

Implementation of Executive Order 12114 Environmental Effects Abroad of Major Federal Actions; Final Guideline

AGENCY: Department of Energy

ACTION: Final guideline for Implementation of Executive Order 12114

SUMMARY: The Department of Energy (the Department) hereby adopts final Departmental guidelines implementing Executive Order 12114 – Environmental Effects Abroad of Major Federal Actions, which was issued on January 4, 1979.

The guidelines published here in reflect certain revisions to the proposed guidelines, published in the Federal Register on September 6, 1979 (44 FR 52146), based upon the Department's consideration of comments received and upon experience acquired in working under Executive Order 12114. The guidelines supplement the procedures set forth in the Department's final guidelines for compliance with the National Environmental Policy Act of 1969, 42 U.S.C. 4321 et seq., which were published in the Federal Register on March 28, 1980 (45 FR 20694), and are designed to be coordinated with the environmental review procedures established by those procedures. They are applicable to all organizational units of the Department, except the Federal Energy Regulatory Commission, an independent regulatory commission within the Department not subject to the supervision or direction of the other parts of the Department.

EFFECTIVE DATE: January 5, 1981.

Department of Energy Guidelines for Implementation of Executive Order 12114- Environmental Effects Abroad of Major Federal Actions

Part A-General

Section 1 Background

Executive Order 12114 of January 4, 1979, 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 the National Environmental Policy Act with respect to the environment outside the United States, its territories and possessions. The Executive Order requires that all Federal agencies taking actions subject to environmental review under the Order adopt their own implementing procedures.

Section 2 Purpose and Scope

These guidelines are intended for use by all persons acting on behalf of the Department in implementing Executive Order 12114. The guidelines are not intended to create or enlarge any procedural or substantive rights or cause of action against the Department.

Section 3 Applicability

These guidelines apply to all organizational elements of the Department except the Federal Energy Regulatory Commission.

Part B-Actions for Which Environmental Review Is Required

Section 4 Categories of Actions and Mandatory Environmental Review Requirements

In the decisionmaking process for actions in the following categories, the Department will prepare and take into consideration the documents or studies specified below:

- 4.1 Major Federal actions significantly affecting the environment of the global commons outside the jurisdiction of any nation (e.g., the oceans or Antarctica]. Actions in this category require the preparation of an environmental impact statement, including, as appropriate, generic, program and specific statements.
- 4.2 Major Federal actions, significantly affecting the environment of a foreign nation not participating with the United States and not otherwise involved in the action. Actions in this category require the preparation either:
 - 4.2.1 A bilateral or multilateral environmental study relevant or related to the proposed action. The study is to be conducted by the United States and one or more foreign nations, or by an international body or organization in which the United States is a member or participant; or
 - 4.2.2 A concise analysis of the environmental issue involved, including environmental assessments, summary environmental analyses or other appropriate documents.
- 4.3 Major Federal actions significantly affecting the environment of a foreign nation which provide to that nation:
 - (a) A product, or physical project producing a principal product or an emission or effluent, which is prohibited or strictly regulated by Federal law in the United States because its toxic effects on the environment create a serious public health risk (see Appendix A); or
 - (b) A physical project which in the United States is prohibited or strictly regulated by Federal law to protect the environment against radioactive substances.

For actions in this category, the Department will either:

- 4.3.1 Prepare a document as specified in Section 4.2.1; or
- 4.3.2 Prepare a document as specified in Section 4.2.2.

- 4.4 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 pursuant to section 2-3(d) of Executive Order 12114 or, in the case of such a resource protected by international agreement binding on the United States, by the Secretary of State.

For actions in this category, the Department will either:

- 4.4.1 Prepare a document as specified in Section 4.1; or
- 4.4.2 Prepare a document as specified in Section 4.2.1; or
- 4.4.3 Prepare a document as specified in Section 4.2.2.

