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Daniel Cohen, Assistant General Counsel
Legislation, Regulation, and Energy Efficiency
Office of the General Counsel
U.S. Department of Energy
1000 Independence Avenue, SW
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Dear Mr. Cohen:

I have reviewed the Request For Information regarding Reducing Regulatory Reform issued February 3, 2011 (Federal Register /Vol. 76, No. 23 /Thursday, February 3, 2011 /Notices). In the Department of Energy's (DOE) attempt to meet its obligation to implement Executive Order 13563, "Improving Regulation and Regulatory Review," issued by the President on January 18, 2011, I recommend DOE make a bold move to change their paradigm from traditional NEPA practices and push the envelope by incorporating a proven NEPA compliance methodology already used effectively in a segment of DOE. The methodology is formed around a policy-level Environmental Impact Statement (EIS) and subsequent tiering structure of Records of Decisions (RODs) rather than the traditional use of supplemental EISs, Environmental Assessments (EAs), and Categorical Exclusions (CEs). Broadening the use of this tiering of RODs methodology agencywide would facilitate expedited NEPA compliance and decisionmaking as well as effective policy implementation monitoring.

The following points are how this methodology could advantageously be incorporated more fully into DOE's decisionmaking and monitoring process. A description of context, proposed changes, and suggested 10 CFR Part 1021 DOE NEPA Regulation modifications is given below.

Basic Enhancements

- 1. Lessen the need to make unnecessary determinations for proposed actions regarding the "potential for significant impacts"*
- 2. Reduce litigation risks from cumulative, connected, or similar actions "potential for significant impacts"*
- 3. Use fewer EAs that require mitigated Findings of No Significant Impact (FONSIs)*
- 4. Reduce the size of documents needed to sustain a plausible and legally defensible EA/FONSI*
- 5. Introduce strategic use of the policy-level EIS into the programmatic EIS mix*

6. *Establish the Tiered RODs methodology agencywide to permit balancing of decision factors without apprehension over potential for significant impacts and/or reaching FONSI*s

Context and Current Practices

The DOE had its National Environmental Policy Act (NEPA) regulations (10 CFR Part 1021) out for proposed Rulemaking changes as recent as January 3, 2011 which closed comments on February 17, 2011. The changes were the typical limited focus which relies heavily on new additions to categories of CEs and EAs. In other words, the intent was to follow traditional NEPA practices of trying to fit as many actions as possible into the “*insignificant impact*” mode of thinking. This practice tends to steer an agency toward breaking actions down far enough to promote use of CEs and EAs that must result in FONSI. An agency channeled this way uses the mitigated FONSI to avoid potential for significant impacts and preparation of a possible EIS, instead of good sound NEPA principles and public policy decisions.¹

For example, the following DOE statements were taken from the latest NEPA Rulemaking² modifications that closed comments on February 17, 2011:

“What kinds of changes does DOE propose?”

DOE proposes to amend 10 CFR part 1021, subparts C and D. The majority of changes are proposed for the categorical exclusion provisions at 10 CFR part 1021, subpart D, appendices A and B, with a small number of related changes proposed for other provisions within subparts C and D. DOE proposes to add 20 new categorical exclusions.

...

DOE proposes to remove two categorical exclusion categories, one EA category, and two EIS categories.

What would result from DOE’s proposed changes?

The proposed changes would better align DOE’s categorical exclusions with its current activities and its experience and bring the provisions up-to-date with current technology and regulatory requirements. The changes would also facilitate compliance with NEPA by providing for more efficient review of actions (helping the Department meet the goals

¹ 40 CFR 1508.27 Significantly, “(7) *Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.*”

² US DOE “Notice of proposed rulemaking and public hearing”, National Environmental Policy Act Implementing Procedures, Federal Register, Vol. 76, No. 1, Monday, January 3, 2011, Proposed Rules, pp. 215 & 216.

set forth by Congress, for example, in the Energy Policy Act of 2005), and allowing the Department to focus its resources on proposed actions that have the potential for significant environmental impacts.” [Emphasis added]

