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DEPARTMENT OF JUSTICE
Office of Justice Programs
28 CFR Part 91
[OJP(OJP)-1277]
RIN 1121- AA52

Environmental Impact Review Procedures for the VOI/TIS Grant Program

AGENCY: Corrections Program Office, Office of Justice Programs, Justice.

ACTION: Interim final rule with request for comments.

SUMMARY: The Corrections Program Office, Office of Justice Programs, Department of Justice, is issuing this Interim Final Rule to set forth the procedures that OJP and the States awarded federal funds under the Violent Offender Incarceration/ Truth-in-Sentencing Incentive Grants Program must follow in order to comply with the environmental impact review procedures mandated by the National Environmental Policy Act, the Council on Environmental Quality's implementing regulations, and other related federal environmental impact review requirements.

DATES: This Interim Final Rule is effective on August 8, 2000. Written comments must be received by 5:00 p.m. ET on October 10, 2000.

ADDRESS: Send written comments concerning this rule to Jennifer Romeo, Attorney, Office of the General Counsel, Office of Justice Programs, 810 Seventh Street, NW, Room 5411, Washington, DC 20531.

FOR FURTHER INFORMATION CONTACT: Phil Merkle, Special Advisor to the Director, Corrections Program Office, Office of Justice Programs, 810 Seventh Street, NW, Washington, DC 20531; Telephone: 1-(800)848-6325. Additional program guidance can be found at http://www.ojp.usdoj.gov/cpo/.

SUPPLEMENTARY INFORMATION:

Background

Purpose

The purpose of this interim final rule is to set forth the implementation procedures that the Office of Justice Programs (OJP) and the States awarded funds under the Violent Offender Incarceration/ Truth-in-Sentencing Incentive Grants Program

(VOI/TIS) must follow in order for OJP to comply with the environmental impact review requirements mandated by the National Environmental Policy Act (NEPA),42 U.S.C. 4321 et seq., the Council on Environmental Quality's implementing regulations (CEQ regulations), 40 CFR Parts 1500- 1508, and other related environmental impact review requirements.

Authority

Section 20105 of subtitle A, title II of the Violent Crime Control and Law Enforcement Act of 1994 authorizes the Office of Justice Programs, as the agency charged with administering and enforcing the VOI/TIS grant program, to issue regulations. Moreover, both NEPA and the CEQ's implementing regulations direct agencies to adopt supplemental environmental impact review procedures.

VOI/TIS Grants Program

As part of the Violent Crime Control and Law Enforcement Act of 1994, Public Law 103-322 ("1994 Crime Bill"), Congress enacted the Violent Offender Incarceration and Truth-in-Sentencing (VOI/TIS) Incentive Grants Program, 42 U.S.C. 13701 et. seq., which offered prison construction grants and other institutional improvement funding to encourage States to adopt tougher sentencing policies for violent offenders.

In the FY 1996 Omnibus Appropriations Act, Public Law 104-134, Congress significantly amended this legislation by changing the formula for distribution of grant funds and limiting the types of construction projects for which State recipients could use the grant money. Currently, the VOI/TIS program provides funds for eligible States to build or expand permanent or temporary correctional facilities in order to increase secure confinement space for violent offenders. Grant funds may also be used to build or expand local jails and juvenile correctional facilities, and for the privatization of facilities.

State applicants for VOI/TIS grants must provide assurances that funds received under the program will be used to supplement, not supplant, other federal, state, and local funds. Awards are made to States and Territories whose correctional policies, programs and truth-in-sentencing statutes meet the VOI/TIS grant eligibility requirements. Eligible states may make sub-awards to State agencies and units of local government.

NEPA Compliance

The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321-4370d, establishes the environmental protection policy and requirements governing all federal departments and agencies. Specifically, NEPA requires federal agencies to consider the environmental effects of their proposed actions at the earliest possible time in their decision-making process and

to prepare detailed environmental impact statements on proposals for legislation or on other major federal actions that significantly affect the quality of the human environment. Moreover, NEPA seeks to ensure that such environmental information is available to the public for review and comment before federal agencies take such action. In short, NEPA is a policy and procedural statute that makes environmental protection a part of the mandate of every federal agency and department.

The Council on Environmental Quality (CEQ) issued regulations to implement NEPA's procedural provisions at 40 CFR Parts 1500- 1508. The CEQ regulations define "major federal actions," which trigger NEPA's requirements, as those actions with effects that may be major and which are subject to Federal control and responsibility. 40 CFR §1508.18. Actions include, among other things, projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies. 40 CFR §1508(a). The CEQ regulations identify four categories of "federal actions," one of which involves the "[a]pproval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities." 40 CFR §1508.18(b)(4).

Change in Circumstances

When the VOI/TIS Program was implemented in 1996, the Office of Justice Programs determined that the implementation of this program did not result in a "major federal action" because, under the formula grant program, OJP was not involved in the funding decisions and site selection for specific projects.

Over the past several years, however, OJP has been required to make a variety of important policy decisions in response to project-specific questions from grantees, including those regarding allowable and unallowable costs, and match issues. Additionally, OJP has been required to exercise greater authority over funding determinations and to participate more actively in VOI/TIS construction projects. These activities signal the agency's continuing role in, and discretion and control over, VOI/TIS-funded projects.

As a result of this increased federal involvement in the VOI/TIS program, and of the number of newly-established grant programs involving similar degrees of federal participation, OJP initiated an agency-wide review of the implementation of environmental policies in all its financial assistance programs and determined that the VOI/TIS program is subject to NEPA's environmental impact review requirements. Accordingly, OJP must require compliance with NEPA's provisions as a condition of granting VOI/TIS funds.

