

# LESSONS LEARNED

March 3, 1997

For First Quarter FY 1997

## CEQ Study: NEPA a "Success" Overall

-- Improved Implementation Needed --  
 -- DOE Leadership Highlighted --

The President's Council on Environmental Quality (CEQ) issued in January the results of its extensive study on the effectiveness of the National Environmental Policy Act during the statute's 25-year history. From the cover letter by CEQ Chair Kathleen McGinty to its four short appendices, the 50-page booklet entitled *The National Environmental Policy Act—A Study of Its Effectiveness After Twenty-five Years*, provides commentary on the origin, history of implementation, and possible future of the nation's central environmental statute. "Overall, what we found is that NEPA is a success—it has made agencies take a hard look at the potential environmental consequences of their actions,

and it has brought the public into the agency decision making process like no other statute," according to Ms. McGinty. On the other hand, CEQ found that "NEPA's implementation at times has fallen short of its goals." In the course of the discussion, exemplary uses of the NEPA process are set out in a dozen case studies involving various agencies, including DOE.

### Council on Environmental Quality NEPA Effectiveness Study Partners



By involving a wide gamut of participants—from the original framers of NEPA and drafters of the CEQ regulations to Federal practitioners, state agencies, attorneys, academicians, businesses, and other stakeholders (11 "cluster groups" in all)—the study "sought to distinguish NEPA's strengths" while, at the same time, it "focussed more effort on identifying limitations to the effective and efficient implementation of the Act."

According to CEQ's report, "NEPA's most enduring legacy is as a framework for collaboration between Federal agencies and those who will bear  
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# CEQ Effectiveness Study (continued)

the environmental, social, and economic impacts of agency decisions." Indisputably, the Act forever changed the way the government makes decisions potentially affecting the environment.

CEQ's report frankly acknowledges areas in which NEPA implementation needs improvement:

**(F)requently NEPA takes too long and costs too much, agencies make decisions before hearing from the public, documents are too long and technical for many people to use, and training for agency officials, particularly senior leadership, is inadequate. According to many Federal agency NEPA liaisons, the EIS process is still frequently viewed as merely a compliance requirement rather than as a tool to effect better decision-making. Because of this, millions of dollars, years of time, and tons of paper have been spent on documents that have little effect on decision making.**

CEQ's report is presented in terms of five "elements" of the NEPA process that were found to be critical to its

success. The first element, **strategic planning**, is the extent to which agencies integrate NEPA's framework for collaboration into their internal planning processes at an early stage. The report refers to strategic planning as "an unfilled promise" because the NEPA process is often begun too late to be fully effective, and stresses that agency decision makers need to embrace the benefits of NEPA in early planning.

DOE was cited as exemplary of strategic planning because agency leadership "viewed NEPA as a tool for policy leaders and top managers in decision making—not a routine activity for environmental technicians." As an example, the report describes the efforts of Secretaries Watkins and O'Leary to reinvigorate, streamline, and open up the DOE NEPA process as the Department was undergoing a major transition in its mission. The report noted that DOE received the Third Annual Federal Environmental Quality Award for the best agency NEPA program, given jointly by CEQ and the National Association of Environmental Professionals.

A second critical element, **public information and input**—"the extent to which an agency takes into account the views of the surrounding community and other interested members of the public during its planning and decision making process"—was a "critical innovation" of NEPA that "opened Federal decision making processes." According to the report, "this open process has improved the effectiveness of project design and implementation." Nevertheless, citizens sometimes feel frustrated that their concerns may not have been heard, or that they are being treated as adversaries rather than welcome participants.

With this in mind, CEQ expressed concern that as agencies rely more heavily on environmental assessments (EA), public involvement will be diminished. CEQ estimates that since it issued its NEPA regulations, agencies prepare significantly more EAs (currently about 50,000 per year) and fewer draft and final environmental impact statements (EIS) (from 2000 per year earlier to about 500 currently). Another significant trend, CEQ noted, is the increasing use of "mitigated FONSI." That is, when agencies discover significant impacts that would require preparation of an EIS, they propose measures to mitigate the effects and issue findings of no significant impact.

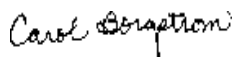
"The EA has evolved to the point where it is the predominant way agencies conduct NEPA analyses...(w)hen agencies do not seek interagency and

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## Inside *LESSONS LEARNED*

Welcome again to the Quarterly Report on Lessons Learned in the NEPA process. This report includes:

- Public Participation in the EA Process, Stockpile Stewardship PEIS ROD signing, Coordination with CP, EPA Rating System, a DOE EA Quality Review, and the NEPA Website - Pages 4-10
- Litigation Updates, Misuse of DOE NEPA Process Data, Administrative Record, and Qs&As - Pages 11-13
- First Quarter FY 1997 Lessons Learned Questionnaire Results, including EIS and EA Cost and Time reports - Pages 14-18.



Director  
Office of NEPA Policy and Assistance

# CEQ Effectiveness Study (continued)

public review of an EA, a fundamental opportunity is lost to build trust with the neighboring community," CEQ wrote. "The preparation of an EA, rather than an EIS, is the most common source of conflict and litigation under NEPA," CEQ noted. On the other hand, CEQ stated that EAs "are a promising tool for maintaining public involvement while streamlining the [NEPA] process." For these reasons, CEQ encouraged agencies to be more creative in their EA outreach, and recognized DOE as one of three agencies that provide for public involvement in the EA process (see related article on page 4).

The report suggested that **interagency coordination**—"how well and how early agencies share information and integrate planning responsibilities with other agencies"—has provided "an opportunity for streamlining" environmental review processes. Through scoping and tiering, concurrent preparation of environmental studies and documents, and combined public participation activities, the NEPA process can be used to integrate multiple statutory requirements.

