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NRR PROCEDURE FOR ENVIRONMENTAL JUSTICE REVIEWS

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BACKGROUND

This procedure provides guidance to the Office of Nuclear Reactor Regulation staff on conducting environmental justice (EJ) reviews for proposed agency actions. Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," 59 FR 7629 (1994), directs Federal agencies in the Executive Branch to consider environmental justice so that their programs and activities will not have "... disproportionately high and adverse human health or environmental effects..." The NRC, although an independent agency, indicated its willingness to comply with the Executive Order.

The Council on Environmental Quality (CEQ) has finalized guidelines for Federal agencies on how to integrate EJ into the National Environmental Policy Act (NEPA) process. The guidelines are contained in the December 10, 1997, CEQ document, "Environmental Justice Guidance Under the National Environmental Policy Act." The CEQ guidance is not binding on NRC activities, however, much of the CEQ guidance has been incorporated in this procedure. ~~The staff should consult the CEQ guidance for more detailed information when performing an EJ review.~~

This document is an NRC staff policy

SCOPE

Environmental justice reviews will be performed for all regulatory actions, including licensing actions and rulemaking activities, requiring preparation of an environmental impact statement (EIS), a supplement to an EIS, or a generic EIS (GEIS). An EIS is required for those regulatory actions identified in 10 CFR 51.20 or when there is a sufficient impact on the physical or natural environment to be "significant" within the meaning of NEPA. Agency consideration of impacts on minority or low-income populations may lead to the identification of disproportionately high and adverse human health or environmental effects that are significant and that otherwise would be overlooked.

For environmental assessments (EAs) with a Finding of No Significant Impact (FONSI) determination, the staff concludes, as part of its analysis, that there will be no significant offsite impacts from the action. If no significant offsite impacts will occur, no member of the public will be substantially affected. Therefore, in most cases, there can be no disproportionately high and adverse effects of impacts on any member of the public including minority or low-income populations. In these instances, no EJ review will be performed. However, under special circumstances, EJ reviews may be needed for actions in which an EA/FONSI is prepared if there is the potential that an analysis of environmental justice issues may identify significant environmental impacts that would be otherwise not identified. In these cases, the staff will inform NRR senior management and a decision will be made on a case-by-case basis whether the circumstances warrant an EJ review for an EA.

Under NEPA, the identification of a disproportionately high and adverse human health or environmental effect on a minority or low-income population does not preclude a proposed agency action from going forward, nor does it necessarily compel a conclusion that a proposed

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action is environmentally unsatisfactory. Rather, the identification of such an effect should heighten agency attention to alternatives (including alternative sites), mitigation strategies, monitoring needs, and preferences expressed by the affected community or population.

A graduated evaluation of impacts may be performed, if appropriate, if the nature of the impact has an identifiable variation within the area or with distance from the source (for example, radiation exposure).

DOCUMENTATION

Each EIS, EIS supplement, or GEIS shall contain a section titled, "Environmental Justice," which will either contain the complete EJ review or a reference to another document containing the review. If a reference to another document is used, a summary of the review and its conclusions should be included in the EIS section. An EA will only have an EJ section if a review was performed.

in the rare and unusual situation in which

GENERAL PRINCIPLES OF EJ

the usual EJ issues encompass a broad range of impacts *normally* covered by NEPA. The staff should be sensitive to the fact that EJ issues may arise at any step of the NEPA process.

The staff should consider the composition of the affected area to determine whether minority or low-income populations are present in the area and affected by the proposed action. If there are significant impacts from the proposed action, the staff needs to determine whether there may be disproportionately high and adverse human health or environmental effects on minority or low-income populations.

As with all EIS reviews, The staff should consider relevant public health data and industry data concerning the potential for multiple or cumulative exposure to human health or environmental hazards in the affected population and historical patterns of exposure to environmental hazards, to the extent such information is reasonably available. The staff should consider multiple or cumulative effects, where appropriate, even if certain effects are not within the control or subject to the discretion of the agency proposing the action. This means that cumulative impacts from other facilities in the same area not licensed by the NRC should be included in the review. Impacts from other facilities licensed by the NRC should be considered to the extent possible.

