

# AUDIT REPORT

Audit of NRC's Compliance With 10 CFR Part 51 Relative  
to Environmental Impact Statements

OIG-13-A-20 August 20, 2013



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**UNITED STATES  
NUCLEAR REGULATORY COMMISSION**  
WASHINGTON, D.C. 20555-0001

**OFFICE OF THE  
INSPECTOR GENERAL**

August 20, 2013

MEMORANDUM TO: R. William Borchardt  
Executive Director for Operations

FROM: Stephen D. Dingbaum */RA/*  
Assistant Inspector General for Audits

SUBJECT: AUDIT OF NRC'S COMPLIANCE WITH 10 CFR PART 51  
RELATIVE TO ENVIRONMENTAL IMPACT STATEMENTS  
(OIG-13-A-20)

Attached is the Office of the Inspector General's (OIG) audit report titled, *Audit of NRC's Compliance With 10 CFR Part 51 Relative to Environmental Impact Statements*.

The report presents the results of the subject audit. The agency provided comments to the report on July 22, 2013. The agency's comments have been incorporated into the report at Appendix D.

Please provide information on actions taken or planned on each of the recommendations within 30 days of the date of this memorandum. Actions taken or planned are subject to OIG followup as stated in Management Directive 6.1.

We appreciate the cooperation extended to us by members of your staff during the audit. If you have any questions or comments about our report, please contact me at 415-5915 or Sherri Miotla, Team Leader, Nuclear Materials & Waste Safety Audit Team, at 415-5914.

Attachment: As stated

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## **EXECUTIVE SUMMARY**

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### **BACKGROUND**

#### **The National Environmental Policy Act**

The National Environmental Policy Act of 1969 (NEPA) established a national policy to encourage productive and enjoyable harmony between man and his environment, promote efforts that will prevent or eliminate damage to the environment, and enrich the understanding of ecological systems and natural resources important to the United States. To implement NEPA, Federal agencies must undertake an assessment of the environmental effects of their proposed actions prior to making a decision. The two major purposes of the NEPA process are better informed decisions and citizen involvement.

NEPA requires that Federal agencies prepare a detailed statement on the environmental impacts and effects, alternatives to the action, and irreversible commitments of resources involved in the action. This detailed statement is called an Environmental Impact Statement (EIS).

#### **NRC's NEPA Role**

The Nuclear Regulatory Commission's (NRC) regulations to implement NEPA are found in Title 10, Code of Federal Regulations, Part 51 (10 CFR Part 51). NRC's process for preparing an EIS begins when the agency receives an application for a proposed action that requires an EIS. A typical NRC environmental review includes analyses of impacts to specific resource areas, including air, water, animal life, natural resources, and property of historic, archeological, or architectural significance. In its NEPA review, NRC also evaluates cumulative, economic, social, cultural, and environmental justice impacts.

#### **NRC's Commitments to the Public**

The purposes of NEPA and its implementation dovetail with NRC's organizational values of openness and transparency, as expressed in the Principles of Good Regulation and the Strategic Plan. NRC activities generate a great deal of public interest. For their participation to be meaningful, stakeholders must have access to clear and understandable information about NRC's role, process, activities, and decisionmaking.

## **OBJECTIVE**

The audit objective was to determine whether NRC complies with the regulations in 10 CFR Part 51 relative to the preparation of environmental impact statements.

## **RESULTS IN BRIEF**

### **Areas of Current Noncompliance**

In recent years, NRC has taken steps to enhance its NEPA reviews and procedures. These initiatives have generated important discussions and provide a context for long-term progress. However, the Office of the Inspector General (OIG) has identified areas of noncompliance with 10 CFR Part 51 relative to disclosure and public involvement. In order to clearly communicate the results of and involve the public in its environmental reviews, NRC management should strengthen its EIS preparation process by:

- Publishing a Record of Decision (ROD) that complies with 10 CFR 51.102 and 51.103.
- Publishing an EIS that complies with the format provided in 10 CFR Part 51, Appendix A.
- Performing all regulatory requirements for scoping for EISs that tier off of a generic EIS.

## **RECOMMENDATIONS**

This report makes six recommendations to bring the agency into compliance with 10 CFR Part 51 relative to the preparation of EISs.

## **AGENCY COMMENTS**

On July 22, 2013, NRC provided comments to the draft report. The agency stated its belief that its NEPA implementation activities have been fully compliant with the relevant regulations in 10 CFR Part 51. OIG's central message in the report is that through lack of compliance with NRC's NEPA-implementing regulations, the agency has made it difficult for stakeholders to access information developed in environmental reviews and may have omitted opportunities for public participation in certain environmental reviews. Appendix D contains NRC's comments

and Appendix E contains OIG's analysis of the agency's comments. The agency said it will consider OIG's recommendations as part of the agency's continuous improvement efforts because the recommendations could help enhance effectiveness, efficiency, and consistency across NRC programs in implementing NEPA.

## **ABBREVIATIONS AND ACRONYMS**

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|       |   |
|-------|---|
| ASLB  | Atomic Safety and Licensing Board   |
| ASLBP | Atomic Safety and Licensing Board Panel                                     |
| CFR   | Code of Federal Regulations   |
| EIS   | Environmental Impact Statement  |
| FSME  | Office of Federal and State Materials and Environmental Management Programs |
| NEPA  | The National Environmental Policy Act of 1969                               |
| NMSS  | Office of Nuclear Material Safety and Safeguards                            |
| NRO   | Office of New Reactors  |
| NRR   | Office of Nuclear Reactor Regulation  |
| NRC   | Nuclear Regulatory Commission   |
| OIG   | Office of the Inspector General   |
| ROD   | Record of Decision  |

## TABLE OF CONTENTS

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|   |    |
|---|----|
| EXECUTIVE SUMMARY .....   | i  |
| ABBREVIATIONS AND ACRONYMS .....  | iv |
| I. BACKGROUND .....   | 1  |
| II. OBJECTIVE .....   | 4  |
| III. FINDINGS .....   | 4  |
| A. Records of Decision Not in Full Compliance With<br>Regulations ..... | 5  |
| B. NRC EISs Do Not Follow the Required Format.....                      | 12 |
| C. NRC Not in Full Compliance With Scoping<br>Regulations .....         | 17 |
| IV. CONSOLIDATED LIST OF RECOMMENDATIONS.....                           | 27 |
| V. AGENCY COMMENTS .....  | 28 |
| <b>APPENDICIES</b>  |    |
| A. MAJOR STEPS IN EIS PROCESS.....                                      | 29 |
| B. OBJECTIVE, SCOPE, AND METHODOLODY .....                              | 30 |
| C. SAMPLING METHODOLODY.....  | 33 |
| D. AGENCY COMMENTS.....   | 35 |
| E. OIG ANALYSIS OF AGENCY COMMENTS .....                                | 45 |

## **I. BACKGROUND**

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### **The National Environmental Policy Act**

The National Environmental Policy Act of 1969 (NEPA) established a national policy to encourage productive and enjoyable harmony between man and his environment, promote efforts that will prevent or eliminate damage to the environment, and enrich the understanding of ecological systems and natural resources important to the United States. To implement NEPA, Federal agencies must undertake an assessment of the environmental effects of their proposed actions prior to making a decision. The two major purposes of the NEPA process are better informed decisions and citizen involvement.

NEPA requires that for a major Federal action significantly affecting the quality of the human environment, Federal agencies must prepare a detailed statement on the environmental impacts and effects, alternatives to the action, and irreversible commitments of resources involved in the action. This detailed statement is called an Environmental Impact Statement (EIS).

NEPA also established the White House Council on Environmental Quality to monitor and foster Federal agency compliance with NEPA. The Council on Environmental Quality promulgated regulations to ensure that agency procedures produce high quality environmental information, make that information available to the public and to agency decisionmakers, and ultimately to make "better decisions" as stated in NEPA. The Council on Environmental Quality regulations require Federal agencies to develop their own implementing procedures.<sup>1</sup>

### **NRC's NEPA Role**

The Nuclear Regulatory Commission's (NRC) regulations to implement NEPA are found in Title 10, Code of Federal Regulations, Part 51 (10 CFR Part 51), "Environmental Protection Regulations for Domestic Licensing

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<sup>1</sup> NRC revised its environmental regulations to meet the Council on Environmental Quality requirement to develop NEPA implementing procedures.

and Related Regulatory Functions.” Part 51 identifies licensing actions that require the preparation of an EIS, including issuance of:

- An early site permit for a nuclear power reactor.
- A combined license to construct and operate a nuclear power reactor.
- A license renewal for an operating nuclear power reactor.
- A license to possess and use special nuclear material for processing and fuel fabrication or conversion of uranium hexafluoride.
- A license to possess and use source material for uranium milling or production of uranium hexafluoride.
- A license for a uranium enrichment facility.

NRC's process begins when the agency receives an application for a proposed action that requires an EIS. Once NRC considers the application complete and “accepts” it for review, an environmental review to comply with 10 CFR Part 51 and NEPA begins, paralleling the separate agency review for compliance with its technical or “safety” regulations. A typical NRC environmental review includes analyses of impacts to specific resource areas, including air, water, animal life, natural resources, and property of historic, archeological, or architectural significance. In its NEPA review, NRC also evaluates cumulative, economic, social, cultural, and environmental justice impacts.

The major steps in NRC's process for conducting this review and preparing the EIS are outlined in Appendix A of this report. Several steps provide opportunities for public involvement throughout preparation of the EIS. The Record of Decision (ROD) ties together the results of the environmental review and serves as an important vehicle for informing the public of the agency's conclusions and decision.

## **NRC's Commitments to the Public**

The purposes of NEPA and its implementation dovetail with NRC's organizational values of openness and transparency, as expressed in the Principles of Good Regulation and the Strategic Plan.

### *Principles of Good Regulation*

NRC has a longstanding goal of conducting its regulatory responsibilities in an open manner, and keeping the public informed of the agency's regulatory, licensing, and oversight activities. In pursuing its mission to protect public health and safety and the environment, NRC strives to adhere to the Principles of Good Regulation – independence, openness, efficiency, clarity, and reliability. More specifically, in the Principles, NRC says nuclear regulation is the public's business, and it must be transacted publicly and candidly. Furthermore, NRC commits that the public must be informed about and have the opportunity to participate in the regulatory process as required by law. Additionally, NRC states that open channels of communication must be maintained with Congress, other government agencies, licensees, and the public.

### *NRC's Strategic Plan 2008-2013*

Ensuring appropriate openness explicitly recognizes that the public must be informed about, and have a reasonable opportunity to participate meaningfully in NRC's regulatory processes. NRC activities generate a great deal of public interest. For their participation to be meaningful, stakeholders must have access to clear and understandable information about NRC's role, processes, activities, and decisionmaking. In the Strategic Plan published in 2008, NRC adopted strategies to achieve openness goals, including:

- Communicating about NRC's role, processes, activities, and decisions in plain language that is clear and understandable to the public.
- Initiating early communication with stakeholders on issues of substantial interest.