**"Interdisciplinary place-based approach to decision making"** focuses "the knowledge and values from a variety of sources on the decision making needs of a specific place." This approach, advocated in the CEQ report, seeks to improve Federal decision making by integrating the efforts of local, state, and Federal agencies in multi-agency NEPA analyses united by commonality of place, region, or ecosystem. The key to implementing an interdisciplinary place-based approach lies in obtaining adequate environmental baseline data, such as that used in geographic information systems, and the tools to effectively analyze the data: "What is often lacking in EISs is not raw data, but meaning—i.e., a comparison of the potential impacts of choosing particular alternatives at particular locations expressed in clear, concise language."

The fifth critical element, **"monitoring and adaptive environmental management"** through **"science-based and flexible management approaches"** is the "challenge for the future." In the words of the report, the old paradigm of "predict, mitigate, implement" is being replaced by a new paradigm of "predict, mitigate, implement, monitor, and adapt." Adaptive environmental management, the iterative process of adjusting management actions in light of new information (some of which may be derived from project monitoring), allows agencies to deal with the uncertainties of environmental impact prediction by giving them the flexibility to make mid-course corrections.

Overall, the CEQ report offers a positive, multi-faceted, and insightful commentary on 25 years of NEPA policy and practice. As the report points out, the drafters of NEPA showed great foresight in anticipating issues such as sustainable development, government accountability, and enhanced involvement and responsibility for local communities. Similarly, after reading the report, readers may well agree with Kathleen McGinty that "NEPA is a tool with tremendous potential to help build community and to strengthen our democracy."

## The Future for NEPA

Following from this effectiveness study, CEQ plans to launch a "major effort" to improve the implementation of NEPA and "reinvent the NEPA process." Over the next several years, CEQ will be proposing specific actions to strengthen the five elements that were crucial to NEPA's effectiveness during its first 25 years: strategic planning, public information and input, interagency coordination, interdisciplinary and place-based decision-making, and science-based and flexible management approaches.

Copies of the CEQ effectiveness study are available from CEQ at (202) 395-5754. The Office of NEPA Policy and Assistance will distribute copies of the report to NEPA Compliance Officers. [L](#)

## CEQ Issues Final Handbook:

### "Considering Cumulative Effects Under the National Environmental Policy Act"

Issued in late February 1997, the CEQ Handbook outlines principles and provides information on methods of cumulative effects analysis and data sources. CEQ stated that the recommendations in the Handbook do not establish new requirements, are not formal CEQ guidance, and are not intended to be legally binding.

The final Handbook does not differ substantially from the draft, which was issued in September 1996 and discussed in the December 2, 1996 edition of the Lessons Learned Quarterly Report (page 3). The Office of NEPA Policy and Assistance will distribute copies of the Handbook to NEPA Compliance Officers. Copies also may be obtained directly from CEQ at (202) 395-5754.

# DOE Sites Enhancing EA Public Participation Efforts



DOE increasingly has recognized the importance of providing opportunities for public participation in the environmental assessment (EA) process, and through several administrations has enhanced its provisions for such opportunities. In 1990 DOE started providing affected states and tribes a notice of DOE's intent to prepare EAs and an opportunity to review EAs before approval. Enhanced public involvement was prominent in the Secretarial NEPA Policy Statement issued in June 1994. In its recently-issued NEPA Effectiveness Study (see related article, page 1), the Council on Environmental Quality (CEQ) recognized DOE's leadership in opening up its NEPA process, including providing for enhanced public participation for EAs.

DOE's NEPA Compliance Order 451.1 directs NEPA Document Managers to "encourage and facilitate public participation through the NEPA process." To assist them, the Office of NEPA Policy and Assistance issued guidance on enhanced public participation: [Effective Public Participation under the National Environmental Policy Act](#) ("the Gold Book"), December 1994. DOE program and field offices have made substantial progress implementing the guidance and are providing beyond-the-minimum opportunities when circumstances warrant, such as conducting public workshops to help scope and review EAs.

A key step to enhanced public involvement is providing adequate notice of DOE's intent to prepare an EA, or that an EA is available for review. To foster sharing of information among sites, we asked nine DOE field/operations offices about their EA notification practices and report the results below. We also report in more detail exemplary practices followed at the Savannah River Site.

## Practices at Field/Operations Offices:

DOE Offices routinely use three media for providing information to the public: newspapers, Internet Home Pages, and direct mailings. Richland also notifies city and county governments by letter, and informs the U.S. Fish and Wildlife Service and the Bureau of Reclamation when a draft EA is available for review. Nevada posts its Annual Planning Summary on its Home Page to inform stakeholders of its future NEPA plans; both Idaho and Nevada mail the Summary or notification of its availability to selected stakeholders. When appropriate, Albuquerque's Area Offices, Chicago, Richland, and


Rocky Flats hold public workshops to discuss or obtain comments on an EA before approval. Any comments received on a Richland or Oakland EA receive an individual response, while all comments and responses are included in an approved Richland EA. Most of the sites automatically notify their local Citizens' Advisory Boards of EA determinations and availability.

## Practices at the Savannah River Site (SRS):

The Savannah River Operations Office sends a monthly newsletter called the *Environmental Bulletin* to more than 3,000 stakeholders who have asked to be kept informed of the Site's environmental activities. The *Bulletin*, prepared for DOE by the Westinghouse Savannah River Company, generally includes a page on the status of EAs and EISs affecting SRS. The *Bulletin* discusses each NEPA document a minimum of three times: for EAs this would include notification of proposed action, availability of draft EA, and availability of final EA and determination. NEPA milestones for major actions affecting SRS, such as the Stockpile Stewardship and Management Record of Decision, may be discussed in detail. The *Bulletin* contains articles on other topics of environmental interest, such as SRS hazardous waste and site remediation activities.


