). The process must involve affected federal, state, and local agencies, Indian tribes, and members of the public. *The purpose of scoping is to*

identify "significant issues" to be analyzed in depth and eliminate those that are either not significant or have been covered adequately in prior NEPA review. (Scoping of EAs is usually an internal agency process.) See Guide Sections 3.3.3 and 3.5.5 on scoping EAs and EISs.

Writing and Reducing Paperwork: §§1500.1(b); 1500.4; 1502.7 and 1502.10.

NEPA documents must focus on issues that are "truly significant" and avoid "amassing needless detail." *"NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action."* Procedures must be implemented to reduce "extraneous background data" and make NEPA documents "concise, clear, and to the point." EISs (and EAs) must be "analytic rather than encyclopedic" and written in "plain language" while following a "clear format" (see Guide Section 4.1).

Interdisciplinary Approach: §§1501.2(a) and 1502.6. *NEPA §102(2)(A) requires the integrated use of the natural and social sciences and the environmental design arts in planning and decisionmaking.* The CEQ regulations extend this requirement to document preparation. This provision has generally been ignored, probably because agencies and consulting firms are often lacking in biologists, social scientists, architects, and planners. However, the involvement of disciplines other than engineering and the "hard" sciences can provide more complete environmental analyses as well as greater public credibility for the EIS or EA.

Methodology and Scientific Accuracy: §§1502.22 and 1502.24. The CEQ regulations do not specify any particular methodology to be used in an analysis of impacts. However, the impact analysis must be "supported by credible scientific evidence" and not be based on "pure conjecture." Agencies must ensure "professional integrity, including scientific integrity," and must identify any methodologies used and reference their sources. Section 1502.22 dealing with incomplete or unavailable information replaces the earlier requirement for conducting a "worst case" analysis. If the means of obtaining information needed for an analysis of "foreseeable significant adverse effects" are not known, or the costs of obtaining it are exorbitant, this should be discussed following a specified format (see Guide Section 4.2.6).

Integrating Other Environmental Review Requirements: §§1500.2(c) and 1502.25. *Integrating NEPA documents with other environmental review requirements is seen as a way of reducing paperwork and duplication of effort.* Agencies "to the fullest extent

possible" are to integrate environmental impact analyses and related surveys and studies. Requirements specifically identified are those of the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*), National Historic Preservation Act (NHPA) (16 U.S.C. 470 *et seq.*), and Endangered Species Act (ESA) (16 U.S.C. 1531 *et seq.*). Procedures for complying with the NHPA and the ESA are discussed in Guide Attachment III and IV. All necessary permits and licenses must be listed in the EIS (although this is also good practice for an EA). See Guide Section 5.1 on NEPA/CERCLA/RCRA Integration.

CEQ Regulations Guidance. Unlike the EPA, which has published dozens of "guidance" documents, the CEQ has issued little guidance. The most detailed guidance is contained in answers to the *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations* which were published in 1981 (46 FR 18026) (CEQ 1981).

2.3 U.S. Department of Energy (DOE) Regulations, Policy, and Guidance

DOE NEPA policy and procedure have changed dramatically since the Secretary of Energy Notice of February 5, 1990 (SEN 15-90). Although it is only of historic interest, SEN 15-90 charted a new course for DOE compliance with NEPA that is now being implemented through a number of new initiatives. This section summarizes the most current DOE directions in NEPA implementation.

2.3.1 DOE NEPA Implementing Procedures (10 CFR Part 1021)

The DOE's extensively revised NEPA implementing procedures (regulations) were published in final form on April 24, 1992 (57 FR 15122). The regulations rewrite the old 10 CFR Part 1021, revoke the 1987 DOE NEPA Guidelines (52 FR 47662, December 15, 1987), and adopt, once again, the CEQ regulations highlighted in Guide Section 2.2.2. They are included in their entirety in Guide Attachment III.

As to which regulations take precedence, DOE's or CEQ's, both are equally important for NEPA compliance at DOE facilities. The overall purpose of the DOE regulations is to assist DOE operations in complying with both NEPA and the CEQ regulations. The DOE regulations supplement, and are to be used in conjunction with, the CEQ regulations. The following policy statement is included in the DOE regulations:

It is DOE's policy to follow the letter and spirit of NEPA; ***comply fully with the CEQ Regulations***; and apply the NEPA review process early in the planning stages for DOE proposals (§1021.101). (Emphasis added.)

DOE Regulations Highlights. Highlights of the DOE regulations in 10 CFR Part 1021 are as follows:

- **Classes of Actions.** DOE will determine whether a DOE proposed action (1) requires preparation of an EIS; (2) requires preparation of an EA; or (3) is categorically excluded (CX) from preparation of either an EIS or EA. EIS "classes of actions" are listed in Appendix D to Subpart D, EA classes are listed in Appendix C, and CXs are listed in Appendices A and B. Of course, it is not possible for these listings to be all-inclusive as some proposed actions will not "fit" a particular list [§1021.300(a)].
- **Availability of NEPA Documents to the Public.** NEPA documents (including EAs) will be made available to federal, state, and local agencies, American Indian tribes, and interested members of the public in accordance with CEQ requirements in 40 CFR §1506.6 [§1021.301(a)].
- **Notification to States/Tribes/Public.** DOE will notify "affected" host states, host Indian tribes, and the public of its intent to prepare either an EA or an EIS [§1021.301(c)]. CEQ only requires a Notice of Intent (NOI) for preparation of an EIS.
- **EA Review and Comment.** DOE will provide host states, host tribes, and the public with an opportunity to review and comment on any EA prior to approval of the EA by DOE. DOE may establish a review period of from 14 to 30 days [§1021.301(d)]. There is no comparable CEQ requirement.
- **Notice of Intent to Prepare an EIS.** When a determination has been made to prepare an EIS, DOE will publish an NOI, according to the CEQ requirements, to begin the public scoping process. If there will be a "lengthy delay" between the time of the EIS determination and the start of scoping, DOE may publish an Advance NOI (ANOI) (§1021.310) (see Guide Section 3.5.4).
- **EIS Implementation Plan.** An EIS Implementation Plan (IP), required by DOE as part of the public scoping process, must be made available to the public for information purposes (although DOE has held public meetings on some IPs) [§1021.312]. The CEQ regulations do not require an IP or its disclosure (see Guide Section 3.5.5).
- **Supplement Analysis.** The DOE regulations create a new type of document: the Supplement Analysis. This analysis must be prepared to determine whether an existing EIS must be supplemented, a new EIS prepared, or no further NEPA documentation is required. The Supplement Analysis and its associated determination must also be made available to the public (see Guide Section 3.5.9).

Other Features of DOE Regulations. The CEQ regulations do not provide much guidance on preparation of EAs and Findings of No Significant Impact (FONSI). In contrast, the DOE regulations address EAs and FONSI in some detail. Although an EA must be prepared for any of the classes of actions listed in Subpart D, Appendix C of the regulations, DOE can prepare an EA on any proposal at any time (see Guide Section 3.3 on EAs).

A unique DOE requirement concerns the preparation of what is known as a "mitigated FONSI." If there are any "commitments" to mitigation measures that are "essential to render the impacts of the proposed action not significant," a Mitigation Action Plan (MAP) must be prepared before the FONSI is issued. See Guide Section 3.4.2 for details.

The new DOE requirements for "programmatic" and "sitewide" NEPA documents is of particular interest to SNL/NM. As "a matter of policy," DOE will prepare sitewide EISs for certain large, multiple-facility DOE sites and sitewide EAs or EISs for other sites [§1021.330]. Sitewide NEPA documents are to be reevaluated every 5 years using a Supplement Analysis (see Guide Section 3.5.8).

Perhaps the most significant provision of the new DOE NEPA regulations is the greatly expanded list of CXs in 10 CFR Part 1021, Subpart D. Subpart D Appendices A and B list 107 categories of activities that require neither an EA nor an EIS. This compares with the 49 CXs listed in the new revoked DOE NEPA Guidelines of December 15, 1987 (52 FR 47662). Sixteen classes of actions normally require an EA (compared with 14 classes under the old Guidelines) while 12 classes of actions normally require an EIS (compared with seven classes under the old Guidelines). CXs are discussed in detail in Guide Section 3.2. [See DOE NEPA regulations in 10 CFR Part 1021, Subpart D (Guide Attachment III).]

2.3.2 Secretary of Energy's Policy Statement on NEPA

Secretary of Energy Hazel O'Leary issued a *Secretarial Policy on the National Environmental Policy Act* on June 13, 1994 (DOE 1994a). She directed that a number of initiatives be implemented to *"streamline the NEPA process, minimize the cost and time for document preparation and review, emphasize teamwork, and make the process more useful to decisionmakers and the public."* The policy statement covers six principal areas: (1) delegations of authority; (2) NEPA process changes; (3) contract reform; (4) reforms for high priority projects; (5) enhanced public involvement; and (6) continuing improvement. The six areas are summarized as follows:

Delegations of Authority. *Heads of DOE Field Organizations are delegated "full authority" for EAs, FONSI, CX determinations, and floodplain/wetlands documentation requirements.* These responsibilities may be redelegated to subsidiary Field Organizations. The delegations are based on these criteria: designation of a NEPA Compliance Officer (NCO); establishment of internal scoping procedures; preparation of a public participation plan; and preparation of a quality assurance plan (QAP). Field organizations must also have adequate DOE legal resources available. This new authority was delegated to the DOE Albuquerque Operations Office (DOE-AL) on December 20, 1994, and to the DOE Kirtland Area Office (KAO) on March 6, 1995.

DOE Secretarial Officers (assistant secretaries, directors, and administrators) are authorized to approve EIS IPs after soliciting comments from the Office of Environment, Safety, and Health (ES&H) and consulting with the Office of General Counsel (OGC). (IPs are intended to be *brief*, normally about 20 pages.) ES&H can direct Secretarial Officers and field organizations to prepare an EA or an EIS on any proposed project. Annual NEPA planning summaries must be submitted by Secretarial Officers and heads of Field Organizations by January 31 of each year, with summaries made available to the public. Every three years, Field Organizations must include in the annual NEPA planning summary an evaluation of whether a sitewide EIS would facilitate future NEPA compliance efforts for sites under their jurisdiction.

NEPA Process Changes. Implementation of the NEPA process must be a *team effort* including the designation of a DOE NEPA Document Manager (NDM). Either the Project Manager or the NCO may serve in this capacity. The NDM is directed to conduct an *early internal scoping process* for any EA or EIS being proposed. For an EIS, internal scoping will precede the public scoping process and will include a proposed schedule and a public participation plan. Absent "extraordinary circumstances," *a Final EIS (FEIS) must be completed within 15 months* from the date of issuance of the NOI (an unprecedented schedule). Internal reviews of draft EAs and DEISs are to be concurrent rather than sequential in order to eliminate multiple revision cycles.

Under the new Secretarial Policy Statement, "integration" of NEPA and Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) processes is not mandatory but may be done after consultation with stakeholders. The policy provides that DOE "will rely on the CERCLA process for review of actions taken under CERCLA." Separate NEPA reviews will be undertaken for certain waste management activities while

CERCLA documents will "incorporate NEPA values, such as analysis of cumulative, off-site, ecological, and socioeconomic impacts, to the extent practicable." Project managers must consult with DOE Environment, Safety and Health (ES&H) offices and the Office of General Counsel (OGC) regarding NEPA compliance procedures to be used for Resource Conservation and Recovery Act (RCRA) corrective action. (SNL project initiatives should consult with Departments 7258 or 8644.) (See Guide Section 5.2 on NEPA/CERCLA/RCRA integration.)

Contract Reforms. Future contracts for preparation of EAs and EISs will contain incentives to encourage superior performance. *All NEPA document contractors (including SNL) will be subject to a performance appraisal.* At the conclusion of each EA or EIS preparation contract, the NDM will evaluate the contractor's performance in terms of quality, timeliness, cost-effectiveness, responsiveness, and application of the May 1993 DOE *Recommendations for the Preparation of Environmental Assessments and Environmental Impact Statements* (DOE 1993a). (See Guide Section 2.3.4 for a discussion of the DOE guidance or *Green Book*.)

Reforms for High Priority Projects. If an EA or EIS has a short time fuse or is "unusually controversial," the policy statement directs that DOE personnel rather than contractors be used to prepare the documents "to the maximum extent practicable." Contractors would be used only for limited analytical or drafting assignments. In such circumstances, the NDM can form a "special team" comprised of field organization personnel and representatives of ES&H and OGC. (No criteria are provided for determining what constitutes a "short" preparation time or a project of "unusual" controversy.)

Enhanced Public Involvement. NEPA Document Managers are directed to "take appropriate action to encourage and facilitate public participation throughout the NEPA process," using available DOE guidance. *"Enhanced" opportunities for public involvement include, at the minimum, early public notice of the intent to prepare an EA and opportunity for interested parties to review EAs prior to their being approved by DOE.* (This policy is already being implemented under the DOE NEPA procedures discussed in Guide Sections 3.3.6, 3.5.5, and 3.5.10.)

Continuing Improvement. On the first anniversary date of the 1994 Secretarial Policy Statement, a DOE "quality improvement team" will be formed to evaluate the effectiveness of the new initiatives and consider additional NEPA compliance reforms. DOE ES&H will solicit comments on "lessons learned" upon the completion of each EA or EIS in the DOE

system for circulation to NCOs and NDMs. The May 1993 EA/EIS preparation guidance (*Green Book*) will be revised as appropriate to reflect lessons learned and improve DOE NEPA policy, guidance, and training.

2.3.3 DOE Order 5440.1E and DOE Draft Order 491

DOE Order 5440.1E of November 10, 1992, on the "National Environmental Policy Act Compliance Program" replaced DOE Order 5440.1D of February 22, 1992. The Order references a long list of federal statutes and regulations and other DOE orders. It also contains a number of useful definitions. DOE 5440.1E is devoted primarily to establishing organizational responsibilities and authorities although some policy initiatives are included.

Draft DOE Order 491, which is intended to replace Order 5440.1E, was circulated for comment on April 6, 1995. The draft Order reflects many of the policy initiatives contained in the DOE Secretarial NEPA policy statement of June 1994 (Guide Section 2.3.2) and contains more substantive NEPA compliance guidance than DOE 5440.1E. While reiterating the standing DOE policy of "full compliance with the letter and spirit" of NEPA, *the draft Order stresses the need to "control the cost and time for document preparation and review" while maintaining quality.* Included in the NEPA compliance requirements are internal scoping procedures, scheduling, QAPs for NEPA document preparation, public participation plans, and the assignment of a DOE NDM for each EA and EIS. Responsibilities of Secretarial Officers and Field Organizations for preparation and review of EAs and EISs are set forth in detail. Responsibilities of NEPA NCOs and NDMs are also included.

2.3.4 DOE May 1993 EA/EIS Preparation Guidance (The "Green Book")

A 38-page guidance document, *Recommendations for the Preparation of Environmental Assessments and Environmental Impact Statements* (referred to in this Guide as the *Green Book*), was issued by the DOE Office of NEPA Oversight in May 1993. The purpose of the guidance is to improve the quality of EAs and EISs and "expedite their review and approval." The *Green Book* recognizes that each DOE project presents a unique set of circumstances and that *EA or EIS preparation cannot be reduced to "a simple formula or cookbook."* Thus, none of the recommendations are inflexible and must be "adapted" to particular circumstances.

The *Green Book* introduces the "*sliding scale approach*" which embraces the CEQ requirements that only real issues be addressed and that insignificant issues be eliminated from detailed study. The term "scale" refers to the spectrum of significance of environmental

impact (see Figure 2-2). *Under the sliding scale approach, issues and impacts are to be analyzed "in proportion to their significance."* This would also hold true for other elements, e.g., descriptions of the proposed action, alternatives, and the affected environment. However, the guidance cautions that the sliding scale approach should not be used "to address potentially significant impacts in a complex EA, rather than preparing an EIS."

Figure 2-2
DOE "Sliding Scale" Approach

The *Green Book* provides guidance in the following areas:

- Purpose and Need for Action
- Description of Alternatives, Including the Proposed Action
- The Affected Environment
- Environmental Impacts (Effects)
- List of Preparers, Agencies, and Persons Consulted
- General Document Quality/Reader Friendliness.

Many of the recommendations in the guidance document are incorporated or referenced in the EA and EIS discussion in Guide Section 4.0.

Caution: The *Green Book* notes that it is "one tool among many." It does not purport to serve as comprehensive EA and EIS guidance or as a "replacement for good judgment."

Project managers and document authors should not rely solely on the Green Book without consulting the appropriate SNL ES&H departments, the SNL NEPA Group, CEQ and DOE NEPA regulations, and other guidance documents.

2.3.5 DOE Floodplains/Wetlands Review Requirements

Analyses of the impact of a proposed action on floodplains and wetlands is a prime example of integrating other environmental review procedures with NEPA documentation. The DOE

regulations in 10 CFR Part 1022 establish the procedures to be followed for "Compliance with Floodplain/Wetlands Environmental Review Requirements." The requirements are based primarily on the following two Executive Orders (E.O.s):

- ***E.O. 11988 on Floodplain Management*** of May 24, 1977, requires federal agencies to: minimize the impacts of floods on human safety, health, and welfare; restore and preserve the natural and beneficial values served by floodplains; evaluate potential effects of actions taken in floodplains; consider alternatives to avoid adverse effects and incompatible development in floodplains; and provide opportunity for early public review of proposed actions.
- ***E.O. 11990 on Protection of Wetlands*** of May 24, 1977, requires federal agencies to: minimize destruction, loss, or degradation of wetlands; preserve and enhance their natural and beneficial values; avoid support of new construction of wetlands where there is a practicable alternative; provide for early public review of proposals for new construction; and provide mitigation measures.

The DOE regulations apply to all proposed actions in floodplains or wetlands where practical alternatives are still available. If a project has progressed to the point where alternatives are no longer practical, mitigation measures are to be undertaken to minimize potential harm and preserve floodplain values. *When considering how NEPA applies to a proposed action, DOE (and SNL) must determine the applicability of floodplain management and wetlands protection requirements.*

If the regulations apply to a proposed project, a "floodplain/wetlands assessment" is mandatory. The assessment must include a project description; positive and negative effects of the proposed action on the floodplain or wetlands; and alternatives to avoid adverse impacts. Mitigation measures must also be identified. Where an EA or an EIS is required, the floodplain/wetlands assessment must be prepared concurrently with and included in the appropriate NEPA document. If neither an EA nor an EIS is required, a *separate* assessment must be prepared. Public notice and opportunity for "early" public comment is required whether or not an EIS is prepared.

2.3.6 DOE-AL Environmental Assessment Quality Assurance Plan (QAP)

In January 1995, DOE-AL issued a *Quality Assurance Plan for the Environmental Assessment Process Under the National Environmental Policy Act* (DOE-AL 1995). The Quality Assurance Plan (QAP) defines policy, responsibilities, and minimum requirements for implementing a comprehensive QAP for the DOE-AL EA process. *The QAP is intended to fulfill the requirements for quality assurance contained in the June 1994 DOE Secretarial*

policy statement on NEPA (Guide Section 2.3.2). Responsibilities are spelled out in detail for the following: Area Office Manager (KAO); NEPA Document Manager (NDM); Area Office Environmental Manager; DOE-AL Environmental Protection Division (EPD) Director; DOE Management and Review (M&R) team members; DOE-AL NEPA Compliance Officer (NCO); and DOE-KAO NCO.

The EA QAP includes a DOE-AL "Guide for Public Participation Plans." Example transmittal letters and memoranda are also included. However, the focus of the QAP is on DOE-AL and DOE-KAO functions and responsibilities. *DOE Maintenance and Operations (M&O) contractors are required to prepare and maintain their own QAP for EA preparation and review.* The DOE-AL EA QAP contains very little information on the DOE-M&O contractor interface and no information on SNL responsibilities.

2.4 Other Federal Laws

In addition to NEPA, other federal environmental laws and parallel state regulatory requirements are frequently discussed in EAs and EISs. Generally, the NEPA document discussion is in the context of compliances applicable to the proposed action (e.g., those under the Clean Air Act, Clean Water Act, RCRA, or CERCLA). The applicability of other environmental laws to the proposed action also indicates the nature and magnitude of environmental consequences that must be addressed in the EA or EIS. Thus, *any "checklist" used as a tool to determine the appropriate level of NEPA documentation will include the identification of permits, consultations, and other approvals associated with the proposal* (see Guide Section 3.1.3). Also, complying with another environmental law (e.g., site cleanup under RCRA corrective action) could itself create impacts that need to be addressed in a NEPA document.

Obviously, compliance with other environmental laws and regulations serves as *one of many* methods of mitigating what might otherwise result in unacceptable environmental consequences (e.g., contributing to significant deterioration of air quality or destroying an endangered species habitat). *However, it is not adequate for purposes of environmental impact analysis to state that "all applicable environmental laws and standards will be complied with in implementing the proposed action."* The assessment must specifically identify the standards or other requirements and demonstrate how compliance will be achieved (see DOE *Green Book* Section 6.2). Also, the mere fact that a regulation or standard will be complied with does not mean that there will be no adverse impact. [For example, some cancer risk

associated with releases of radionuclides may still exist even if there is rigorous compliance with all EPA, DOE, or Nuclear Regulatory Commission (NRC) standards.]

As discussed in Guide Section 2.2.2, the CEQ regulations require that the environmental review procedures under laws be integrated with NEPA requirements [40 CFR §1500.2(c)]. *The regulations specifically require integrating NEPA requirements with surveys and investigations imposed by the National Historic Preservation Act and the Endangered Species Act* (see Guide Attachments IV and V). Other obvious opportunities for integration include, but are not limited to: analysis of air pollutant emissions regulated under the Clean Air Act; assessment of "dredge and fill" activities under §404 of the Clean Water Act; and hazardous waste-related investigations conducted under RCRA or CERCLA. Most of the federal laws have parallel or similar counterparts at the state level. Project managers of SNL-proposed actions should review these requirements for possible integration with NEPA documentation.

2.5 Other Federal Agency NEPA Requirements

At SNL/NM, the DOE owns land outright and uses other land under agreements with the U.S. Air Force (USAF), Kirtland Air Force Base (KAFB), and the U.S. Forest Service (USFS). At the Kauai Test Facility (KTF) in Hawaii, the DOE is a tenant of the U.S. Navy's Pacific Missile Range Facility (PRMF). *At the facilities where the DOE is a tenant or permittee of another federal agency, the NEPA compliance procedures of that particular federal agency must be considered.*

For example, all proposed SNL/NM actions occurring on USAF lands at the KAFB, and subject to a USAF permit, require compliance with both DOE and USAF NEPA review procedures. Compliance with the USAF NEPA process is required for new permits, permit renewals, and any permit amendments involving a change in activities at the KAFB site.

In January 1995, the KAFB issued *The Environmental Impact Analysis Process Guide* (*The EIAP Guide*, Shipley Associates 1995b) to implement NEPA compliance procedures contained in Air Force Instruction (AFI) 32-7061 of March 7, 1994, on "The Environmental Impact Analysis Process" (EIAP). Among other things, *The EIAP Guide* provides detailed instructions for filling out AF Form 813 which must be submitted to the KAFB Technical Advisory Subcommittee (TAS). The TAS then makes a determination on the required level of NEPA documentation for a proposed action (CX, EA, or EIS).

If an SNL/NM proposed action is on KAFB land, an AF Form 813 must be prepared by the SNL/NM organization proposing the project and submitted to Facilities Planning (Department 7312). Following review and comment, Department 7312 submits the AF Form 813 to SNL/NM Department 7258. DOE-KAO is responsible for submitting the AF Form 813 to the Air Force. A DOE-AL Environmental Checklist (ECL)/Action Description Memorandum (ADM) (see Guide Section 3.1) should be prepared in advance or concurrently with preparation of any necessary USAF documentation.

3.0 NEPA Document Preparation Guidance

This section provides the "nuts and bolts" of the Guide. The intent is to provide guidance that is consistent with the requirements of the CEQ and DOE NEPA procedures as well as the EA/EIS recommendations contained in the *Green Book* and other DOE guidance. The NEPA compliance documents addressed in this section include the following:

- *Environmental Checklist (ECL)/Action Description Memorandum (ADM): Guide Section 3.1*
- *Categorical Exclusion (CX) Determinations: Guide Section 3.2*
- *Environmental Assessment (EA): Guide Section 3.3*
- *Finding of No Significant Impact (FONSI): Guide Section 3.4*
- *Environmental Impact Statement (EIS): Guide Section 3.5*
- *Notice of Intent (NOI): Guide Section 3.5.4*
- *Record of Decision (ROD): Guide Section 3.5.10.*

The NEPA documentation decision process is illustrated in Figure 3-1.

3.1 Environmental Checklist (ECL)/Action Description Memorandum (ADM)

The ADM is used throughout the DOE complex. However, the combined ECL/ADM is unique to DOE-AL and its area offices. The ADM is defined in DOE Order 5440.1E as:

An internal DOE document (normally, not more than 5 pages) containing a concise description of a proposed action and discussion of relevant potential environmental issues to assist DOE in determining the appropriate level of a NEPA document for the proposed action.

Neither the ADM nor the ECL/ADM qualifies as an "environmental document" under the CEQ regulations in 40 CFR §1508.10 or as a "NEPA document" under the DOE regulations in 10 CFR §1021.104. Nevertheless, these documents are used much more frequently in the DOE system than either EAs or EISs. *Instructions on preparing an ECL/ADM are found in the Department 7258 "Guidance on Completing DOE ECL/ADM NEPA Form."* They are

¹ ECL/ADM – Environmental Checklist/Action Description Memorandum

² Subpart D – Of DOE NEPA Procedures (10 CFR Part 1021)

³ Appendix A of CFR Part 1021, Subpart D lists categorical exclusions that apply to general (e.g., administrative) actions with potential impacts too remote and conjectural to be meaningfully analyzed. An Appendix A CX determination does not require DOE internal documentation.

Figure 3-1
NEPA Documentation Decision Process

also found in Chapter 10, Section I of the SNL Environment, Safety, and Health (ES&H) Manual (Sandia 1995a).

3.1.1 ECL/ADM Role in the NEPA Process

When properly prepared, the ECL/ADM plays a dual role in the DOE-AL NEPA process:

1. It serves as a device for determining the *appropriate level of NEPA documentation* for a proposed action (CX, EIS, EA, or no documentation required).
2. It provides the initial scoping for an EA or EIS.

The historic role of the ADM (with or without an ECL) did not change with the publication of the DOE NEPA regulations. The preamble to the regulations states as follows:

An ADM is an internal DOE document used to assist DOE in determining the appropriate level of NEPA review—EA or EIS—for a proposed action not listed in the classes of action in the appendices to Subpart D of the rule or for which the appropriate level of review is unclear (57 *FR* 15123, April 24, 1992).

If it seems clear at the outset that a proposed action can be categorically excluded under Subpart D, Appendix B, filling out the "checklist" form and attaching a brief project description will usually be sufficient to support a CX determination. (A Subpart D, Appendix A CX does not require preparation of an ECL/ADM.) (See Guide Section 3.2 for information on CX determinations.)

3.1.2 ECL/ADM Step-By-Step Process

The purpose of this section is to outline "who does what when" throughout the ECL/ADM process. This procedure also applies to CX determinations and preparation of EAs and EISs discussed in Guide Sections 3.2, 3.3, and 3.5, respectively. An ECL/ADM process flow chart is presented in Figure 3-2.

Step 1: Initiation of NEPA Process. In most cases, the NEPA process begins with the SNL Line Organization which serves as the "action originator." There are exceptions, such as when Department 7258 or 8644 takes the lead or preparation of a NEPA document is assigned to SNL by DOE Headquarters (DOE-HQ). *Ultimately, the Line Organization is responsible for seeing the process through to completion (unless an EIS is required).* (See Guide Section 2.5 for a discussion of procedures to be followed when proposed action is on

¹ DOE NEPA regulations in 10 CFR Part 1021.

² In some cases, DOE-KAO may elevate determinations to DOE-AL.

Figure 3-2
Environmental Checklist/Action Description Memorandum Process Flow Chart

KAFB lands.) [Note: Ultimately, NEPA compliance is DOE's responsibility. Thus, DOE can always initiate the NEPA process unilaterally.]

Step 2: Consultation with NEPA Group. *Consulting with the SNL/NM Risk Management and NEPA Department (7258) or the SNL/CA Environmental Operations Department (8644) is imperative for starting out on the right foot.* A common error is assuming at the outset that if a proposed action qualifies for a CX nothing more needs to be done. This is the case only with one of the classes of action listed in Subpart D, Appendix A of the DOE NEPA regulations. All that is required is internal documentation in the Line Organization's files (e.g., the Management Assurance Notebook) that a NEPA review was conducted and its conclusion. *If Appendix A does not apply, the NEPA Group should be consulted regarding preparation of the ECL/ADM.*

Step 3: ECL/ADM Preparation. *The ECL/ADM is prepared by the SNL Line Organization which is the "owner" of the proposed action.* Preparers can use the guidance contained in the SNL ES&H Manual, Chapter 10, or the Department 7258 guidance. The Department 7258 guidance is summarized in Guide Section 3.1.3 below on ECL/ADM Format and Content. Department 7258 or 8644 will assist and advise upon request.

Step 4: Submittal to SNL NEPA Compliance Group. *The completed ECL/ADM is submitted to the SNL Department 7258 or 8644 Team Leader for further processing and interface with DOE.* The SNL NEPA Team Leader then assigns the ECL/ADM to a NEPA Specialist for further review and subsequent action.

Step 5: NEPA Specialist Review. *The assigned SNL NEPA Specialist reviews the ECL/ADM for completeness and technical accuracy.* If necessary, the NEPA Specialist refers the document back to the originating ES&H Coordinator or Line Organization manager for additional information or revisions necessary to meet DOE requirements and expedite the DOE review process.

Step 6: SNL Recommendation of Appropriate Level of NEPA Documentation to DOE. Following review and possible revisions of the ECL/ADM, the Department 7258 or 8644 NEPA Specialist recommends (subject to a DOE determination) whether the proposed action is likely to qualify for one of the following levels of NEPA documentation:

1. **An Appendix B CX:** The proposed action is the same or similar to the actions listed in 10 CFR Part 1021, Subpart D, Appendix B. (Appendix A CXs do not require DOE documentation or review.) If the proposed action corresponds to actions described in a current "umbrella" ECL/ADM on which DOE has already made a CX determination, the SNL NEPA specialist can make the decision without DOE review unless there is some uncertainty.
2. **An EA:** The proposed action is the same or similar to the actions listed in Subpart D, Appendix C. (See Guide Section 3.2.2 regarding other circumstances in which an EA may be required.)
3. **An EIS:** The proposed action is the same or similar to the actions listed in Subpart D, Appendix D, or an EIS is otherwise appropriate. (An EIS determination must be made at the DOE-HQ level.)
4. **Prior NEPA documentation:** The proposed action is an integral part of a "continuing" or "ongoing" activity or program that has been *adequately* analyzed in a prior EA or EIS and does not qualify as a "new" proposed action.
5. **None of the above:** The proposed action is not listed in any of the Subpart D Appendices and has not been analyzed in a prior NEPA document. In this case, it may be determined that an EA or an EIS is required.

Step 7: Forward Recommendation to DOE-KAO and Assign NEPA Tracking

Number. The NEPA Specialist assigned to the ECL/ADM forwards the document to DOE-KAO with a transmittal letter recommending an appropriate level of NEPA documentation for the proposed action described in the ECL/ADM. A copy goes to the KAO NCO and other appropriate parties. The SNL NEPA Specialist assigns an internal ECL/ADM identification number for entry into the NEPA tracking system which tracks each movement of a NEPA or NEPA-related document into and out of Departments 7258 or 8644.

Step 8: DOE Determination on Appropriate Level of NEPA Documentation. Upon the recommendation of DOE, the KAO Area Manager *either* makes a determination on the appropriate level of NEPA documentation *or* elevates the decision to DOE-AL. (The latter occurs if it appears that an EIS might be required, although it also occurs if a CX or EA determination is uncertain.) Once the determination is made at one of these two levels, DOE-KAO transmits the information back to the SNL NEPA Group.

Step 9: Transmittal of DOE Determination to Line Organization. The DOE determination is transmitted by Departments 7258 and 8644 with an attached memorandum to

the SNL Line Organization that prepared the ECL/ADM with copies to the assigned NEPA Specialist and other NEPA Team members. *The Line Organization is told to proceed with the proposed action if: it fits the Subpart D, Appendix B list or is determined to be an "ongoing" operation that has adequate prior NEPA documentation.* The proviso is that the Line Organization has complied with all other permitting and regulatory compliance requirements (e.g., cultural resources, endangered species, and air emissions).

3.1.3 ECL/ADM Format and Content

The format and content specified in the Department 7258 "Guidance on Completing DOE ECL/ADM Form" should be followed closely. *Major deviations from this format and content lengthen the review cycle and cause delay.* A copy of the form can be obtained from Departments 7258 or 8644. An electronic copy is also available on Microsoft Word for Windows.

The top one-third of page 1 of the ECL/ADM form is devoted to project information such as: project/activity title (same as the "proposed action"); NEPA ID number (assigned by Department 7258 or 8644); program office; budget and reporting (B/R) code, if known; and names of contacts. The remainder of the form contains six sections or "blocks" as follows:

Block A: Brief Project/Activity Description. This is almost always prepared as an attachment to the form. *It must contain information necessary for the SNL NEPA Group and DOE reviewers to understand what is being proposed, determine if CX eligibility criteria are being met (see Guide Section 3.2.2), and decide what level of NEPA documentation is appropriate.* Generally, the text for this block will take one or two pages and will include:

- Scope of the proposed action [geographic location(s), time frame]
- Major activity elements (new construction, new processes, modifications, expansions, relocations)
- SNL's and DOE's respective roles
- Potential environmental issues that may not require a "yes" response in Block B but may be of interest to DOE decisionmakers.

Brief answers to the who, what, where, why, when, and how questions provide a good information content. Attach site plans, maps, or diagrams if they will clarify and not

complicate the project description. Avoid trying to "sell" or otherwise justify the project. *An inadequate project description is the major cause of delays in ECL/ADM reviews and decisionmaking.*

Block B: Environmental Concerns. Completing this block involves checking "yes" or "no" beside each of the 22 environmental parameters and providing *brief* explanations (one to two paragraphs if possible) for any "yes" response. Environmental concerns under "other" might include socioeconomic issues, environmental justice (see Guide Section 5.3), or land use conflicts. *Possible impacts should be estimated conservatively rather than dismissed or understated.* Check "yes" if in doubt and explain why there may, or may not, be a concern about the parameter in question. Avoid an EA-type impact analysis and conclusions that an impact is "significant" or "insignificant." Pay particular attention to the CX eligibility criteria listed in 10 CFR Part 1021, Subpart D, Appendix B (see Guide Section 3.2.2). The major problem with preparing Block B is the failure to *objectively* evaluate potential environmental concerns. This can cause considerable delay in the ECL/ADM review process.

Block C: Permits. This is usually an attachment to the ECL/ADM form. An explanation is provided if the proposed action requires any local, state, or federal permits, notifications, concurrences, consultations, or other approvals or poses a potential violation of any laws, regulations, or DOE Orders. Examples are: air emissions permits; National Pollution Discharge Elimination System (NPDES) permits; RCRA permits; federal and state agency concurrences regarding threatened or endangered species and cultural resources; violations of ambient air quality standards in "nonattainment" areas; and potential radiological exposures exceeding DOE or EPA standards.

3.1.4 ECL/ADM Review and Determination Time Requirements

The time required for preparing an ECL/ADM varies enormously—from a few hours to a few weeks. *If the checklist is incomplete or inadequate, the designated SNL NEPA Specialist will require revisions or rewrites.* After the document is transmitted to DOE for a determination, the time line ranges from four to six weeks (see Guide Section 3.2.3). This depends principally on whether the determination is made by DOE-KAO or whether it needs to be elevated to DOE-AL. It also depends on the complexity of the proposed action and whether it "fits" one of the CX, EA, or EIS lists in the Part 1021, Subpart D appendices.

3.1.5 Public Participation/Disclosure

The CEQ regulations require agencies to make "diligent efforts" to involve the public in implementing their NEPA procedures and to provide public notice of the availability of environmental documents [§§1506.6(a) and (b)]. *Because ECL/ADMs are part of a DOE internal procedure and are not included in the definition of "environmental documents," public disclosure is not required.* However, ADMs do qualify as "underlying documents" available to the public under the Freedom of Information Act (FOIA) [§1506.6(f)].

3.2 Categorical Exclusion (CX) Determination

The CEQ regulations require federal agencies to identify three typical classes of proposed actions: (1) those which normally require an EIS; (2) those which normally require an EA but not necessarily an EIS; and (3) those which normally do not require either an EIS or an EA. *The latter are referred to as "categorical exclusions." They are defined as classes of actions "which do not individually or cumulatively have a significant effect on the human environment" (§1508.4).* The reason behind granting a CX is to reduce paperwork and delay and make the NEPA process more efficient.

The greatly expanded list of CXs in the DOE regulations referred to in Guide Section 3.2.1 is included in Part 1021, Subpart D, Appendices A and B which are generally referred to as the "Subpart D list." Appendix A lists 30 "general agency actions" which are strictly administrative or procedural in nature (e.g., finance, personnel, contracts, information gathering) and would generally have no environmental impact. Appendix B lists 77 activities in seven broad classes of "specific agency actions." Twenty-two of these are associated with facility operation and eight relate to environmental restoration and waste management.

The DOE Appendix B CXs fall in the following categories:

- B1: CXs applicable to facility operation (e.g., routine maintenance, routine on-site storage, minor road relocation).
- B2: CXs applicable to safety and health (e.g., workplace modifications, facility upgrades).
- B3: CXs applicable to site characterization, monitoring, and general research (e.g., transport packaging tests, bench-scale projects, outdoor tests and experiments).
- B4: CXs applicable to power marketing and power resources (e.g., dismantling and removal of transmission lines, construction or modification of substations).

- B5: CXs applicable to conservation, fossil, and renewable energy activities (e.g., repair/replacement of pipeline, oil spill cleanup).
- B6: CXs applicable to environmental restoration and waste management activities (e.g., CERCLA removals and similar actions under RCRA, environmental control systems improvement, siting/construction/operation of pilot-scale waste management facilities).
- B7: CXs applicable to international activities (e.g., import/export of special nuclear or isotopic materials).

A CX is not a formal NEPA document. Rather, it is a DOE determination supported by documentation: an ECL/ADM with attachments and correspondence pertaining to recommendations or concurrence between SNL, DOE-KAO, or DOE-AL. DOE-HQ offices are not involved in CX determinations.

3.2.1 CX Step-By-Step Procedure

The steps outlined in Guide Section 3.1.2 for preparation and review of an ECL/ADM also apply to obtaining a CX determination for a proposed action. Step 1, consultation with Departments 7258 or 8644, is especially critical in order to determine if the proposed action *might* fall (is the same or similar to) within the classes of actions listed in Subpart D, Appendix B. *The Subpart D, Appendix A list includes classes of actions "with impacts so remote or conjectural as to preclude meaningful consideration" (57 FR 15131).* Appendix A determinations can be made by the SNL Line Organization with or without consultation with the NEPA Group. If a proposed action clearly fits Appendix A, that ends the process (Figure 3-2). Formal DOE documentation is not required. *Further, an ECL/ADM is not required for a proposed action that clearly fits an action listed in Appendix A.*

Determining if a proposal is among the classes of actions on the Appendix B list is more complex. Even if a proposal fits the Appendix B list, its associated activities could still "individually or cumulatively have a significant effect on the human environment" (57 FR 15130). In such a case, a CX would be invalid. This could be due to extraordinary circumstances, connections to other actions with potentially significant impacts, or failure to meet the eligibility criteria discussed in Section 3.2.3 below. *A proposed action does not automatically qualify for a CX simply because it is on the Appendix B list.*

3.2.2 Required Findings and Eligibility Criteria for a CX

A proposed action cannot be presumed a priori to qualify for a CX merely because it appears on the Subpart D, Appendix B list. Being on the list is only a *conditional* CX qualification. A CX determination can be made only if the ECL/ADM indicates that the proposed action is eligible for a CX according to findings and criteria spelled out in the DOE regulations. These findings and criteria indicate whether CX candidate actions could individually or cumulatively have a significant effect on the human environment (57 FR 15130). The CX "screening" process is shown in Figure 3-3.

First, the DOE must make three specific findings listed in §1021.410:

1. *The proposal "fits" within a class of actions listed in Subpart D, Appendix A or B* (although the SNL project initiator can make an Appendix A finding).
2. *There are no "extraordinary circumstances" related to the proposal that may affect the "significance" of its environmental effects.* Extraordinary circumstances include "unique situations" such as scientific controversy about environmental effects, uncertain effects or unknown risks, or unresolved conflicts concerning alternative uses of available resources. (Although not included in the DOE regulations, public controversy about environmental effects also influences a CX determination.)
3. *The proposal is not "connected" to other actions with potentially significant impacts or is not "related" to other actions with cumulatively significant impacts* [see Guide Section 3.5.5 and §1508.25(a)(1)]. Also, a proposed action cannot get a CX determination if it is part of a proposal for which an EIS is being prepared unless it qualifies as an "interim" action under 40 CFR §1506.1.

Second, it must be determined that the proposed CX meets the "conditions that are elements of the classes of action in Appendix B" (also known as "*eligibility criteria*"). For a proposed action to "pass" the eligibility criteria, it must *not*:

- Threaten a violation of applicable statutory, regulatory, or permit requirements, including requirements of DOE Orders (e.g., air emissions that do not conform to a state air quality implementation plan).
- Require siting, construction, or major expansion of waste storage, disposal, recovery, or treatment facilities (e.g., wastewater or groundwater treatment facilities).

¹ Categories of actions fitting the Subpart D, Appendix A list do not require DOE CX documentation.

Figure 3-3
Categorical Exclusion (CX) "Screening" Process

- Disturb hazardous substances, pollutants, or contaminants so as to result in uncontrolled or unpermitted releases (e.g., excavation of solid waste management units containing hazardous wastes).
- Adversely affect "environmentally sensitive" resources. These include, but are not limited to: properties of historic, archeological, or architectural significance; federally-listed as well as state-listed endangered or threatened plant or animal species or critical habitat; floodplains and wetlands (see Guide Section 2.3.5); prime agricultural lands; special sources of water (sole-source aquifers and other vital regional water resources); and tundra, coral reefs, or rain forests.

3.2.3 Time Requirements

DOE-KAO has considerably speeded up its review and approval of CX determinations. During 1994, DOE approval time ranged from five weeks to seven months. The FY95 approval time is averaging four to six weeks. If the proposed action is controversial or has to be elevated to DOE-AL for a determination, additional time will be required. A complete and adequate ECL/ADM which addresses the findings and eligibility criteria discussed in Guide Section 3.2.2 above will hasten the CX determination time.

3.2.4 Public Participation/Disclosure

As with ECL/ADMs (Guide Section 3.1.5), public disclosure is not required for CX determinations. However, such determinations and any "underlying documents" are available to the public under the FOIA.

3.3 Environmental Assessment (EA)

EA preparation and review is part of a multi-phased process that leads to one of two endpoints: preparation of an EIS or a FONSI (see Figure 3-4). Federal agencies, including DOE, prepare many more EAs than EISs. Since 1979, when 1,273 EISs were filed, the number of EISs has steadily declined; in 1991, only 446 EISs were filed (Blaug 1993). Clearly, the EA has become the "detailed statement" of choice.

It is obvious that agencies often prepare EAs to avoid preparing EISs, frequently based on the erroneous assumption that EAs do not require public involvement (see Guide Section 3.3.6). At the same time, increased reliance on EAs can result in project design changes and incorporation of mitigation measures early in the decisionmaking process—a NEPA objective (Blaug 1993).

Figure 3-4
Environmental Assessment (EA) Decision Process

3.3.1 EA Role in the NEPA Process

The CEQ regulations require agencies to prepare an EA "when necessary" as prescribed by their own agency procedures (§1501.3). If a decision has already been made to prepare an EIS, an EA is not required. An EA is defined by CEQ as "a concise public document" which is intended to briefly provide "sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact" (§1508.9).

The primary role of an EA is to determine whether the potential impacts of a proposed action are "significant" enough to require an EIS. Even if no EIS is necessary, an EA can serve many other purposes including: complying with other laws and regulations such as those pertaining to cultural resources or threatened/endangered species; mitigating impacts; guiding project planning and design; evaluating alternatives; bridging the gap between a CX and an EIS; or simply promoting the purposes of NEPA (Blaug 1993).

3.3.2 Proposed Actions "Normally" Requiring an EA

The sixteen classes of actions that "normally require EAs but not necessarily EISs" are listed in 10 CFR Part 1021, Subpart D, Appendix C. Those that potentially apply to SNL activities are:

- C1: Major projects, as designated by DOE Order 4240.1 on "Designation of Major System Acquisitions and Major Projects."
- C4: Upgrading (reconstructing) an existing transmission line.
- C8: Protection of fish and wildlife habitat.
- C9: Field demonstration projects for wetlands.
- C10: Siting/construction/operation/decommissioning of a synchrotron radiation accelerator facility.
- C11: Siting/construction/operation/decommissioning of a particle acceleration facility.
- C14: Siting/construction/operation of water treatment facilities.
- C15: Siting/construction/operation of research and development incinerators and nonhazardous waste incinerators.
- C16: Siting/construction/operation of on-site waste storage facilities (excluding high-level waste and spent nuclear fuel).

In summary, an EA must be prepared when:

1. *The proposed action cannot be categorically excluded (is not on the Subpart D, Appendix A or B list), or its exclusion is uncertain.*
2. *The proposed action is on the Subpart D, Appendix A or B list, but there are "extraordinary circumstances"; the action is "connected" to other actions with potentially significant impacts; or the action does not meet the Appendix B eligibility criteria (see Guide Section 3.2.2).*
3. *The proposed action is not one normally requiring an EIS (Appendix D list).*
4. *The proposed action is in a "gray area" that does not fit either the Appendix C list (requiring an EA) or the Appendix D list (requiring an EIS). However, in this case an EIS could be required.*
5. *DOE, at its discretion, determines that an EA is appropriate.*

Any proposed action with anticipated impacts that are not clearly insignificant can require an EA. (See Guide Section 3.4 on the definition of "significance.") While the Subpart D appendices should be consulted, the final determination must rest on informed professional judgment and DOE concurrence. If a determination of the *degree* of significance of potential impacts requires detailed analysis (e.g., a transportation risk assessment), then an EA (or an EIS) is appropriate. The determination of when to prepare an EA is not subject to a mathematical formula or some type of "cookbook."

3.3.3 Step-By-Step Preparation and Review

This section is similar to Guide Section 3.1.2 on ECL/ADMs in that it provides the steps or "building blocks" for the EA preparation and review process (see Figure 3-5). Although there are a number of "feedback loops," the steps outlined are generally sequential. The EA process begins where the ECL/ADM process ends: with a DOE-KAO determination regarding the appropriate level of NEPA documentation for the proposed action, in this case an EA.

EA preparation and review is a DOE responsibility, supported as appropriate by SNL.

Thus, the DOE-AL and DOE-KAO roles described in the DOE-AL QAP for the EA process (see Guide Section 2.3.6) are referenced where they apply.

Step 1: DOE EA Determination. This determination will be made, in most cases, by DOE-KAO following a recommendation by the Department 7258 or 8644 NEPA Specialist or the NEPA Team Leader (ECL/ADM Step 8). In cases of uncertainty, this determination may be elevated to DOE-AL or DOE-HQ.

Step 2: Establishment of the EA Team. According to the June 1994 DOE Secretarial policy statement on NEPA (DOE 1994a) (Guide Section 2.3.2), the NEPA process should be a "team effort." Under the January 1995 DOE-AL *Quality Assurance Plan for the Environmental Assessment Process Under the National Environmental Policy Act* (DOE-AL 1995) (EA QAP), the "team" for the preparation and review of any EA would consist of:

- The DOE-KAO NEPA Compliance Officer (NCO)
- The DOE-KAO NEPA Document Manager (NDM)
- Members of the DOE M&R Team (legal counsel, environmental specialists, public information specialists, program specialists, etc.).

Figure 3-5
Environmental Assessment (EA) Preparation and Review Building Blocks

It is anticipated by the QAP that some EAs "will be best handled by having a DOE team assume complete responsibility for writing and processing the EA" (QAP Item 7).

The QAP does not provide for EA Team membership for non-DOE employees (e.g., SNL NEPA specialists). However, as a practical matter, *the EA Team should be jointly established by DOE-KAO and SNL for proposed actions to be implemented by SNL and for EAs to be prepared by SNL or SNL subcontractors*. At a minimum, non-DOE personnel should include SNL Department 7258 or 8644 NEPA Specialists, the appropriate SNL Line Organization manager, and the EA subcontractor's project manager (when preparation of the EA is contracted). SNL program personnel with special expertise should also be EA Team members. At the same time, the EA Team should be kept small so as to facilitate decision-making. *EA Team members should be dedicated to seeing the EA process through from start to finish*. (See Step 2, Guide Section 3.5.3 on the EIS Team.)

Step 3: Internal Scoping. *Early internal scoping, conducted in advance of actual EA preparation, assures effectiveness and efficiency of the EA process.* The internal scoping procedures to be established by DOE-KAO will serve as a guide. The DOE NDM will have the principal responsibility. Others who should be involved in internal scoping include: DOE M&R team members; project initiator personnel; the EA preparer or contractor; SNL Department 7258 or 8644 NEPA Specialists; and DOE and/or SNL project specialists. The procedures used for scoping should be flexible and informal. Internal scoping should focus on: purpose and need for the action; description of the proposed action; identification of alternatives; the degree of analysis for each alternative; important issues and concerns (initially identified in the ECL/ADM); depth of environmental impact analysis (using the DOE "sliding scale" approach); type and extent of risk assessment (if one is conducted as part of the impact analysis); and schedule. (Note: Public scoping meetings are held only rarely for EAs in the DOE system. The nine public meetings held on the 1995 Medical Radioisotope Production Program EA prepared by SNL/NM Department 6626 does not represent typical EA procedure.) (See Step 3, Guide Section 3.5.3 on EIS scoping.)

Step 4: Project Plan. An EA Project Plan is not required by DOE regulations or guidance or the DOE-AL EA QAP. However, a Project Plan has been prepared for several recent EAs prepared by SNL/NM. The Project Plan should include: the EA's purpose and objectives; the EA scope (from Step 3); description of activities and responsibilities; a quality assurance/quality control (QA/QC) plan; a prepared schedule; review and commenting procedures; plan

for preserving an "administrative record" (see Glossary); and expected results. Assumptions on which the Project Plan is based can also be included.

Step 5: Notification of Host State(s), Tribe(s), and the Public of Intent to Prepare an EA.

The DOE regulations require that the host state and host tribe, and any other state or American Indian tribe that may be "affected" by the proposed action, be notified of DOE's determination to prepare an EA [§1021.301(c)]. *The DOE Secretarial NEPA policy statement of June 1994 (DOE 1994a) extends this notification to the public "concurrent with state/tribal notification" as part of DOE's enhanced public involvement initiative.* The DOE Los Alamos Area Office (DOE-LAAO) adopts the concurrent state/tribal/public notification in its "stakeholder involvement" policy which is attached to the DOE-AL EA QAP as an example public participation plan. Although this notification will inform states, tribes, and the public of the opportunity to review and comment on the draft EA prior to DOE approval, it is not intended to extend to the EA scoping process. The notification (which is the responsibility of the DOE-KAO NDM) can occur following the DOE EA determination or after EA scoping. If some scoping has been accomplished, more information will be available to answer state/tribal/public questions.

Step 6: Annotated Outline. This is not required by DOE regulations or guidance.

However, it has been used for recent EAs prepared by SNL/NM and is recommended. The Annotated Outline is generally organized as a four-column table: outline elements; number of pages targeted for each element; persons responsible for each element; and comments on how each element will be prepared. Data needs are also identified. For the Annotated Outline to be most useful, it is important to establish "ownership" by involving EA Team members and proposed authors of various EA sections in its preparation and review.

Step 7: Preliminary (Pre-Decisional) Draft EA. The preliminary draft should be prepared for the entire document. *It should not be prepared and reviewed in segments because all of the segments are interrelated.* The schedule for achieving the preliminary draft milestone must be realistic enough to allow preparation of what the authors consider to be a "final" document. It is important for review purposes that figures, tables, and appendices be included. Substituting "to be done's" (TBDs) for text, figures, and tables should be avoided as much as possible.

Step 8: Internal Review and Comment. *Any EA prepared by SNL personnel or an EA contractor must be thoroughly reviewed for completeness and accuracy, and comments*

resolved, before being submitted to DOE-KAO. SNL reviewers will include appropriate NEPA specialists, Line Organization personnel, and program personnel with special expertise. If the EA is contracted, contractor personnel will be assigned to resolve comments. The DOE-KAO internal review will be coordinated by the KAO NEPA Document Manager with participation by the KAO NCO, DOE M&R Team members, and the DOE-AL NCO. According to the June 1994 DOE Secretarial NEPA policy statement, "internal (DOE) reviews of draft environmental assessments and environmental impact statements will be concurrent, rather than sequential" in order to eliminate multiple revision cycles (DOE 1994a).

Step 9: Response to Comments and Revision of Preliminary Draft EA. The SNL NEPA Team Leader will assign a staff person or the EA contractor to consolidate all DOE comments in one document to avoid redundant or conflicting comments. The draft will be revised in response to comments, as appropriate. A brief document will be prepared by the EA contractor (or SNL preparer personnel) on how comments were resolved in the revision. The revised document will become the draft EA. If the impact analysis indicates that the proposed action will not result in any significant environmental impacts, a draft FONSI will be prepared and attached to the front of the document. A Mitigation Action Plan (MAP) will be included if appropriate (see Guide Section 3.4.2). [A draft FONSI (if applicable) may also be attached to the preliminary draft in Step 6 although this may be premature.]

Step 10: Internal Review and Comment on Draft EA. If possible, this step should be avoided in accordance with the June 1994 Secretarial NEPA policy statement (see Step 7). However, this is not realistic unless the preliminary draft EA requires only minor revision (which is unlikely). This step will involve the same reviewers as Step 7. The draft FONSI will also be reviewed in this step.

Step 11: Preparation of "Final" Draft EA for State/Tribe/Public Review. This step responds to Step 9 comments which should be very minor at this point. Every effort should be made to avoid this third iteration if at all possible.

Step 12: Review and Comment on Draft EA by Host State(s), Tribe(s), and the Public. One or more host states and American Indian tribes will be provided with the opportunity to review and comment on the draft EA prior to DOE's approval in compliance with §1021.301(d) of the DOE regulations. At DOE's discretion, this review period will range from 14 to 30 days. The review should also involve the general public according to the June 1994 Secretarial Policy Statement (see Guide Section 3.3.6). All comments will be

"considered" prior to final EA revisions or approval. DOE-KAO is responsible for accomplishing this step with SNL's assistance. This step is not to be confused with Step 14 involving publication of proposed FONSI.

Step 13: EA and FONSI Revision and Response to Comments. During this step, the EA and FONSI may be revised as appropriate in response to comments received as a result of Step 12. However, DOE may decide that the documents do not need further revision. If so, the EA and FONSI are now in final form and ready for publication.

Step 14: Publication of EA and FONSI or Publication of Proposed FONSI for Public Review and Comment. If no further review is required, the EA and FONSI are ready for publication. *According to the CEQ regulations in §1504.4(e)(2) and the DOE regulations in §10210.322(d), a proposed FONSI must be made available for public review if (1) the proposed action is the same or similar to one requiring an EIS, or (2) the nature of the proposed action is without precedent.* DOE can also publish a proposed FONSI as warranted in other situations (e.g., the proposed action is highly controversial). The proposed FONSI is published in the *Federal Register*. Although not specified in the regulations, the normal public review period will be 30 days. The supporting EA will be made available in public reading rooms at the appropriate locations. FONSI that have been finalized without publication as proposed FONSI must also be made available to the public [§1021.301(a)].

3.3.4 EA Format and Content

EAs are enormously flexible documents with no prescribed format. EA contents vary widely on a case-by-case basis, depending on the nature of the proposed action, internal agency procedures, and other factors. While this is still true, *the trend is toward preparation of EAs that closely mimic EISs in format and content.* The CEQ regulations, which focus almost exclusively on EIS preparation, require only that an EA "provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact" (§1508.9). To fulfill this objective, an EA must *at least* include "brief discussions" of the following:

- Need for the proposal
- Description of appropriate alternatives
- Environmental impacts of the proposed action and alternatives
- Listing of agencies and persons consulted.

The DOE NEPA regulations do not specify EA content other than that required by CEQ except that the "no action" alternative is required even when the proposed action is mandated by legislation or a court order [§1021.321(c)]. However, there are DOE requirements for contents of a FONSI (see Guide Section 3.4.3).

The recommended EA elements and format described below and shown in Figure 3-6 are consistent with various DOE guidance documents, including the May 1993 *Green Book* (DOE 1993a). Guidance for preparing the major EA (and EIS) sections is provided in Guide Section 4.0 on Dealing with NEPA Documentation Problems.

Figure 3-6
Recommended Environmental Assessment (EA) Elements

Executive Summary. *This summarizes the entire document, not just portions.* It is confined to material in the EA and does not include extraneous material or comment. It is not to be confused with a preface, an introduction, or an abstract.

Section 1.0: Purpose and Need for Action. *This section defines the underlying need for DOE action, not merely for the proposed action.* It broadly states the problem or opportunity to which DOE is responding, at least in part, with the proposed action. (See Guide Section 3.5.6 on EIS Format and Content.) (See DOE Green Book Section 3.)

Section 2.0: Proposed Action and Alternatives. This EA element is presented in sufficient detail to allow an adequate analysis of potential impacts. It follows the DOE "sliding scale" approach in that the description is *limited* to activities with the potential for significant environmental consequences. *Mitigation measures that are "integral elements" of the proposed action are included.* A range of "reasonable" alternatives, including no action, is identified and reasons are given for excluding some (or all) of the alternatives from detailed analysis. Relationships to other actions are identified to avoid improperly segmenting connected actions. (See Guide Section 3.5.6 on EIS Format and Content and Guide Section 5.9 on Segmentation.)

Section 3.0: Affected Environment. This section *succinctly* lays a foundation for analyzing potential impacts of both the proposed action and one or more alternatives. It includes a description of environmental parameters that can be *affected by* the action/alternatives (e.g., air and water quality) as well as those that can *affect* the proposal's implementation (e.g., geological structure and seismic events). This section is consistent with the "sliding scale" approach in that *the data presented are commensurate with the importance of the potential impact* (see Guide Section 3.5.6).

Section 4.0: Environmental Consequences. This section evaluates potential direct, indirect, and cumulative effects (both beneficial and adverse) associated with the proposed action. *It provides the basis for determining whether a FONSI is appropriate or whether an EIS should be prepared.* It uses the "sliding scale" approach by discussing impacts in proportion to their significance. It does not analyze the impacts of the proposed action and all of the alternatives in the same level of detail although it provides sufficient information for a comparison. Mitigation measures not identified in Section 2.0 are included here (see Guide Section 3.5.6).

Section 5.0: Mitigation Measures. Although *not required* by CEQ or DOE, this section is recommended for purposes of reader understanding and reviewer assistance. It summarizes or restates the mitigation measures identified throughout Sections 2.0 and 4.0. It includes both mitigation measures that are integral parts of the proposed action as well as those

essential to render the impacts not significant. If required by DOE regulations in §1021.331(b), it includes a MAP as an appendix (see Guide Section 3.4.2).

Section 6.0: Applicable Environmental Laws, Regulations, Permits, and DOE Orders. This section serves as a tool for integration of NEPA requirements with other environmental review procedures [§1500.2(c)]. It also provides an explanation and clarification for regulations, standards, permits, and DOE Orders referred to in Sections 2.0 and 4.0. This section can also be relegated to an appendix.

Section 7.0: Agencies and Persons Consulted. This requirement for EAs in the CEQ regulations in §1508.9(b) is sometimes confused with the lists of EIS preparers and agencies/organizations/persons to whom copies of an EIS are sent (§1502.10). All governmental agencies and other persons contacted for information are listed by name, organization, address, and telephone number. (SNL and EA contractor personnel are not to be included.)

Supporting Documentation. Lists of figures and tables are included in the table of contents. A list of acronyms and abbreviations follow the table of contents. *References at the end of the document are essential. A glossary is optional but very helpful to lay readers.*

3.3.5 Page Limits

CEQ advised in 1981 that EAs not exceed 10 to 15 pages except in "unusual cases" (CEQ 1981), and some agencies have established their own page limits. However, arbitrarily limiting EAs to some minimal number of pages is no longer realistic as agencies move away from EISs and toward preparing EAs that serve as the principal NEPA "detailed statement." Also, an EA of 15 pages or less may be adequate for simple, routine, repetitive actions with minimal environmental impact but totally insufficient for complex hazardous waste cleanup projects. *The best way to manage EA length is to concentrate on impacts that are potentially significant, delete encyclopedic descriptions of the proposed action and the affected environment, and adhere to the DOE "sliding scale" approach.* It is possible to prepare a "brief" EA and still include all of the elements shown in Figure 3-6.

3.3.6 Public Participation/Disclosure

Many federal agencies prepare EAs where an EIS would be more appropriate because of the erroneous impression that EAs do not require public participation or disclosure. Absent

litigation or public protest, this idea has become a self-fulfilling prophecy. *In fact, the DOE trend is to greatly increase public participation for EAs and other NEPA documents.*

CEQ Requirements. The initial mandate in the regulations states: "The agency shall involve environmental agencies, applicants, and the public, *to the extent practicable*, in preparing [environmental] assessments . . . " [§1501.4(b)] (emphasis added). The qualification, "to the extent practicable," was never intended to eliminate public participation in EAs.

The most comprehensive CEQ requirement is as follows:

Agencies shall:

- a. Make diligent efforts to involve the public in preparing and implementing their NEPA procedures [§1506.6(a)].
- b. Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected [§1506.6(b)].

The term "environmental documents" includes EAs, EISs, FONSI, and notices of intent (NOIs) to prepare an EIS. The regulations provide a long list of mechanisms that can be used to provide the required public notice. (See Guide Sections 3.5.5 and 3.5.10 for more information on public participation required for an EIS.)

DOE Requirements. The June 1994 Secretarial Policy Statement on NEPA (DOE 1994) specifically addresses DOE public participation policy for EAs as follows:

Whenever possible, the Department of Energy will provide enhanced opportunities for public involvement in the environmental assessment process, which ordinarily will include at a minimum:

1. Early public notice of the [DOE's] intent to prepare an environmental assessment (concurrent with state/tribal notification; and
2. Opportunity for interested parties, on request, to review environmental assessments . . . prior to [DOE] approval. (Emphasis added.)

Detailed "Guidance on Implementation of the Department's Public Participation Policy" was issued in memorandum form to all DOE employees on July 29, 1994 (DOE 1994b). The

memo points out that the new policy represents a "clear break with past practice" and challenges DOE and its contractors to "perform to a new standard of openness."

The DOE NEPA regulations are more specific. They require that:

- "NEPA documents" be made available to other federal agencies, states, local governments, American Indian tribes, and the general public in accordance with 40 CFR §1506.6 (see above) (§1021.301).
- Host states and host tribes that might be affected by a proposal be notified of any DOE determination to prepare an EA [§1021.301(c)]. This has been extended to the general public. (See Guide Section 3.3.3, Step 5.)
- Host states and tribes be given the opportunity to review and comment on any EA prior to DOE's approval of the document [§1021.301(d)]. (See Guide Section 3.3.3, Step 12.)
- DOE "consider" all state and tribal comments. Responses to comments [as required for draft EISs (DEISs)] are not necessary. (See Guide Section 3.3.3, Step 13.)

Nevertheless, the DOE Office of NEPA Oversight's *Effective Public Participation Under NEPA* (DOE 1994c) states that ***DOE will "whenever possible" provide early notice of intent to prepare an EA not only to states and tribes but also to the public.*** Also, the public will have the opportunity "on request" to review draft EAs concurrent with state and tribal review.

Even with regulations and various guidance documents in place, it can be concluded that DOE's policy and practice regarding public participation in the EA process are still evolving. There is, as yet, no "standard" procedure. For example, the 1995 "Environmental Assessment of Medical Isotope Production at Sandia National Laboratories, New Mexico and Los Alamos National Laboratory" (DOE 1995c) went through an EIS-like public participation process with nine public information meetings, one public tour, and an extended public comment period.