The staff should recognize the interrelated cultural, social, occupational, historical, or economic factors that may amplify the natural and physical environmental effects of the proposed agency action. These factors should include the physical sensitivity of the community or population to particular impacts; the effect of any disruption on the community structure associated with the proposed action; and the nature and degree of impact on the physical and social structure of the community.

The staff should develop effective public participation strategies. The staff should acknowledge and seek to overcome linguistic, cultural, institutional, geographic, and other barriers to

meaningful participation and should incorporate active outreach to affected groups.

The staff should ^{strive for} assure meaningful community representation in the process. The staff should be aware of the diverse constituencies within any community and should endeavor to have complete representation of the community as a whole. The staff should be aware that community participation must occur as early as possible if it is to be meaningful.

The staff should seek tribal representation in the process in a manner that is consistent with government-to-government relations.

The review should focus on the action being taken. If the action is, for example, a license amendment, only the activities covered by the amendment, and not the overall impact from the issuance of the original license, should be reviewed. This applies even if an EJ review was not performed for the original action.

PROCEDURES FOR LICENSING ACTIONS

The following guidance should be used when performing an EJ review. This procedure may not address all situations that may occur. Project managers should consult with the Generic Issues and Environmental Projects Branch (PGE) whenever an EJ review is ~~required~~ ^{undertaken}.

1. Determine whether the regulatory action will be supported by an EIS or by an EA. When the regulatory action requires the preparation of an EIS or a supplement to an EIS, an EJ review must be prepared using the process discussed in paragraphs 2 through 9 below. When the regulatory action involves the siting of new facilities or requires the evaluation of alternative sites, EJ information must be developed for each site.

When the regulatory action is supported by an EA, the reviewer should recommend to management whether unusual circumstances warrant the consideration of potential EJ concerns in the EA. The determinations will be made on a case-by-case basis. When EJ is discussed in an EA, the process outlined in paragraphs 2 through 9 should be followed.

2. During the public scoping process for the EIS, include EJ as a discussion topic. Solicit ^{from populations potentially affected by the action.} input ~~from groups and/or individuals of minority and low-income status concerning any human health or environmental impacts they believe may occur in their communities due to the proposed action.~~ Special attention must be taken to ensure that minority and low-income populations are adequately informed and given the opportunity to participate. This may require actions such as holding scoping meetings at night or on weekends ^{along with other topics normally addressed in the EIS scoping process.} when those groups can attend without having to take time off from work, extra announcements in local media, through local churches, and community, and issuing announcements and publishing information in a language other than English.

^{No different than other typical issues} The preparer should refer to the CEQ guidance and other NRC guidance for additional public outreach methods that can be employed.

3. Using the input received from public scoping process and the evaluation of

environmental impacts for the EIS, determine the location of all adverse human health or environmental impacts that are known to be significant or perceived as significant by groups and/or individuals (typically up to 80 kilometers or 50 miles). The locations that are impacted by the proposed action are called environmental impact sites or affected areas. More than one environmental impact site may exist if multiple impacts can occur from the proposed action. The size of the environmental impact site or affected area will vary according to the nature of the impacts and should be consistent with the areas used to review environmental impacts in the EIS. See Figure 1 for examples.

4. Determine the geographic area to be used for the comparative analysis in determining whether a minority or low-income population exists. The area used for the comparative analysis is a larger area that encompasses all of the environmental impact sites (and is called the geographic area). See Figures 1 and 2 for examples.

When a regulatory action is being considered that involves alternative site locations, in addition to determining the individual geographic area for each site as defined above, determine an overall geographic area that encompasses all of the alternative site geographic areas. See Figure 2 for an example.

If the environmental impact sites overlap several States, then the geographic area will encompass parts of each State. The geographic area does not have to follow established boundaries such as county or State lines.

5. Determine minority and low-income composition in the geographic area:

Determine the percentage of the total population within the geographic area for each minority and low-income category.