Responsibility for NEPA Compliance

OJP, as the federal agency, always remains responsible for compliance with NEPA and must work closely with the State or local agency responsible for implementing the project. Regarding environmental documents, the CEQ regulations allow the grantee agency to play a major role in preparing Environmental Assessments. As to Environmental Impact Statements, the CEQ regulations prohibit the entity preparing the EIS from having a stake in the outcome of the EIS. Consequently, the federal agency or a third party expert under the direction of the federal agency prepares the EIS.

However, as an exception to this latter provision, NEPA was specifically amended to allow a state agency with statewide jurisdiction and responsibility for the action to prepare the EIS as long as the responsible federal agency furnishes guidance, participates in the preparation of and independently evaluates the EIS prior to its approval and adoption. VOI/TIS grantees are either the state agency responsible for its corrections programs or the state agency responsible for its criminal justice programs. In either case, they are agencies with statewide jurisdiction. Sub-grantees, however, do not have state-wide jurisdiction and, therefore their responsibilities are more limited under this rule.

Parties Affected by this Interim Final Rule

This interim final rule applies to all VOI/TIS grant recipients which include the 50 States, the District of Columbia, the territories, and various Indian tribes. Sub-grantees such as state agencies, counties and other units of local government are also affected by the interim final rule's application of NEPA requirements to VOI/TIS-funded construction projects.

OJP's Initial Notice and Guidance Handbook for VOI/TIS Grantees Regarding NEPA Compliance

On March 22, 2000, OJP sent letters to all VOI/TIS grantees to inform them of its decision to apply the NEPA requirements to VOI/TIS construction projects. To facilitate compliance, OJP enclosed copies of its newly published handbook, Program Guidance on Environmental Protection Requirements. OJP also posted this instructive handbook on its website at http://www.ojp.usdoj.gov/cpo/.

OJP's handbook provides detailed guidance to grantees on the environmental impact review process, and on preparing environmental assessments (EA) and environmental impact statements (EIS). The handbook also includes questions and answers related to NEPA's requirements and their applicability to the VOI/TIS construction grant program. Finally, OJP's handbook contains a copy of the CEQ regulations implementing NEPA.

Interim Final Rule Limited to VOI/TIS Grant Program

This interim final rule implementing NEPA's environmental impact review procedures applies only to the VOI/TIS grant program. Accordingly, this rule amends 28 CFR Part 91 pertaining to grants for correctional facilities.

Notably, Justice Department regulations implementing NEPA's procedures and applying them to all organizational elements of the Department already exist in 28 CFR Part 61 and its appendices. Appendix D of 28 CFR Part 61, promulgated by the predecessor agency to OJP, adopted supplemental procedures to ensure NEPA compliance among its three federal financial assistance offices. OJP intends to update and revise Appendix D to correspond to the current OJP Bureaus and Program Offices and to implement environmental impact review procedures for those OJP grant programs subject to NEPA's requirements.

However, until such time as OJP updates and revises Appendix D, OJP finds it necessary to provide immediate guidance to VOI/TIS grantees on these environmental impact review procedures through regulations tailored specifically to the VOI/TIS construction grant program. For that reason, OJP has initially designated this interim final rule as an amendment to Part 91-Grants for Correctional Facilities. At an appropriate time in the future, OJP intends to transfer this subpart to Appendix D of Part 61, which will contain all other OJP environmental regulations.

OJP's Good Cause Determination for Issuing an Interim Final Rule

Pursuant to §553(b)(B) of the Administrative Procedure Act, the Office of Justice Programs believes that there is good cause for finding that providing notice and comment in connection with this rulemaking action is impracticable and contrary to the public interest.

Several considerations guided OJP's decision to proceed with an interim final rule rather than a notice of proposed rulemaking. First, providing for notice and comment would be impracticable in that the delay would prevent OJP from carrying out its statutory mandate and lawfully administering its VOI/TIS grant program. Consequently, in this case, the interim final rule immediately applies NEPA's requirements to VOI/TIS construction grants and in providing specific procedural information, facilitates the ability of State grantees to take proper environmental impact review actions on proposed projects for which they have already received VOI/TIS funding, as well as to become eligible to apply for and receive VOI/TIS funding for fiscal year 2000.

Second, absent an interim final rule, real harm will result. Such harm arises from the urgent need: (1) to avoid disruption to-if not a complete shut down of- the VOI/TIS grant program; (2) to make clear the rights and responsibilities of States that have

already been awarded funding under VOI/TIS; (3) to prevent State grantees from allocating resources towards the construction of new projects or the completion of existing ones during the period between the proposed and final rule; and (4) to prevent an immediate threat of harm to the environment and protected species. In short, OJP's use of expedited rulemaking procedures in this case will further the public interest by ensuring that VOI/TIS-funded correctional facilities are planned, constructed, and operated with the least adverse impact on the environment.

Finally, because this interim rule's requirements are based primarily upon the CEQ regulations which: (1) have been in effect since 1978, (2) were subject to their own notice and comment procedures, and (3) apply to many other federally-funded activities engaged in by VOI/TIS grantees and subgrantees, VOI/TIS grantees are not being uniquely affected by its requirements. For these reasons, OJP for good cause finds that notice and comment are impracticable and contrary to the public interest.

OJP's Good Cause Determination for Exemption from the 30-day Delay in Effective Date

OJP also believes that good cause exists to forego the 30-day waiting period between publication of the rule and its effective date. In this case, a 30-day delayed effective date is impracticable, unnecessary and contrary to the public interest. For the reasons stated above, the 30-day delay interferes with OJP's ability to carry out its mission and could result in harm to the environment during the interim.