The Westinghouse Savannah River Company's NEPA group maintains a database of currently active NEPA documents that provides information for the *Bulletin*. The database lists each document's purpose, current status, major milestones, cost to date, contacts, etc., and also is used to prepare a monthly report for the SRS Citizens' Advisory Board.

Computer links provide public and internal access to electronic copies of NEPA documents and related documents, the NEPA Monthly Report and the monthly Citizens' Advisory Board report, and to helpful NEPA references, guidelines, training contact lists and the DOE NEPA Website. In addition, the Westinghouse Savannah River Company and Halliburton NUS Corporation maintain toll-free numbers for public requests for NEPA documents or questions about the location of documents on the Web.

For more information on Savannah River's NEPA public participation process, contact Drew Grainger, the NEPA Compliance Officer, at (803) 725-1523. 

# Secretary O'Leary and Staff Celebrate Signing of Stockpile Stewardship and Management ROD



*Members of the Document Team and then-Secretary Hazel R. O'Leary celebrate the signing of the Record of Decision for the Stockpile Stewardship and Management Programmatic EIS on December 19, 1996. Appearing from left to right: Dr. Dave Crandall, Director, National Ignition Facility Project Office, DP; Lisa Evanson, Office of International Policy and Analysis, NN; Jim Landers, Director, Executive Support, DP; Carol Borgstrom, Director, Office of NEPA Policy and Assistance, EH; Steve Ferguson, Office of the Assistant General Counsel for Environment, GC; Mary Anne Sullivan, Deputy General Counsel for Environment and Civilian and Defense Nuclear Programs, GC; Earl Whiteman, Acting Assistant Manager for Energy, Science and Technology, AL; Jay Rose, PEIS Document Manager, DP (holding ROD); Secretary Hazel O'Leary (with staff); Dr. Victor Reis, Assistant Secretary for DP; and Gary Palmer, Leader, DP NEPA Support Team. The culmination of years of planning in response to several changes in policy and direction resulting from the end of the Cold War, the Record of Decision enables the Department to implement a smaller, more efficient, and flexible nuclear weapons complex that can maintain the nation's nuclear deterrent without underground testing and without production of new weapons for the foreseeable future. In the Record of Decision DOE decided to: (1) construct and operate the National Ignition Facility and the Contained Firing Facility at the Lawrence Livermore National Laboratory in California and the Atlas Facility at Los Alamos National Laboratory in New Mexico; (2) downsize the existing weapons industrial plants (Y-12 at Oak Ridge, the Kansas City Plant, and Pantex); (3) reestablish the plutonium pit component manufacturing capability at Los Alamos National Laboratory; and (4) transfer a small amount of plutonium-242 material from the Savannah River Site to Los Alamos National Laboratory for stockpile stewardship activities. *

## Coordinate with Office of Congressional, Public and Intergovernmental Affairs on EIS Distribution

Recent experience managing the approval and distribution of an unusually large number of draft and final environmental impact statements (EISs) in a short time has highlighted the importance of effectively coordinating with the Office of Congressional, Public and Intergovernmental Affairs (CP) on such distributions. Based on lessons learned during this experience, the Office of NEPA Policy and Assistance and CP make the following recommendations:

- NEPA Document Managers should consult with CP staff early about schedules and for help in preparing

communications plans and EIS distribution lists. CP should be involved even if approval of the EIS has been delegated to a field office.

- Allow three days for “final” coordination with CP, which should occur after the EIS is approved, normally while the document is being printed. Final coordination may include setting up a precise timeline for congressional notifications, stakeholder outreach and media activities; media spokespeople should be identified as well. Note that CP-1 concurrence is

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# The EPA Rating System - Consistent or Unpredictable?

By: Joanne Arenwald Geroe, Office of NEPA Policy and Assistance

"Environmentally unsatisfactory (EU) - inadequate (3) impact statement." This is the rating those who have worked on a draft environmental impact statement (EIS) least want to see in the Environmental Protection Agency's (EPA) comment letter. But how does EPA decide the ratings for EISs, and promote consistency of ratings on projects nationwide?

EPA's 1984 manual titled *Policy and Procedures for the Review of Federal Actions Impacting the Environment* guides the EIS reviews that EPA performs in accordance with its duties and responsibilities under NEPA and Section 309 of the Clean Air Act, as amended. According to the EPA manual, the objective of EPA's EIS reviews is to ensure that the EPA's environmental expertise, as expressed in its comments and other interagency liaison activity, is considered by other agencies' decision makers. It is EPA's policy to:

- (1) participate early in an agency's planning process to identify significant environmental issues that should be addressed in completed documents;
- (2) follow-up where EPA has identified significant environmental impacts to ensure that the sponsoring agency fully understands the issues and applies appropriate corrective actions; and
- (3) identify environmentally unsatisfactory proposals and consult other agencies to achieve timely resolution of the major issues and problems.

An EPA Regional Office normally performs EPA's review of an EIS for a proposed action in the region. EPA intends its manual to provide uniform methods and standards for such reviews. A number of circumstances lead to inconsistencies in the EPA's ratings, however. EPA regions may pay special attention to issues that are locally contentious, or have received political or media interest. Further, there are only a handful of NEPA/309 reviewers in each EPA Regional Office (they range in number from 2 to 8 per region), and competing workload demands may affect the level of review a document receives.

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## SUMMARY OF RATING DEFINITIONS AND FOLLOW-UP ACTIONS \*

### Environmental Impact of the Action

#### **LO — Lack of Objections**

The EPA review has not identified any potential environmental impacts requiring substantive changes to the proposal. The review may have disclosed opportunities for application of mitigation measures that could be accomplished with no more than minor changes to the proposal.