3.3.7 Time Requirements

The time required for preparation, review, and approval of an EA (and a FONSI if one is appropriate) is a function of at least six principal factors:

1. ***The commitment of the project's sponsor (Line Organization manager or project manager) to giving high priority to an EA document that will withstand SNL, DOE, state, tribal, and public scrutiny.***

2. The project's complexity (e.g., type and number of activities covered, sensitive species or cultural resources present, or the need to conduct a detailed risk assessment).
3. The nature and degree of public controversy (e.g., radioactive waste transportation).
4. Quality and completeness of the initial draft document.
5. Number of review and revision cycles.
6. Time required for DOE-KAO or DOE-AL approval (unless EA preparation has been assigned to SNL by a DOE-HQ program office).

Based on an examination of 76 EAs and FONSIIs completed in FY92 and FY93, a DOE-HQ survey (Process Improvement Team 1994) discovered that the time required from EA determination to FONSI approval ranged from less than three months to greater than 24 months. The average time was 15.2 months. Recent SNL/NM experience indicates a range of from 12 months to 41 months. At least half of this time was consumed by review and approval time for DOE-HQ program offices, which ranged in median times from 7.0 to 15.5 months during the FY91 to FY93 time period (Process Improvement Team 1994).

However, these time lines are mostly of historic interest. Now that EA review and approval have been delegated to DOE-AL and DOE-KAO, the EA/FONSI review/approval track will be much faster. Approval times of three months or less may become common. A generic ten-month schedule for an EA of moderate complexity is included in Figure 3-7.

3.4 Finding of No Significant Impact (FONSI)

A FONSI determination requires an answer to this question: Does the proposal qualify as a "major federal action significantly affecting the quality of the human environment?" If it does, an EIS is required. If it does not, a FONSI may be issued. The answer depends on the meaning of "significantly."

Roget's Thesaurus includes among the synonyms for "significant": important, noteworthy, momentous, consequential, prominent, weighty, and outstanding. *The CEQ regulations define "significantly" in terms of context and intensity (§1508.27).* The contexts given are:

Figure 3-7
Generic Schedule, Environmental Assessment (EA)

society as a whole (national, global); the affected region (e.g., San Francisco area or metropolitan Albuquerque); or the affected locality [e.g., Livermore, CA, or KAFB]. Whether the impacts are short-term or long-term is also part of the context.

Intensity or severity (magnitude) depends in part on weighing adverse versus beneficial effects. Other factors that determine intensity are the "degree to which" the proposed action:

- Affects public health and safety
- Affects unique and sensitive environments (e.g., cultural resources, endangered species, parks, wetlands)
- Has possible impacts that are highly controversial
- Involves impacts that are highly uncertain or involve unique or unknown risks
- Establishes a precedent for future actions with significant effects
- Is related to other actions so as to have cumulative impacts
- Threatens a violation of federal, state, or local environmental protection requirements.

Obviously, the determination of "significance" requires both quantitative and qualitative analysis.

The environmental impact analysis in an EA can lead to only one of two conclusions: (1) that an EIS must be prepared, or (2) that the impacts of the proposed action are insignificant (Figure 3-4). *Simply defined, a FONSI is a document that records an agency's reasons for concluding that a proposed action not categorically excluded will not have a significant environmental effect and will not require preparation of an EIS (§1508.13).*

3.4.1 FONSI Role in the NEPA Process

The purposes of a FONSI include reducing paperwork [§1500.4(g)] and reducing delay [§1500.5(l)] by avoiding an EIS. If an EA does not support a FONSI, the DOE has no choice but to prepare an EIS and issue an ROD before the proposed action can proceed [§1021.322(a)]. In actual practice, DOE almost always makes EIS determinations without

preparing an EA. Thus, it is usually assumed by DOE and project proponents that an EA will lead to a FONSI if the potential impacts are appropriately mitigated.

3.4.2 The "Mitigated" FONSI and MAP

Many proposals will not qualify for a FONSI absent commitments to mitigation measures that render the impacts insignificant. The courts have generally upheld mitigated FONSIs when supported by an adequate EA. They have also been upheld when the mitigation measures specifically address the impact, are directly related to the proposed action, and are committed to by the agency. Courts are less friendly toward "paper waving" such as promised "consultation" with other organizations, "review" at some unspecified future date, or where mitigation will be "encouraged" or subjected to "further study."

Under the CEQ definition in §1508.20, "mitigation" can take many forms:

- *Avoiding or minimizing* the impact (e.g., reducing the amount of land disturbance)
- *Rectifying* the impact through repair, restoration, or rehabilitation (e.g., reclamation of disturbed vegetation)
- *Reducing or eliminating* the impacts over time
- *Compensating* for the impact by replacing resources or providing substitute resources or environments (e.g., creating new wetlands).

The 1992 DOE NEPA regulations have special requirements for a mitigated FONSI. *A FONSI must include "commitments to mitigations that are essential to render the impacts of the proposed action not significant, beyond those that are integral elements of the proposed action" [§1021.322(b)(2)] (emphasis added).* In these circumstances, a MAP must be prepared before the FONSI is issued. MAPs must be "as complete as possible" and are subject to later revision. Copies must be made available in public reading rooms and upon written request.

DOE does not view activities that are "routine" parts of the proposed action as "mitigation commitments." Thus, activities such as routine erosion control, land reclamation, use of high-efficiency particulate air (HEPA) filters, or use of personal protective equipment (PPE) would not qualify as mitigation measures that are "over and above" those required to render impacts insignificant. Examples of mitigation commitments "over and above" the routine included in

the Kauai Test Facility (KTF) EA (DOE 1992a) are: removing and transplanting a sensitive plant species; shielding construction lights posing a risk to shore birds; providing special protective measures for a threatened sea turtle; and establishing a noise monitoring program.

3.4.3 Format and Content

The CEQ regulations require that a FONSI include (or attach) the EA or an EA summary and note any other related EAs or EISs. If the EA is included with the FONSI, the same discussion need not be repeated in the FONSI but can be referenced (§1508.13). Under the DOE regulations, a FONSI must include:

- A summary of the supporting EA including a brief description of the proposed action and alternatives together with projected impacts.
- A reference to the MAP (if applicable; see Guide Section 3.4.2 above).
- Any "Statement of Findings" regarding compliance with the floodplain/wetland environmental review requirements under 10 CFR Part 1022 (see Guide Section 2.3.5.)
- The date the FONSI was issued.
- Signature of the appropriate DOE official.

Issuance of a FONSI (and the required public review discussed below) is the responsibility of DOE rather than SNL. Nevertheless, in actual practice the FONSI is prepared by SNL or the EA contractor for DOE review and concurrence. Thus, any EA submitted to DOE for review should attach a *draft* FONSI (see Step 8, Guide Section 3.3.3).

3.4.4 Public Participation/Disclosure

Many of the same public participation and disclosure requirements discussed in Guide Section 3.3.5 for EAs apply equally to FONSIs. *FONSIs qualify as "NEPA documents" that must be made available to the public* (CEQ §1506.6 and DOE §1021.301). FONSIs must be made available in public reading rooms or other appropriate locations [§1021.322(c)]. As noted in Guide Section 3.3.3, Step 14, DOE must make a *proposed* FONSI available for public review and comment for 30 days. However, DOE may issue a proposed FONSI for public review in other situations (e.g., where there is considerable public controversy). The same comment opportunities given to states and tribes with regard to EAs also apply to FONSIs (see Guide Section 3.3.6).

3.4.5 Time Requirements

The time requirements discussed in Guide Section 3.3.7 for EAs also apply to FONSIIs (see Figure 3-7). The time lines are from DOE's determination to prepare an EA through FONSI approval. No data are available on the time required for actual publication of the FONSI following DOE approval.

3.5 Environmental Impact Statement (EIS)

SNL would not be given the responsibility of preparing a project-specific or sitewide EIS focusing on SNL's own activities. *However, SNL would have a major support role if an EIS was prepared by another DOE contractor.* Thus, this section is included in the Guide to provide an understanding of the EIS process in which SNL could participate. It also includes recommendations for consideration by DOE.

Historically, the major distinctions between EAs and EISs were that EISs analyzed issues involving "significant" impacts, had considerably more public involvement, and were more comprehensive and detailed. *However, these distinctions have become less pronounced in the DOE system given the increasing complexity of EAs, the use of "mitigated FONSIIs" (see Guide Section 3.4.2), and the Secretarial policy of enhanced public involvement in the EA process.*

The fundamental EIS requirements are found in NEPA §102(2)(C):

[A]ll agencies of the Federal government shall . . . include in every recommendation or report on proposals for . . . *major actions significantly affecting the quality of the human environment*, a detailed statement by the responsible official on:

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local and short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. (Emphasis added.)

Whether a proposal is a "major federal action" with the potential to "significantly affect the human environment" is referred to as the NEPA threshold question (see Guide Section 5.1).

The purpose of an EIS as stated in §1502.1 of the CEQ regulations is worth repeating in its entirety. By itself, it serves as an excellent "mini" guidance for preparing an EIS.

The primary purpose of an [EIS] is to serve as an *action-forcing* device to ensure that the policies and goals defined in [NEPA] are infused into ongoing programs and actions of the Federal Government. [An EIS] shall provide full and fair discussion of *significant* environmental impacts and shall inform decisionmakers and the public of the *reasonable alternatives* which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on *significant environmental issues and alternatives* and shall *reduce paperwork and the accumulation of extraneous background data*. Statements shall be *concise, clear, and to the point*, and shall be supported by evidence that the agency has made the necessary *environmental analyses*. An [EIS] is more than a disclosure document. *It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.* (Emphasis added.)

The intent of both NEPA and the CEQ regulations to have *significant* impacts and issues analyzed in an EIS bears special emphasis. This is where the DOE "sliding scale" approach is particularly useful. (See Guide Section 2.3.4.)

3.5.1 EIS Role in the NEPA Process

For many years, the EIS was the primary mechanism for NEPA implementation. While it has been replaced in part by a trend to make the EA the "detailed statement," there are still circumstances in which an EIS cannot be avoided if an agency's NEPA compliance is to survive a court challenge. Examples are:

- When an agency's own procedures identify classes of action that normally require preparation of an EIS (see Guide Section 3.5.2 below).

- When the proposed action and/or its possible environmental effects are so controversial that an EA will never be acceptable to the public.
- When the proposed action is of such magnitude, complexity, or geographic scope as to demand an EIS on its face. For example, it is highly unlikely that a sitewide EA would be considered adequate to address all continuing and future actions at the SNL/NM facility (see Guide Section 3.5.8).

3.5.2 Proposed Actions "Normally" Requiring an EIS

There are only 12 classes of actions listed in Subpart D, Appendix D of the DOE NEPA regulations which "normally" require an EIS. Most of these apply to power marketing or other types of energy facilities. Those that potentially apply to SNL activities are as follows:

- D1: Major system acquisitions as designated by DOE Order 4240.1 on "Designation of Major System Acquisitions and Major Projects." The "major projects" referred to in the Order normally require an EA (Guide Section 3.3.2).
- D3: Siting/construction/operation/decommissioning of reactors.
- D12: Siting, construction, and operation of incinerators other than incinerators for research and development or for nonhazardous solid waste.

Of course, DOE can determine that a proposal requires an EIS regardless of the Appendix D list. The degree of potential *significance* of environmental effects (including public controversy) is the major determinant (see Guide Section 3.4).

3.5.3 Step-By-Step Preparation and Review

Some of the steps involved in preparation and review of an EA as outlined in Guide Section 3.3.3 also apply to the EIS process. Where they are the same or very similar, the EA steps are cross-referenced to avoid redundancy. The EIS process is shown in Figure 3-8. Preparation of an SNL/NM sitewide EIS for continuing operations is anticipated in many of the step descriptions (see Guide Section 3.5.8). It is assumed that a DOE contractor will be used to prepare the EIS document.

Step 1: DOE EIS Determination. *At present, the decision to prepare an EIS remains with the DOE-HQ Assistant Secretary for ES&H.* The June 1994 Secretarial NEPA policy statement delegates only EA/FONSI authority to Field Organizations like DOE-AL or Area Offices like DOE-KAO. However, the "cognizant" Secretarial Officer (Defense Programs, Environmental Management, etc.) may consult with DOE ES&H to determine whether

Figure 3-8
Environmental Impact Statement (EIS) Process

delegation of approval authority for a specific EIS to a Secretarial Officer or Head of Field Organization is appropriate. For an SNL/NM sitewide NEPA document, DOE-AL will probably have a major role regarding the level of documentation (e.g., EIS) and the timing.

Step 2: Establishment of EIS Team. For a sitewide SNL/NM EIS, it is recommended that the EIS Team be established *jointly* by DOE-HQ, DOE-AL and/or DOE-KAO, and SNL/NM. (See Guide Section 3.3.3, Step 2 on the EA Team.) The proper team makeup is critical to the success of the EIS process. It is very important that team members be committed to the EIS project for its duration in order to maintain continuity. While the major DOE and SNL/NM "stakeholders" must be represented, the number of team members must be minimized to avoid the "too many cooks spoiling the broth" syndrome. Every effort should be made to limit the number of team members. Team members should consist of at least the following: the DOE NCO and NDM; a DOE-HQ liaison person; the Department 7258 NEPA Team Leader; the DOE-AL or DOE-KAO general counsel; a representative of SNL/NM ES&H; a representative of the SNL/NM M&O contractor; and the EIS contractor Project Manager (when the contractor is selected). Other SNL/NM organizations should be represented as appropriate. Representatives of appropriate DOE-HQ program offices (DP, EM, NE, ER, etc.) and the DOE Office of General Counsel should serve as advisors but not as team members. [Note: SNL/NM would be precluded from serving as the sitewide EIS contractor due to the CEQ Regulations in §1506.5(c) barring contractors with a "financial or other interest in the outcome of the project." However, this would not disqualify SNL/NM from serving as an advisor on the EIS Team where its knowledge of SNL/NM operations and other technical expertise would be critical to preparation of a credible document.]

Step 3: Internal Scoping. The June 1994 Secretarial NEPA policy statement specifies that the "early internal scoping process" for an EIS should commence *before* the public scoping process that starts with the NOI (see Guide Section 3.5.4 below). This is necessary because the NOI must contain a description of the proposed action and alternatives which cannot be prepared without scoping. Also, internal scoping is required for preparation of the Scope of Work (SOW) which is part of the Request for Proposal (RFP) circulated to prospective contractors. *The internal scoping process should also adopt a proposed schedule, a public participation plan, and a quality assurance plan.* Topics to be addressed in internal scoping are listed in Step 3 in Guide Section 3.3.3 on EA preparation. *Preparation of an ECL/ADM can serve as a valuable tool for identifying scoping topics.* According to the Secretarial policy statement, internal scoping should be conducted by the DOE NDM. *However, scoping should be a DOE-SNL "team" effort.* Adequate time must be allowed for

this process, perhaps as much as six months. An Advance Notice of Intent (ANOI) may be appropriate (see Guide Section 3.5.4 below). (Note: It is recommended by this Guide that the EIS contractor should be selected early enough to be involved in at least part of the internal scoping process and all of the public scoping.)

Step 4: Project Plan. As pointed out in Guide Section 3.3.3 (Step 4), *this is not required by DOE*. However, SNL should recommend that a Project Plan be prepared for EIS planning purposes.

Step 5: Public Notice. DOE must publish a Notice of Intent (NOI) of its decision to prepare an EIS and notify the host state(s) and tribe(s) [§§1021.311 and 1021.301(c)]. Both types of notifications should be issued concurrently. NOIs are discussed in Guide Section 3.5.4.

Step 6: Public Scoping. The public scoping process, for which DOE must allow a minimum of 30 days, begins with the NOI and the notification to host state(s) and tribe(s). DOE must hold at least one public scoping meeting. This is discussed in Guide Section 3.5.5 below.

Step 7: Implementation Plan (IP). The IP, in conjunction with the Annotated Outline, provides overall guidance for preparation of the EIS. See discussion and list of contents in Guide Section 3.5.5 below.

Step 8: Annotated Outline. See Step 5 in Guide Section 3.3.3 for a description. *Although highly recommended by this Guide, an Annotated Outline is not required by the DOE regulations or guidance.* A rough preliminary draft can be prepared as part of Step 3, Internal Scoping. However, preparation of the final draft to serve as the principal "road map" for the EIS should be accomplished only after the EIS contractor has started work. *The Annotated Outline should be completed before any actual document preparation begins.* It is critical that EIS authors receive a copy of the Annotated Outline so as to understand how their sections or segments fit into the overall document.

Step 9: Preliminary Draft EIS (DEIS). See Step 7 in Guide Section 3.3.3 on the preliminary draft EA. The purpose of the preliminary draft is to minimize the numerous review, comment, and rewriting iterations that accompany preparation of the DEIS that is

circulated to the public. As with the preliminary draft EA, *it should not be prepared and reviewed in segments* except for "in progress" reviews by the DOE NEPA Document Manager, the contractor Project Manager, and other EIS team members with particular expertise. The schedule must allow for preparation of a preliminary draft that is close to the quality and completeness of the DEIS.

Step 10: Internal Review and Comment. The same review process should be followed as for review of the preliminary draft EA (see Step 7, Guide Section 3.3.3). Concurrent reviews should be conducted by the EIS Team and the appropriate DOE-AL and KAO personnel. Appropriate DOE-HQ review should be coordinated by the designated DOE NDS. All comments should be consolidated by the EIS contractor. *A computer-based process is recommended by this Guide to track all internal comments and their responses.* Conflicting comments will be resolved by the contractor and other selected members of the EIS team. When the preliminary draft is circulated for comment, it should be made clear that all individual comments will not necessarily result in revisions of the document.

Step 11: Preliminary Draft Revision and Preparation of DEIS. The following guidance from the June 1994 Secretarial policy statement should be adhered to: "As a general matter, documents will be revised only after all reviewing offices have submitted their comments and agreement has been reached as to what changes are necessary." This step will result in preparation of the document that is circulated to other agencies and the public. If Steps 9 and 10 are properly implemented, an additional internal review cycle can be eliminated. All revisions will be made by the DEIS authors in consultation with the DOE NEPA Document Manager and appropriate members of the EIS team. However, if totally new information or analysis is introduced in this step, another iteration of the Step 10 review will be required.

Step 12: DOE Headquarters Review and Approval of DEIS for Publication. The nature and extent of any additional DOE-HQ comments on the DEIS will depend on how well Steps 10 and 11 are carried out. If the required revisions are made in Step 11, as they should be, a third iteration of the DEIS should not be necessary. (Note: This may seem unrealistic to those familiar with past DOE EIS experience. However, this Guide is suggesting ways in which the June 1994 Secretarial policy on NEPA can be implemented.)

Step 13: Notice of Availability (NOA) of DEIS. The EPA is required to publish a notice in the *Federal Register* of DEISs filed during the preceding week [§1506.10(a)]. The

public review and comment period begins with this NOA. In addition, DOE must provide public notice of the availability of the DEIS for review using the devices listed in §1506.6(b) of the CEQ regulations (see Guide Section 3.5.9 below).

Step 14: Public and Agency Review and Comment. DOE must obtain comments on the DEIS from "any Federal agency which has jurisdiction by law or special expertise" or which has environmental regulatory and enforcement responsibilities (§1503.1). Comments must also be requested of appropriate state and local agencies, affected Indian tribes, any agency which has requested copies of EISs on the kinds of actions proposed, state and local environmental agencies, and the public. *Specifically, DOE must "affirmatively" solicit comments from "persons or organizations who may be interested or affected."* Although the public review and comment period cannot be less than 45 days, requests for extension are frequently granted. DOE must hold at least one public hearing on the DEIS, announced at least 15 days in advance [§1021.313(b)]. In actual practice, DOE usually holds several public hearings at multiple locations.

Step 15: Response to Comments, Mitigation Action Plan (MAP), and Final EIS (FEIS). The FEIS will respond to both oral and written comments in accordance with the requirements of §1503.4. *Possible responses are to: (1) modify the proposed action or alternatives; (2) develop and evaluate alternatives not previously given serious consideration; (3) supplement, improve, or modify the impact analysis; (4) make factual corrections; and (5) explain why comments do not warrant further response.* All comments (or summaries if the comments are voluminous) will be included in an appendix. Based on past experience, most responses to comments are in categories 4 and 5. Unless there is sustained public controversy or actual or threatened litigation, rewriting the DEIS is not required. It is recommended that the MAP required by DOE be included as an appendix (see Guide Section 3.5.6).

Step 16: Filing of the FEIS. The FEIS, together with comments and responses, will be filed with the EPA Office of Federal Activities. Notice of the filing will be published by EPA in the *Federal Register*, the same as the NOA for the DEIS.

Step 17: Record of Decision (ROD). The ROD cannot be published less than 30 days after the NOA of the FEIS. See Guide Section 3.5.11 for ROD contents.

3.5.4 Notice of Intent (NOI)

Once DOE decides to prepare an EIS, an NOI must be published in the *Federal Register*. If there is a long delay between the EIS determination and actual preparation (as could occur if there is an internal scoping period of several months), the DOE regulations provide for one of two options: (1) defer NOI publication until a "reasonable time" before starting preparation of the EIS, or (2) publish an Advance Notice of Intent (ANOI) to provide an early opportunity for public comments [§1021.311(a) and (b)]. *The ANOI is not a substitute for the NOI; it is the NOI that begins the public scoping process.*

Under the CEQ regulations (§1508.22), an NOI must include the following elements:

- Description of the proposed action and possible alternatives
- Description of the proposed scoping process including whether, when, and where any public scoping meetings will be held
- The name and address of an agency contact who can answer questions.

The format and content of DOE NOIs vary considerably. Recent NOIs contain some or all of the following elements: summary; DOE contacts; background; proposed action and alternatives; environmental issues; public scoping meetings (where and when); and public commenting procedure. Although DOE-ES&H must issue the NOI, it is advisable for SNL to draft a "straw man" document for DOE-HQ.

3.5.5 Public Scoping and Implementation Plan (IP)

A DEIS must be prepared in accordance with the scope agreed upon during the scoping process [§1502.9(a)]. If there is a scope deficiency, the document may be subject to legal challenge.

"Scoping" is defined as an "early and open process" for deciding on the scope of the issues to be addressed and for identifying the "significant issues" (§1501.7). The regulations provide a handy scoping checklist:

- Invite participation of federal, state, and local agencies; affected Indian tribes; and other interested persons (including those who oppose the proposed action).
- Determine the scope and the *significant issues* to be analyzed in depth.
- Narrow the discussion by eliminating insignificant issues from detailed study.

- Allocate assignments among lead and cooperating agencies, with the "lead" agency retaining ultimate responsibility for the EIS.
- Identify EAs or other EISs which relate to but are not part of the scope of the EIS being considered.
- Identify other environmental review and consultation requirements.

Setting page limits, adopting a schedule, and holding scoping meetings may also be part of the public scoping process.

In order to determine the scope of an EIS (or EA), CEQ requires consideration of three types of actions, alternatives, and impacts (see Figure 3-9). The three types of actions are: *connected actions* (closely related, interdependent); *cumulative actions* that may have incremental impacts; and *similar actions* (e.g., common activities, timing, or geography). The three types of alternatives are: no action; other "reasonable" alternatives; and mitigation measures not part of the proposed action. *The three types of impacts are: direct; indirect; and cumulative.*

Source: Modified from *The NEPA Compliance Manual* with permission of Government Institutes, Inc., 4 Research Pl., Ste. 200, Rockville, MD 20850

Figure 3-9
CEQ Definition of Scope

Although public scoping meetings are not mandatory under the CEQ requirements, many agencies hold them routinely. *The DOE regulations require that at least one public scoping*

meeting be held following a minimum 15-day meeting notice [§1021.311(d)]. While the NOI is the most appropriate vehicle for announcing the dates and locations of scoping meetings, news releases, direct mail, and other devices can also be used. DOE must allow a minimum of 30 days for public comments on scoping following publication of the NOI [§1021.311(c)]. Also, DOE must "consider" all of the comments received during the public scoping process.

Even though the DOE regulations mandate only one public scoping meeting, multiple meetings are the rule. For example, eight public scoping meetings to be held in Nevada and Utah were announced in the NOI for the Nevada Test Site (NTS) EIS (DOE 1995d).

Implementation Plan (IP). Results of the DOE scoping process must be documented in an IP. *The IP must be completed as soon as possible after the public scoping process ends and before publication of the DEIS* [§1021.312(a)]. The IP, which is a public document, must include at least the following:

- The planned scope and content of the EIS
- Purpose and need for the proposed action
- Scoping process results with a summary of comments and their disposition
- Target schedule
- Anticipated consultation with other agencies
- Disclosure statement executed by the EIS contractor concerning conflict of interest [see §1506.5(c)].

Target page limits, work assignments, expected consultation with other groups, and other information can also be included. Copies of the IP must be made available in public reading rooms or other locations or provided upon written request [§1021.312(d)]. Public meetings are not required although DOE has held some IP public meetings in the past.

Scoping is a vital part of the EIS public participation plan. Depending on how well it is planned and implemented, it can result in generating either support or opposition. If at all possible, the process should be conducted by trained community relations specialists with excellent communications skills. It is also important that the EIS contractor participate in the process.

DOE IPs have tended to be fairly voluminous, particularly because of the requirement for summarizing public comments and their disposition. The June 1994 Secretarial NEPA policy statement (DOE 1994a) says that IPs are "intended to be brief (normally about 20 pages)." Although there is a close relationship, the IP is not a substitute for the Annotated Outline (see Step 8, Guide Section 3.5.3 above).

3.5.6 EIS Format and Content

DOE and other agencies are required to use an EIS format "which will encourage good analysis and clear presentation" (§1502.10). Although the CEQ format is recommended but not mandatory, it should be followed unless there is a "compelling" reason to follow some other format. The recommended elements and format for an EA are found in Guide Section 3.3.4 and Figure 3-6. Because the major elements are the same as or similar to an EIS, duplicative discussions have been avoided. This section borrows from the DOE May 1993 *Green Book* and is intended to be used as a supplement.

Additional discussion of most of these elements is included in Guide Section 4.0. The major EIS elements are discussed below. The appropriate CEQ regulations citation follows each element title.

Cover Sheet (§1502.11). The cover sheet immediately follows the cover (title page) of the document. It contains: a list of responsible lead and cooperating agencies; title of the proposed action covered by the EIS; geographic location; name, address, and phone number of the appropriate agency contacts (e.g., DOE Field Organization and Headquarters contacts); designation of the statement as a DEIS, FEIS, draft supplement, or final supplement; a one-paragraph abstract; and the date by which comments must be received.

Table of Contents. The Table of Contents immediately follows the cover sheet. It lists the titles and numbers of all sections and subsections as well as the titles and numbers (or letters) of all tables, figures, and appendices. If there are multiple volumes of the DEIS and FEIS, the Table of Contents should be included in the front of each volume.

Executive Summary (§1502.12). Some recipients of a DEIS or FEIS never get beyond the summary; this is their entire impression of the document. Therefore, the summary should "stand alone" as much as possible although it can still cross-reference parts of the principal document. It must summarize the *entire* document including: purpose and need; proposed action and alternatives; environmental consequences; and mitigation measures. It need not

summarize the affected environment except to identify the parameters investigated. Under the CEQ regulations, the summary stresses major conclusions (e.g., regarding impacts), areas of controversy, and issues yet to be resolved. *It is vitally important that the material summarized be consistent with what is present in the document.* For example, issues never addressed in the EIS should not appear for the first time in the summary. See Guide Section 3.3.4 and DOE *Green Book* Section 3.

Section 1.0: Purpose and Need for Action (§1502.13). This section must define the need for *DOE action*, not merely the need for the proposed action. For example, the proposed action may be to treat hazardous and mixed waste at a facility, but the *underlying* need for DOE action is to implement a national environmental restoration program and comply with federal and state waste cleanup laws and regulations. The purpose and need should not be defined so broadly that the number of alternatives becomes limitless, or so narrowly that only the proposed action is acceptable. See Guide Section 3.3.4 and DOE *Green Book* Section 3.

Section 2.0: Proposed Action and Alternatives (§1502.14). *The CEQ describes this section as the "heart" of the EIS. For an environmental analysis to be most objective, the proposed action should be considered as only one of several alternative ways of fulfilling the purpose and need.* The impact analysis of the alternatives (including the proposed action) is to be presented in *"comparative form"* in order to define the issues and provide a *"clear basis for choice among options."* *All "reasonable" alternatives must be "rigorously" explored and objectively evaluated.* If alternatives are eliminated from detailed analysis (which is usually the case), a brief discussion of the reasons for their elimination must be included. Alternatives which will be "carried through" in the impact analysis (the "analyzed alternatives") must be very carefully selected. The "no action" (maintaining the status quo) alternative must always be included.

If a particular mitigation measure is not already included as part of the proposed action, an alternative should be structured to include it. *Routine mitigation measures* (e.g., following standard safety practices, sprinkling to depress fugitive dust) *should always be included in a description of the proposed action.* The proposed action must be described in *sufficient detail* in order to adequately analyze potential impacts. *The focus must be on activities which can result in impacts.* See Guide Section 5.3 and the DOE *Green Book* Section 4.

Section 3.0: Affected Environment (§1502.15). Environmental parameters (e.g., biological resources, air quality) can be impacted *by* the proposed action or they can *affect* the proposed action's implementation (e.g., geologic structure, seismology, climate).

Environmental parameters should be succinctly described and be "no longer than necessary to understand the effects of the alternatives." Data and analysis must be "commensurate" with the significance of the potential impact. This section should be prepared in anticipation of the impact analysis in Section 4.0. Environmental parameters that will not be impacted at all, or impacted only slightly, should be treated accordingly. However, if sensitive environments (e.g., cultural resources, wetlands, floodplains, endangered species) are absent, this should be stated. For SNL/NM, the 1995 "Sandia National Laboratories, New Mexico Environmental Baseline Update - Revision 1.0" (SNL/NM 1995b) is the principal resource document. See Guide Section 4.2.3 and DOE *Green Book* Section 5.

Section 4.0: Environmental Consequences (§§1502.16 and 1508.8). A much more detailed analysis of environmental consequences (synonymous with "effects" or "impacts") is required for an EIS than for an EA. But like an EA, *direct, indirect, and cumulative impacts* (both beneficial and adverse) of the proposed action and alternatives must be evaluated. If there will be no apparent effect on sensitive environments (e.g., archeological resources, wetlands, or threatened/endangered species), the DOE *Green Book* recommends that a "negative declaration" be included.

Routine mitigation measures can be discussed in this section although it is preferable that they be covered in the description of the proposed action. Mitigation measures that are "over and above" those normally applied and not "integral" to the proposed action *must* be discussed in this section.

Above all, the impacts identified in an EIS (or an EA) should not be trivialized (e.g., compared with pollutant emissions on a national or global scale), dismissed without any analysis, grossly understated, or discounted on the basis of mitigation. Also, stating that some activity will comply with all applicable environmental regulations and DOE Orders does *not* mean that there will be no impact. DOE guidance warns: "Do not state bald or unsubstantiated conclusions" (see *Green Book* Section 6.6).

Section 5.0: Mitigation Measures [§§1502.14(f), 1502.16(h), and 1508.20].

Addressing mitigation measures in a separate section is *not a requirement of either the CEQ or the DOE regulations*. Nevertheless, it is recommended for both an EA and EIS as a

reader's aid because mitigation discussion tends to get "lost" in Sections 2.0 and 4.0. Another reason for restating and summarizing mitigation in this section is that *the DOE regulations require that a MAP (discussed in Guide Section 3.4.2) be prepared following "completion of each EIS and its associated ROD" to address "mitigation commitments expressed in the ROD"* [§1021.331(a)].

The MAP must be prepared before the proposed action is implemented. The reason for this DOE requirement is that the CEQ regulations mandate that an agency state in its ROD "whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not" [§1505.2(c)]. A mitigation monitoring and enforcement program is also required. Although not specified in the regulations, it is recommended that the MAP be included in an appendix to the DEIS and circulated for public comment. DOE requires public disclosure of the MAP [§1021.331(d)]. (See Guide Section 3.4.2 on the "mitigated FONSI.")

Section 6.0: Applicable Environmental Laws, Regulations, Permits, and DOE Orders [§§1500.2(c) and 1502.25]. The CEQ requirements for integrating NEPA documentation with other environmental review requirements are discussed in Guide Section 2.2.2. This section serves a function similar to that of Section 5.0: putting all of the regulatory and DOE Order requirements referred to in Sections 2.0 and 4.0 in one place. Also, this section affords an opportunity for more detailed explanations of regulatory requirements that are not appropriate for the previous sections. An alternative to this section is preparation of an appendix in tabular form that can be referenced throughout the document. See Guide Section 2.3.6.

References. These can go in one place at the end of the document or after each major section. Unless each major section is signified with a tab, putting all of the references at the end of the document is easier for the reviewer.

Glossary. Although not required by the regulations, this is an invaluable tool for the non-technical reviewer. It follows the references at the end of the text.

List of Preparers. This list provides a brief biographical sketch of each author. A table showing which authors participated in the preparation of each section is also helpful.

Index. The index, included CEQ's recommended format, is frequently ignored in EISs. It is highly recommended as an aid to the reviewer.

3.5.7 EIS Page Limits

According to the CEQ regulations, the text of an FEIS "shall normally be less than 150 pages" (§1502.7). For proposals of "unusual scope or complexity," the target length is less than 300 pages. These page limits do not include the summary, table of contents, list of preparers, technical appendices, responses to comments from the public, and other material not considered part of the text.

Throughout their history, most EISs (and many EAs) have been excessively long, redundant, tedious, and filled with almost endless detail. Overall, they have been much more encyclopedic than analytic. While there are many reasons for this "wretched excess" (Bausch 1992), the principal culprits have been lack of an adequate scoping process and deficient document management. The Lawrence Livermore National Laboratory (LLNL) and SNL/CA sitewide Draft Environmental Impact Statement (EIS) and Environmental Impact Report (EIR) (DOE 1992b) is a fairly typical example of current EIS length. The text, including 76 figures and 101 tables, is 803 pages. The appendices volume, including references but excluding glossaries for each appendix, totals 1,004 pages.

3.5.8 Programmatic and Sitewide EIS

The following is one of several categories into which a "major federal action" can fall:

Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive [§1508.18(b)(3)].

EISs prepared for broad federal programs, regulations, or policy initiatives are referred to as "programmatic" statements or PEISs. They usually apply to broad regional or national programs. These programs can be evaluated geographically (same general location), in terms of generic similarities (timing, subject matter, impacts), or according to stage of technological development (e.g., federal research or demonstration projects) [§1502.4(c)]. The "NEPA Pyramid" shown in Figure 3-10 illustrates the relationships between programmatic, sitewide, and project-level EAs or EISs. See Guide Section 4.2.6 on "tiering" and "bounding."

Figure 3-10
NEPA Pyramid

In addition to requiring the preparation of a PEIS "[w]hen required to support a programmatic decision," the DOE regulations also provide as follows:

As a matter of policy when not otherwise required, *DOE shall prepare site-wide EISs for certain large, multiple-facility sites*; DOE may prepare EISs or EAs for *other* sites to assess impacts of all or selected functions at those sites . . . DOE shall evaluate site wide NEPA documents . . . at least every five years [§§1021.330(c) and (d)]. (Emphasis added.)

A final sitewide EIS/Environmental Impact Report (EIR) for LLNL and SNL/CA was published in August 1992 (DOE 1992c). Sitewide EISs are in progress for the NTS, the Los Alamos National Laboratory (LANL), and the Pantex Plant. A sitewide EIS determination for SNL/NM is expected in the near future. No current DOE guidance directed specifically at preparation of sitewide EISs or EAs is available. (For a discussion of using comprehensive sitewide NEPA documents to reduce program risks, see Wolff and Hansen 1994.)

The SNL M&O contractor would be precluded from preparing an SNL/NM sitewide EIS. *Nevertheless, SNL/NM would play a major support role in many areas including the following:*

- Providing environmental baseline information for the description of the affected environment
- Providing comprehensive descriptions of ongoing SNL/NM operations and proposed future actions
- Reviewing and validating the completeness and accuracy of information and analysis
- Supporting necessary risk assessments and accident analyses
- Interfacing on numerous technical issues with the EIS contractor
- Supporting preparation of responses to public comments on the DEIS.

3.5.9 Supplemental EIS and Supplement Analysis

The CEQ and DOE regulations require preparation of a supplemental DEIS or FEIS when there are: (1) substantial changes in the proposed action; or (2) significant new circumstances or information relevant to environmental concerns [§§1502.9(c)(1) and 1021.314(a)]. DOE may also supplement a DEIS or FEIS "at any time" to further the purposes of NEPA [§§1502.9(c)(2) and 1021.314(b)].

When it is unclear whether a DEIS or FEIS supplement is required, DOE requires preparation of a Supplement Analysis [§1021.314(c)]. The Supplement Analysis must contain sufficient information to allow DOE to determine whether: (1) an existing EIS should be supplemented; (2) a new EIS should be prepared; or (3) no further NEPA documentation is required. This determination and the Supplement Analysis will be made available for informal public review. The supplemental DEIS or FEIS (SEIS) will be made available for public review and comment in the same manner as any other DEIS or FEIS. However, under the DOE regulations, public scoping for an SEIS is optional.

3.5.10 Public Participation/Disclosure

CEQ and DOE requirements for public involvement concerning EAs is discussed in Guide Section 3.3.5. This section provides additional detail for EISs.

CEQ Requirements. The CEQ regulations make it clear why NEPA is often referred to as a "public disclosure law." The regulations state: *"Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA"* [§1500.1(b)]. Federal agencies are to "[e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment" [§1500.2(d)]. Comments must be requested from agencies and the public, "affirmatively soliciting comments from those persons or organizations who may be interested or affected" [§1503.1(a)(4)].

The principal public involvement requirements are found in §1506.6. *Agencies must make "diligent efforts to involve the public" and provide public notice of hearings, meetings, and the availability of DEISs through a number of devices including:*

- Notice by mail to those who have made a request
- Publication in the *Federal Register* when effects of the proposed action are of national concern and notice by mail to interested national organizations [Note: The NOI, which gives notice of DOE's intent to prepare an EIS and announces public scoping meetings, is always published in the *Federal Register* as is the NOA of the DEIS (see Guide Sections 3.5.3 and 3.5.4 above).]
- Notice to state and areawide clearing houses pursuant to OMB Circular A-95
- Notice to Indian tribes when effects may occur on reservations
- Notice using the affected state's notification procedures
- Publication in local newspapers of general circulation
- Notice through other local media
- Notice to potentially interested community organizations
- Publications in newsletters expected to reach interested persons
- Direct mailings to owners and occupants of affected properties
- Posting of notice on site and off site in the area where the proposed action would be located.

Under the CEQ regulations, the decision to sponsor public hearings or public meetings is a matter of agency discretion. Criteria used to determine whether hearings or meetings are "appropriate" include: (1) whether there is "substantial" public controversy or a "substantial

interest" in having a hearing; and (2) another agency with jurisdiction over the action requests a hearing [§1506.6(c)]. This differs from DOE requirements which mandate public meetings or hearings (see below).

DOE Requirements. In July 1994, DOE Secretary O'Leary issued a guidance memorandum on DOE's public participation policy (DOE 1994b). The guidance defines "public participation" as "open, ongoing two-way communication, both formal and informal, within the DOE Complex between the Department and its stakeholders." "Stakeholders" are defined as "those individuals and groups who are interested in and/or affected by the Department's activities and decisions." The memorandum states:

Public participation is a fundamental component in program operations, planning activities, and decisionmaking within the Department This policy is intended to ensure that public participation is an integral and effective part of Departmental activities and that decisions are made with the benefit of important public perspectives.

In October 1994, the DOE Office of NEPA Policy and Assistance circulated "Effective Public Participation Under NEPA" to implement the Secretarial public participation policy as it applies to the NEPA process (DOE 1994c). It defines the "public" broadly to include: interested or affected private citizens; state and local agencies; Indian tribes; special interest and environmental groups; civic and community organizations; business and labor groups; and independent experts from the scientific, technical, and academic communities.

The extensive requirements of the DOE NEPA regulations that pertain to public participation for DEISs and FEISs, most of which are discussed elsewhere in the Guide, are summarized below:

- Make NEPA documents available to other federal agencies, state and local governments, Indian tribes, interested groups, and the general public [§1021.301(a)].
- Use terms familiar to the general public when explaining technical, scientific, or military terms [§1021.301(b)].
- Notify host state(s) and host tribe(s) of a determination to prepare an EA or EIS [§1021.301(c)].

- Publish an NOI in the *Federal Register* when a determination has been made to prepare an EIS [§1021.311].
- Sponsor a public scoping process and hold at least one public scoping meeting [§1021.311].
- Make the EIS IP available to the public for information purposes [§1021.312(d)].
- Allow a public review and comment period on a DEIS of at least 45 days and hold at least one public hearing [§§1021.313(a) and (b)].
- Respond to oral and written public comments on the DEIS in the FEIS and publicize the availability of the FEIS [§§1021.313(c) and (d)].
- Publish the ROD in the *Federal Register* and take no action on the proposal until the decision has been made public [§1021.315].

3.5.11 Record of Decision (ROD)

The ROD is a federal agency's final decision with respect to the proposed action and alternatives analyzed in an EIS. It must be published in the *Federal Register* and made available to the public. The ROD can only be published after the 30-day "waiting period" following completion of the FEIS. A ROD is not required for a CX, an EA, or a FONSI. The ROD is required by §1505.2 of the CEQ regulations to:

- a. State what the decision was.
- b. Identify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable, and how the agency balanced economic, technical, and other considerations.
- c. State whether all practical means to avoid or minimize environmental harm from the alternative selected have been adopted and, if not, why they were not. A monitoring and enforcement program must be adopted and summarized where applicable for any mitigation. (See Guide Section 3.5.6 discussion on mitigation.)

The DOE regulations on RODs are consistent with the CEQ requirements.

3.5.12 Time Requirements

As with EAs, time requirements for EISs vary enormously and depend on the same six principal factors discussed in Guide Section 3.3.7. The generally accepted "rule of thumb"

for federal agency EIS preparation and approval—from NOI to ROD—is two years; the range is close to from six months to five years. However, with respect to DOE EIS schedules, the widely varying historic time lines are irrelevant in view of the June 1994 Secretarial NEPA policy statement which includes the following NEPA process change:

For each [EIS], the schedule established during the internal scoping process will, *absent extraordinary circumstances*, provide for completion of a final [EIS] *within 15 months* of the issuance of the [NOI]. (Emphasis added.)

Reducing the "median process time" to 15 months "*with no decline in quality*" is to occur over a two-year period or by June 1996.

3.5.13 Recommendations for Increasing EIS Preparation Efficiency

The following Guide recommendations are intended to help make EIS (and EA) preparation more efficient and cost-effective. This list is not all inclusive but supplements the discussion in Guide Section 4.0 on "Dealing with NEPA Documentation Problems."

- **Early EIS Determination.** DOE-ES&H must be urged to make an *early* EIS determination (e.g., for a sitewide SNL/NM EIS) to allow adequate time for early internal scoping and strategy development. Announcing an EIS determination on Monday while expecting to publish the NOI on Friday does the process irreparable harm before it starts.
- **Early Internal Scoping.** The internal scoping process must commence well in advance of the NOI, using the ANOI if appropriate. Six months would be ideal but three months is the minimum. Although there are many scoping tasks, adequate time must be allowed to prepare the EIS SOW for contractor solicitation. (Contractor solicitation alone can take 6 months or longer.)
- **Early Contractor Selection.** The EIS contractor should be on board by the time the NOI is published or shortly thereafter. While the public scoping process which is triggered by the NOI is conducted by DOE, SNL and contractor personnel can render vital support. Also, the contractor can function more efficiently and effectively if allowed to participate in the scoping process. (DOE should be urged to expedite the contractor selection process.)
- **QA/QC Program From the Beginning.** The QA/QC Program is frequently implemented too late in the process to influence EIS preparation on a day-to-day basis. *QA/QC should be an integral element of document preparation from the beginning.*

- **Public Participation Planning.** Although a generic public participation program and related DOE guidance is in place, *it must be tailored to meet the needs of each particular EIS.* Last minute public participation crises, dictated by unexpected controversy, can be avoided with considerable time savings. This should be part of the early internal scoping process.
- **Annotated Outline.** See Guide Sections 3.3.3 and 3.5.3. *The Annotated Outline is the "blueprint" for EIS contents,* detailing how each section and subsection is to be prepared. This must be completed concurrent with the IP to avoid premature writing of sections that may need to be redone.
- **Environmental Baseline Data.** Existing environmental baseline data must be used to the maximum possible extent, so long as it is reliable and up to date. Enormous amounts of time can be consumed doing field investigations (e.g., cultural resources and sensitive species surveys). The description of the affected environment starts with the "SNL/NM Environmental Baseline Update, Revision 1.0" (SNL/NM 1995b) and information in the LLNL-SNL/CA EIS/EIR (DOE 1992c) and KTF EA (DOE 1992a). These data should be supplemented in the EIS only if absolutely essential. (Descriptions of the affected environment suffer greatly from the "reinvention of the wheel" syndrome. They also consume inordinate amounts of time and space.)
- **Risk Assessment Scope.** The "show stopper" for many EAs and EISs is the time and budget expended on numerous iterations of complex human health and environmental risk assessments that are now standard parts of the analysis of environmental consequences. *The scope of the risk assessment should be initially determined early and any changes in scope carefully monitored.* This is one of the more difficult NEPA document management tasks.
- **Computer-Based Review/Comment Process.** A computer-based tracking system should be created and utilized to: (1) track, monitor, and consolidate all internal and public comments, and (2) record the disposition of each comment. Internal review comments should be concurrent rather than sequential, in keeping with the 1994 DOE Secretarial NEPA policy initiative. This will minimize numerous confusing and unnecessary iterations. (Warning: The computer-based system should be used as a *tool* and not allowed to dictate the entire review/comment process.)
- **Technical Editing.** An experienced technical editor should be assigned to correct and monitor all spelling, grammatical, typographical, and format errors. Reviewer time should be focused on substantive technical and scientific issues.
- **Writers and Writing.** Although difficult to accomplish, efforts should be made to *persuade contractors to enlist the services of good writers,* preferably with NEPA experience. At least half of the time wasted on NEPA document preparation is because of poor writing which necessitates constant rewriting.

Implementation of any of these time-saving devices requires dedicated and committed DOE, SNL, and contractor project managers and staff. A generic 15-month EIS schedule is shown in Figure 3-11.

Figure 3-11
Generic 15-Month Environmental Impact Statement (EIS) Schedule

4.0 Dealing With NEPA Documentation Problems

The biggest obstacle to streamlining the NEPA process is preparation of documents that are poorly written and poorly organized, and that overwhelm the reader with incomprehensible technical detail. Much more time is spent on project management techniques, budget and schedule control, creating computerized tracking systems, and other administrative matters than on producing high quality documents that are understandable to the public and other nontechnical reviewers. The "lessons learned" in hindsight about NEPA documents that have run into difficulty are quickly unlearned with the commencement of each new EA or EIS.

This section is not about writing style, rules of composition, or proper use of the English language. Instead, it is intended to provide a review of some of the key CEQ requirements and DOE *Green Book* guidance on preparing EAs and EISs and dealing with documentation problems that have occurred repeatedly over 25 years.

4.1 Document Writing and Preparation

The following CEQ requirements have been almost universally ignored by federal agencies.

Environmental impact statements shall be written in plain language and may use appropriate graphics so that decisionmakers and the public can readily understand them. Agencies should employ writers of clear prose or editors to write, review, or edit statements, which will be based upon the analysis and supporting data from the natural and social sciences and the environmental design arts . . . (§1502.8).

The CEQ emphasizes the importance of focusing only on issues that are "truly significant" and avoiding "amassing needless detail" (§1500.1). Further, "excessive paperwork" is to be reduced by setting page limits, being "analytic rather than encyclopedic," writing in "plain language," and following a "clear format" (§1500.4). Material reasonably available to interested persons must be incorporated by reference to "cut down on bulk" without impeding agency and public review (§1502.21). While the CEQ regulations focus on preparing EISs, the same editorial principles apply to EAs and even ECL/ADMs.

The DOE *Green Book* provides guidance on "General Document Quality/Reader Friendliness" in Section 9. Documents are to "inform, not intimidate, the interested public." The guidance calls for achieving a "balance" between using plain language and accurately describing

complex technical issues. Tables and figures should be easy to follow and inform rather than confuse the reader. (For example, tables and figures should be clearly interpreted in the text. Avoid such expressions as: "For results, see Table X" when Table X consists of columns of mathematical calculations even the most sophisticated readers cannot understand.)

The Green Book admonishes preparers to write "precisely and concisely" and to "avoid jargon." Technical terms should be defined in the text and/or in a glossary. The *Green Book* also urges objectivity by, for example, using a conditional verb tense such as "would" rather than "will" when describing the proposed action and alternatives. Impacts should not be characterized as being "acceptable" without presentation of data and analysis that might allow a reader to draw the same conclusion. The reviewer will detect bias when potential impacts are dismissed without adequate analysis or discounted because of proposed compliance with all applicable laws, regulations, and standards.

The underlying basis for the CEQ regulations and DOE guidance is that an EA or EIS is intended to make information on the environmental consequences of pending agency decisions available and understandable to the public. *The overwhelming tendency of NEPA document preparers is to write for their peers rather than for the general public or those in other disciplines.* It can be assumed that some court challenges to EISs or EAs have been successful because the documents were not understandable either to those filing the lawsuit or to the court trying the case.

Implementing the following suggestions on document management and writing could result in measurable improvement in NEPA document preparation:

- ***Annotated Outline.*** Prepare a detailed Annotated Outline of the entire EA or EIS as described in Guide Sections 3.3.3 and 3.5.3. This provides the table of contents, page limit targets, and authors responsible for each section. It also provides instructions on how each section is to be written and identifies data gaps and uncertainties. Each proposed author should participate in preparation of the Outline, and each EA or EIS "team" member should have a copy. *Document writing should not commence until the Annotated Outline is available and agreed upon by all authors.*
- ***Involvement of Authors.*** Authors of document sections or segments should be kept involved in the entire document preparation process. Too frequently authors are given an assignment with no opportunity to communicate with other authors or even see the Annotated Outline. It is impossible to produce an integrated NEPA document that "flows" intelligently through all of its parts if

individual authors are isolated in hermetically sealed compartments. Authors should be treated as being a part of the EA or EIS "team."

- **Document Coordinator.** This is not the same person as the DOE NDM or NCO. Neither is it the same person as the SNL or document subcontractor project manager. The Document Coordinator will usually be an employee of the EIS or EA contractor, directly responsible to the contractor's project manager. *The responsibility of the Document Coordinator is to do the nitty-gritty, day-by-day tracking of text, figures, tables, appendices, and other work products to ensure that they are integrated into the document through several iterations.* Another responsibility of the Document Coordinator is to make sure that the QA/QC plan is implemented on a daily basis. This individual should be a seasoned professional with excellent oral and written communications skills.
- **Technical Editor(s).** The DOE *Green Book* recommends using technical editors to "help identify unclear passages, undefined terms, and unsupported conclusions, and generally improve the presentation of material." Technical editors also do more mundane tasks like checking for spelling, typographical, and grammatical errors and ensuring that cross references are correct. They are also responsible for compiling appendices, working with authors on the glossary, preparing the list of acronyms, and maintaining a running list of references. *Qualified and experienced technical editors allow authors and reviewers to devote their time to substantive document content.*
- **Regulatory Precision.** *Be precise and accurate in the use of regulatory terms and the explanation of regulatory requirements.* Check with legal counsel for correct legal citations. Do not copy regulatory discussion from another report or NEPA document which may be dead wrong! Seek expert regulatory advice as required.
- **Jargon.** Synonyms for "jargon" are "lingo," "shoptalk," "argot," "doubletalk," and "gibberish." Jargon is also related to terms like "concealment," "smoke-screen," and "camouflage." All scientific and technical disciplines are loaded with jargon to which its practitioners give little thought. Run a test. See if someone in a different discipline can easily understand what has been written.
- **Understatement and Avoidance.** Potential environmental impacts are frequently understated or dismissed without an adequate rationale or backup analysis. Avoid jumping to unsupported conclusions like "wildlife will not be impacted," "archaeological sites are not known to be present," or "there are not expected to be any major air quality effects." *Statements of this nature—all too common in NEPA documents—are prejudicial, unduly presumptive, and even unprofessional.*
- **Objectivity.** Being objective is difficult for project proponents who want to get their project "on line" as quickly as possible. Yet, lack of objectivity invites a

court challenge. All potential adverse impacts must be presented objectively and honestly without minimizing or discounting them, although mitigation measures can be used to reduce impact significance. *The best approach is to objectively analyze potential impacts and then explain how they can be mitigated.*

4.2 Major EA and/or EIS Sections

The DOE *Green Book* contains recommendations for preparing all of the major sections of an EA or EIS: purpose and need for action; description of the proposed action and alternatives; description of the affected environment; environmental impacts; list of preparers and agencies/ persons consulted; and appendices. Rather than duplicating or restating the *Green Book* guidance, this section serves only as a supplement to emphasize some of the EA/EIS preparation imperatives.

4.2.1 Purpose and Need for Action

The CEQ regulations provide as follows:

The (EIS) shall briefly specify the *underlying* purpose and need to which the agency is responding in proposing the alternatives including the proposed action (§1502.13). (Emphasis added.)

Thus, the purpose and need section should state the basic, fundamental, essential reason for DOE to undertake the proposed action. The proposed action and the alternatives identified must be consistent with and respond specifically to the purpose and need. If the purpose and need go in one direction and the proposed action in another (as sometimes happens), the document will be burdened with ambiguity. Alternatives, including the proposed action, are a *function* of purpose and need. The purpose and need are the target at which all alternatives must be aimed.

Authors should avoid the appearance of bias which results when this section gives the impression that only the proposed action can possibly fulfill the purpose and need. Otherwise, any discussion of alternatives becomes only a *pro forma* exercise. The DOE *Green Book* also warns against stating the purpose/need so broadly that it can be achieved by an infinite variety of alternatives (see *Green Book* Section 3).

"Purpose" and "need" are not synonymous. "Purpose" is defined by such terms as intention, end, goal, objective, mission, and direction. "Need" on the other hand can be equated with

necessity, desire, demand, and requirement. Both the "purpose" of the project and the "need" for the project should be addressed in this section.

4.2.2 Proposed Action and Alternatives

This is one of the two "Achilles' Heels" of EIS and EA preparation. (The other is the analysis of environmental consequences.) *Unclear and incomplete descriptions of what is proposed, and the options available, are primary weaknesses of NEPA documents.* If the proposed action and alternatives are not adequately described, it is not possible to perform an impact analysis that will withstand the glare of public and judicial scrutiny.

The CEQ regulations require that both the proposed action and the alternatives be analyzed in "comparative form" so that decisionmakers have a "clear basis for choice among options" (§1502.14). Thus, the proposed action is seen as only one of several alternatives. In practice, this is not realistic because federal agencies start with a proposed action they want to see implemented following a procedural examination of alternatives as required by NEPA. Although an examination of alternatives is clearly required for an EA (§1508.9), the level of detail of analysis is much less than for an EIS.

The "preferred alternative," a term often used in EISs, is really no different from the "proposed action." It is the alternative which the agency believes will fulfill the purpose and need and its statutory mission, giving consideration to economic, environmental, technical, and other factors. The term "preferred alternative" should not be confused with the "environmentally preferable alternative" which agencies are required to identify in the ROD (see Guide Section 3.5.11).

The CEQ regulations in §1502.14 require agencies to:

- Rigorously explore and objectively evaluate all "reasonable" alternatives. Reasonable alternatives include those that are practical or feasible from a technical and economic standpoint, using common sense (CEQ 1981).
- Briefly discuss why certain alternatives were eliminated from detailed study.
- Devote substantial treatment to the proposed action and alternatives considered in detail (which would be the most "reasonable" alternatives).
- Include alternatives not within the jurisdiction of the "lead" agency.

- Include the alternative of "no action" (meaning either that the proposed action would not take place or ongoing actions, i.e., the status quo, would continue as before).

Both the proposed action and the alternatives should be discussed in terms of "activities" that can potentially trigger environmental impacts (e.g., road construction, vegetation removal, pollutant emissions, effluent discharges, radioactive waste transportation, construction/operation of waste treatment facilities, etc.). *Needless detail should not be devoted to project characteristics that would not result in some type of environmental change or disturbance* (e.g., project cost, engineering approaches, design details, worker training, historical background, etc.). Consistent with the DOE *Green Book's* "sliding scale" approach, discussion of the proposed action and alternatives should be commensurate with the potential for causing environmental impacts (adverse or beneficial).

4.2.3 Affected Environment

The description of the affected environment is the "baseline" condition which launches the analysis of environmental consequences. Environmental baseline descriptions are usually assigned to individual authors according to discipline (e.g., geology, surface water hydrology, air quality). Each author has the tendency to write everything that he or she knows about the topic, frequently resulting in bulky, encyclopedic minutiae. The CEQ regulations on describing the affected environment are worth repeating here:

The environmental impact statement shall *succinctly* describe the environment of the area(s) to be affected by the alternatives under consideration. The descriptions shall be *no longer than is necessary to understand the effects of the alternatives*. Data and analyses in a statement shall be *commensurate with the importance of the impact*, with less important material summarized, consolidated, or simply referenced. Agencies shall avoid *useless bulk* in statements and shall concentrate effort and attention on important issues. *Verbose descriptions of the affected environment are themselves no measure of the adequacy of an environmental impact statement* (§1502.15). (Emphasis added.)

Perhaps no other CEQ (or DOE) requirement is so consistently violated in preparation of both EAs and EISs. *Descriptions of environmental baseline conditions are often verbose, highly technical, full of jargon, and frequently irrelevant to an analysis of environmental impacts.* The critical connection between *activities, environmental conditions, and impacts* is often obscured. Sections on the affected environment are often more encyclopedic than analytic,

not written in "plain language," and do nothing to reduce the length (and cost) of EAs and EISs.

The following "helpful hints" are intended to improve preparation of sections on the "affected environment" for both EAs and EISs:

- *Utilize existing environmental baseline data where available.* For example, a "Sandia National Laboratories, Albuquerque Environmental Baseline Update" (SNL/NM 1995b) was recently prepared specifically for use in NEPA documents. The report includes baseline data on: geology, climate and meteorology, ecology, air quality, noise, cultural resources, visual resources, socioeconomics, and land use. The recently published "Final Environmental Impact Statement and Environmental Impact Report for Continued Operation of Lawrence Livermore Laboratory and Sandia National Laboratories, Livermore" (DOE 1992c) provides extensive background data for NEPA documents prepared by SNL/CA. A corollary suggestion is to *avoid using environmental baseline information that is badly outdated.*
- *Describe only those environmental parameters that could potentially be affected by the proposed action.* For example, groundwater hydrology is not likely to be affected by road construction or transmission lines. It could be affected by a "pump and treat" groundwater remediation system.
- *Prepare environmental parameter descriptions (soils, surface water, vegetation, etc.) in the context of activities that are part of the proposed action.* For example, a description of surface water quality is relevant to the impact assessment if road construction could increase stream sedimentation or change water temperatures.
- *Establish page limit goals for descriptions of environmental parameters as a guide to the diverse authors who will serve as investigators and writers.* (Page limit goals should be established for all EA or EIS sections in the Annotated Outline.)
- *Avoid needless detail in environmental descriptions that bear little, if any, relationship to the impact assessment* (e.g., long lists of wildlife and vegetation species, or tables devoted to threatened or endangered species that probably do not exist in the project area).

4.2.4 Environmental Consequences (Impact Analysis)

Most of the NEPA cases successfully litigated in the federal courts since 1970 have been based on two prevalent complaints: (1) failure of the agency to prepare an EIS when one is required (e.g., an inappropriate CX or FONSI); and (2) preparation of an inadequate impact

assessment either for an EA or an EIS. Impact analyses that survive close scrutiny are not solely a function of sophisticated and complex methodologies like fault tree analysis, numerical screening of alternatives, or computerized mathematical models. It is primarily the result of training, experience, common sense, and most importantly, intellectual honesty. Although many methods and approaches have generated numerous journal articles, *there is no magic formula or "cookbook" approach to the analysis of environmental consequences.*

NEPA Requirements. NEPA itself (§102) provides the basic framework for successful impact analysis as follows:

1. *Utilize a systematic, interdisciplinary approach which will ensure the integrated use of the natural and social sciences and the environmental design arts* (see also the CEQ regulations in §1502.6). This provision was included to ensure that disciplines other than engineering and other "hard" sciences are used in preparing NEPA documents.
2. *Identify and develop methods and procedures to ensure that unquantified environmental amenities and values are considered along with economic and technical elements.* This refers to such values as parklands, wetlands, endangered species, cultural resources, and intact ecosystems.
3. *Analyze environmental effects which cannot be avoided;* effects of alternatives; relationship between short-term uses and long-term productivity; and any irreversible and irretrievable commitments of resources.
4. Prior to preparing an EIS (or EA), *consult with and obtain the comments of any federal agency which has jurisdiction by law or special expertise* with respect to any environmental impact.
5. *Study, develop, and describe appropriate alternatives* in any proposal which involves unresolved conflicts concerning alternative uses of available resources.
6. *Recognize the worldwide and long-range character of environmental problems.*
7. *Initiate and utilize ecological information* in the planning and development of resource-oriented projects.

Of these seven NEPA requirements for adequate environmental impact analysis, only number 2 is routinely complied with in most EAs and EIS. The interdisciplinary approach that NEPA intended is rarely achieved because very few social scientists or environmental designers (planners, architects, etc.) are involved in the process. Number 3 has generally been omitted from EAs and is not adequately analyzed in most EISs. As to number 4, federal

agencies are reluctant to seek comments of other agencies during the scoping process. Number 5 is complied with only occasionally while numbers 6 and 7 are mostly ignored. It is no wonder that so many EAs and EISs are vulnerable to challenges by the public and the courts.

CEQ Requirements. The CEQ regulations elaborate on the Act by providing more detailed instructions on "environmental consequences" (§1502.16). An environmental impact analysis must (as appropriate) include discussions of:

- *Direct effects* which are caused by the proposed action and occur at the same time and place
- *Indirect effects* which are caused by the proposed action but are later in time or farther removed in distance (e.g., growth-inducing impacts, effects related to land use changes, long-range ecosystem alterations, etc.)
- *Possible conflicts* between a proposed action and federal, regional, state, local, and tribal land use plans, policies, and controls
- *A comparative analysis* of the environmental effects of the proposed action and the alternatives
- *Energy requirements and conservation potential* of various alternatives and mitigation measures
- *Natural or depletable resource requirements* and the conservation potential of various alternatives and mitigation measures
- *Urban quality, historic and cultural resources*, and the design of the "built" environment
- *Means to mitigate adverse environmental impacts* (if not fully covered under the description of the proposed action and alternatives).

Recommendations for Improvement. This list consists, in part, of recommendations contained in Section 6 of the *Green Book*. It also borrows from the 1991 "DOE NEPA Review: Lessons Learned/Common Errors" by Eric Cohen (Cohen 1991). The following recommendations are by no means all-inclusive:

- *Focus on significant or potentially significant issues* (e.g., radioactive releases, sensitive species, transportation risks). Use the "sliding scale" approach (Figure 2-2) by discussing impacts in proportion to their significance.

- Confine the analysis in an EA to information needed to support a determination to issue a FONSI or prepare an EIS.
- *Provide a concise comparison of the impacts of alternatives* (preferably at the end of the EA or EIS section of environmental consequences), using a matrix, table, or some other appropriate device.
- Avoid confusing *causes* (e.g., air emissions, radioactive releases, land disturbances, liquid effluents) with *impacts* (e.g., cancer risks, disruption of critical habitat, degradation of water resources). *Activities* associated with the proposed action must be interpreted in terms of changes or alterations in the human and natural environment. (See Figure 4-1.)
- Provide a credible scientific or technical basis for estimating *cumulative impacts*, which are additive or incremental effects which accumulate over time. Individually minor impacts may become collectively significant (e.g., minor project-by-project vegetation removal for new structures).
- Provide a brief "negative declaration" if sensitive (and, therefore, controversial) resources are not an issue, if such a statement is supported by good information. For example: "A recent 100-percent pedestrian survey by a qualified archaeologist did not discover any cultural resources to be present in the project area (Reference)."
- *Quantify both activities and impacts as much as possible* as long as the quantification methodology is generally accepted in the scientific community (e.g., release rates, air concentrations, cancer risks). Do not attempt to quantify the unquantifiable.
- Do not confine human health and environmental impacts to radioactive or hazardous chemical exposures and doses. Interpret exposures/doses in terms of cancer deaths or toxicological effects. Compare exposure data to existing DOE, NRC, or EPA standards where they exist.
- *Prepare write-ups of risk assessment results that are understandable to the public as well as to sophisticated reviewers who are not risk assessment specialists.* Incremental cancer risks expressed only as 2.53×10^{-6} or $3.48 \text{ E-}9$ with no interpretation mean *nothing* to most readers. Use phrases like "increased cancer fatalities of 2.53 per million persons."
- *Do not ignore ecological effects—the impacts of releases of radionuclides or hazardous chemical constituents on plants and animals.* This is a common failing of most risk assessment discussions in NEPA documents. Make a good faith effort even if information is incomplete or unavailable (see §1502.22). See Guide Section 4.2.6.