While there is nothing inherently wrong with such traditional NEPA practices it does little to advance agency decisionmaking or meet EO 13653’s intent to, “*identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends.*” Instead, the first part of this statement demonstrates how DOE continues to focus on the past issues and practices rather than pushing the envelope for a paradigm change. The second part of the statement further supports standard NEPA practices to, “*better align DOE’s categorical exclusions with its current activities and its experience,*” thus, “*allowing the Department to focus its resources on proposed actions that have the potential for significant environmental impacts.*” Again, the concentration of effort is on making endless determinations of *non-significant impact* which burdens the agency by leaning heavily on CEs and EAs with mitigated FONSI to do the bulk of the work. Such traditional NEPA practices leave the agency open to unnecessary legal, institutional, and political risks of potential for significant impacts based on cumulative, connected, or similar actions impacts whether adverse or beneficial.³

Proposed Agency Mindset Changes

DOE hasn’t really sought much innovation in NEPA practices since the institution of the “supplement analysis (SA)” about two decades ago.⁴ The SA at that time was a step in the right direction to try and expedite agency actions associated with an existing EIS. Its underlying premise was still founded on a determination of non-significant impacts to minimize the preparation of a Supplemental EIS from substantial changes, new information, or changed circumstances associated with the scope of an existing EIS.⁵ Thus, the SA still supports the same context as a CE or EA to make a determination that potential impacts are insignificant, and in addition, it doesn’t offer the public knowledge of the determination (SA) until after the decision is made. The DOE further states that an SA is not a sanctioned NEPA document, “... *because these documents [SA] are not required by NEPA or the CEQ regulations,*” and therefore don’t include a public process as with EAs and cannot use them to modify a ROD for an existing EIS.⁶

The major driving force pushing the need to persist in this practice of trying to make determinations of non-significant potential impacts is the desire to avoid preparing EISs which

³ 40 CFR 1508.8 Effects, 1508.25 Scope, and 1508.27 Significantly.

⁴ “*Supplement Analysis* means a DOE document used to determine whether a supplemental EIS should be prepared pursuant to 40 CFR 1502.9(c), or to support a decision to prepare a new EIS.” 10 CFR Part 1021 – National Environmental Policy Act Implementing Procedures, Section 1021.104.

⁵ 40 CFR 1502.9(c), Draft, final, and supplemental statements.

⁶ US DOE “Final Rule”, 10 CFR 1021 National Environmental Policy Act Implementing Procedures, Federal Register, Vol. 57, No. 80, Friday, April 24, 1992, Rules and Regulations, response to Sections 1021.104 Definitions and 1021.314(d) Supplemental Environmental Impact Statements.

agencies consider time consuming and overwhelming. *Both the time required and overwhelming nature of EISs is an agency created problem, not NEPA.* A well designed policy-level EIS process and Tiered RODs methodology would help solve this misperception. This unique methodology would:

- vacate the need to make determinations of potential significant impacts for policy, plans, programs, or site-specific projects;
- replace traditional NEPA practices with a more flexible ability to balance national, regional, and/or local public policy issues each time an agency contemplates a policy implementation decision through plans, programs, and projects;
- allow weighing relevant factors including economic and technical considerations as well as agency statutory mission;
- track policy implementation consistency from agency plans to site-specific projects;
- better inform the agency decisionmaker and public on a wide array of related or connected agency actions in a timely manner.⁷

DOE was also on the right track decades ago with the Site-Wide EIS process except they failed to take the next step to the Tiered RODs process for expediting decisionmaking and reducing unnecessary legal, institutional, and political risks. Considering the massive BP oil spill last year and the current Japan nuclear reactor issues the DOE has left itself open to such risks by not meeting the issue of potential for significant environmental impacts head-on. The special interest environmental groups, other legal and professional entities, and even the public have had a sense of being left out of the important agency decisions and have been reinvigorated by these recent occurrences to take action.

The current standard NEPA practices have led not only DOE but other agencies into a situation where Congress and the Administration are challenged more often to take actions they may not see as in the best interest of public policy. For example, they basically “pass the buck” by instituting unrealistic demands on NEPA staff and agencies to implement less than desirable or sometimes unethical NEPA compliance. The NEPA compliance associated with the BP oil spill situation is a prime example of this problem. A very recent event for DOE is the American Recovery and Reinvestment Act of 2009 which may create a similar problem by promoting unwise fast tracking of NEPA compliance through excessive use of CEs, EAs, and SAs to promote insignificant potential impacts even though the Act is to significantly change the nationally economy and environment.