The staff may use the most recent demographic data available from the Bureau of the Census (BOC) to identify the composition of the potential geographic area. Geographic distribution by race, ethnicity, and income, as well as delineation of tribal lands and resources, should be examined. Census data are available in published formats, and on CD-ROM available through the BOC. These data are also available from a number of local, college, and university libraries, and the World Wide Web. Information may also be found through demographic information and studies, such as the Landview III system, which is used by the BOC to assist in utilizing data from a geographic information system.

Minority is defined as: American Indian or Alaskan Native; Asian or Pacific Islander; Black, not of Hispanic origin; or Hispanic.

Low-income households should be identified using the annual statistical poverty thresholds from the BOC.

6. For each environmental impact site, determine the percentage of the minority population within the environmental impact site for each minority category. Likewise, determine the percentage of the households within the environmental impact site that are below the poverty level (low-income). The selection of the appropriate unit of geographic analysis may likely be a census block group or a governing body's jurisdiction, a neighborhood, census tract or similar unit.

If no minorities or low-income households are identified for any environmental impact site, document the conclusion. The EJ review is complete.

7. An EJ review must be performed if the following exists:

A minority population exists if: 1) the minority population of the environmental impact site exceeds 50 percent, or 2) the minority population percentage of the environmental impact site is significantly greater (typically at least 20%) than the minority population percentage in the geographic area chosen for the comparative analysis.

A low-income population is considered to be present if the percentage of household below the poverty level in an environmental impact site is significantly greater (typically at least 20%) than the low-income population percentage in the geographic area chosen for the comparative analysis.

In identifying minority or low-income populations, reviewers may consider as a community either a group of individuals living near one another or a group of individuals that experience common conditions of environmental exposure or effect.

8. When the review identifies minority or low-income populations, the staff needs to identify whether disproportionately high and adverse effects result from the proposed action. This is determined by completing the following steps:

a) Are the radiological health effects significant or above generally accepted norms? Is the risk or rate of hazard significant and appreciably in excess of the general population? Do the radiological health effects occur in groups affected by cumulative or multiple adverse exposures from environmental hazards?

b) Is there an impact on the natural or physical environment that significantly and adversely affects a particular group? Are the environmental effects significant? Are they having or may they have an adverse impact on a group that appreciably exceeds or is likely to appreciably exceed those on the general population? Do the environmental effects occur or would they occur in groups affected by cumulative or multiple adverse exposure from environmental hazards?

c) Reviewers should recognize that the impacts within minority or low-income populations may be different from impacts on the general population due to a community's distinct cultural practices. In addition, reviewers should take into account different patterns of living and consumption of natural resources, such as subsistence consumption.

d) Assess the significance or potential significance of such adverse impact on each minority or low-income population.

Provide an assessment of the degree to which each minority or low-income population is disproportionately receiving any benefits compared to the entire geographic area.

Discuss any mitigative measures for which credit is being taken to reduce ~~EJ~~ ^{disparate impacts} concerns.

9. The staff should clearly state the conclusion regarding whether the proposed action will have disproportionately high and adverse environmental impacts on minority or low-income populations. This statement should be supported by sufficient information for the public to understand the rationale for the conclusion. The underlying information should be presented as concisely as possible, using language that is understandable to the public and minimizes use of acronyms or jargon.

PROCEDURES FOR RULEMAKING ACTIVITIES

1. The staff responsible for rulemaking should integrate EJ into the proposed and final rules that require an EIS, EIS supplement, or generic EIS. *to the same extent that it integrates other relevant environmental considerations*
2. If it is known in advance that a particular rulemaking might impact a specific population disproportionately, the NRC staff should ensure that the population knows about the rulemaking and is given the opportunity to participate. Such actions may include translating the Federal Register Notice (FRN) into a language other than English for publication in a local newspaper and holding public outreach meetings in the affected area.
3. As noted in the "Scope" section, there may be special circumstances under which a rulemaking that has an EA/FONSI prepared or is categorically excluded from a NEPA review may identify significant environmental impacts not otherwise identified. In these cases, the staff will inform NRR senior management and a decision will be made on a case-by-case basis whether the circumstances warrant an EJ review for an EA. *special*
4. If an EJ analysis is performed for a rulemaking activity, the staff should include language contained in NUREG/BR-0053, Revision 4, Section 3.13 and 5.13 ⁱⁿ to the FRN to seek and welcome public comments on EJ. The staff should follow steps 2-9 of "Procedures for Licensing Actions," above, to perform the EJ review.
5. Public comments received pertaining to EJ on rulemaking should be addressed in the final FRN in the same section and at the same level of detail as comments received on