Source: Modified from *The NEPA Compliance Manual* with permission of Government Institutes, Inc., 4 Research Pl., Ste. 200, Rockville, MD 20850

Figure 4-1
Environmental Impacts: Cause and Effect Relationships

- *Do not minimize or discount impacts by emphasizing compliance with applicable environmental laws, regulations, permits, DOE Orders, or established health and safety procedures.* Even with full compliance, significant impacts can still occur.
- *Avoid making purely arbitrary or self-serving value judgments concerning the type or degree of impact expected (e.g., "acceptable," "minimal," "moderate," "minor") without sufficient analyses to support them.*

4.2.5 Cumulative Impacts

Under the CEQ regulations, three types of impacts must be analyzed: direct, indirect, and cumulative (see Guide Section 3.5.6 and Figure 3-9). EAs and EISs are especially deficient with respect to analysis and discussion of cumulative impacts. Nevertheless, this requirement has been consistently upheld by the courts.

The CEQ regulations define "cumulative impact" as:

[T]he impact on the environment which results from the *incremental impact* of the action when *added to other past, present, and reasonably foreseeable future actions* regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time (§1508.7). (Emphasis added.)

Ray Clark, the Senior Policy Analyst for CEQ, stated in a 1993 paper:

Experience suggests that perhaps the most ecologically devastating environmental effects may not result from the direct effects of a particular proposal, but from a combination of existing stresses on the environment, coupled with individually minor effects of multiple actions over time. In fact, some authorities contend that all environmental effects can be seen as cumulative since almost all systems have already been stressed by humans (Clark 1993).

For example, the Bureau of Land Management (BLM) links the decline of the Desert Tortoise in the western U.S. to such activities as grazing, off-road vehicle travel, military operations, housing developments, garbage dumping, pet collecting, and fence construction (Clark 1993). While all of these activities may be individually insignificant, their cumulative effect is to threaten the existence of a species.

Clark notes that "there is no single, universally accepted, conceptual approach" to cumulative impact analysis. A major problem is that people cannot agree on the geographic area to be considered (the "spatial bounds") or how far the analysis must stretch into the past and into the future. However, Clark does identify the following steps as an approach to cumulative impact assessment:

1. **Set Goals.** This pertains to the different environmental protection requirements that various agencies and governmental bodies establish as goals for sustainable development.
2. **Establish Spatial and Temporal Boundaries.** The geographic area to be examined can be agreed upon during the scoping process. It may consist of a watershed, an airshed, a community, or a federal facility like the KAFB or LLNL. Decisions must be made on which types of impacts are short-term and which may have a long-term effect (e.g., 25 years or longer).
3. **Establish the Environmental Baseline.** "Past, present, and reasonable foreseeable" effects analyzed or understood without reliable biophysical and socioeconomic information about the area for which cumulative impacts will be estimated.
4. **Define Impact Factors.** During the scoping process, identify the types of activities most likely to have major effects on such parameters as air quality, ecosystems, or community stability. Large-scale environmental restoration programs contain a number of impact factors.
5. **Identify Thresholds.** Ecosystem "carrying capacity" and air quality or water quality standards are examples. The DOE *Green Book* discussion of cumulative impacts notes the "markedly different effects of adding a small amount of liquid to a full glass or a nearly empty one." Every natural or manmade system has limits.
6. **Analyze the Impacts of Proposals and Their Alternatives.** The analysis must include an examination of "additive" and "synergistic" effects, not merely the direct effects of one single activity. One truckload of hazardous waste hauled one mile may have inconsequential effects when compared to 500 truckloads hauled the same distance.

Clark's guidance, plus some creative thinking that has been lacking in the past, may provide better cumulative impact assessment for SNL NEPA documents.

4.2.6 "Tiering" and "Bounding"

"Tiering" refers to the analysis of general issues addressed in broad "programmatic" EISs (see discussion of PEISs in Guide Section 3.5.8) followed by subsequent EISs or EAs of narrower scope (§1508.28). The tiering concept is illustrated by the "NEPA pyramid" in Figure 3-10.

When done properly, the narrower EIS or EA can "tier off" the broader EIS or PEIS by incorporating by reference and concentrating on issues pertinent to the narrower analysis.

Tiering increases NEPA document efficiency and saves time and cost. Examples include:

- Tiering from a program or policy EIS to a program or policy EIS of lesser scope. Example: tiering from a "programmatic" EIS (PEIS) on environmental restoration and waste management (ERWM) at all DOE facilities to an ERWM EIS at a single facility.
- Tiering from a program or policy EIS ("programmatic") to a site-specific EA or EIS. Example: tiering from a nationwide weapons testing programmatic to an EA or EIS on rocket testing at SNL.
- Tiering from an early stage site-specific EIS to a supplemental EIS on a later stage. Example: tiering from the 1980 Waste Isolation Pilot Plant (WIPP) project EIS to the 1990 Supplement EIS on program modifications and new information.
- Tiering from a broad scope sitewide EIS on continuing operations to EAs or EISs on new or expanded operations. Example: tiering from a sitewide EIS to an EA on a new waste management unit.

"Bounding" is a concept used to describe circumscribing or including potential impacts in an EA or EIS by using conservative assumptions and analytical techniques. ("Worst case" analysis is not required by the CEQ regulations.) The purpose of bounding is to minimize the need for additional or supplemental NEPA documentation for the same or similar actions. Bounding analysis is consistent with CEQ requirements that EISs and EAs focus on the most significant (or potentially significant) impacts. Bounding not only ensures that impacts are not underestimated, it tends to overestimate impacts. By "capturing" or "enclosing" actions with impacts of the greatest significance, bounding also ensures that all "reasonably foreseeable" impacts are included.

Two authors have identified four situations to which bounding of impacts applies (Saylor and McCold 1994):

1. When the impact is expected to be insignificant. This can be confirmed by using conservative bounding analysis.

2. When "generic" PEISs, EISs, or EAs are used for "actions which have relevant similarities, such as common timing, impacts, alternatives, methods of implementation, media, or subject matter" [§1502.4(c)(2)]. Bounding analysis can be used to estimate the largest foreseeable consequences. Examples are the nationwide DOE environmental restoration (ER) program and the SNL/NM ER program. Waste cleanup activities and numerous diverse sites have many "relevant similarities" where bounding is applicable.
3. When programmatic documents evaluate overall program impacts but not site-specific impacts. (This also applies to tiering.)
4. When bounding analyses are applied to accident analyses which focus on low-probability, high-consequence events. Transportation risk assessment is an example. Bounding of the most conservative impacts can be accomplished by changing the assumptions.

However, bounding is not a perfect analytical technique. It can be so conservative that the proposed action has unacceptable impacts or calls for unreasonable mitigation. If it is not conservative enough (or lacks essential data), some impacts will escape capture; they will not be bounded. Figure 4-2 illustrates this problem.

4.2.7 Incomplete or Unavailable Information

In 1986, CEQ abolished its "worst case analysis" requirement and substituted §1502.22 on "incomplete or unavailable information" (51 *FR* 15625, April 25, 1986). When information is lacking, three things need to be done:

1. When needed data are incomplete or unavailable (which occurs with regularity), the agency must make clear that the information needed to evaluate "reasonably foreseeable significant adverse effects" is not available or difficult to obtain.
2. If the incomplete information is essential to "a reasoned choice among alternatives," and it can be obtained at costs that are "not exorbitant," the agency must include this information in the EIS.
3. If the needed information cannot be obtained because of exorbitant costs or lack of knowledge in how to obtain it, the agency must include in an EIS:
 - A statement that such information is incomplete or unavailable
 - A statement of the relevance of the incomplete or unavailable information with respect to evaluating reasonably foreseeable significant adverse impacts

Note: Each "Activity" is part of an overall action. Activities 11 and 12 are not bounded by the EA or EIS and require separate NEPA documentation or a Supplemental EIS. See Wolff and Hansen 1994.

Figure 4-2
"Bounding" Environmental Impacts

- A summary of existing credible scientific evidence which is relevant to evaluating the impacts
- The agency's evaluation of reasonably foreseeable significant adverse impacts based upon theoretical approaches or research methods generally accepted in the scientific community.

The requirements further state that "reasonably foreseeable" includes impacts which have "catastrophic consequences even if their probability of occurrence is low"—provided that the impact analysis is supported by credible scientific evidence and is not based on pure conjecture.

4.2.8 Mitigation Measures

The CEQ regulations in §1508.20 define "mitigation" as:

- *Avoiding* the impact altogether by not taking a certain action or parts of an action
- *Minimizing* impacts by limiting the degree or magnitude of the action and its implementation
- *Rectifying* the impact by repairing, rehabilitating, or restoring the affected environment
- *Reducing or eliminating* the impact over time by preservation and maintenance operations during the life of the action
- *Compensating for* the impacts by replacing or providing substitute resources or environment.

Mitigation measures must be identified in at least one of two places in an EA or EIS:

- The description of the proposed action or alternatives [§1502.14(f)].
- The analysis of environmental consequences, unless fully covered in the proposed action and alternatives section [§1502.16(h)].

As discussed in Guide Section 3.4.2, *DOE requires that a Mitigation Action Plan (MAP) be prepared for mitigation measures that are essential to "render the impacts of the proposed action not significant"* [§1021.322(b)(2)]. These are distinguished from "those mitigations that are integral elements of the proposed action." Thus, mitigation measures that are

common and routine elements of the proposed action or alternatives (e.g., use of HEPA filters or dust suppression during construction) are part of the proposed action/alternatives discussion. *Mitigation measures that go beyond the routine integral elements, those proposed to address a particular or peculiar impact, should be discussed in the section on environmental consequences.*

Mitigation must also be addressed in an agency's ROD (Guide Section 3.5.11). *In the ROD, the agency preparing the EIS must state whether all practicable means to avoid or minimize environmental harm resulting from the selected alternative have been adopted. If means have not been adopted, the agency must state why they have not.* A monitoring and enforcement program must be summarized in the ROD where applicable for any proposed mitigation. The CEQ regulations require that mitigation and other conditions established in the EIS or during its review, and committed to as part of the ROD, must be implemented by the lead agency or a "consenting" agency (§1505.3).

5.0 Special NEPA Compliance Issues

This section addresses nine NEPA compliance issues that require further elaboration than the discussion in other sections of the Guide. It is intended for NEPA professionals who want to examine these issues in greater depth. This section is, by no means, to be construed as the "definitive" examination of each issue. Numerous articles in legal, scientific, and professional journals have appeared on each of these topics. Compliance with the National Historic Preservation Act and Endangered Species Act appears separately in Guide Attachments IV and V. Some of these sections contain considerable detail due to the complexity of the issue. However, the detail is minimal compared to the regulations or other source documents.

5.1 The NEPA Threshold Question: "Federalization" and "Defederalization"

NEPA requires that an EIS be prepared on "proposals for major Federal actions significantly affecting the quality of the human environment" [§102(2)(C)]. (EAs are prepared to determine if the effects of a federal action are "major" in terms of being "significant" enough to necessitate an EIS; if not, a FONSI is appropriate.) *The terms "proposal," "major," "federal action," and "significantly" are all elements of the "threshold question" in NEPA law that have been defined in the CEQ regulations and interpreted in numerous court decisions.* If an agency decides not to prepare an EIS (or EA) based on an *a priori* decision that the proposed action is not "major," not "federal," or has no "significant" effects, it proceeds at the risk of litigation (Mandelker 1993).

Under the CEQ regulations and the case law, "major federal action" covers an extremely wide range of federal projects, permits, approvals, and other assistance. According to the CEQ definition in §1508.18, the term "major federal action" includes "actions with *effects* that may be major and which are *potentially* subject to Federal control and responsibility" (emphasis added). Further: *"Major reinforces but does not have a meaning independent of significantly."* "Actions" are defined by CEQ as follows:

Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals [§1508.18(a)].

Under the CEQ provisions in §1508.18(b), federal actions "tend" to fall in one of the following four categories:

1. Adoption of official policy including rules, regulations, and interpretations.
2. Adoption of formal plans which guide or prescribe alternative uses of federal resources and on which future actions are based.
3. Adoption of programs or a group of concerted actions to implement a specific policy or plan.
4. Approval of specific projects, e.g., construction or management activities in a defined geographic area. "Projects" include actions approved by permit or other regulatory decisions as well as "federal" and "federally assisted" activities.

For purposes of NEPA compliance, all but the first category potentially apply to SNL activities. For example, category 2 could be associated with "formal plans" for alternative uses of all or part of the KAFB. A "program" or "group of concerted actions" is exemplified by the SNL/NM Environmental Restoration Program. However, most SNL NEPA compliance is triggered by "projects" such as construction, renovation, waste cleanup, or facility utilization. Some are "proposed actions" while others are "continuous activities" (see Wolff and Hansen 1993).

Federal Action. Situations occur where the participation or responsibility of the federal agency is so marginal that the action is no longer "federal." *Sometimes federal agencies (or nonfederal entities) attempt to minimize the federal role ("defederalize") to escape NEPA compliance.* The defederalization issues can arise whenever a nonfederal entity (state or local government, educational institution, or private company) undertakes an activity that requires *some* federal participation (e.g., permit, funding, or use of federal lands or facilities). If the federal participation is not extensive (or the impacts are not significant enough to be "major"), then NEPA does not apply to the project (Mandelker 1993).

The following examples of where the "federalization" issue arises are based on court opinions:

- Where the action undertaken by a nonfederal entity is "enabled" by a federal permit, license, approval, or other assistance. The question focuses on the degree of federal "enablement."

- Where the nonfederal project could not proceed "but for" federal participation or some form of federal assistance.
- Where the nonfederal action could be undertaken without federal approval or assistance but would be more feasible or successful with federal participation.
- Where the nonfederal action is "paired with" or undertaken jointly with the federal action, as with so-called federal/state or federal/private sector "partnerships."

Applicability to Sandia. *Each of these situations exists or may exist in the future at SNL facilities.* Examples are the "work for others" (WFO) or "user-facility" agreements whereby other agencies, laboratories, or private industry use SNL facilities and/or expertise. Use of the SNL-managed Kauai Test Facility (KTF) by the U.S. Army for rocket launching experiments is another example. There are also "cooperative research and development agreements" (CRADAs) under which SNL implements research and development (R&D) initiatives in "partnership" with nonfederal entities. For example, SNL/NM has a CRADA in effect with General Motors for design of an electronic emissions control device for 1998 model vehicles. There are many other examples of nonfederal entities using SNL facilities and personnel for R&D or "technology transfer" activities because of SNL's unique, state-of-the-art capabilities or technical resources.

There are no hard and fast rules which can conveniently be applied to determine if such activities are "federal" enough for NEPA purposes. It depends on the size of the "federal handle." If the "handle" is small enough in terms of funding, approvals, participation, technical contribution, and other factors, NEPA may not apply. (The level of funding is only *one* consideration.) What Mandelker refers to as the "small handle rule" (denying federalization) has to be played out against the "substantial contribution rule" (where the action is "federal") (Mandelker 1993). It is another application of the DOE "sliding scale" approach.

Unfortunately, these determinations must be made on a case-by-case basis, ultimately by the courts. *The recommended approach is to assume that the joint nonfederal/federal action is "federal," and that NEPA compliance is required, unless a convincing argument can be made for defederalization.* Preparation of an ECL/ADM would help in this determination by describing the proposed action. Assistance of legal counsel should also be solicited. Further, it must be kept in mind that even a "minor" level of federal participation on a project with potentially "significant" impacts can translate into "major federal action significantly affecting the quality of the human environment."

5.2 NEPA/CERCLA/RCRA Document Integration

The CEQ regulations contain very few qualifications such as "when practicable" or "where feasible"; most of the requirements are unconditional mandates. One of the exceptions relates to document integration. Agencies are to "integrate the requirements of NEPA with other planning and environmental review procedures" to the *"fullest extent possible"* [§1500.2(c)]. Further, they are required to prepare DEISs "concurrent with and integrated with" investigations required by "other environmental review laws and executive orders" to the *fullest extent possible* [§1502.25(a)]. These qualifications indicate that CEQ recognizes the difficulty and impracticality of integrating EAs and EISs with other forms of environmental documentation.

Because of inherent problems associated with integrating NEPA, CERCLA, and RCRA, DOE policy and practice has been slowly evolving. Although there were earlier attempts at NEPA/CERCLA integration, DOE policy was first enunciated in DOE Order 5400.4 on "Comprehensive Environmental Response, Compensation, and Liability Act Requirements" (DOE 1989). The Order states that it is the policy of DOE to integrate the procedural and documentation requirements of CERCLA and NEPA *"wherever practical"* and to combine the CERCLA and NEPA public review process *"where appropriate."*

The June 1994 DOE Secretarial Policy on NEPA (DOE 1994a) contains the latest policy guidance on NEPA/CERCLA integration. DOE will rely on "the CERCLA process" for reviewing actions taken under CERCLA. NEPA values and public involvement will be addressed as follows:

- NEPA reviews will be undertaken for siting, construction, and operation of treatment, storage, and disposal (TSD) facilities that support CERCLA remediation, waste management, and "other purposes."
- CERCLA documents [e.g., remedial investigations (RI) and feasibility studies (FS)] will incorporate NEPA values (e.g., cumulative, off-site, ecological, and socioeconomic impacts) "to the extent practicable."
- Steps will be taken to ensure opportunities for "early public involvement" in the CERCLA process.
- DOE may "choose," after consultation with "stakeholders," to integrate the NEPA/CERCLA processes "for specific proposed actions" (no examples provided).

- For RCRA "corrective actions," project managers should consult with the DOE NCO who will consult with ES&H and the Office of General Counsel on how to proceed under NEPA.

In summary, there is no current blanket DOE policy to integrate NEPA documentation with CERCLA or RCRA requirements except in certain circumstances to be decided on a case-by-case basis.

An EA was recently completed for the SNL/NM Environmental Restoration Program which analyzed the impacts of proposed RCRA corrective action at 89 solid waste management units (SWMU) (DOE 1995). This EA, which was primarily a NEPA document prepared for RCRA requirements, was based in part on the "NEPA/CERCLA/RCRA Integration Strategy for Environmental Restoration Program Sandia National Laboratories, Albuquerque" (Hansen 1992).

The integration strategy document, published as SAND 7312, contains a detailed table which compares NEPA, CERCLA, and RCRA documentation requirements with respect to: purpose, proposed action, alternatives, environmental consequences, scoping, public involvement, quality and extent of analysis, documentation format, timing or processes, and record of decision (Hansen 1992). As can be seen from the table, CERCLA and RCRA documents which focus on hazardous, radioactive, or mixed waste cleanup are prepared for substantially different purposes than NEPA documents (Hansen and Wolff 1993).

5.3 Environmental Justice

On February 11, 1994, President Clinton issued Executive Order 12898 on "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations."

Although environmental justice requirements are broader than NEPA, they must now be taken into account in the preparation of all NEPA documents. Environmental justice is an important "new" issue within the DOE system.

Under the E.O., each federal agency is ordered to:

[M]ake achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories and possessions

There are as yet no standard definitions of "environmental justice," "minority community," "low-income community," "disproportionately high," or the type of "social impacts" to be considered.

The EPA is charged with the responsibility of convening an interagency Federal Working Group on Environmental Justice composed of representatives of at least seventeen executive departments and offices including DOE. The Working Group is to provide guidance to and coordination among federal agencies in implementing the environmental justice policy. Each agency must develop an "agency-wide environmental justice strategy" which will, at the minimum:

- Promote enforcement of all health and environmental statutes in areas with minority or low-income populations.
- Ensure greater public participation.
- Improve research and data collection relating to the health of minority and low-income populations.
- Identify differential patterns of consumption of natural resources among minority and low-income populations.

Among the E.O. mandates most applicable to SNL facilities is that of requiring federal agencies (whenever practicable and appropriate) to collect, maintain, and analyze information on the race, national origin, income level, and other characteristics for populations surrounding federal facilities. This requirement is particularly focused on facilities that are subject to reporting under the Emergency Planning and Community Right-to-Know Act (EPCRA) and that are expected to have a "substantial" environmental, human health, or economic effect on surrounding populations.

Further, each agency must work to ensure that public documents, notices, and hearings related to human health or the environment are "concise, understandable, and readily accessible to the public." This applies especially to NEPA documents. *The President's memorandum which accompanies E.O. 12898 specifically requires that an analysis of environmental, human health, economic, and social effects on minority and low-income communities be included in NEPA reviews.*

*DOE issued a pre-decisional draft environmental justice strategy document on December 12, 1994 (DOE 1994d). No "bureaucratic structure" is being proposed to implement the environmental justice policy. A "limited staff" in the DOE-HQ Office of Environmental Justice and Research, within the Office of Economic Impact and Diversity, will work with the Federal Interagency Working Group and coordinate environmental justice activities. Although the pre-decisional draft has numerous DOE-wide goals and objectives, **those that apply particularly to the NEPA process are as follows:***

- Provide technical assistance to DOE-HQ and Field Operations in implementing the Department's environmental justice guidance as it relates to NEPA and Title VI of the Civil Rights Act.
- Develop and issue detailed NEPA guidance for all DOE elements involving appropriate stakeholder reviews.
- Address minority and low-income communities in descriptions of the affected environment and in the analysis of environmental consequences.
- Include subsections under "socioeconomic impacts" to address any disproportionately high and adverse impacts on minority and low-income populations (e.g., health effects, contamination sources, exposure predictions, and unique risk scenarios).
- Identify mitigation measures for disproportionately high and adverse health or environmental effects in low-income and minority populations by establishing liaisons with such communities.
- Expand opportunities for minority and low-income communities to participate in the NEPA public involvement process by using "proactive" measures.
- Conduct "outreach" activities for minority and low-income populations and American Indian tribes by encouraging their participation in scoping and development of NEPA documents.
- Improve research and data collection methods relating to human health and environmental risks posed to minority and low-income populations.

Consideration of environmental justice factors in NEPA documents requires more than adding a new dimension to socioeconomic impact analysis. It also involves analyzing potential disproportionately high adverse health and environmental effects related to air and water pollution, biological resources, cultural resources, transportation, cumulative impacts, subsistence consumption of resources, and other parameters.

5.4 Pollution Prevention

The Pollution Prevention Act of 1990 (PPA) (42 U.S.C. §§13101 to 13109) affirmed a new approach to improving environmental quality consistent with one of the purposes of NEPA: "to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man" (NEPA §2; 42 U.S.C. §4321). The PPA also reflects the CEQ regulations policy provision that requires federal agencies to "avoid or minimize any possible adverse effects of their actions upon the quality of the human environment" [§1500.2(f)].

The PPA signals a change in direction for improving and maintaining environmental quality: away from focusing only on cleanup of pollution that has already occurred and toward increased pollution reduction and prevention. The PPA establishes a national policy comprising the following hierarchy of actions:

- Prevention or reduction of pollution at the source ("source reduction")
- Recycling of materials in an environmentally safe manner when pollution cannot be prevented
- Treatment in an environmentally safe manner of pollutants that cannot be prevented or recycled
- Disposal in an environmentally safe disposal facility or other release into the environment only as a last resort.

Pollution prevention in the form of waste minimization has been a national policy for over ten years. The Hazardous and Solid Waste Amendments (HSWA) of 1984 require generators of hazardous waste (and owners and operators of TSD facilities) to certify that they have a waste minimization program in place [42 U.S.C. §6922(b)]. The 1993 EPA "Guidance to Hazardous Waste Generators on the Elements of a Waste Minimization Program" (58 FR 31114) identifies six key elements:

- Top management support
- Waste accounting
- Audits
- Cost allocation
- Technology transfer
- Periodic review of program effectiveness.

Pollution Prevention Defined. CEQ and EPA define "pollution prevention" in somewhat different ways. Under the CEQ definition (CEQ 1993a), "pollution prevention" includes, but is not limited to:

- Reducing or eliminating hazardous or other polluting inputs which can contribute to both point and non-point source pollution. ["Point source" is defined in the National Pollutant Discharge Elimination System (NPDES) regulations in 40 CFR §122.2 which are authorized by the Clean Water Act.]
- Modifying manufacturing, maintenance, or other industrial practices.
- Modifying product designs and recycling (especially recycling that is a "closed loop" part of a manufacturing process).
- Preventing the disposal and transfer of pollution from one media to another (e.g., transferring soil contaminants to air or water through incineration).
- Increasing energy efficiency and conservation.

This definition is included in a 1993 CEQ memorandum on "Pollution Prevention and the National Environmental Policy Act" (CEQ 1993a).

The EPA definition describes "pollution prevention" in terms of source reduction and other practices which reduce or eliminate pollutants through more efficient use of raw materials, energy, water, or other resources. This also includes natural resource conservation practices. "Source reduction" is defined in the PPA as any practice which reduces the amount of any hazardous substance, pollutant, or contaminant entering any waste stream or otherwise released into the environment prior to recycling, treatment, or disposal and which reduces the hazards to public health and the environment (PPA §6603).

Integrating Pollution Prevention with the NEPA Process. According to the 1993 CEQ memorandum, pollution prevention is one of the environmental policy matters that federal agencies must consider to "integrate the NEPA process with other planning at the earliest possible time . . . to avoid delays later in the process, and to head off potential conflicts" (§1501.2). This integration can occur through:

1. Including pollution prevention in the EA or EIS scoping process
2. Considering specific pollution prevention actions as measures for mitigating adverse impacts (and including them in a MAP as appropriate)

3. Including pollution prevention activities as part of the proposed action or in one or more alternatives
4. Addressing pollution prevention (or the failure to prevent pollution) in the environmental consequences analysis
5. Providing information on pollution prevention in the EIS ROD as part of the discussion on mitigation.

Pollution prevention measures can also be used in an EA to support a FONSI.

DOE's "Policy on Waste Minimization and Pollution Prevention was issued on August 20, 1992 (DOE 1992)d. The policy expresses a commitment to "the inclusion of cost-effective waste minimization and pollution prevention in all (DOE) activities, including considerations of these concepts and approaches in DOE's program planning and major assessment processes . . . such as NEPA."

5.5 Air Conformity

Sweeping amendments to the Clean Air Act (CAA) were enacted by Congress on November 15, 1990. Among them is Section 176(c) which prohibits any federal agency from supporting "in any way" any activity which does not conform to a state implementation plan (SIP) designed to attain National Ambient Air Quality Standards (NAAQS) in each state air quality control region. Agencies have an "affirmative responsibility" for air conformity which means:

- Conformity to an SIP's purpose of eliminating or reducing the severity and number of NAAQS violations while achieving "attainment" of the standards
- Ensuring that agency activities will not cause any new violation of any air quality standard, increase the frequency or severity of any existing violation, or delay timely attainment of any standard or any required emission reductions or other milestones.

EPA Air Conformity Regulations. The EPA issued final regulations implementing Section 176(c) on November 30, 1993 (58 *FR* 63214). These were published as 40 CFR Parts 6, 51, and 93 and became effective on January 31, 1994.

Some of the more salient features of the complex air conformity regulations can be summarized as follows:

- *Federal agencies must make a "conformity determination" for each criteria pollutant where the total direct and indirect emissions in a nonattainment or maintenance area caused by a federal action would equal or exceed the threshold levels (in tons per year) established for nonattainment areas (NAA) [40 CFR §51.853(b)].* Criteria pollutants for which NAAQSs are established in 40 CFR Part 50 include: ozone (O₃) [volatile organic compounds (VOC) or nitrogen oxides (NO_x)]; carbon monoxide (CO); sulfur dioxide (SO₂); nitrogen dioxide (NO₂); particulate matter (PM-10); and lead. "Direct emissions" are those of a criteria pollutant or its precursors caused by a federal action that occur at the same time and place. "Indirect emissions" are those of a criteria pollutant or its precursors that are (1) caused by a federal action but that may occur later in time or farther removed in distance; and (2) those that the agency can control due to its continuing program responsibility.
- *Conformity determinations are not required when the emissions levels are below the threshold levels specified in the regulations [§51.853(b)(1)], or when the federal action would result in no emissions increase or the increase would be "clearly de minimus."* The regulations designate a long list of actions as being "de minimus" (e.g., routine maintenance and repair, routine transport of material and personnel, routine operation of facilities and equipment, and transfers of real property).
- *A number of actions are exempted from a conformity determination* including responses to emergencies, additions to existing structures required by environmental regulations, and direct emissions from remedial and removal actions carried out under CERCLA when the emissions comply with Prevention of Significant Deterioration (PSD) and New Source Review (NSR) requirements [§52.853(d)]. Air emission-related activities associated with RCRA corrective action are *not* exempted.
- *An agency must make its draft conformity determination available for public review together with supporting materials including a description of analytical methods.* A 30-day period is required for written comments although the comment period can run concurrently with other public involvement processes including those under NEPA. Responses to comments must be documented. The final conformity determination must be made available to the public through advertisements. (§51.856).
- EPA and state and local air quality agencies must be given a 30-day notice concerning the proposed action and the draft conformity determination. The same agencies must be notified within 30 days of a final conformity determination (§51.855).

DOE-AL Guidance. On April 20, 1994, DOE-AL issued a memorandum to implement EPA's air conformity rule. The memo announced that DOE-AL is adding a new "environmental concern" to Section B of the Environmental Checklist (ECL) discussed in Guide Section 3.1.3. The addition is "1b. Non-attainment maintenance area." This will allow DOE-AL facilities who are in nonattainment areas for a criteria pollutant to conduct a preliminary conformity determination for that pollutant. SNL/NM is located in Bernalillo County which has a classification of "moderate" nonattainment for CO. SNL/CA, located in Alameda County, is in a "moderate" nonattainment area for O₃ and CO.

The DOE-AL memorandum established the following step-by-step procedures to be used in integrating the air conformity analysis and determination with the DOE-AL NEPA process:

- **Step 1.** Determine if the proposed action would result in any direct or indirect air emissions (see definitions above). If not, mark Environmental Concern 1a as "no" on the ECL. If marked "yes," the emissions should be identified and discussed.
- **Step 2.** Determine if the proposed action would be located within a nonattainment area for any criteria pollutants. (This is not the case for all SNL facilities. However, even if Environmental Concern 1b is marked "yes," the proposed action may not emit the nonattainment pollutant in question.)
- **Step 3.** Determine the applicability of the air conformity determination to the proposed action. As discussed above, the proposed action may result in no emissions above the establish thresholds or the emission increases may be *de minimus*. In such a case, the air conformity process is complete. If not, the conformity determination must be made before a NEPA document can be approved.

If the proposed action would *otherwise* qualify for a CX, it might not meet one of the 10 CFR Part 1021, Subpart D, Appendix B eligibility criteria because absence of air conformity would "threaten a violation of applicable statutory, regulatory, or permit requirements for environment, safety, and health" (see Guide Section 3.2.3). In such a case, at least an EA would be required.

Air conformity is a complex and difficult issue for NEPA practitioners who may not qualify as air quality specialists. An excellent article on "Applying Conformity Determinations Under Section 176(c) of the Clean Air Act: NEPA With A Hammer" appeared in the Autumn 1994 issue of the *Federal Facilities Environmental Journal* (Stubblebine 1994).

5.6 Biodiversity

The science of ecology is the study of how organisms interact with their environment and with each other. The term derives from the Greek root "oikos" which means "home" or "habitat." Ecology has often been referred to as "the web of life," a metaphor describing a fundamental ecological principle: *everything affects everything else, directly or indirectly.* Professional ecologists refer to the "interconnectedness" of organisms and environmental factors as the "holocoenotic" or "wholistic" environment. A late 19th century English poet, Francis Thompson, described the wholistic ecosystem in this manner:

*All things by immortal power
Near or far
Hiddenly
To each other linked are,
That thou canst not stir a flower
Without troubling a star.*

Biological diversity or "biodiversity" is an ecological principle as old as the Earth itself. It has recently been discovered by the popular press and the general public as a "new" and complex global environmental issue that is understood only by some (not all) biological scientists.

This discussion is based primarily on the CEQ 1993 report on "Incorporating Biodiversity Considerations Into Environmental Impact Analysis Under the National Environmental Policy Act" (CEQ 1993).

Biodiversity Defined. *Biodiversity is a general term often referred to simply as "the variety and variability of life" or, more particularly, as the "diversity of genes, species, and ecosystems."* Biodiversity can be subdivided into several components:

- Regional ecosystem diversity which describes patterns of local ecosystems across a larger landscape, such as a river basin.
- Local ecosystem diversity or "community diversity" which refers to various assemblages of plant and animal communities in individual ecosystems, e.g., riparian areas, wetlands, old growth timber, or shortgrass prairie.
- Species diversity, referring to the wide variety of individual species of plants, animals, and microorganisms.

- Genetic diversity, which refers to specialization among organisms in response to changing environmental conditions.

A number of factors contribute to the decline or complete eradication of biodiversity including: physical alterations through changing land uses; direct and indirect effects of pollution (e.g., bioaccumulation of hazardous chemicals); introduction of exotic species which can eventually eliminate native species; disruption of natural processes through resource management; and global climate change.

As the CEQ report points out, the loss of biodiversity is not confined to tropical rain forests or coral reefs (CEQ 1993). It is a major problem in the U.S. with 600 plant and animal species listed as threatened or endangered under the Endangered Species Act and 4,000 species identified as candidates for listing. Recent data indicate that 9,000 species may be at risk. It is estimated that approximately 20 percent of the plant and animal communities in California are at risk while the figure for Hawaii is over 50 percent (CEQ 1993).

The NEPA Role. NEPA establishes policies and procedures that relate directly to the biodiversity issue including:

- The purpose clause in Section 2 includes promoting efforts which will "prevent or eliminate damage to the environment and biosphere" and "enrich the understanding of ecological systems."
- Section 101(a) states that "it is the continuing policy of the Federal Government . . . to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony"
- Federal plans, functions, and programs are to be improved and coordinated to "preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment that supports diversity" and "achieve a balance between population and resource use" [§101(b)].
- All federal agencies must ensure that "unquantified environmental amenities and values" are considered in decisionmaking and that "ecological information" is used in planning and developing resource-oriented projects [§§102(2)(B) and (H)].

DOE Policy. On December 21, 1994, Secretary of Energy Hazel O'Leary issued a new "Land and Facility Use Policy" (DOE 1994e). The policy, aimed at encouraging good "stewardship" of DOE lands and facilities, states in part:

It is Department of Energy's policy to manage all of its land and facilities as valuable natural resources. Our stewardship will be based on the principles of ecosystem management and sustainable development. We will integrate mission, economic, ecologic, social, and cultural factors in a comprehensive plan for each site that will guide land and facility use decisions. Each comprehensive plan will consider the site's larger regional context and be developed with stakeholder participation.

This policy statement followed a February 12, 1993, memorandum from DOE EH-25 which accompanied the circulation of the CEQ biodiversity report referenced in this section. The memo encouraged DOE staff to consider pollution prevention and biodiversity concepts in NEPA analyses, as appropriate (DOE 1993b).

Problems and Obstacles in Current NEPA Practice. Adequate consideration of biodiversity in NEPA documents has faced a number of problems and obstacles. A few of them are as follows:

- ***Focusing Only on "Federally Listed" Species.*** Plant and animal species listed by the U.S. Fish and Wildlife Service (USFWS) as threatened or endangered, and candidates for such listing, must be included in any NEPA review. However, confining the analysis to "federally listed" species is inadequate for an EA or EIS because it ignores state listed or candidate species as well as species listed by other federal agencies (e.g., U.S. Forest Service) and private organizations. All 50 states have Natural Heritage Data Centers with information on plant and animal species, biological communities, ecosystems, natural areas, and other biological resources that are not limited to threatened and endangered species. The term "sensitive species" is preferred because it encompasses species whose existence or critical habitat is threatened, whether they are "listed" or unlisted.
- ***Ignoring Species That Are "Non-Economic" or Unglamorous.*** All species are ecologically important whether they have recreational, commercial, or other economic value. Many animal species lack the "glamour" appeal or sporting value of Rocky Mountain bighorn sheep, Wapiti elk, mule deer, or rainbow trout. In fact, protection of such species often conflicts with broader biodiversity objectives. Species should be evaluated in NEPA documents in terms of their role in an ecosystem and not solely according to "values" imposed by humans.
- ***Giving Inadequate Consideration to Cumulative Impacts.*** This is difficult to accomplish in EAs or EISs that address only project-specific impacts unless the projects cover a region or ecosystem (such as a sitewide EIS for a large DOE facility like INEL or NTS). Such an analysis must consider "incremental" impacts further removed in time and distance. For example, Antarctic penguins

have accumulated DDT and radionuclides in their tissue from sources far removed both geographically and temporally.

The CEQ report on biodiversity (CEQ 1993) makes six specific recommendations for improving consideration of biodiversity in NEPA analyses:

1. Acknowledge the conservation of biodiversity as part of a national environmental policy and incorporate its consideration in the NEPA process.
2. Encourage and seek out opportunities to participate in efforts to develop regional ecosystem plans.
3. Actively seek relevant information from sources both within and outside of government agencies, e.g., universities.
4. Encourage and participate in efforts to improve communication, cooperation, and collaboration between and among governmental and non-governmental entities.
5. Improve the availability of information on the status and distribution of biodiversity and on techniques for biodiversity management and restoration.
6. Expand the information base on which biodiversity analyses and management decisions are based.

5.7 NEPA Exemptions

In general, NEPA does not exempt any federal agency from its requirements. The procedural requirements of §102 apply to "all agencies of the Federal Government" which must comply to the "fullest extent possible." Nevertheless, six categories of exemptions from NEPA have been established by CEQ, the Congress, and/or the courts. Although these do not currently apply to SNL projects, knowledge of them is useful for future reference.

CEQ's Emergency Provision. This provision appears in §1506.11 of the CEQ regulations:

Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with the Council about alternative arrangements. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review.

CEQ made it clear that the consultation envisioned need not take place *before* the emergency action is taken but can occur "as soon as feasible" (Swenson 1991).

The CEQ General Counsel's office is reported as stating that CEQ rarely grants requests for emergency exemptions and that circumstances approaching an "act of God" would be needed to justify a release from NEPA compliance (Swenson 1991). There have been perhaps one or two emergency exemptions a year since the regulations became effective in 1978. Actions in response to imminent threats to agricultural crops, salmon fisheries, and endangered species are cited as examples. Also, an emergency exemption was granted to the Department of Defense (DoD) for Operations Desert Shield and Desert Storm (the "Persian Gulf War") (Swenson 1991).

Statutory Exemptions. Congress has explicitly exempted a number of agency programs from the application of NEPA. Among the set of exemptions extended to EPA are those covering all EPA actions under the Clean Water Act and many actions authorized by the Clean Air Act. Other agency programs and projects have also been exempted by statute. Two of the more notable projects exempted were the Alaska Pipeline and the San Antonio Freeway which were tied up in litigation blocking both projects. Other examples of project or program exemptions authorized by statute include: the Synthetic Fuels Corporation (which is partially exempted); certain activities under the Surface Mining Control and Reclamation Act (SMCRA); and federal agency assistance under the Disaster Relief Act (DRA) to victims of flooding, earthquakes, fires, and other catastrophes.

Statutory Conflicts. NEPA specifically provides that its requirements will not "in any way affect the specific statutory obligations of any Federal agency," although this provision is limited to compliance with environmental quality standards and coordination or consultation with other agencies (NEPA §104). In one case, the U.S. Supreme Court struck down a lower court's claim that *any* federal action could be enjoined under NEPA and held that "NEPA was not intended to repeal by implication any other statute" [*United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 93 S.Ct. 2405 (1973)]. In another U.S. Supreme Court case, the court recognized that "where a clear and unavoidable conflict in statutory authority exists, NEPA must give way" [*Flint Ridge Development Co. v. Scenic Rivers Association of Oklahoma*, 426 U.S. at 788 (1976)].

Functional Equivalency. Courts have exempted EPA actions from NEPA on a case-by-case basis under the doctrine of "functional equivalency." In these cases, the procedural

requirements implemented by EPA under an environmental statute were deemed to be the functional equivalent of NEPA procedures (including public participation). EPA has long claimed to be exempt from NEPA for actions taken under CERCLA, although this position is not supported by the CERCLA legislative history or by CEQ. This may be clarified in future legislation.

A number of agencies other than EPA have claimed an entitlement to the functional equivalence exemption to cover some environmental protection or management responsibility. However, the courts have fashioned a "narrow" functional equivalence exemption to cover environmental analysis and public participation that is "equivalent" to that required by NEPA (Mandelker 1993). Also, in almost every case, the courts have limited the exemption to programs administered by EPA. Agencies whose sole mission is something other than environmental protection have not fared as well. In one case involving an attempted exemption under the Marine Mammal Protection Act, the court noted that the "mere fact that an agency has been given the role of implementing an environmental statute is insufficient to invoke the 'functional equivalent' exception" [*Jones v. Gordon*, 621 F.Supp. 7, 13 (1985)].

Presidential and National Security Exemptions. NEPA applies only to "agencies of the Federal Government" and not to the entire executive branch. The CEQ regulations explicitly state that "Federal agency" does *not* include "Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office" (§1508.120). According to the U.S. Supreme Court, this interpretation by CEQ is entitled to "substantial deference" [noted in Swenson 1991, *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979)].

The national security issue arises in two contexts: (1) where the federal government claims an "implied exemption" for actions associated with national defense and security; and (2) where federal agencies invoke public disclosure provisions of the Freedom of Information Act (FOIA) to exclude defense activities from judicial review (Mandelker 1993). In *Concerned About Trident v. Rumsfeld* [555 F.2d 817 (1977)], the court could find "no support in either the statute [NEPA] or the cases" for a national defense exemption. In that case, the Navy did not make a secrecy claim under the FOIA. (Compare the CEQ §1506.11 "emergency" exemption discussed above as applied to Desert Storm/Desert Shield.)

The FOIA expressly exempts from public disclosure activities specified by Executive Order "to be kept secret in the interest of national defense" [5 U.S.C. §552(b)(3)]. The U.S.

Supreme Court applied the FOIA secrecy provision to an exemption from preparing an EIS on nuclear weapons storage [see *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139 (1981)]. However, in other cases, courts have held that while the national defense action was not exempted from NEPA, the "secret" contents are protected from judicial review.

To summarize, neither the cases nor the FOIA secrecy exception assert a *carte blanche* NEPA exemption for national security reasons. Rather, the document contents can be shielded from public scrutiny.

CEQ and DOE Regulations on "Classified" Material. The CEQ regulations allow each federal agency to create limited exceptions to the regulations for "classified" proposals [§1507.3(c)]. Classified proposals are those that are specifically authorized under an Executive Order or statute to be kept secret in the interest of national defense. In addition, the CEQ regulations allow EISs (and EAs) which address "classified proposals" to be restricted from public dissemination under the agencies' own classified information procedures. These documents may be organized so that classified material is segregated in appendices, allowing unclassified portions to be released to the public.

The DOE NEPA implementing procedures track with the CEQ regulations. They prohibit the disclosure of "classified, confidential, of other information that DOE otherwise would not disclosure pursuant to the [FOIA] [§1021.340(a)]." However, the regulations require that, "to the fullest extent possible," information that is exempt from public disclosure be "segregated" and placed in an appendix "to allow public review of the remainder of a NEPA document." If the classified material cannot be segregated and still remain meaningful, the entire NEPA document can be withheld from the public. In such a case, DOE would still prepare the document and use it (internally) in decisionmaking (see §1021.340).

5.8 Extraterritorial Applications of NEPA

NEPA does not expressly provide that it applies to federal agency actions outside of the United States and its territories. However, the issue is so controversial that dozens of law review articles have addressed international application of the Act. One provision of NEPA directs federal agencies to "recognize the worldwide and long-range character of environmental problems and . . . lend appropriate support . . . to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment" [§102(2)(F)].

E.O. 12114, on "Environmental Effects Abroad of Major Federal Actions" (January 4, 1979), furthers the purposes of NEPA by requiring that federal agencies consider the effects of their actions on the environment outside the United States, its territories, and possessions. The following actions are included:

- Major federal actions significantly affecting the environment of the global commons outside the jurisdiction of any nation (e.g., the oceans or Antarctica)
- Major federal actions significantly affecting the environment of a foreign nation not participating with the United States and not otherwise involved in the action
- Major federal actions significantly affecting the environment of a foreign nation which provide to that nation:
 - A product, emission, or effluent which is prohibited or strictly regulated in the United States because it creates a serious health risk
 - A physical project which in the United States is prohibited or strictly regulated by federal law to protect the environment against radioactive substances
- Major federal actions outside the United States, its territories, and possessions which significantly affect natural or ecological resources of global importance designated for protection by the President or by an international agreement.

DOE issued its Final Guideline for Implementation of E.O. 12114 on January 5, 1981 (46 FR 1007). The guideline in large measure reiterates E.O. 12114.

E.O. 12114 provides for three types of environmental reviews: (1) environmental impact statements, (2) international bilateral or multilateral environmental studies, and (3) "concise reviews of the environmental issues involved, including environmental assessments, summary environmental analyses, or other appropriate documents." The E.O. designates the types of federal actions to which it applies and indicates the environmental review and documentation procedures that apply to each action as follows:

Major Federal Actions	Requirement
Significantly affecting the environment of the global commons	EISs (generic, program, or specific)
Significantly affecting the environment of a foreign nation not participating with the U.S. and not involved in the action	Bilateral or multilateral environmental studies by the U.S. and one or more foreign nations or by an international organization in which the U.S. is a participant Concise reviews of the environmental issues involved, including EAs, summary environmental analyses, or other appropriate documents
Significantly affecting the environment of a nation which provides to that nation a product, emission, or effluent which is strictly regulated or prohibited in the U.S. because it creates a serious health risk, or a project which is prohibited or strictly regulated in the U.S. to protect the environment against radioactive substances	Bilateral or multilateral environmental studies by the U.S. and one or more foreign nations or by an international organization in which the U.S. is a participant Concise reviews of the environmental issues involved, including EAs, summary environmental analyses, or other appropriate documents
Outside the U.S., its territories, and possessions which significantly affect resources of global importance designated for protection by the President or by an international agreement	EISs (generic, program, or specific) Bilateral or multilateral environmental studies by the U.S. and one or more foreign nations or by an international organization in which the U.S. is a participant Concise reviews of the environmental issues involved, including EAs, summary environmental analyses, or other appropriate documents

As noted above, the United States has the responsibility under E.O. 12114 to prepare NEPA documents addressing actions affecting the environment of the global commons outside of the jurisdiction of any nation. *The term "global commons" is usually understood to include portions of the planet, such as the oceans and upper atmosphere, in which nations have a common but not a proprietary interest.* Typically, NEPA documentation for actions affecting the global commons will include a discussion of the effects of transportation on water quality and air quality; the risks to threatened, endangered, and sensitive species and critical habitats; risks to commercial fisheries; and risks to the human population.

The federal courts have addressed the extraterritorial application of E.O. 12114 in several instances although the issue is not really settled. In *Sierra Club v. Adams* [578 F.2d 389 (D.C. Cir. 1978)], the court found that the Department of Transportation (DOT) and Federal Highway Administration (FHA) fulfilled NEPA requirements for the construction of the

Darien Gap Highway through Panama and Colombia. In that case, the court assumed that NEPA applied to the proposed action and did not question its application. Similarly, in *National Organization for Reform of Marijuana Laws (NORML) v. U.S.* [452 F. Supp. 1226 (D.C. 1978)], the court assumed but did not decide as a matter of law that NEPA was applicable to the United States' participation in a paraquat spraying program in Mexico. The court found that the preparation of an "environmental analysis" on the effects outside of the United States (i.e., in Mexico) would satisfy NEPA requirements. Both cases were concerned with major federal decisions that would produce impacts *both* in the United States and in a sovereign foreign nation.

However, in *Natural Resources Defense Council v. Nuclear Regulatory Commission* [647 F.2d 1345, 1367 (D.C. Cir. 1981)], ***the Court held that NEPA did not apply to the Nuclear Regulatory Commission's (NRC) decision to issue a nuclear export license for the exportation of nuclear reactor technology to the Philippines.*** The court reasoned that NEPA did not require the preparation of an EIS for nuclear technology export decisions with respect to impacts which fall *exclusively* within a foreign jurisdiction, based in part on the consideration that the extraterritorial application of U.S. regulatory laws might result in a conflict with or a displacement of the foreign sovereign's own regulations. The court noted that "NEPA's legislative history illuminates nothing in regard to extraterritorial application" (*NRDC v. NRC*, 647 F.2d at 1367).

More recent court decisions such as *Greenpeace USA v. Stone* [748 F.Supp. 749 (D. Hawaii 1990); 924 F.2d 195 (Cal. 9th Cir. 1991)] and *Environmental Defense Fund v. Massey* [772 F.Supp. 1296 (D.D.C. 1991)] have also addressed the application of NEPA outside the jurisdiction of the United States. In *Greenpeace*, environmental groups and an individual plaintiff sought a preliminary injunction prohibiting the movement of U.S. chemical munitions from the Federal Republic of Germany to Johnston Atoll in the Pacific. ***The court found that NEPA did not apply to movement of munitions through and within West Germany pursuant to an executive agreement between the United States and West Germany.*** The court also found that the Army adequately addressed the issue of transoceanic shipment (i.e., across the global commons) by preparing a Global Commons Environmental Assessment in compliance with E.O. 12114.

In *EDF v. Massey*, an environmental group sought to enjoin the National Science Foundation from taking steps to incinerate wastes in Antarctica. The court concluded that NEPA itself does not apply extraterritorially (see *NRDC v. NRC* above) and that E.O. 12114 does not

provide for a cause of action to bring a civil suit asserting the application of NEPA (or lack thereof).

In summary, it appears that the issue of whether NEPA applies extraterritorially has been decided by the courts based on the facts of each case. *As a general rule of thumb, NEPA documentation must be prepared for major federal actions affecting the global commons, actions affecting both the United States and a foreign nation, and actions affecting the environment of a foreign nation that is not involved in the action (the so-called "innocent bystander" situation).* NEPA documentation does *not* have to be prepared if a foreign nation is participating in the proposed action, provided that the action and the potential impacts are confined exclusively to the foreign sovereign state.

5.9 Segmentation

The "segmentation" issue arises when an EIS (or EA) is prepared on an individual action rather than a group of actions that are closely related and that constitute a "proposal."

The largest number of examples of improper segmentation have arisen in the highway cases when the Federal Highway Administration (FHA) or some other federal agency has attempted to prepare EISs or EAs on small segments of major highway projects to minimize environmental impacts. Also, preparation of a NEPA document for only the first phase or segment of a proposal can result in the remainder of the project not addressed in the NEPA documentation becoming inevitable, a *fait accompli*.

Segmentation is also used by agencies to avoid the NEPA threshold question. An action may not qualify as a "major federal action" if the segment addressed is small enough in scope or qualifies for a categorical exclusion (see Guide Section 5.1).

The segmentation issue relates to a number of questions such as:

- Should a group of connected or related actions be discussed in one comprehensive NEPA document (EIS or EA) even if some of the "segments" are separated in time?
- Does a group of actions the agency wishes to segment qualify as a "proposal" to be addressed in a single NEPA document?
- Should a "program" or "programmatic" EIS be prepared on groups of actions to avoid improper segmentation?

- Does it make a difference when individual but related actions are widely separated geographically rather than proposed to occur in the same geographic area?
- Can environmental issues be treated as "divisible" in multistage projects?

The courts have struggled with these and other segmentation questions since the early 1970s. While a comprehensive discussion of court opinions on segmentation is beyond the scope of this Guide, a discussion of some of the basic segmentation elements may be helpful in avoiding the segmentation problem.

The CEQ regulations provide as follows:

Agencies shall make sure a proposal which is the subject of an Environmental Impact Statement is properly defined. Agencies shall use the criteria for scope (§1508.25) to determine which proposal(s) shall be the subject of a particular statement. *Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement* [§1502.4(a)] (emphasis added).

The regulations in §1508.25 relate to the scope or range of actions, alternatives, and impact to be considered in an EIS. Three types of actions, three types of alternatives, and three types of impacts are to be considered. These include:

- ***Connected actions that are closely related.*** Included are actions that:
 - Automatically trigger interactions which may require EISs
 - Cannot or will not proceed unless other actions have been taken previously or simultaneously
 - Are interdependent parts of a larger action independent of the larger action for the justification
- ***Cumulative actions*** which when viewed with other proposed actions may have cumulatively significant impacts that should be discussed in the same EIS
- ***Similar actions*** such as those with common timing or geography.

Numerous court opinions have confirmed that a NEPA document is required only when an agency makes a "proposal." *Thus, only those parts of an action which have reached the*

proposal stage need be considered connected or closely related. [See *Aberdeen and Rockfish Railroad Company v. Students Challenging Regulatory Agency Procedures (SCRAP II)*, 422 U.S. 289, 485 L. Ed. 191 (1975).] The CEQ regulations provide that a "proposal" exists when an agency has a goal and is actively preparing to make a decision on how the goal should be accomplished. "A proposal may exist in fact as well as by agency declaration that one exists" (§1508.23). Under these guidelines, agencies have broad discretion for determining when goal implementation becomes a "proposed action."

While the courts have carefully crafted a number of criteria for permissible and non-permissible segmentation in the highway cases, it is hard to generalize from the court decisions in the non-highway cases. Many of them have seemed to hinge on geography: Segmentation being permissible if the "segments" are widely separated geographically but not permissible when they are in close geographic proximity. Thus, segmentation would probably not be permissible for closely related actions at the SNL/NM geographic location. An example case is *Cady v. Morton*, 527 F.2d 786 (1975). In that case, a federal agency approved coal leases on 30,800 acres of Indian land. The agency then prepared an EIS on the company's mining plan for 770 acres. The court held that the 770 acres could not be segmented. Even though each individual mining plan might be considered an "independent" project, the entire lease program on all 30,800 acres had to be addressed in a comprehensive EIS.

As can be seen from this discussion, segmentation is hardly a "cut and dried" issue with simple rules that are easy to follow. However, some things to be avoided if at all possible include:

- Segmenting "obviously" closely connected, interrelated actions with readily apparent cumulative impacts (e.g., individual remediation activities which are part of a comprehensive environmental restoration program) [see §1021.410(b)(3)]
- Preparing EAs or making CX determinations on small segments of a larger project or program to avoid a comprehensive EIS
- Making CX determinations on a number of closely related activities that should, at the least, be addressed comprehensively in an EA.

List of References

- Bausch, C., 1992, "A Simple Formula for Crafting Better NEPA Documents," *Federal Facilities Environmental Journal*, pp. 235-243 (Autumn 1992).
- Black, H.C., 1990, "Black's Law Dictionary," 6th Ed., West Publishing Co., St. Paul, MN.
- Blaug, E.A., 1993, "Use of the Environmental Assessment by Federal Agencies in NEPA Implementation," *The Environmental Professional*, Vol. 15, No. 1, pp. 57-65.
- Clark, R., 1993, "Cumulative Impact Assessment: A Tool for Sustainable Development," Council on Environmental Quality (Paper presented at the International Association of Impact Assessment Annual Conference, Shanghai, China, June 6, 1993).
- Cohen, E., undated, "DOE NEPA Review: Lessons Learned/Common Errors," U.S. Department of Energy (EH-251), Washington, D.C.
- Council on Environmental Quality, 1993a, "Pollution Prevention and the National Environmental Policy Act," Memorandum (January 12, 1993).
- Council on Environmental Quality, 1993b, "Incorporating Biodiversity Considerations Into Environmental Impact Analysis Under the National Environmental Policy Act," Washington, D.C. (January 1993).
- Council on Environmental Quality, 1981, "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations,: Volume 46, *Federal Register*, p. 18026 (March 23, 1981).
- Friesma, P.H., and P.J. Culhane, 1976, "Social Impacts, Politics, and Environmental Impact Statement Process," Vol. 16, *Natural Resources Journal*, p. 339 (1976).
- Hansen, R.P., 1992, "NEPA/CERCLA/RCRA Integration Strategy for Environmental Restoration Program Sandia National Laboratories, Albuquerque," SAND92-7312, Sandia National Laboratories, Albuquerque, NM (October 1992).
- Hansen, R.P., and T.A. Wolff, 1993, "NEPA/CERCLA/RCRA Integration: Policy vs. Practice," Proc. NAEP 18th Annual Conference, Raleigh, NC, May 24-26, 1993, pp. 203-228.
- Mandelker, D.R., 1993, "NEPA Law and Litigation," §8.04, Clark Boardman Callahan, New York, NY.
- Sandia National Laboratories, 1995a, "ES&H Manual," MN471001, March 31, 1995.
- Sandia National Laboratories, New Mexico (SNL/NM), 1995b, "Sandia National Laboratories, New Mexico Environmental Baseline Update - Revision 1.0" (Draft).

List of References *(Continued)*

Saylor, R.E., and L.N. McCold, 1994, "Bounding Analysis in NEPA Documents: When Are They Appropriate?," *The Environmental Professional*, Volume 16, No. 4, pp. 285-291 (December 1991).

Shipley Associates, 1995b, "The Environmental Impact Analysis Process Guide," Kirtland Air Force Base, January 23, 1995.

Stubblebine, S.D., 1994, "Applying Conformity Determinations Under Section 176(c) of the Clean Air Act: NEPA With A Hammer," *Federal Facilities Environmental Journal*, pp. 319-331 (Autumn 1994).

Swenson, R.T., 1991, "Desert Storm, Desert Flood: A Guide to Emergency and Other Exemption from NEPA and Other Environmental Laws," *Federal Facilities Environmental Journal* (Spring 1991).

U.S. Department of Energy (DOE), 1995c, "Environmental Assessment of Medical Isotope Production at Sandia National Laboratories/New Mexico and Los Alamos National Laboratory," Pre-Decisional Draft, Albuquerque, NM, February 7, 1995.

U.S. Department of Energy (DOE), 1995d, "Implementation Plan Nevada Test Site Environmental Impact Statement," Washington, D.C. (January 1995 Draft).

U.S. Department of Energy (DOE), 1994a, "Secretarial Policy on the National Environmental Policy Act," Washington, D.C. (June 1994).

U.S. Department of Energy (DOE), 1994b, "Guidance on Implementation of the Department's Public Participation Policy," Memorandum from Hazel R. O'Leary to all DOE Employees, Washington, D.C. (July 29, 1994).

U.S. Department of Energy (DOE), 1994c, "Effective Public Participation Under the National Environmental Policy Act," Office of NEPA Policy and Assistance (December 1994).

U.S. Department of Energy (DOE), 1994d, "U.S. Department of Energy Proposed Environmental Justice Strategy Executive Order 12898," Washington, D.C. (December 12, 1994).

U.S. Department of Energy (DOE), 1994e, "Land and Facility Use Policy," Memorandum from Secretary Hazel R. O'Leary to DOE Secretarial Officers and Operations Office Managers (December 21, 1994).

U.S. Department of Energy (DOE), 1993a, "Recommendations for the Preparation of Environmental Assessments and Environmental Impact Statements," Office of NEPA Oversight, Washington, D.C. (May 1993).

List of References (Continued)

U.S. Department of Energy (DOE), 1993b, "Information on Incorporating Pollution Prevention and Biodiversity Considerations into National Environmental Policy Act (NEPA) Analyses," Memorandum from Peter N. Brush, Acting Assistant Secretary, Environment, Safety and Health (February 12, 1993).

U.S. Department of Energy (DOE), 1992a, "Kauai Test Facility (KTF) Environmental Assessment," DOE/EA-0492, Albuquerque, NM.

U.S. Department of Energy (DOE), 1992b, "Draft Environmental Impact Statement and Environmental Impact Report for Continued Operation of Lawrence Livermore National Laboratory and Sandia National Laboratories, Livermore," Volumes I and II, DOE/EIS-0157 and/or SCH 90030847 (February 1992).

U.S. Department of Energy (DOE), 1992c, "Final Environmental Impact Statement and Environmental Impact Report for Continued Operation of Lawrence Livermore National Laboratory and Sandia National Laboratories, Livermore" (DOE/EIS-0157 and/or SCH 90030847), Volumes I and II (August 1992).

U.S. Department of Energy (DOE), 1992d, "Policy on Waste Minimization and Pollution Prevention," August 20, 1992.

U.S. Department of Energy (DOE), 1989, "Comprehensive Environmental Response, Compensation, and Liability Act Requirements," (DOE Order 5400.4), October 6, 1989.

U.S. Department of Energy, Albuquerque Operations Office (DOE-AL), 1995, "Quality Assurance Plan for the Environmental Assessment Process Under the National Environmental Policy Act," January 1995.

U.S. Senate, 1969, Committee on Interior and Insular Affairs, Hearing on S. 1075, S. 237, and S. 1752, 91st Congress, 1st Session.

Wolff, T.A., and R.P. Hansen, 1994, "Use of Comprehensive NEPA Documents to Reduce Program Risk," Proc. NAEP 19th Annual Conference, New Orleans, LA, June 12-14, 1994, pp. 341-354.

Wolff, T.A., and R.P. Hansen, 1993, "The NEPA Threshold Question Revisited: 'Proposed' Actions and 'Continuous Activities'," Proc. NAEP 18th Annual Conference, Raleigh, NC, May 24-26, 1993, pp. 248-258.

Glossary

Administrative record	The record (e.g., draft and final documents, reports, special studies, public comments) compiled by an agency to support a decision subjected to judicial review.
Affected environment	Environmental elements (e.g., air quality, water quality, or esthetics) to be affected or created by the proposed action. Includes elements (e.g., geologic structure, seismicity, climate) that can affect the proposed action.
Alternatives	Alternative ways of meeting the purpose of and need for the project or program including the proposed action. Always includes no action.
Bounding	Encompassing, circumscribing, including all reasonably foreseeable environmental impacts in the same EA or EIS by using conservative assumptions and analytical techniques so as to avoid or minimize additional NEPA documentation.
Categorical Exclusion (CX)	One of a class of actions that DOE has determined does not individually or cumulatively have a significant effect on the human environment so as to require neither an EA nor an EIS.
Cumulative Impact	An impact which results from the incremental impact of an action when added to other past, present, and reasonably foreseeable future impacts caused by or associated with the proposed action.
Environmental Impact	Changes in or alterations of the existing biophysical, cultural, or socioeconomic environment resulting from or associated with the proposed action or an alternative. Includes direct, indirect, and cumulative effects. "Impact," "effect," and "consequence" are used interchangeably in NEPA analyses.
Human Environment	Interpreted to comprehensively include the natural and physical environment and the relationship of people to that environment. Social and economic conditions alone do not constitute the human environment for purposes of NEPA.

Glossary (Continued)

Major Federal Action	Proposed action with effects that may be major and which is subject to federal control and responsibility. "Major" reinforces but does not have a meaning independently of "significantly."
Mitigation	Avoiding, minimizing, rectifying, reducing, eliminating, or compensating for the effects of a proposed action or alternative.
NEPA Process	The multiple procedures federal agencies must implement in order to comply with the requirements of NEPA. Includes agency planning, intergovernmental cooperation and consultation, scoping, document preparation, reviewing and commenting, public involvement, and agency decisionmaking.
NEPA Document	In the DOE system, includes NOI, EIS, ROD, EA, FONSI, and any other document required by NEPA or the CEQ regulations. Does not include ECLs and ADMs, or CX memoranda which are internal DOE documents.
Programmatic	A broad-scope program or policy EA or EIS which can be used as a "tiering" document for programs or projects of narrower scope.
Proposed Action	A federal program, project, or activity which is being proposed to accomplish a specific goal. It remains a "proposal" and cannot be implemented or involve a commitment of resources until NEPA compliance is completed and approved by DOE.
Scoping	An internal or public process devoted to determining the range of actions, alternatives, impacts, and issues to be addressed in an EA or EIS. A major purpose of scoping is to identify issues and impacts to be analyzed in depth and to eliminate insignificant issues from detailed study.
Significantly Affecting	The analysis of environmental effects in terms of both <i>context</i> and <i>intensity</i> . The context may be local, national, or global or short-term or long-term. Intensity refers to the severity of the impact and the degree to which the proposed action may potentially affect many human health and environmental factors. (See CEQ regulations in §1508.27.)

Glossary *(Continued)*

Supplemental Analysis

An analysis required by DOE to determine whether to prepare a supplemental EIS, prepare a new EIS, or prepare no additional NEPA documentation on the same program or project.

Supplemental EIS

A supplement to a DEIS or FEIS required when substantial changes are made to a proposed action that are relevant to environmental concerns or there are significant new circumstances or information bearing on the proposed action or its impacts.

Tiering

Preparation of a broad-scope programmatic-type EIS from which EISs or EAs of narrower scope are "tiered." The narrower scope documents can incorporate by reference discussion in the broad-scope EIS and concentrate on issues pertinent to the specific narrow-scope EA or EIS.

