

ATTACHMENT E

ICF DELIVERABLE: REGULATORY REVIEW

Laws and Associated Regulations, and Executive Orders with Potential NEPA Relevance

Environmental Assessments and Environmental Impact Statements completed under NEPA provide an umbrella for considering a wide range of potential impacts to the human and natural environment. Federal laws and the associated regulations and Executive Orders, in general, focus on protecting a particular resource (e.g., endangered species) or a particular environmental media (e.g., air, water, drinking water). The combination of NEPA and relevant laws, regulations, and orders, ensures that Federal agencies consider the potential effects of the proposed action on environmental resources and media. As specified in DOE regulations, 10 CFR Part 1021, Sec. 1021.341, DOE is required to integrate the NEPA process and coordinate NEPA compliance with other environmental review requirements to the fullest extent possible in accordance with the CEQ regulations for implementing NEPA, 40 CFR 1500.4(k) and (o), 1502.25, and 1506.4.

The Strategic Petroleum Reserve (SPR) operates four crude oil storage sites in Texas and Louisiana. The original site-specific EISs for these sites were completed in the 1970s and 1980s, and DOE is currently performing a Supplement Analysis to determine if there is a need to supplement or replace these EISs or if they still remain valid. ICF Consulting has been asked by DOE to review regulatory changes to support the Supplement Analysis. As outlined in our memo of August 11, 2003, our analysis of both NEPA regulations and judicial precedents indicates that changes in laws, regulations, and executive orders will not be sufficient reason to require a Supplemental EIS.

To fulfill the requirements of the Task Order, ICF has provided below an update on laws and executive orders of potential relevance to the SPR. As detailed in our August 11 deliverable, we began with an extensive list of laws and regulations, provided by DM prior to the task initiation. We reviewed the operational changes memo prepared by DM on June 4, 2003. With our general awareness of SPR operations and our background in NEPA compliance for a range of agencies, we then selected laws that may have an impact on SPR operations. A primary criterion for the selection was whether the Act or EO provided a new way to identify a potentially effected segment of the human population or natural environment.

ICF Consulting completed a similar analysis in 1991 for the DOE's Supplement Analysis for the Programmatic EIS. Thus, the current analysis focuses on changes in since 1991. The updates provide an overview of the law or order and would enable the SPR to determine whether there is a need for further review.

After completion of this regulatory review, ICF reaffirms the position stated in the August deliverable – laws, regulations, and executive orders do not provide a sufficient basis to supplement an EIS. Further, we did not uncover any specific laws, regulations, or executive orders that would cause us to waiver on the applicability of the original generalized finding to the SPR sites.

Safe Drinking Water Act of 1974

The Safe Drinking Water Act (SDWA) requires that each Federal agency having jurisdiction over a Federally owned or maintained public water system must comply with all federal, state, and local requirements; administrative authorities; and processes and sanctions regarding the provision of safe drinking water. The 1996 amendments to the SDWA, (PL 104-182), establish a new charter for the nation's public water systems in protecting the safety of drinking water. The amendments include, among other things, new prevention approaches, improved consumer information, changes to improve the regulatory program, and funding for States and local water systems. One program in particular calls for the development of Source Water Assessment Program (SWAP), which includes:

- Delineating the source water protection area
- Conducting a contaminant source inventory
- Determining the susceptibility of the public water supply to contamination from the inventoried sources
- Releasing the results of the assessments to the public

To date, EPA has approved 52 SWAPs, including SWAPs from Texas and Louisiana. The DOE SPRs should coordinate with the state if they are located in or may affect a source water protection area.

In addition, under the SDWA, EPA regulates the use of underground injection wells through the Underground Injection Control (UIC) program of the Safe Drinking Water Act (SDWA). Both Texas and Louisiana have EPA authorized state run UIC programs.

Port and Tanker Safety Act of 1978

The Port and Tanker Safety Act (PTSA), Public Law 95-474, and the Oil Pollution Act of 1990 (OPA), is designed to promote navigation, vessel safety, and protection of the marine environment. Generally, the PWSA applies in any port or place under the jurisdiction of the U.S., or in any area covered by an international agreement negotiated pursuant to section. Title 33 CFR 2.05-30 defines waters subject to the jurisdiction of the U.S. as navigable waters, other waters on lands owned by the U.S., and waters within U.S. territories and possessions of the U.S.