#### **EC — Environmental Concerns**

The EPA review has identified environmental impacts that should be avoided in order to fully protect the environment. Corrective measures may require changes to the preferred alternative or application of mitigation measures that can reduce the environmental impact. EPA would like to work with the lead agency to reduce these impacts.

#### **EO — Environmental Objections**

The EPA review has identified significant environmental impacts that must be avoided in order to provide adequate protection for the environment. Corrective measures may require substantial changes to the preferred alternative or consideration of some other project alternative (including the no action alternative or a new alternative). EPA intends to work with the lead agency to reduce these impacts.

#### **EU — Environmentally Unsatisfactory**

The EPA review team identified adverse environmental impacts that are of sufficient magnitude that they are unsatisfactory from the standpoint of public health or welfare or environmental quality. EPA intends to work with the lead agency to reduce these impacts. If the potential unsatisfactory impacts are not corrected at the final EIS stage, this proposal will be recommended for referral to the Council on Environmental Quality.

### Adequacy of the Impact Statement

#### **Category 1 — Adequate**

EPA believes the draft EIS adequately sets forth the environmental impact(s) of the preferred alternative and those of the alternatives reasonably available to the project or action. No further analysis or data collection is necessary, but the reviewer may suggest the addition of clarifying language or information.

#### **Category 2 — Insufficient Information**

The draft EIS does not contain sufficient information for EPA to fully assess environmental impacts that should be avoided in order to fully protect the environment, or the EPA reviewer has identified new reasonably available alternatives that are within the spectrum of alternatives analyzed in the draft EIS, which could reduce the environmental impacts of the action. The identified additional information, data, analyses, or discussion should be included in the final EIS.

#### **Category 3 — Inadequate**

EPA does not believe that the draft EIS adequately assesses potentially significant environmental impacts of the action, or the EPA reviewer has identified new, reasonably available alternatives that are outside of the spectrum of alternatives analyzed in the draft EIS, which should be analyzed in order to reduce the potentially significant environmental impacts. EPA believes that the identified additional information, data, analyses, or discussions are of such a magnitude that they should have full public review at a draft stage. EPA does not believe that the draft EIS is adequate for the purposes of the NEPA and/or Section 309 review, and thus should be formally revised and made available for public comment in a supplemental or revised draft EIS. On the basis of the potential significant impacts involved, this proposal could be a candidate for referral to the Council on Environmental Quality.

\* From EPA Manual 1640: *Policy and Procedures for the Review of Federal Actions Impacting the Environment*.

# EPA Rating System (continued)

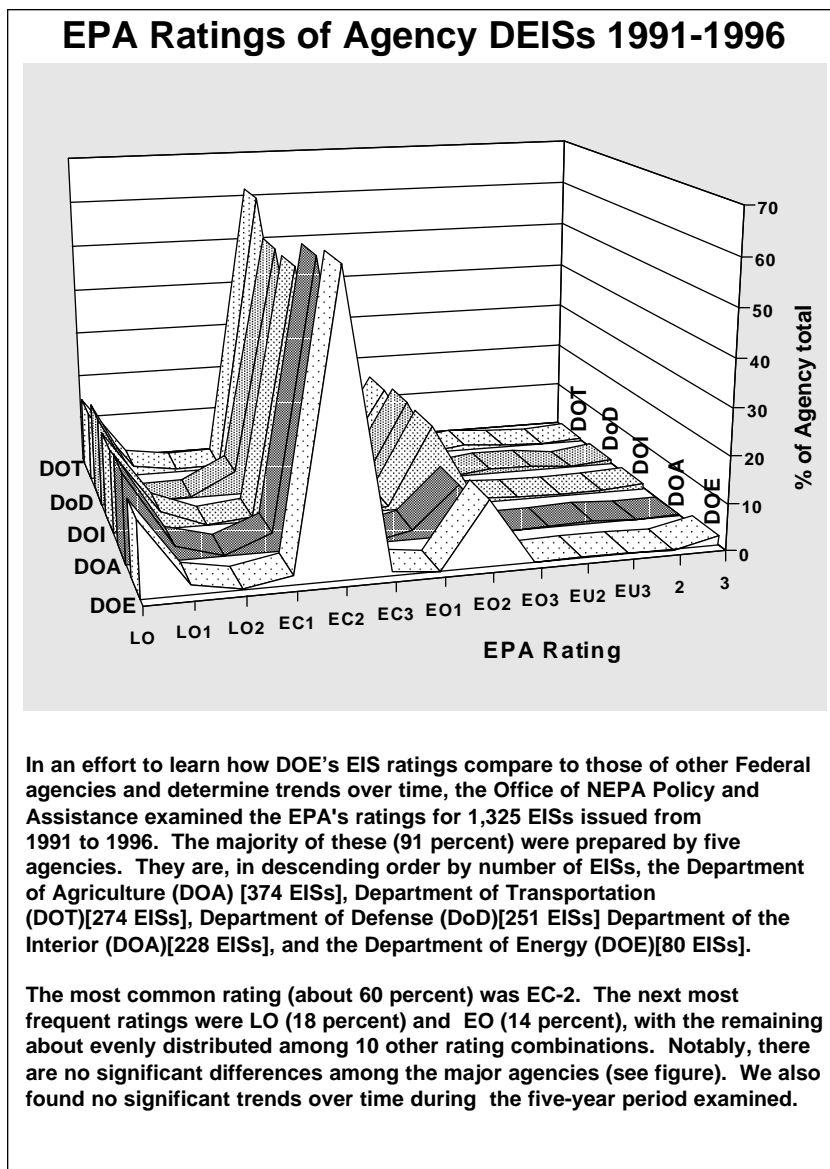
Another potential source of inconsistency is related to how EPA rates EISs that do not identify a preferred alternative. Although EPA has not issued guidance for such EISs, EPA's Office of Federal Activities (OFA) advises that the reviewers should rate all of the alternatives (although this is not a requirement) and that the rating reported in the Federal Register should be an overall rating based on the "worst case" alternative. [An agency is required to identify a preferred alternative in a draft EIS if it has one at that point. An agency must identify a preferred alternative in a final EIS, however.]