Index

Action Forcing Requirements	1-3
AF Form 813	2-17
Biodiversity	5-13
NEPA Role	5-14
Problems and Obstacles in Current NEPA Practice	5-15
Categorical Exclusion	
DOE Appendix B CXs	3-9
Eligibility Criteria for a CX	3-11
Public Participation/Disclosure	3-13
Step-By-Step Procedure	3-10
Time Requirements	3-13
Categorical Exclusion (CX)	3-9
CEQ Regulations Guidance	2-7
CEQ Regulations Highlights	2-4
Agency Compliance	2-5
Commenting	2-5
Environmental Impact Statement (EIS)	2-4
NEPA and Agency Decisionmaking	2-5
NEPA and Agency Planning	2-4
Department of Energy (DOE) Draft Order 491	2-12
Department of Energy (DOE) EA/EIS Preparation Guidance ("Green Book")	2-12
Department of Energy (DOE) Floodplains/Wetlands Review Requirements	2-13
Floodplain Management	2-14
Protection of Wetlands	2-14
Department of Energy (DOE) NEPA Implementing Procedures	2-7
Department of Energy (DOE) Order 5440.1E on NEPA Compliance	2-12
Department of Energy (DOE) Regulations Highlights	2-8
Availability of NEPA Documents to the Public	2-8
Classes of Actions	2-8
EA Review and Comment	2-8
EIS Implementation Plan	2-8
Notice of Intent to Prepare an EIS	2-8
Notification to States/Tribes/Public	2-8
Supplement Analysis	2-8

Index (Continued)

Department of Energy (DOE) Secretarial Policy Statement on NEPA	2-9
Department of Energy Albuquerque Operations Office (DOE-AL) Environmental Assessment (EA) Quality Assurance Plan (QAP)	2-14
Environmental Assessment (EA)	3-13
Affected Environment	3-23
Annotated Outline	3-19
DOE EA Determination	3-16
DOE M&R	3-18
Draft EA	3-20
Environmental Consequences	3-23
Establishment of the EA Team	3-16
Executive Summary	3-22
Finding of No Significant Impact (FONSI)	3-21, 3-23
Format and Content	3-21
Generic Schedule	3-28
Internal Review and Comment	3-19
Internal Review and Comment on Draft EA	3-20
Internal Scoping	3-18
Mitigation Action Plan (MAP)	3-24
Mitigation Measures	3-23
Must be prepared when:	3-15
Notification of Host State(s), Tribe(s), and the Public	3-19
Page Limits	3-24
Pre-Decisional Draft EA	3-19
Preparation and Review	3-17
Project Plan	3-18
Proposed Action and Alternatives	3-23
Proposed Actions "Normally" Requiring an EA	3-14
Public Participation/Disclosure	3-24
Purpose and Need for Action	3-23
Recommended Elements	3-22
Review and Comment on Draft EA by Host State(s), Tribe(s), and the Public ..	3-20
Role in the NEPA Process	3-14
Step-By-Step Preparation and Review	3-16
Team	3-18

Index (Continued)

Time Requirements	3-26
Environmental Checklist/Action Description Memorandum (ECL/ADM)	3-1
Categorical Exclusion (CX) Determination	3-9
CX Screening Process	3-11
Determination Time Requirements	3-8
Format and Content	3-7
Instructions on Preparing	3-1
NEPA Documentation Decision Process	3-1
Preparation	3-5
Process Flow Chart	3-4
Public Participation/Disclosure	3-9
Role	3-3
Step-By-Step Process	3-3
Environmental Impact Statement (EIS)	3-32
Affected Environment	3-45
Annotated Outline	3-37
Applicable Environmental Laws, Regulations, Permits	3-46
Connected Actions	3-41
Content	3-43
Cumulative Actions	3-41
Cumulative Impacts	3-45
Direct Impacts	3-45
DOE EIS Determination	3-34
DOE Headquarters Review and Approval	3-38
Draft EIS (DEIS)	3-37
Environmental Baseline Data	3-54
Environmental Consequences	3-45
Executive Summary	3-43
Format	3-43
Generic 15-Month EIS Schedule	3-56
Implementation Plan (IP)	3-37, 3-40, 3-42
Indirect Impacts	3-45
NEPA Pyramid	3-48
NEPA Threshold Question	3-33
Notice of Availability (NOA)	3-38

Index (Continued)

Notice of Intent (NOI)	3-37, 3-40
Programmatic and Sitewide EIS	3-47
Record of Decision (ROD)	3-39, 3-52
Risk Assessment Scope	3-54
Routine Mitigation Measures	3-44
Schedule	3-27, 3-36, 3-38, 3-53, 3-55
Supplement Analysis	3-49
Supplemental EIS	3-49
Team	3-36
Writers and Writing	3-54
Finding of No Significant Impact (FONSI)	3-27, 3-31
Format and Content	3-31
Major Federal Action	3-27
Mitigated FONSI	3-30
Mitigation Action Plan (MAP)	3-24, 3-30, 3-46
Public Participation/Disclosure	3-31
Role	3-29
Significantly Defined	3-27
Time Requirements	3-8, 3-13, 3-26, 3-32, 3-52
Integrating Other Environmental Review Requirements	2-6
Interdisciplinary Approach	2-6
Methodology and Scientific Accuracy	2-6
Mitigated FONSI	2-9
Mitigation Action Plan (MAP)	2-9, 3-24, 3-30, 3-46
National Environmental Policy Act (NEPA)	1-1, 2-2
Document Preparation Guidance	3-1
Regulatory Hierarchy	2-1
National Environmental Policy Act (NEPA) Documentation Problems	4-1, 4-17
Affected Environment	4-6
Annotated Outline	4-2
Bounding	4-14, 4-16
Comparative Analysis	4-9
Cumulative Impact Analysis	4-13
Cumulative Impacts	4-12
Direct Effects	4-9

Index (Continued)

Document Coordinator	4-3
Document Writing and Preparation	4-1
Ecological Information	4-8
Energy Requirements	4-9
Environmental Baseline	4-6, 4-7
Environmental Consequences (Impact Analysis)	4-7
Incomplete or Unavailable Information	4-15
Indirect Effects	4-9
Interdisciplinary Approach	4-8
Involvement of Authors	4-2
Jargon	4-3
Mitigation Action Plan (MAP)	4-17
Mitigation Measures	4-17
Objectivity	4-3
Page Limit Goals	4-7
Preferred Alternative	4-5
Programmatic	4-14
Proposed Action and Alternatives	4-5
Purpose and Need for Action	4-4
Recommendations for Improvement	4-9
Regulatory Precision	4-3
Sitewide	4-14
Technical Editor(s)	4-3
Tiering	4-14
Understatement and Avoidance	4-3
National Environmental Policy Act (NEPA) Exemptions	5-16
CEQ and DOE Regulations on Classified Material	5-19
CEQ's Emergency Provision	5-16
Desert Storm/Desert Shield	5-18
Functional Equivalency	5-17
Presidential and National Security Exemptions	5-18
Statutory Conflicts	5-17
Statutory Exemptions	5-17
NEPA Process	1-3
NEPA Process Elements	1-4

Index (Continued)

Agency Decisionmaking	1-5
Agency Planning	1-4
Commenting and Document Review	1-5
Coordination and Cooperation With Other Agencies	1-4
Document Preparation	1-5
Public Involvement	1-5
Scoping	1-4
Other Federal Laws	2-15
Endangered Species Act	2-16
National Historic Preservation Act	2-16
Programmatic and Sitewide NEPA Documents	2-9
Public Participation/Disclosure	3-24
CEQ Requirements	3-25
DOE Requirements	3-25
Environmental Documents	3-25
Public Participation	3-9, 3-24, 3-49, 3-54
Public Participation Policy	3-25
Scientific Evidence	2-6
Scope	3-40
Scoping	2-5
Secretary of Energy's Policy Statement on NEPA	2-9
Continuing Improvement	2-11
Contract Reforms	2-11
Delegations of Authority	2-10
Enhanced Public Involvement	2-11
NEPA Compliance Officer (NCO)	2-10
NEPA Document Manager (NDM)	2-10
NEPA Process Changes	2-10
Reforms for High Priority Projects	2-11
Scoping	2-10
Significantly Define	3-27
Sliding Scale Approach	2-13
Special NEPA Compliance Issues	5-1
Air Conformity	5-10
Air Conformity Regulations	5-10

Index (Continued)

Biodiversity	5-13
CEQ Report on Biodiversity	5-16
Connected Actions	5-24
Criteria Pollutants	5-11
Cumulative Actions	5-24
Defederalization	5-1
Direct Emissions	5-11
Ecology	5-13
Environmental Effects Abroad	5-20
Environmental Justice	5-5
Extraterritorial Applications of NEPA	5-19
Federal Action	5-1, 5-2
Federal Agency Actions Outside of the U.S.	5-19
Federalization	5-1
Federally Listed Species	5-15
Global Commons	5-21, 5-23
Indirect Emissions	5-11
Low-Income Populations	5-5
Minority Populations	5-5
NEPA Threshold Question	5-1
NEPA/CERCLA/RCRA Document Integration	5-4
Pollution Prevention	5-8, 5-9
Pollution Prevention Act of 1990 (PPA)	5-8
Segmentation	5-23
Significantly Defined	3-27, 5-1
Similar Actions	5-24
Waste Minimization Program	5-8
USAF NEPA Process	2-16
Worst Case Analysis	2-6
Writing and Reducing Paperwork	2-6

Attachment I

National Environmental Policy Act (NEPA)

THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969, AS AMENDED*

An Act to establish a national policy for the environment, to provide for the establishment of a Council on Environmental Quality, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "National Environmental Policy Act of 1969."

PURPOSE

SEC. 2. The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

TITLE I

DECLARATION OF NATIONAL ENVIRONMENTAL POLICY

SEC. 101. (a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

- (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
- (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
- (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
- (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice;
- (5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
- (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

*Pub. L. 91-190, 42 U.S.C. 4321-4347, January 1, 1970, as amended by Pub. L. 94-52, July 3, 1975, and Pub. L. 94-83, August 9, 1975.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

SEC. 102. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—

(A) Utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) Identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations;

(C) Include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

- (i) The environmental impact of the proposed action,
- (ii) Any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) Alternatives to the proposed action,
- (iv) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (c) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

- (i) the State agency or official has statewide jurisdiction and has the responsibility for such action,
- (ii) the responsible Federal official furnishes guidance and participates in such preparation,
- (iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and
- (iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) Recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) Make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) Initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) Assist the Council on Environmental Quality established by title II of this Act.

Sec. 103. All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

Sec. 104. Nothing in section 102 or 103 shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

Sec. 105. The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.

TITLE II

COUNCIL ON ENVIRONMENTAL QUALITY

Sec. 201. The President shall transmit to the Congress annually beginning July 1, 1970, an Environmental Quality Report (hereinafter referred to as the "report") which shall set forth (1) the status and condition of the major natural, manmade, or altered environmental classes of the Nation, including, but not limited to, the air, the aquatic, including marine, estuarine, and fresh water, and the terrestrial environment, including, but not limited to, the forest, dryland, wetland, range, urban, suburban and rural environment; (2) current and foreseeable trends in the quality, management and utilization of such environments and the effects of those trends on the social, economic, and other requirements of the Nation; (3) the adequacy of available natural resources for fulfilling human and economic requirements of the Nation in the light of expected population pressures; (4) a review of the programs and activities (including regulatory activities) of the Federal Government, the State and local governments, and nongovernmental entities or individuals with particular reference to their effect on the environment and on the conservation, development and utilization of natural resources; and (5) a program for remedying the deficiencies of existing programs and activities, together with recommendations for legislation.

Sec. 202. There is created in the Executive Office of the President a Council on Environmental Quality (hereinafter referred to as the "Council"). The Council shall be composed of three members who shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate. The President shall designate one of the members of the Council to serve as Chairman. Each member shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the Federal Government in the light of the policy set forth in title I of this Act; to be conscious of and responsive to

the scientific, economic, social, esthetic, and cultural needs and interests of the Nation; and to formulate and recommend national policies to promote the improvement of the quality of the environment.

SEC. 203. The Council may employ such officers and employees as may be necessary to carry out its functions under this Act. In addition, the Council may employ and fix the compensation of such experts and consultants as may be necessary for the carrying out of its functions under this Act, in accordance with section 3109 of title 5, United States Code (but without regard to the last sentence thereof).

SEC. 204. It shall be the duty and function of the Council—

(1) to assist and advise the President in the preparation of the Environmental Quality Report required by section 201 of this title;

(2) to gather timely and authoritative information concerning the conditions and trends in the quality of the environment both current and prospective, to analyze and interpret such information for the purpose of determining whether such conditions and trends are interfering, or are likely to interfere, with the achievement of the policy set forth in title I of this Act, and to compile and submit to the President studies relating to such conditions and trends;

(3) to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in title I of this Act for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto;

(4) to develop and recommend to the President national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation;

(5) to conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality;

(6) to document and define changes in the natural environment, including the plant and animal systems, and to accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes;

(7) to report at least once each year to the President on the state and condition of the environment; and

(8) to make and furnish such studies, reports thereon, and recommendations with respect to matters of policy and legislation as the President may request.

SEC. 205. In exercising its powers, functions, and duties under this Act, the Council shall—

(1) Consult with the Citizens' Advisory Committee on Environmental Quality established by Executive Order No. 11472, dated May 29, 1969, and with such representatives of science, industry, agriculture, labor, conservation organizations, State and local governments and other groups, as it deems advisable; and

(2) Utilize, to the fullest extent possible, the services, facilities and information (including statistical information) of public and private agencies and organizations, and individuals, in order that duplication of effort and expense may be avoided, thus assuring that the Council's activities will not unnecessarily overlap or conflict with similar activities authorized by law and performed by established agencies.

SEC. 206. Members of the Council shall serve full time and the Chairman of the Council shall be compensated at the rate provided for Level II of the Executive Schedule Pay Rates (5 U.S.C. 5313). The other members of the Council shall be compensated at the rate provided for Level IV of the Executive Schedule Pay Rates (5 U.S.C. 5315).

SEC. 207. The Council may accept reimbursements from any private non-profit organization or from any department, agency, or instrumentality of the Federal Government, any State, or local government, for the reasonable travel expenses incurred by an officer or employee of the Council in connection with his attendance at any conference, seminar, or similar meeting conducted for the benefit of the Council.

SEC. 208. The Council may make expenditures in support of its international activities, including expenditures for: (1) international travel; (2) activities in implementation of international agreements; and (3) the sup-

port of international exchange programs in the United States and in foreign countries.

Sec. 209. There are authorized to be appropriated to carry out the provisions of this chapter not to exceed \$300,000 for fiscal year 1970, \$700,000 for fiscal year 1971, and \$1,000,000 for each fiscal year thereafter.

Attachment II

Council on Environmental Quality (CEQ) Regulations on Implementing NEPA Procedures (40 CFR Parts 1500 to 1508)

Council on Environmental Quality
Executive Office of the President

REGULATIONS
For Implementing The Procedural Provisions Of The
**NATIONAL
ENVIRONMENTAL
POLICY ACT**

Reprint
40 CFR Parts 1500-1508

TABLE OF CONTENTS

PART 1500—PURPOSE, POLICY, AND MANDATE

Sec.

- 1500.1 Purpose.
- 1500.2 Policy.
- 1500.3 Mandate.
- 1500.4 Reducing paperwork.
- 1500.5 Reducing delay.
- 1500.6 Agency authority.

PART 1501—NEPA AND AGENCY PLANNING

- 1501.1 Purpose.
- 1501.2 Apply NEPA early in the process.
- 1501.3 When to prepare an environmental assessment.
- 1501.4 Whether to prepare an environmental impact statement.
- 1501.5 Lead agencies.
- 1501.6 Cooperating agencies.
- 1501.7 Scoping.
- 1501.8 Time limits.

PART 1502—ENVIRONMENTAL IMPACT STATEMENT

- 1502.1 Purpose.
- 1502.2 Implementation.
- 1502.3 Statutory requirements for statements.
- 1502.4 Major Federal actions requiring the preparation of environmental impact statements.
- 1502.5 Timing.
- 1502.6 Interdisciplinary preparation.
- 1502.7 Page limits.
- 1502.8 Writing.
- 1502.9 Draft, final, and supplemental statements.
- 1502.10 Recommended format.
- 1502.11 Cover sheet.
- 1502.12 Summary.
- 1502.13 Purpose and need.
- 1502.14 Alternatives including the proposed action.
- 1502.15 Affected environment.
- 1502.16 Environmental consequences.
- 1502.17 List of preparers.
- 1502.18 Appendix.
- 1502.19 Circulation of the environmental impact statement.
- 1502.20 Tiering.
- 1502.21 Incorporation by reference.
- 1502.22 Incomplete or unavailable information.

Sec.

- 1502.23 Cost-benefit analysis.
- 1502.24 Methodology and scientific accuracy.
- 1502.25 Environmental review and consultation requirements.

PART 1503—COMMENTING

- 1503.1 Inviting comments.
- 1503.2 Duty to comment.
- 1503.3 Specificity of comments.
- 1503.4 Response to comments.

PART 1504—PREDECISION REFERRALS TO THE COUNCIL OF PROPOSED FEDERAL ACTIONS DETERMINED TO BE ENVIRONMENTALLY UNSATISFACTORY

- 1504.1 Purpose.
- 1504.2 Criteria for referral.
- 1504.3 Procedure for referrals and response.

PART 1505—NEPA AND AGENCY DECISIONMAKING

- 1505.1 Agency decisionmaking procedures.
- 1505.2 Record of decision in cases requiring environmental impact statements.
- 1505.3 Implementing the decision.

PART 1506—OTHER REQUIREMENTS OF NEPA

- 1506.1 Limitations on actions during NEPA process.
- 1506.2 Elimination of duplication with State and local procedures.
- 1506.3 Adoption.
- 1506.4 Combining documents.
- 1506.5 Agency responsibility.
- 1506.6 Public involvement.
- 1506.7 Further guidance.
- 1506.8 Proposals for legislation.
- 1506.9 Filing requirements.
- 1506.10 Timing of agency action.
- 1506.11 Emergencies.
- 1506.12 Effective date.

PART 1507—AGENCY COMPLIANCE

- 1507.1 Compliance.
- 1507.2 Agency capability to comply.
- 1507.3 Agency procedures.

PART 1508—TERMINOLOGY AND INDEX

- 1508.1 Terminology.
- 1508.2 Act.

Sec.
1508.3 Affecting.
1508.4 Categorical exclusion.
1508.5 Cooperating agency.
1508.6 Council.
1508.7 Cumulative impact.
1508.8 Effects.
1508.9 Environmental assessment.
1508.10 Environmental document.
1508.11 Environmental impact state-
ment.
1508.12 Federal agency.
1508.13 Finding of no significant
impact.
1508.14 Human environment.

Sec.
1508.15 Jurisdiction by law.
1508.16 Lead agency.
1508.17 Legislation.
1508.18 Major Federal action.
1508.19 Matter.
1508.20 Mitigation.
1508.21 NEPA process.
1508.22 Notice of intent.
1508.23 Proposal.
1508.24 Referring agency.
1508.25 Scope.
1508.26 Special expertise.
1508.27 Significantly.
1508.28 Tiering.
Index.

PART 1500—PURPOSE, POLICY, AND MANDATE

Sec.

- 1500.1 Purpose.
- 1500.2 Policy.
- 1500.3 Mandate.
- 1500.4 Reducing paperwork.
- 1500.5 Reducing delay.
- 1500.6 Agency authority.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and E.O. 11514, Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55990, Nov. 28, 1978, unless otherwise noted.

§ 1500.1 Purpose.

(a) The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment. It establishes policy, sets goals (section 101), and provides means (section 102) for carrying out the policy. Section 102(2) contains "action-forcing" provisions to make sure that federal agencies act according to the letter and spirit of the Act. The regulations that follow implement section 102(2). Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101.

(b) NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.

(c) Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions

that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.

§ 1500.2 Policy.

Federal agencies shall to the fullest extent possible:

(a) Interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies set forth in the Act and in these regulations.

(b) Implement procedures to make the NEPA process more useful to decisionmakers and the public; to reduce paperwork and the accumulation of extraneous background data; and to emphasize real environmental issues and alternatives. Environmental impact statements shall be concise, clear, and to the point, and shall be supported by evidence that agencies have made the necessary environmental analyses.

(c) Integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively.

(d) Encourage and facilitate public involvement in decisions which affect the quality of the human environment.

(e) Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.

(f) Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.

§ 1500.3 Mandate.

Parts 1500 through 1508 of this title provide regulations applicable to and binding on all Federal agencies for implementing the procedural provisions

of the National Environmental Policy Act of 1969, as amended (Pub. L. 91-190, 42 U.S.C. 4321 et seq.) (NEPA or the Act) except where compliance would be inconsistent with other statutory requirements. These regulations are issued pursuant to NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.) section 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977). These regulations, unlike the predecessor guidelines, are not confined to sec. 102(2)(C) (environmental impact statements). The regulations apply to the whole of section 102(2). The provisions of the Act and of these regulations must be read together as a whole in order to comply with the spirit and letter of the law. It is the Council's intention that judicial review of agency compliance with these regulations not occur before an agency has filed the final environmental impact statement, or has made a final finding of no significant impact (when such a finding will result in action affecting the environment), or takes action that will result in irreparable injury. Furthermore, it is the Council's intention that any trivial violation of these regulations not give rise to any independent cause of action.

§ 1500.4 Reducing paperwork.

Agencies shall reduce excessive paperwork by:

(a) Reducing the length of environmental impact statements (§ 1502.2(c)), by means such as setting appropriate page limits (§§ 1501.7(b)(1) and 1502.7).

(b) Preparing analytic rather than encyclopedic environmental impact statements (§ 1502.2(a)).

(c) Discussing only briefly issues other than significant ones (§ 1502.2(b)).

(d) Writing environmental impact statements in plain language (§ 1502.8).

(e) Following a clear format for environmental impact statements (§ 1502.10).

(f) Emphasizing the portions of the environmental impact statement that are useful to decisionmakers and the public (§§ 1502.14 and 1502.15) and reducing emphasis on background material (§ 1502.16).

(g) Using the scoping process, not only to identify significant environmental issues deserving of study, but also to deemphasize insignificant issues, narrowing the scope of the environmental impact statement process accordingly (§ 1501.7).

(h) Summarizing the environmental impact statement (§ 1502.12) and circulating the summary instead of the entire environmental impact statement if the latter is unusually long (§ 1502.19).

(i) Using program, policy, or plan environmental impact statements and tiering from statements of broad scope to those of narrower scope, to eliminate repetitive discussions of the same issues (§§ 1502.4 and 1502.20).

(j) Incorporating by reference (§ 1502.21).

(k) Integrating NEPA requirements with other environmental review and consultation requirements (§ 1502.25).

(l) Requiring comments to be as specific as possible (§ 1503.3).

(m) Attaching and circulating only changes to the draft environmental impact statement, rather than rewriting and circulating the entire statement when changes are minor (§ 1503.4(c)).

(n) Eliminating duplication with State and local procedures, by providing for joint preparation (§ 1506.2), and with other Federal procedures, by providing that an agency may adopt appropriate environmental documents prepared by another agency (§ 1506.3).

(o) Combining environmental documents with other documents (§ 1506.4).

(p) Using categorical exclusions to define categories of actions which do not individually or cumulatively have a significant effect on the human environment and which are therefore exempt from requirements to prepare an environmental impact statement (§ 1508.4).

(q) Using a finding of no significant impact when an action not otherwise excluded will not have a significant

effect on the human environment and is therefore exempt from requirements to prepare an environmental impact statement (§ 1508.13).

[43 FR 55990, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

§ 1500.5 Reducing delay.

Agencies shall reduce delay by:

(a) Integrating the NEPA process into early planning (§ 1501.2).

(b) Emphasizing interagency cooperation before the environmental impact statement is prepared, rather than submission of adversary comments on a completed document (§ 1501.6).

(c) Insuring the swift and fair resolution of lead agency disputes (§ 1501.5).

(d) Using the scoping process for an early identification of what are and what are not the real issues (§ 1501.7).

(e) Establishing appropriate time limits for the environmental impact statement process (§§ 1501.7(b)(2) and 1501.8).

(f) Preparing environmental impact statements early in the process (§ 1502.5).

(g) Integrating NEPA requirements with other environmental review and consultation requirements (§ 1502.25).

(h) Eliminating duplication with State and local procedures by providing for joint preparation (§ 1506.2) and with other Federal procedures by providing that an agency may adopt appropriate environmental documents prepared by another agency (§ 1506.3).

(i) Combining environmental documents with other documents (§ 1506.4).

(j) Using accelerated procedures for proposals for legislation (§ 1506.8).

(k) Using categorical exclusions to define categories of actions which do not individually or cumulatively have a significant effect on the human environment (§ 1508.4) and which are therefore exempt from requirements to prepare an environmental impact statement.

(l) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment (§ 1508.13) and is therefore exempt

from requirements to prepare an environmental impact statement.

§ 1500.6 Agency authority.

Each agency shall interpret the provisions of the Act as a supplement to its existing authority and as a mandate to view traditional policies and missions in the light of the Act's national environmental objectives. Agencies shall review their policies, procedures, and regulations accordingly and revise them as necessary to insure full compliance with the purposes and provisions of the Act. The phrase "to the fullest extent possible" in section 102 means that each agency of the Federal Government shall comply with that section unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible.

PART 1501—NEPA AND AGENCY PLANNING

Sec.

1501.1 Purpose.

1501.2 Apply NEPA early in the process.

1501.3 When to prepare an environmental assessment.

1501.4 Whether to prepare an environmental impact statement.

1501.5 Lead agencies.

1501.6 Cooperating agencies.

1501.7 Scoping.

1501.8 Time limits.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609, and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55992, Nov. 29, 1978, unless otherwise noted.

§ 1501.1 Purpose.

The purposes of this part include:

(a) Integrating the NEPA process into early planning to insure appropriate consideration of NEPA's policies and to eliminate delay.

(b) Emphasizing cooperative consultation among agencies before the environmental impact statement is prepared rather than submission of adversary comments on a completed document.

(c) Providing for the swift and fair resolution of lead agency disputes.

(d) Identifying at an early stage the significant environmental issues deserving of study and deemphasizing insignificant issues, narrowing the scope of the environmental impact statement accordingly.

(e) Providing a mechanism for putting appropriate time limits on the environmental impact statement process.

§ 1501.2 Apply NEPA early in the process.

Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Each agency shall:

(a) Comply with the mandate of section 102(2)(A) to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment," as specified by § 1507.2.

(b) Identify environmental effects and values in adequate detail so they can be compared to economic and technical analyses. Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents.

(c) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of the Act.

(d) Provide for cases where actions are planned by private applicants or other non-Federal entities before Federal involvement so that:

(1) Policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for later Federal action.

(2) The Federal agency consults early with appropriate State and local agencies and Indian tribes and with interested private persons and organizations when its own involvement is reasonably foreseeable.

(3) The Federal agency commences its NEPA process at the earliest possible time.

§ 1501.3 When to prepare an environmental assessment.

(a) Agencies shall prepare an environmental assessment (§ 1508.9) when necessary under the procedures adopted by individual agencies to supplement these regulations as described in § 1507.3. An assessment is not necessary if the agency has decided to prepare an environmental impact statement.

(b) Agencies may prepare an environmental assessment on any action at any time in order to assist agency planning and decisionmaking.

§ 1501.4 Whether to prepare an environmental impact statement.

In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in § 1507.3) whether the proposal is one which:

(1) Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§ 1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by § 1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

(d) Commence the scoping process (§ 1501.7), if the agency will prepare an environmental impact statement.

(e) Prepare a finding of no significant impact (§ 1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement.

(1) The agency shall make the finding of no significant impact available

to the affected public as specified in § 1506.6.

(2) In certain limited circumstances, which the agency may cover in its procedures under § 1507.3, the agency shall make the finding of no significant impact available for public review (including State and areawide clearinghouses) for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are:

(i) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to § 1507.3, or

(ii) The nature of the proposed action is one without precedent.

§ 1501.5 Lead agencies.

(a) A lead agency shall supervise the preparation of an environmental impact statement if more than one Federal agency either:

(1) Proposes or is involved in the same action; or

(2) Is involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity.

(b) Federal, State, or local agencies, including at least one Federal agency, may act as joint lead agencies to prepare an environmental impact statement (§ 1506.2).

(c) If an action falls within the provisions of paragraph (a) of this section the potential lead agencies shall determine by letter or memorandum which agency shall be the lead agency and which shall be cooperating agencies. The agencies shall resolve the lead agency question so as not to cause delay. If there is disagreement among the agencies, the following factors (which are listed in order of descending importance) shall determine lead agency designation:

(1) Magnitude of agency's involvement.

(2) Project approval/disapproval authority.

(3) Expertise concerning the action's environmental effects.

(4) Duration of agency's involvement.

(5) Sequence of agency's involvement.

(d) Any Federal agency, or any State or local agency or private person substantially affected by the absence of lead agency designation, may make a written request to the potential lead agencies that a lead agency be designated.

(e) If Federal agencies are unable to agree on which agency will be the lead agency or if the procedure described in paragraph (c) of this section has not resulted within 45 days in a lead agency designation, any of the agencies or persons concerned may file a request with the Council asking it to determine which Federal agency shall be the lead agency.

A copy of the request shall be transmitted to each potential lead agency. The request shall consist of:

(1) A precise description of the nature and extent of the proposed action.

(2) A detailed statement of why each potential lead agency should or should not be the lead agency under the criteria specified in paragraph (c) of this section.

(f) A response may be filed by any potential lead agency concerned within 20 days after a request is filed with the Council. The Council shall determine as soon as possible but not later than 20 days after receiving the request and all responses to it which Federal agency shall be the lead agency and which other Federal agencies shall be cooperating agencies.

[43 FR 55992, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

§ 1501.6 Cooperating agencies.

The purpose of this section is to emphasize agency cooperation early in the NEPA process. Upon request of the lead agency, any other Federal agency which has jurisdiction by law shall be a cooperating agency. In addition any other Federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement may be a cooperating agency upon request of the lead agency. An agency may re-

quest the lead agency to designate it a cooperating agency.

(a) The lead agency shall:

(1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time.

(2) Use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.

(3) Meet with a cooperating agency at the latter's request.

(b) Each cooperating agency shall:

(1) Participate in the NEPA process at the earliest possible time.

(2) Participate in the scoping process (described below in § 1501.7).

(3) Assume on request of the lead agency responsibility for developing information and preparing environmental analyses including portions of the environmental impact statement concerning which the cooperating agency has special expertise.

(4) Make available staff support at the lead agency's request to enhance the latter's interdisciplinary capability.

(5) Normally use its own funds. The lead agency shall, to the extent available funds permit, fund those major activities or analyses it requests from cooperating agencies. Potential lead agencies shall include such funding requirements in their budget requests.

(c) A cooperating agency may in response to a lead agency's request for assistance in preparing the environmental impact statement (described in paragraph (b) (3), (4), or (5) of this section) reply that other program commitments preclude any involvement or the degree of involvement requested in the action that is the subject of the environmental impact statement. A copy of this reply shall be submitted to the Council.

§ 1501.7 Scoping.

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. This process shall be termed scoping. As soon as practicable after its decision to prepare an environmental impact statement and

before the scoping process the lead agency shall publish a notice of intent (§ 1508.22) in the **FEDERAL REGISTER** except as provided in § 1507.3(e).

(a) As part of the scoping process the lead agency shall:

(1) Invite the participation of affected Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons (including those who might not be in accord with the action on environmental grounds), unless there is a limited exception under § 1507.3(c). An agency may give notice in accordance with § 1506.6.

(2) Determine the scope (§ 1508.25) and the significant issues to be analyzed in depth in the environmental impact statement.

(3) Identify and eliminate from detailed study the issues which are not significant or which have been covered by prior environmental review (§ 1506.3), narrowing the discussion of these issues in the statement to a brief presentation of why they will not have a significant effect on the human environment or providing a reference to their coverage elsewhere.

(4) Allocate assignments for preparation of the environmental impact statement among the lead and cooperating agencies, with the lead agency retaining responsibility for the statement.

(5) Indicate any public environmental assessments and other environmental impact statements which are being or will be prepared that are related to but are not part of the scope of the impact statement under consideration.

(6) Identify other environmental review and consultation requirements so the lead and cooperating agencies may prepare other required analyses and studies concurrently with, and integrated with, the environmental impact statement as provided in § 1502.25.

(7) Indicate the relationship between the timing of the preparation of environmental analyses and the agency's tentative planning and decisionmaking schedule.

(b) As part of the scoping process the lead agency may:

(1) Set page limits on environmental documents (§ 1502.7).

(2) Set time limits (§ 1501.8).

(3) Adopt procedures under § 1507.3 to combine its environmental assessment process with its scoping process.

(4) Hold an early scoping meeting or meetings which may be integrated with any other early planning meeting the agency has. Such a scoping meeting will often be appropriate when the impacts of a particular action are confined to specific sites.

(c) An agency shall revise the determinations made under paragraphs (a) and (b) of this section if substantial changes are made later in the proposed action, or if significant new circumstances or information arise which bear on the proposal or its impacts.

§ 1501.8 Time limits.

Although the Council has decided that prescribed universal time limits for the entire NEPA process are too inflexible, Federal agencies are encouraged to set time limits appropriate to individual actions (consistent with the time intervals required by § 1506.10). When multiple agencies are involved the reference to agency below means lead agency.

(a) The agency shall set time limits if an applicant for the proposed action requests them: *Provided*, That the limits are consistent with the purposes of NEPA and other essential considerations of national policy.

(b) The agency may:

(1) Consider the following factors in determining time limits:

(i) Potential for environmental harm.

(ii) Size of the proposed action.

(iii) State of the art of analytic techniques.

(iv) Degree of public need for the proposed action, including the consequences of delay.

(v) Number of persons and agencies affected.

(vi) Degree to which relevant information is known and if not known the time required for obtaining it.

(vii) Degree to which the action is controversial.

(viii) Other time limits imposed on the agency by law, regulations, or executive order.

(2) Set overall time limits or limits for each constituent part of the NEPA process, which may include:

(i) Decision on whether to prepare an environmental impact statement (if not already decided).

(ii) Determination of the scope of the environmental impact statement.

(iii) Preparation of the draft environmental impact statement.

(iv) Review of any comments on the draft environmental impact statement from the public and agencies.

(v) Preparation of the final environmental impact statement.

(vi) Review of any comments on the final environmental impact statement.

(vii) Decision on the action based in part on the environmental impact statement.

(3) Designate a person (such as the project manager or a person in the agency's office with NEPA responsibilities) to expedite the NEPA process.

(c) State or local agencies or members of the public may request a Federal Agency to set time limits.

PART 1502—ENVIRONMENTAL IMPACT STATEMENT

Sec.

1502.1 Purpose.

1502.2 Implementation.

1502.3 Statutory requirements for statements.

1502.4 Major Federal actions requiring the preparation of environmental impact statements.

1502.5 Timing.

1502.6 Interdisciplinary preparation.

1502.7 Page limits.

1502.8 Writing.

1502.9 Draft, final, and supplemental statements.

1502.10 Recommended format.

1502.11 Cover sheet.

1502.12 Summary.

1502.13 Purpose and need.

1502.14 Alternatives including the proposed action.

1502.15 Affected environment.

1502.16 Environmental consequences.

1502.17 List of preparers.

1502.18 Appendix.

1502.19 Circulation of the environmental impact statement.

1502.20 Tiering.

1502.21 Incorporation by reference.

1502.22 Incomplete or unavailable information.

Sec.

1502.23 Cost-benefit analysis.

1502.24 Methodology and scientific accuracy.

1502.25 Environmental review and consultation requirements.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.

§ 1502.1 Purpose.

The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.

§ 1502.2 Implementation.

To achieve the purposes set forth in § 1502.1 agencies shall prepare environmental impact statements in the following manner:

(a) Environmental impact statements shall be analytic rather than encyclopedic.

(b) Impacts shall be discussed in proportion to their significance. There shall be only brief discussion of other than significant issues. As in a finding of no significant impact, there should be only enough discussion to show why more study is not warranted.

(c) Environmental impact statements shall be kept concise and shall be no longer than absolutely necessary to comply with NEPA and with these regulations. Length should vary first with potential environmental problems and then with project size.

(d) Environmental impact statements shall state how alternatives considered in it and decisions based on it will or will not achieve the requirements of sections 101 and 102(1) of the Act and other environmental laws and policies.

(e) The range of alternatives discussed in environmental impact statements shall encompass those to be considered by the ultimate agency decisionmaker.

(f) Agencies shall not commit resources prejudicing selection of alternatives before making a final decision (§ 1506.1).

(g) Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.

§ 1502.3 Statutory requirements for statements.

As required by sec. 102(2)(C) of NEPA environmental impact statements (§ 1508.11) are to be included in every recommendation or report.

On proposals (§ 1508.23).

For legislation and (§ 1508.17).

Other major Federal actions (§ 1508.18).

Significantly (§ 1508.27).

Affecting (§§ 1508.3, 1508.8).

The quality of the human environment (§ 1508.14).

§ 1502.4 Major Federal actions requiring the preparation of environmental impact statements.

(a) Agencies shall make sure the proposal which is the subject of an environmental impact statement is properly defined. Agencies shall use the criteria for scope (§ 1508.25) to determine which proposal(s) shall be the subject of a particular statement. Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall

be evaluated in a single impact statement.

(b) Environmental impact statements may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs or regulations (§ 1508.18). Agencies shall prepare statements on broad actions so that they are relevant to policy and are timed to coincide with meaningful points in agency planning and decisionmaking.

(c) When preparing statements on broad actions (including proposals by more than one agency), agencies may find it useful to evaluate the proposal(s) in one of the following ways:

(1) Geographically, including actions occurring in the same general location, such as body of water, region, or metropolitan area.

(2) Generically, including actions which have relevant similarities, such as common timing, impacts, alternatives, methods of implementation, media, or subject matter.

(3) By stage of technological development including federal or federally assisted research, development or demonstration programs for new technologies which, if applied, could significantly affect the quality of the human environment. Statements shall be prepared on such programs and shall be available before the program has reached a stage of investment or commitment to implementation likely to determine subsequent development or restrict later alternatives.

(d) Agencies shall as appropriate employ scoping (§ 1501.7), tiering (§ 1502.20), and other methods listed in §§ 1500.4 and 1500.5 to relate broad and narrow actions and to avoid duplication and delay.

§ 1502.5 Timing.

An agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal (§ 1508.23) so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal. The statement shall be prepared early enough so that it can

serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made (§§ 1500.2(c), 1501.2, and 1502.2). For instance:

(a) For projects directly undertaken by Federal agencies the environmental impact statement shall be prepared at the feasibility analysis (go-no go) stage and may be supplemented at a later stage if necessary.

(b) For applications to the agency appropriate environmental assessments or statements shall be commenced no later than immediately after the application is received. Federal agencies are encouraged to begin preparation of such assessments or statements earlier, preferably jointly with applicable State or local agencies.

(c) For adjudication, the final environmental impact statement shall normally precede the final staff recommendation and that portion of the public hearing related to the impact study. In appropriate circumstances the statement may follow preliminary hearings designed to gather information for use in the statements.

(d) For informal rulemaking the draft environmental impact statement shall normally accompany the proposed rule.

§ 1502.6 Interdisciplinary preparation.

Environmental impact statements shall be prepared using an interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts (section 102(2)(A) of the Act). The disciplines of the preparers shall be appropriate to the scope and issues identified in the scoping process (§ 1501.7).

§ 1502.7 Page limits.

The text of final environmental impact statements (e.g., paragraphs (d) through (g) of § 1502.10) shall normally be less than 150 pages and for proposals of unusual scope or complexity shall normally be less than 300 pages.

§ 1502.8 Writing.

Environmental impact statements shall be written in plain language and may use appropriate graphics so that decisionmakers and the public can readily understand them. Agencies should employ writers of clear prose or editors to write, review, or edit statements, which will be based upon the analysis and supporting data from the natural and social sciences and the environmental design arts.

§ 1502.9 Draft, final, and supplemental statements.

Except for proposals for legislation as provided in § 1506.8 environmental impact statements shall be prepared in two stages and may be supplemented.

(a) Draft environmental impact statements shall be prepared in accordance with the scope decided upon in the scoping process. The lead agency shall work with the cooperating agencies and shall obtain comments as required in Part 1503 of this chapter. The draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements in section 102(2)(C) of the Act. If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion. The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action.

(b) Final environmental impact statements shall respond to comments as required in Part 1503 of this chapter. The agency shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised.

(c) Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if:

(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

(2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.

(3) Shall adopt procedures for introducing a supplement into its formal administrative record, if such a record exists.

(4) Shall prepare, circulate, and file a supplement to a statement in the same fashion (exclusive of scoping) as a draft and final statement unless alternative procedures are approved by the Council.

§ 1502.10 Recommended format.

Agencies shall use a format for environmental impact statements which will encourage good analysis and clear presentation of the alternatives including the proposed action. The following standard format for environmental impact statements should be followed unless the agency determines that there is a compelling reason to do otherwise:

(a) Cover sheet.

(b) Summary.

(c) Table of contents.

(d) Purpose of and need for action.

(e) Alternatives including proposed action (sections 102(2)(C)(iii) and 102(2)(E) of the Act).

(f) Affected environment.

(g) Environmental consequences (especially sections 102(2)(C) (i), (ii), (iv), and (v) of the Act).

(h) List of preparers.

(i) List of Agencies, Organizations, and persons to whom copies of the statement are sent.

(j) Index.

(k) Appendices (if any).

If a different format is used, it shall include paragraphs (a), (b), (c), (h), (i), and (j), of this section and shall include the substance of paragraphs (d), (e), (f), (g), and (k) of this section, as further described in §§ 1502.11 through 1502.18, in any appropriate format.

§ 1502.11 Cover sheet.

The cover sheet shall not exceed one page. It shall include:

(a) A list of the responsible agencies including the lead agency and any co-operating agencies.

(b) The title of the proposed action that is the subject of the statement (and if appropriate the titles of related cooperating agency actions), together with the State(s) and county(ies) (or other jurisdiction if applicable) where the action is located.

(c) The name, address, and telephone number of the person at the agency who can supply further information.

(d) A designation of the statement as a draft, final, or draft or final supplement.

(e) A one paragraph abstract of the statement.

(f) The date by which comments must be received (computed in cooperation with EPA under § 1506.10).

The information required by this section may be entered on Standard Form 424 (in items 4, 6, 7, 10, and 18).

§ 1502.12 Summary.

Each environmental impact statement shall contain a summary which adequately and accurately summarizes the statement. The summary shall stress the major conclusions, areas of controversy (including issues raised by agencies and the public), and the issues to be resolved (including the choice among alternatives). The summary will normally not exceed 15 pages.

§ 1502.13 Purpose and need.

The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.

§ 1502.14 Alternatives including the proposed action.

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental im-

pacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

§ 1502.15 Affected environment.

The environmental impact statement shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration. The descriptions shall be no longer than is necessary to understand the effects of the alternatives. Data and analyses in a statement shall be commensurate with the importance of the impact, with less important material summarized, consolidated, or simply referenced. Agencies shall avoid useless bulk in statements and shall concentrate effort and attention on important issues. Verbose descriptions of the affected environment are themselves no measure of the adequacy of an environmental impact statement.

§ 1502.16 Environmental consequences.

This section forms the scientific and analytic basis for the comparisons under § 1502.14. It shall consolidate

the discussions of those elements required by sections 102(2)(C) (i), (ii), (iv), and (v) of NEPA which are within the scope of the statement and as much of section 102(2)(C)(iii) as is necessary to support the comparisons. The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented. This section should not duplicate discussions in § 1502.14. It shall include discussions of:

- (a) Direct effects and their significance (§ 1508.8).
- (b) Indirect effects and their significance (§ 1508.8).
- (c) Possible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned. (See § 1506.2(d).)
- (d) The environmental effects of alternatives including the proposed action. The comparisons under § 1502.14 will be based on this discussion.
- (e) Energy requirements and conservation potential of various alternatives and mitigation measures.
- (f) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.
- (g) Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.
- (h) Means to mitigate adverse environmental impacts (if not fully covered under § 1502.14(f)).

[43 FR 55994, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

§ 1502.17 List of preparers.

The environmental impact statement shall list the names, together

with their qualifications (expertise, experience, professional disciplines), of the persons who were primarily responsible for preparing the environmental impact statement or significant background papers, including basic components of the statement (§§ 1502.6 and 1502.8). Where possible the persons who are responsible for a particular analysis, including analyses in background papers, shall be identified. Normally the list will not exceed two pages.

§ 1502.18 Appendix.

If an agency prepares an appendix to an environmental impact statement the appendix shall:

- (a) Consist of material prepared in connection with an environmental impact statement (as distinct from material which is not so prepared and which is incorporated by reference (§ 1502.21)).
- (b) Normally consist of material which substantiates any analysis fundamental to the impact statement.
- (c) Normally be analytic and relevant to the decision to be made.
- (d) Be circulated with the environmental impact statement or be readily available on request.

§ 1502.19 Circulation of the environmental impact statement.

Agencies shall circulate the entire draft and final environmental impact statements except for certain appendices as provided in § 1502.18(d) and unchanged statements as provided in § 1503.4(c). However, if the statement is unusually long, the agency may circulate the summary instead, except that the entire statement shall be furnished to:

- (a) Any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved and any appropriate Federal, State or local agency authorized to develop and enforce environmental standards.
- (b) The applicant, if any.
- (c) Any person, organization, or agency requesting the entire environmental impact statement.
- (d) In the case of a final environmental impact statement any person,

organization, or agency which submitted substantive comments on the draft.

If the agency circulates the summary and thereafter receives a timely request for the entire statement and for additional time to comment, the time for that requestor only shall be extended by at least 15 days beyond the minimum period.

§ 1502.20 Tiering.

Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review (§ 1508.28). Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action. The subsequent document shall state where the earlier document is available. Tiering may also be appropriate for different stages of actions. (Section 1508.28).

§ 1502.21 Incorporation by reference.

Agencies shall incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action. The incorporated material shall be cited in the statement and its content briefly described. No material may be incorporated by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment. Material based on proprietary data which is itself not available for review and comment shall not be incorporated by reference.

§ 1502.22 Incomplete or unavailable information.

When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.

(a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement: (1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, "reasonably foreseeable" includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

(c) The amended regulation will be applicable to all environmental impact statements for which a Notice of Intent (40 CFR 1508.22) is published in the FEDERAL REGISTER on or after May 27, 1986. For environmental impact statements in progress, agencies may choose to comply with the re-

quirements of either the original or amended regulation.

[51 FR 15625, Apr. 25, 1986]

§ 1502.23 Cost-benefit analysis.

If a cost-benefit analysis relevant to the choice among environmentally different alternatives is being considered for the proposed action, it shall be incorporated by reference or appended to the statement as an aid in evaluating the environmental consequences. To assess the adequacy of compliance with section 102(2)(B) of the Act the statement shall, when a cost-benefit analysis is prepared, discuss the relationship between that analysis and any analyses of unquantified environmental impacts, values, and amenities. For purposes of complying with the Act, the weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations. In any event, an environmental impact statement should at least indicate those considerations, including factors not related to environmental quality, which are likely to be relevant and important to a decision.

§ 1502.24 Methodology and scientific accuracy.

Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.

§ 1502.25 Environmental review and consultation requirements.

(a) To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.), the National Historic Preservation Act of 1966 (16 U.S.C. 470 et seq.), the Endangered

Species Act of 1973 (16 U.S.C. 1531 et seq.), and other environmental review laws and executive orders.

(b) The draft environmental impact statement shall list all Federal permits, licenses, and other entitlements which must be obtained in implementing the proposal. If it is uncertain whether a Federal permit, license, or other entitlement is necessary, the draft environmental impact statement shall so indicate.

PART 1503—COMMENTING

Sec.

1503.1 Inviting comments.

1503.2 Duty to comment.

1503.3 Specificity of comments.

1503.4 Response to comments.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55997, Nov. 29, 1978, unless otherwise noted.

§ 1503.1 Inviting comments.

(a) After preparing a draft environmental impact statement and before preparing a final environmental impact statement the agency shall:

(1) Obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved or which is authorized to develop and enforce environmental standards.

(2) Request the comments of:

(i) Appropriate State and local agencies which are authorized to develop and enforce environmental standards;

(ii) Indian tribes, when the effects may be on a reservation; and

(iii) Any agency which has requested that it receive statements on actions of the kind proposed.

Office of Management and Budget Circular A-95 (Revised), through its system of clearinghouses, provides a means of securing the views of State and local environmental agencies. The clearinghouses may be used, by mutual agreement of the lead agency and the clearinghouse, for securing

State and local reviews of the draft environmental impact statements.

(3) Request comments from the applicant, if any.

(4) Request comments from the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected.

(b) An agency may request comments on a final environmental impact statement before the decision is finally made. In any case other agencies or persons may make comments before the final decision unless a different time is provided under § 1506.10.

§ 1503.2 Duty to comment.

Federal agencies with jurisdiction by law or special expertise with respect to any environmental impact involved and agencies which are authorized to develop and enforce environmental standards shall comment on statements within their jurisdiction, expertise, or authority. Agencies shall comment within the time period specified for comment in § 1506.10. A Federal agency may reply that it has no comment. If a cooperating agency is satisfied that its views are adequately reflected in the environmental impact statement, it should reply that it has no comment.

§ 1503.3 Specificity of comments.

(a) Comments on an environmental impact statement or on a proposed action shall be as specific as possible and may address either the adequacy of the statement or the merits of the alternatives discussed or both.

(b) When a commenting agency criticizes a lead agency's predictive methodology, the commenting agency should describe the alternative methodology which it prefers and why.

(c) A cooperating agency shall specify in its comments whether it needs additional information to fulfill other applicable environmental reviews or consultation requirements and what information it needs. In particular, it shall specify any additional information it needs to comment adequately on the draft statement's analysis of significant site-specific effects associated with the granting or approving by that cooperating agency of neces-

sary Federal permits, licenses, or entitlements.

(d) When a cooperating agency with jurisdiction by law objects to or expresses reservations about the proposal on grounds of environmental impacts, the agency expressing the objection or reservation shall specify the mitigation measures it considers necessary to allow the agency to grant or approve applicable permit, license, or related requirements or concurrences.

§ 1503.4 Response to comments.

(a) An agency preparing a final environmental impact statement shall assess and consider comments both individually and collectively, and shall respond by one or more of the means listed below, stating its response in the final statement. Possible responses are to:

(1) Modify alternatives including the proposed action.

(2) Develop and evaluate alternatives not previously given serious consideration by the agency.

(3) Supplement, improve, or modify its analyses.

(4) Make factual corrections.

(5) Explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response.

(b) All substantive comments received on the draft statement (or summaries thereof where the response has been exceptionally voluminous), should be attached to the final statement whether or not the comment is thought to merit individual discussion by the agency in the text of the statement.

(c) If changes in response to comments are minor and are confined to the responses described in paragraphs (a) (4) and (5) of this section, agencies may write them on errata sheets and attach them to the statement instead of rewriting the draft statement. In such cases only the comments, the responses, and the changes and not the final statement need be circulated (§ 1502.19). The entire document with

a new cover sheet shall be filed as the final statement (§ 1506.9).

PART 1504—PREDECISION REFERRALS TO THE COUNCIL OF PROPOSED FEDERAL ACTIONS DETERMINED TO BE ENVIRONMENTALLY UNSATISFACTORY

Sec.

1504.1 Purpose.

1504.2 Criteria for referral.

1504.3 Procedure for referrals and response.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55998, Nov. 29, 1978, unless otherwise noted.

§ 1504.1 Purpose.

(a) This part establishes procedures for referring to the Council Federal interagency disagreements concerning proposed major Federal actions that might cause unsatisfactory environmental effects. It provides means for early resolution of such disagreements.

(b) Under section 309 of the Clean Air Act (42 U.S.C. 7609), the Administrator of the Environmental Protection Agency is directed to review and comment publicly on the environmental impacts of Federal activities, including actions for which environmental impact statements are prepared. If after this review the Administrator determines that the matter is "unsatisfactory from the standpoint of public health or welfare or environmental quality," section 309 directs that the matter be referred to the Council (hereafter "environmental referrals").

(c) Under section 102(2)(C) of the Act other Federal agencies may make similar reviews of environmental impact statements, including judgments on the acceptability of anticipated environmental impacts. These reviews must be made available to the President, the Council and the public.

§ 1504.2 Criteria for referral.

Environmental referrals should be made to the Council only after con-

certed, timely (as early as possible in the process), but unsuccessful attempts to resolve differences with the lead agency. In determining what environmental objections to the matter are appropriate to refer to the Council, an agency should weigh potential adverse environmental impacts, considering:

(a) Possible violation of national environmental standards or policies.

(b) Severity.

(c) Geographical scope.

(d) Duration.

(e) Importance as precedents.

(f) Availability of environmentally preferable alternatives.

§ 1504.3 Procedure for referrals and response.

(a) A Federal agency making the referral to the Council shall:

(1) Advise the lead agency at the earliest possible time that it intends to refer a matter to the Council unless a satisfactory agreement is reached.

(2) Include such advice in the referring agency's comments on the draft environmental impact statement, except when the statement does not contain adequate information to permit an assessment of the matter's environmental acceptability.

(3) Identify any essential information that is lacking and request that it be made available at the earliest possible time.

(4) Send copies of such advice to the Council.

(b) The referring agency shall deliver its referral to the Council not later than twenty-five (25) days after the final environmental impact statement has been made available to the Environmental Protection Agency, commenting agencies, and the public. Except when an extension of this period has been granted by the lead agency, the Council will not accept a referral after that date.

(c) The referral shall consist of:

(1) A copy of the letter signed by the head of the referring agency and delivered to the lead agency informing the lead agency of the referral and the reasons for it, and requesting that no action be taken to implement the matter until the Council acts upon the

referral. The letter shall include a copy of the statement referred to in (c)(2) of this section.

(2) A statement supported by factual evidence leading to the conclusion that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality. The statement shall:

(i) Identify any material facts in controversy and incorporate (by reference if appropriate) agreed upon facts,

(ii) Identify any existing environmental requirements or policies which would be violated by the matter,

(iii) Present the reasons why the referring agency believes the matter is environmentally unsatisfactory,

(iv) Contain a finding by the agency whether the issue raised is of national importance because of the threat to national environmental resources or policies or for some other reason,

(v) Review the steps taken by the referring agency to bring its concerns to the attention of the lead agency at the earliest possible time, and

(vi) Give the referring agency's recommendations as to what mitigation alternative, further study, or other course of action (including abandonment of the matter) are necessary to remedy the situation.

(d) Not later than twenty-five (25) days after the referral to the Council the lead agency may deliver a response to the Council, and the referring agency. If the lead agency requests more time and gives assurance that the matter will not go forward in the interim, the Council may grant an extension. The response shall:

(1) Address fully the issues raised in the referral.

(2) Be supported by evidence.

(3) Give the lead agency's response to the referring agency's recommendations.

(e) Interested persons (including the applicant) may deliver their views in writing to the Council. Views in support of the referral should be delivered not later than the referral. Views in support of the response shall be delivered not later than the response.

(f) Not later than twenty-five (25) days after receipt of both the referral and any response or upon being informed that there will be no response

(unless the lead agency agrees to a longer time), the Council may take one or more of the following actions:

(1) Conclude that the process of referral and response has successfully resolved the problem.

(2) Initiate discussions with the agencies with the objective of mediation with referring and lead agencies.

(3) Hold public meetings or hearings to obtain additional views and information.

(4) Determine that the issue is not one of national importance and request the referring and lead agencies to pursue their decision process.

(5) Determine that the issue should be further negotiated by the referring and lead agencies and is not appropriate for Council consideration until one or more heads of agencies report to the Council that the agencies' disagreements are irreconcilable.

(6) Publish its findings and recommendations (including where appropriate a finding that the submitted evidence does not support the position of an agency).

(7) When appropriate, submit the referral and the response together with the Council's recommendation to the President for action.

(g) The Council shall take no longer than 60 days to complete the actions specified in paragraph (f) (2), (3), or (5) of this section.

(h) When the referral involves an action required by statute to be determined on the record after opportunity for agency hearing, the referral shall be conducted in a manner consistent with 5 U.S.C. 557(d) (Administrative Procedure Act).

[43 FR 55998, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

PART 1505—NEPA AND AGENCY DECISIONMAKING

Sec.

1505.1 Agency decisionmaking procedures.

1505.2 Record of decision in cases requiring environmental impact statements.

1505.3 Implementing the decision.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C.

7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55999, Nov. 29, 1978, unless otherwise noted.

§ 1505.1 Agency decisionmaking procedures.

Agencies shall adopt procedures (§ 1507.3) to ensure that decisions are made in accordance with the policies and purposes of the Act. Such procedures shall include but not be limited to:

(a) Implementing procedures under section 102(2) to achieve the requirements of sections 101 and 102(1).

(b) Designating the major decision points for the agency's principal programs likely to have a significant effect on the human environment and assuring that the NEPA process corresponds with them.

(c) Requiring that relevant environmental documents, comments, and responses be part of the record in formal rulemaking or adjudicatory proceedings.

(d) Requiring that relevant environmental documents, comments, and responses accompany the proposal through existing agency review processes so that agency officials use the statement in making decisions.

(e) Requiring that the alternatives considered by the decisionmaker are encompassed by the range of alternatives discussed in the relevant environmental documents and that the decisionmaker consider the alternatives described in the environmental impact statement. If another decision document accompanies the relevant environmental documents to the decisionmaker, agencies are encouraged to make available to the public before the decision is made any part of that document that relates to the comparison of alternatives.

§ 1505.2 Record of decision in cases requiring environmental impact statements.

At the time of its decision (§ 1506.10) or, if appropriate, its recommendation to Congress, each agency shall prepare a concise public record of decision. The record, which may be integrated

into any other record prepared by the agency, shall:

(a) State what the decision was.

(b) Identify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable. An agency may discuss preferences among alternatives based on relevant factors including economic and technical considerations and agency statutory missions. An agency shall identify and discuss all such factors including any essential considerations of national policy which were balanced by the agency in making its decision and state how those considerations entered into its decision.

(c) State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.

§ 1505.3 Implementing the decision.

Agencies may provide for monitoring to assure that their decisions are carried out and should do so in important cases. Mitigation (§ 1505.2(c)) and other conditions established in the environmental impact statement or during its review and committed as part of the decision shall be implemented by the lead agency or other appropriate consenting agency. The lead agency shall:

(a) Include appropriate conditions in grants, permits or other approvals.

(b) Condition funding of actions on mitigation.

(c) Upon request, inform cooperating or commenting agencies on progress in carrying out mitigation measures which they have proposed and which were adopted by the agency making the decision.

(d) Upon request, make available to the public the results of relevant monitoring.

PART 1506—OTHER REQUIREMENTS OF NEPA

Sec.

- 1506.1 Limitations on actions during NEPA process.
- 1506.2 Elimination of duplication with State and local procedures.
- 1506.3 Adoption.
- 1506.4 Combining documents.
- 1506.5 Agency responsibility.
- 1506.6 Public involvement.
- 1506.7 Further guidance.
- 1506.8 Proposals for legislation.
- 1506.9 Filing requirements.
- 1506.10 Timing of agency action.
- 1506.11 Emergencies.
- 1506.12 Effective date.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 56000, Nov. 29, 1978, unless otherwise noted.

§ 1506.1 Limitations on actions during NEPA process.

(a) Until an agency issues a record of decision as provided in § 1505.2 (except as provided in paragraph (c) of this section), no action concerning the proposal shall be taken which would:

- (1) Have an adverse environmental impact; or
- (2) Limit the choice of reasonable alternatives.

(b) If any agency is considering an application from a non-Federal entity, and is aware that the applicant is about to take an action within the agency's jurisdiction that would meet either of the criteria in paragraph (a) of this section, then the agency shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved.

(c) While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:

(1) Is justified independently of the program;

(2) Is itself accompanied by an adequate environmental impact statement; and

(3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.

(d) This section does not preclude development by applicants of plans or designs or performance of other work necessary to support an application for Federal, State or local permits or assistance. Nothing in this section shall preclude Rural Electrification Administration approval of minimal expenditures not affecting the environment (e.g. long leadtime equipment and purchase options) made by non-governmental entities seeking loan guarantees from the Administration.

§ 1506.2 Elimination of duplication with State and local procedures.

(a) Agencies authorized by law to cooperate with State agencies of statewide jurisdiction pursuant to section 102(2)(D) of the Act may do so.

(b) Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include:

- (1) Joint planning processes.
- (2) Joint environmental research and studies.
- (3) Joint public hearings (except where otherwise provided by statute).
- (4) Joint environmental assessments.

(c) Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and comparable State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include joint environmental impact statements. In

such cases one or more Federal agencies and one or more State or local agencies shall be joint lead agencies. Where State laws or local ordinances have environmental impact statement requirements in addition to but not in conflict with those in NEPA, Federal agencies shall cooperate in fulfilling these requirements as well as those of Federal laws so that one document will comply with all applicable laws.

(d) To better integrate environmental impact statements into State or local planning processes, statements shall discuss any inconsistency of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law.

§ 1506.3 Adoption.

(a) An agency may adopt a Federal draft or final environmental impact statement or portion thereof provided that the statement or portion thereof meets the standards for an adequate statement under these regulations.

(b) If the actions covered by the original environmental impact statement and the proposed action are substantially the same, the agency adopting another agency's statement is not required to recirculate it except as a final statement. Otherwise the adopting agency shall treat the statement as a draft and recirculate it (except as provided in paragraph (c) of this section).

(c) A cooperating agency may adopt without recirculating the environmental impact statement of a lead agency when, after an independent review of the statement, the cooperating agency concludes that its comments and suggestions have been satisfied.

(d) When an agency adopts a statement which is not final within the agency that prepared it, or when the action it assesses is the subject of a referral under Part 1504, or when the statement's adequacy is the subject of a judicial action which is not final, the agency shall so specify.

§ 1506.4 Combining documents.

Any environmental document in compliance with NEPA may be combined with any other agency document to reduce duplication and paperwork.

§ 1506.5 Agency responsibility.

(a) *Information.* If an agency requires an applicant to submit environmental information for possible use by the agency in preparing an environmental impact statement, then the agency should assist the applicant by outlining the types of information required. The agency shall independently evaluate the information submitted and shall be responsible for its accuracy. If the agency chooses to use the information submitted by the applicant in the environmental impact statement, either directly or by reference, then the names of the persons responsible for the independent evaluation shall be included in the list of preparers (§ 1502.17). It is the intent of this paragraph that acceptable work not be redone, but that it be verified by the agency.

(b) *Environmental assessments.* If an agency permits an applicant to prepare an environmental assessment, the agency, besides fulfilling the requirements of paragraph (a) of this section, shall make its own evaluation of the environmental issues and take responsibility for the scope and content of the environmental assessment.

(c) *Environmental impact statements.* Except as provided in §§ 1506.2 and 1506.3 any environmental impact statement prepared pursuant to the requirements of NEPA shall be prepared directly by or by a contractor selected by the lead agency or where appropriate under § 1501.6(b), a cooperating agency. It is the intent of these regulations that the contractor be chosen solely by the lead agency, or by the lead agency in cooperation with cooperating agencies, or where appropriate by a cooperating agency to avoid any conflict of interest. Contractors shall execute a disclosure statement prepared by the lead agency, or where appropriate the cooperating agency, specifying that they have no financial or other interest in the out-

come of the project. If the document is prepared by contract, the responsible Federal official shall furnish guidance and participate in the preparation and shall independently evaluate the statement prior to its approval and take responsibility for its scope and contents. Nothing in this section is intended to prohibit any agency from requesting any person to submit information to it or to prohibit any person from submitting information to any agency.

§ 1506.6 Public involvement.

Agencies shall:

(a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures.

(b) Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.

(1) In all cases the agency shall mail notice to those who have requested it on an individual action.

(2) In the case of an action with effects of national concern notice shall include publication in the *FEDERAL REGISTER* and notice by mail to national organizations reasonably expected to be interested in the matter and may include listing in the *102 Monitor*. An agency engaged in rulemaking may provide notice by mail to national organizations who have requested that notice regularly be provided. Agencies shall maintain a list of such organizations.

(3) In the case of an action with effects primarily of local concern the notice may include:

(i) Notice to State and areawide clearinghouses pursuant to EO 12372, the Intergovernmental Review Process.

(ii) Notice to Indian tribes when effects may occur on reservations.

(iii) Following the affected State's public notice procedures for comparable actions.

(iv) Publication in local newspapers (in papers of general circulation rather than legal papers).