Additionally, the 30-day delay is unnecessary because in March 2000, OJP issued a letter and guidance book to all eligible State grantees announcing NEPA's application to VOI/TIS construction projects and explaining the requisite environmental impact review procedures. Consequently, the grantees have had prior actual notice and do not need additional time to adjust their behavior before the rule takes effect. Thus, without any further regulatory action by OJP, this interim final rule is fully in effect and binding upon its date of publication in the FEDERAL REGISTER.

Consideration of Public Comments

In order to benefit from the experiences, observations or viewpoints that any interested or affected parties may have, OJP is requesting post-promulgation comments on the interim final rule. OJP will carefully consider all written comments received by October 10, 2000.

Additionally, within a reasonable time after the comment period ends, OJP will publish in the FEDERAL REGISTER a response to any significant adverse comments received along with any modifications to the interim final rule, where appropriate.

Regulatory Certifications

Executive Order 12866

OJP has drafted and evaluated this interim final rule in accordance with Executive Order 12866, "Regulatory Planning and Review" and has determined that the rule is not a significant regulatory action. Specifically, OJP's interim final rule is not expected to have an annual effect on the economy of $100 million or more. Furthermore, OJP's interim final rule is mandated by federal law– NEPA and the CEQ regulations- which requires all federal agencies to implement environmental impact review procedures for their "major federal actions." Congress is not expected to appropriate any additional funds to the VOI/TIS program in response to this rule.

Moreover, OJP, as the federal agency responsible for compliance, will permit the VOI/TIS grantees to use federal grant funds to cover the costs of NEPA procedures and related activities. Similarly, OJP seeks to lessen any perceived burden on the States by categorically excluding activities that are presumed not to have a substantial effect on the human the environment. For these reasons, OJP has concluded that this rule is not a "significant regulatory action" under Executive Order 12866, and accordingly, this rule has not been reviewed by the Office of Management and Budget.

Regulatory Flexibility Act of 1980

The Office of Justice Programs, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this interim final rule and by approving it certifies that this rule will not have a significant economic impact on a substantial number of small entities. This interim final rule applies the National Environmental Policy Act's environmental impact review procedures to VOI/TIS-funded construction projects, and for the most part, is nondiscretionary. Eligible grantees under the VOI/TIS program are the 50 States, the District of Columbia, the territories, and Indian tribes. In general, State agencies with state-wide jurisdiction are responsible for working with federal agencies to carry out NEPA's requirements. However, OJP, as the federal agency, remains ultimately responsible for NEPA compliance.

Regardless, OJP believes that pursuant to 5 U.S.C. §601(2), the Regulatory Flexibility Act does not apply to rules adopted under the APA's good cause exception. Rather, the statute's requirements are triggered only by rules for which an agency publishes a notice of proposed rulemaking as required by the APA or other law. Consequently, on that basis, OJP's interim final rule is exempt from all Regulatory Flexibility Act analysis requirements.

Unfunded Mandates Act of 1995

This interim final rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Paperwork Reduction Act

Information collection and record keeping requirements associated with this interim final rule have been approved by the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1995(44 USC Chapter 35). The OMB control number for the information collection is OMB NO. 1121-0245.

Administrative Procedure Act

This interim final rule is exempt from the provision of the Administrative Procedure Act (5 U.S.C. 533) requiring notice of proposed rulemaking, the opportunity for public comment, and delay in effective date. The Office of Justice Programs believes that there is good cause for finding that providing notice and comment in connection with this rulemaking action is impracticable, unnecessary, and contrary to the public interest.

Executive Order 13132: Federalism

OJP's interim final rule implementing NEPA's environmental impact review requirements for the VOI/TIS grant program will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

OJP's interim final rule implements federal NEPA compliance procedures which promote environmental protection policies and which do not preempt State law. Rather, OJP's rule provides for coordination between federal and State agencies to ensure that any State or local environmental impact review requirements similar to the federal NEPA procedures will be met concurrently, to the extent possible, to avoid or minimize any duplication of effort. Moreover, the rule permits State grantees to use federal grant funds to pay for the federal environmental impact review activities, and thus, does not impose substantial direct compliance costs on State and local governments. Finally, OJP, as the federal agency administering the VOI/TIS program, remains ultimately responsible for NEPA compliance.

Therefore, in accordance with section 6 of Executive Order 13132, the Office of Justice Programs has determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Small Business Regulatory Enforcement Fairness Act of 1996

This Interim Final Rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Environmental Impact

The Office of Justice Programs has evaluated this interim final rule in accordance with its procedures for ensuring full consideration of the potential environmental impacts of Office of Justice Programs' actions, as required by the National Environmental Policy Act (42 U.S.C. 4321 et seq.) and related directives. The Office of Justice Programs has concluded that the issuance of this interim final rule, which establishes the environmental compliance process for grantees under the VOI/TIS program, does not have a significant impact on the quality of the human environment and, therefore, does not require the preparation of an Environmental Impact Statement.

List of Subjects in 28 CFR part 91

Environmental impact statements; Environmental protection; Grant programs-law.

Interim Final Rule

For the reasons discussed in the preamble, the Corrections Program Office, Office of Justice Programs, amends Part 91 of Title 28 of the Code of Federal Regulations as follows:

PART 91–GRANTS FOR CORRECTIONAL FACILITIES

1. The authority citation for Part 91 is revised to read as follows:

AUTHORITY: 42 U.S.C. §13705.

2. Add Subpart D to read as follows:

Subpart D–Environmental Impact Review Procedures for VOI/TIS Grant Program

In General

Sec.
91.50 Purpose.

91.51 Policy.
91.52 Definitions.
91.53 Other guidance.

Application to VOI/TIS Grant Program

91.54 Applicability.
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Environmental Review Procedures

91.58 Timing of the environmental review process.
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91.60 Grantee's responsibilities.
91.61 Subgrantee's responsibilities.
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91.64 Supplemental EA or EIS
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91.66 Public participation.