other parts of the rule. *aspects of the environmental considerations for*

6. When a rule is being modified or developed that contains siting evaluation factors or criteria for siting a new facility, the staff should consider including specific language in the rule or supporting regulatory guidance to state that an EJ review will be performed ~~as part of the licensing process.~~

*included as part of
the normal environmental
analysis performed in
siting a new facility*

OFFICE OF NUCLEAR REACTOR REGULATION

TO: All NRR Employees

SUBJECT: NRR OFFICE LETTER NO. 906, REVISION 2, "PROCEDURAL GUIDANCE FOR PREPARING ENVIRONMENTAL ASSESSMENTS AND CONSIDERING ENVIRONMENTAL ISSUES"

PURPOSE: Revised Office Letter No. 906 establishes procedures and provides guidance pertaining to the preparation of environmental assessments and the consideration of environmental issues for licensing actions. It supersedes Office Letter 906, Revision 1, dated September 27, 1996. Substantive revisions and editions are indicated in bold.

DIVISION OF

ORIGIN: Division of Reactor Program Management

CONTACT: Claudia M. Craig, 415-1053

DATE APPROVED:

AVAILABILITY: Roberta Ingram, 415-1219

NRR OFFICE LETTER NO. 906, REVISION 2

PROCEDURAL GUIDANCE FOR PREPARING ENVIRONMENTAL ASSESSMENTS AND CONSIDERING ENVIRONMENTAL ISSUES

OBJECTIVES

This office letter is intended to (1) define the responsibilities of the Generic Issues and Environmental Projects Branch (PGEb) for ensuring that NRR is consistent in its implementation of NRC and other Federal environmental regulations, (2) define NRR staff responsibilities, and (3) provide guidance to NRR staff on the procedural requirements for demonstrating compliance with environmental statutes and regulations covering environmental issues for docketed facilities.

Disparate impact
The office letter contains guidance for preparing environmental assessments (EAs) and for considering the environmental issues associated with the Coastal Zone Management Act of 1972 (CZMA), the Endangered Species Act of 1973 (ESA), the National Historical Preservation Act, as amended (NHPA), and the Executive Order related to environmental justice. These issues entail, in part, determining an action's impact on protected coastal zones, protected endangered species, and archaeological and historical sites, and considering the degree to which an action has an effect on minority populations and low-income populations. It should be noted that an environmental impact statement (EIS) addresses the same issues as an EA, but in a more detailed format. This office letter does not address the preparation of an EIS; an EIS will be prepared with technical support from PGEb staff. This office letter supersedes previous guidance on these subjects.

RESPONSIBILITIES AND AUTHORITIES

PGEb

PGEb is responsible for providing implementation guidance and technical support to the NRR staff for the resolution of environmental issues for docketed facilities. PGEb is also responsible for coordinating environmental issues with other NRC offices, for ensuring NRR meets its obligations under all Federal environmental regulations and the National Environmental Policy Act (NEPA), and for consistently and properly implementing the requirements of 10 CFR Part 51, "Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions," for docketed facilities.

All NRR Employees

Individual NRR staff members are responsible for implementing the procedural requirements of this office letter; the staff should consult with PGEb when reviewing environmental issues.

BASIC REQUIREMENTS

In addition to NRC's regulatory responsibilities embodied in the traditional health and safety requirements of the Atomic Energy Act, NRC also has responsibilities that derive from the NEPA and from other environmental regulations (such as the ESA, the NHPA, and the CZMA) ~~and from Presidential Executive Orders.~~ The NRR staff should consider the environmental issues when performing license amendment activities including, but not limited to

- (1) increasing the authorized power level of commercial power reactors (power uprate up to 5 percent and extended power uprate up to 120 percent),
- (2) changing the license expiration date to recapture time between the construction permit and actual operation (construction recapture),
- (3) performing decommissioning activities under 10 CFR Part 50, and
- (4) revising Appendix B of a licensee's operating license (environmental protection plan).