The PWSA authorizes the U.S. Coast Guard (USCG) to establish vessel traffic service/separation (VTSS) schemes for ports, harbors, and other waters subject to congested vessel traffic. The VTSS apply to commercial ships, other than fishing vessels, weighing 300 gross tons (270 gross metric tons) or more. The OPA amended the PWSA to mandate that appropriate vessels must comply with the VTSS.

Clean Air Act of 1963, as amended 1970 and 1990.

Federal facilities are required to comply with air quality standards to the same extent as nongovernmental entities (42 U.S.C. 7418). Part C of the 1977 amendments stipulates requirements to prevent significant deterioration of air quality and, in particular, to preserve air quality in national parks, national wilderness areas, national monuments and national seashores (42 U.S.C. 7470). Section 176(c)(1) of the CAA requires Federal agencies to assure that their actions conform to applicable implementation plans for achieving and maintaining the National Ambient Air Quality Standards for criteria pollutants. In 1993, the EPA issued general conformity regulations (40 CFR Part 93, Subpart B) containing procedures and criteria for determining whether a proposed Federal action would conform with CAA implementation plans. The regulations apply to a proposed Federal action that would cause emissions of criteria air pollutants above certain levels to occur in locations designated as nonattainment or maintenance areas for the emitted criteria pollutants, sulfur dioxide, nitrogen dioxide, carbon monoxide, ozone, lead, and particulate matter. In April 2000, DOE Environment, Safety and Health Office of NEPA Policy and Assistance published "Clean Air Act General Conformity Requirements and The National

Environmental Policy Act Process," which provides guidance specific to DOE actions.

In 1997, modifications to the CAA included revised ozone and particulate matter standards. The new ozone standard adopted by EPA is an 8-hour standard with a level of 0.08 ppm to provide greater protection to public health. The revised 24-hour PM₁₀ standard is very similar to the current standard. However, by using the 99th percentile concentration approach, the revised standard better accounts for the effects on public health and inherently compensates for missing data, and simplifies the data handling requirements. The annual PM_{2.5} standard is 15 µg/m³, and the 24-hour standard is 65 µg/m³.

Coastal Zone Management Act of 1972

The Coastal Zone Management Act was again reauthorized and amended as part of the Omnibus Budget Reconciliation Act of 1990 (P.L. 101-508). As amended, the statute now requires that "any Federal activity within or outside of the coastal zone that affects any land or water use or natural resource of the coastal zone" shall be "consistent to the maximum extent practicable with the enforceable policies" of a State's coastal zone management plan. Federal agencies, in carrying out their functions and responsibilities, shall consult with, cooperate with, and, to the maximum extent practicable, coordinate their activities with other interested Federal agencies. Each Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs.

The 1992 amendments (P.L. 102-587) made minor technical corrections to the law. The law was amended most recently in June 1996 (P.L. 104-150) to allow the Secretary of Commerce to provide development grants to states to develop management programs, with the provision that the grant will not exceed \$200,000.

National Marine Sanctuaries Act of 1972

Title I of the original Act authorized the Environmental Protection Agency to regulate ocean dumping of industrial wastes, sewage sludge, and other wastes through a permit program. Title III of the Act, as enacted in 1972, authorized the Secretary of Commerce to designate national marine sanctuaries based on statutory criteria and stipulated factors to be considered by the Secretary as a basis for designation. Consultation requirements with various Federal agencies, Congressional committees, State agencies and regional fishery councils were also stipulated. The law also provided notice requirements and mandatory procedures pursuant to the National Environmental Policy Act.

Public Law 104-283, October 11, 1996, 110 Stat. 3363, 3364, 3367, 3368 reauthorizes the National Marine Sanctuaries Act, and enhances support for the National Marine Sanctuaries, including amending the boundaries of the Flower Garden Banks National Marine Sanctuary (located in the Gulf of Mexico off the Texas coast), and making other technical boundary corrections to existing sanctuaries.