When NRC updated its 2008-2013 Strategic Plan in 2012, the agency affirmed the importance of openness strategies to its effectiveness. The revised plan notes that “public stakeholders must have timely access to clear and understandable information.” Further, the plan states that “participation allows members of the public to contribute ideas and expertise so that the NRC can make regulatory decisions with the benefit of information from a wide range of stakeholders.”

## **II. OBJECTIVE**

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The audit objective was to determine whether NRC complies with the regulations in 10 CFR Part 51 relative to the preparation of environmental impact statements. Appendix B to this report contains information on the audit scope and methodology.

## **III. FINDINGS**

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In recent years, NRC has taken steps to enhance its NEPA reviews and procedures. For example, NRC has contracted to bring courses from the Duke University Environmental Leadership Program to NRC to develop a cadre of NEPA professionals in the agency. In addition, the agency's NEPA Executive Steering Committee was formed to identify common issues for NEPA implementation across NRC's program offices, including best practices and areas needing guidance. These initiatives have generated important discussions and provide a context for long-term progress. However, the Office of the Inspector General (OIG) has identified areas of noncompliance with 10 CFR Part 51 relative to disclosure and public involvement. In order to clearly communicate the results of and involve the public in its environmental reviews, NRC management should strengthen its EIS preparation process by:

- Publishing a ROD that complies with 10 CFR 51.102 and 51.103.
- Publishing an EIS that complies with the format provided in 10 CFR Part 51, Appendix A.

- Performing all regulatory requirements for scoping for EISs that tier off of a generic EIS.

### **A. Records of Decision Not in Full Compliance With Regulations**

NRC offices with EIS preparation responsibilities do not publish a ROD that complies with the requirements in 10 CFR Part 51. NRC regulations provide specific criteria for the publication of a ROD and what must be included in a ROD. NRC does not publish a ROD that complies with its regulations because within the agency there are incorrect and varying interpretations of what the regulations require. Thus, NRC is not in compliance with its regulations. As a result, NRC (1) does not adequately notify the public, including Congress, Federal agencies, government partners and other stakeholders,<sup>2</sup> of its decision and the basis of that decision and (2) undermines its extensive efforts to be clear, open, and transparent.

#### **NRC Regulations Require a Concise Public ROD**

Any Commission decision for which an EIS is prepared must include or be accompanied by a ROD. A ROD is a document that explains NRC's decision, describes the alternatives considered, discusses potential environmental effects, and summarizes license conditions and monitoring programs adopted in connection with mitigation of environmental impacts. The ROD closes the NEPA process. 10 CFR 51.102 and 51.103 are the NRC regulations that require publication of a ROD and state what it must contain.

#### *10 CFR 51.102*

Section 51.102 specifies that for any action for which an EIS has been prepared, the EIS must include or be accompanied by a concise public ROD. If a hearing is held on the proposed action, the initial decision of the presiding officer will constitute the ROD. If the proposed action can only be taken by the Commissioners acting as a collegial body, the final

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<sup>2</sup> Government partners include tribal governments, State governments, and local or municipal governments. Other stakeholders include public interest groups and any other interested member of the public.

decision of the Commission will constitute the ROD. The designated NRC staff director<sup>3</sup> is responsible for preparation of the ROD, except for instances when a hearing is held on the proposed action or the action is concluded as a result of a Commission decision.

*10 CFR 51.103*

Section 51.103 prescribes what all RODs must include, regardless of whether a hearing is held. Table 1 depicts these specifications.

**Table 1. Requirements for a ROD**

| <b>51.103(a): The ROD must be clearly identified and must:</b> |   |
|--|---|
| (1)  | State the decision.   |
| (2)  | Identify all alternatives considered by the Commission in reaching the decision, state that these alternatives were included in the range of alternatives discussed in the EIS, and specify the alternative(s) which were considered to be environmentally preferable.  |
| (3)  | Discuss preferences among alternatives based on relevant factors, including economic and technical considerations where appropriate, NRC's statutory mission, and any other essential considerations of national policy, which were balanced by the Commission in making the decision and state how these considerations entered into the decision. |
| (4)  | State whether the Commission has taken all practicable measures within its jurisdiction to avoid or minimize environmental harm from the alternative selected, and if not, to explain why those measures were not adopted. Summarize any license conditions and monitoring programs adopted in connection with mitigation measures.                 |
| (5)  | In making a final decision on a license renewal action pursuant to Part 54 of this chapter, the Commission shall determine whether or not the adverse environmental impacts of license renewal are so great that preserving the option of license renewal for energy planning decisionmakers would be unreasonable.                                 |

**Source:** 10 CFR 51.103(a)

<sup>3</sup> Section 51.4 defines the NRC staff director as the, (1) Executive Director for Operations, (2) Office of Nuclear Reactor Regulation (NRR) Director, (3) Office of New Reactors (NRO) Director, (4) Office of Nuclear Material Safety and Safeguards (NMSS) Director, (5) Office of Federal and State Materials and Environmental Management Programs (FSME) Director, (6) Office of Nuclear Regulatory Research Director, (7) Office of Governmental and Public Affairs Director, and (8) the designee of any NRC staff director.

*51.103(b) and (c)*

Additionally, a ROD meeting these requirements may be integrated into any other record prepared by NRC in connection with the action or may incorporate by reference material contained in the final EIS.

**NRC Does Not Publish a ROD that Complies With the Regulations**

For the sample of RODs provided by NRC and reviewed by OIG, NRC offices that prepare and publish EISs do not publish a ROD that complies with 10 CFR 51.102 and 51.103. OIG requested that NRC provide the RODs for 10 specific licensing actions. NRC responded to this request, providing documents that the offices asserted to be the ROD. See Appendix C for the specific licensing actions and OIG's methodology in selecting those actions.

*The Documents Provided Are Not Concise*

The documents provided by NRC are not concise as required by 10 CFR 51.102. For 4 of the 10 licensing actions, NRC provided multiple documents for each ROD. For example,

- For a fuel cycle facility, NRC provided (1) the 6-page materials license, (2) a 91-page decision from the Atomic Safety and Licensing Board (ASLB),<sup>4</sup> and (3) a 116-page decision from ASLB.<sup>5</sup>
- For another fuel cycle facility, NRC provided (1) the materials license, (2) the Federal Register Notice for the publication of the EIS, and (3) the Federal Register Notice for the publication of the Safety Evaluation Report.
- For each of the two Early Site Permits, NRC provided two documents: (1) a 100+ page ASLB decision and (2) a Commission Order.

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<sup>4</sup> Decision Title: "First Partial Initial Decision (Uncontested/Mandatory Hearing on Safety Matters)" dated April 8, 2011.

<sup>5</sup> Decision Title: "Second and Final Partial Initial Decision (Uncontested/Mandatory Hearing on Environmental Matters)" dated October 7, 2011.

For an additional 4 of the 10 licensing actions, NRC provided a Federal Register Notice notifying the public that NRC had issued a license. The Federal Register Notices fail to state the required information, although they refer the reader to the EIS for “further information.” However EISs are not concise. They are lengthy and complex documents, as depicted in Table 2.

**Table 2. Length of EIS by Responsible Office**

| Responsible NRC Office | Range of Page Length of EIS |
|------------------------|-----------------------------|
| FSME                   | 570 to 749 pages            |
| NMSS                   | 493 to 537 pages            |
| NRO                    | 504 to 919 pages            |
| NRR                    | 309 to 751 pages            |

Source: OIG analysis of NRC EISs in sample (See Appendix C)

*Generally, the Documents Did Not Meet Regulatory Requirements for a ROD*

Generally, the documents provided by NRC did not comply with the requirements of section 51.103(a), as depicted in Table 3. Table 3 represents OIG's analysis of the documents provided by NRC in response to OIG's request.

**Table 3. Compliance With 51.103(a) Requirements by Office**

| Office | State the decision<br>51.103(a)(1) | Identify alternatives<br>51.103(a)(2) | Specify the environmentally preferred alternative<br>51.103(a)(2) | Discuss preferences among alternatives<br>51.103(a)(3) | State whether all practicable measures were taken to avoid environmental harm<br>51.103(a)(4) | Summarize license conditions and monitoring programs<br>51.103(a)(4) | Commission determination for license renewal <sup>6</sup><br>51.103(a)(5) |
|--------|------------------------------------|---------------------------------------|---|--|---|--|---|
| FSME   | YES                                | YES <sup>7</sup>                      | NO  | NO   | NO  | NO   | N/A   |
| NMSS   | YES                                | NO                                    | NO  | NO   | NO  | NO   | N/A   |
| NRR    | YES                                | YES <sup>7</sup>                      | NO  | NO   | NO  | NO   | NO  |
| NRO    | YES                                | NO <sup>7</sup>                       | NO  | NO   | NO  | NO   | N/A   |

**Source:** OIG analysis of documents provided by NRC for the sample of licensing actions (See Appendix C)

<sup>6</sup> 51.103(a)(5) states, "In making a final decision on a license renewal action pursuant to Part 54 of this Chapter, the Commission shall determine whether or not the adverse environmental impacts of license renewal are so great that preserving the option of license renewal for energy planning decisionmakers would be unreasonable."

<sup>7</sup> 51.103(c) allows NRC to incorporate by reference material contained in the final EIS. Among documents sent to OIG in response to the request were Federal Register Notices from different offices. For two offices, FSME and NRR, the Federal Register Notices identified alternatives considered and refer to the EISs for further discussion. However, the NRO Federal Register Notices do not mention alternatives but only state where to locate documents associated with the licensing action, including the EIS.

### **NRC Offices Are Incorrectly Interpreting Regulations**

NRC is not in compliance with 10 CFR 51.102 and 51.103 because the offices that publish EISs have varying and incorrect interpretations of the regulatory requirements. NRC managers gave varying responses as to what constitutes a ROD. For example, a senior manager advised OIG that “there is no such thing as a ROD in this [NRC] environment.” Another senior manager said the ROD issue is an ongoing debate. Another senior manager said that the license, Safety Evaluation Report, and EIS constitute the ROD.

NRC staff also gave varying responses to what constitutes a ROD. For example, some FSME staff said that the Federal Register Notice is the ROD and others said the licenses or licensing documents are the ROD. An NRR staff member advised that the Federal Register Notice constitutes the ROD. Generally, NRO staff advised that the hearing or hearing decision constitutes the ROD. However, it is not clear, from staff responses, which document in the hearing record they consider to be the ROD. Additionally, another NRO staff member advised that the license is the ROD.

### **NRC Is Not in Compliance With Its Regulations**

NRC is not in compliance with the requirements for publishing a ROD in sections 51.102 and 51.103. As a result, NRC does not adequately notify the public, including Congress, Federal agencies, government partners, and other stakeholders, of its decision and the basis for its decision.

A senior official from another Federal agency noted he looked for RODs in order to be more informed of the final decisions made by NRC, but found none. Another staff member of the same agency advised she could not find the information, for a specific licensing action, that should have been in a ROD.