(v) Notice through other local media.

(vi) Notice to potentially interested community organizations including small business associations.

(vii) Publication in newsletters that may be expected to reach potentially interested persons.

(viii) Direct mailing to owners and occupants of nearby or affected property.

(ix) Posting of notice on and off site in the area where the action is to be located.

(c) Hold or sponsor public hearings or public meetings whenever appropriate or in accordance with statutory requirements applicable to the agency. Criteria shall include whether there is:

(1) Substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing.

(2) A request for a hearing by another agency with jurisdiction over the action supported by reasons why a hearing will be helpful. If a draft environmental impact statement is to be considered at a public hearing, the agency should make the statement available to the public at least 15 days in advance (unless the purpose of the hearing is to provide information for the draft environmental impact statement).

(d) Solicit appropriate information from the public.

(e) Explain in its procedures where interested persons can get information or status reports on environmental impact statements and other elements of the NEPA process.

(f) Make environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552), without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action. Materials to be made available to the public shall be provided to the public without charge to the extent practicable, or at a fee which is not more than the actual costs of reproducing copies required to be sent to other Federal agencies, including the Council.

§ 1506.7 Further guidance.

The Council may provide further guidance concerning NEPA and its procedures including:

(a) A handbook which the Council may supplement from time to time, which shall in plain language provide guidance and instructions concerning the application of NEPA and these regulations.

(b) Publication of the Council's Memoranda to Heads of Agencies.

(c) In conjunction with the Environmental Protection Agency and the publication of the 102 Monitor, notice of:

- (1) Research activities;
- (2) Meetings and conferences related to NEPA; and
- (3) Successful and innovative procedures used by agencies to implement NEPA.

§ 1506.8 Proposals for legislation.

(a) The NEPA process for proposals for legislation (§ 1508.17) significantly affecting the quality of the human environment shall be integrated with the legislative process of the Congress. A legislative environmental impact statement is the detailed statement required by law to be included in a recommendation or report on a legislative proposal to Congress. A legislative environmental impact statement shall be considered part of the formal transmittal of a legislative proposal to Congress; however, it may be transmitted to Congress up to 30 days later in order to allow time for completion of an accurate statement which can serve as the basis for public and Congressional debate. The statement must be available in time for Congressional hearings and deliberations.

(b) Preparation of a legislative environmental impact statement shall conform to the requirements of these regulations except as follows:

- (1) There need not be a scoping process.
- (2) The legislative statement shall be prepared in the same manner as a draft statement, but shall be considered the "detailed statement" required by statute; *Provided*, That when any of the following conditions exist both the draft and final environmental impact statement on the legislative

proposal shall be prepared and circulated as provided by §§ 1503.1 and 1506.10.

(i) A Congressional Committee with jurisdiction over the proposal has a rule requiring both draft and final environmental impact statements.

(ii) The proposal results from a study process required by statute (such as those required by the Wild and Scenic Rivers Act (16 U.S.C. 1271 et seq.) and the Wilderness Act (16 U.S.C. 1131 et seq.)).

(iii) Legislative approval is sought for Federal or federally assisted construction or other projects which the agency recommends be located at specific geographic locations. For proposals requiring an environmental impact statement for the acquisition of space by the General Services Administration, a draft statement shall accompany the Prospectus or the 11(b) Report of Building Project Surveys to the Congress, and a final statement shall be completed before site acquisition.

(iv) The agency decides to prepare draft and final statements.

(c) Comments on the legislative statement shall be given to the lead agency which shall forward them along with its own responses to the Congressional committees with jurisdiction.

§ 1506.9 Filing requirements.

Environmental impact statements together with comments and responses shall be filed with the Environmental Protection Agency, attention Office of Federal Activities (A-104), 401 M Street SW., Washington, D.C. 20460. Statements shall be filed with EPA no earlier than they are also transmitted to commenting agencies and made available to the public. EPA shall deliver one copy of each statement to the Council, which shall satisfy the requirement of availability to the President. EPA may issue guidelines to agencies to implement its responsibilities under this section and § 1506.10.

§ 1506.10 Timing of agency action.

(a) The Environmental Protection Agency shall publish a notice in the *FEDERAL REGISTER* each week of the environmental impact statements filed

during the preceding week. The minimum time periods set forth in this section shall be calculated from the date of publication of this notice.

(b) No decision on the proposed action shall be made or recorded under § 1505.2 by a Federal agency until the later of the following dates:

(1) Ninety (90) days after publication of the notice described above in paragraph (a) of this section for a draft environmental impact statement.

(2) Thirty (30) days after publication of the notice described above in paragraph (a) of this section for a final environmental impact statement.

An exception to the rules on timing may be made in the case of an agency decision which is subject to a formal internal appeal. Some agencies have a formally established appeal process which allows other agencies or the public to take appeals on a decision and make their views known, after publication of the final environmental impact statement. In such cases, where a real opportunity exists to alter the decision, the decision may be made and recorded at the same time the environmental impact statement is published. This means that the period for appeal of the decision and the 30-day period prescribed in paragraph (b)(2) of this section may run concurrently. In such cases the environmental impact statement shall explain the timing and the public's right of appeal. An agency engaged in rule-making under the Administrative Procedure Act or other statute for the purpose of protecting the public health or safety, may waive the time period in paragraph (b)(2) of this section and publish a decision on the final rule simultaneously with publication of the notice of the availability of the final environmental impact statement as described in paragraph (a) of this section.

(c) If the final environmental impact statement is filed within ninety (90) days after a draft environmental impact statement is filed with the Environmental Protection Agency, the minimum thirty (30) day period and the minimum ninety (90) day period may run concurrently. However, subject to paragraph (d) of this section agencies shall allow not less than 45

days for comments on draft statements.

(d) The lead agency may extend prescribed periods. The Environmental Protection Agency may upon a showing by the lead agency of compelling reasons of national policy reduce the prescribed periods and may upon a showing by any other Federal agency of compelling reasons of national policy also extend prescribed periods, but only after consultation with the lead agency. (Also see § 1507.3(d).) Failure to file timely comments shall not be a sufficient reason for extending a period. If the lead agency does not concur with the extension of time, EPA may not extend it for more than 30 days. When the Environmental Protection Agency reduces or extends any period of time it shall notify the Council.

[43 FR 56000, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

§ 1506.11 Emergencies.

Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with the Council about alternative arrangements. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review.

§ 1506.12 Effective date.

The effective date of these regulations is July 30, 1979, except that for agencies that administer programs that qualify under section 102(2)(D) of the Act or under sec. 104(h) of the Housing and Community Development Act of 1974 an additional four months shall be allowed for the State or local agencies to adopt their implementing procedures.

(a) These regulations shall apply to the fullest extent practicable to ongoing activities and environmental documents begun before the effective date. These regulations do not apply to an environmental impact statement or supplement if the draft statement was filed before the effective date of these

regulations. No completed environmental documents need be redone by reasons of these regulations. Until these regulations are applicable, the Council's guidelines published in the *FEDERAL REGISTER* of August 1, 1973, shall continue to be applicable. In cases where these regulations are applicable the guidelines are superseded. However, nothing shall prevent an agency from proceeding under these regulations at an earlier time.

(b) NEPA shall continue to be applicable to actions begun before January 1, 1970, to the fullest extent possible.

PART 1507—AGENCY COMPLIANCE

Sec.

1507.1 Compliance.

1507.2 Agency capability to comply.

1507.3 Agency procedures.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 56002, Nov. 29, 1978, unless otherwise noted.

§ 1507.1 Compliance.

All agencies of the Federal Government shall comply with these regulations. It is the intent of these regulations to allow each agency flexibility in adapting its implementing procedures authorized by § 1507.3 to the requirements of other applicable laws.

§ 1507.2 Agency capability to comply.

Each agency shall be capable (in terms of personnel and other resources) of complying with the requirements enumerated below. Such compliance may include use of other's resources, but the using agency shall itself have sufficient capability to evaluate what others do for it. Agencies shall:

(a) Fulfill the requirements of section 102(2)(A) of the Act to utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on the human environment. Agencies shall designate a

person to be responsible for overall review of agency NEPA compliance.

(b) Identify methods and procedures required by section 102(2)(B) to insure that presently unquantified environmental amenities and values may be given appropriate consideration.

(c) Prepare adequate environmental impact statements pursuant to section 102(2)(C) and comment on statements in the areas where the agency has jurisdiction by law or special expertise or is authorized to develop and enforce environmental standards.

(d) Study, develop, and describe alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources. This requirement of section 102(2)(E) extends to all such proposals, not just the more limited scope of section 102(2)(C)(iii) where the discussion of alternatives is confined to impact statements.

(e) Comply with the requirements of section 102(2)(H) that the agency initiate and utilize ecological information in the planning and development of resource-oriented projects.

(f) Fulfill the requirements of sections 102(2)(F), 102(2)(G), and 102(2)(I), of the Act and of Executive Order 11514, Protection and Enhancement of Environmental Quality, Sec. 2.

§ 1507.3 Agency procedures.

(a) Not later than eight months after publication of these regulations as finally adopted in the *FEDERAL REGISTER*, or five months after the establishment of an agency, whichever shall come later, each agency shall as necessary adopt procedures to supplement these regulations. When the agency is a department, major subunits are encouraged (with the consent of the department) to adopt their own procedures. Such procedures shall not paraphrase these regulations. They shall confine themselves to implementing procedures. Each agency shall consult with the Council while developing its procedures and before publishing them in the *FEDERAL REGISTER* for comment. Agencies with similar programs should consult with each other

and the Council to coordinate their procedures, especially for programs requesting similar information from applicants. The procedures shall be adopted only after an opportunity for public review and after review by the Council for conformity with the Act and these regulations. The Council shall complete its review within 30 days. Once in effect they shall be filed with the Council and made readily available to the public. Agencies are encouraged to publish explanatory guidance for these regulations and their own procedures. Agencies shall continue to review their policies and procedures and in consultation with the Council to revise them as necessary to ensure full compliance with the purposes and provisions of the Act.

(b) Agency procedures shall comply with these regulations except where compliance would be inconsistent with statutory requirements and shall include:

(1) Those procedures required by §§ 1501.2(d), 1502.9(c)(3), 1505.1, 1506.6(e), and 1508.4.

(2) Specific criteria for and identification of those typical classes of action:

(i) Which normally do require environmental impact statements.

(ii) Which normally do not require either an environmental impact statement or an environmental assessment (categorical exclusions (§ 1508.4)).

(iii) Which normally require environmental assessments but not necessarily environmental impact statements.

(c) Agency procedures may include specific criteria for providing limited exceptions to the provisions of these regulations for classified proposals. They are proposed actions which are specifically authorized under criteria established by an Executive Order or statute to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order or statute. Environmental assessments and environmental impact statements which address classified proposals may be safeguarded and restricted from public dissemination in accordance with agencies' own regulations applica-

ble to classified information. These documents may be organized so that classified portions can be included as annexes, in order that the unclassified portions can be made available to the public.

(d) Agency procedures may provide for periods of time other than those presented in § 1506.10 when necessary to comply with other specific statutory requirements.

(e) Agency procedures may provide that where there is a lengthy period between the agency's decision to prepare an environmental impact statement and the time of actual preparation, the notice of intent required by § 1501.7 may be published at a reasonable time in advance of preparation of the draft statement.

PART 1508—TERMINOLOGY AND INDEX

Sec.	
1508.1	Terminology.
1508.2	Act.
1508.3	Affecting.
1508.4	Categorical exclusion.
1508.5	Cooperating agency.
1508.6	Council.
1508.7	Cumulative impact.
1508.8	Effects.
1508.9	Environmental assessment.
1508.10	Environmental document.
1508.11	Environmental impact statement.
1508.12	Federal agency.
1508.13	Finding of no significant impact.
1508.14	Human environment.
1508.15	Jurisdiction by law.
1508.16	Lead agency.
1508.17	Legislation.
1508.18	Major Federal action.
1508.19	Matter.
1508.20	Mitigation.
1508.21	NEPA process.
1508.22	Notice of intent.
1508.23	Proposal.
1508.24	Referring agency.
1508.25	Scope.
1508.26	Special expertise.
1508.27	Significantly.
1508.28	Tiering.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 56003, Nov. 29, 1978, unless otherwise noted.

§ 1508.1 Terminology.

The terminology of this part shall be uniform throughout the Federal Government.

§ 1508.2 Act.

"Act" means the National Environmental Policy Act, as amended (42 U.S.C. 4321, et seq.) which is also referred to as "NEPA."

§ 1508.3 Affecting.

"Affecting" means will or may have an effect on.

§ 1508.4 Categorical exclusion.

"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 (§ 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 § 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.

§ 1508.5 Cooperating agency.

"Cooperating agency" means any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action significantly affecting the quality of the human environment. The selection and responsibilities of a cooperating agency are described in § 1501.6. A State or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency.

§ 1508.6 Council.

"Council" means the Council on Environmental Quality established by Title II of the Act.

§ 1508.7 Cumulative impact.

"Cumulative impact" is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

§ 1508.8 Effects.

"Effects" include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

§ 1508.9 Environmental assessment.

"Environmental assessment":

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining

whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

§ 1508.10 Environmental document.

"Environmental document" includes the documents specified in § 1508.9 (environmental assessment), § 1508.11 (environmental impact statement), § 1508.13 (finding of no significant impact), and § 1508.22 (notice of intent).

§ 1508.11 Environmental impact statement.

"Environmental impact statement" means a detailed written statement as required by section 102(2)(C) of the Act.

§ 1508.12 Federal agency.

"Federal agency" means all agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office. It also includes for purposes of these regulations States and units of general local government and Indian tribes assuming NEPA responsibilities under section 104(h) of the Housing and Community Development Act of 1974.

§ 1508.13 Finding of no significant impact.

"Finding of no significant impact" means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it

(§ 1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

§ 1508.14 Human environment.

"Human environment" shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of "effects" (§ 1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

§ 1508.15 Jurisdiction by law.

"Jurisdiction by law" means agency authority to approve, veto, or finance all or part of the proposal.

§ 1508.16 Lead agency.

"Lead agency" means the agency or agencies preparing or having taken primary responsibility for preparing the environmental impact statement.

§ 1508.17 Legislation.

"Legislation" includes a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a Federal agency, but does not include requests for appropriations. The test for significant cooperation is whether the proposal is in fact predominantly that of the agency rather than another source. Drafting does not by itself constitute significant cooperation. Proposals for legislation include requests for ratification of treaties. Only the agency which has primary responsibility for the subject matter involved will prepare a legislative environmental impact statement.

§ 1508.18 Major Federal action.

"Major Federal action" includes actions with effects that may be major and which are potentially subject to

Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 et seq., with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

(b) Federal actions tend to fall within one of the following categories:

(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 et seq.; treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

(2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of federal resources, upon which future agency actions will be based.

(3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

§ 1508.19 Matter.

"Matter" includes for purposes of Part 1504:

(a) With respect to the Environmental Protection Agency, any proposed legislation, project, action or regulation as those terms are used in section 309(a) of the Clean Air Act (42 U.S.C. 7609).

(b) With respect to all other agencies, any proposed major federal action to which section 102(2)(C) of NEPA applies.

§ 1508.20 Mitigation.

"Mitigation" includes:

(a) Avoiding the impact altogether by not taking a certain action or parts of an action.

(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

(c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.

(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(e) Compensating for the impact by replacing or providing substitute resources or environments.

§ 1508.21 NEPA process.

"NEPA process" means all measures necessary for compliance with the requirements of section 2 and Title I of NEPA.

§ 1508.22 Notice of intent.

"Notice of intent" means a notice that an environmental impact statement will be prepared and considered. The notice shall briefly:

(a) Describe the proposed action and possible alternatives.

(b) Describe the agency's proposed scoping process including whether, when, and where any scoping meeting will be held.

(c) State the name and address of a person within the agency who can answer questions about the proposed action and the environmental impact statement.

§ 1508.23 Proposal.

"Proposal" exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an environmental impact statement on a proposal should be timed (§ 1502.5) so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal. A proposal may exist in fact as well as by agency declaration that one exists.

§ 1508.24 Referring agency.

"Referring agency" means the federal agency which has referred any matter to the Council after a determination that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality.

§ 1508.25 Scope.

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§ 1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts

and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include: (1) No action alternative.

(2) Other reasonable courses of actions.

(3) Mitigation measures (not in the proposed action).

(c) Impacts, which may be: (1) Direct; (2) indirect; (3) cumulative.

§ 1508.26 Special expertise.

"Special expertise" means statutory responsibility, agency mission, or related program experience.

§ 1508.27 Significantly.

"Significantly" as used in NEPA requires considerations of both context and intensity:

(a) *Context*. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) *Intensity*. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency

believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that

has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

[43 FR 56003, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

§ 1508.28 Tiering.

"Tiering" refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared. Tiering is appropriate when the sequence of statements or analyses is:

(a) From a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of lesser scope or to a site-specific statement or analysis.

(b) From an environmental impact statement on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or analysis at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe.

INDEX

Act	1508 2
Action	1508 18, 1508 25.
Action-forcing	1500 1, 1502 1
Adoption	1500 4(n), 1500 5(h), 1506 3
Affected Environment	1502 10(f), 1502 15.
Affecting	1502 3, 1508 3
Agency Authority	1500 6
Agency Capability	1501 2(a), 1507 2
Agency Compliance	1507 1
Agency Procedures	1505 1, 1507 3
Agency Responsibility	1506 5
Alternatives	1501.2(c), 1502 2, 1502 10(e), 1502 14, 1505 1(e), 1505 2, 1507 2(d), 1508 25(b)
Appendices	1502 10(k), 1502 18, 1502 24
Applicant	1501 2(d)(1), 1501 4(b), 1501 8(a), 1502 19(b), 1503 1(a)(3), 1504 3(e), 1506 1(d), 1506 5(a), 1506 5(b).
Apply NEPA Early in the Process	1501 2
Categorical Exclusion	1500 4(p), 1500 5(k), 1501 4(a), 1507 3(b), 1508 4
Circulating of Environmental Impact Statement	1502 19, 1506 3
Classified Information	1507 3(c)
Clean Air Act	1504 1, 1508 19(a)
Combining Documents	1500 4(o), 1500 5(i), 1506 4
Commenting	1502 19, 1503 1, 1503 2, 1503 3, 1503 4, 1506 6(f)
Consultation Requirement	1500 4(k), 1500 5(g), 1501 7(a)(6), 1502 25
Context	1508 27(a)
Cooperating Agency	1500 5(b), 1501 1(b), 1501 5(c), 1501 5(f), 1501 6, 1503 1(a)(1), 1503 2, 1503 3, 1506 3(c), 1506 5(a), 1508 5
Cost-Benefit	1502 23.
Council on Environmental Quality	1500 3, 1501 5(e), 1501 5(f), 1501 6(c), 1502 9(c)(4), 1504 1, 1504 2, 1504 3, 1506 6(f), 1506 9, 1506 10(d), 1506 11, 1507 3, 1508 6, 1508 24.
Cover Sheet	1502 10(a), 1502 11.
Cumulative Impact	1508 7, 1508 25(a), 1508 25(c)
Decisionmaking	1505 1, 1506 1
Decision points	1505 1(b)
Dependent	1508 25(a)
Draft Environmental impact Statement	1502 9(a)
Early Application of NEPA	1501 2
Economic Effects	1508 8
Effective Date	1506 12
Effects	1502 16, 1508 8.
Emergencies	1506 11.
Endangered Species Act	1502 25, 1508 27(b)(9).
Energy	1502 16(e)
Environmental Assessment	1501 3, 1501 4(b), 1501 4(c), 1501 7(b)(3), 1506 2(b)(4), 1506 5(b), 1508 4, 1508 9, 1508 10, 1508 13, 1502 10(g), 1502 16
Environmental Consequences	

INDEX—Continued

Environmental Consultation Requirements	1500 4(k), 1500 5(g), 1501 7(a)(6), 1502 25, 1503 3(c)
Environmental Documents	1508 10.
Environmental Impact Statement	1500 4, 1501 4(c), 1501 7, 1501 3, 1502 1, 1502 2, 1502 3, 1502 4, 1502 5, 1502 6, 1502 7, 1502 8, 1502 9, 1502 10, 1502 11, 1502 12, 1502 13, 1502 14, 1502 15, 1502 16, 1502 17, 1502 18, 1502 19, 1502 20, 1502 21, 1502 22, 1502 23, 1502 24, 1502 25, 1506 2(b)(4), 1506 3, 1506 8, 1508 11.
Environmental Protection Agency	1502 11(f), 1504 1, 1504 3, 1506 7(c), 1506 9, 1506 10, 1508 19(a)
Environmental Review Requirements	1500 4(k), 1500 5(g), 1501 7(a)(6), 1502 25, 1503 3(c)
Expediter	1501 8(b)(2)
Federal Agency	1508 12.
Filing	1506 9
Final Environmental Impact Statement	1502 9(b), 1503 1, 1503 4(b)
Finding of No Significant Impact	1500 3, 1500 4(q), 1500 5(1), 1501 4(e), 1508 13
Fish and Wildlife Coordination Act	1502 25.
Format for Environmental Impact Statement	1502 10.
Freedom of Information Act	1506 6(f)
Further Guidance	1506 7
Generic	1502 4(c)(2)
General Services Administration	1506 8(b)(5)
Geographic	1502 4(c)(1)
Graphics	1502 8.
Handbook	1506 7(a)
Housing and Community Development Act	1506 12, 1508 12.
Human Environment	1502 3, 1502 22, 1508 14.
Impacts	1508 8, 1508 25(c)
Implementing the Decision	1505 3
Incomplete or Unavailable Information	1502 22.
Incorporation by Reference	1500 4(j), 1502 21.
Index	1502 10(j)
Indian Tribes	1501 2(d)(2), 1501 7(a)(1), 1502 15(c), 1503 1(a)(2)(iii), 1506 6(b)(3)(ii), 1508 5, 1508 12.
Intensity	1508 27(b)
Interdisciplinary Preparation	1502 6, 1502 17.
Interim Actions	1506 1.
Joint Lead Agency	1501 5(b), 1506 2.
Judicial Review	1500 3
Jurisdiction by Law	1508 15.
Lead Agency	1500 5(c), 1501 1(c), 1501 5, 1501 6, 1501 7, 1501 8, 1504 3, 1506 2(b)(4), 1506 8(a), 1506 10(e), 1508 16.
Legislation	1500 5(j), 1502 3, 1506 8, 1508 17, 1508 18(a)
Limitation on Action During NEPA Process	1506 1.
List of Preparers	1502 10(h), 1502 17.

federal register

**Friday
April 24, 1992**

Part II

Department of Energy

10 CFR 1021

**National Environmental Policy Act;
Implementing Procedures and Guidelines
Revocation; Final Rule and Notice**

DEPARTMENT OF ENERGY**10 CFR Part 1021****National Environmental Policy Act
Implementing Procedures****AGENCY:** Department of Energy.**ACTION:** Final rule.

SUMMARY: The Department of Energy (DOE) is revising the existing rule at 10 CFR part 1021, titled "Compliance with the National Environmental Policy Act," to incorporate revised provisions of DOE's Guidelines for Implementing the Procedural Provisions of the National Environmental Policy Act (NEPA). DOE is also revoking its existing NEPA guidelines. This rule incorporates changes required by certain policy initiatives instituted by the Secretary of Energy to facilitate participation of the public and affected states in the NEPA process for proposed DOE actions. The rule also includes a revised and expanded list of typical classes of actions, including categorical exclusions. Categorical exclusions are classes of actions that normally do not require the preparation of either an environmental impact statement or an environmental assessment.

EFFECTIVE DATE: This rule will become effective May 26, 1992.

FOR FURTHER INFORMATION CONTACT: Carol Borgstrom, Director, Office of NEPA Oversight, EH-25, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-4600 or (800) 472-2756.

SUPPLEMENTARY INFORMATION:**I. Background**

On November 2, 1990 (55 FR 46444), DOE published a proposed rule that would revise 10 CFR part 1021, revoke the DOE NEPA Guidelines (52 FR 47662, December 15, 1987, as amended), and adopt the Council on Environmental Quality (CEQ) regulations implementing NEPA (40 CFR parts 1500-1508). Publication of the Notice of Proposed Rulemaking began a 45-day public comment period, ending December 17, 1990. As part of the notice and comment process, DOE held a public hearing on the proposed rule on December 5, 1990. Comments were received from 19 sources, including private individuals, state and Federal agencies, public interest groups, and other organizations. Copies of all written comments and the transcript of the public hearing have been provided to CEQ and are available for public inspection at the DOE Freedom of Information Reading Room, room 1E-190, Forrestal Building, 1000

Independence Avenue, SW., Washington, DC 20585, (202) 586-6020.

Today's notice adopts the revisions proposed at that time, with certain changes discussed below, and codifies them at 10 CFR Part 1021. A separate notice published today revokes the existing Guidelines on the date that these regulations become effective.

Copies of the final rule are available upon request to the information contact listed above.

In accordance with 40 CFR 1507.3, DOE has consulted with CEQ regarding this rule. CEQ has found that this regulation conforms with NEPA and the CEQ regulations and has no objection to its promulgation.

II. Statement of Purpose

The purpose of the rule is to revise the provisions of DOE's NEPA Guidelines, based on DOE's experience in the implementation of NEPA and on the directives of Secretary of Energy Notice 15-90 (SEN-15-90), to provide more specificity and detail than the Guidelines and to enhance public review opportunities. (For further information on SEN-15-90, issued February 5, 1990, see the Notice of Proposed Rulemaking (55 FR 46445, November 2, 1990); copies are available from the information contact listed above.) The rule is to be codified at 10 CFR part 1021. By issuing its NEPA Guidelines as regulations published in the Code of Federal Regulations, DOE will ensure that its NEPA procedures are more accessible to the public.

III. Comments Received and DOE's Responses

DOE has considered and evaluated the comments received during the public comment period. Many revisions suggested in these comments have been incorporated into the final rule. The following discussion describes the comments received, provides DOE's position on the comments, and describes any resulting changes to the rule. Section references, unless otherwise indicated, are to those in the proposed rule rather than the final rule; changed section designations are noted below, in response to corresponding comments.

Many of the commenters expressed overall support for DOE's efforts to improve its NEPA procedures, especially in the areas of increased public participation and requirements for programmatic and site-wide NEPA documentation and mitigation action plans. Because these comments are general in nature and do not require consideration of any changes to the proposed rule, they will not be discussed individually.

In addition to revisions made in response to comments and other revisions already discussed, DOE has made a number of editorial, stylistic, and format revisions. DOE also has made certain technical changes for clarity and consistency, which are described below under corresponding subject headings.

A. Procedural Comments

Several commenters addressed the procedural aspects of this rulemaking. One commenter requested that DOE hold public hearings on the proposed rule in the vicinity of its nuclear weapons facilities. DOE provided an opportunity for both oral and written comment on this rule. Written comments were given the same consideration as oral comments. For this reason, DOE determined that additional public hearings in the vicinity of its nuclear weapons facilities were not necessary.

One commenter disagreed with DOE's position—stated in the November 2, 1990, Preamble, regarding NEPA review requirements for the proposed rule—that the promulgation of this rule does not require an environmental assessment (EA) or environmental impact statement (EIS). The commenter asserted that, in light of the absence of documentary support for the many decisions made in the rule, especially the identification of classes of categorically excluded actions, not only is NEPA review required, but an EA or EIS would help to provide a basis for these decisions.

Issuance of this rule complies fully with NEPA's review requirements. DOE's NEPA Guidelines (52 FR 47662, December 15, 1987) list a categorical exclusion for "promulgation of rules and regulations which are clarifying in nature, or which do not substantially change the effect of the regulations being amended." The regulations adopted today will revise 10 CFR part 1021, which simply adopts the CEQ regulations. The amendment clarifies the previous rule by adding specificity, and contains only procedural requirements. Therefore, this action is categorically excluded from further NEPA review. (Also see section V, below.)

A number of commenters addressed the effective date of the final rule. One supported DOE's intention to have the rule become effective immediately upon publication. Another asserted that the rule should not become effective immediately upon publication because "good cause" does not exist within the meaning of the Administrative Procedure Act, 5 U.S.C. 553(d), to waive the standard 30-day period between publication and effective dates. Two

commenters asserted that because their comments suggested such substantial revisions to the proposed rule, the rule should be reissued as a proposed rule.

As indicated earlier in this Notice of Final Rulemaking, the effective date of the rule will be 30 days from the date of publication. DOE does not agree that the rule should be repropose for further public comment. The revisions are a logical outgrowth of the Notice of Proposed Rulemaking published on November 2, 1990, reflecting responses to public comments and limited technical changes in the proposed rule.

B. General Comments on Subparts A Through C

Two commenters were concerned about the length of time needed to complete NEPA documentation. One commenter suggested that DOE establish time periods for internal DOE review and decisions. The other commenter suggested establishing limits on the total time allowed for the completion of each NEPA document process, as many states have done in connection with state processes under NEPA-equivalent laws. Although DOE is aware of the advantages of being able to predict the time the NEPA process will take for proposed actions, the variety of the type and complexity of DOE actions precludes establishing a single time period that would be practical for all actions. Therefore, DOE does not believe that establishing time limits for NEPA review is feasible.

One commenter was concerned in particular about the duplication of effort that might arise from the need to meet both Federal and state NEPA requirements and asserted that guidance on this issue should be provided in DOE's NEPA procedures. One of the goals of these regulations is to implement the CEQ regulation encouraging Federal agencies to cooperate with state agencies to the fullest extent possible to reduce duplication between NEPA and state requirements (see 40 CFR 1506.2). In the past, DOE has been successful in attaining that goal, and, in nearly all cases, a single document has sufficed for both NEPA and state requirements. Under this rule, DOE will continue to work to minimize duplication and to maximize coordination and cooperation. Should the unusual situation arise where there is a conflict between NEPA and state requirements, however, DOE is bound by the requirements of NEPA. Accordingly, DOE believes that no revisions to the proposed rule are necessary as a result of this comment.

There were three comments regarding DOE internal procedures related to the

proposed rule. One commenter requested a discussion of the future role of the Action Description Memorandum (ADM). An ADM is an internal DOE document used to assist DOE in determining the appropriate level of NEPA review—EA or EIS—for a proposed action that is not listed in the classes of actions in the appendices to Subpart D of the rule or for which the appropriate initial level of review is unclear. The role of the ADM will not change with the promulgation of this rule.

One commenter requested clarification of how the final rule would be applied to NEPA documents that had been initiated before its effective date. DOE intends to apply the rule to ongoing activities and to environmental documents begun before the effective date of the rule to the fullest extent practicable. The rule will not apply to an EIS if the draft EIS was filed before the rule's effective date, and completed environmental documents will not be required to be redone as a result of this rule.

Two commenters stated that the proposed rule contains an overabundance of imprecise, subjective, and discretionary language, sometimes in provisions where discretionary language is inconsistent with NEPA and the CEQ regulations. The commenters urged DOE to eliminate such language from the proposed rule. DOE generally agrees with these comments and has removed the phrase "in DOE's judgment" from the following sections of the proposed rule: 1021.200(b), 212(b), 213(b), 301(d), 311(a), 332(a) and (c), 340(b), and 341(a) and (b). Similarly, the phrase "at its [or DOE's] discretion" has been removed from the following sections: 1021.300(b), 301(c) and (d), 311(b) and (e), 312(d), 313(d), 314(d)(3), 322(d), and 330(a). The phrase "at its option" has been removed from 1021.312(a).

C. Comments on Subpart A—General Section 1021.102 Applicability

One commenter suggested that the phrase "any DOE action affecting the environment" be changed to the language in NEPA: "major Federal actions significantly affecting the quality of the human environment." Because DOE is required to examine all actions that affect the environment to determine whether they are major Federal actions that may significantly affect the human environment, the commenter's suggested change was not adopted.

Another commenter suggested that DOE follow the lead of other agencies with overseas activities (e.g., the U.S.

Agency for International Development and the National Oceanic and Atmospheric Administration) and analyze all the environmental impacts of proposed activities, not just impacts within U.S. territory. Executive Order 12114, "Environmental Effects Abroad of Major Federal Actions," states in section 1-1 that the Order "represents the United States government's exclusive and complete determination of the procedural and other actions to be taken by Federal agencies to further the purpose of [NEPA], with respect to the environment outside the United States, its territories and possessions." As explained in the proposed rule, DOE has adopted procedures (46 FR 1007, January 5, 1981) implementing E.O. 12114, pursuant to section 2-1 of that Order. As long as the Order is in effect, DOE will use these procedures in addressing the extraterritorial environmental effects of DOE actions, and no change is needed in this final rule.

Section 1021.104 Definitions

Section 1021.104(b). In addition to the comments discussed below, other comments that nominally relate to definitions are addressed elsewhere, in the discussion of sections of the rule where the comment has more substantive relevance.

Definition: Action and DOE decision. One commenter stated that the failure of officials to act was reviewable and thus should be included in DOE's definition of action. The commenter suggested that DOE should simply reference the CEQ definition at 40 CFR 1508.18. The proposed rule did reference § 1508.18 of the CEQ Regulations, and DOE's paraphrasing of that section in the proposed rule was not intended to exclude any activity covered by 40 CFR 1508.18, including the failure to act. In response to the comment, however, the final rule has been modified to more closely parallel 40 CFR 1508.18. (As a result of this change and a related comment on the definition of "DOE decision," DOE has deleted the definition of "DOE decision" from the final rule.) The definition of "action" has also been changed to make clear that these regulations do not apply to "ministerial actions," such as congressionally mandated funding passsthroughs, which DOE does not propose and over which it has no discretion. (Also see the discussion of appendix A1.5, below.)

Definition: Adjacent state. One commenter stated that the requirement that a state must have a common boundary with a host state in order to be an adjacent state was too limiting.

Specifically, they asserted that states may be downwind or downstream from the location of a proposed action or have vital social or economic interests in a proposed action without sharing a common boundary. In response to the comment, the definition of "adjacent state" has been deleted, and in corresponding provisions of the rule, DOE has replaced "adjacent state" with the concept of a state or American Indian tribe that may be affected by a proposed action.

Definition: American Indian tribe. This definition has been added to accommodate changes made in §§ 1021.301(c) and (d) in response to comments and the addition of § 1021.301(e).

Definition: Contaminant and hazardous substance. One commenter objected to defining these words by reference to their definitions under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) because this would potentially exclude actions involving petroleum and natural gas products from NEPA review. DOE has addressed the commenter's concern by adding a definition for "CERCLA-excluded petroleum and natural gas products" and incorporating this phrase in appropriate parts of the final rule.

Definition: Documentation. One commenter stated that the proposed definition would supplant the environmental assessment that CEQ requires as the basis for determining the significance of the environmental effects of a proposed action. DOE agrees with the commenter's basic assertion that the purpose of "documentation" should be to have a record of a decision that categorical exclusion from environmental analysis is appropriate. This was DOE's intention, but comments on the definition of "documentation" and related parts of the proposed rule suggest that the intended purpose was not well understood. The CEQ regulations do not require documentation of the application of a categorical exclusion, and DOE is withdrawing the proposed regulatory requirement for such documentation. DOE believes that internal procedural and recordkeeping requirements for overseeing the application of categorical exclusions are more appropriate, and therefore has deleted the proposed definition and related provisions of the proposed rule.

Definition: EIS Implementation Plan. One commenter suggested that the definition be altered by adding "schedule" so as to read "that explains and supports the scope, schedule, and approach * * * DOE accepts the

comment, but has also added the qualifying word "target" because schedules are subject to change.

Definition: Host tribe. This definition has been added to accommodate changes made in 1021.301(c) and (d).

Definition: Interim action. One commenter thought that this definition would be more instructive if it cited the CEQ definition rather than referring to it. The commenter's suggested change, however, would include only one of the limitations from 40 CFR 1506.1. The proposed language that was the source of confusion has been rewritten.

Definition: NEPA document. One commenter would expand this definition by adding "Supplement Analysis," "Environmental Critique," and "Environmental Synopsis." DOE disagrees because these documents are not required by NEPA or the CEQ regulations. DOE has deleted "documentation of a categorical exclusion" from this definition because listing it was inappropriate at the outset, and the final rule does not require such documentation.

Definition: Pollutant. This definition has been affected indirectly by the addition of a new definition—"CERCLA-excluded petroleum and natural gas products"—in response to comments.

Definition: Project. DOE has modified this definition to more explicitly comport with CEQ's corresponding language, as a commenter suggested.

Definition: Site-wide NEPA document. The definition in the final rule acknowledges the programmatic nature of a site-wide NEPA document, in response to a commenter's request for clarification.

Section 1021.105 Oversight of Agency NEPA Activities

One commenter interpreted DOE's proposed offer to provide information on procedures and the status of NEPA reviews as an offer to provide written guidance and reports, and suggested that the rule make further provisions regarding such materials. DOE does not prepare written reports on individual NEPA reviews. The rule has been changed to clarify the original intent that DOE will make every effort to respond to public inquiries and to provide timely information regarding the status of NEPA review of specific projects.

D. Comments on Subpart B—DOE Decisionmaking

Section 1021.200 DOE Planning

Section 1021.200(a). A commenter stated that many DOE orders issued under the Department's Atomic Energy

Act authority govern critical environmental, health, and safety matters with the potential for significant impacts on the human environment, and suggested that promulgation of DOE orders be included as an activity that may require NEPA review. DOE accepts the suggestion and § 1021.200(a) has been modified accordingly. Another commenter requested that the rule clearly state the criteria DOE will use in deciding when to initiate a NEPA review in order to ensure a consistent approach to the NEPA process. The commenter was concerned that DOE might begin NEPA review after committing to a course of action. Section 1021.210(b) has been modified to emphasize DOE's intention to complete NEPA review before committing to a course of action. However, DOE believes that specific criteria for individual types of actions can be more effectively administered through internal procedures.

Section 1021.200(b). One commenter suggested the addition of, or a reference to, the CEQ requirement (40 CFR 1501.2) to integrate the NEPA process with other planning as early as possible. In § 1021.200(a), DOE commits to performing an adequate and timely NEPA review in accordance with 40 CFR 1501.2. Section 1021.200(b) only amplifies the general directive for a proposed action and is not intended to eliminate that commitment.

Section 1021.211 Interim Actions

One commenter supported the intent of the section but was concerned that DOE commitment of resources to an action before completing NEPA review might bias the consideration of alternatives. This commenter also requested that criteria for determining whether future actions fall within the bounds of permissible interim actions under the CEQ regulations (40 CFR 1506.1) be proposed for public review and comment. The commenter expressed concern that DOE will interpret this section too loosely. The commenter did not offer additional criteria. DOE believes that the criteria in the CEQ regulations are adequate, and, therefore, no additional criteria are included in the final rule. The title and language of this section have been modified editorially, however, to more closely parallel the CEQ regulations.

Another commenter was concerned that ongoing and planned environmental restoration actions would be delayed until records of decision for larger "umbrella" EISs or supplemental EISs are issued. DOE believes that many such actions would satisfy the criteria of 40 CFR 1506.1 and, therefore, could

proceed while "umbrella" NEPA reviews are being prepared.

Section 1021.212 Research, Development, Demonstration, and Testing

Section 1021.212(b). One commenter requested that criteria be added for DOE to use in determining when to begin a NEPA review, but did not suggest additional criteria. DOE believes that the criteria in this section, in 40 CFR 1501.2, and elsewhere in this rule are sufficient for that purpose.

In the final rule DOE has moved the last part of proposed § 1021.212(b), which concerned completion of NEPA review before a decision to proceed with detailed design, to § 1021.210(b) in the final rule. This was done to emphasize that this aspect of timing has general applicability.

Section 1021.212(c). One commenter was concerned that this section might be read to allow improper segmentation of the NEPA review of a project. DOE's rule, at § 1021.212(b), provides for subsequent NEPA reviews to evaluate those environmental impacts that could not be meaningfully evaluated at the time the initial review was prepared. Accordingly, the rule does not sanction improper segmentation. In the event that there are legitimate phases to an action, each successive EA or EIS considers cumulative impacts as required under 40 CFR 1508.25.

Section 1021.213 Rulemaking

Section 1021.213(b). One commenter objected to the "internal, subjective" decisionmaking process for determining when to begin NEPA review, but did not offer specific suggestions for more objective criteria. DOE believes that the criteria contained in § 1021.213(b) are adequate and consistent with 40 CFR 1501.2, in that they emphasize conducting NEPA review early in the process.

Section 1021.214 Adjudicatory Proceedings

Sections 1021.214(a) and 1021.214(c). One commenter questioned the meaning of "adjudicatory proceeding" and how it is distinguished from "administrative action." The comma inadvertently placed after "administrative" has been deleted to clarify the provision and to be consistent with 40 CFR 1508.18(a). Also, the phrase "for formal adjudicatory proceedings" has been deleted from § 1021.214(c) to eliminate confusion.

Section 1021.215 Applicant Process

Section 1021.215(b)(6). In response to a comment, and to clarify DOE's original intent, language has been added

indicating that DOE would take appropriate action if an applicant were about to take an action that would not satisfy the criteria in 40 CFR 1506.1(a) before DOE completes the NEPA process.

Section 1021.215(c). One commenter believed that the generic guidelines mentioned in this section should be proposed under the Administrative Procedure Act with adequate public notice and opportunity for comment. DOE has modified the section to clarify that any guidance issued to assist preparation of applications would be nonbinding on the applicants. Such guidance need not be subjected to public notice and comment.

Section 1021.216 Procurement and Financial Assistance

This section has been modified to clarify that it applies to DOE joint ventures entered into as a result of a competitive solicitation. Such joint ventures are authorized pursuant to the Renewable Energy and Energy Efficiency Technology Competitiveness Act of 1989 (Pub. L. 101-218).

E. Comments on Subpart C—Implementing Procedures

Section 1021.300 General Requirements

Section 1021.300(b). One commenter requested that this section be clarified to reflect the mandatory nature of NEPA review for ongoing activities. DOE agrees that NEPA applies to ongoing activities in appropriate circumstances; however, this section addresses preparation of NEPA documents that are not required by law or regulations. DOE has made clarifying changes.

Section 1021.301 Agency Review and Public Participation

Section 1021.301(a). The term "interested groups" has been added to the list of entities to which DOE will make its NEPA documents available, in response to a comment. In response to another commenter's general concern about the public's information and involvement opportunities regarding DOE's activities, DOE notes that the rule enhances such opportunities and exceeds CEQ's minimum requirements.

Section 1021.301(c). (Section 1021.301(d) of the final rule). Commenters addressed several aspects of this section, including to whom the proposed opportunity for pre-approval review of EAs should be offered, the length of the review period, and the fact that states may vary in making DOE's documents available to the public.

DOE accepts several commenters' suggestions that American Indian tribes

be accorded the same pre-approval review opportunities as similarly situated states. The opportunity will not be extended to the public generally or to citizen groups, however, as several commenters also suggested. The pre-approval review opportunity implements the Secretary of Energy's policy to closely coordinate DOE's NEPA actions with host and potentially affected states and American Indian tribes. The courtesy established by this policy is consistent with the special relationship between the Federal Government and the sovereign states and American Indian tribes. The rule exceeds and does not detract from CEQ's public review requirements.

In regard to the length of the review period, two commenters stated that the proposed 14- to 30-day period was inadequate, and one commenter thought the proposed period was adequate. DOE believes that the proposed period is adequate, and notes that this period is a minimum that may be extended as appropriate. DOE believes that the phrase "[a]t DOE's discretion" regarding the review period is necessary to provide flexibility in tailoring the review process to the circumstances of an individual action.

One commenter questioned the meaning of the proposed language explaining how DOE will proceed after giving the opportunity for pre-approval review. DOE has clarified that it may take any appropriate action on the EA before the end of the review period if the states and American Indian tribes have already waived the opportunity or have responded.

Finally, as previously noted regarding the definition of "adjacent state," this definition has been replaced with the concept of a state or American Indian tribe that may be "affected" by a proposed action. DOE believes that it is necessary to maintain the phrase "in DOE's judgment," however, when determining which states or American Indian tribes may be affected by a proposed action, contrary to several commenters. In many cases, this determination will depend on subjective evaluations of multiple factors. Therefore, DOE believes that the rule should state that DOE retains the discretion to exercise judgment in these matters.

Section 1021.301(d). (Section 1021.301(c) of the final rule). Two commenters recommended that, in addition to adjacent (now "affected") states, Indian tribes should also be notified of DOE's determination to prepare an EA or EIS for a DOE action. DOE agrees. One of the commenters

further suggested that interested agencies, citizen groups, and the general public should be notified. This comment was not accepted for the same reasons described in the response to comments on proposed § 1021.301(c).

Section 1021.301(e). In considering the comments opposing the early notification and review and comment provisions of §§ 1021.301 (c) and (d), DOE concluded that there are circumstances when this process would be inappropriate. Therefore, DOE added this section to the final rule so that these provisions would not apply where providing such advance information to a state or American Indian tribe could create a conflict of interest. The rule specifically cites power marketing actions, such as rate-setting, in which a state or Indian tribe is a customer.

Section 1021.311 Notice of Intent and Scoping

Section 1021.311(a). One commenter suggested that a Notice of Intent (NOI) should include at least a brief discussion of potential alternatives. DOE agrees, and a reference to 40 CFR 1508.22, which includes potential alternatives within the NOI contents, has been added to the section.

One commenter objected to the lack of criteria on which DOE will base its decisions on publishing an NOI or an Advance NOI, and also suggested that the rule should allow for maximum public notice of any opportunity for public comment. DOE notes that the wording of the first portion of this subsection is almost a direct quotation of the CEQ regulations, and it is not intended to limit public notice and comment.

The same commenter also stated that the section could be interpreted to mean that DOE has a choice whether or not to provide a reasonable opportunity for public participation regarding a proposed action. DOE believes that this would not be a reasonable interpretation of the section. The provision allowing an NOI to be deferred is intended to ensure that scoping comments are timely, not to limit public participation.

Section 1021.311(b). Two commenters recommended that criteria be established for requiring the publication of an Advance NOI; one suggested that an Advance NOI should be required if the delay between the time DOE has decided to prepare an EIS and the beginning of the public scoping process will be longer than three months. DOE disagrees. The purpose of an Advance NOI is to enhance public involvement, not to restrict it. It is neither necessary nor practical to establish fixed criteria

for providing this opportunity. Issuance of an Advance NOI exceeds the requirements of the CEQ regulations, and, therefore, no change is necessary to this section.

Section 1021.311(c). Three commenters suggested that the minimum scoping period should be at least 45 days; another commenter objected to extending the minimum scoping period from the current 20 days to 30 days. DOE has retained the proposed 30-day period as a minimum that can be extended when appropriate, commensurate with the importance, size, and complexity of an individual project and other factors (see 40 CFR 1501.8(b)(1)). Late comments may also be considered when practicable (see § 1021.311(e)). DOE believes that the rule provides an adequate opportunity for informed participation without risking significant project delay as a result of the NEPA process.

Section 1021.311(d). Three commenters suggested that there should be at least 30 days between the announcement of the scoping meeting and the meeting itself and that DOE should provide notice of meetings and schedule changes in the **Federal Register** and in other ways. DOE has retained the 15-day notice period as a minimum. DOE believes that a 15-day notice will generally provide adequate opportunity for informed public participation without risking significant project delay. The notice period may be extended when appropriate, commensurate with the importance, size, complexity of an individual project and other factors.

Regarding the request that DOE provide notice of meetings and schedule changes by publication in the **Federal Register** and through other means, DOE believes that the proposed rule reflects the Department's commitment to aggressively promote use of the most effective means of publicizing the details of public meetings, including schedule changes. As noted in § 1021.311(d), DOE intends to use various means of announcements, including the **Federal Register**, news releases, or letters to affected parties, to ensure that the public has adequate notification.

Section 1021.311(g). A commenter noted that the rule did not establish any criteria for determining the need for a scoping period for a supplemental EIS or any reason why such a scoping period should be optional. DOE believes that there is no need to repeat the public scoping process if the scope of the proposed action has not changed. This provision is consistent with 40 CFR 1502.9, which does not require public scoping for a supplemental EIS. When

the scope has changed, however, or when the importance, size, or complexity of the proposal warrants, DOE may elect to have a scoping process.

Section 1021.312 EIS Implementation Plan

Section 1021.312(c). A commenter objected to the proposed rule's categorization of target schedules and anticipated consultations with other agencies in an EIS Implementation Plan as discretionary. DOE has modified the rule to include target schedules and anticipated consultations with other agencies in the list of required items (§ 1021.312(b)).

Section 1021.312(d). Several commenters objected to the provision in the proposed rule for making copies of the EIS Implementation Plan available in DOE public reading rooms. To enhance public access to EIS Implementation Plans, DOE has modified the rule to remove the discretionary language and to require that all EIS Implementation Plans be made available in the appropriate DOE public reading rooms or other appropriate locations.

Section 1021.313 Public Review of Environmental Impact Statements

Section 1021.313(a). Several commenters suggested that the minimum public review and comment period for a draft EIS should be 60 to 90 days or more, except under documented extraordinary circumstances. One commenter objected to the establishment of a minimum period and said that if a minimum is established, it should be no more than 30 days. DOE will retain the minimum comment period of 45 days, consistent with CEQ's minimum requirement (40 CFR 1506.10(c)). DOE may specify a longer comment period for an individual proposal, and often does.

Section 1021.313(b). Two commenters suggested that the minimum notice for a public hearing on a draft EIS should be 30 rather than 15 days. DOE does not agree. As noted in responses to comments at § 1021.311 (c) and (d), DOE believes that a 15-day notice will generally provide adequate opportunity for informed public participation without risking significant project delay due to the NEPA process. DOE may provide a longer period of notice before a hearing when the circumstances warrant, and often does.

Section 1021.313(d). Two commenters stated that DOE should be required to publicize the availability of draft and final EISs and the time and place for

public hearings, and to announce the availability of these documents through additional methods beyond a **Federal Register** notice. DOE agrees and has modified the section by removing discretionary language and clarifying that DOE shall use other appropriate means to publicize the availability of such events.

Section 1021.314 Supplemental Environmental Impact Statements

Section 1021.314(a). A commenter questioned why the phrase "new circumstances," which appears in the CEQ regulations (40 CFR 1502.9(c)(1)), was omitted from DOE's proposed rule. The omission in the proposed rule was inadvertent, and "new circumstances" has been added to the final rule.

Section 1021.314(c)(1). (Not included in the final rule). A commenter suggested that a supplemental EIS might be required even though the impacts may not change, such as when the need for the proposed action, the range of reasonable alternatives, or available mitigation measures may have changed. The commenter suggested that the proposed provision at § 1021.314(c)(1) was inconsistent with CEQ provisions at 40 CFR 1502.9(c) regarding when a supplemental EIS is required. DOE has deleted the proposed subsection from the final rule, and other provisions of the section have been redesignated as appropriate.

Section 1021.314(c)(2). (Not included in the final rule). No comments were received on this section, which provided that DOE could revise an existing Record of Decision (ROD) if a decision were subsequently made to proceed with an alternative that was evaluated in the EIS but was not part of the initial decision. The proposed provision has been deleted, however, because the circumstances under which it would apply are adequately addressed by § 1021.315(d) of the final rule (which was § 1021.315(f) of the proposed rule).

Section 1021.314(d). (Section 1021.314(c) of the final rule). Two commenters stated that DOE should provide a public notice and comment opportunity concerning its intent to prepare an EIS Supplement Analysis (SA) and publish a Notice of Availability of the SA and the resulting determination. One commenter further suggested treating an SA like an EA (i.e., providing the same review and comment opportunities as for an EA). An EA, in contrast to an SA, is a NEPA document required by the CEQ regulations. DOE does not believe parallel procedures for the two documents are appropriate, and does not believe it is necessary to seek public input prior to a determination

whether a supplemental EIS is required. DOE will follow the criteria at 40 CFR 1502.9(c)(1) when determining whether to supplement an EIS. If a supplement is required, the public will be fully involved in the NEPA process per the requirements at 40 CFR 1502.9(c)(4) and § 1021.314(d) of these rules. In response to the comments, however, DOE has modified § 1021.314(d)(3) to provide that SAs shall be placed in the appropriate DOE public reading rooms or other appropriate locations.

Section 1021.314(d)(1). (Section 1021.314(c)(1) of the final rule). DOE modified this section in accordance with a commenter's suggestion that the content of an SA be described more specifically.

Section 1021.314(d)(2). (Section 1021.314(c)(2) of the final rule). Language in the proposed rule regarding revision of an existing ROD has been deleted from this subsection of the final rule to eliminate potential confusion regarding the basis for revising an ROD. As provided for in § 1021.315(d) of the final rule, DOE may revise an ROD only when it is adequately supported by an existing EIS.

Section 1021.314(d)(3). (Section 1021.314(c)(3) of the final rule). A commenter thought that it should be required, not discretionary, for the SA and the determination resulting from it to be provided to the public in relevant DOE reading rooms. Another commenter suggested that DOE should establish an affirmative system for providing access to SAs. (See response under § 1021.314(d)).

Section 1021.314(e). (Section 1021.314(d) of the final rule). Language of the proposed rule regarding revision of an ROD has been deleted to be consistent with changes made at § 1021.314(d)(2). Additionally, a reference to § 1021.315 of the final rule has been added to this section to clarify and emphasize provisions associated with issuing RODs.

Section 1021.315 Records of Decision

Section 1021.315(b). (Section 1021.313(c) of the final rule). DOE has moved the requirements in this proposed subsection to § 1021.313(c) of the final rule in order to be consistent with the requirements of 10 CFR part 1022. Part 1022 requires that a Statement of Findings for floodplain actions shall be noted in a final EIS.

Section 1021.315(d). (Not included in the final rule). A commenter objected to having the date of issuance of an ROD be the date of signature rather than the date it is published in the **Federal Register** because that could mean that the action might proceed before the

public becomes aware of the decision. DOE has modified § 1021.315(b) of the final rule (§ 1021.315(a) of the proposed rule) to clarify that no action may be taken until the decision has been "made public"; proposed § 1021.315(d) has been deleted. Section 1021.315(c) of the proposed and final rule provide a requirement that RODs be published in the **Federal Register**, which exceeds CEQ's requirement. DOE may also provide initial public notification by a press release, for example, announcing the availability of the ROD in appropriate DOE public reading rooms.

Section 1021.315(e). (Section 1021.315(a) of the final rule). DOE agrees with the commenters that the CEQ regulations allow for situations when comments on a final EIS may be appropriate. The phrase leading to confusion regarding this subject has been deleted.

Section 1021.315(f). (Section 1021.315(d) of the final rule). One commenter stated that revision of the preferred alternative would only be appropriate if all of the alternatives had received the same level of analysis and discussion of mitigation. DOE acknowledges the general correctness of this comment, but believes strict equality of treatment among alternatives may not be necessary in all cases. Rather, each alternative must be analyzed to a degree commensurate with its potential for environmental impact, and sufficient information must be provided for all alternatives to allow a proper basis for comparison among them. Rather than making the rule more specific, as the commenter further suggested, DOE has added language to the final rule to assure that revisions of the ROD will only take place if the EIS "adequately" supports the revised decision.

Section 1021.321. Requirements for Environmental Assessments.

Section 1021.321(a). One commenter expressed concern about the breadth of DOE's proposal to prepare an EA for all proposed actions not listed in appendices A, B, or D to subpart D. No change has been made to the final rule. DOE will prepare an EA for such actions unless it has already decided to prepare an EIS. This is consistent with 40 CFR 1501.4(b). DOE may add classes of actions to the lists in appendices A, B, or D in accordance with the CEQ regulations (40 CFR 1507.3).

Section 1021.321(b). One commenter thought the proposed focus of an EA was too limited, in comparison with the CEQ requirements. The discussion in the proposed rule focused on the major

purpose of an EA but was not intended to be limiting. DOE has added clarifying language to indicate that an EA shall serve all the purposes identified in 40 CFR 1508.9(a).

Section 1021.321(c). One commenter suggested that DOE withdraw the requirement to analyze the no action alternative in an EA when a proposed action is required by law or court order. DOE believes that it is appropriate to retain this provision. Presentation of the impacts of the no action alternative establishes a "baseline" for judging the impacts of the proposed action. The purpose served by this requirement (i.e., informing Congress and the public, as well as the decisionmaker, of the implications of not taking the action) is consistent with the reasoning behind the judicial interpretations and the CEQ regulation requiring consideration of the no action alternative in EISs.

Section 1021.322 Findings of no Significant Impact

Section 1021.322(a). DOE accepts a commenter's suggestions regarding clarification of when it is appropriate to issue a Finding of No Significant Impact (FONSI). DOE has modified this section editorially to clarify that a FONSI will be issued only if the related EA supports the finding that the proposed action will not have a significant effect on the human environment.

Section 1021.322(b)(2). A commenter requested that DOE clarify this section to distinguish the types of environmental impacts that may be mitigated consistent with issuance of a FONSI from those warranting preparation of an EIS. Because of the varied nature of DOE's projects, it is not practical to define with precision the types of mitigation that would support the issuance of a FONSI. However, DOE does not view activities that are routine parts of proposed actions, such as routine erosion control, as "mitigation commitments" in the context of § 1021.322(b)(2). Rather, § 1021.322(b)(2) refers to mitigation actions over and above the proposed action that are necessary to render the impacts of the action insignificant. DOE agrees with the commenter's suggestion that actions requiring relocation of endangered species habitat or reconstruction of major wetlands are EIS candidates. DOE believes such determinations should be made case by case, however, taking account of all the pertinent circumstances. DOE has revised the appropriate parts of § 1021.322 to make these distinctions clearer.

Section 1021.322(c). One commenter suggested that DOE should add a commitment to the final rule to provide

a notice of availability of FONSI to interested state and Federal agencies, tribal governments, citizen groups, and members of the general public. The procedure proposed by DOE and retained in the final rule is in accordance with CEQ regulations for distribution of a FONSI. It includes options such as those proposed by the commenter. DOE believes this is adequate, but will accommodate the commenter's further suggestion to make FONSI available in the appropriate DOE public reading rooms or other appropriate locations. The section is modified accordingly.

Section 1021.330 Programmatic NEPA Documents

A commenter requested clarification of the distinction between programmatic NEPA documents and site-wide NEPA documents as discussed in proposed § 1021.331, especially in view of DOE having proposed periodic review only for the latter. DOE considers site-wide NEPA documents to be programmatic in nature and, accordingly, has merged proposed § 1021.331 into § 1021.330 of the final rule. Many DOE sites contain facilities that support diverse and unrelated missions and activities. Site-wide NEPA documents are programmatic in the sense that they review the collective potential environmental effects of such facilities on a single geographic location, and in the sense that these facilities are operated under a single management. However, DOE has retained the requirement for periodic review of site-wide NEPA documents without extending it to programmatic NEPA documents in general. A site-wide NEPA review evaluates the potential individual and cumulative environmental impacts of ongoing and reasonably foreseeable activities at a DOE site (including potential mitigations of any environmental problems); periodic review of those evaluations is appropriate. Periodic review of programmatic NEPA documents (other than site-wide NEPA documents) would not be useful if the proposed program has been implemented, as often is the case.

Section 1021.330(a). A commenter observed that a programmatic EIS is required not only for "connected actions," but also for "cumulative actions" and "similar actions." DOE did not intend to limit the circumstances that require a programmatic EIS. The section has been revised to delete the reference to connected actions and to refer instead to the CEQ Regulations (40 CFR 1508.18(b)(3)), which define a program to include a group of concerted

actions and systematic and connected agency decisions.

Section 1021.331 Site-wide NEPA Documents (Included in Section 1021.330 of the Final Rule)

Section 1021.331(a). A commenter maintained that DOE's requirement in the proposed rule to prepare site-wide EISs for certain large, multiple-facility sites is inconsistent with the definition of an EIS, would not significantly further the purposes of NEPA, and would mainly provide information that is already available from other sources. DOE believes, however, that site-wide NEPA review will serve to improve and coordinate agency plans, functions, programs, and resource utilization. A site-wide EIS provides an overall NEPA baseline for a site that is particularly useful for tiering or as a reference when preparing project-specific NEPA documents for new proposals. The requirement is retained.

Another commenter stated that inclusion of the phrase "as a matter of policy" was inappropriate because site-wide EISs may be required under NEPA in certain circumstances. DOE will prepare site-wide EISs when required, but may also, "as a matter of policy," prepare site-wide EISs for a number of reasons including, for example, to improve site planning efforts, to consolidate activities, and to maximize cost-saving efficiencies.

As discussed at § 1021.330, DOE considers site-wide NEPA documents to be programmatic in nature and, accordingly, has merged proposed § 1021.331 into § 1021.330 of the final rule.

Section 1021.331(b). Several commenters suggested public participation opportunities for the proposed periodic evaluation of site-wide NEPA documents. DOE does not believe it necessary to require public notice of its intent to conduct such evaluations and will evaluate case by case whether such notice is appropriate. DOE has modified the rule, however, so that analyses and determinations resulting from such reviews will be made available in the appropriate DOE public reading rooms or other appropriate locations.

One commenter requested that DOE define the starting time of the cycle for the five-year reviews. DOE does not agree that specifying procedural starting times in this regulation is necessary or appropriate.

Finally, DOE has modified this section of the final rule to delete an unintended reference in the proposed rule to supplementing an EA.

Section 1021.332 Mitigation Action Plans (Section 1021.331 of the Final Rule)

One commenter stated that DOE must narrow the scope of this section, which allows for mitigation in support of a FONSI, citing the answer to Question 40 of CEQ's "Forty Most Asked Questions" (46 FR 18038, March 23, 1981), which addresses the circumstances under which a FONSI based on mitigation is appropriate. DOE has not modified the rule in this regard because it believes that the rule, as proposed, is consistent with CEQ's guidance. The answer to Question 40 focuses on the principle that a FONSI cannot be based only on the possibility of mitigation. However, DOE action under a FONSI supported by mitigation would be based on a commitment to perform the mitigation, not the possibility. This section has been modified to clarify this point; in doing so, DOE separated the discussion of EISs and EAs into different subsections. The discussion regarding Mitigation Action Plans (MAPs) for EISs and EAs/FONSIs can now be found at § 1021.331(a) and (b), respectively.

Two commenters suggested that MAPs be made available for public review and comment. DOE believes that public review of the MAP is not necessary because commitments to perform the subject actions would be included in the FONSI or EIS and associated ROD. The MAP is an internal DOE document that describes the plan for implementing and monitoring mitigation commitments made in these documents. DOE, however, will make copies of MAPs available in the appropriate DOE public reading rooms or other appropriate locations (see § 1021.331(d) of the final rule).

Section 1021.332(a) (Section 1021.331(b) of the Final Rule)

One commenter suggested that the phrase "in significant part" was inappropriate and should be deleted because, no matter how small the mitigation, its accomplishment would be critical to avoid the need for an EIS. The phrase "in significant part" has been deleted from the final rule, and the section has been changed to clarify that DOE commits to performing all mitigations "essential to render the impacts of the proposed action not significant." However, as discussed under and clarified in § 1021.322(b)(2), DOE does not intend the term "commitments to mitigations" to apply to actions that are routinely taken as part of or are integral elements of a proposed action.

Section 1021.340 Classified, Confidential, and Otherwise Exempt Information

A commenter suggested that DOE exercise greater restraint in deciding which information to withhold from the public. DOE believes that this rule in many ways enhances public access to information. With respect to confidential or classified documents, however, DOE must comply with applicable laws and regulations. Procedures for classifying information are beyond the scope of this rule.

Although no comments were received to this effect, DOE has deleted the reference to disclosure of interagency memoranda transmitting comments on EISs. This modification was made to avoid the possible misconception that DOE intended to disclose classified comments. For unclassified comments, the provisions of the CEQ Regulations at 40 CFR 1506.6(f) would apply. Additionally, DOE has deleted from the final rule the inadvertent and unnecessary reference to "restricted" information made in the proposed rule.

Section 1021.340(a). A commenter expressed a concern that unless this section is limited, inappropriate material will be made available to the public, especially draft comments and attorney work product. The provision at issue addresses interagency memoranda transmitting comments. By their nature, such documents are final and become public comments (40 CFR 1506.6(f)). No exception in the requirement is made for the case where the agency's responding unit is its legal counsel. DOE legal counsel's comments (intraagency), like other internal deliberative documents, are exempt from release. The section is not changed.

Section 1021.340(b). One commenter suggested that the phrase "wherever possible" should be deleted because it might lead to a determination that the release of information was not "possible" because of costs or inconvenience. This section addresses the preparation of a document in the context of § 1021.340(c), in which cost and inconvenience are not issues. The final rule has been modified, however, to indicate that DOE will, to the fullest extent possible, segregate any information that is exempt from disclosure into an appendix to facilitate public review of the remainder of the document.

Another commenter suggested that the rule acknowledge that classified portions of documents will undergo an independent review by other Federal agencies whenever appropriate. This comment refers to the responsibilities of

the Environmental Protection Agency under section 309 of the Clean Air Act. This rule need not restate review responsibilities that are otherwise provided for by law.

