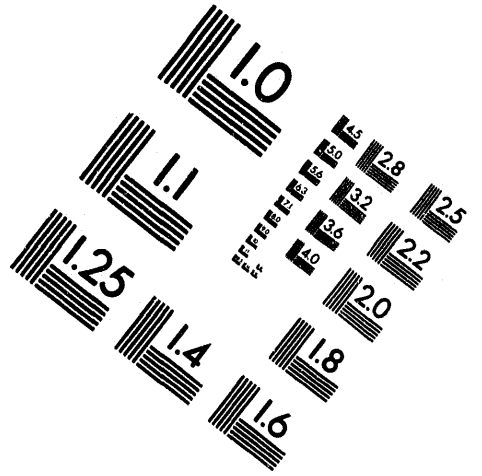
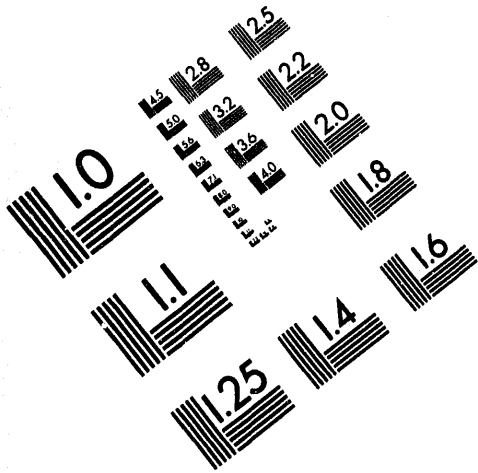




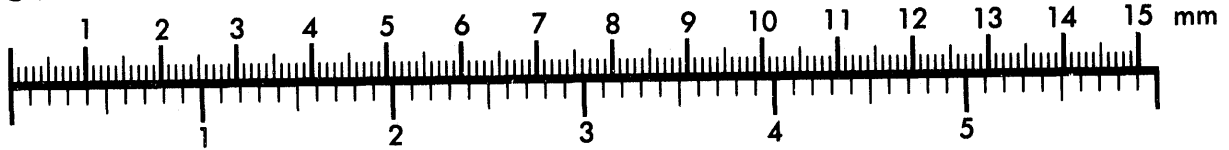
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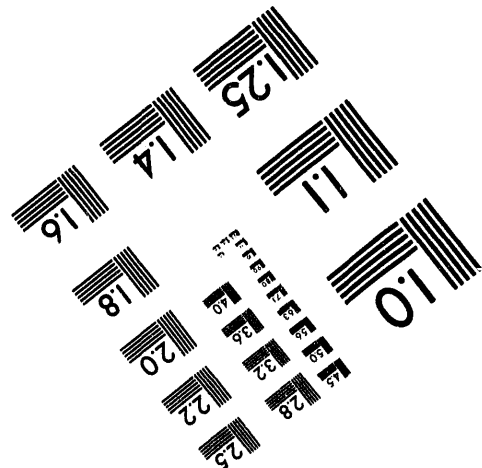
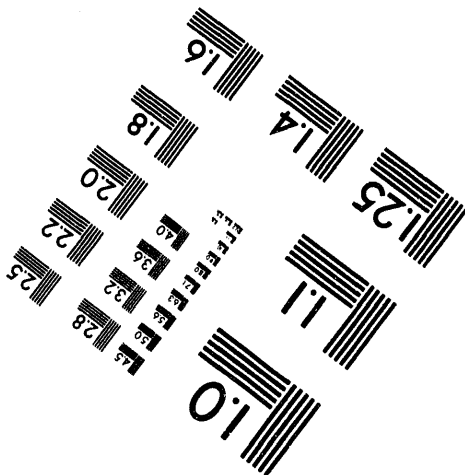
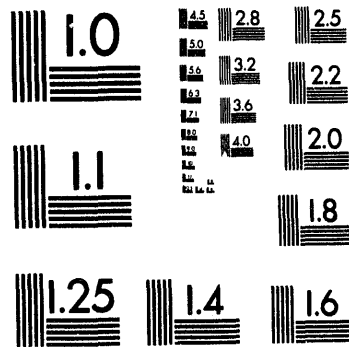
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Integrating the NEPA 216 Process with Large-Scale Privitization Projects Under the U.S. Department of Energy