Some members of the public were unable to identify NRC RODs and had difficulty with the information provided by NRC in lieu of a ROD. One stakeholder stated that NRC makes NEPA information available to the public by putting it on NRC's Web site. However, according to the stakeholder, the problem is there are voluminous amounts of data and it is

overwhelming to the average person. The information is not clear and concise, as required of a ROD. Another stakeholder opined that for a specific NRC licensing action that the stakeholder's group commented on, there was no ROD. This stakeholder informed OIG of reminding NRC that a ROD is required according to NRC's regulations. Another stakeholder said that NRC should summarize and simplify NEPA data so the average person can understand it. This stakeholder was experienced with NRC's Web site and understands environmental documents; however, this stakeholder opined, without a ROD the general public would have a difficult time understanding the data.

NRC does not publish a ROD that complies with its own regulations, and therefore does not adequately close the NEPA process. This fosters public skepticism that undermines the agency's extensive efforts to be clear, open, and transparent.

### **Recommendations**

OIG recommends that the Executive Director for Operations:

1. Develop agencywide guidance for NRC staff to prepare and publish a concise public document that meets the requirements of 10 CFR 51.102 and 51.103.
2. Implement the agencywide guidance to ensure that all offices will consistently prepare and publish a concise public document that meets the requirements of 10 CFR 51.102 and 51.103.

## **B. NRC EISs Do Not Follow the Required Format**

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NRC's EISs do not follow the format described by 10 CFR Part 51, Appendix A. Appendix A to 10 CFR Part 51 identifies the format elements that must be included. NRC's EISs do not follow the Appendix A format because controls are not in place to assure use of that format. Thus, NRC is not in compliance with its regulations. As a result, NRC (1) does not clearly present, in an accessible way, the proposed action, alternatives, and conclusions to stakeholders and (2) undermines its extensive efforts to be clear, open, and transparent.

### **NRC Regulations Require a Specific Format**

Appendix A to 10 CFR Part 51 prescribes a format that EISs "should" follow. The stated purpose of the standard format is to encourage good analysis and clear presentation of the alternatives, including the proposed action. The Appendix A format requires each EIS to have the following elements:

- *Summary.* The regulations require a summary that adequately and accurately summarizes the EIS. The purpose of a summary is to stress the major issues, discuss the areas of controversy, identify any remaining issues to be resolved, and present the major conclusions and recommendation.
- *Index.* The regulations require each EIS to have an index.
- *Cover Sheet.* The regulations require each EIS to have a cover sheet that includes the name, address, and telephone number of an individual at NRC who can provide further information. The cover sheet must also list the State, county, or municipality where the facility is located. Lastly, the cover sheet is not to exceed one page.

Appendix A allows a different format to be used, if there is a compelling reason to do so. However, if a different format is used, it "shall" include a summary, index, and cover sheet.

## **EIS Format Does Not Meet Regulatory Requirements**

Based on OIG's sample, NRC's EISs do not follow the format required by 10 CFR Part 51, Appendix A, regarding a summary, index, and cover sheet. OIG reviewed a sample of 10 EISs prepared by NRC for 10 licensing actions. A list of those licensing actions and the methodology for OIG's sample selection is in Appendix C of this report. None of the 10 EISs reviewed fully met the Appendix A requirements for a summary or cover sheet. Only one of the EISs reviewed contained an index.

### *Summary*

Each EIS contained an executive summary; however, none of the executive summaries adequately summarized the EIS or fully complied with the Appendix A requirements for a summary.

- For one office, the summaries did not stress the major issues considered, discuss areas of controversy, or identify any remaining issues to be considered.
- For another office, it is not clear whether the summaries stress the major issues considered,<sup>8</sup> and the summaries did not discuss the areas of controversy or identify any remaining issues to be considered.
- For another office, both summaries reviewed stressed major issues considered and one identified remaining issues to be considered. However, neither summary discussed areas of controversy.

### *Index*

Of the 10 EISs reviewed, 9 lacked an index. The sole EIS that contained an index included key NEPA terms such as "alternatives," "mitigation," and "scoping" as well as a reference to Federal agencies such as the

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<sup>8</sup> It is not clear whether these summaries stressed the major issues considered because the summaries included a summary of the environmental impacts for each resource area analyzed in the EIS. It is not apparent that each resource area is a major issue. Each resource area is required to be assessed in each EIS the office publishes.

Department of Energy and the Environmental Protection Agency and to State agencies.

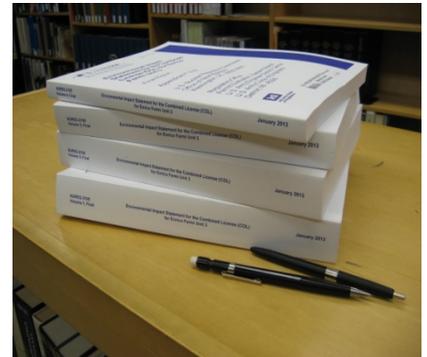
### *Cover Sheet*

While all of the EISs reviewed did have a cover sheet, none of the 10 EISs fully met the Appendix A requirements. Specifically:

- None of the cover sheets contained the name, address, and telephone number of an individual who could be contacted for further information.
- Four of the cover sheets did not contain the State, county, or municipality where the facility is located.
- None of the cover sheets contained the required information on a single page; instead, the information spanned three to five separate pages.

### **Controls Not in Place To Assure Proper Format**

NRC EISs are not in compliance with the formatting requirements set forth in 10 CFR Part 51, Appendix A. Although NRC managers said they expect staff to follow the format prescribed in Appendix A, these managers are allowing EISs to be issued that are not properly formatted. The EISs are missing key components prescribed in Appendix A because controls assuring proper formatting are not in place. Although each NRC office that publishes an EIS has guidance that staff must follow to standardize environmental reviews, the “environmental standard review plans” instruct staff only to follow the Appendix A format. There is no clear, agencywide guidance to implement the requirements and thereby assure that EISs contain the key components.



**Figure 1:** NRC's most recent final EIS, published in four volumes.  
**Source:** OIG

## **NRC Is Not in Compliance With Its Regulations**

NRC is not in compliance with the format requirements for an EIS prescribed in 10 CFR Part 51, Appendix A. As a result, NRC is not presenting, in an accessible way, the proposed action, alternatives, major issues, controversies, remaining issues, and conclusions and recommendations to the public, including Congress, Federal agencies, government partners, and other stakeholders.

OIG interviewed stakeholders who provided public comments on EISs published by NRC. Generally, the stakeholders opined that information provided is not clear. One stakeholder, a former Federal Government employee familiar with looking at documents, stated that NRC's NEPA information is not clear or concise. This stakeholder further commented that reading and digesting the data provided by NRC is very difficult because the data is so voluminous. NRC ought to break down the information "in a common sense approach so the average person can do a quick read and learn how they may be impacted by the action," this stakeholder explained. Another stakeholder opined that some of NRC's EISs were long and complex and it was difficult for the stakeholder's organization to understand everything. As a result, this stakeholder's organization felt compelled to consult with other organizations to help them understand NRC's information. Another stakeholder opined that the way NRC reports information is difficult to understand. NRC provides a lot of technical information, but the meaning of the information is not obvious, added this stakeholder.

By not following the Appendix A format, NRC does not adequately present to the EIS reader the proposed action and alternatives considered by NRC. This inadequate presentation fosters public skepticism that undermines the agency's extensive efforts to be clear, open, and transparent.

### **Recommendations**

OIG recommends that the Executive Director for Operations:

3. Develop agencywide guidance for NRC staff to comply with 10 CFR Part 51, Appendix A.

4. Implement the agencywide guidance to ensure that all EISs include all cover sheet information, a consistent summary format, and an index in compliance with 10 CFR Part 51, Appendix A.

## **C. NRC Not in Full Compliance With Scoping Regulations**

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NRC did not fully comply with scoping regulations for in-situ uranium recovery EISs that tier off of a generic EIS. NRC regulations require scoping when preparing an EIS and specify actions the agency must take during the scoping process. NRC did not fully comply with the scoping regulations because there is an incorrect understanding of the regulations related to scoping for EISs that tier off of a generic EIS. Thus, NRC is not in compliance with its regulations. By not fully complying with the regulations, NRC may exclude some interested persons who wish to participate in the process. Additionally, NRC undermines its extensive efforts to be clear, open, and transparent.

### **NRC Regulations Require Scoping**

#### *Scoping Requirements*

NRC is required to conduct an appropriate scoping process and publish a Notice of Intent when preparing an EIS, and NRC regulations specify actions the agency must take during the scoping process. Regulations for scoping enumerated in 10 CFR Part 51 describe a formal process initiated by the publication of a Notice of Intent to prepare the EIS. During the scoping process, the agency shall define the proposed action and receive input from stakeholders about the significant issues on which the EIS analysis should focus. A public meeting is one way to receive input, but is not required. The formal scoping process must be open to anyone who expresses an interest in participating. The formal scoping process concludes with the publication of a scoping summary report. This report characterizes and responds to all the input received during the formal scoping process and communicates to all participants what the agency learned in scoping and how scoping results will shape the environmental review.

NRC's regulations governing scoping for an EIS are summarized in Table 4.

**Table 4: NRC Scoping Regulations**

| NRC Scoping Regulations in 10 CFR Part 51 |   |
|---|---|
| 51.26(a)                                  | When an EIS will be prepared, requires preparation of a Notice of Intent and conduct an appropriate scoping process   |
| 51.26(d)                                  | Scoping not required for a supplement as defined in 10 CFR 51.92  |
| 51.27                                     | Defines content of a Notice of Intent, including description of proposed scoping process; address and deadline for written comments; and whether, where, and when a public meeting will be held |
| 51.28                                     | Defines scoping participants  |
| 51.29                                     | Defines scoping for an EIS and its objectives   |
| 51.29(b)                                  | Requires preparation of a scoping summary report  |

**Source:** OIG analysis of 10 CFR Part 51

*Exception for Supplements*

The regulations carve out certain exceptions to the requirement to conduct a formal scoping process when preparing an EIS. One exception is when a supplement to a final EIS is prepared when the proposed action considered in the final EIS has not been taken. A supplement to the final EIS will be prepared if:

- “There are substantial changes in the proposed action that are relevant to environmental concerns; or,

- There are new and significant circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.”<sup>9</sup>

The scope of the supplemental EIS must be limited to the new information or change in the proposed action. A formal scoping process need not be conducted.

### *Tiering*

NRC regulations provide for a practice known as tiering. In 10 CFR Part 51, Appendix A, tiering is defined by referring directly to and quoting the Council on Environmental Quality definition. As a result, the Council on Environmental Quality regulation<sup>10</sup> applies directly to NRC. Council on Environmental Quality regulations define tiering as the development of a broad or programmatic EIS that assesses the scope and impact of the environmental effects that would be associated with an action at numerous sites. Tiering is encouraged by Council on Environmental Quality regulations and guidance and is intended to reduce repetitive analyses and increase meaning for the public in EISs for similar actions. When conducting subsequent environmental reviews of individual sites within the program, the agency can concentrate on the unique, site-specific features and impacts. If review of site-specific conditions shows that the programmatic conclusions are applicable, relevant parts of the broader, programmatic EIS can be incorporated by reference into the site-specific document. According to the Council on Environmental Quality, scoping should be performed whenever an EIS is prepared, including for the subsequent, site-specific EISs that tier off of the programmatic EIS.