Other State and Federal Law Requirements

91.67 State Environmental Policy Acts.
91.68 Compliance with other federal environmental statutes, regulations and executive orders.

AUTHORITY: 42 U.S.C. 13701 et seq.,as amended by Pub. L. 104-134; 42 U.S.C. 4321 et seq.; 40 CFR Parts 1500-1508.

In General

§91.50 Purpose.

The purpose of this subpart is to inform grant recipients under the Violent Offender Incarceration and Truth-in-Sentencing Incentive (VOI/TIS) Formula Grant Program of OJP's procedures for complying with the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 et. seq., and related environmental impact review requirements.

§91.51 Policy.

(a) NEPA Policy . NEPA policy requires that federal agencies, to the fullest extent possible:

(1) Implement procedures to make the NEPA process more useful to decision-makers and the public; reduce paperwork and the accumulation of extraneous background data; and emphasize real environmental issues and alternatives. Environmental impact statements shall be concise, clear, and to the point, and shall be supported by evidence that agencies have made the necessary environmental analyses.

(2) Integrate the requirements of NEPA with other planning and environmental review procedures required by law and by agency practice so that all such procedures run concurrently rather than consecutively.

(3) Encourage and facilitate public involvement in decisions which affect the quality of the human environment.

(4) Use the NEPA process to identify and assess reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.

(5) Use all practicable means to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of the actions upon the quality of the human environment.

(b) OJP's policy to minimize harm to the environment . It is OJP's policy to minimize harm to the environment. Consequently, OJP can reject proposals or prohibit a State from using formula grant funds for a project that would have a substantial adverse impact on the human environment. Additionally, federal law prohibits the implementation of a project that jeopardizes the continued existence of an endangered species or that violates certain regulations related to water quality. Generally, though, where an EA or EIS reveals that a project will have adverse environmental impacts, OJP will work with the State grantee to identify ways to modify the project to mitigate any adverse impacts, or will encourage the State to consider an alternative site.

(c) Mitigation . OJP may require the following mitigation measures to reduce or eliminate a project's adverse environmental impacts:

(1) Avoiding the impact altogether by not taking certain action or part of an action.

(2) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

(3) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.

(4) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(5) Compensating for the impact by replacing or providing substitute resources or environments.

(d) Use of Grant Funds . In accordance with OJP's general policy of providing the States with the maximum amount of control and flexibility over the use of formula grant funds, the States can use VOI/TIS grant funds to pay for the costs of preparing environmental documents, to implement mitigation measures to reduce adverse environmental impacts, and to cover the costs of construction delays or other project changes resulting from compliance with the NEPA process. However, any funds used for these purposes must be included as a portion of the State's grant which requires a State match.

§91.52 Definitions.

The definitions supplied by the Council on Environmental Quality in its Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act , 40 CFR Parts 1500 through 1508, (CEQ Regulations), shall apply to the terms in this subpart.

§91.53 Other guidance.

The Department of Justice has also published NEPA procedures that incorporate the CEQ regulations at 28 CFR part 61. Additionally, the Office of Justice Programs' Corrections Program Office has prepared a handbook for VOI/TIS grantees, Program Guidance on Environmental Protection Requirements . This publication and other relevant documents can be found at http://www.ojp.usdoj.gov/cpo.

Application to VOI/TIS Grant Program

§91.54 Applicability.

(a) Major federal action . NEPA's requirements apply to any proposal for legislation or other major federal action that might significantly impact the quality of the human environment. The CEQ regulations in 40 CFR 1508.18 define "major federal actions" as actions with effects that may be major and which are potentially subject to federal control and responsibility. The CEQ regulations categorize "major federal actions" as, among other things, the "[a]pproval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities." (40 CFR 1508.18(b)(4)).

(b) VOI/TIS construction grants subject to NEPA . This subpart applies to all proposed, new and partially completed VOI/TIS projects (including projects on tribal lands) initiated by state or local units of government with grant funding from OJP

that involve construction, expansion, renovation, facility planning, site selection, site preparation, security or facility upgrades or other activities that may significantly impact the environment.

(c) Projects . Although VOI/TIS money cannot be used for a project's operations expenses, the definition of "project" or "proposal" for NEPA review purposes is defined as both the construction and the long-term operation of correctional facilities and related components such as all off-site projects to accommodate the needs of the correctional facilities project (e.g., road and utility construction or expansion, projects offered to the affected community as an incentive to accept the correctional facility construction or expansion, and other reasonably foreseeable future actions regardless of what agency or third party undertakes such action). Reasonably foreseeable actions include future prison construction phases, especially when either current acreage requirements or design capacities for utilities are based on needs stemming from future phases.

§91.55 Categorical exclusions.

Activities undertaken by State, local, or tribal entities using VOI/TIS funds that are consistent with any of the following categories are presumed not to have a significant effect on the human environment and thus, are categorically excluded from the preparation of either an EA or an EIS. Although these activities are excluded from environmental reviews under NEPA, they are not excluded from compliance with other applicable local, State, or Federal environmental laws. Additionally, an otherwise excluded activity loses its exclusion and is subject to environmental review if it either would be located within or potentially affect any of the following: a 100-year flood plain, a wetland, important farmland, a proposed or listed endangered or threatened species, a proposed or listed critical habitat, a property that is listed or eligible for listing on the National Register of Historic Places, an area within an approved State Coastal Zone Management Program, a coastal barrier or a portion of a barrier within the Coastal Barrier Resources System, a river or portion of a river included in or designated for potential addition to the Wild and Scenic Rivers System, a designated or proposed Wilderness Area, or a sole source aquifer recharge area designated by the Environmental Protection Agency (EPA). The resulting environmental review for those activities that lose their exclusion status shall focus on the factor or factors that caused the loss of the exclusion.