⁷ 40 CFR 1505.2(c), “... An agency may discuss preferences among alternatives based on relevant factors including economic and technical considerations and agency statutory missions. An agency shall identify and discuss all such factors including any essential considerations of national policy which were balanced by the agency in making its decision and state how those considerations entered into its decision.”

DOE management and the NEPA community need to take a strategic NEPA view and stop the overuse of trying to prove insignificant potential environmental impacts. DOE should accept the fact that most of its real actions other than paperwork have the potential for significant effects in today's human environment, otherwise, why are they taking the actions to meet their mission objectives. For example, review DOE's mission statement.

The mission of the Department of Energy is to ensure America's security and prosperity by addressing its energy, environmental, and nuclear challenges through transformative science and technology solutions.

Goal 1: Catalyze the timely, material, and efficient transformation of the nation's energy system and secure U.S. leadership in clean energy technologies.

Goal 2: Maintain a vibrant U.S. effort in science and engineering as a cornerstone of our economic prosperity, with clear leadership in strategic areas.

Goal 3: Enhance nuclear security through defense, nonproliferation, and environmental efforts.

We will achieve our mission by establishing an operational and adaptable framework that combines the best wisdom of all Department stakeholders.

If DOE is to be successful at this mission and the goals set forth in it then they must have a significant impact on the human environment to, “ensure America's security and prosperity by addressing its energy, environmental, and nuclear challenges through transformative science and technology solutions.” Review 40 CFR 1508.27 on significance of impacts to understand how.

§1508.27 Significantly.

“Significantly” as used in NEPA requires considerations of both context and intensity:

(a) *Context.* This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short and long-term effects are relevant.

(b) *Intensity.* This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the federal agency believes that on balance the effect will be beneficial.

...

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts. [Emphasis added]

Once DOE accepts the potential for their actions to have significant impacts they have the freedom and flexibility to strategically attack accomplishing efficient and effective decisionmaking as well as NEPA compliance. If DOE started NEPA compliance with an EIS(s) at the policy level to address their mission instead of programs and projects all other actions whether plans, programs, or projects would be within the scope. By instituting Tiered RODs rather than tiering EAs and CEs or even SAs to programmatic EISs for programs DOE could negate the need to make potential significant impacts determinations and focus on meeting legislative, administrative, political, or institutional concerns through balancing the true factors associated with meeting their mission and goals.

Suggested 10 CFR Part 1021 DOE NEPA Regulation Modifications

The following are suggested 10 CFR Part 1021 modifications and explanation.

Modification: §1021.104 Definitions.

[Policy-level NEPA document means a broad-scope EIS that is programmatic in nature and identifies and assesses cumulative impacts of ongoing environmental impacts associated with DOE policy, plan, or mission; it also establishes the linkage to the tiered NEPA documents, such as lesser EISs and RODs.]

Rationale: Add a Policy-level NEPA Document definition to complete the programmatic EIS list and facilitate more complete association with 40 CFR 1508.18 and 1502.4.

Modification: §1021.104 Definitions.

[Tiered Record of Decision (ROD) means a ROD that is tiered to a broad-scope programmatic EIS such as policy-level, site-wide, or multi-

program and the initial programmatic EIS ROD; it establishes a consistent linkage of agency decisions related to implementing individual programs and projects covered under the programmatic EIS; and, provides the necessary assessment information and balancing of decision factors to meet the requirements of a NEPA ROD (40 CFR 1505.2).]

Rationale: Adding the Tiered ROD definition completes the process for eliminating the unnecessary and time consuming process of determining whether a proposed program or project action to implement agency policy has the potential for significant impacts. It assumes potential for significant impacts whether individually or cumulatively and allows the balancing of agency factors such as meeting mission objectives, economic and technical considerations, and/or national, regional, or local policy concerns (see 40 CFR 1505.2).

Modification: **§1021.330 Programmatic (including *policy-level and* site-wide) NEPA documents.**

(a) When required to support a DOE programmatic decision (40 CFR 1508.18(b)(~~3~~)), DOE shall prepare a programmatic EIS or EA (40 CFR 1502.4). DOE may also prepare a programmatic EIS or EA at any time to further the purposes of NEPA.

[(f) To further the purposes of NEPA when not otherwise required, DOE may prepare a policy-level EIS when the agency deems policy related actions to have the potential for cumulative significant effects or the issue of potential significance of effects is given in legislation and other administrative mandates or orders.]