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INTEGRATING THE NEPA 216 PROCESS WITH LARGE-SCALE PRIVATIZATION PROJECTS UNDER THE U.S. DEPARTMENT OF ENERGY

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ABSTRACT

The U.S. Department of Energy (DOE) is considering the possibility of replacing the existing Hanford Site 200 Area steam system through a privatization effort. Such an action would be subject to requirements of the *National Environmental Policy Act (NEPA) of 1969*. Section 216 of the DOE NEPA Implementation Procedures (216 Process) provides a specific mechanism for integrating the DOE procurement process with NEPA compliance requirements.

This paper discusses a NEPA strategy for integrating the 216 Process with the privatization process. It also interprets some of the technical requirements cited in this regulation. Suggestions are provided regarding changes that could be made to improve the process.

I. INTRODUCTION

Over the next 30 years, a source of steam may be needed in the 200 Areas of the Hanford Site to support environmental remediation and waste management activities. To secure a supply of steam, DOE is considering construction of a new steam supply system to replace the existing system which has outlived its useful life.

The DOE may choose to replace the steam supply system through a privatization effort. Under the privatization option, DOE would encourage the private sector to design, construct, own, and operate facilities

^aThe views presented in this paper are those of the author and do not necessarily reflect the views of either the U.S. Department of Energy or the Westinghouse Hanford Company.

and services that would support waste management and environmental remediation activities. This endeavor creates new challenges which require an innovative approach for preparing an environmental analysis that satisfies the requirements of both the privatization process and *National Environmental Policy Act (NEPA) of 1969*.¹

A successful NEPA compliance strategy must address the financial and business considerations within the private sector as well as the requirements of NEPA. Section 216 of the DOE NEPA Implementation Procedures (216 Process) provides a specific mechanism for integrating the procurement process with NEPA compliance requirements.² The 216 Process requires that DOE consider project-specific environmental information before awarding a contract to an offeror. This process is intended to allow DOE to continue with certain aspects of the procurement process while concurrently complying with the requirements of NEPA.

The 216 Process has been used on rare occasions within the DOE complex. This paper provides an overview of the 216 Process and provides suggestions on how this process can be improved. Described below are some of the financial, business considerations that must be incorporated into a successful NEPA compliance strategy.

II. PRIVATE SECTOR CONSIDERATIONS

Typically private sector proposals are based on transient factors (e.g., interest rates, guarantees of financial backing, negotiated arrangements) that fluctuate over time. For instance, only a narrow 'window of opportunity' typically exists from the time a proposal is submitted until it must be accepted. As a rule, the most favorable interest rates are available for the shortest

period of time. Schedules for privatization projects should, therefore, be designed so that the time from bid to award of contract is shorter than the window of opportunity. Shortening the time from bid to award improves prospects for both offerors and the DOE.

Exceeding the window of opportunity may invalidate a proposal, resulting in renegotiation of financing and business arrangements. The offeror would then have to prepare and resubmit a proposal based on a revised price for providing steam that would reflect prevailing market conditions. This is an expensive, complicated, and time-consuming effort that could likely discourage many, if not all, offerors from participating in the privatization process. Although such a scenario appears to work from a technical standpoint, it is unattractive from a business standpoint. A successful privatization strategy, therefore, must incorporate the factors described above with the regulatory compliance requirements of the NEPA process.

III. NEPA REQUIREMENTS

The Council on Environmental Quality has promulgated regulations that require agencies to complete a NEPA review process before making a final decision to pursue a proposed action.³ Additionally, these regulations state that "agencies are not to commit resources prejudicing selection of alternatives before making a final decision."⁴

If an action is not categorically excluded from NEPA review and the agency's NEPA implementation procedures do not require preparation of an EIS, an agency may choose to begin the NEPA process by preparing an Environmental Assessment (EA) to evaluate the impacts associated with the project. If the agency determines that no significant environmental impacts are associated with the project, it may issue a finding of no significant impact (FONSI). An Environmental Impact Statement (EIS) must be prepared, however, if the agency concludes that the proposed project may result in a significant environmental impact. On completing the EIS, the agency issues a Record of Decision (ROD), which publicly records the agency's decision. The agency may then pursue the project.