Additionally, the staff should consider the environmental issues when processing license renewal applications and requests for exemptions from NRC regulations, and when conducting rulemaking. **The staff need not consider environmental issues when performing licensing and regulatory activities eligible for categorical exclusions under 10 CFR 51.22.**

The NRR staff is encouraged to seek assistance from PGEB early in dealing with environmental issues that are unique, particularly difficult, or unfamiliar. The NRR staff may request formal guidance in writing EAs or EISs from PGEB. When seeking concurrence, assistance, or safety evaluation input, the NRR staff should provide the PGEB staff a Technical Assignment Control (TAC) number because environmental reviews are fee recoverable under 10 CFR Part 170.

PGEB Responsibilities

- (1) Review and concur on **plant-specific and generic EAs** prepared by the NRR staff for the activities listed above. PGEB will maintain typical treatments of environmental issues and provide input to standard wording used in addressing similar environmental issues.
- (2) Review and provide guidance and support to the NRR staff in the preparation of all EISs (draft, final, and supplements) for docketed facilities.
- (3) Participate in environmental rulemaking activities. PGEB will review proposed environmental legislation, statutes, regulations, and guidance for potential impact on NRR and will participate in Federal Government-wide meetings. PGEB will provide guidance to the NRR staff regarding the implementation of other applicable Federal statutes.
- (4) Review new and emerging environmental issues and provide support to the NRR staff in resolving environmental issues.
- (5) Review environmental documents submitted by other Federal and State agencies.
- (6) Review recovery plans for endangered species and prepare or direct the preparation of biological assessments (BAs) as required by the ESA.
- (7) Coordinate environmental issues with other NRC offices and Federal and State

agencies.

- (8) Maintain and update this office letter.

General Staff Requirements for EAs

As previously discussed under "Basic Requirements", EAs must be written for certain licensing and rulemaking activities. Although most environmental reviews performed by NRC are EAs, it is important to understand the distinction between an EA and an EIS and when each is used.

NEPA requires that a detailed statement of the environmental impact of the proposed action and alternatives (an EIS) be prepared for "major Federal actions significantly affecting the quality of the human environment." The process used to determine whether an action will significantly affect (or impact) the environment is an EA. If the review documented in an EA shows that the proposed action will not have a significant impact on the environment, a finding of no significant impact (FONSI) is made in the conclusion of the EA and no EIS need be prepared. If, on the other hand, the environmental review reveals that the proposed action will, or has the potential to, significantly affect the environment, the EA must conclude that a more detailed review of the environmental effects (i.e., an EIS) should be prepared. In general, an EIS contains much more detail about the specific environmental impacts of the proposed action and alternatives, and requires extensive public participation, public comment, and coordination with other agencies. Normally, project managers (PMs) prepare EAs and are responsible for coordinating the preparation of EISs.

Upon receipt of a proposed action, the PM should determine whether an environmental review is needed and, if it is needed, the type that should be prepared. Section 51.22 of Title 10 of the Code of Federal Regulations (10 CFR 51.22) identifies categories of actions that are excluded from environmental reviews because it has been determined that certain categories do not individually or cumulatively have a significant effect on the human environment. If the PM determines that the proposed action is outside one of the excluded categories, the PM shall prepare the EA in accordance with the requirements in 10 CFR 51.30, unless significant environmental impacts may occur as a result of the action. If significant environmental impacts may occur, the PM should contact PGEB and an EIS will be prepared. Section 51.30 requires an EA to (1) identify the proposed action, (2) briefly discuss the need for the proposed action, (3) briefly discuss the alternative courses of action if the proposed action involves an *unresolved conflict concerning alternative uses of resources*, (4) describe the environmental impacts of the proposed action and any alternative courses of action noted in item (3), and (5) list agencies and persons consulted and identify sources used. **EAs should not address the safety details of the review, only the environmental impacts of the proposed action.** An EA should include a FONSI if the EA supports a conclusion that the proposed action will not have a significant effect on the quality of the human environment. If such a finding cannot be made, an EIS will have to be prepared. The preparation of the EIS should be coordinated with PGEB. Attachment 1 is a flow chart outlining the process. Attachment 2 contains detailed guidance on each step in the preparation of an EA. Attachment 3 contains a sample (boilerplate) of the appropriate format and content of an EA.