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<sup>9</sup> A supplement to an EIS is defined in NRC regulations at 10 CFR 51.92.

<sup>10</sup> The Council on Environmental Quality regulations regarding tiering are found at 40 CFR 1502.20 and 40 CFR 1508.28.

Additionally,

“[s]coping may or may not include meetings, but the process should involve interested parties at all levels of government, and all interested private citizens and organizations.”<sup>11</sup>

NRC refers to a programmatic EIS as a generic EIS.

### **NRC Did Not Fully Comply With Scoping Regulations**

NRC did not fully comply with scoping regulations for in-situ uranium recovery EISs that tier off of a generic EIS. Two NRC program offices currently use a generic EIS and tiering in environmental reviews:

- NRR published a generic EIS for the renewal of operating reactor licenses.
- FSME published a generic EIS for in-situ uranium recovery facilities.

#### *Tiering by NRR*

When NRR prepares an EIS for renewal of an operating reactor license, the review includes a formal scoping process. The following steps are included:

- The Notice of Intent is published to meet the requirements of 10 CFR 51.27.
- A public meeting is held.
- Written comments are received through e-mail or in hard copy.

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<sup>11</sup>Bear, Dinah, “NEPA at 19: A Primer on an ‘Old’ Law with Solutions to New Problems,” Environmental Law Reporter, 1989, available on Council on Environmental Quality’s guidance Web page at <http://ceq.hss.doe.gov/nepa/regs/iii-11.pdf>. Bear was the General Counsel for the Council on Environmental Quality, and her article outlines NEPA’s purposes, scope, and implementation procedures.

- A scoping summary report is prepared, distributed to scoping participants, and included as an appendix to the draft and final EISs.

NRC's 1996 rule that codified the findings of the generic EIS for operating reactor license renewal specifically required a formal scoping process be conducted when preparing the EIS for a license renewal application.

#### *Tiering by FSME*

By contrast, when NRC prepares site-specific EISs for applications for new in-situ uranium recovery operations, the agency does not seek broad public comment and specifically does not open a formal scoping period. Notices of Intent to prepare EISs were published for six applications received since publication of the generic EIS for in-situ uranium recovery. Although one application has since been put on hold, NRC has published final or draft EISs for five projects. Final EISs have been published for three in-situ uranium recovery projects, and draft EISs have been published for two proposed projects. Table 5 summarizes the information regarding early public input as described in the six published Notices of Intent.

**Table 5: Notices of Intent to Prepare EISs for New In-Situ Uranium Recovery Applications**

| <b>Notices of Intent for New In-Situ Uranium Recovery Applications</b> |                       |  |  |
|--|-----------------------|--|--|
| <b>Facility</b>  | <b>Date Published</b> | <b>Information Provided by NRC</b>   | <b>Actions Omitted</b>   |
| <b>Nichols Ranch (complete)</b>  | August 5, 2009        | NRC staff met with Federal, State, and local government agencies and public organizations in January 2009 as part of a site visit to gather site-specific information. Staff also "contacted potentially interested tribes and local public interest groups via email and telephone."                              | <ul style="list-style-type: none"> <li>• No formal scoping process opened.</li> <li>• No invitation for broad public comment.</li> </ul> |
| <b>Antelope-Jab (on hold)</b>  | August 14, 2009       | NRC staff planned to place ads in newspapers requesting information and comments from the public regarding the proposed action; also planned to "meet with and gather information from" local agencies and public interest groups during a visit to the proposed site. "No public scoping meetings" would be held. | <ul style="list-style-type: none"> <li>• No formal scoping process opened.</li> <li>• No invitation for broad public comment.</li> </ul> |
| <b>Moore Ranch (complete)</b>  | August 21, 2009       | NRC staff met with Federal, State, and local government agencies and public organizations in January 2009 as part of a site visit to gather site-specific information. Staff also "contacted potentially interested tribes and local public interest groups via email and telephone."                              | <ul style="list-style-type: none"> <li>• No formal scoping process opened.</li> <li>• No invitation for broad public comment.</li> </ul> |
| <b>Lost Creek (complete)</b>   | September 3, 2009     | NRC staff met with Federal, State, and local government agencies and public organizations in January 2009 as part of a site visit to gather site-specific information. Staff also "contacted potentially interested tribes and local public interest groups via email and telephone."                              | <ul style="list-style-type: none"> <li>• No formal scoping process opened.</li> <li>• No invitation for broad public comment.</li> </ul> |
| <b>Dewey-Burdock (draft)</b>   | January 20, 2010      | NRC staff planned to place ads in newspapers requesting information and comments from the public regarding the proposed action. Also staff were "consulting" with various Federal and State agencies, tribal entities, and potentially interested public interest groups.  | <ul style="list-style-type: none"> <li>• No formal scoping process opened.</li> <li>• No invitation for broad public comment.</li> </ul> |
| <b>Ross (draft)</b>  | November 16, 2011     | NRC staff planned to place ads in newspapers requesting information and comments from the public regarding the proposed action. Also "met with and gathered information from" local agencies and public interest groups during a visit to the proposed site.   | <ul style="list-style-type: none"> <li>• No formal scoping process opened.</li> <li>• No invitation for broad public comment.</li> </ul> |

**Source:** OIG analysis of NRC Notices of Intent

The Notices of Intent depict a range of approaches for seeking input for site-specific environmental reviews. In four cases, NRC staff met with State and local governments and other stakeholders before the Notice of Intent was published. In the other two cases, however, the Notice of Intent indicates that NRC staff planned to conduct such meetings. NRC staff referred to these meetings with agencies, known tribes, and previously-identified public interest groups as “targeted information gathering.”

Beyond the meetings that were part of “targeted information gathering,” for three projects – Nichols Ranch, Moore Ranch, and Lost Creek – no additional public comment was sought to develop the scope of the site-specific EIS. Notices of Intent for three other projects state that staff planned to place advertisements in local media seeking public comment, although no address or deadline for submitting comments was included in any of the Notices of Intent. Two of the environmental reviews for which advertisements were placed received some public comments. In one draft EIS, these comments were referred to as “scoping” comments, although neither a formal opening nor closing date of the scoping process was included in the Notice of Intent.



**Figure 2:** Public comments at a scoping meeting.  
**Source:** NRC

In several of the Notices of Intent, NRC asserted that “NRC regulations do not require scoping,” but then described activities normally conducted by staff as part of the scoping process. These activities were conducted without the opening of a formal scoping process, which would have included in the Notice of Intent an invitation for broad public comment and the publication of an address and deadline for submission of comments.

In practice, the site-specific review and assessment of impacts occurred without a complete site-specific scoping process. The three completed EISs reviewed by OIG and one of the drafts state that NRC staff considers “the scope of the generic EIS to be sufficient for the purposes of defining the scope” of the EIS for the specific site. The most recent draft EIS

states that “NRC conducted scoping activities for the purposes of defining the scope of the GEIS [generic EIS] and any future” EISs for specific sites that tier off of the generic EIS. Thus, for the in-situ uranium recovery EISs that have tiered off of the generic EIS to-date, NRC has determined the scope of the site-specific EIS by using the generic EIS and has omitted some opportunities for broad public comment.

Further, in the absence of a formal scoping process, NRC did not publish a scoping summary report to characterize and respond to the comments received from stakeholders. Also, there was no summary characterization of or response to comments received during “targeted information gathering” in face-to-face meetings, teleconferences, or as a result of advertisements in local media.

### **Incorrect Understanding of Scoping Regulations**

NRC did not fully comply with the scoping regulations because of incorrect understanding of the regulations related to scoping for EISs that tier off of a generic EIS. Specifically, NRC staff refer to the tiered site-specific EIS as a “supplement” to the generic EIS, leading to the belief that the exception in 10 CFR 51.26(d) applies to tiered EISs. Some NRC managers assert that the public scoping process for the generic EIS for in-situ uranium recovery suffices for subsequent, site-specific uranium recovery applications.

However, during that generic EIS scoping process in 2007, NRC staff emphasized in response to public comments that all applications would receive a site-specific review. Staff also emphasized that there would be a request for public input on scoping through a “scoping meeting” on site-specific issues if an EIS were prepared for a future application. In this way, NRC did not give public notice that the public scoping for the generic EIS would serve as the scoping process for later EISs. The public, defined broadly, was not able to comment on issues of significance for specific sites because specific applications were not yet under consideration during the scoping process for the generic EIS.

## **Limiting Scoping Undermines NRC Transparency**

NRC is not in compliance with its regulations for scoping in 10 CFR 51.26-29. Public comment at an early stage in the environmental review enables NRC to determine the scope of the issues to be addressed in the EIS, as required by the regulations. By not seeking broad public comment, NRC may not fully develop the scope of the issues to be addressed in the EIS. Also, less opportunity for involvement and input may exclude some interested persons who wish to participate in the process. As one NRC staff member noted, "There are different issues that people really need for the NEPA process to address and it is up to those in NRC responsible for NEPA to report what they see and respond to what they are presented with."

For future EISs that tier off of an already-finalized generic EIS, the scoping conducted during the generic EIS may become out-of-date. The scoping conducted for the generic EIS for in-situ uranium recovery is more than 5 years old. Over time, methods of analysis and human communities change. As a result, generic scoping becomes less meaningful.

Failure to conduct scoping and enhance public participation undermines the agency's extensive efforts to be clear, open, and transparent. Although the level of public interest in proposed actions under NRC review may vary, opening a formal scoping process to written comments and preparing a scoping summary report remain important steps in the NEPA process that are compatible with NRC's objectives of providing opportunities for meaningful public involvement. For members of the public with an interest in or concerns about NRC-licensed projects, such opportunities are valuable. When the opportunities are not available, public skepticism is heightened. For example, one public commenter about the generic EIS for in-situ uranium recovery reported feeling "a little dubious" about the generic EIS because it appeared to be "a way to streamline a process, and to keep the public out."

Moreover, without ensuring correct understanding of scoping requirements for EISs that tier off of a generic EIS, NRC might not conduct scoping for site-specific EISs that tier off of a future generic EIS, based on the precedent set.

## **Recommendations**

OIG recommends that the Executive Director for Operations:

5. Develop agencywide guidance for all offices that prepare EISs to ensure that scoping is performed for all EISs that tier off of a generic EIS.
6. Implement the agencywide guidance to ensure that scoping is performed for all EISs that tier off of a generic EIS.

## **Summary and Conclusion**

The two major purposes of the NEPA process are better informed decisions and citizen involvement. In recent years, NRC has taken steps to enhance its NEPA reviews and procedures. However, through lack of compliance with 10 CFR Part 51, the agency has made it difficult for stakeholders to access information developed in environmental reviews and may have omitted opportunities for public participation in certain environmental reviews. This lack of compliance fosters public skepticism and undermines the agency's extensive efforts to be clear, open, and transparent.