(g) DOE shall prepare the policy-level EIS to negate unnecessary determinations of non-significant potential impacts and expedite agency decisionmaking while reducing needless NEPA compliance delays and paperwork. As part of the policy-level EIS process, subsequent program and project implementation RODs shall be tiered to the policy EIS and initial policy ROD (see Tiered Records of Decision 1021.1040).

(h) Tiered RODs shall include an analysis consistent with the requirements of 40 CFR 1505.2 and 10 CFR 1021.315.]

Rationale: Add “*policy-level and*” to the 1021.330 title and delete the reference to (3) in the 1508.18(b)(3). By adding *policy-level* to title and stopping the reference at 1508.18(b) ensures both formal policy and official plans are more explicitly included in the programmatic EIS process for DOE.

Paragraphs (f) and (g) have been added to account for a paradigm shift in DOE NEPA compliance. Paragraph (f) allows DOE to prepare a policy-level EIS in the interest of saving time, money, and institutional, political, or legal controversy over the potential for significant environmental impacts. It also helps offset the

unreasonable requirements associated with legislation and administrative directives to complete NEPA compliance in shortened periods of time. Paragraph (g) supports paragraph (f) by allowing an agency to accept the potential for significant impacts and balance other relevant agency and outside factors when making decisions associated with public policy.

Conclusions and Recommendations

DOE should make a paradigm shift to modernize the application of NEPA. It should examine the already fifteen plus years of experience with the policy-level EIS and Tiered RODs methodology at Bonneville Power Administration. By contacting the originator and architect of this innovative NEPA process DOE could work to incorporate it agencywide. As a first step in response to this request for information regarding reducing regulatory reform DOE should begin the incorporation process for the suggested 10 CFR 1021 modifications. The second step could be done without the 10 CFR 1021 modifications by immediately initiating the implementation of the policy-level EIS and Tiered RODs methodology. This methodology could offer the strategic benefits for future NEPA as follows.

- DOE could begin preparation of a policy-level EIS on its mission and lay the groundwork for Tiered RODs under the programmatic EIS language in 10 CFR Section 1021.330 (e.g., prepare a programmatic EIS to support a DOE programmatic decision (40 CFR 1502.4(b)) or to further the purposes of NEPA).
- Tiered RODs are already included under DOE's 10 CFR 1021.104 definition for Programmatic NEPA document which mentions associated NEPA documents such as a ROD which deal with potential actions that may or may not have potential significant effects.
- The current NEPA processes underway for programs and projects do not need to be stopped because they meet the requirements of 40 CFR 1506.1(c) (i.e., proposed actions are; independently justified, accompanied by an EIS, and do not prejudice the ultimate decision on programs and projects or limit alternatives of the policy EIS).
- Once the policy EIS and Tiered RODs methodology are properly put in place through a legally sufficient NEPA process DOE could incorporate any relevant EISs, EAs, or CEs underway or completed in future proposed policy implementation actions.
- The Tiered RODs would allow necessary modifications within the policy EIS scope to any existing EIS ROD, change in policy when needed, and satisfy policy implementation for plans, programs, and projects without needing a determination of potential for significant impacts.
- The legal challenge risk of cumulative, connected, or similar actions "*potential for significant impacts*" would be effectively reduced or eliminated.
- The public process and transparency would be improved in DOE's agencywide decisionmaking and NEPA processes.

DOE's application of a new NEPA paradigm and implementation of the suggested NEPA compliance changes would have the effect of leading all federal agency management and the

NEPA community in eliminating unwanted, lengthy EAs used to substantiate mitigated FONSI. It would also break the unhealthy promotion of force fitting proposed agency actions into non-significant potential impacts categories or breaking down actions until they no longer have the potential for significant effects due to their minute size. DOE's ability to monitor its policy implementation would be enhanced and offer opportunity to realize when existing policies need change without having to go through another unnecessary programmatic EIS or supplemental EIS process. Thus, the suggested 10 CFR 1021 changes and proposed paradigm shift would meet the request for information on modifying, streamlining, and expanding DOE's NEPA compliance process to eliminate or minimize regulatory burdens.

Thank you for the prospect of helping DOE to modernize NEPA compliance and agency decisionmaking. My comments should answer many of the eleven questions that were posed regarding your Request For Information. If further clarification is needed for any of my comments do not hesitate to contact me.

Sincerely,

Charles C. Alton
Director for Strategic Environmental Assessment