Note that the sample is intended to be used as guidance and is not a substitute for an objective consideration of the impacts and conclusions. PMs must independently satisfy themselves that any boilerplate statements used are correctly applied to the specific action being reviewed.

General Requirements for Rulemaking Activities

When an EA is written in support of rulemaking activities, the initiating office implements additional procedures. Detailed guidance is provided in the NRC Regulations Handbook, NUREG/BR-0053.

In general, after the Federal Register notice (FRN) for the proposed rule is signed by the Commission Secretary or the Executive Director for Operations (EDO), and before the FRN is published, a generic cover letter with a copy of the draft EA and the FRN should be sent to the State Liaison Officer requesting the State's comments. As with an EA for a licensing action, the consultation must be documented in a brief summary in the EA, and must address the comments and staff response. A sample letter is included in the NUREG.

General Requirements for Environmental Justice

In February 1994, the President issued an Executive Order mandating that Federal agencies make "environmental justice" part of each agency's mission by addressing disproportionately high and adverse human health or environmental effects of Federal programs, policies, and activities on minority populations and on low-income populations. The Council on Environmental Quality developed guidelines on how to integrate environmental justice into the NEPA process. The guidelines are contained in the document "Environmental Justice Guidance Under the National Environmental Policy Act," December 10, 1997. NRR developed a corresponding procedure (Attachment 4) for incorporating environmental justice into the licensing process.

Environmental justice reviews will be performed for all actions requiring preparation of an EIS or a supplement to an EIS. An environmental justice review is not usually required for an EA in which a FONSI is made, unless warranted by special circumstances. These cases may include regulatory actions that involve a significant site modification with an identifiable impact on the environment or that have substantial public interest. In these circumstances, the staff will inform NRR senior management and a decision will be made on a case-by-case basis as to whether the circumstances warrant an environmental justice review for an EA.

Coastal Zone Management Act

The CZMA was promulgated to encourage and assist States and territories in developing management programs that preserve, protect, develop, and, where possible, restore the resources of the coastal zone. A "coastal zone" is generally described as the coastal waters and the adjacent shore lands strongly influenced by each other. This includes islands, transitional and intertidal areas, salt marshes, wetlands, beaches, and Great Lakes waters. Activities of Federal agencies that are reasonably likely to affect coastal zones shall be consistent with the approved coastal management program (CMP) of the State or territory. The CZMA provisions apply to all Federal licenses and actions requiring Federal approval (new plant licenses, license renewals, materials licenses, and major amendments to existing licenses) that affect the coastal zone in a State or territory with a federally approved CMP. Attachment 5 lists those States and territories with federally approved CMPs.

PMs should determine whether the State or territory has an approved CMP and whether their licensee is within the boundary of the CMP. If the plant is located within the CMP boundary, the

PM should become familiar with the requirements of the CMP. Within the CMP, predetermined activities are listed that may affect the coastal zone. When the PM determines that a proposed licensing activity may affect coastal uses or resources, the PM should inform the licensee of the need to contact the government of the State or territory and to comply with the provisions of the CZMA. The licensee should certify its compliance to the State or territory. Attachment 6 is a draft model certification for license amendment applicants.