Section 1021.341 Coordination With Other Environmental Review Requirements

Section 1021.341(a). One commenter suggested that the rule provide for integrating NEPA with CERCLA requirements in order to preclude delays and unnecessary duplication of effort. Another expressed a concern that this rule should not prejudice an ongoing, broader discussion of the applicability of NEPA to the environmental restoration activities conducted by Federal agencies other than EPA. It is DOE's policy to integrate NEPA values into activities undertaken pursuant to CERCLA wherever practical. DOE's implementation of this policy is not intended to represent a statement on the legal applicability of NEPA to environmental restoration activities conducted under CERCLA or other legal authority, and DOE believes that this policy will not prejudice any subsequent resolution of the applicability issue.

Section 1021.341(b). DOE agrees with a comment noting that the determination of applicability of other environmental requirements (e.g., those of the Endangered Species Act, section 106 of the Historic Preservation Act, and section 404 of the Clean Water Act) is not always left to the agency proposing an action, but sometimes to other agencies with given program responsibilities. DOE did not intend to imply in the proposed rule that it could unilaterally determine the applicability of such requirements. The final rule has been modified from the proposed rule to state that DOE will determine the applicability of other environmental requirements in consultation with other agencies when necessary or appropriate.

Section 1021.342 Interagency Cooperation

One commenter requested clarification of DOE's procedures for the designation of a lead office within DOE and the designation of cooperating offices and agencies within and without DOE, including entities other than Federal agencies. Another commenter thought that the provisions for involvement of cooperating agencies should be expanded and improved to reference or acknowledge the CEQ regulations. DOE has reinforced its general obligation, acknowledged in § 1021.103, to comply with all CEQ requirements, including those for lead

and cooperating agencies, by establishing in § 1021.342 an affirmative policy to cooperate with other agencies, including the development of interagency agreements. The final rule cites specific CEQ requirements (i.e., 40 CFR 1501.5 and 1501.6) for greater clarity. DOE's internal procedures for carrying out its responsibilities are beyond the scope of this rulemaking, however.

Section 1021.343 Variances

Section 1021.343(a). DOE has modified the rule in response to a commenter's request to make the rule more clearly consistent with the CEQ regulation regarding consultation with CEQ about "alternative arrangements." The final rule also requires DOE to publish a notice in the *Federal Register* after taking an emergency action, which exceeds CEQ requirements.

Section 1021.343(b). A commenter suggested that DOE limit its reduction of time periods established in the rule to extraordinary situations that demand immediate attention. The only time periods that DOE has discretion to change are those established by DOE that exceed CEQ's requirements. DOE does not believe it is appropriate to establish criteria for reducing these time periods, because it is not possible to foresee all possible circumstances under which reductions may be needed. However, in no case would the time periods resulting from application of this subsection be less than the minimums established by CEQ.

Section 1021.343(c). One commenter suggested that the variance provision should be deleted, describing it as a "catch-all." Another suggested that a *Federal Register* notice be required for such variances. DOE believes the variance provision is reasonable and appropriate, and consistent with 40 CFR 1506.11. The rule has been modified, however, to require that a notice of variance be published in the *Federal Register*, as the commenter suggested. Editorial modifications were also made to clarify responsibilities of the Secretary of Energy.

F. General Comments on Subpart D—Typical Classes of Actions

DOE received extensive comments on the approach to NEPA compliance reflected in the proposed regulations and appendices of Subpart D, with the major focus of these comments on the classes of actions proposed in appendices A and B to be categorically excluded from the preparation of an EA or EIS.

Commenters pointed out that DOE failed in the proposed rule to make the

finding required by the CEQ regulations (at 40 CFR 1506.4) that the classes of actions categorically excluded from the requirement to prepare an EA or EIS do not individually or cumulatively have a significant effect on the human environment. Two commenters further asserted that DOE must, for each class of action included in appendices A and B, make an explicit finding with an articulated basis, supported by documentation, that the actions encompassed by the class never, except in extraordinary circumstances, have a significant effect on the human environment.

DOE agrees that the CEQ regulations do require DOE to find that the classes of actions in appendices A and B will not individually or cumulatively have a significant effect on the human environment and that this finding be made in procedures adopted in implementing the CEQ regulations. Accordingly, DOE has included such a finding at § 1021.410(a) of the final rule. However, DOE does not believe that it is required to set forth in the preamble a detailed, individualized explanation for such finding for each of the classes of actions in appendices A and B. In finding that the classes of actions categorically excluded in the final rule will not individually or cumulatively have a significant effect on the human environment, DOE has considered, among other things, its own experiences with these classes of actions, other agencies' experiences as reflected in their NEPA procedures, and the comments received on the proposed rule.

One commenter also questioned DOE's exclusive reliance on experience to support its identification of categorical exclusions and the use of memoranda-to-file as a part of this experience record because, the commenter asserted, DOE has determined that memoranda-to-file do not constitute acceptable NEPA documentation. Although DOE stopped using the memorandum-to-file as part of its NEPA process on September 30, 1990, DOE believes that memoranda-to-file prepared before that date are valid documents that should be considered as part of DOE's experience with particular actions. The purpose of memoranda-to-file was to determine whether proposed actions, not included in the list of categorical exclusions, would have clearly insignificant impacts, and therefore not require either an EA or an EIS. This is precisely the type of document that is relevant for the finding required by 40 CFR 1506.4.

Some commenters stated that DOE's extensive list of categorical exclusions

suggested a DOE position that classes of actions can be categorically excluded if, some of the time, they would not have significant impacts. The commenters compared this to the CEQ regulations, which clearly limit categorical exclusions to those classes of actions that have significant impacts only in extraordinary circumstances. DOE believes its categorical exclusions comply with the CEQ regulations and agrees that to be eligible for categorical exclusion, a class of actions must not individually or cumulatively have significant effects on the human environment except in extraordinary circumstances. DOE has determined that the classes of actions included in appendices A and B of the final rule meet this standard.

One commenter noted that if the individual actions encompassed by a categorical exclusion have the potential for significant impact on a cumulative basis, then the categorical exclusion is invalid. DOE agrees that it must find that classes of actions categorically excluded do not individually or cumulatively have a significant effect on the human environment. The commenter further noted that if a proposal encompasses actions within multiple categorical exclusions and cumulatively the actions have the potential for significant impacts, then the categorical exclusions encompassed are invalid. DOE agrees that such a proposal could not be categorically excluded but believes that the individual categorical exclusions would still be valid. DOE has added § 1021.410(b)(3) to address this concern and to preclude the segmentation of a proposal into component parts, which as discrete proposals are categorically excluded, to avoid preparation of an EA or EIS.

Commenters, expressing the view that DOE's proposed categorical exclusions are too broad, asserted that DOE should prepare more EAs and that DOE's extensive list of categorical exclusions results from a reluctance on DOE's part to prepare EAs because its internal EA requirements are so burdensome. Commenters asserted that the approach represented by the expanded list of categorical exclusions is not consistent with the requirements of NEPA and the CEQ regulations. One commenter noted that an increased reliance on EAs would not necessarily require vast new commitments of time and resources if DOE would take heed of CEQ regulations and guidance that intend the EA to be a concise and expeditious analysis. Other commenters criticized DOE for presenting a confusing and illogical mix of activities, ranging from

the payment of salaries to the restart of nuclear facilities, and for not having a *de minimis* level for actions to be subject to a NEPA review.

The extensive list of categorical exclusions results primarily from the fact that DOE is engaged in many different types of activities. DOE's extensive list of categorical exclusions also reflects DOE's policy that some NEPA review is required for all DOE actions potentially affecting the environment, even if there is no apparent potential for any significant effect. DOE believes the extensive list of categorically excluded actions in the final rule is consistent with NEPA and the CEQ regulations. The CEQ regulations require agencies to reduce excessive paper work and avoid delays by using categorical exclusions (40 CFR 1500.4(p) and 1500.5(k)). DOE will prepare EAs when necessary—that is, when the class of actions has not been excluded and/or when DOE is uncertain whether the proposed action would have significant environmental impacts. DOE believes it will serve environmental concerns best if it focuses its efforts on analyzing those actions that may or do have potential for significant impact.

One commenter stated that the categorical exclusions in proposed appendix B were inappropriate because they were vaguely drafted and were entirely without reference to size, volume, or significance in a way that would encompass major Federal actions that were likely to have significant environmental impacts. Others expressed concern about the broad scope of the classes of actions categorically excluded. DOE has reevaluated all categorical exclusions in the proposed rule to determine the appropriateness of more precise language, adding limiting factors or otherwise narrowing the scope of the categorical exclusions, and has modified several accordingly. DOE has decided not to categorically exclude some classes of actions that were included on the list in the proposed rule. These deletions and changes are described in more detail in the discussion under section III G below.

One commenter suggested that DOE delete proposed appendix B in its entirety, and instead add explicit limits on the size of each class of actions proposed in that appendix and move the classes of actions to proposed appendix A. The commenter further suggested that DOE prepare EAs or EISs for all proposed activities beyond the expressed size limit of the classes of action in the resulting appendix A.

DOE believes it is reasonable to retain two appendices for categorical exclusions but has revised the distinction between the types of classes of actions included in appendices A and B. Appendix A in the final rule lists categorical exclusions applicable to general agency actions and includes those classes of actions with impacts so remote or conjectural as to preclude meaningful consideration. Appendix A includes some classes of actions to which NEPA probably does not apply but that DOE has listed to clarify that neither an EA nor EIS is needed and to avoid any potential misunderstanding associated with the absence of such listing. Appendix B in the final rule lists categorical exclusions that are applicable to specific agency actions and have conditions specified as integral elements of the classes of actions. The conditions that are integral elements of the classes of actions in appendix B of the final rule were the eligibility criteria in § 1021.410(b) of the proposed rule. Even though originally proposed to apply to all categorical exclusions as eligibility criteria, DOE believes that inclusion of the conditions specified in appendix B would be meaningless for the categorical exclusions DOE retained in appendix A in the final rule. This is because appendix A is limited to classes of actions with impacts that cannot be meaningfully evaluated. DOE moved the classes of actions with impacts that are not so remote or conjectural as to preclude meaningful analysis that were included in appendix A of the proposed rule to appendix B in the final rule so that the conditions specified in appendix B would be integral elements of these classes of actions. Categorical exclusions in appendices A and B have been found by DOE not to individually or cumulatively have a significant effect on the human environment.

Two commenters were concerned that, while DOE's proposed rule purports to abolish the memorandum-to-file, DOE has merely substituted a new system, "documentation," which also would not be made available to the public. One commenter considered the documented categorical exclusions as "phantom" EAs that would reinsert into DOE's NEPA process the very subjectivity, discretion, and secrecy that SEN 15-90 was intended to eliminate. Another commenter viewed DOE's creation of the proposed Appendix B as indicating a lower level of certainty about those categorical exclusions and noted that, when an analysis is required to decide whether an action meets the criteria for a categorical exclusion, then

the proper format for that analysis is an EA subject to public review, not documentation behind closed doors.

DOE has eliminated the requirements for documentation of categorical exclusions from its regulations. It was not DOE's intent that any categorical exclusion in appendix B be supported by an analysis of environmental effects ("phantom" EAs) or that the documented categorical exclusion be equivalent to the memorandum-to-file, which DOE has eliminated from its NEPA procedures. The documentation that DOE referred to for these categorical exclusions in the proposed rule was to be a record of the determination that the action was appropriately categorically excluded and was to be used for internal oversight purposes. Although the CEQ regulations require public review of categorical exclusions proposed for listing, the regulations do not require documentation, public review, or notification when categorical exclusions are applied.

One commenter was concerned that proper documentation is needed to ensure that an established process has been followed, and suggested that DOE use a checklist to demonstrate why an action has been excluded from further NEPA review. DOE is evaluating the need for internal recordkeeping procedures and, if such procedures are established, will consider the use of a checklist.

In contrast to the commenters who believed that the classes of actions proposed to be categorically excluded were too broad, some commenters believed the classes of actions to be categorically excluded should be broader than those proposed. One commenter thought that rather than listing specific classes of actions, DOE should establish "guiding criteria." Some commenters suggested that certain classes of actions, in addition to those in the proposed rule, should be categorically excluded in the final rule. DOE believes that the classes of actions categorically excluded in the final rule are appropriate and does not believe that it could make the necessary findings at this time for any broader classes of actions. As to the comments suggesting the categorical exclusion of classes of actions not proposed by DOE, DOE cannot categorically exclude in the final rulemaking any classes of actions not included in the proposed categorical exclusions. The CEQ regulations require that categorical exclusions be established only after public notice and the opportunity for public comment. DOE will consider the suggestions of the

commenters in determining whether to propose new or broader classes of actions for categorical exclusion in a future rulemaking.

The comment was made that because many of the classes of actions proposed to be categorically excluded in appendices A and B entail activities that could affect the character or use of historic properties, DOE should make absolutely clear in its final rule that the categorical exclusion of an action does not exempt it from the requirements of other environmental regulations. DOE's NEPA rule addresses NEPA compliance only, not other environmental requirements. Coordination with other environmental review requirements is addressed in § 1021.341; in addition, condition B.(4)(i) in appendix B of the final rule precludes a proposed action from categorical exclusion if the action would have an adverse effect on historic properties.

Four commenters expressed concern about the lack of public participation in, and public scrutiny of, the process of determining whether particular proposed actions are appropriately categorically excluded. One commenter suggested that records of determinations that proposed actions are categorically excluded be placed in public reading rooms. Another commenter felt that in view of the breadth of the classes of actions on the list of categorical exclusions and the discretion to be exercised in applying eligibility criteria to proposed actions, there should be public participation in the process.

The CEQ regulations do not provide for public participation in determinations that particular proposed actions are categorically excluded, nor do they require that records of such determinations be kept or made public. DOE believes that requiring public participation in categorical exclusion determinations or that documentation of categorical exclusion determinations be made available in public reading rooms would be contrary to the purposes of categorical exclusions, as stated in the CEQ regulations—reducing paperwork and avoiding delays.

G. Comments on Specific Sections of Subpart D—Typical Classes of Actions

Section 1021.400 Level of NEPA Review

A commenter suggested that § 1021.400 as proposed should address proposed actions covered by "memoranda-to-file." DOE does not believe a reference in the rule to memoranda-to-file is needed or appropriate because such documents are no longer part of DOE's NEPA

procedures. To clarify the effect of this rulemaking on completed NEPA reviews and documents, DOE has changed § 1021.400(b) in the final rule to state that "any completed, valid NEPA review does not have to be repeated, and no completed NEPA documents need to be redone by reasons of these regulations, except as provided in § 1021.314" (which concerns supplemental EISs). Because a memorandum-to-file issued before September 30, 1990, is a valid NEPA document, § 1021.400(b) would apply. (See additional discussion under section III B above.)

A commenter suggested that clarification be provided in § 1021.400(b), as proposed, on the use of existing site-wide EAs or EISs during the evaluation of those documents or the preparation of new site-wide documents for continuing or new actions. DOE believes that this issue is generally addressed by § 1021.400(b) and that any further clarification is better addressed in internal guidance than in this rulemaking because of site-specific issues and circumstances. Accordingly, DOE did not provide the requested clarification in the final rule.

Another commenter was concerned that the language in § 1021.400(c), as proposed, did not make it sufficiently clear that the application of a categorical exclusion to a particular DOE proposal depends on the proposal meeting the eligibility criteria of proposed § 1021.410(b). DOE agrees with respect to those classes of actions listed in appendix B of the final rule. However, rather than modifying § 1021.400(c) in the final rule, DOE has included the eligibility criteria in § 1021.410(b) of the proposed rule in appendix B of the final rule as conditions that are integral elements of the classes of actions listed in appendix B. DOE has not included the proposed eligibility criteria in § 1021.410 of the final rule. DOE believes that this provides the clarification requested by the commenter.

A commenter expressed concern that the proposed rule did not provide for instances where actions falling within a category of categorically excluded actions might have significant environmental effects because of extraordinary circumstances. DOE intended to provide for such instances in § 1021.400(c) as proposed. In light of the commenter's concern, DOE has modified § 1021.400(c) in the final rule and added § 1021.410(b) (2) to clarify that DOE will not proceed with the level of review indicated in the appendices if there are extraordinary circumstances related to the proposal that may affect the significance of its environmental effects. DOE has included a circumstance cited

by the commenter (i.e., the unresolved conflicts concerning alternative uses of available resources within the meaning of § 102(2)(E) of NEPA) as an example of an extraordinary circumstance in § 1021.410(b) (2) of the final rule. DOE also modified § 1021.400(d) in the final rule to be consistent with the revisions to § 1021.400(c).

Section 1021.410 Application of Categorical Exclusions (Classes of Actions That Normally Do Not Require EAs or EISs)

Section 1021.410(a) General. In the final rule, DOE has expanded this section to clarify the application of categorical exclusions and has divided the proposed section into four parts. DOE has incorporated § 1021.410(b) of the proposed rule into appendix B in the final rule. Therefore, § 1021.410(a) of the proposed rule as modified is § 1021.410 in the final rule, as explained below.

Section 1021.410(a) states DOE's required finding that the classes of actions listed in appendices A and B of subpart D are classes of actions that DOE has determined do not individually or cumulatively have a significant effect on the human environment.

Section 1021.410(b)(1) clarifies that to be eligible for categorical exclusion, the proposal must be determined by DOE to fit within a class of actions listed in appendix A or B. For a proposal to fit within a class of actions in appendix B, it must meet the conditions specified in B.(1)–(4) in appendix B.

Section 1021.410(b)(2) clarifies that to find that a proposal is categorically excluded, DOE must determine that there are no extraordinary circumstances related to the proposal that may affect the significance of the environmental effects of the proposal. This section identifies three examples of extraordinary circumstances that could exclude actions within a class of actions in appendix A or B from eligibility for categorical exclusions. These examples are unresolved conflicts concerning alternative uses of available resources, scientific controversy about the environmental effects of the proposal, and uncertain effects or effects involving unique or unknown risks.

Section 1021.410(b)(3) clarifies that DOE, in determining that a proposal is categorically excluded, shall find that the proposal is not connected to other actions with potentially significant impacts, is not related to other proposed actions with cumulatively significant impacts (following 40 CFR 1508.25(a) (1) and (2)), and is not precluded by 40 CFR 1506.1 or § 1021.211 of these regulations. Section 1021.410(b)(3) was included in

response to comments concerning cumulative impacts, as discussed above.

Section 1021.410(c) includes the statements contained in proposed § 1021.410(a) concerning the application of the classes of action by any element of DOE and the division of appendices A and B only for organizational purposes. In the final rule the word "organizational" was added before "element of DOE" to be consistent with § 1021.102(a).

Section 1021.410(d) modifies § 1021.410(a) as proposed to clarify that, to avoid segmentation, the classes of actions are intended to include all activities necessary to implement a proposal, such as transportation activities and award of implementing grants and contracts.

A commenter recommended that § 1021.410(a) as proposed be revised to provide for a case-by-case determination that a proposed action, not included within classes of actions listed in appendices A and B, be categorically excluded if the action meets the eligibility criteria set forth in § 1021.410(b). DOE has not made the requested revision because, as discussed above, the CEQ regulations require that categorically excluded classes of actions be identified in an agency's published procedures. The proposed eligibility criteria and the appendix B conditions in the final rule are not classes of actions.

Section 1021.410(b) Eligibility criteria for categorical exclusions (Appendix B of the final rule). One commenter expressed concern that DOE used as eligibility criteria for categorical exclusions some of the factors in 40 CFR 1508.27 intended for evaluating the intensity or severity of impacts and for determining the significance of the environmental impacts of proposed actions. The commenter pointed out that the analysis of such factors is more appropriately accomplished in an EA. The commenter acknowledged, however, that the use of these factors as eligibility criteria is better than no requirement for screening and suggested that, if such a screening mechanism is developed, it include several additional critical factors found in 40 CFR 1508.27. Another commenter also recommended that other factors in 40 CFR 1508.27 be added to DOE's list of eligibility criteria.

DOE agrees that subjective evaluation of the intensity or severity of an impact as prescribed in 40 CFR 1508.27 is not appropriate in a determination that an action fits within a categorically excluded class of actions. The conditions specified as integral elements of the classes of actions in appendix B in the final rule, which were the

eligibility criteria in proposed § 1021.410(b)(1), require a factual determination. That is, the presence, not the severity, of the factor would make a proposed action ineligible for categorical exclusion. For example, 40 CFR 1508.27(b)(8) requires an evaluation of "the degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places." On the other hand, condition B.(4)(i) of DOE's final rule screens from categorical exclusion status proposed actions that "adversely affect environmentally sensitive resources," which include property listed on the National Register.

The final rule retains the eligibility criteria proposed for classes of actions in appendix B as conditions that are integral elements of the classes of actions in appendix B in the final rule. DOE did not include, however, additional conditions based on the CEQ factors in 40 CFR 1508.27. DOE believes that controversial environmental effects (40 CFR 1508.27(b)(4)) and uncertain effects or effects that involve unique or unknown risks (40 CFR 1508.27(b)(5)) would not, except in extraordinary circumstances, be associated with any of the categorically excluded classes of actions included in the final rule. As explained earlier, DOE has identified these factors as possible extraordinary circumstances in § 1021.410(b)(2) of the final rule. The other CEQ criteria of establishing a precedent for future actions with significant effects (40 CFR 1507.28(b)(6)) or relation to other actions with individually insignificant but cumulatively significant impacts (40 CFR 1507.28(b)(7)) are included in § 1021.400(b)(3) of the final rule, discussed above.

In the final rule, DOE has added a condition that is an integral element of the classes of actions listed in Appendix B: a proposal must be one that would not disturb hazardous substances, pollutants, contaminants, or CERCLA-excluded petroleum and natural gas products that preexist in the environment such that there would be uncontrolled or unpermitted releases (B.(3)). This condition is similar to an element of several categorical exclusions in the proposed rule (proposed A1.34, A3.1, A3.5, B3.3, B6.2, and B6.7) that concerned inadvertent or uncontrolled movement of hazardous substances, pollutants, contaminants, or non-native organisms.

In response to comments that many of the proposed categorical exclusions were too broad, DOE believes that condition B.(3) in the final rule, along with other changes described herein,

will appropriately narrow the scope of categorical exclusions in appendix B. Proposed disturbance with subsequent unpermitted or uncontrolled releases of hazardous substances, pollutants, contaminants, or CERCLA-excluded petroleum and natural gas products warrants analysis to determine if there is potential for significant impact. DOE is concerned that such an action, otherwise without potential for significant impact, may have the side-effect of spreading preexisting contamination in the environment.

As a consequence of adding condition B.(3) to the final rule, the corresponding restricting phrase proposed as part of several categorical exclusions is no included in those categorical exclusions in the final rule. With regard to proposed A1.34 (final B1.3) that concerns component testing (generally an indoor activity), condition B.(1) of the final rule (i.e., proposals cannot threaten applicable environment, safety, and health requirements) would provide the assurance that emissions are controlled. With regard to the condition in proposed A3.1 (site characterization/environmental monitoring) and proposed A3.5 (research related to conservation of fish and wildlife) that the proposals not result in the uncontrolled movement of non-native organisms, DOE now believes that these actions (final B3.1 and B3.3, respectively) will not foreseeably involve non-native organisms.

In response to a suggestion by a commenter that § 1021.410(b)(1)(i) should have a disjunctive effect, the word "and" in the phrase "applicable statutory, regulatory, and permit requirements" has been changed to "or" in condition B.(1) in appendix B in the final rule. DOE also added the phrase "for environment, safety, and health" to the condition in appendix B.(1) in the final rule to clarify its intent that the term "requirements" applies to safety and health as well as environment in response to a comment in this regard.

DOE has revised the proposed eligibility criterion in § 1021.410(b)(1)(ii) of the proposed rule as condition B.(2) in appendix B in the final rule, and that condition includes waste storage facilities because DOE believes the siting, construction, or major expansion of waste storage facilities cannot be categorically excluded.

DOE has revised proposed §§ 1021.410(b)(1)(iii) and (b)(2) of the proposed rule as condition B.(4) in the final rule, and that condition refers to "environmentally sensitive resources" rather than "environmentally sensitive areas" in light of a comment that the

proposed criteria reflected the sensitivity of the habitat of protected species but not the species themselves. Condition B.(4) also includes the protected species as well as its habitat as examples of environmentally sensitive resources.

In response to another comment on § 1021.410(b)(2) of the proposed rule, DOE added the phrase "but not limited to" after the word "include" in condition B.(4) in appendix B in the final rule to clarify that the listing of environmentally sensitive resources is not intended to be inclusive.

H. Comments on Appendices

In the following discussion of the comments on the appendices, the headings are those used in the table of contents of the appendices in the proposed rule. The conversion table on the following page shows which proposed classes of actions have not been included in the final rule and also refers the reader to the appropriate headings in the final rule for those proposed classes of actions that are included in the final rule. There were many numbering changes between the proposed and final rule because some classes of actions were deleted, combined with other classes of actions, or reordered to group similar classes of actions. As explained above, many classes of actions in proposed appendix A of the proposed rule were moved to appendix B in the final rule so that the conditions specified in appendix B would be integral elements of these classes of actions.

Proposed A1.1 Administrative Procurements (Final A1)

Proposed A1.2 Routine Financial Transactions (Final A1)

Proposed A1.16 Personnel Actions/Personal Service Contracts (Final A1 and A8)

Proposed A1.25 Business Support Activities (Final A1)

DOE consolidated these four separate categorical exclusions into one inclusive categorical exclusion in the final rule. DOE believes that there was overlap among the four and that combining them into one categorical exclusion avoids segmentation. (See also discussion of proposed A1. 16 below.) A1 in the final rule categorically excludes routine actions necessary to support the normal conduct of business, which are those actions that are encompassed in the four proposed categorical exclusions.

Proposed A1.3 Grant/Contracts for Categorically-Excluded and Some Interim Actions (Not Included in the Final Rule)

DOE has not included this proposed categorical exclusion in the final rule because grants and contracts are merely elements of a proposed action rather than separate actions, as indicated in § 1021.410(d) of the final rule. Separating the award of grants or contracts to implement the proposed action from the proposed action for purposes of determining the level of NEPA review would constitute inappropriate segmentation.

Conversion Table

Subpart D—Typical Classes of Actions

Designation of Classes of Action in Subpart D

Proposed	Final
A1.1	A1.
A1.2	A1.
A1.3	Not included. ¹
A1.4	A2.
A1.5	Not included. ²
A1.6	B1.1.
A1.7	Not included. ²
A1.8	A3.
A1.9	A4.
A1.10	A5.
A1.11	A6.
A1.12	A6.
A1.13	Not included.
A1.14	A6.
A1.15	A7.
A1.16	A1, A8.
A1.17	A9.
A1.18	A9.
A1.19	A10.
A1.20	A11.
A1.21	A9.
A1.22	A12.
A1.23	B1.2.
A1.24	A13.
A1.25	A1.
A1.26	B1.3, B2.5.
A1.27	B1.15, B4.11.
A1.28	B1.3, B2.5.
A1.29	B1.4.
A1.30	B1.5.
A1.31	B1.6.
A1.32	B1.7.
A1.33	B1.8.
A1.34	B1.3.
A1.35	B1.3.
A1.36	B1.9.
A1.37	B1.10.
A1.38	B1.11.
A1.39	B5.1.
A1.40	B1.12.
A1.41	B1.13.
A1.42	Not included. ¹
A1.43	Not included. ¹
A1.44	Not included. ¹
A1.45	B1.14.
A1.46	Not included. ¹
A2.1	B2.1.
A2.2	B2.2.
A2.3	A12, B1.3, B2.2, B2.5.
A2.4	B2.3.
A2.5	B2.4.
A3.1	B3.1.
A3.2	B3.1.

Proposed	Final
A3.3	B3.1.
A3.4	B3.2.
A3.5	B3.3.
A3.6	B3.4.
A3.7	B3.5.
A3.8	B3.6.
A4.1	B4.1.
A4.2	A7.
A4.3	B4.2.
A4.4	B4.3.
A4.5	B4.4.
A4.6	Not included.
A4.7	B4.11.
A4.8	B4.5.
A4.9	B4.6.
A4.10	B4.7.
A5.1	B5.2.
A5.2	B5.3.
A5.3	B5.4.
A5.4	Not included.
A6.1	A14.
A6.2	A15.
A6.3	B7.1.
B1.1	B1.15.
B1.2	B1.3.
B1.3	B1.16.
B1.4	B1.17.
B1.5	B1.18.
B1.6	B1.19.
B1.7	B5.1.
B1.8	B1.20.
B1.9	Not included. ¹
B2.1	B2.5.
B3.1	B3.1, B3.8, B6.2.
B3.2	B3.7.
B3.3	B3.8, B6.2.
B3.4	B3.9.
B3.5	B3.10.
B3.6	B3.11.
B4.1	B4.8.
B4.2	B4.9.
B4.3	B4.10.
B4.4	B4.11.
B4.5	B4.12.
B4.6	B4.13.
B4.7	B1.21.
B5.1	B5.5.
B5.2	B5.6.
B5.3	B5.7.
B5.4	B5.8.
B5.5	B5.9.
B5.6	B5.10.
B5.7	B5.11.
B5.8	B5.12.
B5.9	B5.13.
B5.10	B5.14.
B5.11	B5.15.
B5.12	B5.16.
B6.1	B6.1.
B6.2	B6.2.
B6.3	B6.3.
B6.4	C16, B6.4, B6.5, B6.8.
B6.5	B6.6.
B6.6	B6.7.
B6.7	B1.22.
B6.8	B6.8.
B7.1	B7.2.
B7.2	Not included.
C1	C1.
C2	C8.
C3	C2.
C4	C3.
C5	C10, C11.
C6	C12.
C7	C4.
C8	C5.
C9	C6.
C10	C7.
C11	C13.

Proposed	Final
C12.....	C14.....
C13.....	C15.....
C14.....	C16.....
C15.....	Not included.
C16.....	C9.....
D1.....	D1.....
D2.....	D2.....
D3.....	D3.....
D4.....	D4.....
D5.....	D5.....
D6.....	D6.....
D7.....	D8.....
D8.....	D9.....
D9.....	D10.....
D10.....	D11.....
D11.....	Not included.
D12.....	D12.....

¹ In scope of broader proposals.

² CEQ definition of action excludes this classification.

Proposed A1.5 Pass-throughs (Not Included in the Final Rule)

DOE has not included this proposed categorical exclusion in the final rule because congressionally mandated funding pass-throughs are "ministerial actions," which DOE does not propose and over which it has no discretion. Therefore, these are not DOE actions as discussed above under "action" in III C.

Proposed A1.7 Administrative Enforcement Actions (Not Included in the Final Rule)

DOE has not included this proposed categorical exclusion in the final rule because the CEQ definition of a "major Federal action" at 40 CFR 1508.18(a) specifically excludes administrative enforcement actions.

Proposed A1.11 Rulemaking for Technical and Pricing Proposals (Final A6)

Proposed A1.12 Rulemaking for Grants and Cooperative Agreements (Final A6)

Proposed A1.14 Procedural Rulemakings (Final A6)

DOE has consolidated these proposed categorical exclusions into one categorical exclusion in the final rule because rulemakings that are strictly procedural include those described in proposed A1.11 and A1.12.

Proposed A1.13 Rulemaking for Categorically-excluded Actions (Not Included in the Final Rule)

DOE has not included this categorical exclusion in the final rule. Specific classes of rulemakings that are categorically excluded are specified in appendix A of the final rule; other types of rulemaking will require an EA or EIS.

Proposed A1.15 Transfer of Property, Use Unchanged or Categorically Excluded (Final A7)

DOE has modified the wording of this categorical exclusion in the final rule. The phrase referring to proposed uses that are "categorically excluded in this subpart" has been deleted because DOE believes that transfers, leases, dispositions, or acquisitions of property that are part of a broader proposed action must be reviewed for NEPA purposes in the context of the broader proposed action. Separating these property transfers from the proposed new use would constitute inappropriate segmentation. DOE also deleted the phrase referring to disposition through the General Services Administration because the phrase was unnecessary.

Proposed A1.16 Personnel Actions/ Personal Service Contracts (Final A1 and A8)

One commenter was concerned that technical support contracts and management and operating (M&O) contracts should not be categorically excluded because hiring certain contractors or using ineffective contracting practices and procedures might have environmental impacts that could require an EA or EIS. DOE does not believe that contracts for technical services, management and operation of DOE facilities, or personal services, or even contracting procedures in general, have potential for significant environmental effects because they are merely arrangements to perform future actions, yet to be assigned. Subsequent actions carried out under such contracts, however, may have environmental consequences and will be the subject of NEPA review. Furthermore, Federal procurement policy requires that contracts be awarded only to responsible contractors (48 CFR part 9), and based on this standard, DOE will not knowingly contract with an environmentally irresponsible party. DOE believes that discussion of the purported environmental merits of potential contractors in a NEPA document would be extremely speculative and not amenable to meaningful analysis.

The commenter also mentioned that DOE's proposed "Alternate Contracting System" would benefit from NEPA analysis. DOE believes that this reference is to the alternate business strategy for environmental restoration (Notice of Intent to develop an environmental restoration alternate business strategy, 55 FR 48544, October 31, 1990). This strategy would establish environmental restoration management

contractors at certain DOE field offices, separate from the M&O contractors that otherwise manage DOE facilities. DOE believes that establishing the framework for these contracts does not have the potential for significant environmental impact. Specific restoration activities carried out under the contracts will be subject to separate NEPA review.

DOE has revised the categorical exclusion in the final rule to refer only to the award of contracts (final A8) and has rephrased it to clarify that contracts for technical support services and for management and operation of a government-owned facility are not subsets of contracts for personal services. In the final rule, personnel actions are included in the categorical exclusion for actions necessary to support the normal conduct of business (Final A1). (See also discussion of proposed A1.1, A1.2, A1.16, and A1.25, above.)

Proposed A1.17 Document Preparation (Final A9)

Proposed A1.18 Information Gathering/Analysis/Dissemination (Final A9)

Proposed A1.21 Classroom Training and Informational Programs (Final A9)

DOE has consolidated these categorical exclusions into one covering information gathering, analysis, documentation preparation, and dissemination of information. DOE believes that these proposed categorical exclusions are interrelated, and combining them into one categorical exclusion avoids segmentation. One commenter suggested that the list of documents given as examples should be expanded to include monitoring reports, permit applications, project scope, and cost estimating. DOE does not believe that additional examples are necessary to ensure that the scope of the consolidated categorical exclusion is clearly understood to be paperwork activities.

Proposed A1.19 Reports or Recommendations on non-DOE Legislation (Final A10)

One commenter suggested that the proposed categorical exclusion be expanded to include reports or recommendations on legislation or rulemaking proposed by DOE. This change was not made because DOE-proposed legislation and rulemaking that is not categorically excluded in the final rule may require preparation of an EA or an EIS.

Proposed A1.26 Routine Maintenance/ Custodial Services for Building Structures and Equipment (Final B1.3 and B2.5)

Proposed A1.34 Routine Testing/ Calibration of Facility Components (Final B1.3)

Proposed A1.35 Routine Decontamination, not part of Decommissioning (Final B1.3)

Proposed B1.2 Removal of Contamination, not Decommissioning Project (Final B1.3)

DOE has revised the definition and scope of proposed A1.26 to clarify that the scope includes work on infrastructures (such as roads), maintenance work of a predictive nature (i.e., continuous or periodic monitoring or diagnosis to forecast component degradation), and suspension of operations to perform maintenance and subsequent resumption of operations. In addition, DOE has included custodial services in the general description and scope paragraph in the final rule (rather than as an example of routine maintenance, as proposed).

DOE has added two examples of routine maintenance. One example (example B1.3(n) in the final rule) concerns predictive maintenance and incorporates proposed A1.34 (discussed below under that heading). The other example (example B1.3(o) in the final rule) concerns routine decontamination of the interior surfaces of buildings and removal of contaminated equipment and other material. This last example incorporates activities in proposed A1.35 and proposed B1.2, as discussed below under those headings.

One commenter objected to categorically excluding the repair and maintenance of transmission facilities (example (m) of proposed A1.26 and final B1.3) because of the potential for polychlorinated biphenyl (PCB) contamination, noting that maintenance of transformers at many DOE facilities has resulted in environmental contamination. The routine maintenance procedure referred to by the commenter (i.e., draining a small amount, about one quart, of transformer oil into the ground to flush out impurities before sampling) was common practice before regulations controlling PCBs were established in 1979 (40 CFR part 761). This practice has now been discontinued. DOE believes that maintenance activities involving PCBs carried out in compliance with applicable regulations are appropriate for a categorical exclusion. For purposes of clarity, DOE has added a stipulation to the example that the activities be

conducted in accordance with 40 CFR part 761.

The commenter was concerned that cumulative maintenance activities involving PCBs would have significant impact and stated that an EA or EIS might be a valuable means of demonstrating long-term benefits of a systematic phaseout of PCB-containing equipment. In establishing this categorical exclusion, DOE has determined, based on its experience, that the class individually and cumulatively has no potential for significant environmental effect.

In response to two commenters' requests that applicable statutory and regulatory requirements be added to the example concerning removal and replacement of tanks and piping (example (n) of proposed A1.26), DOE has included citations of applicable statutory and regulatory requirements. As one commenter also requested, DOE has added a requirement that there be no evidence of leakage based on regulatory performance requirements. On further analysis, DOE determined that removal and replacement of tanks and piping form an example of an upgrade rather than routine maintenance. Accordingly, DOE has deleted it as an example of routine maintenance and included it as an example in B2.5 in the final rule (B2.1 in the proposed rule), which addresses safety and environmental improvements and facility upgrades.

Proposed A1.27 Siting/Construction/ Operation of Storage Area for Maintenance/Administrative Supplies/ Equipment (Final B1.15 and B4.11)

To avoid inappropriate segmentation, DOE has not included this categorical exclusion as a separate class of actions in the final rule but incorporated this categorical exclusion into proposed B1.1 (E 1.15 of the final rule) as one of several categorically excluded support facilities and into proposed B4.4 (B4.11 of the final rule). (See the discussion under proposed B1.1, below.)

Proposed A1.28 Replacement/ Extension of Existing Utility Systems for Categorically-Excluded Actions (Final B1.3 and B2.5)

Commenters requested that the concepts of repair, modification, and upgrade be added to this categorical exclusion. DOE has not included this categorical exclusion in the final rule because it duplicates activities (e.g., replacement of existing utility systems) in both proposed A1.26 (B1.3 of the final rule) and B2.1 (B2.5 of the final rule). DOE also now recognizes that extension of utility systems required as a result of

categorically excluded actions is part of the larger action and the exclusion would have resulted in inappropriate segmentation.

Proposed A1.31 Installation of/ Improvements to Liquid Retention Tanks, Small Basins (Final B1.6)

DOE has narrowed the scope of this categorical exclusion by limiting the size of basins installed or modified to generally less than one acre. One commenter felt that the term "liquid retention" implied the exclusion of holding tanks for gas and other materials and suggested that the term be deleted. DOE intended the categorical exclusion to apply to a facility's improved handling of materials (such as sludges, wastewater, or stormwater) to control spills and runoff. DOE deleted the term "liquid" and otherwise modified the categorical exclusion to clarify this intent.

Proposed A1.32 Acquisition/ Installation/Operation of Communication Systems, Data Processing Equipment (Final B1.7)

In response to a comment on this categorical exclusion, DOE has added "removal" to the stated activities.

Proposed A1.34 Routine Testing/ Calibration of Facility Components (Final B1.3)

In response to a comment, DOE has added portable equipment in the list of proposed items. Because testing and calibration of equipment is predictive maintenance, DOE has incorporated this proposed categorical exclusion as an example (example (n)) in the categorical exclusion for routine maintenance (proposed A1.26 and final B1.3).

Proposed A1.35 Routine Decontamination, not Part of Decommissioning (Final B1.3)

One commenter objected to categorically excluding decontamination activities, even if they are not part of a decommissioning project. At many DOE facilities, decontamination of equipment, rooms, hot cells, and the interior of buildings is a daily or weekly activity, which includes wiping with rags, using strippable latex, and minor vacuuming. These activities are part of routine maintenance. The commenter interpreted a much broader scope to this proposed categorical exclusion than DOE intended. Therefore, DOE incorporated the categorical exclusion as an example (along with proposed B1.2) into the categorical exclusion for routine maintenance (proposed A1.26, final B1.3, example (o)).

Another commenter suggested that exterior decontamination activities should be categorically excluded as well. Exterior decontamination is addressed in categorical exclusion B6.1, CERCLA removals/similar actions under RCRA or other authorities.

Proposed A1.37 On-site Storage of Activated Material at Existing Facility (Final B1.10)

One commenter suggested that this categorical exclusion be deleted because it allowed too broad a range of actions, given the risks of storing any radionuclides. DOE has revised this categorical exclusion in the final rule to emphasize that its scope is the routine storage of activated equipment and construction materials to allow radionuclides with short half-lives (days or weeks) to decay sufficiently before reuse. The activation-produced radioisotopes are in the matrix of the material and are not likely to leak out.

Proposed A1.40 Detonation of High Explosives in Reserved Areas (Final B1.12)

One commenter objected to this categorical exclusion because, based on its vague wording, it could be interpreted to apply broadly to all high explosive detonations. DOE has revised the categorical exclusion to clarify that it applies only to the detonation or burning of failed or damaged explosives or propellants under an existing permit issued by state or local authorities.

Proposed A1.42 Routine Transportation of Nonhazardous Materials and Nonradioactive, Nonwaste Hazardous Materials (Not included in the final rule)

Proposed A1.43 Routine Transportation of Waste (Not Transuranic, not High Level) (Not Included in the final rule)

One commenter objected to the broad scope of proposed A1.42, based on concern about the transport of hazardous substances (including CERCLA-excluded petroleum and natural gas products), uncertainty regarding DOE's adoption of the Nuclear Regulatory Commission's Below Regulatory Concern level, and the lack of eligibility criteria to screen for potential impacts on public health and safety and for cumulative impacts. DOE believes that reviewing transportation for proposals separately from the proposals themselves would be inappropriate segmentation. DOE will consider the transportation impacts of proposed actions in EAs and EISs, as appropriate. As indicated in

§ 1021.410(d) of the final rule, DOE views classes of actions as including all activities necessary to implement a proposal within the class of actions, such as associated transportation activities. DOE has not adopted the Nuclear Regulatory Commission's Below Regulatory Concern level. DOE has revised the proposed eligibility criterion concerning statutory, regulatory, and permit requirements and, as explained above, included it as condition B.(1) in appendix B of the final rule to clearly indicate that public health and safety issues are covered. DOE also has added § 1021.410(b)(3) to address cumulative impacts.

Proposed A1.44 Temporary Shutdown/Restart of a Facility for Inventory, Routine Maintenance (Not Included in the Final Rule)

Proposed A1.46 Shutdown of an Operating Facility (Not Included in the Final Rule)

DOE now recognizes that in proposing these two categorical exclusions, it inappropriately identified suspension and resumption of operations as separate and distinct actions. These exclusions identified activities that are part of ongoing routine operations of an existing facility and thus by themselves are not subject to NEPA. The final rule has been revised to focus on the activities to be performed while operations are suspended. (See, e.g., proposed A1.26 (final B1.3), proposed A1.45 (final B1.14), and proposed B1.9 (final B2.5). See also the discussion below for proposed A1.45 (final B1.14) and proposed B1.9 (final B2.5).) Therefore, DOE has not included proposed A1.44 and A1.46 in the final rule.

One commenter, in reference to proposed A1.44, was concerned about the vagueness of the terms related to maintenance and about the potential for DOE to carry out substantial work to correct safety or environmental concerns through repeated shutdowns. The categorical exclusion for routine maintenance (proposed A1.26, final B1.3) provides many examples that describe and limit the nature and scope of these activities.

Another commenter, in reference to proposed A1.44 and A1.46, stated that it was unreasonable for DOE to predetermine that a shutdown for up to two years would not require an EA or EIS and expressed concern, in reference to proposed A1.44, that the magnitude of problems at DOE facilities can easily be underestimated. DOE agrees that it cannot predetermine the length of time

that activities appropriately categorically excluded might take, and has not included a time period in those categorical exclusions that may involve a suspension and resumption of operations. DOE must determine the appropriate level of NEPA review and complete it before taking the proposed action. If a proposed action changes as a result of initial activities, DOE will complete a new NEPA review before taking further action.

One commenter, in reference to proposed A1.46, was concerned that this categorical exclusion would exempt shutdown of facilities intended primarily for environmental mitigation or improvement (e.g., a wastewater treatment plant or a renewable energy facility), and that such a shutdown could have potential for significant adverse impacts. DOE believes that temporary suspension of operation and subsequent resumption (e.g., for routine maintenance) would not have potential for significant impacts except in extraordinary circumstances. This commenter also requested clarification that permanent shutdown may require additional NEPA review if decontamination and decommissioning activities are proposed. DOE agrees and notes the lack of a categorical exclusion for facility decommissioning, as well as the inclusion of decommissioning in several of the classes of actions found in appendix D to Subpart D of the rule, which normally require an EIS.

Proposed A1.45 Temporary Shutdown/Restart of a Nuclear Reactor for Refueling (Final B1.14)

DOE has retained this categorical exclusion, but it is revised to focus on the refueling activity, while acknowledging that operations may be suspended and resumed for such activity.

Proposed A2.3 Establishment of/Improvements to Warning Systems Monitors, Evacuation Routes (Final A12, B1.3, B2.2, and B2.5)

DOE has not included this proposed categorical exclusion in the final rule because DOE believes the actions are encompassed by proposed A2.2 (final B2.2), which addresses building instrumentation, and proposed A1.22, A1.26, and B2.1 (final A12, B1.3, and B2.5, respectively), which cover emergency evacuation road designation, repair, and improvement. DOE clarified the scope of B2.2 and A12 in the final rule.

**Proposed A2.4 Promotion/
Maintenance of Employee Health (Final
B2.3)**

One commenter requested that radiation monitoring devices and fumehoods with associated collection and exhaust systems be added to the list of examples in this categorical exclusion and that a reference be made to applicable regulations. DOE has added the additional example to the categorical exclusion in the final rule (B2.3), but has not provided the requested reference to applicable regulations because there are no regulations specifically applicable to this categorical exclusion.

**Proposed A3.1 Site Characterization/
Environmental Monitoring (Final B3.1)**

**Proposed B3.1 Siting/Construction/
Operation of Small-Scale Laboratory
Building or Renovation of Room for
Sample Analysis for Site
Characterization/Environmental
Monitoring (Final B3.1, B3.8, and B6.2)**

In response to a comment, DOE has modified proposed A3.1 to clarify that site characterization and environmental monitoring activities for remedial investigation and feasibility studies are within the scope of the categorical exclusion.

Another commenter stated that proposed A3.1 should be limited to existing waste site cleanups and should not apply to site characterization for the construction of new facilities. DOE has not limited the categorical exclusion in this way because it believes that the environmental impacts of activities covered by this categorical exclusion are insignificant whether performed for possible restoration or construction. Site characterization may be necessary before formulating a proposal involving new construction and for which preparation of an EA or EIS is necessary, as the data may be needed for conceptual design and to evaluate impacts of construction, operation, and, as appropriate, eventual decommissioning. DOE believes that § 1021.410(b)(3), which clarifies that DOE's categorically excluded actions will not be connected to other actions with potentially significant impacts or otherwise be related to actions with cumulatively significant impacts, addresses the commenter's concern that the site characterization activities not establish a precedent for future actions with significant impacts or represent a decision in principle about a future consideration.

DOE has included the scope of activities of proposed B3.1 into proposed A3.1 (final B3.1), proposed B3.3 (final

B3.8 and B6.2) and proposed B6.2 (final B6.2) to avoid inappropriate segmentation.

**Proposed A3.2 Geochemical Surveys/
Geological Mapping/Geophysical
Investigation (Final B3.1)**

DOE has not included this categorical exclusion in the final rule because DOE believes the categorical exclusion is encompassed by proposed A3.1, which is B3.1 in the final rule. In the final rule, example (a) in B3.1 was modified accordingly to clarify the scope of that categorical exclusion.

**Proposed A3.3 Archeological/Cultural
Resource Identification (Final B3.1)**

DOE has included this proposed categorical exclusion as an example of a site characterization activity in the final rule (B3.1(j)).

**Proposed A3.5 Research Related to
Conservation of Fish and Wildlife
Conservation (Final B3.3)**

In response to a comment that categorically excluded research should not significantly reduce the study populations of non-nuisance species, DOE has narrowed this proposed categorical exclusion. In the final rule, the categorical exclusion is limited to research activities that would involve only negligible population reduction.

Another commenter asserted that this categorical exclusion was inconsistent with 40 CFR 1506.1, proposed § 1021.410, and proposed appendix C2 to subpart D. In the final rule under § 1021.410(b)(3), all categorically excluded actions must meet the criteria in 40 CFR 1506.1 (limitations on actions during NEPA process). Because the categorically excluded research activities in this class of actions might directly involve fish and wildlife resources that are not environmentally sensitive (section 1021.410(b)(2)(ii) in the proposed rule, condition B(4) in Appendix B in the final rule), the categorical exclusion emphasizes minimization of animal mortality, population reduction, or habitat destruction regardless of whether these resources are protected by other statutes. The class of actions in proposed C2 (Protection of fish and wildlife habitat), which is final C8, and in proposed B1.8 (Protect/restore/improve fish and wildlife habitat), which is final B1.20, concern habitat modification, rather than research as in this categorical exclusion.

**Proposed A3.8 Indoor Bench-Scale
Research Projects/Conventional
Operation (Final B3.6)**

One commenter asserted that this proposed categorical exclusion might be

used to exempt laboratory operations that are conducted with radioactive and hazardous materials as part of a larger development project. The commenter had specific concerns that categorically excluded research could lead to violations of National Pollutant Discharge Elimination System permits and larger programs with significant environmental impacts. DOE had proposed an eligibility criterion for categorical exclusions (section 1021.410(b)(1)(i) in the proposed rule) that the proposed actions would not threaten a violation of applicable permit requirements. In the final rule, DOE has revised this criterion to be condition B(1), which is an integral element of all the classes of actions in appendix B. DOE has also added § 1021.410(b)(3) to this final rule to clarify that DOE's categorically excluded proposals will not involve segmentation. DOE believes that this type of laboratory work, even involving radioactive and hazardous materials, does not have potential for significant impact.

Another commenter suggested expanding the list of examples of conventional laboratory operations and adding the restriction that operations be in accordance with applicable requirements, permits, and DOE orders. This restriction was covered in DOE's proposed eligibility criteria at proposed § 1021.410(b)(1) and is in condition B(1) in appendix B in the final rule. DOE does not believe it is necessary to augment the list of examples but has revised the categorical exclusion to explicitly state that the activities will be conducted within existing laboratory facilities. Establishing a laboratory facility is a separate action, for which DOE will prepare an EA or EIS to address, among other issues, overall wastewater treatment and pollution prevention and the impacts from discharges related to research performed therein.

**Proposed A4.1 Contracts/Marketing
Plans/Policies for the Short Term (Final
B4.1)**

**Proposed A4.5 Power Marketing
Services Within Normal Operating
Limits (Final B4.4).**

**Proposed A4.8 Temporary
Adjustments to River Operations (Final
B4.5)**

One commenter strongly objected to these categorical exclusions because of concern for cumulative impacts as well as immediate, direct effects from changes in the timing and flow of rivers. The commenter stated that marketing plans and contracts have the potential

for significant environmental effects and pointed out the ambiguity in timeframes in proposed A4.1. The same commenter thought that the use of hydropower resources to meet peak demands may tend to displace oil- and gas-fired thermal generation. Another commenter stated that proposed A4.1 should not apply when there is increased emissions from fossil-fueled powerplants or major changes in reservoir levels or streamflows.

After consideration of the comments, DOE has determined that the three proposed categorical exclusions do not individually or cumulatively have a significant effect on the human environment. Repeatedly and consistently, DOE has found no significant impacts associated with actions by the power marketing agencies that are within the existing constraints of a particular hydrosystem operation, including past decisions concerning actions that would be beyond the parameters of the proposed categorical exclusions.

DOE considers a five-year limit for categorical exclusion (proposed A4.1, final B4.1) of disposition, allocation, or acquisition of excess power appropriate because it is consistent with (1) the delineation of a "major" resource in the Northwest Power Act (that is, sections 3(12) and 6(c) of the act define resources of more than 50 average megawatts acquired for more than 5 years as "major" and impose special procedures for such acquisitions) and (2) the Bonneville Power Administration's normal multiyear planning process (promulgated, in accordance with the Pacific Northwest Coordination Agreement, to effect short-term marketing actions to optimize the system economically or short-term power acquisitions to avoid power shortages).

Excess power refers to nonfirm power or surplus firm power derived from existing resources. Proposed A4.1 (final B4.1) would not apply to transactions enabling the construction of new resources. (See the discussion of proposed C10, below.)

In response to the commenter's concern regarding the subjectivity of proposed A4.5 (final B4.4) and proposed A4.8 (final B4.5), including the use of such terms as "temporary" and "minor," DOE believes that the limitations within the final categorical exclusions, while not eliminating, will minimize the need for subjective judgment.

DOE agrees that the establishment of basic hydrosystem operating parameters is appropriately addressed through means other than categorical exclusions. (See discussion below under proposed

C10.) The Bonneville Power Administration, for example, is preparing the Columbia River System Operation Review EIS to consider the balance of uses on the Columbia River.

One commenter indicated that the categorical exclusion for temporary river adjustments (proposed A4.8, final B4.5) should not be applied if the changes would reduce instream flows below minimum requirements. This categorical exclusion would not apply in this situation because such changes would exceed the existing constraints of a particular hydrosystem operation and would not be regarded as a minor change to reservoir levels or streamflows.

Proposed A4.2 Leasing of Existing Transmission Facilities (Final A7)

DOE has not included this categorical exclusion in the final rule. This categorical exclusion is unnecessary because the leasing of existing transmission facilities is encompassed by proposed A1.15, which is A7 in the final rule.

Proposed A4.6 Buffer Rights-of-Way at Existing Transmission Facilities (Not included in the final rule)

DOE has not included this categorical exclusion in the final rule. DOE recognizes that there is potential for significant impact from acquisition of rights-of-way because of possible changes in land use related to establishing buffer zones; therefore, a categorical exclusion is inappropriate. If land use in the buffer zone will not change, proposed A1.15 (A7 in the final rule) may apply to the action.

Proposed A4.7 Minor Substation Modifications/Expansions (Final B4.11)

In the final rule, DOE included the scope of this proposed categorical exclusion into the scope of proposed B4.4 (final B4.11), which concerns construction and modification of substations, to avoid segmentation.

Proposed A5.4 Removal of Oil Field Waste to Permitted Disposal Facility (Not Included in the Final Rule)

One commenter strongly objected to this categorical exclusion, stating that research conducted by EPA had indicated that there are significant environmental impacts from disposal practices used for oil field wastes. DOE reconsidered its proposal of this categorical exclusion and, because of uncertainty as to the potential for significant impacts, has not included it in the final rule.

Proposed A6.2 Umbrella Agreements for Cooperation in Energy Research and Development (Final A15)

DOE has not included phrase (b) in proposed A6.2 (that referred to categorically excluded projects and activities) in the categorical exclusion in the final rule (A15). The phrase was unnecessary because specific energy research and development projects that are categorically excluded are specified in Appendix B of the final rule.

Proposed B1.1 Siting/Construction/Operation of Support Structures (Final B1.15)

Proposed A1.27 Siting/Construction/Operation of Storage Area for Maintenance/Administrative Supplies, Equipment (Final B1.15 and B4.11)

One commenter stated that the scope of proposed B1.1 was too broad; it would essentially exempt all construction and operation of service and support buildings regardless of size, soil contamination, resuspended dust from construction, environmental and energy impacts of operation, and alternative designs and locations that could minimize impacts.

In response to the comment, DOE has narrowed the scope of proposed B1.1 in the final rule (B1.15). The siting and construction of structures covered by the categorical exclusion are limited to small-scale support buildings and structures within or contiguous to an already developed area where site utilities and roads are available. DOE has added a condition in the final rule, B.(3), that is an integral element of the classes of actions in appendix B: Construction activities that would disturb hazardous substances, pollutants, contaminants, CERCLA-excluded petroleum and natural gas products that preexist in the environment such that there would be uncontrolled or unpermitted releases would not be categorically excluded. (See additional discussion under section III F, above.)

In addition, DOE incorporated proposed A1.27 into this categorical exclusion for support buildings and structures as an example (as noted above in the discussion of proposed A1.27) because small-scale storage areas for maintenance and administrative supplies are support facilities.

In the final rule, DOE has added the phrase "and similar support purposes" to the list of support functions for which buildings and structures may be constructed because DOE believes that siting, construction, and operation of

any small-scale support structure will not individually or cumulatively have a significant impact on the human environment and that it is appropriate to categorically exclude these activities. DOE had not intended this categorical exclusion to be limited to only those support buildings and structures for the purposes listed in the proposed rule. DOE has also added the phrase "but excluding facilities for waste storage activities" to clarify that it does not consider these to be support activities for which construction may necessarily be categorically excluded except as provided in the final rule. (See the discussion of proposed B6.4 for categorically excluded waste storage facilities.)

Proposed B1.2 Removal of Contamination, Not Decommissioning Project (Final B1.3)

Two commenters suggested that this categorical exclusion be deleted because they did not believe that the only test for deciding whether to prepare an EA or EIS is whether the action is part of a decommissioning project. One of the commenters was concerned that certain activities at the Rocky Flats Plant and at the Portsmouth and Paducah Uranium Enrichment Plants might inappropriately come under this exclusion.

DOE intended the proposed categorical exclusion to cover routine actions where intact equipment (e.g., labware) and other materials (such as gloves) that are radioactive or otherwise contaminated are removed from a facility for disposal. The comment implied a much broader scope to the categorical exclusion than DOE intended. Therefore, DOE combined the categorical exclusion with proposed A1.35 as an example under routine maintenance (B1.3(o) in the final rule).

DOE is conducting a program to remove plutonium from contaminated ducts at the Rocky Flats Plant. The current activities include routine decontamination techniques commonly used to maintain facility operations (e.g., wiping with rags, vacuuming, and stripping with latex). These limited activities are encompassed within the existing routine maintenance categorical exclusion under DOE's NEPA guidelines (52 FR 47662, December 15, 1987) and would be encompassed by the categorical exclusion for routine maintenance in this final rule (B1.3). Removal of plutonium from ducts at the Rocky Flats Plant that are more difficult to access or are impossible to clean using routine maintenance techniques may require dismantling and replacement. DOE is currently preparing

an EA to evaluate these types of proposed activities for the Rocky Flats Plant. Similarly, if DOE were to propose large equipment replacement actions, such as the Cascade Improvement and Cascade Upgrading Programs at the Paducah and Portsmouth Uranium Enrichment Plants in the 1970s to which the commenter referred, those large programs would not be categorically excluded.

Proposed B1.5 Construction/Operation of Additional/Replacement Water Supply Wells (Final B1.18)

One commenter stated that the proposed categorical exclusion should be limited to those circumstances where DOE can demonstrate that a steady-state drawdown occurs (i.e., the withdrawal from the supply wells is compensated by the recharge from the surrounding area). Another commenter was concerned that although the construction and operation of a few additional water supply wells might not be a major Federal action, construction and operation of a substantial well field could be. In response to these comments, DOE has added to the categorical exclusion in the final rule the additional stipulation that new wells must be within an existing well field and that there can be no resulting long-term decline of the water table. DOE has also added "siting" to the list of activities for completeness.

Proposed B1.6 Construction/Operation of Microwave/Radio Communication Towers (Final B1.19)

In response to a comment that construction of microwave or radio communications towers in areas considered to be of great visual value could have potential for significant impacts, the categorical exclusion in the final rule has been limited to areas that are not of great visual value. In the final rule, DOE did not include the restrictive phrase concerning prejudice of future site selection decisions for substations and other facilities that was in this categorical exclusion in the proposed rule because the final rule sets forth the restriction in § 1021.410(b)(3) that categorical exclusions may not involve inappropriate segmentation.

Proposed B1.9 Restart of Facility After Categorically Excluded Safety/Environmental Improvements (Not Included in the Final Rule)

Several commenters strongly objected to this categorical exclusion. One commenter viewed it as an attempt to allow DOE to "jump-start" problem-plagued facilities and stated that facilities that have been closed for

modifications (particularly safety modifications) should be subject to an EA or EIS before restart. Another commenter noted that DOE has already had one court require an EIS for restart of a nuclear reactor at the Savannah River Site, and believed that the magnitude of DOE's work at the Rocky Flats Plant is also a major Federal action with significant impacts. A third commenter stated that the categorical exclusion was overly broad.

A fourth commenter said that this categorical exclusion was one of the most troubling of all the proposed categorical exclusions, stating that it conflicts directly with DOE decisions to prepare EISs on such facilities as the Savannah River reactors, the N Reactor, and the PUREX plant at Hanford and with various court decisions. The commenter stated that the effects of both accidental and routine releases from nuclear reactors or chemical processing plants are both highly controversial and involve uncertain risks (factors highlighted by the CEQ regulations as bearing on significance). The commenter asserted that the limitation in the proposed categorical exclusion (that restart would only be categorically excluded after categorically excluded improvements) was meaningless because virtually any improvement to a facility could fit into one of the other proposed categorical exclusions. This commenter noted the elaborate and complex standards and practices for the restart of reactors and chemical processing plants and that these warrant at least an EA. The commenter stated that DOE must eliminate this categorical exclusion and adopt a regulation requiring NEPA analysis of a reactor or chemical processing plant that has been shut down for safety/environmental modifications.

DOE has not included this categorical exclusion in the final rule. DOE recognizes that it inappropriately focused on the resumption of operations rather than the proposed action in proposing this categorical exclusion. DOE has not established a categorical exclusion for resumption of operations after shutdown for safety or environmental improvements, because DOE believes such shutdown is part of routine, ongoing operations.

Proposed B2.1 Improvement of a Facility, Replacement/Upgrade of Facility Components (Final B2.5)

One commenter stated that this categorical exclusion was much too broad; many DOE facilities require significant improvements to even

approach current design and operating parameters. Another commenter, referring to this categorical exclusion as "frightfully wide open," asserted that it could cover major initiatives aimed at rebuilding a nuclear reactor. This commenter referred to the CEQ regulations, which state that a significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial. The commenter stated that DOE must substantially narrow this categorical exclusion or eliminate it altogether. Another commenter asserted that given the age and condition of some DOE facilities, these actions have potential for significant impact. The commenter further stated that DOE cannot predetermine the degree of impacts because of the absence of current, adequate NEPA documentation.

DOE has narrowed the scope of this categorical exclusion in the final rule to emphasize that the activities cannot result in a substantial change in function of a facility and that the categorical exclusion does not apply to rebuilding or modifying substantial portions of a facility. These modifications, along with § 1021.410(b)(3) in the final rule, which addresses segmentation, should ensure that improvements with significant impacts (beneficial or adverse) are not categorically excluded. The categorical exclusion was also modified to acknowledge that operations may be suspended while the action takes place and then be resumed. In accordance with the CEQ regulations, DOE has procedures (section 1021.410(b)(2) in the final rule) for review of individual proposals to determine whether there are extraordinary circumstances that would indicate that a categorical exclusion is not appropriate.

DOE has added an example to this categorical exclusion for an environmental improvement (removal and replacement of underground storage tanks); DOE proposed the example as part of A1.26 (example (n)) but believes it is more appropriately considered as an upgrade. (See the discussion under proposed A1.26.)

Proposed B3.1 Siting/Construction/Operation of Small-Scale Laboratory Building or Renovation of Room for Sample Analysis for Site Characterization/Environmental Monitoring (Final B3.1, B3.8, and B6.2)

Proposed B3.3 Outdoor Ecological/Environmental Research Activities (Final B3.8 and B6.2)

In the final rule, DOE has incorporated the scope of activities in proposed B3.1 (construction and

renovation activities related to sample analysis) into the scope of proposed A3.1 (final B3.1) (discussed above under proposed A3.1), proposed B3.3 (final B3.8), and proposed B6.2 (final B6.2) to avoid inappropriate segmentation.

DOE has narrowed the scope of proposed B3.3 in the final rule (final B3.8) to outdoor ecological and other environmental research activities, none of which could result in any permanent change to the ecosystem. Some environmental restoration experiments concerned with waste, originally in the scope of this categorical exclusion, are now included in the scope of proposed B6.2 (final B6.2) where they are limited by size (further discussion below under proposed B6.2). The restriction concerning release or movement of hazardous and other substances proposed as part of proposed B3.3 was not included in these categorical exclusions in the final rule because the condition that proposals not disturb hazardous substances, pollutants, contaminants, or CERCLA-excluded petroleum and natural gas products such that there would be uncontrolled or unpermitted releases is now an integral element of the classes of actions in appendix B under condition B.(3). (See additional discussion under section III F, above.)