Recent DOE draft EISs that did not identify a preferred alternative have received ratings in different ways. The EIS for the Hanford Remedial Action Program received one overall rating based on the environmentally worst alternative, whereas the Spent Nuclear Fuel Management and Idaho National Engineering Laboratory Environmental Restoration and Waste Management Programs EIS received a separate rating for each alternative, but not an overall rating. To avoid the potential for an EU rating, DOE programs may want to consider expressing a "non-preference" for a no action or reasonable alternative that is environmentally unsound and that DOE would not want to choose in any case.

OFA staff note that the EPA Regional Offices have practical autonomy to conduct environmental reviews and rate documents for projects located in their territory. [OFA designates a lead office when two regions are involved. When an EIS covers several regions or is programmatic, OFA generally takes the lead.] OFA receives and reviews regionally-generated comment letters, but OFA does not study them for consistency. OFA pays greater attention to projects that have an EU

or 3 rating because EPA's procedures require OFA's participation in an interagency process for resolving such comments. OFA believes that their participation ensures consistency for those relatively infrequent cases.

Thanks to Ken Mittelholtz and Jim Serfis of EPA's Office of Federal Activities, as well as Marie Jenet of EPA Region II, for their help in preparing this article. LL





# Results of the EA Quality Review

As previously reported, the Office of NEPA Policy and Assistance has been engaged in an "EA Quality Review" of 20 recent DOE environmental assessments (EAs) approved by Heads of Program and Field Organizations. The study was intended to foster continuing improvement by providing feedback to the DOE NEPA community and a snapshot of Department-wide NEPA performance that may serve as a benchmark for future quality reviews.

## Design of the Study

There is no established measure for the quality of a NEPA document. This study appraised quality in terms of whether the document meets the minimum regulatory requirements; is consistent with guidance provided by the Council on Environmental Quality and DOE; focuses on significant issues and avoids extraneous material; demonstrates a "hard look" at the environmental consequences of a proposed action; and is factual, without bias, correct, and precise.

In this light, the 20 most recently completed EAs as of August 1996 were reviewed. This sample, which includes EAs from 11 field offices and 6 program offices is not necessarily representative of DOE overall. To minimize subjectivity and promote consistency in the review, the DOE Environmental Assessment Checklist (August 1994) served as the primary evaluation tool, but the overall study results nevertheless required considerable interpretation and judgment. The Office of NEPA Policy and Assistance is responsible for the conclusions of the study, although the Office was assisted by a contractor. As appropriate, Office of NEPA Policy and Assistance staff will discuss the review of specific EAs with cognizant NEPA Compliance Officers.

## Results in General

The EAs demonstrated a wide range in overall quality, from marginal to very good, as judged in terms of both technical content and overall readability. On balance, the EAs reviewed gave the potential environmental impacts of the proposed action the "hard look" required by NEPA. It was also evident that a multi-disciplinary team approach to document preparation consistently improved EA quality. A few EAs were judged to be of borderline quality because they did not contain all required elements (although none had a substantively essential omission), were inconsistent with guidance, or lacked rigor in the impact analyses. Many deficiencies could have been avoided by more consistently applying available guidance, such as the Green Book ("Recommendations for the

Preparation of Environmental Assessments and Environmental Impact Statements") and the EA Checklist.

In some cases, including easy-to-obtain information would have considerably improved EA quality with minimal effort.

## Important Fundamentals: Purpose and Need, Proposed Action, and Alternatives

The study strongly suggested that overall EA quality correlates positively with a precise statement of DOE's underlying purpose and need, a clear and complete description of the proposed action, and a convincing consideration of an adequate range of reasonable alternatives.

- While many of the EAs addressed the purpose and need appropriately, some were slanted toward a justification of the specific proposal. Nearly half of the EAs exhibited some bias in favor of the proposed action at one or more places in the document.
- For most of the EAs, the proposed action was described in sufficient detail so that potential impacts from all phases of the action could be identified; the other EAs needed better discussions of environmental issues associated with the proposed action. All EAs included the no action alternative, usually described in sufficient detail so that its potential impacts could be identified.
- Most of the EAs identified the reasonable alternatives, and many of these EAs analyzed such alternatives in addition to the proposed action and no action alternative. Several EAs were not clear regarding the possible existence of reasonable alternatives with lesser environmental impacts than those considered, and this was judged a deficiency.
- All EAs could have better highlighted the key differences among alternatives (environmental impacts, costs, mission needs, or other bases for selection).

**Conclusions:** Areas in need of continuing attention appear to include: describing the underlying purpose and need for action without bias, identifying the reasonable alternatives, properly dismissing any unreasonable alternatives, and effective ways to compare the impacts of analyzed alternatives.