In notifying the licensee of the need to communicate with the State or territorial government, the PM should ascertain whether the proposed activity is listed in the CMP. If the activity has been listed in the CMP, the PM has an obligation to withhold approval of the application until the government of the State or territory has concurred. If the applicant seeks a license, permit, or license amendment for an activity affecting the coastal zone and that activity is not listed in the CMP, the State or territory has the responsibility of informing the NRC and the applicant (within 30 days after the CMP coordinator has been notified) that the activity requires review by the State or territorial government. Otherwise, the State or territory waives the right to review the unlisted activity. In either case, once the State or territory begins its review, it has 6 months to determine whether such activity is consistent with the CMP. If the State or territory concurs, NRC may issue approval of the application. If the State or territory objects to a consistency certification for a listed activity, NRC may not approve the activity unless the applicant appeals the objection to the Secretary of Commerce and the Secretary overrides the objection. Attachment 7 is a flow chart of CZMA activities.

Endangered Species Act

The ESA was promulgated to ensure protection of endangered or threatened species and critical habitats. The ESA imposes two basic requirements on Federal agencies. First, the ESA requires each Federal agency to ensure that any action authorized, funded, or carried out by an agency is not likely to jeopardize the continued existence of any endangered species or threatened species, or result in the destruction or impairment of any critical habitat for such species. "Action" has been interpreted broadly and comprises licensing, rulemaking, and lesser regulatory actions that could jeopardize an endangered species. A Federal agency should act, if possible (where it has the legal authority), to prevent endangered species or their habitats from being threatened or destroyed.

Second, the ESA requires Federal agencies to fulfill the requirements of the act in consultation with, and with the assistance of, the Secretary of the Interior (for freshwater and terrestrial species through the Fish and Wildlife Service) or the Secretary of Commerce (for oceanic and coastal matters through the National Marine Fisheries Service); hereafter both are referred to as "the Service." If the Federal agency fails to consult with the Service, and the action results in the "taking" (harassment, harm, pursuit, hunting, shooting, wounding, killing, trapping, capture, collection, or attempt to engage in such activities) of an endangered species or the impairment or destruction of a critical habitat, the Federal agency is in clear violation of the ESA. Five consultation processes can be used and are discussed briefly next.

Early Consultation

The applicant can request that the Federal agency enter into early consultation with the Service. This may be done if the applicant believes one or more listed species or critical habitats may be affected by the proposed action. The agency initiates early consultation in writing. The process followed is the same as the one discussed under "Formal Consultation";

however, a preliminary biological opinion (BO) is issued. A preliminary BO does not constitute the authority to "take" listed species.

Informal Consultation

Informal consultation, an optional process of discussions between the Service and the Federal agency preceding formal consultation, determines whether formal consultation or a conference is required.

Conference

This process involves informal discussions between a Federal agency and the Service regarding the impact of an action on proposed species or proposed critical habitat and recommendations to minimize or avoid harm.

Biological Assessment

A BA is initiated when a major activity takes place that may affect listed species or critical habitats. The Federal agency requests a list from the Service of endangered or threatened species and critical habitats or sends the Service a list of species and habitats that are being reviewed in the BA. Within 30 days of the request, the Service responds (provides the list or concurs on the list that was prepared by the Federal agency). If no species or habitats are affected, no further action is required. If only proposed species or habitats (not yet listed as an endangered or threatened species or habitat) are involved, the Federal agency must confer with the Service, but a BA is not required. If listed species or critical habitats are involved, the Federal agency must begin the BA within 90 days of the response. **(Although in most cases, the NRC designates the writing of the BA to the licensee.)** The BA may include the findings of onsite inspections, opinions of recognized experts, results of an information review, an analysis of the proposed actions, and alternatives. The BA must be submitted to the Service within 180 days of the response. The Service must respond to the BA within 30 days. If there are no listed species involved and the Service concurs, no formal consultation is required. If the BA concludes that the action is not likely to jeopardize the listed species or any critical habitat and the Service concurs, no conference is required. If the BA concludes that the action affects listed species or critical habitat, the Federal agency can initially request an informal consultation

to determine whether the project can be modified so that the species or critical habitats are not adversely affected. Otherwise, formal consultation is required.

