

United States Government

Department of Energy

memorandum

DATE: June 17, 2003
REPLY TO:
ATTN OF: Office of NEPA Policy and Compliance (B. Mills, 202-586-8267)

SUBJECT: Guidance Regarding Actions That May Proceed During the National Environmental Policy Act (NEPA) Process: Interim Actions

TO: Secretarial Officers
Heads of Field Organizations

The Department of Energy (DOE) frequently needs to decide whether an action that is within the scope of an ongoing environmental impact statement (EIS) may proceed before a record of decision (ROD) is issued. An action within the scope of an EIS that is taken before a ROD is commonly referred to as an "interim action." DOE may propose to take the action before a ROD to reduce risk or mitigate adverse impacts to human health and the environment or reduce program costs. Indeed, interim actions to respond to an immediate need are often permissible and should be pursued, as appropriate. This issue arises most frequently with respect to actions that fall within the scope of a programmatic or site-wide EIS.

In preparing the attached guidance, we consulted with the Office of General Counsel, and we considered suggestions made by NEPA Compliance Officers. We prepared this guidance to help respond to the concern that compliance with NEPA could become the reason for near-term hazards to go unmitigated, as expressed in the February 2002 Environmental Management Top-To-Bottom Review. The guidance is based on criteria established by the Council on Environmental Quality in its regulations implementing the procedural provisions of NEPA (40 CFR Parts 1500-1508), DOE's NEPA implementing regulations (10 CFR Part 1021), which rely on those criteria, and DOE Order 451.1B, *National Environmental Policy Act Compliance Program*. Examples of the types of actions that may proceed as interim actions and a flow diagram summarizing key aspects of the guidance are provided.

If you have any questions regarding this guidance or its application to particular proposed actions, please direct them to Carol Borgstrom, Director, Office of NEPA Policy and Compliance (EH-42), at 202-586-4600.

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June 17, 2003

**Guidance Regarding Actions That May Proceed
During the National Environmental Policy Act (NEPA) Process:
Interim Actions**

The Department of Energy (DOE) frequently needs to decide whether an action that is within the scope of an ongoing environmental impact statement (EIS) may proceed before a record of decision (ROD) is issued. An action within the scope of an EIS that is taken before a ROD is commonly referred to as an "interim action." DOE may propose to take an action before a ROD to reduce risk or mitigate adverse impacts to human health and the environment or to reduce program costs. Indeed, interim actions to respond to an immediate need are often permissible and should be pursued, as appropriate. This issue arises most frequently with respect to actions that fall within the scope of a programmatic or site-wide EIS.

The following guidance is based on criteria established by the Council on Environmental Quality (CEQ) in its regulations implementing the procedural provisions of NEPA (40 CFR Parts 1500-1508; 40 CFR 1506.1 attached as Exhibit 1), DOE's NEPA implementing regulations (10 CFR 1021.104 and 1021.211, attached as Exhibit 2, which define interim action and incorporate the CEQ criteria), and DOE Order 451.1B, *National Environmental Policy Act Compliance Program*. This guidance does not create any additional requirements beyond those in these sources.

To provide assistance in determining whether an action within the scope of an EIS may be taken before a ROD, the guidance reviews applicable requirements, gives examples of the types of actions that may proceed as interim actions, describes case studies, and outlines the steps in the EIS process for interim actions.

Requirements for project-specific and programmatic EISs are distinguished where appropriate. In brief, for a project-specific EIS, an interim action must be one that would not adversely affect the environment nor limit the choice of reasonable alternatives. For a programmatic EIS, an EIS must be prepared for a proposed interim action that has potential for significant environmental effects, and the interim action must be one that would neither affect nor be affected by the proposed program. In general, an action of relatively limited scope or scale that would have only local utility normally could be taken as an interim action before a ROD.

CEQ Criteria for Interim Actions

CEQ's criteria for interim actions (at 40 CFR 1506.1) are best understood in the context of the purpose of an EIS. As stated in the CEQ regulations, 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 an agency's ongoing programs and actions (40 CFR 1502.1). An EIS is more than a disclosure

document; it is to be used by decision makers in conjunction with other relevant information to plan actions and make decisions.