Part C - Actions Exempted From Mandatory Environmental Review

Section 5 Actions Exempted by Executive Order 12114

- 5.1 The following actions are exempted from these guidelines:
 - 5.1.1 Actions not having a significant effect on the environment outside the United States, as determined by the Department. (Actions having a potentially significant impact on the United States, its territories or possessions are subject to the provisions of the Council on Environmental Quality's National Environmental Policy Act regulations (40 CFR Part 1500, November 29, 1978) and the Department's guidelines implementing those regulations (45 FR 20694, March 28, 1980).
 - 5.1.2 Actions taken by the President;
 - 5.1.3 Actions taken by or pursuant to the direction of the President or Cabinet officer when the national security or interest is involved or when the action occurs in the course of an armed conflict;
 - 5.1.4 Intelligence activities and arms transfers;
 - 5.1.5 Actions providing to a foreign nation a nuclear production, utilization or waste management facility. The environmental review of these actions is governed by the Unified Procedures promulgated by the State Department at
 - 5.1.6 All other nuclear actions not covered in section 5.1.5 above, except those actions which significantly affect the environment of the global commons, which will undergo environmental review pursuant to Section 4.1 of these guidelines.
 - 5.1.7 Votes and other actions in International conferences and organizations;
 - 5.1.8 Disaster and emergency relief action.

Section 6 Actions Exempted by the *Department*

- 6.1 The Department has determined that the general classes of actions which are listed in Appendix B generally do not have significant impacts requiring review under these guidelines. They are hereby excluded from mandatory environmental review under these guidelines, unless the Department determines that a particular action within such classes will have a significant environmental effect requiring such a review. The Department may amend or expand Appendix B, as appropriate.
- 6.2 The Department may exempt on a case-by-case basis, any action from these guidelines when such exemption is determined by the Department to be necessary to meet:
 - 6.2.1 Emergency circumstances;
 - 6.2.2 Situations involving exceptional foreign policy or national security sensitivities;
 - 6.2.3 Other such special circumstances.
- 6.3 In utilizing an exemption pursuant to section 6.2 above, the Department will consult with the Department of State and the Council of Environmental Quality as soon as is feasible.

Section 7 Required Documentation for Exempted Actions

For actions in connection with which the Department utilizes any exclusion or exemption pursuant to section 5 or 6 of these guidelines, the Department will prepare a brief record which describes the basis for its determination to utilize such exclusion or exemption.

Part D-Other Provisions

Section 8 · Public Involvement

The Department will provide for public involvement in the environmental review process conducted pursuant to these guidelines to the following extent:

- 8.1. Environmental impact statements prepared pursuant to Sections 4.1 or 4.4.1 of these guidelines shall be subject to the provisions of:
 - 8.1.1 Departmental guidelines regarding publication of a Notice of Intent to prepare an environmental impact statement and public involvement in the environmental impact statement seeping process;
 - 8.1.2 40 CFR 1502.9 regarding preparation of a draft and final environmental impact statement;
 - 8.1.3 40 CFR 1503 regarding comment procedures for a draft environmental impact statement.
- 8.2 Documents or studies prepared pursuant to sections 4.2, 4.3 or 4.4.2 and 3 of these guidelines are not subject to the public involvement procedures in 8.1.1 through 8.1.3 above.

The Department may, at its discretion, elect to utilize any or all of these procedures for any such document or study.

Section 9 Timing

- 9.1 The Department will commence preparation of environmental documents required by these guidelines as close as practicable to the time the Department is developing or is presented with a proposal, and complete such documents early enough so that they can serve practically as an important contribution to the decisionmaking process.
- 9.2 Until an environmental document required by these guidelines has been completed and considered, the Department will take no action concerning the proposal which would have an

adverse environmental impact or limit or prejudice the choice of reasonable alternatives.

- 9.3 For actions which have significant impacts both on the environment of the United States, its territories or possessions and on the environment of foreign nations or the global commons, documents prepared pursuant to sections 4.1, 4.2 or 4.3 of these guidelines analyzing the impacts outside the U.S will, to the extent practicable, be prepared and reviewed in conjunction with the analyses of the domestic impacts of the proposed action.

Section 10 Contents

- 10.1 Environmental impact statements prepared pursuant to section 4.1 or 4.4.1 of these guidelines will follow the recommended format of 40 CFR 1502.10 and contain the types of information specified in 40 CFR 1502.11-1502.18.
- 10.2 Bilateral or multilateral environmental studies prepared pursuant to sections 4.2.1, 4.3.1 or 4.4.2 will contain a currently valid analysis of all significant environmental impacts of the proposed action.
- 10.3 Environmental analyses prepared pursuant to section 4.2.2, 4.3.2 or 4.4.3 will include brief discussions of:
- 10.3.1 The proposed action and the need therefor;
 - 10.3.2 The reasonable alternatives to the proposed action which could be implemented directly or indirectly by the United States; and
 - 10.3.3 All significant environmental impacts associated with the proposed action and the reasonable alternatives.