IV. THE DOE 216 PROCESS

The 216 Process does not supplant the agency's responsibility to prepare NEPA documentation or to comply with the other requirements of the NEPA review process. Instead, it provides an additional process, that is intended to insure that environmental factors are considered when the agency chooses between proposals.

Unless categorically excluded from NEPA review, the 216 Process applies to: (1) DOE competitive and limited-source procurements, (2) awards of financial assistance by a competitive process, and (3) joint ventures entered into as a result of competitive solicitations. Certain aspects of the 216 Process also apply to: (1) sole-source procurements, (2) noncompetitive awards of financial assistance, and (3) sole-source joint ventures.⁵

Agencies are bound to follow their own regulations. Failure to strictly comply with these requirements may provide legitimate grounds for an outside party to challenge the action. Because agencies are bound to follow the requirements of their own regulations, the 216 Process appears to be mandatory, even in cases where the standard NEPA process may provide an appropriate mechanism for choosing between proposals. The procedural steps for complying with the 216 Process are discussed below.

A. The Environmental Critique

As part of the DOE 216 Process, a document referred to as an Environmental Critique (Critique) must be prepared before proposals within the competitive range can be eliminated. The Critique evaluates and compares environmental impacts and issues that are pertinent to selecting among the proposals.

Decisionmakers are required to use this information to ensure that environmental considerations are properly factored into the selection process. This must be done before any proposals within the competitive range are eliminated from consideration. Within the 216 Process, the purpose of the Critique appears to be analogous to that of an EA or EIS in the NEPA process.

The Critique discusses each offeror's proposal, differences among the proposals, and permits and approvals that must be obtained. The Critique also provides a comparative evaluation of the environmental impacts associated with the proposals. The Critique is required to evaluate the impacts, unavoidable adverse impacts, gaps in the environmental data, unresolved environmental issues, and mitigation measures.⁶

During the DOE procurement selection process, it is normally considered inappropriate to select between proposals by comparing one offeror's proposal against another offeror's proposal. This restriction results from a direct comparison of one proposal against another and may form a legitimate basis for challenging the procurement selection process. Instead, proposals should be compared against predetermined selection criteria to

determine if the proposal either meets or does not meet predetermined selection criteria. For this reason, the requirement to include a comparative analysis is interpreted within this paper to mean that proposals would be compared against predetermined environmental standards or criteria to determine if each proposal either meets or does not meet predetermined criteria. That is, the comparison would be used to determine how each proposal either meets or does not meet predetermined environmental selection criteria.

B. The Environmental Synopsis

The 216 Process requires that an Environmental Synopsis (Synopsis) be issued to publicly record consideration (i.e., Critique) that was given to environmental factors during the selection process. Furthermore, the Synopsis is also required to record the relevant environmental consequences of reasonable alternatives that were evaluated during the selection process. It appears that the Synopsis is basically intended to provide a means for publicly demonstrating that environmental factors were properly considered, in procurement situations where an offeror is selected before the NEPA process has been completed. For this reason, the purpose of the Synopsis appears to be analogous to that of a FONSI or ROD in the NEPA process. Once the Synopsis has been issued, the DOE may award a contingent contract. The contract is contingent upon completing the NEPA process.

Because the Synopsis is available to the public, it must not contain business-sensitive, trade secrets, or other confidential information that would compromise confidentiality requirements of the competitive procurement process.⁷ To ensure compliance with this requirement, the Synopsis must not contain any information that may in any way reveal the identity of offerors. This confidentiality requirement, however, appears to undermine the original intent. In many situations, it would be difficult to provide the public with a substitutive account of how environmental factors were considered in the selection process without compromising the identity of the offerors. As a result of the confidentiality requirement, the Synopsis may actually have to be written in such a way that it provides little or no basis for explaining how environmental factors were used in the selection process. Thus, a dilemma results in which the requirement to maintain confidentiality tends to invalidate the purpose of the Synopsis.