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# EA Quality Review (continued)

## Impact Analyses

- For approximately half of the EAs, it was not clear whether preparers identified all potentially non-trivial impacts and analyzed these impacts in proportion to their potential significance. Several EAs notably affirmed that particular resources would not be affected by the proposed action and eliminated those resources from further discussion. Some stated why the resources would not be affected; two EAs included useful summary tables of potential issues and indicated which were addressed further in the EA.
- Some EAs appeared to inappropriately minimize potential environmental impacts. For example, when the analysis indicated a certain level of potential impact to an environmental resource, readers were promptly reassured, without further support, that there would be "no adverse effects," or (erroneously) that compliance with laws and procedures would "avoid" these impacts.
- Nine of the 14 EAs for proposed actions involving radioactive materials clearly addressed potential human health impacts adequately. Some EAs neglected to analyze potential radiological impacts on workers; others did not address all exposure pathways or the collective impact, maximum individual risk, or latent cancer fatalities, apparently relying on the reader deducing that such pathways and impacts were not important.
- Of 15 EAs for which the description of the proposed action suggested that the State Historic Preservation Officer should have been consulted, 9 documented that such consultation actually took place and the others were silent (consultation may or may not have occurred or been required).
- With respect to threatened and endangered species and wetlands, most of the EAs identified the presence or absence of these resources and described potential impacts accordingly. The other EAs were silent, apparently relying on the reader deducing whether or not sensitive resources were an important issue.
- Regarding environmental justice analyses, nearly half of the EAs briefly mentioned potential effects on minority or low-income populations within the potentially affected area. Some appropriately stated that such populations were not present. About half of the EAs were silent regarding the potential for environmental justice impacts.

**Conclusions:** Preparers often seem to rely on the readers to intuit that certain resources would not be affected by a particular proposed action. Summary tables that indicate potentially affected and clearly unaffected resources would effectively show that all resources were considered. Statements regarding compliance with requirements do not provide adequate impacts analysis nor evidence regarding the significance of impacts. More consistent and explicit discussion of environmental impacts is needed.

## Readability and Reader-Friendliness

Many of the EAs were written precisely and concisely, and included helpful glossaries and explanations of technical concepts and scientific notation. However, some EAs require readers to be thoroughly familiar with site environmental resources, facilities, and mission, or used unnecessary jargon or undefined terms. Summary tables are helpful.

- One EA notably combined discussions of the affected environment and the potential consequences in a manner that reduced duplication and increased readability.
- A few EAs did not summarize important information from the referenced documents, making it difficult to assess or confirm the results presented in the EA. In a few cases, appendices contained important information that should have been summarized in the main text.
- Many EAs contained internal inconsistencies, or were inconsistent with EAs for other proposed actions at the same site.
- The quality and utility of maps and other graphic illustrations varied considerably among the EAs. Several included useful and easy-to-read graphics that enhanced the reader's understanding. In other cases, unclear or unreadable graphics detracted from the EA. A few EAs included graphics at the end of the document rather than in the text, making the document less reader-friendly.
- Two EAs inappropriately indicated they were prepared "for" not "by" DOE, and one EA inappropriately included signature spaces for contractor personnel on the front page. A list of preparers was unnecessarily included in one EA.

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# EA Quality Review (continued)

**Conclusions:** Careful editing (e.g., elimination of jargon and internal inconsistencies) and using the EA Checklist (to avoid overlooking required or recommended items) would have solved many of the observed problems. Incorporating material by reference and using appendices may be effective ways to keep NEPA documents succinct, but document preparers must summarize such material appropriately.


## A Record of Compliance and Commitment

An EA can serve to demonstrate DOE's commitment to reducing or avoiding environmental impacts associated with its activities.

- Half of the EAs reviewed included discussions of possible mitigation measures. Two particularly commendable practices were observed: incorporating mitigation measures (or "environmental control measures") as an essential component of the proposed action, and summarizing all mitigation measures in one section of the document to facilitate incorporating mitigation commitments in the finding of no significant impact.
- A few EAs contained promises to conduct future activities, such as special surveys of sensitive species or

cultural resources, as a way to "avoid" impacts. These EAs should have been clear about whether such surveys were routine good management practices that were integral elements of the proposed action, or were mitigation commitments that were essential to render the impacts of the proposed action not significant. In the latter case, preparers would need to document essential mitigation commitments in the finding of no significant impact and in a publicly available Mitigation Action Plan (10 CFR §1021.322 and § 1021.331).

## Follow-up

The Office of NEPA Policy and Assistance will inform cognizant NEPA Compliance Officers, as appropriate, of findings regarding specific EAs in this review. Several NEPA Compliance Officers at a meeting in October 1996 had suggested expanding the study to include consideration of the overall EA process, including public involvement, responses to comments on draft EAs, and findings of no significant impact. The Office of NEPA Policy and Assistance will consider these and any further suggestions for future studies. Please direct suggestions for further study or comments on this review to Joseph Gearo (e-mail address: joseph.gearo@eh.doe.gov), EH-42, at (202) 586-7683 or fax (202) 586-7031. 


# NEPA Web is a Powerful NEPA Research Tool

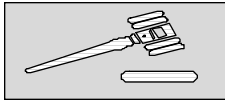
The Office of NEPA Policy and Assistance was able to respond quickly to two recent time-critical requests for information from the Office of Environmental Management by conducting an electronic search of NEPA documents loaded on the DOE NEPA Web (<http://tis-nt.eh.doe.gov/nepa>). Conducting these searches reinforced how important it is to maintain a centralized corporate NEPA data repository. We are again asking for help in maintaining this resource.

The information requests involved identifying NEPA documents associated with transporting waste from DOE sites to a treatment facility in the central U.S. and a commercial disposal facility in the western U.S. We were able to identify many of the relevant documents without a resource-consuming field office data call by searching all NEPA documents loaded on the NEPA Web. One caution, however, is that the loading of EAs and some EISs and Supplement Analyses onto the DOE NEPA Web is incomplete. Despite the large size of many DOE NEPA

documents, the searches were fast and easy, requiring only entering a few well-chosen key words.

The Office of NEPA Policy and Assistance has made significant progress loading EAs and EISs, but still encounters the following barriers: 1) Documents often are submitted in incompatible electronic formats (electronic publishing standards and guidelines are available on the DOE NEPA tools module of the Web); and 2) some documents are not provided at all.