Section 11 Notice of Availability

- 11.1 The Department will, as soon as feasible, inform other Federal agencies with relevant interest and expertise of the availability of any documents prepared pursuant to these guidelines.
- 11.2 The Department will determine, after consultation with the Department of State, the appropriate time and manner for informing an affected nation of the availability of any relevant documents prepared pursuant to these guidelines.
- 11.3 As soon as practicable after notification to an affected nation in accordance with section 11.2 of these guidelines, the Department will provide notice to the public of the availability of the environmental review documents specified in sections 4.1, 4.2, 4.3, and 4.4 of these guidelines.

Section 12 Modifications to Contents, Timing and Availability

The Department will make appropriate modifications to the contents, timing and availability of documents, where necessary, to:

- 12.1 Enable the Department to decide and act promptly as and when required;
- 12.2 Avoid adverse impacts on foreign relations or infringement in fact or appearance of other nations' sovereign responsibilities; or
- 12.3 Ensure appropriate reflection of:
- 12.3.1 Diplomatic factors;
 - 12.3.2 International commercial, competitive and export promotion factors;
 - 12.3.3 Needs for governmental or commercial confidentiality;
 - 12.3.4 National security considerations;
 - 12.3.5 Difficulties of obtaining information and agency ability to analyze meaningfully environmental effects of a proposed action; and

12.3.6 The degree to which the Department is, involved in or able to affect a decision to be made.

12.4 Modifications to the contents of documents might include, for example, the use of generic, typical or hypothetical environmental impact analyses where critical site specific data cannot be obtained from an affected foreign nation. Regarding modifications to the availability of a document, where an affected nation notifies the Department of its desire not to notify the public of the availability of a document prepared pursuant to sections 4.2, 4.3, 4.4.2, or 4.4.3 of these guidelines, the Department may waive the requirements of section 11.3 above regarding notices of availability.

Section 13 Coordination with the Department of State.

The Department will coordinate all communications with foreign governments concerning environmental agreements and other arrangements implementing these guidelines with the Department of State.

Section 14 Duplication of Resources

- 14.1 The Department will not have to prepare any document or study required by Section 4 of these guidelines if it determines that a document or study already exists that is adequate in scope and content to meet the requirements of these guidelines.
- 14.2 The Department may adopt all or part of existing environmental analyses, including those prepared by foreign countries or international organizations, when the Department determines that these analyses are adequate in scope and content to fulfill the requirements of these guidelines.
- 14.3 The Department will, in the early stages of preparing any document or study described in Section 4 above, request the cooperation of any Federal agency which the Department determines to possess a statutory mission or expertise relevant to the proposed action.
- 14.4 Where an action involves multiple Federal agencies including the Department of Energy, a lead agency, as determined by the agencies involved, will have responsibility for implementing the provisions of Executive Order 12114 using its own procedures implementing the Executive Order, significant environmental effects on that foreign nation.
- 14.5 If a major Federal action having significant effects on the environment of the United States or the global commons requires preparation of an environmental impact statement by the Department, and if the action is included in Section 4.2 or 4.3 above as an action having significant effects upon the environment of a foreign nation, the environmental impact statement does not have to contain a review of these foreign impacts. The appropriate type of environmental review, as described in Section 4.2 or 4.3 above, may be issued as a separate document.

Section 15 Miscellaneous Provisions

The provisions of Sections 5 and 6 regarding exclusions or exemptions from these procedures do not apply to major Federal actions significantly affecting the environment of the global commons unless permitted by law.

Section 16 Definitions

16.1 *Environment* means the natural and physical environment, and it excludes social, economic and other environments. Social and economic effects do not give rise to any requirements under these guidelines.

16.2 *Federal Action* means any action that is potentially subject to United States Government control

and responsibility. It includes actions that are implemented, funded or approved directly or indirectly by the United States Government. It does not include actions in which the United States participates in an advisory, information gathering, representational or diplomatic capacity but does not implement, fund or approve the action or cause the action to be implemented. An action significantly affects the environment if it does significant harm to the environment even though on balance the Department believes the action to be beneficial to the environment.

16.3 *Foreign Nation* means any territory under the jurisdiction of one or more foreign governments, including the territorial seas thereof. For the purpose of these procedures, actions having significant environmental effects on the resources of a foreign nation's continental shelf or, to the extent its claim of jurisdiction is recognized by the United States, its fisheries zone, shall be considered to be actions having significant environmental effects on that foreign nation.