Proposed B3.5 Research and Development Activities/Small Scale Testing at Existing Facility, Preceding Demonstration (Final B3.10)

One commenter asserted that this categorical exclusion, because of the inadequacy of proposed eligibility criteria, would exempt activities that have the potential to establish a precedent for future actions with significant effects or that represent a decision in principle about a future consideration. In response to this comment (and similar comments on other categorical exclusions), DOE has added section 1021.410(b)(3) to the final rule that clarifies that the Department will not categorically exclude a proposal if it involves segmentation.

The commenter noted that DOE has prepared EAs for research and development projects involving nonradioactive and nonhazardous materials, and was concerned that this categorical exclusion represented a step backward for DOE. DOE has modified this categorical exclusion in the final rule (B3.10) to clarify its intent (i.e., to include small-scale research and development projects and small-scale pilot projects) and has also narrowed the scope of the categorical exclusion to projects generally less than two years in duration.

The commenter misinterpreted the example for research to improve the capability or efficiency of existing accelerators as applying to accelerator upgrades, for which DOE would prepare an EA or EIS. The commenter also requested a change in the example concerning accelerator beams with insufficient energy to produce reactions. DOE believes the broad examples were misleading and has deleted them.

Proposed B4.1 New Electricity Transmission Agreements, System Operation Within Normal Operation Limits (Final B4.8)

DOE has modified this categorical exclusion in the final rule to clarify that the use of a transmission facility of one system to transfer power of and for another system is the only scope for categorically excluded new or modified transmission agreements. DOE deleted the phrase referring to normal operating limits because it was not necessary, and comments on other categorical exclusions (proposed A4.5 and A4.8) indicated its subjectivity.

Proposed B6.1 CERCLA Removals/Similar Actions Under RCRA or Other Authorities (Final B6.1)

A commenter requested that this categorical exclusion be explicitly restricted to situations involving small-scale removal operations or where there is a threat of a release. The categorical exclusion in the final rule states that DOE's categorically excluded removal actions will meet CERCLA regulatory cost and time limits (currently \$2 million or 1 year from the time activities begin on site) or will satisfy one of two regulatory exemptions. Neither CERCLA nor EPA has set cost or time limits for exempted actions.

The same commenter also recommended that DOE include a period of time (e.g., one year) within which some exposure is expected to occur to qualify for the categorical exclusion. DOE does not believe that the timing of potential exposure from a release is a measure of the significance of impacts expected from cleaning up the release. EPA's National Contingency Plan and written guidance for removal actions do not present a limitation based on the period of time within which some exposure is likely.

Two other commenters requested that DOE address in Suopart D the level of NEPA review required for final corrective or remedial actions and other typical restoration activities, such as waste packaging and repackaging, onsite waste stabilization/ treatment, and bioremediation techniques. As DOE

gains experience in remediation, DOE may propose additions to the listings in subpart D.

A commenter stated that the removal of underground storage tanks (example (c) in the proposed and final rule) should not be categorically excluded, except in the case of the threat of a release, because tank removals are typically large actions and tanks are often used to store petroleum and its byproducts, which are exempted from RCRA review. DOE believes that tank removal that meets the criteria for this categorical exclusion can be appropriately excluded. DOE believes that its phrase concerning reduction of "the likelihood of spillage, leakage, or the spread of, or direct contact with, contamination" is essentially the same as removing "the threat of a release." DOE will review individual activities to determine whether they present extraordinary circumstances such that there is potential for significant impacts on the human environment. (The commenter noted that DOE had removed "tanks" from the list of excluded containers in proposed example (b) (removal of bulk containers); DOE removed "tanks" to avoid overlap and confusion with proposed example (c), not to limit the scope of the categorical exclusion. DOE has not changed this terminology in the final rule.) In the final rule, however, DOE has included citations of applicable statutory and regulatory requirements in this example in response to a comment.

DOE has moved proposed example (p) (transportation, treatment, recovery, storage, or disposal of wastes at existing facilities) to the lead statement of the categorical exclusion to emphasize that these activities (part of any removal action) must occur at existing facilities. DOE did not include transportation in the lead statement of the categorical exclusion because the Department considers it an activity necessary to and included in the categorical exclusion (as discussed under § 1021.410(d)). A commenter was confused by a phrase in this example that concerned reducing the likelihood of human, animal, or food chain exposure, thinking that there would either be only rare opportunities for applying this categorical exclusion, or DOE would have to perform more extensive investigation of the potential exposures from its activities to qualify for the exemption. DOE did not include this confusing and unnecessary phrase in the lead statement of the categorical exclusion in the final rule.

Proposed B6.2 Siting/Construction/Operation of Temporary Pilot-Scale Waste Collection/Treatment Facilities (Final B6.2)

DOE has modified this categorical exclusion in the final rule to include other temporary pilot-scale waste management systems (i.e., stabilization and containment) that were proposed in B3.3 of the proposed rule. This categorical exclusion in the final rule has a one acre size restriction, rather than five acres, as in proposed B3.3. DOE has also modified this categorical exclusion in the final rule to include the scope of activities in proposed B3.1 (construction or renovation of facilities for sample analysis) to avoid inappropriate segmentation. (Also see the discussion under proposed B3.3.)

Proposed B6.3 Improvements to Environmental Control Systems (Final B6.3)

In response to a comment requesting clarification on whether work on outdoor systems was within the scope of the categorical exclusion, DOE has rewritten this categorical exclusion in the final rule for clarity and in so doing included a reference to systems "of" an existing building or structure rather than "within" a building or structure. Categorically excluded activities could include work on piping or duct work leading to a building or structure, but could not include new construction.

Proposed B6.4 Siting/Construction/Operation of Waste Storage Facility (not Transuranic, High Level) (Final C16, B6.4, B6.5 and B6.6)

Proposed B6.5 Modification (not expansion) of Existing Transuranic Waste Storage Facility (Final B6.6)

A commenter was concerned about the potential for long-term storage of waste under proposed B6.4. Two other commenters believed that there was no reasonable basis for DOE's distinction between waste storage facilities for transuranic (TRU) and non-TRU waste (other than high-level waste or spent nuclear fuel). One commenter noted that there are very likely certain hazardous or non-TRU mixed wastes that pose equal or greater dangers than TRU or TRU-mixed wastes. The commenter urged DOE to eliminate this unprincipled distinction and to prepare an EA for storage facilities for all the wastes listed in proposed B6.4 as well as for TRU wastes.

In response to these comments and the general comments that appendix B categorical exclusions are too broad, DOE has included in the final rule two categorical exclusions for waste storage

and staging activities that are smaller in scope and that represent subsets of the originally proposed categorical exclusion (i.e., 90-day hazardous waste storage (final B6.4) and characterizing and sorting previously packaged waste or overpacking waste (final B6.5)).

DOE believes that it is appropriate to analyze the environmental impacts from waste handling (mainly worker exposure), the deterioration of containers during extended storage (which could result in environmental releases), and the establishment of and increases in storage capacity (because of, for example, general radiation from a given volume of waste or the potential for release of hazardous fumes, including explosive fumes, especially if there are accidental releases). Therefore, DOE has categorically excluded only those activities that do not involve direct handling of waste (packaging waste or opening waste containers) or establishing or increasing storage capacity, unless the storage time is quite limited (e.g., 90 days) or the volume of waste generated is very small (e.g., less than 1,000 kilograms in a calendar month).

DOE has modified proposed B6.5 (final B6.6) to address modification of existing structures for storage of wastes proposed to be categorically excluded in proposed B6.4. DOE also has modified proposed C10 (final C7) to address new structures for storage of wastes that had been proposed to be categorically excluded in proposed B6.4.

DOE did not follow another commenter's suggestion that the definition of hazardous waste also refer to applicable state and local regulations because DOE's citation is to a definition or designation of hazardous waste, not to regulations applicable to handling the waste.

Proposed B6.7 Relocation/Demolition/Disposal of Buildings (Final B1.22)

In the final rule, DOE has moved this categorical exclusion to section B1.22 (categorical exclusions applicable to facility operation). This was in response to a request to clarify whether the scope of the categorical exclusion was limited to environmental restoration and waste management, although DOE's division of appendix B is only for purposes of organization and is not limiting. DOE narrowed the scope of the categorical exclusion in the final rule by restricting the relocation of buildings to an already developed area where site utilities and roads are available.

Proposed B7.2 Retransfers of source, special nuclear, and byproduct materials (Not Included in the Final Rule)

DOE has not included proposed B7.2 in the final rule. As proposed the categorical exclusion did not involve transport within the United States or its territorial seas, and therefore these NEPA regulations would not apply to the retransfer actions. DOE actions having environmental effects outside the United States, its territories or possessions are subject to, as set forth in § 1021.102 of the final rule, Executive Order 12114, DOE's guidelines implementing that Order, and Department of State procedures.

Appendix C to Subpart D—Classes of Actions That Normally Require EAs but Not Necessarily EISs

Appendix D to Subpart D—Classes of Actions That Normally Require EISs

A commenter suggested that an item be added relating to research on the conservation of endangered, threatened, or proposed to be listed species. Another commenter requested that DOE consider including chemical, thermal, and other types of process pilot plants in appendix C.

DOE had listed only those classes of actions that are typical classes of actions for DOE (i.e., DOE proposes the type of action frequently) and for which DOE has enough experience to be reasonably confident that an EA will normally be the required level of NEPA review. Therefore, DOE has not added typical classes of actions to appendix C for research on endangered species or for additional process pilot plants.

Substantial changes to proposed Appendix C involved three classes of actions, two of which were modified in response to comments (C10 and C14) and one of which was not included in the final rule (C15) (discussed above under proposed B6.4 and below under proposed C10 and C15). Other minor changes were made in response to comments (discussed below under proposed C8 and C9) or for clarity.

Substantial changes to proposed appendix D involved two classes of action, one of which was not included in the final rule (discussed below under proposed D11) and one of which is new (in response to comments, as discussed below under proposed C10).

C8 Implementation of System-wide vegetation management program (Power Marketing Administrations) (Final C5).

C9 Implementation of System-wide Erosion control program (Power Marketing Administrations) (Final C6).

In response to a commenter's request, DOE clarified that the term "system-

wide" in these classes of actions in the final rule refers to a program of general application regarding all the facilities of a power marketing administration.

C10 Long-term allocation of power (Final C7 and D7).

One commenter believes that long-term (five years or longer) power marketing contracts, policies, marketing plans, or allocation plans should normally be subject to review in an EIS. The commenter noted that two courts that have addressed this issue have determined that EISs were indeed necessary before implementing long-term marketing plans for major river basins. The commenter noted wide-ranging effects, from direct riverine effects (resulting from peak power generation to meet capacity commitments) to indirect effects on air quality and greenhouse gas emissions (that may result from Federal hydropower displacement of different forms of thermal power generation). This commenter added that, because Federal hydropower is generally inexpensive, its availability can reduce incentives for energy conservation. The commenter noted that Federal hydropower dams are some of the largest sources of hydropower generation in the country, contributing substantially to the overall mix of power generation in some regions, and that the long-term marketing plans for these facilities are usually developed on a comprehensive basis for many facilities in an entire river basin.

In response to this comment and comments on proposed A4.1, DOE has added conditions to the various power marketing agreements (i.e., contracts, policies, marketing plans, or allocation plans) to distinguish those that would normally require EAs but not necessarily EISs (final C7) from those that would normally require EISs, and has added a class of actions that normally requires an EIS (final D7). DOE normally will prepare an EIS for long-term (five years or longer) contracts, policies, marketing plans, or allocation plans when the DOE proposal involves adding a major new generation resource or service to a major new load or causes major changes in the operating parameters of power generation resources; otherwise, DOE normally will prepare an EA.

DOE does not consider power marketing actions with durations of five years or longer appropriate for a categorical exclusion because such actions have a duration exceeding the Bonneville Power Administration's normal multiyear planning process (promulgated in accordance with the Pacific Northwest Coordination

Agreement), and, in the case of resource acquisitions, they would be inconsistent with the delineation of a "major" resource in the Northwest Power Act (that is, sections 3(12) and 6(c) of the act define resources of more than 50 megawatts acquired for more than 5 years as "major" and impose special procedures for such acquisitions). The Northwest Power Act also contains a size limit (50 average megawatts) above which a resource acquisition would be considered "major" if acquired for more than five years. This size limit is what DOE determined should differentiate between an EA and EIS relative to resource acquisitions.

C15 Siting/construction/operation of waste disposal facility in contaminated area (not TRU or high-level waste) (Not included in the final rule).

D11 Siting/construction/expansion of waste disposal facility in uncontaminated area (not transuranic or high-level waste) (Not included in the final rule).

Four commenters did not understand how DOE distinguished between EA and EIS levels of review on the basis of the presence or absence of previous contamination. One commenter pointed out that a disposal facility located in a contaminated area may not only add to existing contamination but could actually exacerbate its spread through physical means or its toxicity through synergistic chemical reactions. This commenter noted that impacts from the actual construction of a disposal site in a contaminated area are far more likely to be significant than at an uncontaminated site. This commenter urged DOE to include all siting, construction, and operation of waste disposal sites in appendix D.

Another commenter stated that to proceed as suggested by DOE's proposed rule provides an unwarranted "credit" for prior DOE environmental degradation and does not permit a true evaluation of significant environmental impacts and alternatives of the proposed action. Another commenter believed that nonhazardous solid waste disposal should be a class of action normally requiring an EA but not necessarily an EIS.

DOE has withdrawn the proposed listings and will determine the level of NEPA review required (EA or EIS level) on a case-by-case basis. DOE recognizes that there are many action- and site-specific circumstances that raise questions about the reasonableness of general listings at this time.

IV. Revocation of Existing Guidelines and Replacement of Regulations

On the effective date of this rule, May 26, 1992, DOE revokes the existing DOE NEPA Guidelines and revises the existing regulations at 10 CFR part 1021 by striking the current text and replacing it with this rule.

V. Environmental Review

Section D of the DOE NEPA Guidelines categorically excludes "promulgation of rules and regulations which are clarifying in nature, or which do not substantially change the effect of the regulations being amended." This rule establishes and clarifies procedures for considering the environmental effects of DOE actions within its decisionmaking process, thereby enhancing compliance with the letter and spirit of NEPA, and therefore fits within this categorical exclusion. DOE has determined that promulgation of this rule is not a major Federal action significantly affecting the quality of the human environment within the meaning of NEPA. Consequently, neither an EIS nor an EA is required for this rule. DOE will continue to examine individual actions to determine the appropriate level of NEPA review.

VI. Review Under Executive Order 12291

This rule has been reviewed in accordance with Executive Order 12291, which directs that all regulations achieve their intended goals without imposing unnecessary burdens on the economy, individuals, public or private organizations, or state and local governments. The Executive Order also requires that a regulatory impact analysis be prepared for a "major rule." The Executive Order defines "major rule" as any regulation that is likely to result in: (1) An annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, state, and local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, or innovation or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets.

This rule amends and codifies already existing policies and procedures for compliance with NEPA. The rule contains no substantive changes in the requirements imposed on applicants for a DOE license, financial assistance, permit or other similar actions, which are the areas where one might anticipate an economic effect. Therefore, DOE has

determined that the incremental effect of today's rule will not have the magnitude of effects on the economy to bring this rule within the definition of a "major rule."

Pursuant to the Executive Order, this rule was submitted to the Office of Management and Budget for regulatory review.

VII. Review Under Executive Order 12612

Executive Order 12612 requires that rules be reviewed for Federalism effects on the institutional interest of states and local governments. If the effects are sufficiently substantial, preparation of a Federalism assessment is required to assist senior policymakers. The rulemaking to revoke DOE's NEPA Guidelines and revise 10 CFR part 1021 will not have any substantial direct effects on state and local governments within the meaning of the Executive Order. It will, however, allow states the opportunity to play a more significant role in DOE's NEPA process. This final rule will affect Federal NEPA compliance procedures, which are not subject to state regulation.

VIII. Regulatory Flexibility Act

The Regulatory Flexibility Act, Pub.L. 96-345 (5 U.S.C. 601-612), requires that an agency prepare an initial regulatory flexibility analysis to be published at the time the proposed rule is published. The requirement (which appears in section 603 of the act) does not apply if the agency "certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." This rule modifies existing policies and procedural requirements for DOE compliance with NEPA. It makes no substantive changes to requirements imposed on applicants for DOE licenses, permits, financial assistance, and similar actions as related to NEPA compliance. Therefore, DOE certifies that this rule will not have a "significant economic impact on a substantial number of small entities."

IX. List of Subjects in 10 CFR Part 1021

Environmental assessment, environmental impact assessment, National Environmental Policy Act.

Issued in Washington, DC, April 16, 1992.

Paul L. Ziemer,

Assistant Secretary, Environment, Safety and Health.

For reasons set out in the preamble, 10 CFR part 1021 is revised to read as set forth below:

PART 1021—NATIONAL ENVIRONMENTAL POLICY ACT IMPLEMENTING PROCEDURES

Subpart A—General

- Sec.
- 1021.100 Purpose.
- 1021.101 Policy.
- 1021.102 Applicability.
- 1021.103 Adoption of CEQ NEPA regulations.
- 1021.104 Definitions.
- 1021.105 Oversight of Agency NEPA activities.

Subpart B—DOE Decisionmaking

- 1021.200 DOE planning.
- 1021.210 DOE decisionmaking.
- 1021.211 Interim actions: Limitations on actions during the NEPA process.
- 1021.212 Research, development, demonstration, and testing.
- 1021.213 Rulemaking.
- 1021.214 Adjudicatory proceedings.
- 1021.215 Applicant process.
- 1021.216 Procurement, financial assistance, and joint ventures.

Subpart C—Implementing Procedures

- 1021.300 General requirements.
- 1021.301 Agency review and public participation.
- 1021.310 Environmental impact statements.
- 1021.311 Notice of intent and scoping.
- 1021.312 EIS implementation plan.
- 1021.313 Public review of environmental impact statements.
- 1021.314 Supplemental environmental impact statements.
- 1021.315 Records of decision.
- 1021.320 Environmental assessments.
- 1021.321 Requirements for environmental assessments.
- 1021.322 Findings of no significant impact.
- 1021.330 Programmatic (including site-wide) NEPA documents.
- 1021.331 Mitigation action plans.
- 1021.340 Classified, confidential, and otherwise exempt information.
- 1021.341 Coordination with other environmental review requirements.
- 1021.342 Interagency cooperation.
- 1021.343 Variances.

Subpart D—Typical Classes of Actions

- 1021.400 Level of NEPA review.
- 1021.410 Application of categorical exclusions (classes of actions that normally do not require EAs or EISs).

Appendix A to Subpart D—Categorical Exclusions Applicable to General Agency Actions

Appendix B to Subpart D—Categorical Exclusions Applicable to Specific Agency Actions

Appendix C to Subpart D—Classes of Actions that Normally Require EAs but not Necessarily EISs

Appendix D to Subpart D—Classes of Actions that Normally Require EISs

Authority: 42 U.S.C. 7254; 42 U.S.C. 4321 *et seq.*

Subpart A—General**§ 1021.100 Purpose.**

The purpose of this part is to establish procedures that the Department of Energy (DOE) shall use to comply with section 102(2) of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4332(2)) and the Council on Environmental Quality (CEQ) regulations for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508). This part supplements, and is to be used in conjunction with, the CEQ Regulations.

§ 1021.101 Policy.

It is DOE's policy to follow the letter and spirit of NEPA; comply fully with the CEQ Regulations; and apply the NEPA review process early in the planning stages for DOE proposals.

§ 1021.102 Applicability.

(a) This part applies to all organizational elements of DOE except the Federal Energy Regulatory Commission.

(b) This part applies to any DOE action affecting the quality of the environment of the United States, its territories or possessions. DOE actions having environmental effects outside the United States, its territories or possessions are subject to the provisions of Executive Order 12114, "Environmental Effects Abroad of Major Federal Actions" (3 CFR, 1979 Comp., p. 356; 44 FR 1957, January 4, 1979), DOE guidelines implementing that Executive Order (46 FR 1007, January 5, 1981), and the Department of State's "Unified Procedures Applicable to Major Federal Actions Relating to Nuclear Activities Subject to Executive Order 12114" (44 FR 65560, November 13, 1979).

§ 1021.103 Adoption of CEQ NEPA Regulations.

DOE adopts the regulations for implementing NEPA published by CEQ at 40 CFR parts 1500 through 1508.

§ 1021.104 Definitions.

(a) The definitions set forth in 40 CFR part 1508 are referenced and used in this part.

(b) In addition to the terms defined in 40 CFR part 1508, the following definitions apply to this part:

Action means a project, program, plan, or policy, as discussed at 40 CFR 1508.18, that is subject to DOE's control and responsibility. Not included within this definition are purely ministerial actions with regard to which DOE has no discretion. For example, ministerial actions to implement congressionally mandated funding for actions not proposed by DOE and as to which DOE

has no discretion (i.e., statutorily mandated, congressionally initiated "passthroughs").

Advance NOI means a formal public notice of DOE's intent to prepare an EIS, which is published in advance of an NOI in order to facilitate public involvement in the NEPA process.

American Indian tribe means any Indian tribe, band, nation, pueblo, or other organized group or community, including any Alaska native entity, which is recognized as eligible for the special programs or services provided by the United States because of their status as Indians.

Categorical exclusion means a category of actions, as defined at 40 CFR 1508.4 and listed in appendix A or B to subpart D of this part, for which neither an EA nor an EIS is normally required.

CEQ means the Council on Environmental Quality as defined at 40 CFR 1508.6.

CEQ Regulations means the regulations issued by CEQ (40 CFR parts 1500–1508) to implement the procedural provisions of NEPA.

CERCLA-excluded petroleum and natural gas products means petroleum, including crude oil or any fraction thereof, that is not otherwise specifically listed or designated as a hazardous substance under section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C. 9601.101(14)) and natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel or of pipeline quality (or mixtures of natural gas and such synthetic gas).

Contaminant means a substance identified within the definition of contaminant in section 101(33) of CERCLA (42 U.S.C. 9601.101(33)).

Day means a calendar day.

DOE means the U.S. Department of Energy.

DOE proposal (or *proposal*) means a proposal, as discussed at 40 CFR 1508.23 (whether initiated by DOE, another Federal agency, or an applicant), for an action, if the proposal requires a DOE decision.

EA means an environmental assessment as defined at 40 CFR 1508.9.

EIS means an environmental impact statement as defined at 40 CFR 1508.11, or, unless this part specifically provides otherwise, a Supplemental EIS.

EIS Implementation Plan means a document that explains and supports the scope, target schedule, and approach DOE will use to prepare an EIS.

EPA means the U.S. Environmental Protection Agency.

FONSI means a Finding of No Significant Impact as defined at 40 CFR 1508.13.

Hazardous substance means a substance identified within the definition of hazardous substances in section 101(14) of CERCLA (42 U.S.C. 9601.101(14)). Radionuclides are hazardous substances through their listing under section 112 of the Clean Air Act (42 U.S.C. 7412) (40 CFR part 61, subpart H).

Host state means a state within whose boundaries DOE proposes an action at an existing facility or construction or operation of a new facility.

Host tribe means an American Indian tribe within whose tribal lands DOE proposes an action at an existing facility or construction or operation of a new facility. For purposes of this definition, "tribal lands" means the area of "Indian country," as defined in 18 U.S.C. 1151, that is under the tribe's jurisdiction. That section defines Indian country as:

(i) All land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation;

(ii) All dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and

(iii) All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Interim action means an action concerning a proposal that is the subject of an ongoing EIS and that DOE proposes to take before the ROD is issued, and that is permissible under 40 CFR 1506.1: Limitations on actions during the NEPA process.

Mitigation Action Plan means a document that describes the plan for implementing commitments made in a DOE EIS and its associated ROD, or, when appropriate, an EA or FONSI, to mitigate adverse environmental impacts associated with an action.

NEPA means the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*).

NEPA document means a DOE NOI, EIS, ROD, EA, FONSI, or any other document prepared pursuant to a requirement of NEPA or the CEQ Regulations.

NEPA review means the process used to comply with section 102(2) of NEPA.

NOI means a Notice of Intent to prepare an EIS as defined at 40 CFR 1508.22.

Notice of Availability means a formal notice, published in the **Federal Register**, that announces the issuance and public availability of a draft or final EIS. The EPA Notice of Availability is the official public notification of an EIS; a DOE Notice of Availability is an optional notice used to provide information to the public.

Pollutant means a substance identified within the definition of pollutant in section 101(33) of CERCLA (42 U.S.C. 9601.101(33)).

Program means a sequence of connected or related DOE actions or projects as discussed at 40 CFR 1508.18(b)(3) and 1508.25(a).

Programmatic NEPA document means a broad-scope EIS or EA that identifies and assesses the environmental impacts of a DOE program; it may also refer to an associated NEPA document, such as an NOI, ROD, or FONSI.

Project means a specific DOE undertaking including actions approved by permit or other regulatory decision as well as Federal and federally assisted activities, which may include design, construction, and operation of an individual facility; research, development, demonstration, and testing for a process or product; funding for a facility, process, or product; or similar activities, as discussed at 40 CFR 1508.18(b)(4).

ROD means a Record of Decision as described at 40 CFR 1505.2.

Scoping means the process described at 40 CFR 1501.7; "public scoping process" refers to that portion of the scoping process where the public is invited to participate, as described at 40 CFR 1501.7 (a)(1) and (b)(4).

Site-wide NEPA document means a broad-scope EIS or EA that is programmatic in nature and identifies and assesses the individual and cumulative impacts of ongoing and reasonably foreseeable future actions at a DOE site; it may also refer to an associated NEPA document, such as an NOI, ROD, or FONSI.

Supplement Analysis means a DOE document used to determine whether a supplemental EIS should be prepared pursuant to 40 CFR 1502.9(c), or to support a decision to prepare a new EIS.

Supplemental EIS means an EIS prepared to supplement a prior EIS as provided at 40 CFR 1502.9(c).

The Secretary means the Secretary of Energy.

§ 1021.105 Oversight of Agency NEPA activities.

The Assistant Secretary for Environment, Safety and Health, or his/her designee, is responsible for overall review of DOE NEPA compliance. Further information on DOE's NEPA process and the status of individual NEPA reviews may be obtained upon request from the Office of NEPA Oversight, EH-25, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585.

Subpart B—DOE Decisionmaking

§ 1021.200 DOE planning.

(a) DOE shall provide for adequate and timely NEPA review of DOE proposals, including those for programs, policies, projects, regulations, orders, or legislation, in accordance with 40 CFR 1501.2 and this section. In its planning for each proposal, DOE shall include adequate time and funding for proper NEPA review and for preparation of anticipated NEPA documents.

(b) DOE shall begin its NEPA review as soon as possible after the time that DOE proposes an action or is presented with a proposal.

(c) DOE shall determine the level of NEPA review required for a proposal in accordance with § 1021.300 and subpart D of this part.

(d) During the development and consideration of a DOE proposal, DOE shall review any relevant planning and decisionmaking documents, whether prepared by DOE or another agency, to determine if the proposal or any of its alternatives are considered in a prior NEPA document. If so, DOE shall consider adopting the existing document, or any pertinent part thereof, in accordance with 40 CFR 1506.3.

§ 1021.210 DOE decisionmaking.

(a) For each DOE proposal, DOE shall coordinate its NEPA review with its decisionmaking. Sections 1021.211 through 1021.214 of this part specify how DOE will coordinate its NEPA review with decision points for certain types of proposals (40 CFR 1505.1(b)).

(b) DOE shall complete its NEPA review for each DOE proposal before making a decision on the proposal (e.g., normally in advance of, and for use in reaching, a decision to proceed with detailed design), except as provided in 40 CFR 1506.1 and §§ 1021.211 and 1021.216 of this part.

(c) During the decisionmaking process for each DOE proposal, DOE shall consider the relevant NEPA documents, public and agency comments (if any) on those documents, and DOE responses to those comments, as part of its

consideration of the proposal (40 CFR 1505.1(d)) and shall include such documents, comments, and responses as part of the administrative record (40 CFR 1505.1(c)).

(d) If an EIS or EA is prepared for a DOE proposal, DOE shall consider the alternatives analyzed in that EIS or EA before rendering a decision on that proposal; the decision on the proposal shall be within the range of alternatives analyzed in the EA or EIS (40 CFR 1505.1(e)).

(e) When DOE uses a broad decision (such as one on a policy or program) as a basis for a subsequent narrower decision (such as one on a project or other site-specific proposal), DOE may use tiering (40 CFR 1502.20) and incorporation of material by reference (40 CFR 1502.21) in the NEPA review for the subsequent narrower proposal.

§ 1021.211 Interim actions: Limitations on actions during the NEPA process.

While DOE is preparing an EIS that is required under § 1021.300(a) of this part, DOE shall take no action concerning the proposal that is the subject of the EIS before issuing an ROD, except as provided at 40 CFR 1506.1. Actions that are covered by, or are a part of, a DOE proposal for which an EIS is being prepared shall not be categorically excluded under subpart D of these regulations unless they qualify as interim actions under 40 CFR 1506.1.

§ 1021.212 Research, development, demonstration, and testing.

(a) This section applies to the adoption and application of programs that involve research, development, demonstration, and testing for new technologies (40 CFR 1502.4(c)(3)). Adoption of such programs might also lead to commercialization or other broad-scale implementation by DOE or another entity.

(b) For any proposed program described in paragraph (a) of this section, DOE shall begin its NEPA review (if otherwise required by this part) as soon as environmental effects can be meaningfully evaluated, and before DOE has reached the level of investment or commitment likely to determine subsequent development or restrict later alternatives, as discussed at 40 CFR 1502.4(c)(3).

(c) For subsequent phases of development and application, DOE shall prepare one or more additional NEPA documents (if otherwise required by this part).

§ 1021.213 Rulemaking.

(a) This section applies to regulations promulgated by DOE.

(b) DOE shall begin its NEPA review of a proposed rule (if otherwise required by this part) while drafting the proposed regulation, and as soon as environmental effects can be meaningfully evaluated.

(c) DOE shall include any relevant NEPA documents, public and agency comments (if any) on those documents, and DOE responses to those comments, as part of the administrative record (40 CFR 1505.1(c)).

(d) If an EIS is required, DOE will normally publish the draft EIS at the time it publishes the proposed rule (40 CFR 1502.5(d)). DOE will normally combine any public hearings required for a proposed rule with the public hearings required on the draft EIS under § 1021.313 of this part. The draft EIS need not accompany notices of inquiry or advance notices of proposed rulemaking that DOE may use to gather information during early stages of regulation development. When engaged in rulemaking for the purpose of protecting the public health and safety, DOE may issue the final rule simultaneously with publication of the EPA Notice of Availability of the final EIS in accordance with 40 CFR 1506.10(b).

(e) If an EA is required, DOE will normally complete the EA and issue any related FONSI prior to or simultaneously with issuance of the proposed rule; however, if the EA leads to preparation of an EIS, the provisions of paragraph (d) of this section shall apply.

§ 1021.214 **Adjudicatory proceedings.**

(a) This section applies to DOE proposed actions that involve DOE adjudicatory proceedings, excluding judicial or administrative civil or criminal enforcement actions.

(b) DOE shall complete its NEPA review (if otherwise required by this part) before rendering any final adjudicatory decision. If an EIS is required, the final EIS will normally be completed at the time of or before final staff recommendation, in accordance with 40 CFR 1502.5(c).

(c) DOE shall include any relevant NEPA documents, public and agency comments (if any) on those documents, and DOE responses to those comments, as part of the administrative record (40 CFR 1505.1(c)).

§ 1021.215 **Applicant process.**

(a) This section applies to actions that involve application to DOE for a permit, license, exemption or allocation, or other similar actions, unless the action is categorically excluded from

preparation of an EA or EIS under subpart D of this part.

(b) The applicant shall:

(1) Consult with DOE as early as possible in the planning process to obtain guidance with respect to the appropriate level and scope of any studies or environmental information that DOE may require to be submitted as part of, or in support of, the application;

(2) Conduct studies that DOE deems necessary and appropriate to determine the environmental impacts of the proposed action;

(3) Consult with appropriate Federal, state, regional and local agencies, American Indian tribes and other potentially interested parties during the preliminary planning stages of the proposed action to identify environmental factors and permitting requirements;

(4) Notify DOE as early as possible of other Federal, state, regional, local or American Indian tribal actions required for project completion to allow DOE to coordinate the Federal environmental review, and fulfill the requirements of 40 CFR 1506.2 regarding elimination of duplication with state and local procedures, as appropriate;

(5) Notify DOE of private entities and organizations interested in the proposed undertaking, in order that DOE can consult, as appropriate, with these parties in accordance with 40 CFR 1501.2(d)(2); and

(6) Notify DOE if, before DOE completes the environmental review, the applicant plans to take an action that is within DOE's jurisdiction that may have an adverse environmental impact or limit the choice of alternatives. If DOE determines that the action would have an adverse environmental impact or would limit the choice of reasonable alternatives under 40 CFR 1506.1(a), DOE will promptly notify the applicant that DOE will take appropriate action to ensure that the objectives and procedures of NEPA are achieved in accordance with 40 CFR 1506.1(b).

(c) For major categories of DOE actions involving a large number of applicants, DOE may prepare and make available generic guidance describing the recommended level and scope of environmental information that applicants should provide.

(d) DOE shall begin its NEPA review (if otherwise required by this part) as soon as possible after receiving an application described in paragraph (a) of this section, and shall independently evaluate and verify the accuracy of information received from an applicant in accordance with 40 CFR 1506.5(a). At DOE's option, an applicant may prepare

an EA in accordance with 40 CFR 1506.5(b). If an EIS is prepared, the EIS shall be prepared by DOE or by a contractor that is selected by DOE and that may be funded by the applicant, in accordance with 40 CFR 1506.5(c). The contractor shall provide a disclosure statement in accordance with 40 CFR 1506.5(c), as discussed in § 1021.312(b)(4) of this part. DOE shall complete any NEPA documents (or evaluation of any EA prepared by the applicant) before rendering a final decision on the application and shall consider the NEPA document in reaching its decision, as provided in § 1021.210 of this part.

§ 1021.216 **Procurement, Financial Assistance, and Joint Ventures.**

(a) This section applies to DOE competitive and limited-source procurements, to awards of financial assistance by a competitive process, and to joint ventures entered into as a result of competitive solicitations, unless the action is categorically excluded from preparation of an EA or EIS under Subpart D of this part. Paragraphs (b), (c), and (i) of this section apply as well to DOE sole-source procurements of sites, systems, or processes, to noncompetitive awards of financial assistance, and to sole-source joint ventures, unless the action is categorically excluded from preparation of an EA or EIS under Subpart D of this part.

(b) When relevant in DOE's judgment, DOE shall require that offeror's submit environmental data and analyses as a discrete part of the offeror's proposal. DOE shall specify in its solicitation document the type of information and level of detail for environmental data and analyses so required. The data will be limited to those reasonably available to offerors.

(c) DOE shall independently evaluate and verify the accuracy of environmental data and analyses submitted by offerors.

(d) For offers in the competitive range, DOE shall prepare and consider an environmental critique before the selection.

(e) The environmental critique will be subject to the confidentiality requirements of the procurement process.

(f) The environmental critique will evaluate the environmental data and analyses submitted by offerors; it may also evaluate supplemental information developed by DOE as necessary for a reasoned decision.

(g) The environmental critique will focus on environmental issues that are

pertinent to a decision on proposals and will include:

(1) A brief discussion of the purpose of the procurement and each offer, including any site, system, or process variations among the offers having environmental implications;

(2) A discussion of the salient characteristics of each offeror's proposed site, system, or process as well as alternative sites, systems, or processes;

(3) A brief comparative evaluation of the potential environmental impacts of the offers, which will address direct and indirect effects, short-term and long-term effects, proposed mitigation measures, adverse effects that cannot be avoided, areas where important environmental information is incomplete and unavailable, unresolved environmental issues and practicable mitigating measures not included in the offeror's proposal; and

(4) To the extent known for each offer, a list of Federal, Tribal, state, and local government permits, licenses, and approvals that must be obtained.

(h) DOE shall prepare a publicly available environmental synopsis, based on the environmental critique, to document the consideration given to environmental factors and to record that the relevant environmental consequences of reasonable alternatives have been evaluated in the selection process. The synopsis will not contain business, confidential, trade secret or other information that DOE otherwise would not disclose pursuant to 18 U.S.C. 1905, the confidentiality requirements of the competitive procurement process, 5 U.S.C. 552(b) and 41 U.S.C. 423. To assure compliance with this requirement, the synopsis will not contain data or other information that may in any way reveal the identity of offerors. After a selection has been made, the environmental synopsis shall be filed with EPA, shall be made publicly available, and shall be incorporated in any NEPA document prepared under paragraph (i) of this section.

(i) If an EA or EIS is required, DOE shall prepare, consider and publish the EA or EIS in conformance with the CEQ Regulations and other provisions of this part before taking any action pursuant to the contract or award of financial assistance (except as provided at 40 CFR 1506.1 and § 1021.211 of this part). If the NEPA process is not completed before the award of the contract, financial assistance, or joint venture, then the contract, financial assistance, or joint venture shall be contingent on completion of the NEPA process (except as provided at 40 CFR 1506.1 and

§ 1021.211 of this part). DOE shall phase subsequent contract work to allow the NEPA review process to be completed in advance of a go/no-go decision.

Subpart C—Implementing Procedures

§ 1021.300 General requirements.

(a) DOE shall determine, under the procedures in the CEQ Regulations and this part, whether any DOE proposal:

(1) Requires preparation of an EIS;

(2) Requires preparation of an EA; or

(3) Is categorically excluded from preparation of either an EIS or an EA.

DOE shall prepare any pertinent documents as required by NEPA, the CEQ Regulations, or this part.

(b) Notwithstanding any other provision of these regulations, DOE may prepare a NEPA document for any DOE action at any time in order to further the purposes of NEPA. This may be done to analyze the consequences of ongoing activities, support DOE planning, assess the need for mitigation, fully disclose the potential environmental consequences of DOE actions, or for any other reason. Documents prepared under this paragraph shall be prepared in the same manner as DOE documents prepared under paragraph (a) of this section.

§ 1021.301 Agency review and public participation.

(a) DOE shall make its NEPA documents available to other Federal agencies, states, local governments, American Indian tribes, interested groups, and the general public, in accordance with 40 CFR 1506.6, except as provided in § 1021.340 of this part.

(b) Wherever feasible, DOE NEPA documents shall explain technical, scientific, or military terms or measurements using terms familiar to the general public, in accordance with 40 CFR 1502.8.

(c) DOE shall notify the host state and host tribe of a DOE determination to prepare an EA or EIS for a DOE proposal, and may notify any other state or American Indian tribe that, in DOE's judgment, may be affected by the proposal.

(d) DOE shall provide the host state and host tribe with an opportunity to review and comment on any DOE EA prior to DOE's approval of the EA. DOE may also provide any other state or American Indian tribe with the same opportunity if, in DOE's judgment, the state or tribe may be affected by the proposed action. At DOE's discretion, this review period shall be from 14 to 30 days. DOE shall consider all comments received from a state or tribe during the review period before approving or modifying the EA, as appropriate. If all

states and tribes afforded this opportunity for preapproval review waive such opportunity, or provide a response before the end of the comment period, DOE may proceed to approve or take other appropriate action on the EA before the end of the review period.

(e) Paragraphs (c) and (d) of this section shall not apply to power marketing actions, such as rate-setting, in which a state or American Indian tribe is a customer, or to any other circumstances where DOE determines that such advance information could create a conflict of interest.

§ 1021.310 Environmental impact statements.

DOE shall prepare and circulate EISs and related RODs in accordance with the requirements of the CEQ Regulations, as supplemented by this subpart.

§ 1021.311 Notice of Intent and scoping.

(a) DOE shall publish an NOI in the **Federal Register** in accordance with 40 CFR 1501.7 and containing the elements specified in 40 CFR 1508.22 as soon as practicable after a decision is made to prepare an EIS. However, if there will be a lengthy period of time between its decision to prepare an EIS and the time of actual preparation, DOE may defer publication of the NOI until a reasonable time before preparing the EIS, provided that DOE allows a reasonable opportunity for interested parties to participate in the EIS process. Through the NOI, DOE shall invite comments and suggestions on the scope of the EIS. DOE shall disseminate the NOI in accordance with 40 CFR 1506.6.

(b) If there will be a lengthy delay between the time DOE has decided to prepare an EIS and the beginning of the public scoping process, DOE may publish an Advance NOI in the **Federal Register** to provide an early opportunity to inform interested parties of the pending EIS or to solicit early public comments. This Advance NOI does not serve as a substitute for the NOI provided for in paragraph (a) of this section.

(c) Publication of the NOI in the **Federal Register** shall begin the public scoping process. The public scoping process for a DOE EIS shall allow a minimum of 30 days for the receipt of public comments.

(d) Except as provided in paragraph (g) of this section, DOE shall hold at least one public scoping meeting as part of the public scoping process for a DOE EIS. DOE shall announce the location, date, and time of public scoping meetings in the NOI or by other

appropriate means, such as additional notices in the **Federal Register**, news releases to the local media, or letters to affected parties. Public scoping meetings shall not be held until at least 15 days after public notification. Should DOE change the location, date, or time of a public scoping meeting, or schedule additional public scoping meetings, DOE shall publicize these changes in the **Federal Register** or in other ways as appropriate.

(e) In determining the scope of the EIS, DOE shall consider all comments received during the announced comment period held as part of the public scoping process. DOE may also consider comments received after the close of the announced comment period.

(f) The results of the scoping process shall be documented in the EIS Implementation Plan as provided in § 1021.312 of this part.

(g) A public scoping process is optional for DOE supplemental EISs (40 CFR 1502.9(c)(4)). If DOE initiates a public scoping process for a supplemental EIS, the provisions of paragraphs (a) through (f) of this section shall apply.

§ 1021.312 EIS Implementation plan.

(a) DOE shall prepare an EIS Implementation Plan to provide guidance for the preparation of an EIS and record the results of the scoping process. DOE shall complete the EIS Implementation Plan as soon as possible after the close of the public scoping process, but in any event before issuing the draft EIS. DOE may amend the EIS Implementation Plan to incorporate changes in schedules, alternatives, or other content.

(b) The EIS Implementation Plan shall include:

- (1) A statement of the planned scope and content of the EIS;
- (2) The purpose and need for the proposed action;
- (3) A description of the scoping process and the results (as needed to document DOE compliance with 40 CFR 1501.7), including a summary of comments received and their disposition;
- (4) Target schedules;
- (5) Anticipated consultation with other agencies; and
- (6) A disclosure statement executed by any contractor (or subcontractor) under contract with DOE to prepare the EIS document in accordance with 40 CFR 1506.5(c).

(c) At DOE's option, the Implementation Plan may include target page limits for the EIS, planned work assignments, anticipated consultation with other organizations, or any other

information to support the approach to be used in preparing the EIS.

(d) DOE shall make the EIS Implementation Plan and any formal revisions available to the public for information. DOE shall make copies available for inspection in the appropriate DOE public reading room(s) or other appropriate location(s) for a reasonable time. Copies of these documents shall also be provided upon written request.

§ 1021.313 Public review of environmental impact statements.

(a) The public review and comment period on a DOE draft EIS shall be no less than 45 days (40 CFR 1506.10(c)). The public comment period begins when EPA publishes a Notice of Availability of the document in the **Federal Register**.

(b) DOE shall hold at least one public hearing on DOE draft EISs. Such public hearings shall be announced at least 15 days in advance. The announcement shall identify the subject of the draft EIS and include the location, date, and time of the public hearings.

(c) DOE shall prepare a final EIS following the public comment period and hearings on the draft EIS. The final EIS shall respond to oral and written comments received during public review of the draft EIS, as provided at 40 CFR 1503.4. In addition to the requirements at 40 CFR 1502.9(b), a DOE final EIS shall include any Statement of Findings required by 10 CFR part 1022, "Compliance with Floodplain/Wetlands Environmental Review Requirements."

(d) DOE shall use appropriate means to publicize the availability of draft and final EISs and the time and place for public hearings on a draft EIS. The methods chosen should focus on reaching persons who may be interested in or affected by the proposal and may include the methods listed in 40 CFR 1506.6(b)(3).

§ 1021.314 Supplemental environmental impact statements.

(a) DOE shall prepare a supplemental EIS if there are substantial changes to the proposal or significant new circumstances or information relevant to environmental concerns, as discussed in 40 CFR 1502.9(c)(1).

(b) DOE may supplement a draft EIS or final EIS at any time, to further the purposes of NEPA, in accordance with 40 CFR 1502.9(c)(2).

(c) When it is unclear whether or not an EIS supplement is required, DOE shall prepare a Supplement Analysis.

(1) The Supplement Analysis shall discuss the circumstances that are pertinent to deciding whether to prepare

a supplemental EIS, pursuant to 40 CFR 1502.9(c).

(2) The Supplement Analysis shall contain sufficient information for DOE to determine whether:

- (i) An existing EIS should be supplemented;
- (ii) A new EIS should be prepared; or
- (iii) No further NEPA documentation is required.

(3) DOE shall make the determination and the related Supplement Analysis available to the public for information. Copies of the determination and Supplement Analysis shall be provided upon written request. DOE shall make copies available for inspection in the appropriate DOE public reading room(s) or other appropriate location(s) for a reasonable time.

(d) DOE shall prepare, circulate, and file a supplement to a draft or final EIS in the same manner as any other draft and final EISs, except that scoping is optional for a supplement. If DOE decides to take action on a proposal covered by a supplemental EIS, DOE shall prepare a ROD in accordance with the provisions of § 1021.315 of this part.

(e) When applicable, DOE will incorporate an EIS supplement, or the determination and supporting Supplement Analysis made under paragraph (c) of this section, into any related formal administrative record on the action that is the subject of the EIS supplement or determination (40 CFR 1502.9(c)(3)).

§ 1021.315 Records of decision.

(a) No decision may be made on a proposal covered by an EIS during a 30-day "waiting period" following completion of the final EIS, except as provided at 40 CFR 1506.1 and 1506.10(b) and § 1021.211 of this part. The 30-day period starts when the EPA Notice of Availability for the final EIS is published in the **Federal Register**.

(b) If DOE decides to take action on a proposal covered by an EIS, a ROD shall be prepared as provided at 40 CFR 1505.2 (except as provided at 40 CFR 1506.1 and § 1021.211 of this part). No action shall be taken until the decision has been made public.

(c) DOE RODs shall be published in the **Federal Register** and made available to the public as specified in 40 CFR 1506.6, except as provided in 40 CFR 1507.3(c) and § 1021.340 of this part.

(d) DOE may revise a ROD at any time, so long as the revised decision is adequately supported by an existing EIS. A revised ROD is subject to the provisions of paragraphs (b) and (c) of this section.

§ 1021.320 Environmental assessments.

DOE shall prepare and circulate EAs and related FONSI in accordance with the requirements of the CEQ Regulations, as supplemented by this subpart.

§ 1021.321 Requirements for environmental assessments.

(a) *When to prepare an EA.* As required by 40 CFR 1501.4(b), DOE shall prepare an EA for a proposed DOE action that is described in the classes of actions listed in appendix C to subpart D of this part, and for a proposed DOE action that is not described in any of the classes of actions listed in appendices A, B, or D to subpart D, except that an EA is not required if DOE has decided to prepare an EIS. DOE may prepare an EA on any action at any time in order to assist agency planning and decisionmaking.

(b) *Purposes.* A DOE EA shall serve the purposes identified in 40 CFR 1508.9(a), which include providing sufficient evidence and analysis for determining whether to prepare an EIS or to issue a FONSI. If appropriate, a DOE EA shall also include any floodplain/wetlands assessment prepared under 10 CFR part 1022 and may include analyses needed for other environmental determinations.

(c) *Content.* A DOE EA shall comply with the requirements found at 40 CFR 1508.9. In addition to any other alternatives, DOE shall assess the no action alternative in an EA, even when the proposed action is specifically required by legislation or a court order.

§ 1021.322 Findings of no significant impact.

(a) DOE shall prepare a FONSI only if the related EA supports the finding that the proposed action will not have a significant effect on the human environment. If a required DOE EA does not support a FONSI, DOE shall prepare an EIS and issue a ROD before taking action on the proposal addressed by the EA, except as permitted under 40 CFR 1506.1 and § 1021.211 of this part.

(b) In addition to the requirements found at 40 CFR 1508.13, a DOE FONSI shall include the following:

(1) A summary of the supporting EA, including a brief description of the proposed action and alternatives considered in the EA, environmental factors considered, and projected impacts;

(2) Any commitments to mitigations that are essential to render the impacts of the proposed action not significant, beyond those mitigations that are integral elements of the proposed action, and a reference to the Mitigation Action

Plan prepared under § 1021.331 of this part;

(3) Any "Statement of Findings" required by 10 CFR Part 1022, "Compliance with Floodplain/Wetlands Environmental Review Requirements";

(4) The date of issuance; and

(5) The signature of the DOE approving official.

(c) DOE shall make FONSI available to the public as provided at 40 CFR 1501.4(e)(1) and 1506.6; DOE shall make copies available for inspection in the appropriate DOE public reading room(s) or other appropriate location(s) for a reasonable time.

(d) DOE shall issue a proposed FONSI for public review and comment before making a final determination on the FONSI if required by 40 CFR 1501.4(e)(2); DOE may issue a proposed FONSI for public review and comment in other situations as well.

(e) Upon issuance of the FONSI, DOE may proceed with the proposed action subject to any mitigation commitments expressed in the FONSI that are essential to render the impacts of the proposed action not significant.

(f) DOE may revise a FONSI at any time, so long as the revision is supported by an existing EA. A revised FONSI is subject to all provisions of paragraph (d) of this section.

§ 1021.330 Programmatic (Including Site-wide) NEPA documents

(a) When required to support a DOE programmatic decision (40 CFR 1508.18(b)(3)), DOE shall prepare a programmatic EIS or EA (40 CFR 1502.4). DOE may also prepare a programmatic EIS or EA at any time to further the purposes of NEPA.

(b) A DOE programmatic NEPA document shall be prepared, issued, and circulated in accordance with the requirements for any other NEPA document, as established by the CEQ Regulations and this part.

(c) As a matter of policy when not otherwise required, DOE shall prepare site-wide EISs for certain large, multiple-facility DOE sites; DOE may prepare EISs or EAs for other sites to assess the impacts of all or selected functions at those sites.

(d) DOE shall evaluate site wide NEPA documents prepared under § 1021.330(c) at least every five years. DOE shall evaluate site-wide EISs by means of a Supplement Analysis, as provided in § 1021.314. Based on the Supplement Analysis, DOE shall determine whether the existing EIS remains adequate or whether to prepare a new site-wide EIS or supplement the existing EIS, as appropriate. The determination and supporting analysis

shall be made available in the appropriate DOE public reading room(s) or in other appropriate location(s) for a reasonable time.

(e) DOE shall evaluate site-wide EAs by means of an analysis similar to the Supplement Analysis to determine whether the existing site-wide EA remains adequate, whether to prepare a new site-wide EA, revise the FONSI, or prepare a site wide EIS, as appropriate. The determination and supporting analysis shall be made available in the appropriate DOE public reading room(s) or in other appropriate location(s) for a reasonable time.

§ 1021.331 Mitigation action plans.

(a) Following completion of each EIS and its associated ROD, DOE shall prepare a Mitigation Action Plan that addresses mitigation commitments expressed in the ROD. The Mitigation Action Plan shall explain how the corresponding mitigation measures, designed to mitigate adverse environmental impacts associated with the course of action directed by the ROD, will be planned and implemented. The Mitigation Action Plan shall be prepared before DOE takes any action directed by the ROD that is the subject of a mitigation commitment.

(b) In certain circumstances, as specified in § 1021.322(b)(2), DOE shall also prepare a Mitigation Action Plan for commitments to mitigations that are essential to render the impacts of the proposed action not significant. The Mitigation Action Plan shall address all commitments to such necessary mitigations and explain how mitigation will be planned and implemented. The Mitigation Action Plan shall be prepared before the FONSI is issued and shall be referenced therein.

(c) Each Mitigation Action Plan shall be as complete as possible, commensurate with the information available regarding the course of action either directed by the ROD or the action to be covered by the FONSI, as appropriate. DOE may revise the Plan as more specific and detailed information becomes available.

(d) DOE shall make copies of the Mitigation Action Plans available for inspection in the appropriate DOE public reading room(s) or other appropriate location(s) for a reasonable time. Copies of the Mitigation Action Plans shall also be available upon written request.

§ 1021.340 Classified, confidential, and otherwise exempt information.

(a) Notwithstanding other sections of this part, DOE shall not disclose

classified, confidential, or other information that DOE otherwise would not disclose pursuant to the Freedom of Information Act (FOIA) (5 U.S.C. 552) and 10 CFR 1004.10(b) of DOE's regulations implementing the FOIA, except as provided by 40 CFR 1506.6(f).

(b) To the fullest extent possible, DOE shall segregate any information that is exempt from disclosure requirements into an appendix to allow public review of the remainder of a NEPA document.

(c) If exempt information cannot be segregated, or if segregation would leave essentially meaningless material, DOE shall withhold the entire NEPA document from the public; however, DOE shall prepare the NEPA document, in accordance with the CEQ Regulations and this part, and use it in DOE decisionmaking.

§ 1021.341 Coordination with other environmental review requirements.

(a) In accordance with 40 CFR 1500.4(k) and (o), 1502.25, and 1506.4, DOE shall integrate the NEPA process and coordinate NEPA compliance with other environmental review requirements to the fullest extent possible.

(b) To the extent possible, DOE shall determine the applicability of other environmental requirements early in the planning process, in consultation with other agencies when necessary or appropriate, to ensure compliance and to avoid delays, and shall incorporate any relevant requirements as early in the NEPA review process as possible.

§ 1021.342 Interagency cooperation.

For DOE programs that involve another Federal agency or agencies in related decisions subject to NEPA, DOE will comply with the requirements of 40 CFR 1501.5 and 1501.6. As part of this process, DOE shall cooperate with the other agencies in developing environmental information and in determining whether a proposal requires preparation of an EIS or EA, or can be categorically excluded from preparation of either. Further, where appropriate and acceptable to the other agencies, DOE shall develop or cooperate in the development of interagency agreements to facilitate coordination and to reduce delay and duplication.

§ 1021.343 Variances.

(a) *Emergency Actions.* DOE may take an action without observing all provisions of this part or the CEQ Regulations, in accordance with 40 CFR 1506.11, in emergency situations that demand immediate action. DOE shall consult with CEQ as soon as possible regarding alternative arrangements for

emergency actions having significant environmental impacts. DOE shall document, including publishing a notice in the *Federal Register*, emergency actions covered by this paragraph within 30 days after such action occurs; this documentation shall identify any adverse impacts from the actions taken, further mitigation necessary, and any NEPA documents that may be required.

(b) *Reduction of Time Periods.* On a case-by-case basis, DOE may reduce time periods established in this part that are not required by the CEQ Regulations. If DOE determines that such reduction is necessary, DOE shall publish a notice in the *Federal Register* specifying the revised time periods and the rationale for the reduction.

(c) *Other.* Any variance from the requirements of this part, other than as provided by paragraphs (a) and (b) of this section, must be soundly based on the interests of national security or the public health, safety, or welfare and must have the advance written approval of the Secretary; however, the Secretary is not authorized to waive or grant a variance from any requirement of the CEQ Regulations (except as provided for in those regulations). If the Secretary determines that a variance from the requirements of this part is within his/her authority to grant and is necessary, DOE shall publish a notice in the *Federal Register* specifying the variance granted and the reasons.

Subpart D—Typical Classes of Actions

§ 1021.400 Level of NEPA review.

(a) This subpart identifies DOE actions that normally:

(1) Do not require preparation of either an EIS or an EA (are categorically excluded from preparation of either document) (appendices A and B to this subpart D);

(2) Require preparation of an EA, but not necessarily an EIS (appendix C to this subpart D); or

(3) Require preparation of an EIS (appendix D to this subpart D).

(b) Any completed, valid NEPA review does not have to be repeated, and no completed NEPA documents need to be redone by reasons of these regulations, except as provided in § 1021.314.

(c) If a DOE proposal is encompassed within a class of actions listed in the appendices to this subpart D, DOE shall proceed with the level of NEPA review indicated for that class of actions, unless there are extraordinary circumstances related to the specific proposal that may affect the significance of the environmental effects of the proposal.

(d) If a DOE proposal is not encompassed within the classes of actions listed in the appendices to this subpart D, or if there are extraordinary circumstances related to the proposal that may affect the significance of the environmental effects of the proposal, DOE shall either:

(1) Prepare an EA and, on the basis of that EA, determine whether to prepare an EIS or a FONSI; or

(2) Prepare an EIS and ROD.

§ 1021.410 Application of categorical exclusions (classes of actions that normally do not require EAs or EISs).

(a) The actions listed in appendices A and B to this subpart D are classes of actions that DOE has determined do not individually or cumulatively have a significant effect on the human environment (categorical exclusions).

(b) To find that a proposal is categorically excluded, DOE shall determine the following:

(1) The proposal fits within a class of actions that is listed in appendix A or B to this subpart D;

(2) There are no extraordinary circumstances related to the proposal that may affect the significance of the environmental effects of the proposal. Extraordinary circumstances are unique situations presented by specific proposals, such as scientific controversy about the environmental effects of the proposal; uncertain effects or effects involving unique or unknown risks; or unresolved conflicts concerning alternate uses of available resources within the meaning of section 102(2)(E) of NEPA; and

(3) The proposal is not "connected" (40 CFR 1508.25(a)(1)) to other actions with potentially significant impacts, is not related to other proposed actions with cumulatively significant impacts (40 CFR 1508.25(a)(2)), and is not precluded by 40 CFR 1506.1 or § 1021.211 of this part.

(c) All categorical exclusions may be applied by any organizational element of DOE. The sectional divisions in appendix B to this subpart D are solely for purposes of organization of that appendix and are not intended to be limiting.

(d) A class of actions includes activities foreseeably necessary to proposals encompassed within the class of actions (such as associated transportation activities and award of implementing grants and contracts).

Appendix A to Subpart D—Categorical Exclusions Applicable to General Agency Actions

Table of Contents

- A1. Routine administrative/financial/personnel actions
- A2. Contract interpretations/amendments/modifications, clarifying or administrative
- A3. Certain actions by Office of Hearings and Appeals
- A4. Interpretations/rulings for existing regulations
- A5. Rulemaking (interpreting/amending), no change in environmental effect
- A6. Rulemakings, procedural
- A7. Transfer of property, use unchanged
- A8. Award of contracts for technical support/management and operation/personal services
- A9. Information gathering/data analysis/document preparation/dissemination
- A10. Reports or recommendations on non-DOE legislation
- A11. Technical advice and assistance to organizations
- A12. Emergency preparedness planning
- A13. Procedural Orders, Notices, and guidelines
- A14. Approval of technical exchange arrangements
- A15. Umbrella agreements for cooperation in energy research and development

A1 Routine actions necessary to support the normal conduct of agency business, such as administrative, financial, and personnel actions.

A2 Contract interpretations, amendments, and modifications that are clarifying or administrative in nature.

A3 Adjustments, exceptions, exemptions, appeals, and stays, modifications, or rescissions of orders issued by the Office of Hearings and Appeals.

A4 Interpretations and rulings with respect to existing regulations, or modifications or rescissions of such interpretations and rulings.

A5 Rulemaking interpreting or amending an existing rule or regulation that does not change the environmental effect of the rule or regulation being amended.

A6 Rulemakings that are strictly procedural, such as rulemaking (under 48 CFR part 9) establishing procedures for technical and pricing proposals and establishing contract clauses and contracting practices for the purchase of goods and services, and rulemaking (under 10 CFR part 600) establishing application and review procedures for, and administration, audit, and closeout of, grants and cooperative agreements.

A7 Transfer, lease, disposition, or acquisition of interests in property, if property use is to remain unchanged.

A8 Award of contracts for technical support services, management and operation of a government-owned facility, and personal services.

A9 Information gathering (including, but not limited to, literature surveys, inventories, audits), data analysis (including computer modelling), document preparation (such as conceptual design or feasibility studies,

analytical energy supply and demand studies), and dissemination (including, but not limited to, document mailings, publication, and distribution; and classroom training and informational programs), but not including site characterization or environmental monitoring. (Also see B3.1.)

A10 Reports or recommendations on legislation or rulemaking that is not proposed by DOE.

A11 Technical advice and planning assistance to international, national, state, and local organizations.

A12 Emergency preparedness planning activities, including the designation of onsite evacuation routes.

A13 Administrative, organizational, or procedural Orders, Notices, and guidelines.

A14 Approval of technical exchange arrangements for information, data, or personnel with other countries or international organizations, including, but not limited to, assistance in identifying and analyzing another country's energy resources, needs and options.

A15 Approval of DOE participation in international "umbrella" agreements for cooperation in energy research and development activities that would not commit the U.S. to any specific projects or activities.