## **IV. CONSOLIDATED LIST OF RECOMMENDATIONS**

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OIG recommends that the Executive Director for Operations:

1. Develop agencywide guidance for NRC staff to prepare and publish a concise public document that meets the requirements of 10 CFR 51.102 and 51.103.
2. Implement the agencywide guidance to ensure that all offices will consistently prepare and publish a concise public document that meets the requirements of 10 CFR 51.102 and 51.103.
3. Develop agencywide guidance for NRC staff to comply with 10 CFR Part 51, Appendix A.
4. Implement the agencywide guidance to ensure that all EISs include all cover sheet information, a consistent summary format, and an index in compliance with 10 CFR Part 51, Appendix A.
5. Develop agencywide guidance for all offices that prepare EISs to ensure that scoping is performed for all EISs that tier off of a generic EIS.
6. Implement the agencywide guidance to ensure that scoping is performed for all EISs that tier off of a generic EIS.

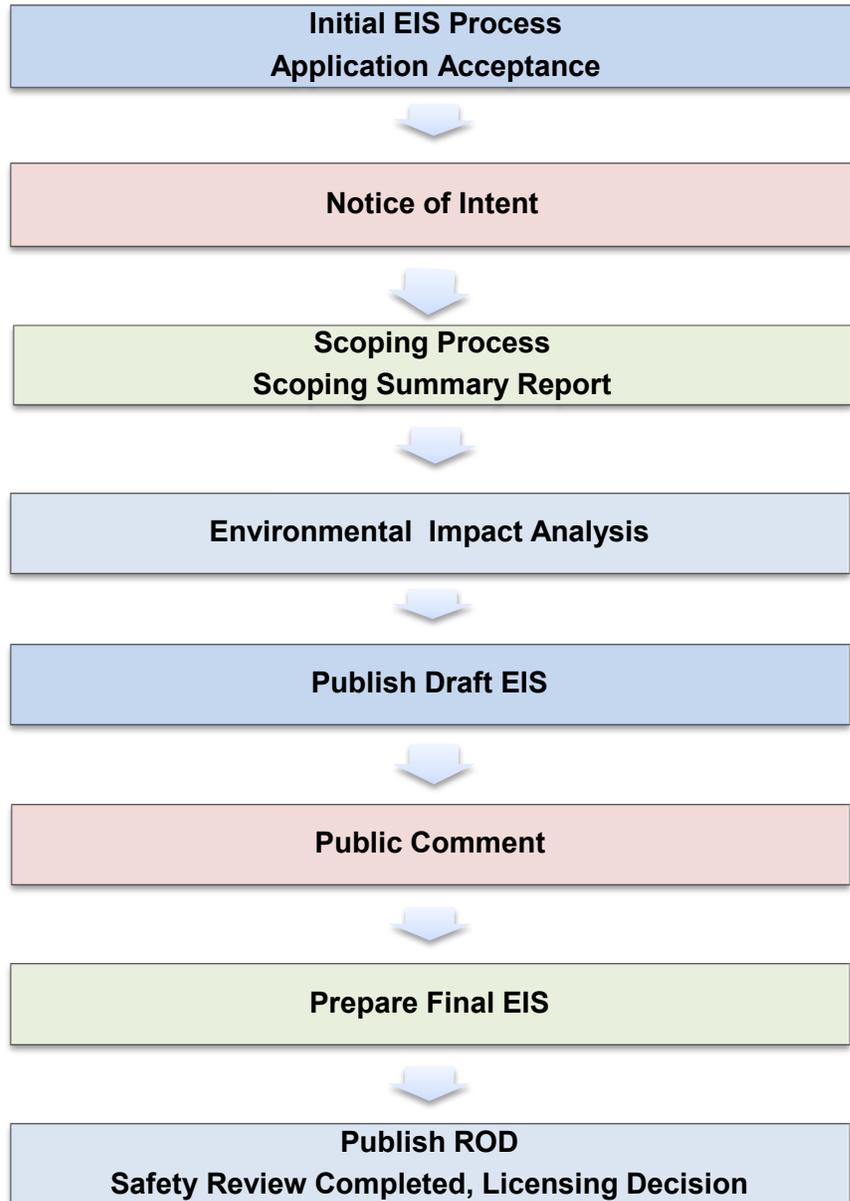
## **V. AGENCY COMMENTS**

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On July 22, 2013, NRC provided comments to the draft report. The agency stated its belief that its NEPA implementation activities have been fully compliant with the relevant regulations in 10 CFR Part 51. OIG's central message in the report is that through lack of compliance with NRC's NEPA-implementing regulations, the agency has made it difficult for stakeholders to access information developed in environmental reviews and may have omitted opportunities for public participation in certain environmental reviews. Appendix D contains NRC's comments and Appendix E contains OIG's analysis of the agency's comments. OIG made no changes to the body of the report based upon the agency's comments. The agency said it will consider OIG's recommendations as part of the agency's continuous improvement efforts because the recommendations could help enhance effectiveness, efficiency, and consistency across NRC programs in implementing NEPA.

## MAJOR STEPS IN EIS PROCESS

Source: OIG analysis of NRC regulations and guidance.



## **OBJECTIVE, SCOPE, AND METHODOLOGY**

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### **OBJECTIVE**

The audit objective was to determine whether NRC complies with the regulations in 10 CFR Part 51 relative to the preparation of environmental impact statements. This audit is a spinoff audit — an offshoot from the Audit of NRC's Implementation of Its NEPA Responsibilities.

### **SCOPE**

This audit focused on reviewing the preparation of EISs published during the last 6 fiscal years. We conducted this performance audit at NRC headquarters (Rockville, Maryland) from January 2013 through April 2013. Internal controls related to the audit objective were reviewed and analyzed. Throughout the audit, auditors were aware of the possibility or existence of fraud, waste, or misuse in the program.

### **METHODOLOGY**

#### *Document Reviews*

The OIG audit team reviewed relevant criteria, including the National Environmental Policy Act of 1969, as amended, 10 CFR Part 51, "Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions," and 40 CFR 1500, "Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act." Auditors received training in the implementation of the National Environmental Policy Act.

OIG reviewed EISs and associated documents for 10 specific licensing actions from fiscal years 2007 through 2012. The sampling methodology used to select the EISs is described in Appendix C.

The OIG team reviewed guidance and documents pertaining to the preparation of EISs by NRC. Key documents reviewed included:

- NRC Commission Papers.
- NRC Staff Requirements Memoranda.
- NUREG-1555, Standard Review Plans for Environmental Reviews for Nuclear Power Plants, and NUREG-1555, Supplement 1, Operating License Renewal.
- NUREG-1748, Environmental Review Guidance for Licensing Actions Associated with NMSS Programs.
- NUREG-1437, Generic Environmental Impact Statement for License Renewal of Nuclear Plants.
- NUREG-1910, Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities.
- Agency and office-level guidance.
- Draft and final environmental impact statements.
- Federal Register Notices.
- Transcripts of public meetings.
- Communications plans.
- Hearing decisions.
- Council on Environmental Quality guidance.
- NRC correspondence with Federal agencies and tribal, State, and local governments related to environmental reviews.

### *Interviews*

At NRC headquarters, auditors interviewed staff and management from the Office of Federal and State Materials and Environmental Management Programs, the Office of Nuclear Reactor Regulation, the Office of New Reactors, the Office of Nuclear Material Safety and Safeguards, the Office of the General Counsel, and the Atomic Safety Licensing Board Panel to gain an understanding of their roles and responsibilities related to the preparation of EISs. Auditors interviewed representatives of the Council on Environmental Quality and the Government Accountability Office. Auditors also conducted telephone interviews with representatives of stakeholder organizations that had provided comments during NRC environmental reviews.

We conducted this performance audit in accordance with generally accepted Government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.

The audit work was conducted by Sherri Miotla, Team Leader; Levar Cole, Audit Manager; Kristen Lipuma, Senior Analyst; Kevin Nietmann, Senior Technical Advisor; and Amy Hardin, Auditor.

## SAMPLING METHODOLOGY

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The OIG audit team identified five types of NRC licensing actions issued in the past 6 fiscal years that required preparation of an EIS:

- Operating reactor license renewals issued by the Office of Nuclear Reactor Regulation.
- Early site permits for new reactor facilities issued by the Office of New Reactors.
- Combined licenses for new reactor facilities issued by the Office of New Reactors.
- Licenses for uranium recovery facilities issued by the Office of Federal and State Materials and Environmental Management Programs.
- Licenses for fuel cycle facilities issued by the Office of Nuclear Material Safety and Safeguards.

OIG then identified 32 licensing actions during the last 6 fiscal years, including 20 license renewals,<sup>12</sup> 4 early site permits, 2 combined licenses, 3 uranium recovery facilities, and 3 fuel cycle facilities. For document review, OIG elected to randomly select from each of the five types of licensing actions issued by the NRC in the past 6 years. The licensing actions were placed in chronological order within each group and numbered sequentially. Using the random number selection function in Microsoft Excel, the following licensing actions were randomly selected:

- Reactor License Renewal: (1) License Renewal for Pilgrim Nuclear Power Station and (2) License Renewal for Columbia Generating Station.
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<sup>12</sup> License renewals for Salem and Hope Creek were treated as a single licensing action because the environmental reviews were combined in a single EIS.

- Early Site Permit for New Reactor: (1) Early site permit for the Grand Gulf site and (2) Early site permit for the North Anna site.
- Combined License for New Reactor: (1) Combined license for Vogtle Electric Generating Plant Units 3 and 4 and (2) Combined license for Virgil C. Summer Nuclear Station Units 2 and 3.
- Uranium Recovery: (1) Materials license for Moore Ranch in-situ recovery project and (2) Materials license for Nichols Ranch in-situ recovery project.
- Fuel Cycle Facility: (1) Materials license for AREVA Eagle Rock Enrichment Facility and (2) Materials license for International Isotopes Fluorine Products, Inc., Uranium Deconversion Plant.

These are the 10 licensing actions for which OIG requested that the agency provide the RODs and for which OIG reviewed the EIS for format requirements.

## AGENCY COMMENTS

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July 19, 2013

MEMORANDUM TO: Hubert T. Bell  
Inspector General

FROM: R. W. Borchardt /RA M. Weber for/  
Executive Director for Operations

SUBJECT: FORMAL COMMENTS ON OFFICE OF THE INSPECTOR GENERAL  
DRAFT REPORT "AUDIT OF NRC'S COMPLIANCE WITH 10 CFR  
PART 51 RELATIVE TO ENVIRONMENTAL IMPACT STATEMENTS"

I am responding to Stephen Dingbaum's July 1, 2013, e-mail transmitting the Office of the Inspector General's (OIG) Draft Report, "Audit of NRC's Compliance with 10 CFR Part 51 Relative to Environmental Impact Statements." Enclosure 1 includes the staff's comments and Enclosure 2 includes the Atomic Safety and Licensing Board Panel's (ASLBP's) comments. The U.S. Nuclear Regulatory Commission (NRC) staff suggested this audit topic to examine if the agency has conducted its environmental reviews in an effective and efficient manner consistent with available resources to accomplish its mission and goals.

Based on a thorough review of the draft report and an extensive interaction between our staffs, the NRC staff concludes that we are fully compliant with the NRC regulations in Title 10 of the *Code of Federal Regulations* (10 CFR) Part 51, "Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions," relative to Environmental Impact Statements (EISs). As discussed more fully below, the NRC does not agree with OIG's findings that the NRC's EISs and Supplemental EISs (SEISs) do not fully comply with 10 CFR Part 51 regulations. The OIG's findings rely on observations and legal interpretations that are inaccurate.