At 40 CFR 1502.2, the CEQ regulations state that:

"(f) Agencies shall not commit resources prejudicing selection of alternatives before making a final decision ([Section]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" (emphasis added).

CEQ established separate criteria for project-specific EISs in Section 1506.1(a) and for required programmatic EISs in Section 1506.1(c), as discussed below.¹ Both sets of criteria address, in part, the need to avoid improper segmentation, in particular with regard to connected actions, e.g., actions that are interdependent parts of a larger action and depend on the larger action for justification (in 40 CFR 1508.25(a)).

Application of CEQ Criteria to DOE Actions Covered by Project-specific EISs

Under Section 1506.1(a), until an agency issues a ROD², no action concerning the proposal can be taken that would:

¹In addition, Section 1506.1(b) states an agency's responsibility to ensure that non-Federal applicants meet the objectives of 40 CFR 1506.1(a), and Section 1506.1(d) allows limited activities (e.g., plans, designs) specifically in support of Federal, State or local permit applications.

CEQ also discusses the Section 1506.1 criteria in two items in Forty Most Asked Questions Concerning CEQ's NEPA Regulations (51 FR 15618; April 25, 1986). In item 10a, CEQ reiterates the criteria in 1506.1(a) and (c). In item 11a, CEQ provides examples of actions an agency could take under 40 CFR 1506.1(b) to ensure that the objectives and procedures of NEPA are met when an applicant proposes to take an invalid interim action within the agency's jurisdiction; the agency's actions could range from negotiation to non-approval of the permit application.

²The CEQ regulations address criteria for interim actions during the preparation of an EIS only. A project or program for which an environmental assessment (EA) is prepared is normally smaller in scope than a project or program for which an EIS is prepared, and the EA process is shorter in duration than the EIS process. Thus the question of interim actions is less likely to arise during EA preparation. However, EAs, like EISs, are intended to inform decisions and therefore, normally should be completed before an action is taken. In those exceptional cases where part of a proposed action needs to proceed while the EA is being prepared, DOE managers should be mindful of the principles enunciated by the Section 1506.1(a) criteria, i.e., that the activity does not have an adverse environmental impact nor does it limit the choice of reasonable alternatives. Early and continued consideration of the Section 1506.1 criteria should lead to better project and program planning and decisions, regardless of whether an EA or an EIS is being prepared.

- (1) Have an adverse environmental impact; or
- (2) Limit the choice of reasonable alternatives.

Many types of actions could be interim actions to a project-specific EIS. In general, project managers may proceed with conceptual design (under DOE 0 413.3, *Program and Project Management for the Acquisition of Capital Assets*) and feasibility studies in support of a project because these activities meet both criteria of Section 1506.1(a). Site characterization activities to support a meaningful analysis of the environmental impacts of the proposed project also generally may be undertaken. Small scale corrective actions under the Resource Conservation and Recovery Act or installing fences to enhance security represent other classes of actions that usually may proceed under the criteria of Section 1506.1(a).

Although the activities discussed in the paragraph above would take place while a more extensive action (e.g., a waste management or nuclear materials action) is being evaluated in its associated EIS, the activities normally are unlikely to involve adverse environmental impacts or limit the choice of reasonable alternatives for the final action. An action that is not within the scope of the EIS, such as ongoing site operations, would not be constrained by the criteria for an interim action and could proceed.

In the context of this guidance "adverse environmental impact" means a negative environmental impact at such a level that an element of the human environment is impaired or damaged. Judgment of whether the level of negative impact is high enough to impair or damage depends on the situation and the resource. For some resources, adverse impact is defined in the statute protecting the resource or in implementing regulations.