We urge NEPA Compliance Officers, with assistance from NEPA Document Managers, to help maintain this repository by submitting electronic copies of completed NEPA documents under their purview to the Office of NEPA Policy and Assistance, as required by DOE Order 451.1, section 5d(11). If you have any questions on the use of the Web or on formatting standards, please contact Lee Jessee, DOE NEPA Webmaster, at [lee.jessee@eh.doe.gov](mailto:lee.jessee@eh.doe.gov) or 202-586-7600. 



# Recent Rulings on DOE and U.S. Forest Service NEPA Documents

By: Stephen Simpson, Office of NEPA Policy and Assistance

The Department of Energy ended 1996 by winning one NEPA lawsuit and began 1997 by receiving a mixed decision on the NEPA issues in another lawsuit. Also, in December 1996, the Forest Service lost a challenge to the alternatives analysis in a Final EIS.

### DOE EIS Upheld

On December 30, 1996, Judge Joseph F. Anderson, Jr., U.S. District Court for the District of South Carolina, ruled that the Department's February 1996 EIS on a Nuclear Weapons Nonproliferation Policy Concerning Foreign Research Reactor Spent Nuclear Fuel was adequate. The State of South Carolina had alleged that the EIS was deficient in that it "utterly fails to make candid disclosure of the known potential environmental and safety hazards" of spent fuel storage at the Savannah River Site.

Judge Anderson ruled that, although the EIS could have been clearer and more concise, it is not so unclear that the public did not have notice of the relevant facts (as evidenced in part by the volume and nature of public hearings and comments). He also held that the "bounding" analysis of safety vulnerabilities of the L-Reactor disassembly basin was adequate for NEPA review; the Department is not required to recognize each individual past study that pointed out various vulnerabilities. Finally, Judge Anderson dismissed the State's argument that the EIS was only written to justify a decision that had already been made, noting that the court's role in a NEPA case is only to review whether the procedural requirements of NEPA were followed.

### DOE Did Not Adequately Apply Categorical Exclusion

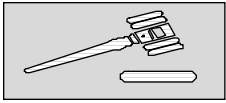
The second recent NEPA decision involving the Department yielded a mixed result. On January 6, 1997, Judge Claudia Wilken of the U.S. District Court for the Northern District of California ruled on a lawsuit involving the Department's NEPA review of the Transuranic Management by Pyroprocessing-Separation (TRUMP-S) project. (The Department had prepared an EA for the first two stages of the TRUMP-S project and categorically excluded the third.) The plaintiffs, concerned about nonproliferation among other issues,

alleged that a programmatic EIS should be prepared on all of the Department's research activities concerning actinide separation technologies (including TRUMP-S, the demonstration of electrometallurgical treatment technology on a limited amount of Experimental Breeder Reactor-II spent nuclear fuel, and other projects). Judge Wilken held that no programmatic NEPA review was merited because the majority of the impacts identified by the plaintiffs were site-specific, no cumulative or synergistic effect had been identified, and the TRUMP-S project has independent utility. (Judge Wilkin noted in passing that one of the plaintiffs' concerns, nuclear proliferation risks, is inappropriate for a NEPA review because such review would involve an analysis focusing more on political questions than environmental impacts.)

Judge Wilkin also ruled that the plaintiffs' alternative argument that the Department should have prepared an EIS for the first two stages of the TRUMP-S project is moot, because those stages are complete, but she ruled in the plaintiffs' favor concerning their opposition to the Department's application of a categorical exclusion to Stage III of the TRUMP-S project. The Department had determined that the proposed Stage III was a small scale research project within the meaning of the categorical exclusion in Appendix B3.10 to 10 CFR Part 1021, Subpart D. The Department's administrative record, however, did not show a determination per 10 CFR 1021.410(b) that there were no extraordinary circumstances and that Stage III is not connected to other actions with potentially significant impacts. Therefore, Judge Wilkin ruled that the Department's decision to proceed with Stage III was arbitrary and capricious.

**[Editor's Note:** The judge's decision in this case highlights the need to satisfy all of the regulatory requirements when determining that a proposed action may be categorically excluded. The Office of the General Counsel, in consultation with the Office of NEPA Policy and Assistance and in light of the court's opinion in this case, will consider what further guidance may be appropriate, especially regarding the issue of documentation, and will distribute such guidance as soon as possible. See related article, page 13.]

continued next page



## Litigation Updates (continued)

### U.S. Forest Service Final EIS Ruled Inadequate

In addition to the cases involving the Department, a recent decision involving the U.S. Forest Service is instructive. In that case, the Forest Service prepared an EIS for expansion of a skiing facility in a National Forest. When the Forest Service issued the Final EIS, it analyzed an alternative (and chose it as the preferred alternative) that the plaintiffs claimed was not analyzed in the Draft EIS. The plaintiffs also claimed that the Forest Service rejected (without explanation) a new alternative proposed by several commenters to mitigate impacts on an important natural pond by using artificial ponds for snowmaking activities. The court ruled that the duty to discuss possible mitigation measures, coupled with comments alerting the Forest Service to adverse impacts and suggesting a solution, required that the Forest Service seriously consider the proffered alternative and explain its reasoning

if it rejected the proposal. As a result of the Forest Service's failure to do so, the court held that the Final EIS was inadequate since it failed to analyze all reasonable alternatives. In addition, because the new alternative analyzed in the Final EIS was a new and different configuration of activities and not just a reduced version of a previously considered alternative, the Forest Service was required to prepare a Supplemental EIS to present to the public for review and comment. The Forest Service's failure to prepare a Supplemental Draft EIS, the court held, is arbitrary and capricious. Dubois v. United States Department of Agriculture, Nos. 96-1015, 96-1068 (1st Cir. Dec. 19, 1996).