(a) Minor renovations. Projects for minor renovations within an existing facility, unless the renovation would impact a

structure which is on the National Register of Historic Places, or is eligible for listing on the register.

(b) **Limited expansion.** Projects for the expansion of an existing facility or within an existing correctional complex, which does not add more than 50 beds or increase the capacity of the facility by more than 50 percent whichever is smaller. This exclusion does not apply to either a phased project that exceeds these numerical thresholds or projects to expand facilities that:
(1) Are located in a floodplain;
(2) Will affect a wetland;
(3) Will affect a facility on the National Register of Historic Places or that is eligible for listing on the register;
(4) Will affect a federally proposed or listed endangered or threatened species or its habitat;
(5) Is controversial for environmental reasons; or
(6) Would not be served by adequate sewage treatment, solid waste disposal, or water facilities.

(c) **Expansion of support facilities.** Projects for the expansion of bed space within an existing facility (e.g., double bunking or conversion of non-cell space) which are using grant funds to expand or add support facilities, such as a kitchen, medical facilities, recreational space, or program space, to accommodate the increased number of inmates. This does not include projects to increase capacity for support facilities which might pose a threat to the environment, such as solid waste and waste water management, new roads, new or upgraded utilities coming into the facility, or prison industry programs that involve the use of chemicals and produce hazardous waste or water or air pollution.

(d) **Security Upgrades.** Security upgrades of an existing facility which are inside the existing perimeter fence or involve the upgrade of the existing perimeter fence. This exclusion does not include such upgrades as adding lethal fences or increasing height or lighting of a perimeter fence in a residential area or other areas sensitive to the visual impacts resulting from height or lighting changes.

(e) **Privatization.** Projects that involve the leasing of bed space (which may include operational costs) from a facility operated by a private correctional corporation or that contract with a private correctional corporation for the operation of a state facility or program. This exclusion does not apply if the correctional agency has contracted with the private vendor to build the facility, operate the

facility, or lease beds to the correctional agency using federal grant funds.

(f) **Drug Testing and Treatment.** Projects that use grant funds to implement drug treatment, testing, sanctions, or interdiction programs.

§91.56 Actions that normally require the preparation of an environmental assessment.

(a) Renovation or expansion of existing correctional facility. Renovation or expansion activities not categorically excluded under §91.55 require an environmental assessment (EA). An environmental assessment is generally prepared when a project is not expected to have a significant impact on the environment. Since projects for the renovation or expansion of an existing facility or the construction of a new facility within an existing correctional complex may have limited impact on the environment, preparing an EA may be sufficient.

(b) Proposed construction of a new correctional facility. The proposed construction of a new correctional facility will require the preparation of an environmental assessment unless the proposal will clearly have a significant environmental impact in which case an environmental impact statement can be initiated immediately without the preparation of an environmental assessment.

§91.57 Actions that normally require the preparation of an environmental impact statement.

Significant impact. For the proposed construction of a new correctional facility or the proposed expansion of an existing facility, if the proposal is large or complex and/or controversial because of the nature of possible environmental impacts, and/or if any EA determines that the project will have a significant impact on the environment, an environmental impact statement (EIS) will be required. For those projects that clearly will have significant environmental impact, a grantee can save time and resources by initiating the EIS immediately without going through the EA process.

Environmental Review Procedures

§91.58 Timing of the environmental review process.

(a) Initial planning and site selection phase. The NEPA procedures must be initiated as part of the planning and site selection phase of all new construction, expansion, and

renovation projects and completed before the construction or renovation on the project can begin.

(b) Early consultation with OJP . As grantees identify proposed, new projects, the grantees must inform OJP and after consulting OJP's Program Guidance on Environmental Protection Requirements , must recommend to OJP whether:

(1) the proposed project meets the criteria of a categorical exclusion;

(2) an environmental assessment should be initiated;

(3) because of the project size and/or anticipated environmental impacts, an environmental impact statement should be initiated.

(c) Design phase . Projects currently in the planning and design phase must complete the NEPA procedures and no further decisions or new commitments of resources can be made on these projects by the State or local entity that would either have an adverse impact on the environment or limit the choice of reasonable alternative sites.

(d) Prohibited pre-analysis activities . None of the following actions can be taken until the NEPA analysis is completed for the affected project:

(1) Starting construction;

(2) Accepting construction bids;

(3) Advertising for construction bids;

(4) Initiating the development of or approving final plans and specifications; or

(5) Purchasing property.

(e) Ongoing or completed construction projects . For grant-funded projects under construction, OJP will work with the States to determine what environmental analysis has been done, making every effort to limit disruption to projects under construction. For completed grant-funded projects, OJP will work with the States to determine whether those projects may pose continuing environmental problems. For example, NEPA issues may exist due to excessive noise, light pollution, excessive water consumption or draw down on an important stream, or adverse visual impact due to an inappropriate facade color in an environmentally scenic area. Consequently, performing an analysis for those VOI/TIS VOI/TIS projects for which construction is completed may still serve the useful purpose of determining the extent of a project's continuing adverse environmental impacts, and the feasibility of mitigation measures.

(f) Avoiding duplication of efforts . If an EA or EIS was completed on an original structure, any environmental research that was conducted at the time the original structure was being planned and is still relevant need not be duplicated in any required environmental impact analysis for proposed modifications or additions to that structure.

§91.59 OJP's responsibilities.

(a) In general. All NEPA decisions such as determining the adequacy of assessments, the need for environmental impact statements, and their adequacy must, by statute, remain with OJP. Therefore, OJP, as the federal agency sponsoring the major federal action, shall determine if a proposed project qualifies for a categorical exclusion, if a finding of no significant impact can be issued based on the EA, or if an EIS will be required.

(b) Specific duties. As part of its role in the NEPA process, OJP shall:

(1) Issue guidance on the preparation of environmental documents and the NEPA process.