V. A PROPOSED STRATEGY FOR INTEGRATING THE NEPA AND PRIVATIZATION PROCESSES

A NEPA compliance strategy has been developed to meet both the requirements of NEPA as well as the constraints of the privatization process. For simplicity, the strategy described below assumes that the NEPA process would begin with the preparation of an EA. Figure 1 illustrates how this NEPA strategy would integrate the 216 Process with the privatization process for the proposed steam plant project.

A. Beginning the NEPA Process

This strategy is specifically designed to reduce the time between receipt of bids and award of contract. To meet this objective, the NEPA analysis should begin before specific proposals have been received from the offerors. A bounding analysis would be used to 'bound' the impacts of proposals that are anticipated to be submitted by potential offerors.

The bounding analysis approach is a key element that is considered necessary for a NEPA strategy that could successfully support the steam plant privatization process. This is because the bounding analysis provides an approach that allows the DOE to begin the NEPA analysis before receiving specific proposals from the offerors. This increases the likelihood that the NEPA documentation can be completed before the window of opportunity is exceeded.

Under this strategy, the bounding analysis would be used to evaluate a spectrum of plants. This analysis would 'bound' the range of emissions and impacts that could result from various proposals. The bounding analysis can be completed without relying on the offeror's project specific data and is therefore independent of the procurement schedule. The strategy described below describes how the 216 Process would be integrated into the bounding analysis.

B. Using the 216 Process to Incorporate Project-Specific Data into the Analysis

To expedite the procurement schedule and reduce the risk of exceeding the window of opportunity, preparation of the EA and its bounding analysis would proceed in parallel with the procurement and the 216 Process. As illustrated in the bottom path of Figure 1, DOE would issue a Request for Proposals (RFP), inviting interested parties to submit proposals for supplying a reliable source of steam to the 200 Areas. As part of the RFP process, offerors would be required to include project-specific environmental data along with their proposals.

These data would provide the basis for preparing the Critique.

On receiving the proposals, the DOE would independently evaluate and verify the accuracy of the environmental data and analysis that were submitted with each proposal. Based on a review of these data, offerors may be requested to provide additional data or analysis.

C. Preparing the Environmental Critique

A draft Critique (see Figure 1) would be prepared and distributed for review. The Critique would focus on environmental issues that are pertinent to a decision on the proposals. On completing the review, the critique would be forwarded to the procurement office to assist DOE in awarding a contingent contract to one of the offerors. The contract would be contingent on successfully completing the NEPA process. The Critique is subject to the confidentiality requirements of the procurement process.

The environmental analysis contained in the Critique would be used by the DOE along with other factors for selecting a final proposal. No proposals within the competitive range would be eliminated from consideration until this step has been completed. Once a decision has been made to select a given proposal, the DOE would prepare the Synopsis to publicly record the environmental factors that were used in the selection process.

D. Environmental Synopsis

Synopsis would be based on the analysis presented in the Critique and would be carefully reviewed to ensure that it does not contain references to proprietary data. The Synopsis would then be issued to the public and a copy would be filed with the U.S. Environmental Protection Agency.

In accordance with the 216 Process, a contingent contract could be signed once the Synopsis has been issued. The contract would be contingent upon completing the NEPA process. Thus, the proposer would assume risk for actions taken before completing the NEPA process. Once this step has been completed, the DOE would be free to proceed with certain aspects of the privatization process while the NEPA review is underway.

E. Incorporating Project-Specific Data into the Environmental Assessment

Concurrently, the Synopsis would be edited and reformatted for insertion into the EA as an appendix (see

top path of Figure 1). The appendix would be carefully reviewed to verify that it does not reference proprietary data. The appendix would provide a brief summary of the data contained in both the Critique and Synopsis. Specifically, the appendix would meet two objectives:

- Provide project-specific information on each of the proposals
- Verify that the impacts of the proposals fall within the envelope of the impacts that were bounded in the EA.

The objective shown in the second bullet may be accomplished with the use of a matrix. The matrix would be used to qualitatively and, where possible, quantitatively compare the impacts of the proposals against the bounding projections that have already been analyzed within the EA.