Copies of the complete opinions are available from Stephen Simpson at 202-586-0125 (e-mail: [stephen.simpson@eh.doe.gov](mailto:stephen.simpson@eh.doe.gov)).

## DOE NEPA Process Data Misused

The May-June 1996 edition of *NEPA NEWS* contained an article highly critical of the NEPA process, written by Carl Bausch, a former assistant general counsel with the Council on Environmental Quality now working for the U.S. Department of Agriculture. *NEPA NEWS* is a newsletter published four times a year by NEPA Watch, located at the Center for Marine Conservation in Washington, D.C.

In his article, Mr. Bausch suggested that NEPA should be scrapped; he relied on DOE data to support his assertion that NEPA documents are not useful or cost effective. Mr. Bausch appeared to have used, out of context and without appropriate references, a portion of the data presented in DOE's first Lessons Learned Quarterly Report, issued December 1, 1994. Long-time readers of these Reports would know that much more recent DOE data were available for his article, and that the newer data would suggest conclusions opposite to those Mr. Bausch reached. Our most recent data reinforce that view.

Mr. Bausch's article provoked several readers to submit articles defending NEPA that were carried in the September-October 1996 edition of *NEPA NEWS*. An article setting the record straight regarding DOE data, by Eric Cohen of the Office of NEPA Policy and Assistance,

was published in *NEPA NEWS* in February 1997. Readers interested in obtaining reprints of any of these articles or information on how to subscribe to *NEPA NEWS* should contact Eric Cohen at (202) 586-7684 ([eric.cohen@eh.doe.gov](mailto:eric.cohen@eh.doe.gov)) or *NEPA NEWS* editor Robert B. Smythe at (301) 654-5661.

### New NEPA Rule Published

The Office of NEPA Policy and Assistance has prepared a booklet, Integrated DOE NEPA Implementing Procedures (10 CFR 1021, as amended) including Preambles, that conveniently consolidates the unchanged portions of the Department's 1992 NEPA Implementing Procedures and the amendments published in the Federal Register in July and October of 1996. The text of the integrated rule is the same as in the Federal Register publications except for minor editorial revisions to resolve format inconsistencies. This booklet is unofficial; however, the 1996 amendments will be officially incorporated into the Code of Federal Regulations in April or May 1997.

Please contact your NEPA Compliance Officer for a copy of the integrated rule, or EH-42 for multiple copies.

# Office of General Counsel to Provide Administrative Record Guidance


By: Janine Sweeney, Office of General Counsel

Each year, DOE reviews many proposed actions under NEPA. In cases where an EA or EIS is prepared, DOE and its contractors prepare many different kinds of materials that take different forms, such as drafts, reports, computer analyses, or e-mail messages.

When the Department is sued on the basis of the adequacy of its environmental analysis under NEPA, the court may consider not only the NEPA document itself, but also what has become known as the “administrative record,” to determine whether DOE has fully complied with NEPA’s requirements. The administrative record generally consists of documents and other materials produced during the preparation of an EA or EIS, and should include all documents and materials the agency decision maker considered in reaching his or her decision.

Because thousands of documents may be produced during the NEPA process, choosing among them to compile the administrative record is often a difficult task requiring sound judgment. To assist the program and field offices in

this task, the Office of General Counsel, in consultation with the Office of NEPA Policy and Assistance, is preparing guidance on what should be included in an administrative record. The guidance will include general guidelines to assist the preparer of the administrative record in deciding which documents to include in the record, as well as specific recommendations about documents that, almost without exception, should be included.

The Office of General Counsel intends to solicit comments on the draft guidance from the Justice Department and NEPA Compliance Officers. After considering the comments, the final guidance will be prepared and distributed. In the meantime, if questions arise concerning what documents or materials should be included in an administrative record, please contact field counsel or the cognizant attorneys in GC-51 (Environment), or Anita Capoferri, an attorney in GC-31 (Litigation) at Headquarters. 

## Questions and Answers

**Q.** Who approves supplement analyses and how are they numbered for publication and archival purposes?

**A.** DOE Order 451.1 (NEPA Compliance Program), section 5a(11), assigns supplement analysis responsibilities to Secretarial Officers and Heads of Field Offices. A supplement analysis is a NEPA determination document, similar to a determination to prepare an EA or an EIS. If EA and EIS determination authority has been further delegated to subsidiary field organization managers, they too would have the authority to approve supplement analyses and make corresponding determinations. As for numbering, supplement analyses are given the same number as the related EIS, with additional identifiers. For example, if the EIS in question was DOE/EIS-0001, the first supplement analysis would be numbered DOE/EIS-0001-SA1; the second, DOE/EIS-0001-SA2; and so forth. The program or field office that would prepare and approve the supplement analysis would have the appropriate number printed on the document. Program and field offices also should provide the Office of NEPA Policy and Assistance with five copies and an electronic disk of each supplement analysis, as for EAs and EISs.

**Q.** When are supplement analyses needed and can they be prepared before the Record of Decision?

**A.** DOE must supplement a draft or final EIS if there are substantial changes in the proposed action or significant new circumstances or information relevant to environmental concerns (see 10 CFR 1021.314 and 40 CFR 1502.9(c)). When it is not clear whether or not a supplemental EIS is required, DOE prepares a supplement analysis to inform three possible decisions: (1) prepare a supplemental EIS, (2) prepare a new EIS (or reissue a draft EIS) or (3) no further NEPA documentation is required. As for timing, a supplement analysis can be prepared at any time after issuance of a draft or final EIS, regardless of whether a Record of Decision has been issued. The need for a supplement analysis is triggered by subsequent changes in the basis upon which an EIS was prepared, and the need to evaluate whether or not the EIS is adequate in light of those changes. If the answer is obvious, a supplement analysis is not needed. 