- For example, under the implementing regulations for the National Historic Preservation Act, "An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association." [36 CFR 800.5(a)(1)]
- Under the implementing regulations for the Endangered Species Act, an adverse impact would be a "take" (of an endangered or threatened species or a species proposed for listing as endangered or threatened), which means "to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect." [50 CFR 10.12] With regard to critical habitat, the implementing regulations define destruction or adverse modification to mean "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species." [50 CFR 402.02]

NEPA documentation is not normally needed for permissible interim actions under project-specific EISs. See Exhibit 3 for a diagram of steps in the NEPA process for interim actions for project-specific EISs. Valid interim actions associated with project-specific EISs should be minor in scope (as discussed above), not require analysis to show that the criteria are met, and be similar in nature to categorical exclusions. That a proposed interim action is similar in nature to a categorical exclusion does not in itself indicate that it is a valid interim action. As with the application of categorical exclusions or many other project or programmatic decisions, a record of interim action determination is recommended.

Proceeding with detailed design under DOE O 413.3, *Program and Project Management for the Acquisition of Capital Assets*, before the NEPA review process is completed (in contrast to conceptual design noted above) is normally not appropriate because the choice of alternatives might be limited by premature commitment of resources to the proposed project and by the resulting schedule advantage relative to reasonable alternatives. For example, detailed design for containers that could only be transported via rail may prejudice consideration of truck or barge transport as alternatives. Concern about limiting the choice of reasonable alternatives is the basis for the DOE policy, expressed in the DOE NEPA regulations at 10 CFR 1021.210(b), that NEPA review normally should be completed before deciding to start detailed design.³

Application of CEQ Criteria to DOE Actions Covered by Programmatic EISs

Section 1506.1(c) states "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 statement⁴; and

³ Note, too, that DOE O 413.3 similarly provides for NEPA documentation to be completed before critical decision-2 (detailed design). Conceptual design and detailed design are defined under this DOE Order.

⁴Section 1506.1(c) speaks in terms of interim actions that require an EIS ("major Federal actions"), and thus the criteria of that section do not specifically apply to interim actions to which a categorical exclusion has been applied or for which an environmental assessment and finding of no significant impact have been issued. However, proceeding with these kinds of interim actions when they do not meet the first and third criteria of section 1506.1(c) could present a risk that DOE could be found to be impermissibly segmenting the programmatic action. Therefore, it is recommended that DOE managers consider these criteria and determine that the interim action is independently justified and will not prejudice the ultimate decision on the program before proceeding with the action.

(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."

In applying the first criterion ("independent justification"), DOE needs to determine that the proposed interim action could be undertaken irrespective of whether or how the program goes forward.

- In most cases in which DOE is obligated by law to carry out the proposed interim action (e.g., usually cases involving compliance with environmental requirements), DOE would be able to demonstrate independent justification by showing that no reasonably foreseeable decision based on the programmatic EIS would affect the proposed interim action.
- In cases that involve an existing facility that is within the scope of a programmatic EIS in preparation, DOE would need to establish, for example, that a proposed interim action involving a change in the facility (structure or operation) is needed to allow the facility to fulfill its existing mission before decisions can be made and implemented on the basis of the programmatic EIS. If so, a near-term modification would be permissible because it would be necessary for the ongoing program, regardless of how decisions based on the programmatic EIS may affect the future of the facility or the ongoing program.

The second criterion indicates that an EIS must be prepared for a proposed interim action that has potential for significant environmental impact.

In applying the third criterion ("non-prejudicial to programmatic decision"), DOE needs to determine whether a proposed interim action would tend to determine subsequent programmatic development or limit programmatic alternatives, as these types of actions could not be taken until a ROD were issued.

- In general, interim actions of relatively limited scope or scale that have only local utility are unlikely to prejudice programmatic development or decisions. A number of related interim actions, however, when considered collectively could unduly influence programmatic decision-making. For example, proceeding with a number of decentralized waste treatment projects could prejudice the choice of programmatic options involving centralized treatment.

- In the case of a site-wide EIS⁵, ongoing site operations are not considered interim actions and may continue. Ongoing site operations are considered under No Action.

See Exhibit 3 for a diagram of steps in the NEPA review process for interim actions for programmatic EISs.