Under this strategy, only a minimal amount of work would be required to complete the NEPA process because most of the analysis has already been completed before receiving the proposals. If properly coordinated, the EA would already have completed most of the DOE review process by the time the appendix is completed and attached to the EA. Thus, this strategy provides the DOE with an efficient strategy for implementing the NEPA process while concurrently addressing the constraints of the privatization process that were discussed earlier. Additionally, this strategy satisfies a 216 Process requirement which states that information provided in the Synopsis must be incorporated into any NEPA document (i.e., EA or EIS) that is prepared for the proposed action.⁸

F. Awarding a Final Contract

Assuming that the impacts are found to be insignificant, a FONSI and the Synopsis would be published in parallel. Contract award would be contingent on completion of the NEPA Process (i.e., FONSI or ROD).

In the unlikely event that the proposal selected has not been adequately evaluated by the EA (or that the impacts are found to be significant), additional NEPA documentation could be required. However, this risk is encountered to some degree in virtually every NEPA process.

VI. EVALUATING THE EFFECTIVENESS OF THE 216 PROCESS: RESTRICTIONS AND DILEMMAS

A contract may be awarded once the Synopsis has been completed and published. If the NEPA process has not been completed at the time the contract is awarded, however, the contract must be made contingent on completion of the NEPA process (i.e., issuance of a FONSI/ROD).⁹ Thus, only a contingent contract may be awarded if a FONSI/ROD has not already been issued for the proposed action.

While a contingent contract can be signed, no action pursuant to the contingent contract may be taken before an EA/EIS has been completed and published.¹⁰ The only exception to this restriction involves interim actions, which are actions that an agency may pursue before the NEPA process has been completed.¹¹ This restriction is interpreted, within this paper, to mean that while a contingent contract may be signed, no action (with the exception of interim actions and actions that are categorically excluded from NEPA review) may be taken by the DOE until the EA/EIS has been completed. It is important to note that this restriction does not extend to activities that are carried out by the private party. However, the private entity assumes risk for any action that is taken because the contract is contingent on successfully completing the NEPA process.

The 216 Process allows the DOE to pursue interim actions before the EA/EIS has been completed. However, this is not an advantage associated strictly with the 216 Process. Interim actions may be pursued regardless of whether DOE pursues the 216 Process or simply follows the standard NEPA process (i.e., 216 Process does not afford an advantage over the standard NEPA process with respect to interim actions).

In addition to placing limitations on activities that may take place before publication of the EA/EIS, the 216 Process places further restrictions on the extent of actions that can be carried out before completing the NEPA process (i.e., FONSI/ROD). The provision states that DOE must schedule actions pursuant to the contract, so that the NEPA process is completed in advance of a go/no-go decision. This restriction pertains to actions carried out by either the DOE or a private entity. The phrase 'go/no-go decision' is interpreted, within this paper, to mean that an 'irreversible action' may not be taken before a FONSI/ROD has been issued. Correspondingly, actions that are not deemed to be irreversible may be taken.¹²

These restrictions appear to lead to a dilemma in which the additional steps required to complete the

216 Process may not necessarily expedite the procurement process. The dilemma arises from the fact that although a contingent contract may be awarded, the DOE may not take any action (with the exception of interim actions) until the EA/EIS has been completed.

Nevertheless, the private entity may take actions pursuant to the contract that are not determined to be of an irreversible nature.¹³ However, because the contract is contingent upon completing the NEPA process, the private entity assumes risk for actions taken before issuance of the FONSI/ROD. Experience indicates that the private sector is unlikely to assume such risk. In circumstances where such risk is assumed, the private sector is likely to significantly increase the price of its proposal to compensate for shouldering the increased risk. Such a scenario tends to nullify one of the fundamental goals of privatization. As a result of this dilemma, it appears questionable that the 216 Process would significantly expedite many types of DOE procurement actions.

VII. CONCLUSIONS

The 216 Process appears to be mandatory, even in cases where the standard NEPA process may provide an appropriate mechanism for choosing between proposals. In certain instances, the 216 Process appears to be a redundant process that may have little or no benefit in choosing between proposals or in expediting the procurement process. In these instances, the 216 Process may result in project delays and increased costs.