Formal Consultation

Formal consultation is a process between the Service and the Federal agency that takes place after the BA has been submitted and the BA has determined that the action affects listed species or critical habitats. **Attachment 8 is a flow chart illustrating the formal ESA consultation process.** The Federal agency sends a written request for consultation to the Service. The written request must contain a description of the action, a description of the area, a description of the listed species, the effects of the action, an analysis of the cumulative effects, and a review of reports and other information. Within 90 days, the Service issues a BO. The BO contains a summary of the action, the effects, an opinion on whether the species is in jeopardy as a result of the action, alternatives, incidental "take" provisions, and

conservation measures.

After the consultation is complete, the Federal agency must determine whether it has taken all necessary actions. Although the Federal agency is not legally bound to comply with Service opinions and can adopt measures that differ from the recommendations, the courts give substantial weight to Service opinions. **In general, the NRC then provides the BO, including the incidental "take" provisions and conservation measures, to the applicant or licensee for implementation.**

There are also provisions for reinitiation of consultation if the original assumptions of the BA change, and there is a provision for a citizen suit to challenge a Federal agency's action.

National Historical Preservation Act

The NHPA was promulgated in 1966 and amended in 1992 to coordinate and support public and private efforts to identify, evaluate, and protect significant historic and archaeological resources. Section 106 of the NEPA directs Federal agencies to consider the effects of their undertakings on historic properties and to give the Advisory Council on Historic Preservation (the Council) an opportunity to review and comment on any Federal agency action that might harm historic property. **Attachment 9 is a flow chart illustrating the Section 106 process.** "Undertakings" denotes a broad range of Federal activities, including the issuance of NRC licenses, license amendments, and permits. "Historic property" is any property listed in or eligible for inclusion in the National Register of Historic Places (register). The NHPA evaluation may take place as part of the NEPA review.

As the first step in the process, the agency identifies the historic property that the undertaking may affect. The Federal agency should review information and consult with the State Historic Preservation Officer (SHPO). **In areas of Native American tribal land, the Native American tribal agencies may act as the SHPO.** If properties are identified and may be eligible for entry in the register but have not yet been listed in it, the agency should evaluate the site against criteria published by the National Park Service. The evaluation is carried out in consultation with the SHPO, and the agency may seek formal determinations. If the property has already been listed in the register, no further evaluation is necessary. The agency should assess the effect of the undertaking on the site that contains an historic property. The Federal agency should work with the SHPO. Three determinations may be made: no effect, no adverse effect, and adverse effect. If an adverse effect determination is made, the agency should consult with the SHPO, the public, and the Council. Consultation will result in a memorandum of agreement (MOA) outlining measures agreed upon by the agency to reduce, avoid, or mitigate the adverse effect. The MOA is submitted to the Council and the Council replies in writing within 30 days.

EFFECTIVE DATE

This office letter is effective immediately.

Attachments:

1. Environmental Assessment Flow Chart
2. Environmental Assessment Preparation Guidance
3. **Format and Content of Environmental Assessment**
4. Environmental Justice Interim Procedure

5. List of States with Federally Approved Coastal Management Programs
6. Draft Model Certification
7. Coastal Zone Management Act Flow Chart
8. Endangered Species Act Consultation Flow Chart
9. Section 106 Flow Chart

cc w/attachments:

J. Callan, EDO
H. Thompson, DEDR
W. Travers, DEDE
H. Miller, RI
L. Reyes, RII
A. Beach, RIII
E. Merschhoff, RIV
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the undertaking on the site that contains an historic property. The Federal agency should work with the SHPO. Three determinations may be made: no effect, no adverse effect, and adverse effect. If an adverse effect determination is made, the agency should consult with the SHPO, the public, and the Council. Consultation will result in a memorandum of agreement (MOA) outlining measures agreed upon by the agency to reduce, avoid, or mitigate the adverse effect. The MOA is submitted to the Council and the Council replies in writing within 30 days.

EFFECTIVE DATE

This office letter is effective immediately.

Attachments:

1. Environmental Assessment Flow Chart
2. Environmental Assessment Preparation Guidance
3. Format and Content of Environmental Assessment
4. Environmental Justice Interim Procedure
5. List of States with Federally Approved Coastal Management Programs
6. Draft Model Certification
7. Coastal Zone Management Act Flow Chart
8. Endangered Species Act Consultation Flow Chart
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