Case Studies of the NEPA Process for Interim Actions to Programmatic EISs

A proposed interim action satisfies criteria (1) and (3) in Section 1506.1(c) when the action neither is affected by nor affects the program. An example of such an interim action was the proposed disposal of a limited quantity of mixed-waste from DOE and other Federal facilities at the Nevada Test Site (NTS) while mixed-waste disposal approaches were being considered system-wide in DOE's *Final Waste Management Programmatic Environmental Impact Statement for Managing Treatment, Storage, and Disposal of Radioactive and Hazardous Waste* (DOE/EIS-0200, May 1997). The interim action was proposed to provide for short-term waste disposal needs and was judged appropriate because its scope was constrained by limiting the volume of waste to be disposed of and the period over which disposal would occur. No decision based on the Waste Management Programmatic EIS was foreseen to be in conflict with the interim decision for waste disposal at NTS. Likewise, because the interim action would not require a large capital expenditure, the interim action would not limit subsequent development at NTS or alternative sites, nor would it limit the choice of programmatic alternatives considered. Criterion (2) in Section 1506.1(c) was met by a site-wide EIS for NTS (*Final Environmental Impact Statement for the Nevada Test Site and Off-Site Locations in the State of Nevada*, DOE/EIS-0243, August 1996) that adequately analyzed past, present, and reasonably foreseeable future mixed-waste disposal activities at the site.

As another example, in April 1996, a U.S. District Court ruled that DOE could proceed with a new major nuclear defense program facility, the Dual Axis Radiographic Hydrodynamic Test facility, at the Los Alamos National Laboratory as an interim action (based on a ROD for the project-specific EIS, *Final Environmental Impact Statement (EIS), Dual Axis Radiographic Hydrodynamic Test Facility*, DOE/EIS-0228, May 1995) while two programmatic EISs were being prepared (*Final Programmatic Environmental Impact Statement for Stockpile Stewardship and Management*, DOE/EIS-0236, September 1996; *Site-Wide Environmental Impact Statement for Continued Operation of the Los Alamos National Laboratory*, DOE/EIS-0238, January 1999). In considering the criteria for valid interim actions, the Court found that DOE had adequately demonstrated that the new facility would be useful notwithstanding the range of alternatives considered in the two programmatic EISs.

⁵ DOE considers site-wide NEPA reviews to be programmatic in nature (although site-wide EISs are not necessarily "required programmatic EISs" within the meaning of Section 1506.1(c)).

Interim Action Determination

The preceding guidance describes the key considerations necessary to determine whether an action that is within the scope of an ongoing NEPA review may proceed as an interim action. Under DOE's NEPA Order, 451.1B, Section 5.a.(12), Secretarial Officers and Heads of Field Organizations have the responsibility to determine whether an interim action is clearly allowable under DOE's NEPA regulations and should factor these considerations into a project's planning process. When it is not clear whether an interim action can proceed, a Secretarial Officer or Head of Field Organization is to provide the Assistant Secretary for Environment, Safety and Health (EH-1) with a recommendation for a determination, and EH-1 will decide, in consultation with the manager, whether the interim action may be taken. The exception to this is that the Administrator, National Nuclear Security Administration (NNSA), makes all determinations concerning NNSA interim actions, consulting with EH-1, as appropriate (DOE O 451.1B, Sections 3 and 6).

**EXHIBIT 1 - Council on Environmental Quality Regulations Implementing the
Procedural Provisions of NEPA 40 CFR 1506.1**

1506.1 Limitations on actions during NEPA process.

(a) Until an agency issues a record of decision as provided in 40 CFR 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 an 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 lead time equipment and purchase options) made by non-governmental entities seeking loan guarantees from the Administration.

EXHIBIT 2 - Department of Energy National Environmental Policy Act Implementing Provisions 10 CFR 1021

Sec. 1021.104 Definitions.

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.

Sec. 1021.211 Interim actions: Limitations on actions during the NEPA process.

While DOE is preparing an EIS that is required under Sec.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.

Exhibit 3 Steps to Follow for Determining Whether Actions May Proceed During the NEPA Process: Interim Actions