16.4 *United States* means the States, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Marianas, the Trust Territory of the Pacific Islands, American Samoa, the United States Virgin Islands, Guam and the other territories and possessions of materials of the United States, including the territorial seas thereof. For the purpose of these procedures, actions having significant environmental effects on the resources of the continental shelf of the United States, or on resources of United States Fisheries Conservation Zones subject to the jurisdiction of the United States, shall be considered to be actions having significant environmental effects in the United States.

16.5 *Global Commons* is equivalent to *areas outside the jurisdiction of any nation* and means all areas not described in subsection 16.3 and not described in subsection 16.4 above.

Section 17 Compliance

These guidelines are intended for use by all persons acting on behalf the Department of Energy in carrying out the provisions of Executive Order 12114. Any deviations from the guidelines must be soundly based and must have the advance approval of the Secretary of the Department of Energy.

Appendix A-Illustrative List for Determining Compliance with Section 4.3

1. The following is an illustrative, non- inclusive list of the products, emissions and effluents encompassed by section 4.3 of these proposed guidelines: Asbestos, acrylonitrile, pesticides, mercury. Arsenic, polychlorinated biphenyls, vinyl chloride, isocyanates, benzene, beryllium, and cadmium.
2. The following is an illustrated. non- inclusion list of the products, emissions and effluents *not* encompassed by section 4.3: Ammonia, chlorine, sulphuric acid, sulphur dioxide, sulfate and sulfate liquors, caustic soda, nitric acid. nitrogen oxides, and phosphoric acid.

Appendix B-Actions Normally Excluded by the Department From Preparation of an Environmental Impact Statement, Bilateral or Multilateral Environmental Study or Concise Environmental Analysis Under These Guidelines

1. Approval of Departmental participation in international "umbrella" agreements for cooperation in energy research and development which do not commit the United States to any specific projects or activities.
2. Approval of technical exchange arrangements for information, data or personnel with other countries or international organizations.
3. Approval of arrangements to assist other countries in identifying and analyzing their energy resources, needs and options.
4. Approval of the export of and subsequent arrangements involving nuclear materials or isotopic material in accordance with the provisions of the Nuclear Non- Proliferation Act of 1978, the "Procedures Established Pursuant to the Nuclear Non- Proliferation Act of 1978" (published in the Federal Register on June 9, 1978, 43 FR 25328) and Section 131 of the Atomic Energy Act of 1954, as amended.

SUPPLEMENTARY INFORMATION:

I. Background

A. National Environmental Policy Act

The National Environmental Policy Act of 1989, 42 U.S.C. 4321 et seq., requires that Federal agencies give appropriate weight to factors affecting the human environment during all stages of their decisionmaking process. In this connection, Federal agencies are required to prepare detailed statements on proposals for major Federal actions significantly affecting the quality of the human environment.

B. Council on Environmental Quality Regulations

The Council on Environmental Quality promulgated regulations establishing uniform procedures implementing the National Environmental Policy Act on November 29, 1978 (43 FR 55978). These regulations (40 CFR 1500 et seq.) require agencies to adopt implementing procedures to supplement these uniform procedures.

C. Department of Energy National Environmental Policy Guidelines

D. Executive Order 12114

On January 4, 1979, President Carter signed Executive Order 12114, entitled Environmental Effects Abroad of Major Federal Actions. The Order represents the exclusive and complete determination by the Executive Branch of the procedural and other actions to be taken by Federal agencies to further the purposes of the National Environmental Policy Act with respect to the environment outside the United States, its territories and possessions.

E. Department Guidelines Implementing Executive Order 12114

The guidelines published herein provide the supplemental implementing procedures required by Executive Order 12114. They are intended for use by all persons acting on behalf of the Department in carrying out the Executive Order. The Executive Order and these final guidelines are not intended to create or enlarge any substantive or procedural rights or cause of action against the Department. These implementing guidelines in large measure reiterate the Executive Order provisions. It is recommended that these guidelines be read and interpreted in conjunction with Executive Order 12114, the Department's guidelines implementing the Council on Environmental Quality National Environmental Policy Act regulations and the Department's Order 5440.1 governing internal National Environmental Policy Act processes to obtain a more complete understanding of the Department's environmental review policies and procedures. The guidelines are applicable to all organizational elements of the Department except the Federal Energy Regulatory Commission, an independent regulatory body within the Department. As required by section 2-1 of Executive Order 12114, the Department has consulted with the Department of State and the Council on Environmental Quality in developing these guidelines.