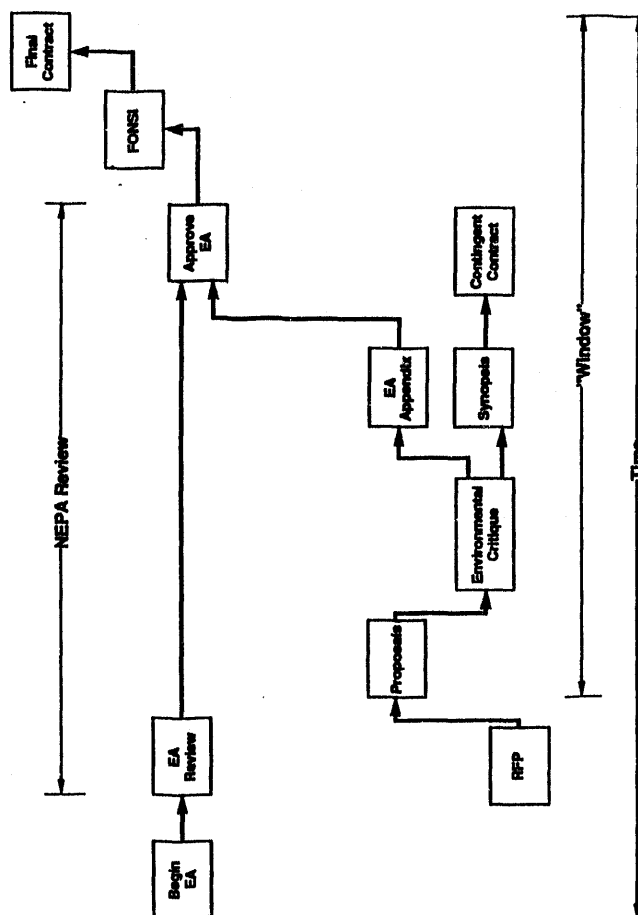
The DOE and the private entity are both prohibited from pursuing any action that is considered to be irreversible until the NEPA process has been completed (i.e., issuance of the FONSI/ROD). While a contingent contract may be awarded before completing the NEPA process, it appears questionable that the 216 Process would significantly expedite the DOE procurement process because the DOE is restricted from taking any actions (with the exception of interim actions) before publication of the EA/EIS. Although this restriction does not apply to the private entity, the 216 Process is unlikely to significantly expedite the private entity's process because they assume risk for any actions that are taken before issuance of the FONSI/ROD. Experience indicates that the private sector is unlikely to assume such risk without some type of compensation or protection. In circumstances where such risk is assumed, the private sector is likely to significantly increase the price of its proposal to compensate for accepting the increased risk. Such a scenario tends to nullify one of the fundamental goals of privatization.

One suggestion for improving the 216 Process involves changing the requirements of the provision so that it becomes a voluntary process that can be used at the DOE's discretion. Specifically, the DOE could choose not to follow the 216 Process as long as: (1) the standard NEPA process is followed, (2) the standard NEPA process provides information that is sufficient to provide a basis for choosing between proposals, and (3) no actions are taken that would violate regulatory requirements that place limitations on the types of actions that can be pursued during the NEPA process (e.g., irreversible actions).

REFERENCES

1. 42 USC 4321-4347, "The National Environmental Policy Act of 1969," *United States Code*, as amended.
2. 10 CFR 1021.216, "U.S. Department of Energy National Environmental Policy Act Implementing Procedures," *Code of Federal Regulations*, as amended.
3. 40 CFR 1500-1508, "Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act," *Code of Federal Regulations*, November 29, 1978.
4. 40 CFR 1501.2, "Apply NEPA Early in the Process," and 1502.2 (f), "Implementation," *Code of Federal Regulations*, as amended.
5. 10 CFR 1021.216 (a), "Procurement, Financial Assistance, and Joint Venture," *Code of Federal Regulations*, as amended.
6. 10 CFR 1021.216 (g).
7. 18 USC 1905; 5 USC 552(b); and 41 USC 423.
8. 10 CFR 1021.216 (h).
9. 10 CFR 1021.216 (i).
10. 10 CFR 1021.216 (i).
11. 40 CFR 1506.1, "Limitations on Actions During NEPA Process," and 10 CFR 1021.211.
12. 10 CFR 1021.216 (i).
13. 40 CFR 1506.1; 10 CFR 1021.216 (i).

Figure 1. Proposed NEPA Strategy.*



*Logic diagram assumes an EA leading to a FONSI.

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