(2) Review all draft documents.

(3) Participate in giving notice to state and federal agencies, as well as to the public, and attend public meetings with the grantee, as appropriate.

(4) Identify and solicit appropriate state, local, and tribal agencies to be a cooperating or joint lead agency, as appropriate.

(5) Prepare a written assessment of any environmental impacts that another state or federal land management or environmental protection agency believes have not been adequately addressed through the NEPA process.

(6) Monitor implementation by the states to ensure the completion of any required mitigation measures.

(7) Develop a sample Statement of Work for preparing an EIS that States employing their own contractor can use to ensure that the services provided meet the requirements.

§91.60 Grantee's responsibilities.

Specific duties. As part of its role in the NEPA process, the grantee agency must:

(a) Work closely with OJP on the development and review of the environmental documents, and follow the NEPA process, with the full participation of OJP.

(b) Issue the documents for public comment jointly with OJP.

(c) Solicit comment from other state and federal agencies, interested organizations, and the public.

(d) Refrain from purchasing land, beginning bidding process, or starting construction on any project until all environmental work has been completed.

(e) Complete a project Status Report form for all projects under construction or completed prior to the effective date of this subpart.

(f) Ensure that appropriate environmental analysis, as determined by OJP, is completed for all projects and that appropriate alternatives are considered and mitigation

measures are implemented to reduce the impact of identified environmental impacts, if any.

(g) Identify and inform OJP of all applicable state and local environmental impact review requirements.

(h) Notify all subgrantees of the requirements of this Subpart in the initial planning and site selection phase.

§91.61 Subgrantee's responsibilities.

If delegated by the grantee, the subgrantee shall:

(a) Prepare (if the required expertise exists) or contract for the preparation of an environmental assessment (EA); and

(b) Submit all environmental assessments through the grantee to OJP for review and the issuance of a draft finding of no significant impact (FONSI) or a determination that an environmental impact statement (EIS) is required. If OJP issues a draft FONSI, the grantee agency shall make the draft FONSI and the underlying EA available for public comment.

§91.62 Preparing an Environmental Assessment.

(a) In general. An Environmental Assessment (EA) is a concise public document that provides sufficient evidence and analysis for determining whether OJP should issue a Finding of No Significant Environmental Impact (FONSI) or prepare an Environmental Impact Statement (EIS). It is designed to help public officials make decisions that are based on an understanding of the human and physical environmental consequences of the proposed project and take actions, in the location and design of the project, that protect, restore and enhance the environment. Completing an EA requires considering all potential impacts associated with the construction of the correctional facility project, its operation and maintenance, any related projects including those off-site, and the attainment of the project's major objectives. The latter requires an analysis of the environmental impacts of any training and vocational activities to be conducted by the inmates.

(b) Project planning and site selection. During the planning phase of the project, OJP and the grantee jointly define the project, explore the various alternatives and identify a proposed site for the construction or renovation project. In order to identify possible environmental concerns and reduce the likelihood of later opposition to the project, the grantee should involve other interested parties at this stage through public meetings which allow affected or interested parties to learn about the need for the action, the scope of the proposed action, and any alternatives being considered. These public meetings should also provide interested parties an opportunity to express comments or concerns about potential consequences of the action. Additionally, minority and low-income populations as well as

Indian tribes that may be affected by the proposal should be consulted at this early stage. The grantee should obtain their views on proposed sites and mitigation measures as an important step in meeting the environmental justice goals of Executive Order 12898.

(c) Draft environmental assessment . The grantee should prepare an EA after identifying the proposed site, but before reaching a final decision to proceed with the effort at that location. The grantee may prepare the EA or contract for the preparation of all or parts of the EA. In order to adequately assess all of the potential environmental impacts, a multi-disciplinary team must be used to perform the environmental analysis. Any state or local environmental impact review requirements should also be incorporated into the EA process. The amount of analysis and detail provided must be commensurate with the magnitude of the expected impact. At a minimum, an EA should include a brief discussion of the need for the proposal, the alternatives considered, the environmental impacts of the proposed action and alternatives considered, and a list of agencies and persons consulted. VOI/TIS grant funds may be used to pay the costs of preparing the environmental assessment.

(d) OJP's Review of the Draft EA . The Office of Justice Programs will review the EA for the following:

(1) Has the need for the proposed action been established?

(2) Have the relevant areas of environmental concern been identified?

(3) Have other agencies with an interest been consulted?

(4) Has the grantee provided opportunities for public involvement?

(5) Have reasonable alternatives and mitigation measures been considered and implemented where possible, including the costs and resources to operate the facility?

(6) Has a convincing case been made that the project as presently conceived will have only insignificant impacts on each of the identified areas of environmental concern?

(7) Has the grantee adequately documented compliance with other related federal environmental laws and regulations as well as similar state and local environmental impact review requirements.

(e) Draft Finding of No Significant Impact (FONSI) or Determination that EIS is required . If the EA satisfies all the factors in OJP's seven-part review set forth in the previous paragraph, OJP will issue a draft FONSI. If OJP's review of the EA results in a response of "no" to any of the questions, except question 6, then the EA is incomplete and will be returned for

further work. If the only “no” is in response to question 6, then OJP will issue a determination requiring an EIS for that particular project at that site. Given the cost and time required to complete an EIS, the grantee may wish to explore another alternative site at this point.

(f) Circulate EA and Draft FONSI for Public Comment. The grantee must provide public notice of availability of a Finding of No Significant Impact. The notice must be timed so that interested agencies and the public have 30 days for review and comment on the draft EA.