Each Sanctuary has its own set of regulations within 15 CFR Part 922 in what are called subparts. The specific regulations for the Flower Garden Banks National Marine Sanctuary are found in Subpart L. The Flower Garden Banks National Marine Sanctuary consists of three separate areas of ocean waters over and surrounding the East and West Flower Garden Banks and Stetson Bank, and the submerged lands thereunder including the Banks, in the northwestern Gulf of Mexico. The area designated at the East Bank is located approximately 120 nautical miles (nmi) south-southwest of Cameron, Louisiana, and encompasses 19.20 square nmi. The area designated at the West Bank is located approximately 110 nmi southeast of Galveston, Texas, and encompasses 22.50 square nmi. The area designated at Stetson Bank is located approximately 70 nmi southeast of Galveston, Texas, and encompasses 0.64 square nmi. The three areas encompass a total of 42.34 square nmi (145.09 square kilometers).

Magnuson Act of 1976, as amended Magnuson-Stevens Act of 1996

The Magnuson Fishery Conservation and Management Act (Magnuson Act) was signed into law on April 13, 1976. On March 1, 1977, fisheries resources within 200 miles of all U.S. coasts (later know as the Exclusive Economic Zone, or EEZ) came under Federal jurisdiction, and a multifaceted regional management system began allocating harvesting

rights, with priority given to domestic enterprises. Under provisions of the Magnuson Act, eight Regional Fishery Management Councils were established for the New England, Mid-Atlantic, South Atlantic, Caribbean, Gulf of Mexico, Pacific, Western Pacific, and North Pacific regions.

The Sustainable Fisheries Act, which amended the Magnuson-Stevens Act, was signed into law on October 11, 1996. Provisions related to fishery habitat included a mandate that the Regional Fishery Management Councils shall, by October 11, 1998, amend each fishery management plan (FMP) to include a description of essential fish habitat (EFH), which is defined as those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity, including adverse impacts on EFH, and actions that may be taken to conserve EFH. The Magnuson-Stevens Act directs each Council to minimize, to the extent practicable, adverse effects of fishing upon EFH.

Each Federal agency is required to consult with the Secretary regarding actions that may adversely affect EFH. Federal agencies that authorize, fund, or undertake actions that may adversely affect EFH must consult with the secretary of commerce, through NOAA Fisheries, regarding potential effects to EFH, and NOAA Fisheries must provide conservation recommendations. To carry out this mandate efficiently, NOAA Fisheries combines EFH consultations with existing environmental reviews required by other laws, so almost all of the consultations are completed within the time frames of those other reviews. The Magnuson-Stevens Act reiterates that the Councils may, or in the case of anadromous fisheries, must comment on Federal or state actions that affect fishery habitat, including EFH. Federal agencies are required to respond in writing within 30 days of receiving EFH conservation recommendations from NMFS or the Councils.

Endangered Species Act of 1973

The Endangered Species Act provided for the conservation of ecosystems upon which threatened and endangered species of fish, wildlife, and plants depend, both through Federal action and by encouraging the establishment of State programs. Section 7 of the Endangered Species Act requires Federal agencies to insure that any action authorized, funded or carried out by them is not likely to jeopardize the continued existence of

listed species or modify their critical habitat. The designations of which species are threatened and endangered species and the habitats of these species can change. An ongoing relationship with USFWS and NMFS should help to ensure that the SPR is alerted of any changes.

Resource Conservation and Recovery Act of 1976

Resource Conservation and Recovery Act (RCRA) regulates the treatment, transportation, storage, and disposal of solid and hazardous wastes. The Service is required to comply with standards for wastes generated at its facilities. The key provisions include:

- Subtitle C. Identification and listing of hazardous waste and standards applicable to hazardous waste -- Requires reporting of hazardous waste, permitting for storage, transport, and disposal, and it includes provisions for oil recycling and Federal hazardous waste facilities inventories.
- Subtitle D. Management for solid waste, including landfills.
- Subtitle F. Applicability of Federal, State, and local laws to Federal agencies. Procurement (recycling) provisions.
- Subtitle G. Citizen suits, judicial review, and enforcement authority.
- Subtitle I. Management, replacement, and monitoring of underground storage tanks.

Oil Pollution Act of 1990

The Oil Pollution Act, Public Law 101-380 (33 U.S.C. 2701 et seq.; 104 Stat. 484) established new requirements and extensively amended the Federal Water Pollution Control Act (33 U.S.C. 1301 et. seq.) to provide enhanced capabilities for oil spill response and natural resource damage assessment by the Service. It required consultation with the U.S. Fish and Wildlife Service on developing a fish and wildlife response plan for the National Contingency Plan, input to Area Contingency Plans, review of Facility and Tank Vessel Contingency Plans, and to conduct damage assessments associated with oil spills. Title I, section 1006, provided that Federal trustees shall assess natural resource damages for natural resources under their trusteeship. Trustees shall develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent of natural resources under their trusteeship.