Comments and Other Revisions

Written comments on the proposed guidelines were received from the Department of State and one private organization. The Department has carefully considered all comments and has modified the proposed guidelines, as appropriate, to reflect those comments.

A. Department of State Comments

The State Department submitted a number of comments regarding the applicability of the Department's guidelines to nuclear activities. The following revisions were made to the proposed guidelines to reflect these comments:

1. Section 5.1.5 in the proposed guidelines was revised to clearly indicate that the environmental review of actions involving the export of a nuclear production, utilization or waste management facility will be accomplished under a set of Unified Procedures recently developed by the State Department and other Federal agencies. Including the Department of Energy, and promulgated at 44 FR 65560 (November 13, 1979).
2. The exemption contained in the proposed guidelines regarding "small quantities" of nuclear material (number 4 in Appendix B) has been revised to remove the "small quantity" limitation. The Department believes that this revision will more closely follow the exemption contained in Section 2- S (a)(v) of Executive Order 12114 regarding nuclear fuel and material exports. The Department believes that, in general, the export of and subsequent arrangements involving nuclear material or isotopic material in accordance with the provisions of the Nuclear Non-Proliferation Act of 1978, the "Procedures Established Pursuant to the Nuclear Non-Proliferation Act of 1978" (published in the Federal Register on June 9, 1978, 43 FR 25328) and Section 131 of the Atomic Energy Act of 1954. As amended, will not have a significant environmental impact on the global commons. Section 6.1 of these guidelines requires that the Department still review every such action to determine whether an exemption is warranted. If an exemption is used, section 7 of the guidelines requires that a brief record documenting the exemption be prepared.
3. The definitions of "foreign nation," "United States" and "global commons" In section 1e of the proposed guidelines have been revised.

B. Private Organization Comments

One private organization submitted three comments on the Department's proposed guidelines:

4. Referring to Part II B. 2. of the preamble and section 4.2 of the guidelines, it was unclear to the commentor what kinds of projects could be conducted in a foreign country without requiring that country's approval. The referenced sections in the guidelines apply to actions taken by the United States, in concert with one or more foreign nations, which significantly affect the environment of a foreign nation which is not participating with the United States in the action and which is not otherwise involved in the action, such as by regulatory control. An example of such an action could be the construction, by the United States (with Departmental funding) and a foreign nation, of a coal liquefaction plant situated near the border between that foreign nation and a neighboring country which is not participating in the project. If the construction and operation of such a plant will significantly affect the environment of this neighboring country, section 4.2 of the Department's guidelines requires that the United States prepare an environmental study relevant or related to the action, or a concise analysis of the environmental issues involved. Pursuant to other provisions in the Department's guidelines, these studies or analyses will discuss all significant environmental impacts associated with the project, including those on the environment of the non-participating foreign nation. The Department believes that this section is sufficiently clear and that no revisions are necessary.
5. Referring to the general issue of the preparation of environmental review documents by the United States in concert with foreign nations or international organizations, the commentor felt that specific guidelines are needed to avoid potential delay while responsibilities and detailed content were being coordinated. The Department recognizes that its procedures implementing Executive Order 12114 do not contain specific guidelines governing the preparation of environmental review documents by the United States in conjunction with foreign nations or international organization. This lack of specificity could lead to some delay in the program while these details are determined. However, the Department believes that, given the variety of foreign policy sensitivities and considerations that are present in situations involving foreign nations and international organizations, it would be impractical to develop detailed generic procedures governing the cooperative preparation of environmental review documents. The Department believes that any potential delays can be minimized by proper coordination in the early stages of the environmental review process. The Department has thus not altered the language in its proposed guidelines regarding this subject area.
6. Should a foreign nation prepare its own environmental review for an action in which the United States is involved, the commentor felt that provisions should be provided in the guidelines to allow the United States to formally adopt all or portions of this review. The Department agrees with the commentor that this authority should be explicitly defined in the guidelines, and has revised the proposed guidelines by adding section 14.2 to so indicate. With respect to Executive Order 12044, "Improving Government Regulations," the Department has determined that its guidelines implementing Executive Order 12114 are "significant" but not "major" because the anticipated effects of the guidelines primarily would be to provide internal direction for implementation of Executive Order 12114. Consequently, a regulatory analysis has not been prepared.