(g) Review Comments and Modify Plans, as Appropriate. The grantee must review any public or agency comments received as a result of review of the EA and draft FONSI, and should modify its plans, if appropriate. Modification may include modifying the project to mitigate the environmental impact of the proposed project, or abandoning the proposed site and selecting an alternative that will have a less significant impact on the environment. The grantee must submit the comments, responses to these comments, and any revisions to the proposed plan to OJP for review. If the grantee recommends proceeding with the project in light of adverse comments on the environmental impact, the grantee must include the rationale for its recommendation.

(h) Final Action on EA. Unless a significant environmental impact surfaces through the public comments or other means, OJP will issue the FONSI and authorize the grantee to begin the purchase of land, the bidding process, the development of final plans and specifications, and the construction work.

§91. 63 Preparing an Environmental Impact Statement

(a) Initial determination. OJP will determine whether a proposed project may have a significant impact on the quality of the human environment, thereby requiring the preparation of an environmental impact statement (EIS). This determination will be made either:

(1) On the basis of an environmental assessment (EA) prepared for the proposed project or

(2) without the preparation of an EA, but based on the extensive size of the proposed facility and the resulting variety of environmental impacts, the sensitive environmental nature of the proposed site, and/or the existence of highly controversial environmental impacts.

(b) CEQ regulations. The CEQ regulations govern the preparation of the EIS. The Corrections Program Office’s Handbook on Environmental Protection Requirements offers further guidance.

(c) EIS preparation team.

(1) Once OJP determines that an EIS is needed, the grantee shall notify OJP in writing about the contracting method that the grantee will use to complete the EIS. The grantee shall establish an EIS preparation team or entity

that meets the requirements for an interdisciplinary approach. The team must not have any interest, financial or otherwise, in the outcome of the proposed projected or any related projects.

(2) If the grantee decides to use an alternate method to contracting out for preparation of the EIS (such as using a team of experts from various state agencies or a university), the grantee must submit a written proposal to OJP demonstrating that the team has the necessary interdisciplinary skills and experience in preparing EISs for similar projects. The proposal must include a completion schedule demonstrating that the alternate method will not result in significant delay. The proposal must also document that all members of the team, other than the grantee's employees, do not have any interest, financial or otherwise, in the outcome of the proposed project or any related projects.

(3) The grantee must use an OJP-approved statement of work (SOW) in conducting the EIS.

(4) Any consultant or contractor hired by OJP or the grantee to prepare an EIS must execute a disclosure statement specifying that it has no financial or other interest in the outcome of the project or any related projects.

(d) Notice of Intent . OJP will publish a notice in the Federal Register to announce its intent to prepare the EIS. The grantee shall be responsible for drafting this notice. This notice must state the date, time and place of the scoping meeting and briefly describe the purpose of the meeting. The grantee should schedule the meeting at least 30 days from the date that the grantee submits the draft Federal Register notice to OJP.

(e) Scoping . The scoping process shall be conducted in accordance with 40 CFR 1501.7 of the CEQ regulations. The purpose of scoping is to identify and consult with affected federal, state and local agencies, Indian tribes, interested organizations and persons, including minority and low-income populations. The grantee and OPD shall conduct two distinct scoping meetings to assist in identifying both major and less important issues for the draft EIS. At the end of the scoping process, a brief report will be prepared summarizing the results, listing the participants, and attaching the meeting minutes.

(f) Draft EIS . The grantee and OJP will prepare the draft EIS in accordance with the requirements of the CEQ regulations in 40 CFR parts 1500 through 1508. The draft EIS must represent the best analysis reasonably possible. The grantee must submit the draft EIS to OJP and any cooperating agencies for internal review and comment. The revised draft must be submitted to OJP and any cooperating agency for approval.

(g) Public comment . The grantee, with OJP approval, must establish a distribution list and must mail the draft EIS to those parties. OJP will then submit the approved draft EIS to the Environmental Protection Agency (EPA) and will request EPA to publish a notice of the availability of the draft in the Federal Register. The grantee must publish a similar notice in a newspaper of general circulation in the area of the proposed action. Additionally, the grantee and OJP shall conduct a public information meeting to answer questions and receive comments on the draft EIS.

(h) Final EIS . The grantee and OJP will prepare the final EIS, including a copy of all comments on the draft and a summary of the public information meeting. The grantee shall submit the final EIS to OJP and any cooperating agencies for internal review. The grantee and OJP will circulate the final EIS to all parties on the distribution list, to any agency or person that requests a copy, and to EPA for publication in the Federal Register. The grantee must also announce the availability of the final EIS locally.

(i) Record of decision . When the waiting period for circulation of the final EIS expires, OJP shall prepare the record of decision in accordance with 40 CFR 1505.2 of the CEQ regulations and in consultation with the grantee. This record of decision shall determine the allowable uses of the grantee's VOI/TIS fund with respect to the proposed action or its alternatives.

(j) Final action on EIS . In proceeding with the proposed action, the grantee must implement any mitigation measures or other conditions established in the Record of Decision. As part of any mitigation, the grantee must report back to OJP on the status of implementing the mitigation.

§91.64 Supplemental EA or EIS.

(a) OJP's duty to supplement . OJP shall prepare supplements to either completed environmental assessments or draft or final environmental impact statements if the grantee proposes to make substantial changes in the proposed action that are relevant to previously assessed environmental concerns; or there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. Additionally, OJP shall include the supplement in its formal administrative record.

(b) Grantee's duty to supplement . A grantee has a duty to inform OJP if it plans to make substantial changes in the proposed action that are relevant to environmental concerns; or if it learns of significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

§91.65 Responsible OJP officials.

(a) Corrections Program Office Director. The Director of the Corrections Program Office is primarily responsible for ensuring the completion of these procedures and for working with grantees to ensure that grantees and subgrantees meet their responsibilities under this subpart. The Director also has the authority to execute on behalf of OJP all FONSIs required under this Subpart.