In August 1992, National Oceanic and Atmospheric Administration promulgated the natural resource damage assessment regulations, which replaced the Department of the Interior regulations at 43 CFR Part 11 for oil spills only. The definition of natural resources damages was amended to include restoration as the basic measure. Damages collected must be retained in a revolving account for use only to reimburse assessment costs and restore, replace, or acquire the equivalent natural resources.

Pipeline Safety Improvement Act of 2002

The Act applies to pipeline facilities which transport natural gas or hazardous liquids in interstate commerce, and gathering facilities in populated areas. The act also applies to intrastate pipelines and local distribution companies, but the states can regulate those entities if their regulations satisfy federal standards. In order to help prevent leaks and ruptures, the Act establishes mandatory inspections of all U.S. oil and natural gas pipelines within ten years, and problematic pipelines will be inspected within the next five years. All pipelines would then be re-inspected every seven years following the ten-year interval. The Act permits the Secretary of the Department of Transportation to order corrective action of a pipeline facility, including physical inspection, testing, repair, or replacement.

Executive Orders

Executive Order 13112, Invasive Species, signed on February 3, 1999

The purpose of this Executive Order is to prevent the introduction of invasive species and provide for their control, as well as to minimize the economic, ecological, and human health impacts that invasive species cause. An “invasive species” is defined as a species that is 1) non-native (or alien) to the ecosystem under consideration and 2) whose introduction causes or is likely to cause economic or environmental harm or harm to human health. Under this Executive Order Federal agencies whose actions may affect the status of invasive species shall: (1) identify such actions, (2) use relevant programs and authorities to prevent, control, monitor, and research such species, and (3) not authorize, fund, or carry out actions that it believes are

likely to cause or promote the introduction or spread of invasive species in the United States or elsewhere.

Federal agencies shall pursue these duties in consultation with the Invasive Species Council, consistent with the Invasive Species Management Plan, dated January 2001. This order also establishes an Invasive Species Council, which provides national leadership regarding invasive species. The Council shall oversee the implementation of this order and see that the Federal agency activities concerning invasive species are coordinated, complementary, cost-efficient, effective, and rely on existing organizations already in place that address invasive species issues. The National Invasive Species Management Plan details and recommends performance-oriented goals and objectives and specific measures of success for Federal agency efforts concerning invasive species.

Executive Order 13186, Migratory Birds, signed January 10, 2001

The purpose of this Executive Order is to provide additional directions for executive departments and agencies to take certain actions to further implement the Migratory Bird Treaty Act. The Executive Order requires that each Federal agency taking actions which have, or are likely to have, a measurable negative effect on migratory bird populations to develop and implement, within 2 years, a Memorandum of Understanding (MOU) with the Fish and Wildlife Service (Service). The MOU shall promote the conservation of migratory bird populations. Each agency shall advise the public of the availability of its MOU through a notice published in the Federal Register.

Executive Order 11988, Floodplain Management, signed May 24, 1977

The purpose of this Executive Order is to prevent Federal agencies from contributing to the "adverse impacts associated with the occupancy and modification of floodplains" and the "direct or indirect support of floodplain development." In the course of fulfilling their respective authorities, Federal agencies "shall take action to reduce the risk of flood loss, to minimize the impact of floods on human safety, health and welfare, and to restore and preserve the natural and beneficial values served by floodplains." Before proposing, conducting, supporting or allowing an action in a floodplain, each

agency is to determine if planned activities will affect the floodplain and evaluate the potential effects of the intended actions on its functions. Agencies shall avoid siting development in a floodplain "to avoid adverse effects and incompatible development in the floodplains."

DOE has issued regulations to comply with the Executive Order at 10 CFR Part 1022. In accordance with the regulations, DOE will avoid to the extent possible the long- and short-term adverse impacts associated with the destruction of wetlands and the occupancy and modification of floodplains and wetlands, and avoid direct and indirect support of floodplain and wetlands development wherever there is a practicable alternative. DOE will incorporate floodplain management goals and wetlands protection considerations into its planning, regulatory, and decisionmaking processes. DOE will promote public awareness of flood hazards by providing conspicuous delineations of past and probable flood heights on DOE property which has suffered flood damage or is in an identified flood hazard area and which is used by the general public; and provide opportunity for early public review of any plans or proposals for actions in floodplains and new construction in wetlands.