First, the NRC complies with 10 CFR § 51.103 as reflected by 10 CFR §§ 51.103(b) and (c), which state that the record of decision may be integrated into any other record prepared by the Commission in connection with the action and incorporate by reference material contained in a final EIS. Second, the regulations do not require a separate record of decision when a hearing is held. Specifically, the NRC regulations in 10 CFR § 51.102(c) state that a presiding officer's initial decision following a hearing or the Commission's final decision following an appeal will "constitute the record of decision." Third, the format for an EIS described in 10 CFR Part 51

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H. Bell

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Subpart A, Appendix A is not binding on the staff. The regulations governing the issuance of a draft or final EIS, 10 CFR §§ 51.70 and 51.90, respectively, use the permissive language "should" in reference to describing the format set forth in 10 CFR Part 51 Subpart A, Appendix A. Fourth, the OIG draft audit report incorrectly describes the site-specific uranium recovery SEISs as stand-alone EISs; one example is the incorrect characterization of the SEISs listed in Table 5 as "EISs." Further, Table 5 incorrectly implies that for the six applications reviewed, there was no opportunity for broad public comment. In fact, the public had significant opportunities to provide comments on each draft SEIS, as well as on the Generic EIS that provides the analytical foundation for each of the SEISs. Finally, there is no requirement in 10 CFR Part 51 to conduct a scoping process for a SEIS; specifically, 10 CFR § 51.92(d) provides that the NRC staff need not conduct scoping when a supplement to an EIS is prepared.

Although the NRC does not agree with OIG's findings in the draft report, we will consider the OIG's recommendations as part of the agency's continuous improvement efforts because they could help enhance effectiveness, efficiency, and consistency across NRC programs in implementing the National Environmental Policy Act of 1969, as amended, (NEPA) and the NRC's public outreach efforts. The NRC's NEPA Executive Steering Committee (ESC) was established several years ago to review, discuss, and guide resolution of complex or cross-cutting NEPA issues to ensure consistency among NRC programs. Based on the information contained in the draft audit report, the NEPA ESC will review the OIG's recommendations and develop, as appropriate, the paths forward, while balancing the potential benefits with available resources.

The NRC is committed to conduct its regulatory and licensing activities in an open and transparent manner, keep the public informed, and foster meaningful stakeholder involvement in the environmental review process. I appreciate the OIG audit of NRC's compliance with 10 CFR Part 51. In addition, and as specifically requested, the staff's review concluded that the draft audit report does not contain any sensitive unclassified information.

Enclosures:

1. Staff's Comments on Draft Audit Report
2. ASLBP's Comments

cc: Chairman Macfarlane  
Commissioner Svinicki  
Commissioner Apostolakis  
Commissioner Magwood  
Commissioner Ostendorff  
SECY

**STAFF'S COMMENTS ON OFFICE OF THE INSPECTOR GENERAL DRAFT  
REPORT: AUDIT OF NRC'S COMPLIANCE WITH 10 CFR PART 51 RELATIVE TO  
ENVIRONMENTAL IMPACT STATEMENTS**

**Office of the Inspector General Finding A: Records of Decision Not in Full Compliance with  
Regulations**

The U.S. Nuclear Regulatory Commission (NRC) complies with regulations in Title 10 of the *Code of Federal Regulations* (10 CFR) Part 51, "Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions," when preparing its Records of Decision (RODs). The regulations in 10 CFR Part 51 do not require preparation of a separate ROD. The regulations in 10 CFR § 51.103(b) and (c) state, respectively, that the ROD may be integrated into any other record prepared by the Commission in connection with the action and incorporate by reference material contained in a final Environmental Impact Statement (EIS). The Office of the Inspector General (OIG) finding that the NRC RODs are not in compliance with the regulations relies on an over-emphasis of the requirement that RODs be concise, and the OIG draft audit report does not identify any Commission or judicial precedent that supports such an extreme application of the regulations. The NRC RODs that are integrated in other documents or that incorporate by reference material from an EIS, as allowed by the regulations, do not violate the requirement to be concise. The conflicting interpretation of the regulations used in the OIG draft audit report is impermissible because it would render Section 51.103(b) and (c) meaningless. The NRC RODs reference EISs and supplemental EISs (SEISs) for the detailed information the OIG draft audit report claims is missing. However, the OIG draft audit report concludes that because they reference lengthy EISs, the RODs are not concise, and therefore, are not in compliance with the regulations. Because the regulations specifically allow RODs to be integrated in other documents or to reference EISs, the length of those documents is not the test for determining whether or not a ROD is concise.

In addition, when there is a hearing on an application, 10 CFR 51.102(c) states that a presiding officer's initial decision following a hearing or the Commission's final decision following an appeal will "constitute the record of decision." The NRC is unique in providing adjudicatory hearings on National Environmental Policy Act of 1969, as amended (NEPA) reviews. When there is a hearing that has environmental matters discussed (whether in addressing proposed contentions or in taking testimony and evidence on admitted contentions) the ROD would be incomplete if it only relied on the record up to the time of issuance of the final EIS. Thus, in the context of the NRC practice, 10 CFR § 51.102(c) is appropriately intended to ensure that the ROD will reflect the entire record of the environmental review the NRC conducted, including matters considered in the hearing process following the issuance of the final EIS. However, the staff recognizes there might be some value in having a summary similar to a formal ROD accompanying the EIS even in cases where there is a hearing that will subsequently complete the environmental record. It is also worth noting that the NEPA Executive Steering Committee (ESC) addressed, and documented in a memorandum to the NRC NEPA-implementing program offices, the content of RODs to enhance the transparency with which the agency documents its regulatory decisions. While the regulations clearly do not require such a ROD under the terms of 10 CFR § 51.102(c), the NRC NEPA ESC will consider options, as appropriate, to address the OIG recommendations.

Enclosure 1

OIG Finding B: NRC EISs Do Not Follow the Required Format

Contrary to the OIG draft audit report Finding B, the format for an EIS set forth in 10 CFR Part 51 Subpart A Appendix A (hereafter "Appendix A") cannot support a conclusion of non-compliance because the format is not a regulatory requirement. The two regulations governing the issuance of a draft or final EIS, 10 CFR §§ 51.70 and 51.90, respectively, use the permissive language "should" in reference to following the format set forth in Appendix A. Because the OIG draft audit report conclusion of non-compliance relies on the misinterpretation that Appendix A is mandatory, the conclusion on regulatory compliance is invalid. Further, even the language of Appendix A, with one exception, indicates that its described format is not mandatory. Appendix A indicates that when its format for an EIS is not followed, only some of its elements "shall" be used (as numbered in Appendix A):

- (1) Cover sheet;
- (2) Summary;
- (3) Table of Contents;
- (8) List of Preparers;
- (9) List of Agencies, Organizations and Persons to Whom Copies of the Statement are Sent;
- (10) Substantive Comments Received and NRC Staff Responses; and
- (11) Index

However, to the extent that Appendix A's use of the prescriptive language ("shall") conflicts with the permissive language of sections 51.70 and 51.90, those regulations control how the Appendix A format applies to EISs issued pursuant to them. Also, for its prescribed elements, Appendix A even provides that the detailed format it presents for these elements is "guidance." Because neither the content nor the format of an EIS issued under sections 51.70 or 51.90 are required to conform to the structure described in Appendix A, any deviation from that structure cannot form the basis for a finding of non-compliance.

Although the EISs and SEISs may not strictly conform to the format suggested almost 3 decades ago in Appendix A, NRC's EISs and SEISs use a format that encourages good analysis and clear presentation of the alternatives including the proposed action. The criticisms raised in the OIG draft audit report such as cover sheets that exceed one page or the lack of an index do not support a conclusion that the EISs foster public skepticism or undermine the agency's efforts to be clear, open, and transparent. The NRC staff develops its documents to achieve these agency goals while also presenting complex detailed information in an understandable format, including issuing documents in an electronic format that supports full text searches, a method of effective public access that was not specifically contemplated or in routine use at the time the guidance in Appendix A was developed. While the format for an EIS set forth in Appendix A is not a regulatory requirement, the NEPA ESC will consider options, as appropriate, to address the OIG recommendations.

OIG Finding C: NRC Not in Full Compliance with Scoping Regulations

Relying on an incorrect interpretation of the regulations in 10 CFR Part 51, the OIG determines that the NRC is not in compliance with scoping requirements. The OIG determination hinges on the incorrect conclusion that SEISs for new In-Situ Uranium Recovery (ISR) facilities are not

SEISs under the regulations. The OIG draft audit report suggests that ISR SEISs are EISs that simply tier off of a final programmatic EIS.

The OIG draft audit report identifies the pertinent regulations describing scoping requirements, but incorrectly describes 10 CFR § 51.92 as defining what is a supplement to an EIS. Rather than provide a limiting definition of SEIS, Section 51.92 along with Section 51.95, identify appropriate circumstances in which to use a supplement to an EIS. The regulations provide broad discretion for using a SEIS when, in the NRC staff's opinion, preparation of a supplement will further the purposes of NEPA. Title 10 CFR § 51.92(d) provides that the NRC staff need not conduct scoping when a supplement to an EIS is prepared. Thus, at its core, the OIG draft audit report conclusion that the NRC staff failed to conduct scoping for ISR SEISs is actually a disagreement with the regulations. The OIG draft audit report alludes to the ISR Generic EIS (GEIS) as being final and therefore being precluded from being supplemented by the staff for site specific reviews. The OIG draft audit report does not identify any legal authority to support its conclusion that the ISR SEISs are impermissibly characterized as supplements. The Office of the General Counsel has been unable to locate any judicial precedent for overturning an agency's designation of an environmental review as a "supplemental" EIS or that even discusses the definition of a "supplement" that would provide any supporting authority for the OIG theory that the SEISs for ISRs are not properly characterized as SEISs.

The OIG draft audit report attempts to establish that the use of tiering off of a GEIS precludes the use of a supplement, although the regulations in 10 CFR Part 51 do not provide such a preclusion. Under the NRC NEPA implementing regulations in 10 CFR Part 51, any subsequent NEPA document can use tiering to avoid duplication of analysis. As described in the OIG draft audit report, tiering promotes efficiency by avoiding duplication. Subsequent NEPA documents that may use tiering do not exclude SEISs, and the OIG draft audit report provides no legal support for a contrary conclusion. Appendix A describes tiering as appropriate when going from a statement of broader scope to one of lesser scope, or when going from a statement at an early stage to a supplement or statement or analyses at a later stage. Appendix A quotes the Council on Environmental Quality (CEQ) regulations that encourage agencies to use tiering in subsequent statements, which includes the preparation of an SEIS. In CEQ regulations at 40 CFR § 1508.28(b) there is an explicit reference in defining tiering to an analysis of specific actions at an early stage of the development of specific proposals that proceeds "to a supplement" [emphasis added] at a later stage. This use is characterized by CEQ in 40 CFR § 1508.28 as addressing those issues that are "ripe" for decision earlier in the process and leaving for the supplement those issues that will not be ripe until later in the process. Given that the CEQ regulations specifically allow the use of tiering in an SEIS, the NRC regulations do not preclude using supplements as part of a tiering process, and the OIG draft audit report lacks legal support for its novel restriction on SEIS use, the staff cannot agree with OIG that the current process for ISR SEISs is incorrect in characterizing those documents as supplements. In addition, on page 18 of the draft audit report under "Tiering" the OIG states that "According to the Council on Environmental Quality, scoping should be performed whenever an EIS is prepared, including for the subsequent, site-specific EISs that tier off of the programmatic EIS." The OIG supports this statement, in part, by a reference to an article from the *Environmental Law Reporter* written by the CEQ General Counsel at that time. However, this article does not conclude that scoping should be performed for subsequent, site-specific EISs that tier off a

GEIS. Having been correctly characterized as supplements, there is no basis for the OIG determination of noncompliance with scoping requirements in development of these documents.