(b) Assistant Attorney General. The Assistant Attorney General of OJP is responsible for executing all records of decisions resulting from the completion of environmental impact statements on projects subject to this subpart.

§91.66 Public participation.

Environmental impact documents are public documents and the public should be provided an opportunity to review and comment on them.

(a) Early Project Planning Stages. During the early planning stages of a project, the grantee should make reasonable efforts to meet with the affected public and other interested parties in order to obtain their views and any concerns regarding the potential environmental impacts of the proposed project.

(b) Environmental Assessment Process.

(1) Newspaper Notice. At a minimum, the grantee must provide public notice of the availability of the draft EA and draft Finding of No Significant Impact (FONSI) for review and comment. The grantee must publish this notice in the non-legal section of at least two consecutive editions of the newspaper of general circulation in the affected community or area. The notice must:

(i) Explain how and where a copy of the assessment can be accessed or obtained for review;

(ii) Include a request for comments; and

(iii) Provide at least a thirty-day comment period that begins from the date of the last published notice.

(2) Post Office Notice. If the project area is not served by a regularly published local or area-wide newspaper, the notice described in paragraph (b)(1) of this section must be prominently displayed at the local post office.

(3) Site Notice. The grantee must send a copy of the notice to owners and occupants of properties that are nearby or directly affected by the proposed project. Additionally, the grantee must place or post the notice on the site of the proposed project.

(4) Distribution of the Draft EA. At the same time that the grantee provides the public notice of the availability of the EA for review and comment, the grantee must mail a copy of the draft EA and FONSI to any individuals and groups that have expressed an interest in the planned project to either the

grantee or OJP and also to appropriate local, state, and federal agencies. OJP will advise the grantee of the identities of any parties who have directly requested project information from OJP.

(5) Public Information Meeting. A public information meeting is not required for each environmental assessment. Rather, OJP will decide if a public meeting would be helpful in those cases in which the public comments either reflect a serious misunderstanding of the proposed project and its potential environmental impacts or raise substantial questions or issues concerning the content of the draft EA. If OJP determines that a meeting is necessary, the grantee must schedule and hold a public meeting. An OJP representative will attend.

(c) EIS process.

(1) Scoping meeting. As one of the first steps in the preparation of a draft EIS, OJP and the grantee will sponsor a public meeting in the area(s) that would be affected by the proposed project and the alternative sites under consideration. This meeting is referred to as a scoping meeting and is intended to identify the proposed project's environmental impacts that are:

(i) Of most concern to the affected public and local, state, and federal agencies and

(ii) Of least concern to the affected public and agencies.

(2) Review and Comment Process For Draft EIS. OJP's procedures require the grantee to obtain the public's comments on the draft EIS by:

(i) Publishing a notice of availability of the draft EIS in the newspaper(s) serving the area(s) that would be impacted by the proposed project and the alternatives sites;

(ii) Distributing copies of the draft EIS to all interested agencies, organizations, and individuals for their review and comment;

(iii) Holding near the site of the proposed project a public information meeting in order to obtain the comments of the attendees; and

(iv) Allowing, at a minimum, a forty-five day review and comment period for the draft EIS. Grantees should refer to OJP's Guidance Handbook for further information on how to conduct these public review and comment procedures.

(3) Distribution of Final EIS. Any interested person or group can request a copy of the final EIS and will be provided a copy.

Other State and Federal Law Requirements

§91.67 State Environmental Policy Acts.

(a) Coordination . OJP will coordinate with grantees to ensure that any state, local, or tribal environmental impact review requirements similar to the federal NEPA procedures will be met concurrently, to the extent possible, through requesting the appropriate non-federal agency(ies) to be a joint lead agency(ies). This effort would involve joint analyses, public involvement and documentation. Grantees are responsible for identifying the application of and informing OJP of these state and local requirements.

(b) Completed analysis . For projects that had state or local environmental impact analysis completed prior the implementation of these procedures, OJP will review the documents prepared to meet the state and local requirements. In order minimize any duplication of analysis, OJP will advise the State on whether additional environmental impact review is required.

§91.68 Compliance with other federal environmental statutes, regulations and executive orders .

(a) Other Federal environmental laws . All projects initiated by State or local units of government with VOI/TIS grant funding are also subject, where applicable, to the environmental impact analysis requirements of the following statutes, their implementing regulations, and the relevant executive orders:

(1) Archeological and Historical Preservation Act,
(2) Coastal Zone Management Act,
(3) Coastal Barrier Resources Act,
(4) Clean Air Act,
(5) Safe Drinking Water Act,
(6) Federal Water Pollution Control Act,
(7) Endangered Species Act,
(8) Wild and Scenic Rivers Act,
(9) National Historic Preservation Act,
(10) Wilderness Act,
(11) Farmland Protection Policy Act,
(12) Flood Disaster Protection Act
(13) Executive Order on Floodplain Management,
(14) Executive Order on Wetland Protection,
(15) Executive Order on Environmental Justice, and
(16) Executive Order on Protection and Enhancement of the Cultural Environment.

(b) Combined requirements . Documenting compliance with the environmental requirements in paragraph (a) of this section does not normally require separate documents or separate processes. Rather, documenting compliance with all of these requirements is generally accomplished by incorporating them into the NEPA documents. For example, one category of environmental impacts that must be addressed in a NEPA analysis is potential impacts to

historic properties. The National Historic Preservation Act, as well as the Advisory Council on Historic Preservation's regulations at 36 CFR Part 800, also contain federal requirements for addressing the impacts on historic properties from federal actions. In order to avoid duplicate compliance procedures, the NEPA document traditionally becomes the process for meeting the requirements of both laws.

DATED:

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Alexa Verveer
Acting Assistant Attorney General
Office of Justice Programs