Executive Order 11990, Protection Of Wetlands, signed May 24, 1977

The purpose of this Executive Order is the furtherance of the National Environmental Policy Act of 1969, in order to avoid to the extent possible the long and short term adverse impacts associated with the destruction or modification of wetlands and to avoid direct or indirect support of new construction in wetlands wherever there is a practicable alternative. Each agency shall provide leadership and shall take action to minimize the destruction, loss or degradation of wetlands, and to preserve and enhance the natural and beneficial values of wetlands in carrying out the agency's responsibilities for (1) acquiring, managing, and disposing of Federal lands and facilities; and (2) providing Federally undertaken, financed, or assisted construction and improvements; and (3) conducting Federal activities and programs affecting land use, including but not limited to water and related land resources planning, regulating, and licensing activities.

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Executive Order 12898, Federal Actions To Address Environmental Justice In Minority Populations And Low-Income Populations, signed on February 11, 1994; and amended by Executive Order 12948, signed on January 30, 1995

This Executive Order mandates that each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations. The Order is also intended to promote nondiscrimination in federal programs substantially affecting human health and the environment. In addition it places emphasis on providing minority communities and low-income communities access to public information on, and an opportunity for public participation in, matters relating to human health or the environment. This order also creates an Interagency Working Group on Environmental Justice to provide guidance to Federal agencies in overcoming these issues.

Executive Order 12898 was amended by 12948 by postponing the deadline of achieving environmental justice of part of an agency mission to March 24, 1995.

Texas and Louisiana State Laws

This section provides a brief overview of the Clean Air Act and coastal zone laws in the two states where the SPR has facilities.

Texas

In accordance with the Clean Air Act, states are responsible for preparing and implementing "State Implementation Plans" to achieve and maintain the air quality standards within their borders. As part of these plans, states divide their total area into "Air Quality Control Regions." State and local air pollution control authorities then establish individual requirements for controlling air pollution within each region.

Under Title 30 Texas Administrative Code Chapter 122 (30 TAC Chapter 122), Federal Operating Permits, owners or operators of major source sites and certain affected source-specific sites are required to obtain an operating permit. Owners or operators of these sites should submit an operating permit application to the Texas Natural Resource Conservation Commission (TNRCC) Air Permits Division (APD) as specified in 30 TAC § 122.130

In accordance with the CZMA, the Texas Coastal Zone Management Program (CZMP) was developed to make more effective and efficient use of public funds and to more effectively and efficiently manage coastal natural resource areas and the uses that affect them. The directive for development of the CZMP passed in 1991, which made the Texas General Land Office (TGLO) lead agency for development of a long-term plan for management of uses affecting coastal natural resource areas such as gulf beaches and critical dune areas, state and private submerged lands; coastal historic areas; coastal parks, wildlife refuges, and preserves; and the water and submerged land of the open Gulf of Mexico within the jurisdiction of the state.

The Texas CZMP gives the state the ability to review permits for consistency with the CZMP. This provides the state the ability to review for consistency of Sections 10 and 404 permits as currently done by the Galveston District. The state of Texas has developed water quality standards for differing water quality issues prior to the CZMP and will continue to enforce them and ensure consistency under the CZMP. Coordination between the state and the Galveston District has developed

similar guidelines for permit applications and public notices. This coordination will allow for joint state-Corps public notices and concurrent review.

Louisiana

Air quality in Louisiana is regulated through Title 30, Minerals, Oil, and Gas and Environmental Quality, Subtitle I, Environmental Quality Chapter 3, Louisiana Air Control Law, cited as the "Louisiana Air Control Law."

The Coastal Use Permit (CUP) process is part of the Louisiana Coastal Resources Program (LCRP), which is an effort among Louisiana citizens, as well as state, federal and local advisory and regulatory agencies to preserve, restore, and enhance Louisiana's valuable coastal resources. The purpose of the Coastal Use Permit process is to make certain that any activity affecting the Coastal Zone, such as a project that involves either dredging or filling, is performed in accordance with guidelines established in the LCRP. The guidelines are designed so that development in the Coastal Zone can be accomplished with the greatest benefit and the least amount of damage. CUP requires the submission of an application for projects that affect the coastal resources of Louisiana.