The ISR GEIS is a generic analysis of the potential impacts of individual ISR facilities in a specified geographic area. The GEIS for ISR facilities serves as the starting point for environmental reviews of site-specific ISR license applications. The NRC tiers the SEISs from the GEIS by incorporating applicable GEIS discussions by reference and adopting relevant GEIS environmental impact conclusions. It is important to note that NRC conducted scoping in developing the ISR GEIS. Scoping provides a means by which the scope of issues to be addressed in the environmental review related to the proposed action are identified. The scoping process for the ISR GEIS identified local conditions and potential impacts that could be considered generically and those that need to be analyzed using site-specific information in a SEIS. The NRC provided opportunities for the public to comment during the scoping period for the GEIS, which included three public scoping meetings. The NRC then issued the draft GEIS for public comment as required by 10 CFR Part 51. Eight additional public meetings were held during the 103 day comment period near locations where NRC anticipated future ISR license applications. Approximately 1,350 individuals submitted nearly 2,200 individual comments on the GEIS.

The GEIS scoping process sufficiently accomplished the goals of scoping set forth in 10 CFR § 51.29, such that additional scoping is unnecessary for ISRs that meet the parameters of the GEIS absent any special circumstances (indeed, as mentioned above, scoping is not required for SEISs per 10 §§ CFR 51.26(d) and 51.92(d)). Further, during the development of each SEIS for an ISR facility, the NRC staff contacted specific external stakeholders through targeted information gathering meetings and by placing advertisements in local newspapers to inform the public of NRC's intent to prepare an SEIS.

In addition, the NRC has discretion on whether to conduct scoping for SEISs. Different offices in the NRC have made individual decisions on whether to incorporate a scoping process when preparing an SEIS. The discussion of the scoping process in the OIG draft audit report does not distinguish between the purpose of the scoping process and the opportunity for public involvement when the NRC publishes draft EISs and SEISs in the *Federal Register* with a solicitation for public comment. The Table 5 of the OIG draft audit report incorrectly implies that for the six ISRs reviewed, there was no opportunity for broad public comment. The public had the opportunity to provide comments on each draft SEIS as shown in the annotated table below. Specifically, the NRC received more than 1,800 comments from external stakeholders, including the public, after the Moore Ranch, Nichols Ranch, and Lost Creek ISR draft SEISs were issued for public comment. All of the comments were considered in the NRC staff's preparation of the final SEISs, during which changes to the draft SEISs were made to reflect those comments where necessary. The NRC is currently in the process of addressing more than 1,800 comments received after the Dewey-Burdock and Ross ISR draft SEISs were issued for public comment and reflecting those comments in the final SEISs. These public outreach efforts confirm NRC's commitment to ensure meaningful participation of external stakeholders, including the public.

The OIG draft audit report focuses its emphasis on whether or not the NRC sought broad public comment through a scoping process for the ISR SEIS development and concludes that limited

scoping during the SEIS development undermines NRC transparency. In this regard, the OIG draft audit report conflates scoping with public participation in the NEPA process—the two are not the same. The purpose of scoping is to define the parameters of the NEPA analysis; in effect, to focus the NEPA analysis on those aspects of the proposed action that may have a potential significant impact, while eliminating from detailed consideration those issues which are not environmentally significant. The specific objectives of scoping are set forth in 10 CFR § 51.29(a) which includes: defining the proposed action; identifying significant issues to be analyzed in depth; identifying and eliminating from detailed study peripheral issues; identifying related environmental reviews; identifying related environmental review and consultation requirements; indicating the relationship between the timing of the analysis and the agency action; identifying cooperating agencies; and describing the means by which the SEIS will be prepared. The scoping process for the ISR GEIS adequately addressed these issues. Further, the NRC's intent to use SEISs for addressing specific applications in the four geographic areas addressed in the GEIS was openly discussed in developing the final GEIS. Nor do the regulations in 10 CFR Part 51 require broad public input during the scoping process to the same extent that draft EISs are circulated for public comment. The regulations in 10 CFR § 51.28 identify the scoping participants, and although the NRC often uses public comment periods and public meetings to enhance some scoping processes, such broad public input may not be beneficial in all circumstances and is not required by the regulations.

While the OIG draft audit report questions the validity of the scoping process for the ISR GEIS after the passage of time, the report does not provide any information to indicate that the information in the ISR GEIS had significantly changed so that additional scoping for any particular SEIS would be justified. Because the use of additional scoping for the ISR SEISs was discretionary, and scoping does not require broad public involvement, the lack of scoping conducted for ISR SEISs cannot form the basis for a determination of noncompliance.

Because the OIG conclusions of noncompliance are based on factual inaccuracies or novel and unprecedented interpretations of regulations which the staff concludes are in error, the staff does not agree in any respect with the OIG characterization of the NRC practice as not being in compliance with the NRC regulations. The OIG recommendations have some merit independent of regulatory requirements for potential enhancements in our communications with the public. The NEPA ESC will consider, as appropriate, options to address the OIG recommendations such as those suggesting that the staff should estimate when it will periodically review the ISR GEIS for updating.

OIG Draft Audit Report – Table 5 – Annotated

| Notices of Intent to Prepare [S]EIS['] for New In-Situ Recovery Applications |                 |  |  |   | Staff Annotation |
|--|-----------------|--|--|---|------------------|
| Facility   | Date Published  | Information Provided by NRC  | Actions Omitted  | Public Comment on Draft SEIS  |                  |
| Nichols Ranch (complete)   | August 5, 2009  | NRC staff met with Federal, State, and local government agencies and public organizations in January 2009 as part of a site visit to gather site-specific information. Staff also "contacted potentially interested tribes and local public interest groups via email and telephone."                              | <ul style="list-style-type: none"> <li>No formal scoping process opened.</li> <li>No invitation for broad public comment.</li> </ul> | Comment Period:<br>December 11, 2009 –<br>March 3, 2010<br><br>Federal Register notice:<br>74 FR 65808 and 75 FR 6066 |                  |
| Antelope-Jab (on hold)   | August 14, 2009 | NRC staff planned to place ads in newspapers requesting information and comments from the public regarding the proposed action; also planned to "meet with and gather information from" local agencies and public interest groups during a visit to the proposed site. "No public scoping meetings" would be held. | <ul style="list-style-type: none"> <li>No formal scoping process opened.</li> <li>No invitation for broad public comment.</li> </ul> | N/A   |                  |
| Moore Ranch (complete)   | August 21, 2009 | NRC staff met with Federal, State, and local government agencies and public organizations in January 2009 as part of a site visit to gather site-specific information. Staff also "contacted potentially interested tribes and local public interest groups via email and telephone."                              | <ul style="list-style-type: none"> <li>No formal scoping process opened.</li> <li>No invitation for broad public comment.</li> </ul> | Comment Period:<br>December 11, 2009 –<br>March 3, 2010<br><br>Federal Register notice:<br>74 FR 65806 and 75 FR 6065 |                  |

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|                                       |                          |  |  |   |
|---------------------------------------|--------------------------|--|--|---|
| <p>Lost Creek<br/>(complete)</p>      | <p>September 3, 2009</p> | <p>NRC staff met with Federal, State, and local government agencies and public organizations in January 2009 as part of a site visit to gather site-specific information. Staff also "contacted potentially interested tribes and local public interest groups via email and telephone."</p> | <ul style="list-style-type: none"> <li>• No formal scoping process opened.</li> <li>• No invitation for broad public comment.</li> </ul> | <p>Comment Period:<br/>December 11, 2009 –<br/>March 3, 2010<br/><br/>Federal Register notice:<br/>74 FR 65804 and 75 FR<br/>6068</p> |
| <p>Dewey-<br/>Burdock<br/>(draft)</p> | <p>January 20, 2010</p>  | <p>NRC staff planned to place ads in newspapers requesting information and comments from the public regarding the proposed action. Also staff were "consulting" with various Federal and State agencies, tribal entities, and potentially interested public interest groups.</p>             | <ul style="list-style-type: none"> <li>• No formal scoping process opened.</li> <li>• No invitation for broad public comment.</li> </ul> | <p>Comment Period:<br/>November 26, 2012 –<br/>January 10, 2013<br/><br/>Federal Register notice:<br/>77 FR 7 048</p>                 |
| <p>Ross<br/>(draft)</p>               | <p>November 16, 2011</p> | <p>NRC staff planned to place ads in newspapers requesting information and comments from the public regarding the proposed action. Also "met with and gathered information from" local agencies and public interest groups during a visit to the proposed site.</p>                          | <ul style="list-style-type: none"> <li>• No formal scoping process opened.</li> <li>• No invitation for broad public comment.</li> </ul> | <p>Comment Period:<br/>March 29, 2013 – May 12,<br/>2013<br/><br/>Federal Register notice:<br/>78 FR 19330</p>                        |

\*10 CFR § 51.92(d) states that "the supplement to a final environmental impact statement will be prepared in the same manner as the final environmental impact statement except that a scoping process need not be used."

DATE: July 8, 2013

FROM: E. Roy Hawkens, Chief Judge /RA/  
Atomic Safety and Licensing Board Panel

SUBJECT: ASLBP COMMENTS ON OFFICE OF THE INSPECTOR  
GENERAL'S FINAL DRAFT REPORT "AUDIT OF NRC'S  
COMPLIANCE WITH 10 CFR PART 51 RELATIVE TO  
ENVIRONMENTAL IMPACT STATEMENTS"

This memorandum is in response to the July 1, 2013 e-mail transmitting the Office of the Inspector General's (OIG) Draft Audit Report, "Audit of NRC's Compliance with 10 CFR Part 51 Relative to Environmental Impact Statements." More specifically, this memorandum focuses on the OIG Draft Audit Report, Section III, Finding A, Recommendation 1. That recommendation states that the Atomic Safety and Licensing Board Panel (ASLBP) should:

"Develop guidance for staff to comply with the requirements of 10 CFR 51.102 and 51.103 when a hearing is held on the proposed action under the regulations in 10 CFR Part 2."