Appendix B to Subpart D—Categorical Exclusions Applicable to Specific Agency Actions

Table of Contents

B Conditions that are integral elements of the classes of actions in appendix B

B1 Categorical exclusions applicable to facility operation

B1.1 Rate increases less than inflation (not power marketing, but see B4.3)

B1.2 Training exercises and simulation

B1.3 Routine maintenance/custodial services for buildings, structures, infrastructures, equipment

B1.4 Installation/modification of air conditioning systems for existing equipment

B1.5 Improvements to cooling water systems within existing building, structure

B1.6 Installation/modification of retention tanks, small basins to control runoff, spills

B1.7 Acquisition/installation/operation/removal of communication systems, data processing equipment

B1.8 Modifications to screened water intake structures

B1.9 Placement of airway safety markings/painting (not lighting) of existing lines, antennas

B1.10 Routine onsite storage of activated material at existing facility

B1.11 Fencing, no adverse effect on wildlife movement/surface water flow

B1.12 Detonation/burning of failed/damaged high explosives or propellants

B1.13 Acquisition or minor relocation of access roads

B1.14 Refueling of a nuclear reactor

B1.15 Siting/construction/operation of support buildings/support structures

B1.16 Removal of asbestos from buildings

B1.17 Removal of polychlorinated biphenyl-containing items from buildings, other aboveground locations

B1.18 Siting/construction/operation of additional/replacement water supply wells

B1.19 Siting/construction/operation of microwave/radio communication towers

B1.20 Protect/restore/improve fish and wildlife habitat

B1.21 Noise abatement

B1.22 Relocation/demolition/disposal of buildings

B2 Categorical exclusions applicable to safety and health

B2.1 Modifications to enhance workplace habitability

B2.2 Installation of/improvements to building/equipment instrumentation (remote controls, emergency warning systems, monitors)

B2.3 Installation of equipment for personnel safety and health

B2.4 Equipment Qualification Programs

B2.5 Safety and environmental improvements of a facility, replacement/upgrade of facility components

B3 Categorical exclusions applicable to site characterization, monitoring, and general research

B3.1 Site characterization/environmental monitoring

B3.2 Aviation activities for survey/monitoring/security

B3.3 Research related to conservation of fish and wildlife

B3.4 Transport packaging tests for radioactive/hazardous material

B3.5 Tank car tests

B3.6 Indoor bench-scale research projects/conventional laboratory operation

B3.7 Siting/construction/operation of new infill exploratory, experimental oil/gas/geothermal wells

B3.8 Outdoor ecological/environmental research in small area

B3.9 Certain Clean Coal Technology Demonstration Program activities

B3.10 Small-scale research and development/small-scale pilot projects, at existing facility, preceding demonstration

B3.11 Outdoor tests, experiments on materials and equipment components, no source, special nuclear, or byproduct materials involved

B4 Categorical exclusions applicable to Power Marketing Administrations and to all of DOE with regard to power resources

B4.1 Contracts/marketing plans/policies for the short term

B4.2 Export of electricity over existing transmission lines

B4.3 Power marketing rate changes less than inflation

B4.4 Power marketing services within normal operating limits

B4.5 Temporary adjustments to river operations within existing operating constraints

B4.6 Additions/modifications to transmission facilities within previously developed area

B4.7 Adding/burying fiber optic cable

- B4.8 New electricity transmission agreements for transfer of power
- B4.9 Multiple use of DOE transmission line rights-of-way
- B4.10 Dismantling and removal of transmission lines
- B4.11 Construction or modification of substations
- B4.12 Construction of tap lines (less than 10 miles in length), not integrating major new sources
- B4.13 Minor relocations of existing transmission lines (less than 10 miles in length)
- B5 Categorical exclusions applicable to conservation, fossil, and renewable energy activities
 - B5.1 Actions to conserve energy
 - B5.2 Modifications to oil/gas/geothermal pumps and piping
 - B5.3 Modification (not expansion)/abandonment of oil storage access/brine injection/geothermal wells, not part of site closure
 - B5.4 Repair/replacement of sections of pipeline within maintenance provisions
 - B5.5 Construction/operation of short crude oil/geothermal pipeline segments
 - B5.6 Oil spill cleanup operations
 - B5.7 Import/export natural gas, no new construction
 - B5.8 Import/export natural gas, new cogeneration powerplant
 - B5.9 Temporary exemption for electric powerplant, fuel-burning installation
 - B5.10 Certain permanent exemptions for electric powerplant, fuel-burning installation
 - B5.11 Permanent exemption for mixed natural gas and petroleum
 - B5.12 Permanent exemption for new peak-load powerplant
 - B5.13 Permanent exemption for emergency operations
 - B5.14 Permanent exemption for meeting scheduled equipment outages
 - B5.15 Permanent exemption due to lack of alternative fuel supply
 - B5.16 Permanent exemption for new cogeneration powerplant
- B6 Categorical exclusions applicable to environmental restoration and waste management activities
 - B6.1 CERCLA removals/similar actions under RCRA or other authorities, meeting CERCLA cost/time limits or exemptions
 - B6.2 Siting/construction/operation of pilot-scale waste collection/treatment/stabilization/containment facilities
 - B6.3 Improvements to environmental control systems
 - B6.4 Siting/construction/operation/decommissioning of facility for storing packaged hazardous waste for 90 days or less
 - B6.5 Siting/construction/operation/decommissioning of facility for characterizing/sorting packaged waste, overpacking waste (not high-level, spent nuclear fuel)
 - B6.6 Modification of facility for storing, packaging, repacking waste (not high-level, spent nuclear fuel)

- B6.7 Granting/denying petitions for allocation of commercial disposal capacity
- B6.8 Modifications for waste minimization/reuse of materials
- B7 Categorical exclusions applicable to international activities
 - B7.1 Emergency measures under the International Energy Program
 - B7.2 Import/export of special nuclear or isotopic materials
- B. Conditions that are Integral Elements of the Classes of Actions in Appendix B

B. The classes of actions listed below include the following conditions as integral elements of the classes of actions. To fit within the classes of actions listed below, a proposal must be one that would not:

- (1) Threaten a violation of applicable statutory, regulatory, or permit requirements for environment, safety, and health, including requirements of DOE orders;
- (2) Require siting and construction or major expansion of waste storage, disposal, recovery, or treatment facilities (including incinerators and facilities for treating wastewater, surface water, and groundwater);
- (3) Disturb hazardous substances, pollutants, contaminants, or CERCLA-excluded petroleum and natural gas products that preexist in the environment such that there would be uncontrolled or unpermitted releases; or
- (4) Adversely affect environmentally sensitive resources. An action may be categorically excluded if, although sensitive resources are present on a site, the action would not adversely affect those resources (e.g., construction of a building with its foundation well above a sole-source aquifer or upland surface soil removal on a site that has wetlands). Environmentally sensitive resources include, but are not limited to:
 - (i) Property (e.g., sites, buildings, structures, objects) of historic, archeological, or architectural significance designated by Federal, state, or local governments or property eligible for listing on the National Register of Historic Places;
 - (ii) Federally-listed threatened or endangered species or their habitat (including critical habitat), Federally-proposed or candidate species or their habitat, or state-listed endangered or threatened species or their habitat;
 - (iii) Floodplains and wetlands;
 - (iv) Areas having a special designation such as Federally- and state-designated wilderness areas, national parks, national natural landmarks, wild and scenic rivers, state and Federal wildlife refuges, and marine sanctuaries;
 - (v) Prime agricultural lands;
 - (vi) Special sources of water (such as sole-source aquifers, wellhead protection areas, and other water sources that are vital in a region); and
 - (vii) Tundra, coral reefs, or rain forests.

B1. *Categorical Exclusions Applicable to Facility Operation*

B1.1 Rate increases for products or services marketed by parts of DOE other than Power Marketing Administrations and approval of rate increases for non-DOE

entities that do not exceed the change in the overall price level in the economy (inflation), as measured by the Gross National Product (GNP) fixed weight price index published by the Department of Commerce, during the period since the last rate increase. (Also see B4.3.)

B1.2 Training exercises and simulations (including, but not limited to, firing-range training, emergency response training, fire fighter and rescue training, and spill cleanup training).

B1.3 Routine maintenance activities and custodial services for buildings, structures, infrastructures (e.g., roads), and equipment, during which operations may be suspended and resumed. Custodial services are activities to preserve facility appearance, working conditions, and sanitation, such as cleaning, window washing, lawn mowing, trash collection, painting, and snow removal. Routine maintenance activities, corrective (that is, repair), preventive, and predictive (as defined in DOE Order 4330.4, "Maintenance Management"), are required to maintain and preserve buildings, structures, infrastructures, and equipment in a condition suitable for a facility to be used for its designated purpose. Routine maintenance may result in replacement to the extent that the replacement is in kind and is not a substantial upgrade or improvement. Routine maintenance does not include replacement of a major component that significantly extends the originally intended useful life of a facility (for example, it does not include the replacement of a reactor vessel near the end of its useful life). Routine maintenance activities include, but are not limited to:

- (a) Repair of facility equipment, such as lathes, mills, pumps, and presses;
- (b) Door and window repair or replacement;
- (c) Wall, ceiling, or floor repair;
- (d) Reroofing;
- (e) Plumbing, electrical utility, and telephone service repair;
- (f) Routine replacement of high-efficiency particulate air filters;
- (g) Inspection and/or treatment of currently installed utility poles;
- (h) Repair of road embankments;
- (i) Repair or replacement of fire protection sprinkler systems;
- (j) Road and parking area resurfacing, including construction of temporary access to facilitate resurfacing;
- (k) Erosion control and soil stabilization measures (such as reseeding and revegetation);
- (l) Surveillance and maintenance of surplus facilities in accordance with DOE Order 5820.2, "Radioactive Waste Management";
- (m) Repair and maintenance of transmission facilities, including replacement of conductors of the same nominal voltage, poles, circuit breakers, transformers, capacitors, crossarms, insulators, and downed transmission lines, in accordance, where appropriate, with 40 CFR Part 761 (Polychlorinated Biphenyls Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions);
- (n) Routine testing and calibration of facility components, subsystems, or portable

equipment (including but not limited to, control valves, in-core monitoring devices, transformers, capacitors); and

(o) Routine decontamination of spot or minor contamination on the surfaces of equipment, rooms, hot cells, or other interior surfaces of buildings (by such activities as wiping with rags, using strippable latex, and minor vacuuming) and removal of contaminated intact equipment (labware) and other materials (e.g., gloves and other clothing).

B1.4 Installation or modification of air conditioning systems required for temperature control for operation of existing equipment.

B1.5 Minor improvements to cooling water systems within an existing building or structure if the improvements would not: (1) Create new sources of water or involve new receiving waters; (2) adversely affect water withdrawals or the temperature of discharged water; or (3) increase introductions of or involve new introductions of hazardous substances, pollutants, contaminants, or CERCLA-excluded petroleum and natural gas products.

B1.6 Installation or modification of retention tanks or small (normally under one acre) basins and associated piping and pumps for existing operations to control runoff or spills (such as under 40 CFR part 112). Modifications include, but are not limited to, installing liners or covers.

B1.7 Acquisition, installation, operation, and removal of communication systems, data processing equipment, and similar electronic equipment.

B1.8 Modifications to screened water intake structures that result in intake velocities and volumes that are within existing permit limits.

B1.9 Placement of airway safety markings and painting (but excluding lighting) of existing electrical transmission lines and antenna structures in accordance with Federal Aviation Administration standards.

B1.10 Routine, onsite storage at an existing facility of activated equipment and material (including lead) used at that facility, to allow reuse after decay of radioisotopes with short half-lives.

B1.11 Installation of fencing, including that for border marking, that will not adversely affect wildlife movements or surface water flow.

B1.12 Detonation or burning of explosives or propellants that failed in outdoor tests (i.e., duds) or were damaged in outdoor tests (e.g., by fracturing) in outdoor areas designated and routinely used for explosive detonation or burning under an existing permit issued by state or local authorities.

B1.13 Acquisition or minor relocation of existing access roads serving existing facilities if the traffic they are to carry will not change substantially.

B1.14 Refueling of an operating nuclear reactor, during which operations may be suspended and then resumed.

B1.15 Siting, construction, and operation of small-scale support buildings and support structures (including prefabricated buildings and trailers) and/or small-scale modifications of existing buildings or structures, within or contiguous to an already

developed area (where site utilities and roads are available). Covered support buildings and structures (and/or modifications) include those for office purposes; parking; cafeteria services; education and training; visitor reception; computer and data processing services; employee health services or recreation activities; routine maintenance activities; storage of supplies and equipment for administrative services and routine maintenance activities; security (including security posts); fire protection; and similar support purposes, but excluding facilities for waste storage activities, except as provided in other parts of this appendix.

B1.16 Removal of asbestos-containing materials from buildings in accordance with 40 CFR part 61 (National Emission Standards for Hazardous Air Pollutants), subpart M (National Emission Standard for Asbestos); 40 CFR part 763 (Asbestos), subpart G (Asbestos Abatement Projects); 29 CFR part 1910, subpart I (Personal Protective Equipment), § 1910.134 (Respiratory Protection); subpart Z (Toxic and Hazardous Substances), § 1910.1001 (Asbestos, tremolite, anthophyllite and actinolite); and 29 CFR part 1926 (Safety and Health Regulations for Construction), subpart D (Occupational Health and Environmental Controls), § 1926.58 (Asbestos, tremolite, anthophyllite, and actinolite), other appropriate Occupational Safety and Health Administration standards in title 29, chapter XVII of the CFR, and appropriate state and local requirements, including certification of removal contractors and technicians.

B1.17 Removal of polychlorinated biphenyl (PCB)-containing items, such as transformers or capacitors, PCB-containing oils flushed from transformers, PCB-flushing solutions, and PCB-containing spill materials from buildings or other aboveground locations in accordance with 40 CFR part 761 (Polychlorinated Biphenyls Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions).

B1.18 Siting, construction, and operation of additional water supply wells (or replacement wells), within an existing well field, if there would be no drawdown other than in the immediate vicinity of the pumping well, no resulting long-term decline of the water table, and no degradation of the aquifer from the new or replacement wells.

B1.19 Siting, construction, and operation of microwave and radio communication towers and associated facilities, if the towers and associated facilities would not be in an area of great visual value.

B1.20 Small-scale activities undertaken to protect, restore, or improve fish and wildlife habitat, fish passage facilities (such as fish ladders or minor diversion channels), or fisheries.

B1.21 Minor noise abatement measures, such as construction of noise barriers and installation of noise control materials.

B1.22 Relocation of buildings (including, but not limited to, trailers and prefabricated buildings) to an already developed area where site utilities and roads are available and demolition and subsequent disposal of buildings and support structures (including, but not limited to, smoke stacks and parking lot surfaces).

B2. Categorical Exclusions Applicable to Safety and Health

B2.1 Modifications of an existing structure to enhance workplace habitability (including, but not limited to: improvements to lighting, radiation shielding, or heating/ventilating/air conditioning and its instrumentation; and noise reduction).

B2.2 Installation of, or improvements to, building and equipment instrumentation (including, but not limited to, remote control panels, remote monitoring capability, alarm and surveillance systems, control systems to provide automatic shutdown, fire detection and protection systems, announcement and emergency warning systems, criticality and radiation monitors and alarms, and safeguards and security equipment).

B2.3 Installation of, or improvements to, equipment for personnel safety and health, including, but not limited to, eye washes, safety showers, radiation monitoring devices, and fumehoods and associated collection and exhaust systems, provided that emissions would not increase.

B2.4 Development and implementation of Equipment Qualification Programs (under DOE Order 5480.6, "Safety of DOE-owned Nuclear Reactors") to augment information on safety-related system components or to improve systems reliability.

B2.5 Safety and environmental improvements of a facility, including replacement and upgrade of facility components, that do not result in a significant change in the expected useful life, design capacity, or function of the facility and during which operations may be suspended and then resumed. Improvements may include, but are not limited to: Replacement/upgrade of control valves, in-core monitoring devices, facility air filtration systems, or substation transformers or capacitors; addition of structural bracing to meet earthquake standards and/or sustain high wind loading; and replacement of aboveground or belowground tanks and related piping if there is no evidence of leakage, based on testing that meets performance requirements in 40 CFR part 280, subpart D (40 CFR part 280.40). This includes activities taken under RCRA, subtitle I; 40 CFR part 265, subpart J; 40 CFR part 280, subparts B, C, and D; and other applicable state, Federal and local requirements for underground storage tanks. These actions do not include rebuilding or modifying substantial portions of a facility, such as replacing a reactor vessel.

B3. Categorical Exclusions Applicable to Site Characterization, Monitoring, and General Research

B3.1 Site characterization and environmental monitoring, including siting, construction, operation, and dismantlement or closing (abandonment) of characterization and monitoring devices and siting, construction, and operation of a small-scale laboratory building or renovation of a room in an existing building for sample analysis. Activities covered include, but are not limited to, site characterization and environmental monitoring under CERCLA and RCRA. Specific activities include, but are not limited to:

(a) Geological, geophysical (such as gravity, magnetic, electrical, seismic, and radar), geochemical, and engineering surveys and mapping, including the establishment of survey marks;

(b) Installation and operation of field instruments, such as stream-gauging stations or flow-measuring devices, telemetry systems, geochemical monitoring tools, and geophysical exploration tools;

(c) Drilling of wells for sampling or monitoring of groundwater or the vadose (unsaturated) zone, well logging, and installation of water-level recording devices in wells;

(d) Aquifer response testing;

(e) Installation and operation of ambient air monitoring equipment;

(f) Sampling and characterization of water, soil, rock, or contaminants;

(g) Sampling and characterization of water effluents, air emissions, or solid waste streams;

(h) Installation and operation of meteorological towers and associated activities, including assessment of potential wind energy resources;

(i) Sampling of flora or fauna; and

(j) Archeological, historic, and cultural resource identification in compliance with 36 CFR part 800 and 43 CFR part 7.

B3.2 Aviation activities for survey, monitoring, or security purposes that comply with Federal Aviation Administration regulations.

B3.3 Research, inventory, and information collection activities that are directly related to the conservation of fish and wildlife resources and that involve only negligible animal mortality, habitat destruction, or population reduction.

B3.4 Drop, puncture, water-immersion, thermal, and fire tests of transport packaging for radioactive or hazardous materials to certify that designs meet the requirements of 49 CFR §§ 173.411 and 173.412 and requirements of severe accident conditions as specified in 10 CFR § 71.73.

B3.5 Tank car tests under 49 CFR part 179 (including, but not limited to, tests of safety relief devices, pressure regulators, and thermal protection systems).

B3.6 Indoor bench-scale research projects and conventional laboratory operations (for example, preparation of chemical standards and sample analysis) within existing laboratory facilities.

B3.7 Siting, construction, and operation of new infill exploratory and experimental (test) oil, gas, and geothermal wells, which are to be drilled in a geological formation that has existing operating wells.

B3.8 Outdoor ecological and other environmental research (including siting, construction, and operation of a small-scale laboratory building or renovation of a room in an existing building for sample analysis) in a small area (generally less than five acres) that would not result in any permanent change to the ecosystem.

B3.9 Demonstration actions proposed under the Clean Coal Technology Demonstration Program, if the actions would not increase the quantity or rate of air emissions. These demonstration actions include, but are not limited to:

(a) Test treatment of 20 percent or less of the throughput product (solid, liquid, or gas) generated at an existing and fully operational coal combustion or coal utilization facility;

(b) Addition or replacement of equipment for reduction or control of sulfur dioxide, oxides of nitrogen, or other regulated substances that requires only minor modification to the existing structures at an existing coal combustion or coal utilization facility for which the existing use remains unchanged; and

(c) Addition or replacement of equipment for reduction or control of sulfur dioxide, oxides of nitrogen, or other regulated substances that involves no permanent change in the quantity or quality of coal being burned or used and involves no permanent change in the capacity factor of the coal combustion or coal utilization facility, other than for demonstration purposes of two years or less in duration.

B3.10 Small-scale research and development projects and small-scale pilot projects conducted (for generally less than two years) to verify a concept before demonstration actions, performed in an existing structure not requiring major modification.

B3.11 Outdoor tests and experiments for the development, quality assurance, or reliability of materials and equipment (including, but not limited to, weapon system components), under controlled conditions that would not involve source, special nuclear, or byproduct materials. Covered activities may include, but are not limited to, burn tests (such as tests of electric cable fire resistance or the combustion characteristics of fuels), impact tests (such as pneumatic ejector tests using earthen embankments or concrete slabs designated and routinely used for that purpose), or drop, puncture, water-immersion, or thermal tests.

B4. Categorical Exclusions Applicable to Power Marketing Administrations and to all of DOE with Regard to Power Resources

B4.1 Establishment and implementation of short-term contracts, marketing plans, policies, annual operating plans, allocation plans, or acquisition of excess power, the terms of any of which do not exceed five years and would not cause changes in the normal operating limits of generating projects, and if transmission would occur over existing transmission systems.

B4.2 Export of electricity over existing transmission lines as provided by section 202(e) of the Federal Power Act.

B4.3 Changes in rates for electric power, power transmission, and other products or services provided by a Power Marketing Administration that are based on a change in revenue requirements that does not exceed the change in the overall price level in the economy (inflation), as measured by the GNP fixed weight price index published by the Department of Commerce, during the period since the last rate adjustment for that product or service or, if the rate change does exceed the change in the GNP fixed weight price index, the rate change would have no potential for affecting the operation of power generation resources.

B4.4 Power marketing services, including storage, load shaping, seasonal exchanges, or

other similar activities if the operations of generating projects would remain within normal operating limits.

B4.5 Temporary adjustments to river operations to accommodate day-to-day river fluctuations, power demand changes, fish and wildlife conservation program requirements, and other external events if the adjustments would occur within the existing operating constraints of the particular hydrosystem operation.

B4.6 Additions or modifications to transmission facilities that would not affect the environment beyond the previously developed facility area, including tower modifications, changing insulators, and replacement of poles, circuit breakers, transformers, and crossarms.

B4.7 Adding fiber optic cable to transmission structures or burying fiber optic cable in existing transmission line rights-of-way.

B4.8 New electricity transmission agreements, and modifications to existing transmission arrangements, to use a transmission facility of one system to transfer power of and for another system, if no new generation projects would be involved and no physical changes in the transmission system would be made beyond the previously developed facility area.

B4.9 Grant or denial of requests for multiple use of a transmission facility rights-of-way, such as grazing permits and crossing agreements, including electric lines, water lines, and drainage culverts.

B4.10 Dismantling and removal of transmission lines and right-of-way abandonment.

B4.11 Construction or modification of substations (including switching stations) with power delivery at 230 kV or below and/or support facilities, that would not involve the construction or relocation of more than 10 miles of transmission lines or the integration of a major new resource.

B4.12 Construction of tap lines (less than 10 miles in length) that are not for the integration of major new sources of generation into a main transmission system.

B4.13 Minor relocations of existing transmission lines (less than 10 miles in length) made to enhance existing environmental and land use conditions. Such actions include relocations to avoid right-of-way encroachments, resolve conflict with property development, accommodate road/highway construction, allow for the construction of facilities such as canals and pipelines, or reduce existing impacts to environmentally sensitive areas.

B5. Categorical Exclusions Applicable to Conservation, Fossil, and Renewable Energy Activities

B5.1 Actions to conserve energy, demonstrate potential energy conservation, and promote energy-efficiency that do not increase the indoor concentrations of potentially harmful substances. These actions may involve financial and technical assistance to individuals (such as builders, owners, consultants, designers), organizations (such as utilities), and state and local governments. Covered actions include, but are not limited to: programmed

lowering of thermostat settings, placement of timers on hot water heaters, installation of solar hot water systems, installation of efficient lighting, improvements in generator efficiency and appliance efficiency ratings, development of energy-efficient manufacturing or industrial practices, and small-scale conservation and renewable energy research and development and pilot projects. The actions could involve building renovations or new structures in commercial, residential, agricultural, or industrial sectors. These actions do not include rulemakings, standard-settings, or proposed DOE legislation.

B5.2 Modifications to oil, gas, and geothermal facility pump and piping configurations, manifolds, metering systems, and other instrumentation that would not change design process flow rates or affect permitted air emissions.

B5.3 Modification (but not expansion) or abandonment (including plugging), which is not part of site closure, of crude oil storage access wells, brine injection wells, or geothermal wells.

B5.4 Repair or replacement of sections of a crude oil, produced water, brine, or geothermal pipeline, if the actions are determined by the Army Corps of Engineers to be within the maintenance provisions of a DOE permit under section 404 of the Clean Water Act.

B5.5 Construction and subsequent operation of short offsite crude oil or geothermal pipeline segments between DOE facilities and existing commercial crude oil transportation, storage, or refining facilities, or geothermal transportation or storage facilities, within a single industrial complex, if the pipeline segments are within existing rights-of-way.

B5.6 Removal of oil and contaminated materials recovered in oil spill cleanup operations in accordance with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) and disposed of in accordance with local contingency plans in accordance with the NCP.

B5.7 Approval of new authorization or amendment of existing authorization to import/export natural gas under section 3 of the Natural Gas Act that does not involve new construction and only requires operational changes, such as an increase in natural gas throughput, change in transportation, or change in storage operations.

B5.8 Approval of new authorization or amendment of existing authorization to import/export natural gas under section 3 of the Natural Gas Act involving a new cogeneration powerplant (as defined in the Powerplant and Industrial Fuel Use Act) within or adjacent to an existing industrial complex and requiring less than 10 miles of new gas pipeline.

B5.9 The grant or denial of any temporary exemption under the Powerplant and Industrial Fuel Use Act of 1978 for any electric powerplant or major fuel-burning installation.

B5.10 The grant or denial of any permanent exemption under the Powerplant and Industrial Fuel Use Act of 1978 of any existing electric powerplant or major fuel-

burning installation, other than an exemption under (1) section 312(c) relating to cogeneration, (2) section 312(1) relating to scheduled equipment outages, (3) section 312(b) relating to certain state or local requirements, and (4) section 312(g) relating to certain intermediate load powerplants.

B5.11 The grant or denial of a permanent exemption from the prohibitions of Title II of the Powerplant and Industrial Fuel Use Act of 1978 for any new electric powerplant or major fuel-burning installation to permit the use of certain fuel mixtures containing natural gas or petroleum.

B5.12 The grant or denial of a permanent exemption from the prohibitions of Title II of the Powerplant and Industrial Fuel Use Act of 1978 for any new peak-load powerplant.

B5.13 The grant or denial of a permanent exemption from the prohibitions of Title II of the Powerplant and Industrial Fuel Use Act of 1978 for any new electric powerplant or major fuel-burning installation to permit operation for emergency purposes only.

B5.14 The grant or denial of a permanent exemption from the prohibitions of Titles II and III of the Powerplant and Industrial Fuel Use Act of 1978 for any new or existing major fuel-burning installation for purposes of meeting scheduled equipment outages not to exceed an average of 28 days per year over a three-year period.

B5.15 The grant or denial of a permanent exemption from the prohibitions of Title II of the Powerplant and Industrial Fuel Use Act of 1978 for any new major fuel-burning installation which, in petitioning for an exemption due to lack of alternate fuel supply at a cost which does not substantially exceed the cost of using imported petroleum, certifies that it will be operated less than 600 hours per year.

B5.16 The grant or denial of a permanent exemption from the prohibitions of Title II of the Powerplant and Industrial Fuel Use Act of 1978 for any new cogeneration powerplant.

B6. Categorical Exclusions Applicable to Environmental Restoration and Waste Management Activities

B6.1 Removal actions under CERCLA (including those taken as final response actions and those taken before remedial action) and removal-type actions similar in scope under RCRA and other authorities (including those taken as partial closure actions and those taken before corrective action), including treatment (e.g., incineration), recovery, storage, or disposal of wastes at existing facilities currently handling the type of waste involved in the removal action. These actions will meet the CERCLA regulatory cost and time limits or satisfy either of the two regulatory exemptions from those cost and time limits (National Contingency Plan, 40 CFR part 300). These actions include, but are not limited to:

(a) Excavation or consolidation of contaminated soils or materials from drainage channels, retention basins, ponds, and spill areas that are not receiving contaminated surface water or wastewater, if surface water or groundwater would not collect and if such actions would reduce the spread of, or direct contact with, the contamination;

(b) Removal of bulk containers (for example, drums, barrels) that contain or may contain hazardous substances, pollutants, contaminants, CERCLA-excluded petroleum or natural gas products, or hazardous wastes (designated in 40 CFR part 261), if such actions would reduce the likelihood of spillage, leakage, fire, explosion, or exposure to humans, animals, or the food chain;

(c) Removal of an underground storage tank including its associated piping and underlying containment systems in compliance with RCRA, subtitle I; 40 CFR part 265, subpart J; and 40 CFR part 280, subparts F and G if such action would reduce the likelihood of spillage, leakage, or the spread of, or direct contact with, contamination;

(d) Repair or replacement of leaking containers;

(e) Capping or other containment of contaminated soils or sludges if the capping or containment would not affect future groundwater remediation and if needed to reduce migration of hazardous substances, pollutants, contaminants, or CERCLA-excluded petroleum and natural gas products into soil, groundwater, surface water, or air;

(f) Drainage or closing of man-made surface impoundments if needed to maintain the integrity of the structures;

(g) Confinement or perimeter protection using dikes, trenches, ditches, or diversions if needed to reduce the spread of, or direct contact with, the contamination;

(h) Stabilization, but not expansion, of berms, dikes, impoundments, or caps if needed to maintain integrity of the structures;

(i) Drainage controls (for example, run-off or run-on diversion) if needed to reduce offsite migration of hazardous substances, pollutants, contaminants, or CERCLA-excluded petroleum or natural gas products or to prevent precipitation or run-off from other sources from entering the release area from other areas;

(j) Segregation of wastes that react with one another to result in adverse environmental impacts;

(k) Use of chemicals and other materials to neutralize the pH of wastes;

(l) Use of chemicals and other materials to retard the spread of the release or to mitigate its effects if the use of such chemicals would reduce the spread of, or direct contact with, the contamination;

(m) Installation and operation of gas ventilation systems in soil to remove methane or petroleum vapors without any toxic or radioactive co-contaminants if appropriate filtration or gas treatment is in place;

(n) Installation of fences, warning signs, or other security or site control precautions if humans or animals have access to the release; and

(o) Provision of an alternative water supply that would not create new water sources if necessary immediately to reduce exposure to contaminated household or industrial use water and continuing until such time as local authorities can satisfy the need for a permanent remedy.

B6.2 The siting, construction, and operation of temporary (generally less than 2 years) pilot-scale waste collection and

treatment facilities, and pilot-scale (generally less than one acre) waste stabilization and containment facilities (including siting, construction, and operation of a small-scale laboratory building or renovation of a room in an existing building for sample analysis) if the action: (1) Supports remedial investigations/feasibility studies under CERCLA, or similar studies under RCRA, such as RCRA facility investigations/corrective measure studies, or other authorities, and (2) would not unduly limit the choice of reasonable remedial alternatives (by permanently altering substantial site area or by committing large amounts of funds relative to the scope of the remedial alternatives).

B6.3 Improvements to environmental monitoring and control systems of an existing building or structure (for example, changes to scrubbers in air quality control systems or ion-exchange devices and other filtration processes in water treatment systems) if during subsequent operations (1) any substance collected by the environmental control systems would be recycled, released, or disposed of within existing permitted facilities and (2) there are applicable statutory or regulatory requirements or permit conditions for disposal, release, or recycling of any hazardous substance or CERCLA-excluded petroleum natural gas products that are collected or released in increased quantity or that were not previously collected or released.

B6.4 Siting, construction (or modification or expansion), operation, and decommissioning of an onsite facility for storing packaged hazardous waste (as designated in 40 CFR part 261) for 90 days or less or for longer periods as provided in 40 CFR part 262.34 (d), (e), or (f) (e.g., accumulation or satellite areas).

B6.5 Siting, construction (or modification or expansion), operation, and decommissioning of an onsite facility for characterizing and sorting previously packaged waste or for overpacking waste, other than high-level radioactive waste or spent nuclear fuel, if operations do not involve unpacking waste. These actions do not include waste storage (covered under C16).

B6.6 Modification (excluding increases in capacity) of an existing structure used for storing, packaging, or repacking waste other than high-level radioactive waste or spent nuclear fuel, to handle the same class of waste as currently handled at that structure.

B6.7 Under the Low-Level Radioactive Waste Policy Amendments Act of 1985 (5(c)(5)), granting of a petition qualified under 10 CFR part 730.6 for allocation of commercial disposal capacity for an unusual or unexpected volume of commercial low-level radioactive waste or denying such a petition when adequate storage capacity exists at the petitioner's facility.

B6.8 Minor operational changes at an existing facility to minimize waste generation and for reuse of materials. These changes include, but are not limited to, adding filtration and recycle piping to allow reuse of machining oil, setting up a sorting area to improve process efficiency, and segregating two waste streams previously mingled and

assigning new identification codes to the two resulting wastes.

B7. Categorical Exclusions Applicable to International Activities

B7.1 Planning and implementation of emergency measures pursuant to the International Energy Program.

B7.2 Approval of import or export of small quantities of special nuclear materials or isotopic materials in accordance with the Nuclear Non-Proliferation Act of 1978 and the "Procedures Established Pursuant to the Nuclear Non Proliferation Act of 1978" (43 FR 25326, June 9, 1978).

Appendix C to Subpart D—Classes of Actions that Normally Require EAs But Not Necessarily EISs

Table of Contents

C1. Major Projects

C2. Rate increases more than inflation, not power marketing

C3. Rate increases more than inflation, power marketing

C4. Upgrading (reconstructing) an existing transmission line

C5. Implementation of Power Marketing Administration systemwide vegetation management program

C6. Implementation of Power Marketing Administration systemwide erosion control program

C7. Allocation of power for five years or longer, no major new generation resource/major new loads/major changes in operation of power generation resources

C8. Protection of fish and wildlife habitat

C9. Field demonstration projects for wetlands

C10. Siting/construction/operation/decommissioning of synchrotron radiation accelerator facility

C11. Siting/construction/operation/decommissioning of particle acceleration facility

C12. Siting/construction/operation of energy system prototypes

C13. Import/export natural gas, minor new construction (other than a cogeneration powerplant)

C14. Siting/construction/operation of water treatment facilities

C15. Siting/construction/operation of research and development incinerators/nonhazardous waste incinerators

C16. Siting/construction/operation of onsite waste storage facilities (not high-level, spent nuclear fuel)

C1 Major Projects, as designated by DOE Order 4240.1, "Designation of Major System Acquisitions and Major Projects."

C2 Rate increases for products or services marketed by DOE, except for electric power, power transmission, and other products or services provided by the Power Marketing Administrations, and approval of rate increases for non-DOE entities, that exceed the change in the overall price level in the economy (inflation), as measured by the GNP fixed weight price index published by the Department of Commerce, during the period since the last rate increase for that product or service.

C3 Rate changes for electric power, power transmission, and other products or

services provided by Power Marketing Administrations that are based on changes in revenue requirements that exceed the change in the overall price level in the economy (inflation), as measured by the GNP fixed weight price index published by the Department of Commerce, during the period since the last rate change for that power or service and have potential for affecting the operation of power generation resources.

C4 Upgrading (reconstructing) an existing transmission line.

C5 Implementation of a Power Marketing Administration system-wide vegetation management program.

C6 Implementation of a Power Marketing Administration system-wide erosion control program.

C7 Establishment and implementation of contracts, policies, marketing plans, or allocation plans for the allocation of power for periods of five years or longer that do not involve (1) the addition of major (greater than 50 average megawatts) new generation resources, (2) service to discrete major (10 average megawatts or more over a 12 month period) new loads, or (3) major changes in the operating parameters of power generation resources.

C8 Protection, restoration, or improvement of fish and wildlife habitat, fish passage facilities, and fish hatcheries if the proposed action may adversely affect an environmentally sensitive resource.

C9 Field demonstration projects for wetlands mitigation, creation, and restoration.

C10 Siting, construction (or major modification), operation, and decommissioning of a synchrotron radiation (light source) accelerator facility (or other electron beam accelerators) and associated particle storage rings and colliders.

C11 Siting, construction (or major modification), operation, and decommissioning of a low- or medium-energy particle acceleration facility and associated particle storage rings and colliders.

C12 Siting, construction, and operation of energy system prototypes including, but not limited to, wind resource, hydropower, geothermal, fossil fuel, biomass, and solar energy pilot projects.

C13 Approval or disapproval of an application to import/export natural gas under section 3 of the Natural Gas Act involving minor new construction (other than a cogeneration powerplant), such as adding new connections, looping, or compression to an existing natural gas pipeline or converting an existing oil pipeline to a natural gas pipeline using the same right-of-way.

C14 Siting, construction (or expansion), and operation of water treatment facilities, including facilities for wastewater, potable water, and sewage.

C15 Siting, construction (or expansion), and operation of research and development incinerators for any type of waste and of any other incinerators that would treat nonhazardous solid waste (as designated in 40 CFR part 261.4(b)).

C16 Siting, construction (including modification to increase capacity), operation, and decommissioning of onsite storage

facilities and/or packaging and unpacking facilities (that may include characterization operations) for all waste other than high-level waste or spent nuclear fuel (except for storage of packaged hazardous waste for 90 days or less or for longer periods as provided for in 40 CFR part 262.34 (d), (e), or (f). (Refer to B6.4; also see B6.5 and B6.6.)

Appendix D to Subpart D—Classes of Actions That Normally Require EISs

Table of Contents

- D1. Major System Acquisitions
- D2. Siting/construction/operation/decommissioning of nuclear fuel reprocessing facilities
- D3. Siting/construction/operation/decommissioning of uranium enrichment facilities
- D4. Siting/construction/operation/decommissioning of reactors
- D5. Main transmission system additions
- D6. Integrating transmission facilities
- D7. Allocation of power for five years or longer, major new generation resources/major loads/major changes in operation of power generation resources
- D8. Import/export of natural gas, involving major new facilities
- D9. Import/export of natural gas, involving significant operational change
- D10. Siting/construction/operation of major high-level waste treatment, storage, disposal facilities
- D11. Siting/construction/expansion of waste disposal facility for transuranic waste

D12. Siting/construction/operation of incinerators (other than research and development, other than nonhazardous solid waste)

D1 Major System Acquisitions, as designated by DOE Order 4240.1, "Designation of Major System Acquisitions and Major Projects."

D2 Siting, construction, operation, and decommissioning of nuclear fuel reprocessing facilities.

D3 Siting, construction, operation, and decommissioning of uranium enrichment facilities.

D4 Siting, construction, operation, and decommissioning of power reactors, nuclear material production reactors, and test and research reactors.

D5 Main transmission system additions (that is, additions of new transmission lines) to a Power Marketing Administration's main transmission grid.

D6 Integrating transmission facilities (that is, transmission system additions for integrating major new sources of generation into a Power Marketing Administration's main grid).

D7 Establishment and implementation of contracts, policies, marketing plans, or allocation plans for periods of five years or longer that involve (1) the addition of major (greater than 50 average megawatts) new generation resources, (2) service to discrete, major (10 average megawatts or more over a 12 month period) new loads, or (3) major

changes in the operating parameters of power generation resources.

D8 Approval or disapproval of an application to import/export natural gas under section 3 of the Natural Gas Act involving major new natural gas pipeline construction or related facilities, such as construction of new liquid natural gas (LNG) terminals, regasification or storage facilities, or a significant expansion of an existing pipeline or related facility or LNG terminal, regasification, or storage facility.

D9 Approval or disapproval of an application to import/export natural gas under section 3 of the Natural Gas Act involving a significant operational change, such as a major increase in the quantity of liquid natural gas imported or exported.

D10 Siting, construction, operation, and decommissioning of major treatment, storage, and/or disposal facilities for high-level waste and/or spent nuclear fuel, such as spent fuel storage facilities and geologic repositories.

D11 Siting, construction (or expansion), and operation of a disposal facility for transuranic (TRU) waste and TRU mixed waste (TRU waste also containing hazardous waste as designated in 40 CFR part 261).

D12 Siting, construction, and operation of incinerators, other than research and development incinerators or incinerators for nonhazardous solid waste (as designated in 40 CFR part 261.4(b)).

[FR Doc. 92-9245 Filed 4-23-92; 8:45 am]

BILLING CODE 6450-01-M

DEPARTMENT OF ENERGY**National Environmental Policy Act Guidelines, Revocation****AGENCY:** Department of Energy.**ACTION:** Notice of Revocation.

SUMMARY: The Department of Energy (DOE) revokes its National Environmental Policy Act (NEPA) Guidelines, as amended, as a technical, conforming change to take effect May 26, 1992 when new regulations codifying a modified version of the NEPA Guidelines take effect. The new regulations are published today in the "Rules" section of the **Federal Register**.

DATES: The revocation of the DOE NEPA Guidelines shall be effective May 26, 1992.

FOR FURTHER INFORMATION CONTACT: Carol M. Borgstrom, Director, Office of NEPA Oversight, EH-25, U.S. Department of Energy, 1000

Independence Avenue SW., Washington, DC 20585, (202) 586-4600 or (800) 472-2756.

SUPPLEMENTARY INFORMATION: DOE originally published its NEPA Guidelines on March 28, 1980, at 45 FR 20694. These Guidelines implemented the procedural provisions of the NEPA as required by the Council on Environmental Quality regulations, 40 CFR parts 1500-1508. The NEPA Guidelines were subsequently revised a number of times and were republished in their entirety on December 15, 1987, at 52 FR 47662. The Guidelines were further amended on March 27, 1989, at 54 FR 12474 and on September 7, 1990, at 55 FR 37174.

On November 2, 1990, DOE proposed to codify a modified version of the Guidelines as regulations, 55 FR 46444. A final rule based on that proposal is published today in the "Rules" section of this **Federal Register** to take effect [insert 30 days from publication]. On

November 15, 1990 (55 FR 47792), DOE proposed to revoke the existing Guidelines in order to terminate their prospective legal effect as of the date that the new regulations take effect. Public comments on the proposed rulemaking and the proposed revocation of the Guidelines were invited through December 17, 1990, and a public hearing was held on December 5, 1990. No comments were received on the proposed revocation of the Guidelines.

Issued in Washington, DC, April 16, 1992.

Paul L. Ziemer,

Assistant Secretary, Environment, Safety and Health.

The DOE NEPA Guidelines, as amended, 52 FR 47662 (December 15, 1987), 54 FR 12474 (March 27, 1989), and 55 FR 37174 (September 7, 1990), are hereby revoked, effective May 26, 1992.

[FR Doc. 92-9246 Filed 4-23-92; 8:45 am]

BILLING CODE 6450-01-M

Attachment IV

Cultural Resources and Historic Preservation Compliance

Attachment IV

Cultural Resources and Historic Preservation Compliance

It is DOE, not SNL, that has the statutory responsibility for protection of cultural resources under its jurisdiction. However, in actual practice, SNL or its contractors carry out many of these responsibilities. For example, official correspondence with the State Historic Preservation Officer (SHPO) is carried out by DOE with input from SNL or its contractors. The precise roles of DOE and SNL (e.g., who makes which contacts with the SHPO) may vary among the different SNL facility locations. [For example, at SNL/New Mexico, the DOE Kirtland Area Office (DOE-KAO) acts as the official contact from federal agency to state agency.] In all cases, SNL is acting for DOE. As a representative of the federal "lead" agency, SNL is responsible for protecting prehistoric and historic resources that may be disturbed by construction or operations activities (including waste cleanup). There are several procedures which SNL, acting for DOE, may be required to follow in order to comply with various federal laws, regulations, and executive orders.

Inventory of Cultural Resources. In order to comply with Executive Order 11593, Protection and Enhancement of the Cultural Environment, federal agencies must provide leadership in preserving, restoring, and maintaining the historic and cultural environment of the nation. In order to ensure the preservation of both prehistoric and historic properties, DOE must locate and inventory all properties under its control. SNL has the responsibility for this task at its facilities.

This is initially accomplished by a literature search at either the Office of the SHPO, the Office of the State Archaeologist, or the appropriate repository (museum) for statewide records (see Table IV-1). If the area in question has not been inventoried, SNL may elect to have qualified archeologists perform a pedestrian survey. This survey can be either (1) a 100 percent coverage of the entire area, or (2) an initial reconnaissance and 100-percent survey of selected areas of known high usage, prospective high usage, and/or areas where cultural resources are likely to occur (e.g., locations of known cultural remains or along water courses). The reconnaissance is combined with a computer modeling program to aid in the prediction of site locations based on environmental variables.

Table IV-1
State Offices and Records Repositories

State	Office
California	Office of Historic Preservation ^a Sacramento, California
Hawaii	State Historic Preservation Officer ^a Department of Land and Natural Resources Honolulu, Hawaii
Nevada	State Historic Preservation Office ^a Capitol Complex Carson City, Nevada or Nevada State Museum Capitol Complex Carson City, Nevada or Environmental Resource Center University of Nevada at Las Vegas Las Vegas, Nevada
New Mexico	Historic Preservation Division ^a Santa Fe, New Mexico or Laboratory of Anthropology Museum of New Mexico Santa Fe, New Mexico

^a Office of State Historic Preservation Officer

After SNL locates and conducts an inventory of prehistoric archeological, historic archeological, and historic properties, DOE is required to nominate to the National Register of Historic Places (National Register or NRHP) all properties under its control that meet the criteria for nomination. These criteria are the National Register's standards for evaluating the significance of properties. The criteria are designed to guide states, federal agencies, the Secretary of the Interior, and others, such as contractors and private organizations, in evaluating potential entries (other than areas of the National Park System and National Historic Landmarks) for the National Register (see 36 CFR Part 60).

Preservation Procedure. Under Section 106 of the National Historic Preservation Act of 1966 (NHPA) (16 U.S.C. §470 *et seq.*), federal agencies are required to preserve and protect historic and cultural properties through a regulated process. This process, known as the "Section 106 process," is to be followed whenever DOE proposes a project or an action which involves land surface or subsurface disturbance activities which would affect cultural

resources. In such a case, DOE is responsible for initiating compliance with the NHPA. To start the process, DOE must consult with the SHPO of the state in which the action is proposed. (Consultation with the SHPO is the prerogative of DOE but usually SNL takes the initiative.) If judged necessary by SNL, DOE, or the SHPO, the Advisory Council on Historic Preservation (the Advisory Council or ACHP) in Washington, D.C. should also be contacted.

Under Advisory Council regulations in 36 CFR §60.4, the "significance" of a property in American history, architecture, archeology, engineering, and culture can be manifested in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association, and:

- a. are associated with events that have made a significant contribution to the broad patterns of U.S. history; or
- b. are associated with the lives of persons significant in U.S. past; or
- c. embody the distinctive characteristics of a type, period, or method of construction; or that represent the work of a master; or that possess high artistic values; or that represent a significant and distinguishable entity whose components may lack individual distinction; or
- d. have yielded, or may be likely to yield, information important in prehistory or history.

The property must meet one or more of the criteria in the list above to qualify for listing in the National Register. Guidance documents are available from Interagency Archaeological Services at the National Park Service (NPS), Department of the Interior (DOI), detailing how to determine the significance of a property and how to apply the National Register criteria for evaluation.

To further comply with Executive Order 11593, SNL must take steps to ensure that cultural resources are not inadvertently damaged, destroyed, or transferred before the completion of inventories and evaluation for the National Register. Such steps might involve the 100 percent pedestrian survey to identify locations or the partial survey and computer predictive modeling previously mentioned.

(As the official list of properties significant in American history, architecture, archeology, engineering, and culture, the National Register was designed to be used by the general public,

local communities, state governments, and federal agencies in their preservation planning efforts. Properties listed in the National Register receive a limited form of protection and certain benefits. For information concerning the effects of listing, SNL should contact the National Register Division, NPS, or the appropriate SHPO.)

SNL Line Organization managers and others who have responsibility for initiating the NEPA process should contact the SNL/NM Risk Management and NEPA Department (7258) or the SNL/CA Environmental Operations Department (8644) for guidance on complying with the NHPA Section 106 process. The Section 106 process consists of the following five basic steps:

Step 1: Identify and Evaluate Historic Properties. There are two parts to this step. First, as the representative for DOE, SNL must review all of the available information that could help in determining whether there may be prehistoric or historic properties in the area of the proposed activity. The sources of information are the site files, maps, and reports at the Office of the State Archaeologist or the Office of Historic Preservation (or its equivalent) or the state repository (e.g., museum) (see Table D-1). If the lands involved are managed by the Bureau of Land Management (BLM), the U.S. Forest Service (USFS), the Department of Defense (DoD), or some other federal or state agency, files at these agencies should be reviewed. Based on this review, SNL must decide whether any additional survey work is needed to locate possible prehistoric and historic properties. If no historic properties are found, DOE simply provides documentation of this to the SHPO, and compliance with the Section 106 process has been achieved.

Second, SNL must identify all properties listed in the National Register that might be affected by the proposed activity. SNL must also identify properties not actually listed in the National Register but which appear to meet eligibility criteria. (See criteria a through d above.) Following this step, DOE (with input from SNL) and the SHPO, together, must apply the National Register criteria to decide whether the properties are eligible for listing and, thus, subject to the Section 106 process.

Step 2: Assess Effects. Once properties have been identified and found to meet National Register criteria, DOE must determine whether its proposed activity will affect them in any way. Again, DOE must work with the SHPO, making judgments based on criteria found in the Advisory Council's regulations in 36 CFR Part 800. There are three possible findings:

- No effect: If there will be no effect of any kind on the historic properties, DOE will notify the SHPO and interested parties of its determination of no effect. If the SHPO does not object, DOE can proceed with the project.
- No adverse effect: If there could be an effect, but the effect would not be harmful to the historic properties, DOE must obtain SHPO concurrence and submit to the Advisory Council a determination of no adverse effect. DOE can submit its own determination of no adverse effect directly to the Advisory Council for review and notify the SHPO of its determination. There is no adverse effect if:
 - The property is not a National Historic Landmark, a National Historic Site in non-federal ownership, or a property of national historical significance so designated within the National Park System.
 - The SHPO has determined that in-place preservation of the property is not necessary to fulfill purposes set forth in the State Historic Preservation Plan.
 - The SHPO, DOE, and SNL agree that:
 - a. the property (including properties that are subsidiary elements in a larger property of national significance) has minimal value as an exhibit in place for public understanding and enjoyment.
 - b. above and beyond its scientific value, the property is not known to have historic or cultural significance to a community, ethnic, or social group that would be impaired by the retrieval of data.
 - c. currently available technology is such that the significant information contained in the property can be retrieved.
 - Funds and time have been committed to adequately retrieve the data.

DOE (with SNL assistance) can also issue a determination of no adverse effect when a data recovery program (i.e., data collection or excavation) is implemented to mitigate any adverse effects. Unless the Advisory Council objects, DOE can then proceed with its project or activity.

- Adverse effect: If there could be a harmful effect to a historic property, DOE must begin the consultation process described below.

Step 3: Consultation. During this step, an effort must be made to find acceptable ways to reduce the harm ("avoid or mitigate the adverse effect") to the prehistoric or historic properties. The consulting parties would be SNL, DOE, and the SHPO; Advisory Council involvement in consultation is optional. Other interested parties (such as a local government,

Indian tribe, or non-DOE federal applicant for a grant, license, or permit on DOE lands) may also be invited to join the consultation. Some of these parties must be invited under certain circumstances.

With direction from DOE, SNL must gather needed documentation, inform the public that consultation is underway, and work with the consulting parties to find a solution. When the consulting parties have agreed on steps to avoid or reduce harm to affected properties, they enter into a Memorandum of Agreement (MOA). (Such steps might include relocation of the project, relocation of historic structures, excavation of prehistoric or historic sites, retrieval of data, or other mitigative measures.)

If the consulting parties cannot agree on a solution, the consultation is terminated. In such a rare case, DOE with SNL's assistance may submit documentation to the Advisory Council and request written comments.

Step 4: Council Comment. Unless the Advisory Council has already signed the MOA (by virtue of being a consulting party), DOE or SNL must submit the signed MOA to the Advisory Council for review. The Advisory Council can accept the MOA, request changes to it, or elect to issue written comments on the proposed activity. If the consulting parties have terminated consultation, the Advisory Council will issue written comments about the proposed agency action directly to the Secretary of Energy.

Step 5: Proceed. If the Section 106 review process has resulted in an Advisory Council-accepted MOA, DOE can proceed with its proposed activity according to the terms of the MOA. Absent an MOA, DOE and SNL must take into account the Advisory Council's written comments, after which DOE and SNL can make the final decision about how (or whether) to proceed with its proposed activity. The decision to proceed with a proposed undertaking absent an MOA must be made by the Secretary of Energy; it cannot be delegated. DOE must notify the Advisory Council of its decision. Either outcome will conclude the Section 106 review process and satisfy DOE's statutory responsibilities under Section 106 of the NHPA.

Federal Actions/Responsibilities. The Archeological and Historic Preservation Act of 1974 (AHPA) [16 U.S.C. §§469(a)-(c)] directs federal agencies to notify the Secretary of Interior when they find that any federal construction project or licensed activity may cause irreparable loss or destruction of significant scientific, prehistoric, historical, or archeological

data. If a construction project (excavation, road building, etc.) being undertaken by SNL uncovers any historic or prehistoric sites or artifacts, construction activities must cease. A qualified archeologist must be called in to assess the items and to make recommendations as to their significance. If the properties appear to be significant, the SHPO or Office of the State Archaeologist SHPO must be notified as the first step toward notification of the Secretary of the Interior.

In an area where cultural resources are likely to occur, a monitoring program can be implemented during construction activities. In this situation, a qualified archeologist accompanies the construction crew during ground disturbance. This allows SNL to expedite construction activities while assuring compliance with the AHPA.

SNL activities could affect cultural resources located on land managed by other federal or state agencies, e.g., the Department of the Air Force. The Archaeological Resources Protection Act of 1979 (ARPA) [16 U.S.C. §§470(a)-(t)] authorizes agency permit procedures for investigations on lands managed by the DOI, Department of Agriculture, and DoD only. For cultural resources projects on BLM land, permits must be obtained under either the Federal Land Policy and Management Act (FLPMA) or ARPA, depending on the extent of the investigations planned. For projects under USFS (Department of Agriculture) control, a special use permit or an ARPA permit must be obtained. The DoD uses ARPA permits for lands under its control, such as Kirtland Air Force Base (KAFB). Many states issue permits for cultural resources investigations on state lands. Some Native American peoples require permits for investigations on American Indian tribal lands. The appropriate tribal leaders should be contacted by SNL prior to any work on Indian or Native Hawaiian lands.

DOE does not currently maintain a permitting process for cultural resources projects on land under DOE control. SNL can implement a permit process through the NPS's Interagency Archaeological Services. ARPA prohibits the removal (i.e., excavation or collection) sale, receipt, and interstate transportation of archeological resources obtained from public or Indian lands without a permit. Should SNL work through the Interagency Archaeological Services for permitting of projects, SNL and its agents (contractors) would be subject to the ARPA prohibitions.

A further procedural consideration in SNL management of cultural resources is the American Indian Religious Freedom Act of 1978 (AIRFA) (42 U.S.C. §1996). AIRFA protects the rights of Native Americans (American Indians, Eskimos, Aleuts, and Native Hawaiians) to

have access to sites, use and possess sacred objects, and worship through ceremony and traditional rites. Under AIRFA regulations, DOE must consult with local tribal leadership whenever a project may impact culturally sensitive properties such as ceremonial, religious, or burial sites. SNL, through DOE, must contact the appropriate tribal leaders or council in writing with information concerning the specific type and location of the proposed project. The tribal leadership has 30 days within which to respond with appropriate concerns.

The Native American Graves Protection and Repatriation Act (NAGPRA) (25 U.S.C. §3001 *et seq.*) provides for the protection of Native American (including Native Hawaiian) graves, human remains, and funerary objects. Intentional excavation and removal of Native American human remains and objects from tribal or federal lands can be conducted only after consultation with the appropriate (if any) Indian tribal or Native Hawaiian organization. In the event of inadvertent discovery of Native American remains and objects (e.g., during construction) on federal or tribal lands, the head of the federal agency having management authority over the federal lands must be notified in writing. Activity in the area of the discovery must cease and a reasonable effort must be made to protect the items discovered before activity is resumed. Following notification of the appropriate agency (or tribal or Native Hawaiian organization for tribal lands) and subsequent certification from the secretary of the agency that notification has been received, activity in the area may resume 30 days after the receipt of such certification.

Attachment V

Threatened/Endangered Species Consultation

Attachment V

Threatened/Endangered Species Consultation

The Endangered Species Act (ESA) (16 U.S.C. §1531 *et seq.*) applies to both private individuals and government agencies. Section 9 of the Act makes it illegal for *any person* to "take" any endangered species of fish or wildlife. "Take" means to harass, harm, pursue, shoot, hurt, kill, capture, or collect and includes interfering with habitat. Section 7 applies only to federal agencies which must ensure that any action authorized, funded, or carried out by them will not *jeopardize* the continued existence of a threatened or endangered (T/E) species or result in adverse modification of its habitat.

The following discussion focuses on the responsibility of federal agencies (e.g., DOE) with respect to ESA implementation. Normally, these requirements will be adhered to by SNL, acting for DOE, or an SNL contractor.

Federal. All federal agencies must comply with the ESA planning federal actions or "major construction activities." The purpose of the ESA is to designate and protect wildlife, fish, and plant species which are in danger of becoming extinct and to conserve habitat which is critical to their survival. The Act defines "endangered species" as any species which is in danger of extinction throughout all or a significant portion of its range. The term "threatened species" means any species which is likely to become endangered within the foreseeable future. "Critical habitat" is defined as: (1) the specific area, within the geographic area occupied by a listed species, in which features essential to the conservation of the species or requiring special management or protection are found, or (2) specific areas outside of the geographic area of a listed species which are essential to the conservation of the species.

The ESA is administered by the U.S. Fish and Wildlife Services (USFWS) within the Department of the Interior (DOE). For marine species, it is administered by the National Marine Fisheries Service within the Department of Commerce. The "listing" of T/E species is contained in 50 CFR Part 17.

Under Section 7 of the ESA, DOE must follow one of several steps in the compliance and consultation process, known as the "Section 7 process."

Step 1: Notification. DOE must inform the USFWS, Fish and Wildlife Enhancement, of the location or the area of influence of the proposed action. Information must be obtained concerning listed or proposed endangered or threatened wildlife, fish, and plant species or "critical habitat" (that habitat in which a listed species occurs for special recognition and management) in the area. This step is known as the *early* or *informal consultation* process. If it is determined that there are no listed or proposed endangered or threatened species or any critical habitat present in the area of the proposed project, SNL, through DOE, should seek written concurrence from the USFWS. This concurrence completes compliance with Section 7. (Note: Early consultation must be conducted prior to the filing of a federal permit or license application.)

Step 2: Biological Assessment. If it is determined that there is a likelihood of the presence of a listed or proposed species or habitat within the proposed project area, DOE must prepare a *biological assessment* to analyze how the project "may affect" listed or proposed endangered species, threatened species, or critical habitat. This is accomplished through: (1) literature searches at such agencies as DOE, SNL, the Bureau of Land Management (BLM), the U.S. Forest Service (USFS), the U.S. Air Force, the U.S. Navy, and others (depending on the land ownership); local museums, universities, and herbariums; and/or (2) field studies (a biological survey). The USFWS will review the assessment and issue a *preliminary biological opinion* concerning the potential impacts to species or habitat. The USFWS has 30 days within which to reply to the biological assessment with its preliminary biological opinion. If DOE and the USFWS agree that there will be no adverse effect on species or habitat, the informal consultation process ends and compliance with Section 7 is complete.

Step 3: Formal Consultation. In selected cases, the USFWS may decide that *formal consultation* is necessary. Or, as an option during the informal consultation or biological assessment, DOE may request review and/or concurrence by the USFWS. The reply to the request for formal consultation must come from the USFWS within 90 days. Formal consultation occurs when an adverse effect on species or habitat is anticipated. This step will result in a formal, written *biological opinion* containing a "jeopardy" or "no jeopardy" decision by the USFWS as to the fate of endangered species within the project area or other affected areas. The formal consultation is ended if the USFWS makes a "no jeopardy" decision. If it makes a "jeopardy" decision, the USFWS will reply with a list of recommendations for reasonable alternatives, if any. At this point, formal consultation ends and SNL and DOE have the option of abandoning the proposed action or incorporating the

USFWS' recommendations concerning reasonable alternatives into the planning stages of the project.

DOE can also submit an application to the Secretary of the Interior requesting an exemption for the proposed action. An independent Review Board reviews the positions of DOE and the USFWS. The Review Board issues its recommendation to an Endangered Species Committee, which votes on the exemption question. If the exemption is granted, the Secretary of the Interior decides whether the species in question will become extinct and whether the exemption should be upheld.

The following table lists the appropriate USFWS regional and endangered species offices for each of the SNL facilities:

U.S. Fish and Wildlife Service Offices

Facility	Regional Office	Fish and Wildlife Enhancement Field Office
Lawrence Livermore National Laboratory, California	Region 1 Portland, Oregon	Sacramento Field Office Sacramento, California
Kauai Test Facility, Hawaii	Region 1 Portland, Oregon	Pacific Islands Office Honolulu, Hawaii
Tonopah Test Range, Nevada	Region 1 Portland, Oregon	Reno Field Office Reno, Nevada
Sandia National Laboratories, Albuquerque, New Mexico	Region 2 Albuquerque, New Mexico	Albuquerque Field Office Albuquerque, New Mexico

State. Individual states also have procedures which must be followed in order to comply with federal and state regulations concerning threatened and endangered species. When an action is planned that might affect endangered animal or plant species, the appropriate state agency must be contacted. The agency will provide the current state list of threatened, endangered, or "sensitive" species and the state requirements for compliance with any state wildlife or plant conservation statutes.

The term "sensitive species" has a much broader connotation for NEPA compliance purposes than "threatened or endangered." It includes federally listed and state-listed T/E species (states usually add species to the federal list), candidate species for listing, species listed by other federal agencies (e.g., the USFWS), and species perceived by the public as "sensitive" (e.g., "big game" species or species with recreational appeal). Many private organizations

(e.g., The Nature Conservancy and California Native Plant Society) also identify and record species needing protection that are on neither a federal nor a state list. See Guide Section 5.6 for discussion of the "biodiversity" issue.

Using the material provided by the state agencies and/or field studies, SNL (for DOE) must determine the species that might be affected within the proposed project area. The state may require that a list of endangered animal and plant species be developed and the potential impacts assessed.

The following table lists the appropriate state agencies, laws, and regulations of the host state for each of the SNL facilities:

Applicable State Agencies and Requirements

State	Agencies	Statutes/Regulations
California	Resource Agency, Fish and Game Commission	Wildlife Conservation Law of 1947, California Administrative Code, Fish and Game Code, Divisions 2, 3, 4, and 5
Hawaii	Department of Land and Natural Resources	Conservation of Aquatic Life, Wildlife, and Land Plants, HRS 12, Chapters 91 and 195D; State Conservation District Use Law, DLNR Rule No. 4
Nevada	Department of Wildlife; Department of Conservation and Natural Resources	Protection and Propagation of Native Fauna, NRS 45, Chapter 503.584-589; Forestry, Forest Products and Flora, NRS 45, Chapters 527-528
New Mexico	Department of Game and Fish; Energy, Minerals and Natural Resources Department, Forestry Division	Wildlife Conservation Act, §19-2-17 <i>et seq.</i> NMSA, §76-6-1 NMSA, §17-2-41 NMSA, §§9-10-5 and 9-10-10 NMSA

Distribution:

2	U.S. Department of Energy Albuquerque Field Office P.O. Box 5400 Albuquerque, New Mexico 87185 Attn: C.L. Soden, EPD, AI
2	MS 0184 U.S. Department of Energy Kirtland Area Office Albuquerque, New Mexico 87185 Attn: G.K. Laskar S.L. Lacy
15	Hansen Environmental Roger Hansen 6439 B South Havana Englewood, Colorado 80111-5618
1	MS 0112 G. Smit, 10601
1	MS 0141 E. Krauss, 11300
1	MS 0318 A. Davis, 12000
1	MS 0360 M. Zanner, 1000
1	MS 0517 B. Campbell-Domme, 2001
1	MS 0522 R. Welberry, 14000
1	MS 0622 C. Harrison, 13000
1	MS 0653 E. Glassman, 3524
1	MS 0724 S. Weissman, 6000
1	MS 1005 J. Henderson, 3538
1	MS 1045 M. Semonisck, 7732
1	MS 1065 T. Lovato, 7254
1	MS 1067 G. Chavez, 7002
1	MS 1307 F. Vigil, 7572
1	MS 9041 D.W. Putz, 8609
1	MS 0121 S. Silver, 10402
1	MS 0125 S. Baker, 12840
1	MS 0129 S. Homer, 12600
1	MS 0169 J. Calderon, 10506
1	MS 0183 M. Coy, 7600
1	MS 0205 L.P. Baca 10205
1	MS 0321 A. Vasey, 1400
1	MS 0362 R. Bickerstaff, 2101
1	MS 0326 G. MacCosbe, 2513
1	MS 0335 W. Davis, 1100
1	MS 0339 R. Fisher, 1800
1	MS 0421 S. Mackel, 4101
1	MS 0435 E. James, 5101
1	MS 0449 T. McMullen, 9401

1	MS 0461	E. Scott-Patterson, 5502
1	MS 0516	W. Vine, 2500
1	MS 0535	T. Donham, 23&2600
1	MS 0557	G. West, 2701
1	MS 0620	L. Milligan, 12700
1	MS 0630	C. Stocks, 13400
1	MS 0631	R. Vigil, 12300
1	MS 0643	C. Stayner, 5513
1	MS 0654	J. Davenport, 9000
1	MS 0701	J. Reinehart, 6100
1	MS 0702	W. Stomp, 6200
1	MS 0736	W. Johnson, 6400
1	MS 0726	L. Martin, 6600
1	MS 0729	N. Finley, 6300/6900
1	MS 0706	J.K. Linn, 6113
1	MS 0762	W. Norton, 5807
1	MS 0661	C. Jones, 13000
1	MS 0801	T. Garcia, 13901
1	MS 0841	K. Guidotti, 1500
1	MS 0861	L. Salgado, 9121
1	MS 0843	D. Dunbar, 5901
1	MS 0937	D. Campbell, 7915
1	MS 0960	J. Vaughan, 2400/2900
1	MS 0942	C. Meincke, 7913
1	MS 0967	A. Stemm, 9213
1	MS 1018	K. Sanderville, 9213
1	MS 1035	J. Baremore, 7200
1	MS 1035	C. Northrup, 7200
1	MS 1037	A. Bendure, 7258
1	MS 1054	D. Trujillo, 7700
1	MS 1084	S. Douglas, 1323
1	MS 1087	C. Jackson, 3612
1	MS 1098	R. Corley, 13202
1	MS 1114	L.P. Baca, 7402
1	MS 1170	G. Zawadzkas, 9302
1	MS 1072	C. Phelps, 2273
1	MS 1143	L. King, 6500
1	MS 1192	M. Harris, 1236
1	MS 1315	B.M. Schwartz, 7500
1	MS 1367	J. Chamberlin, 10104
1	MS 1369	K. Pound, 12900
1	MS 1375	D. Dahlgren, 14400
1	MS 1380	D. Lambert, 4200
1	MS 1395	C. Mewhinney, 6700
1	MS 9005	C. Schafer, 5300/8100
1	MS 9054	J.M. Michael, 8300
1	MS 9222	T.Larson, 8644
1	MS 9222	L. Peeters Gardizi, 8644
1	MS 9404	T. Gardner, 8700

1	MS 9405	G. Christensen, 8701
1	MS 9901	D. Mohrman, 85/86/8800
1	MS 1307	J. Halpern, 7572
1	MS 1033	A. Sattler, 6111
1	MS 1067	M. L. Jones, 7000
1	MS 0720	C. Massey, 6626
1	MS 9018	Central Technical Files, 8523-2
5	MS 0899	Technical Library, 13414
1	MS 0619	Print Media, 12615
2	MS 0100	Document Processing for DOE/OSTI, 7613-2
1	MS 1037	T. Cohen, 7258
1	MS 1037	J. Guerrero, 7258
1	MS 1037	J. Harris, 7258
1	MS 1037	F. March, 7258
3	MS 1037	D. Nargelovic, 7258
1	MS 1037	S. Walker, 7258
10	MS 1037	T.A. Wolff, 7258
1	MS 1037	NEPA Records Center, 7258