This recommendation is inappropriately directed to the ASLBP. The ASLBP is an independent adjudicatory body. The NRC Staff often appears as a party before our licensing boards, but we do not direct or supervise the Staff, and the Commission has expressly prohibited us from doing so. "The licensing boards' sole, but very important, job is to consider safety, environmental, or legal issues raised by license applications. Licensing boards simply have no jurisdiction over nonadjudicatory activities of the Staff that the Commission has clearly assigned to other offices unless the Commission itself grants that jurisdiction to the board."<sup>1</sup> "As [the Commission has] stated repeatedly over the last quarter-century, boards lack the authority to supervise the NRC Staff in the performance of its regulatory duties."<sup>2</sup> In the absence of specific direction from the Commission, the ASLBP has no authority to develop guidance for the Staff concerning NEPA compliance. That is the role of the NRC program offices and the NRC Office of General Counsel.

The jurisdiction of ASLBP licensing boards in contested hearings is strictly limited by the Commission to the subject matter of intervenors' admitted contentions, which typically involve only specific, narrow safety and environmental issues.<sup>3</sup> If no environmental contentions are present in a contested hearing, licensing boards have no authority to address NEPA at all. To the extent that 10 C.F.R. §§ 51.102 and 51.103 suggest otherwise (*i.e.*, to the extent they indicate that a licensing board's initial decision will constitute a Record of Decision), they should be changed.

<sup>1</sup> Duke Energy Corp., (Catawba Nuclear Station, Units 1 and 2), CLI-04-8, 59 NRC 62, 74 (2004).

<sup>2</sup> Dominion Nuclear Conn., Inc., (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 570 (2005).

<sup>3</sup> "As the Commission repeatedly has made clear, our contention rule is 'strict by design.' It thus insists upon 'some reasonably specific factual or legal basis' for a petitioner's allegations. Contention requirements seek to ensure that NRC hearings 'serve the purpose for which they are intended: to adjudicate genuine, substantive safety and environmental issues placed in contention by qualified intervenors.'" Dominion Nuclear Conn., Inc., (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 213 (2003) (internal citations omitted).

Enclosure 2

## OIG ANALYSIS OF AGENCY COMMENTS

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Where the agency commented that OIG is incorrect, OIG disagrees and reaffirms the accuracy of its statements.

OIG's central message in the report is that, through lack of compliance with NRC's NEPA-implementing regulations, the agency has made it difficult for stakeholders to access the information developed in environmental reviews and may have omitted opportunities for public participation in certain environmental reviews.

A finding by finding analysis of the agency's formal comments follows.

### Finding A: Records of Decision Not in Full Compliance With Regulations

The agency asserts that OIG relies on an over-emphasis of the requirement that RODs be concise and that the ROD can incorporate by reference material from the EIS. Additionally, the agency asserts that NRC's unique adjudicatory process preempts the need for a ROD that meets the requirements of 10 CFR 51.103. Finally, the agency asserts that the NEPA Executive Steering Committee addressed the content of RODs and produced a memorandum for the NEPA-implementing program offices.

#### OIG Response:

##### **Concise and Incorporation by Reference**

The OIG report does not rely on an over-emphasis of the requirement that a ROD be concise. 10 CFR 51.102(a) states "A Commission decision on any action for which a final environmental impact statement has been prepared **shall** be accompanied by or include a **concise** public record of decision." **[emphasis added]**

Regarding incorporation by reference, the OIG report does not use an impermissible conflicting interpretation of the regulations. 10 CFR 51.103(b) allows a ROD to be integrated into any other record prepared by the Commission in connection with the action and 10 CFR 51.103(c) allows a ROD to incorporate by reference material contained in a final EIS. However, 51.103(b) and (c) do not trump

the language in 51.102. Therefore, the agency's assertion that "[b]ecause the regulations specifically allow RODs to be integrated in other documents or to reference EISs, the length of those documents is not the test for determining whether or not a ROD is concise" is misplaced. The **mandatory regulatory requirement** that a ROD be concise is as important as the permissible regulatory authority for the agency to integrate the ROD into another document or incorporate it by reference. OIG disagrees with the agency's assertion that OIG's conclusions "render Section 51.103(b) and (c) meaningless."

### **Adjudicatory Process**

The agency asserts that in the context of NRC practice, its regulations are appropriately intended to ensure that the ROD will reflect the entire record of the environmental review, including matters considered in the adjudicatory process following the issuance of an EIS. However, this argument does not address the issue raised by the OIG report. The mandatory regulatory requirement of 51.102 is that the initial decision of the presiding officer is the ROD. The plain reading of 51.102(c) and 51.103(a) is that an initial decision of a presiding officer is a ROD **and** must meet ROD content requirements in 51.103(a).

Additionally, the Atomic Safety and Licensing Board Panel (ASLBP) provided comments on the OIG Report. The ASLBP asserts that the one recommendation directed to it, is inappropriately directed to it and that "[i]n the absence of specific direction from the Commission, the ASLBP has no authority to develop guidance for the Staff concerning NEPA compliance." OIG acknowledges the position of the ASLBP and agrees to remove the recommendation addressed to ASLBP.

ASLBP's comments bring to light an inconsistency with the adjudicatory process and NRC's regulations. ASLBP's jurisdiction is strictly limited to the subject matter of intervenors' admitted contentions, which typically involve only specific, narrow safety and environmental issues. ASLBP asserts that because its jurisdiction is limited, it lacks the authority to enumerate the required ROD elements set forth in 51.103.

Thus, ASLBP concludes that if 10 CFR 51.102 and 103 indicate that a licensing board's initial decision will constitute a ROD, the regulations should be changed. Section 51.103 says that when a hearing is held on the proposed action, the initial decision of ASLBP **will** constitute the ROD.<sup>13</sup>

This inconsistency highlights the need for NRC to consistently prepare a ROD that meets the requirements of 51.102 and 51.103.

### **ROD Memo from the NEPA Executive Steering Committee**

OIG reviewed this memorandum and disagrees with the assertion it addressed "the content of the ROD to enhance transparency with which the agency documents its regulatory decisions." Instead, the memorandum restated the regulations and emphasized that a hearing pre-empts the requirement to prepare a ROD. Further, the memorandum proposed to merely add the words "Record of Decision" to Federal Register Notices to create an identifiable document that could refer a reader to an EIS.

### Finding B: NRC EISs Do Not Follow the Required Format

The agency asserts that the OIG report cannot support a conclusion of non-compliance because the format in 10 CFR Part 51, Appendix A is a not a regulatory requirement.

#### OIG Response:

Appendix A to 10 CFR Part 51 prescribes a format that EISs "should" follow. The stated purpose of the standard format is to encourage good

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<sup>13</sup> Full Text of 10 CFR 51.102(c): "When a hearing is held on the proposed action under the regulations in part 2 of this chapter or when the action can only be taken by the Commissioners acting as a collegial body, the initial decision of the presiding officer or the final decision of the Commissioners acting as a collegial body **will constitute the record of decision**. An initial or final decision constituting the record of decision will be distributed as provided in § 51.93." **[emphasis added]**

analysis and clear presentation of the alternatives, including the proposed action. The Appendix A format requires each EIS to have a summary, index, and cover sheet.

Appendix A allows a different format to be used, if there is a compelling reason to do so. However, if a different format is used, it **shall** include a, summary, index, and cover sheet.

### Finding C: NRC Not in Full Compliance With Scoping Regulations

The agency asserts that the use of tiering is the same as a supplement to an EIS. Additionally, the agency asserts that the scoping conducted for the generic EIS for in-situ uranium recovery suffices for all site-specific EISs for in-situ recovery projects. Finally, by adding annotations to Table 5 of the report, the agency confounds public participation during scoping with public comments on a draft EIS.

#### OIG Response:

#### **Tiering and Use of a Supplement Are Not the Same**

Both NRC and the Council on Environmental Quality regulations for implementing NEPA distinguish the concepts of tiering and supplementation. The agency asserts that OIG believes that the finality of the generic EIS precludes supplementation, a misstatement of OIG's argument that demonstrates the conflation of two distinct concepts.

It is not the generic EIS's **finality** that precludes supplementation. Rather, it is its **generic nature** that precludes supplementation **as the agency interprets** a "supplement" to the generic EIS. The purpose of supplementation is to update the understanding of environmental impacts. The generic EIS analyzed in-situ uranium recovery in four broad geographic regions. The tiered site-specific EISs do not update the generic EIS analysis. Therefore, the subsequent site-specific EISs cannot be "supplements" to the generic EIS.

A supplemental analysis **supports the original analysis** in a site-specific EIS. In tiering, the generic EIS **supports the site-specific analysis** that takes place once a specific application is received by the agency. The

supplemental EIS reviews only the impacts of the new information or change to the proposed action. The tiered EIS must review all the impacts of the proposed action for a specific site, drawing on and incorporating by reference relevant portions of the generic EIS.

The agency also asserts that the Council on Environmental Quality definition of tiering characterizes the tiered site-specific EIS as a supplement. The full text of the definition of the term tiering reads:

Tiering is appropriate when the sequence of statements or analyses is: (a) From a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of lesser scope or to a site-specific statement or analysis. (b) From an environmental impact statement on **a specific action at an early stage** (such as need and site selection) **to a supplement** (which is preferred) **or a subsequent statement or analysis at a later stage** (such as environmental mitigation). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe. **[emphasis added]**

The use of supplement in this definition is limited. An example from NRC practice is the preparation of a supplemental EIS for a combined license for a power reactor, when a final EIS has been prepared and published for an early site permit. The early and late stages are considering the same specific site. By contrast, the generic EIS for in-situ uranium recovery includes no discussion of matters at an early stage of a particular site. Therefore, the site-specific EIS for an in-situ uranium recovery application cannot be considered a "supplement" using the Council on Environmental Quality definition of tiering.

### **NRC Commitments to the Public During Generic EIS Scoping**

OIG disagrees that scoping for the generic EIS adequately fulfills the scoping requirement for tiered site-specific EISs. Not only is site-specific scoping required, but NRC also represented to the public that scoping would be conducted for site-specific EISs for in-situ uranium recovery projects.

At the public meetings and in written comments, members of the public asked questions and expressed concern about how specific sites for in-situ uranium recovery would be considered after the generic EIS. In response, NRC assured the public that if a site-specific EIS were prepared, the agency would then conduct a site-specific scoping process. Specifically, the draft generic EIS stated:

If the NRC staff concludes that it needs to prepare a site-specific EIS, a notice of intent will be published in the Federal Register. Then, the NRC staff will follow the public participation procedures outlined in 10 CFR Part 51, which include **requests for public input on the scope of the EIS** and for public comment on the draft EIS for ISL [in-situ recovery] applications. **[emphasis added]**

However, after the public comment period on the draft generic EIS closed, the NRC approach changed. When the final generic EIS was published, the agency stated that it would prepare a site-specific EIS which would be called a “supplement” and scoping would optional.

### **Comments on a Draft EIS Are Not the Same as Scoping Participation**

The purposes of public participation during scoping and public comment on a draft EIS are different. Public comment during scoping provides an opportunity to shape the environmental review before it begins, but public comment on a draft EIS relates to the results of the environmental review.

The agency added a column to Table 5 of the report. The added column shows the dates of the comment periods for the draft site-specific EISs. However, Table 5 relates to the scoping process. Because the purposes of the two public participation opportunities are different, the agency's annotations to Table 5 are irrelevant.