

Applicability of NEPA to CERCLA Response Actions

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Introduction

The National Environmental Policy Act of 1969 (NEPA) established procedural requirements for federal agencies to evaluate environmental impacts of proposed federal actions. The Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA) was established to cleanup sites with hazardous substances. After CERCLA was enacted, questions were raised concerning the applicability NEPA requirements to response actions conducted under CERCLA.

USEPA states USEPA is exempt from the procedural requirements of NEPA while USDOE policy states NEPA is to be followed as much as practicable. USDOJ claims NEPA does not apply to CERCLA response actions.

This paper will examine the position of USEPA and USDOE for applicability of NEPA to CERCLA response actions and how the USDOJ position impacts USEPA and USDOE. Then impact of NEPA requirements to the US Coast Guard CERCLA response actions will be examined.

National Environmental Policy Act (NEPA) Process

The National Environmental Policy Act of 1969 (NEPA) establishes procedural requirements for federal agencies to evaluate environmental impacts of proposed federal actions. NEPA ensures environmental factors are weighted equally when compared to other factors in the decision making process undertaken by federal agencies.

NEPA also established the Council of Environmental Quality (CEQ) in the Executive Office of the President. The CEQ was established to advise and assist the President in the preparation of an annual environmental quality report on the present progress of federal agencies in implementing NEPA, on national policies to nurture and promote the improvement of environmental quality and on the current state of the environment. CEQ has the authority to adopt regulations to implement NEPA, which include requirements for the content of NEPA documents as well as

procedures for ensuring that the mandate of NEPA is carried out in all federal actions. This is codified at 40 Code of Federal Regulations (CFR) Parts 1500 to 1508. Individual agencies are required to adopt procedures for NEPA compliance within the agency (40 CFR §1507.3).

The NEPA process consists of three levels of analysis a federal agency may undertake to address an action that could have environmental effects. The lowest level is a Categorical Exclusion (CATEX). CATEXs are actions the federal agency has determined do not individually or cumulatively have a significant effect on the quality of the human environment (40 CFR §1507.4). CATEXs are based on the agency's previous experience with these actions and their environmental impact. The list of agency CATEXs must be approved by the CEQ and published in the *Federal Register*.

An Environmental Assessment (EA) is a level of analysis conducted when there is no CATEX available, where there are no environmental significant effects and is documented in a Finding of no Significant Impacts (FONSI). Stakeholders including other federal and state agencies and the public participate in the EA process.

The highest level of NEPA analysis is the Environmental Impact Statement (EIS). An EIS must be prepared when a proposed action does not fall under a CATEX or fit the determination of a FONSI since these actions would significantly impact the quality of the human environment. The EIS process begins when the agency publishes a Notice of Intent in the *Federal Register* announcing the planned environmental analysis. This begins EIS scoping defined in 40 CFR § 1501.7 as “an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action.” Scoping identifies the range of alternatives and impacts the agency is to consider in the agency's decision on the proposed action. The Purpose and Need statement, describing the rationale of the agency proposed action, is the basis for development of alternative solutions. Alternatives range from a no action alternative (if the agency does not pursue the proposed action) to alternatives addressing the proposed action and may include an agency's preferred alternative. The draft EIS is published with a Notice of Availability for a public comment period. After considering substantive

comments, the final EIS is published which is followed by the agency Record of Decision (ROD) which identifies the alternative selected and any plans to mitigate environmental effects.

Comprehensive Environmental Response Compensation and Liability Act (CERCLA) Process

The Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA) also known as Superfund provided Federal authority to respond to releases or threatened releases of hazardous substances that may endanger public health or the environment. The law provided for taxation of petroleum and chemical industries which went to trust fund to cleanup abandoned or uncontrolled sites with hazardous wastes or substances.

CERCLA authorizes two kinds of response actions. Removal actions are short term actions to address releases or threatened releases requiring prompt response. Remedial actions are longer term actions to permanently and significantly reduce the threat of releases from a site with hazardous substances.

The CERCLA process begins with the site discovery either by the public or state or federal agencies. A Preliminary Assessment (PA) followed by Site Inspection (SI) if necessary are conducted as initial site investigations. A Removal or Emergency Response action is conducted if at this point it is determined the site requires and immediate of short term action to address the release of hazardous substances.

A Remedial Action / Feasibility Study (RI/FS) is then conducted. The RI is to characterize fully the source and extent of the release identified in the PA/SI. The FS uses information from the RI to develop and screen alternatives which may be used as an appropriate cleanup remedy.

Scoping in the RI process includes development of a community relations plan by the lead federal agency managing the cleanup (40 CFR §300.430(c)). The community relations plan needs to identify how the lead agency will (1) provide how the public can learn about the site

cleanup activities and (2) provide opportunities for the public to be involved in site activities including the remedy selection.

The FS process includes the development and comparative analysis of remedial alternatives to address site cleanup. The alternatives need to range from a no-action alternative, alternatives where treatment reduces toxicity, mobility and or volume to alternatives that involve containment with little treatment of wastes. After preliminary screening considering effectiveness, implementability and cost, the remaining alternatives undergo detail analysis against nine specific criteria:

- Overall protection of human health and the environment
- Compliance with applicable of relevant and appropriate requirements (ARARs)
- Long-term effectiveness and permanence
- Reduction of toxicity, mobility and volume
- Short-term effectiveness
- Implementability
- Cost
- State acceptance
- Community acceptance

The lead agency then prepares a Proposed Plan which identifies the preferred alternative and summarizes information from the RI/FS. After public comment on the RI/FS and Proposed Plan, the lead agency prepares a Record of Decision which describes site information, rationale for the selected remedy and engineering components and remediation goals of the selected remedy.

Comparison of NEPA and CERCLA

The primary goal of NEPA is the incorporate environmental considerations in federal agency decision making processes. The procedural requirements of NEPA apply to a universe of federal actions and are intended to guarantee reasonable alternatives are identified and environmental consequences of proposed actions are weighted against other considerations and disclosed to the public.

Under CERCLA remedial actions are conducted to identify, investigate and cleanup contamination from releases or threatened releases of hazardous substances. The RI/FS process geared toward remedial action by investigating site conditions and evaluating alternatives in order to select a preferred course of remedial action.

NEPA and CERCLA processes require the identification, development and analysis of alternative courses of action. Both also require public participation in the decision making process and provide for consideration of other environmental reviews and requirements. Similar phases in the two processes include scoping, data collection and alternative development and analysis. Both require a formal ROD to document the results.

US Environmental Protection Agency and NEPA Requirements for CERCLA

Under EPA's Notice of Policy and Procedures for Voluntary Preparation of National Environmental Policy Act (NEPA) Documents (FR Vol. 63, No.209, page 58045), EPA states in the Statement of Policy section "EPA is also exempted from the procedural requirements of environmental laws, including NEPA, for Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) response actions. Courts also consistently have recognized that EPA procedures or environmental reviews under enabling legislation are functionally equivalent to the NEPA process and thus exempt from the procedural requirements of NEPA."

US Department of Energy

The July 11, 2002 Office of NEPA Policy and Compliance Memorandum states "Under DOE's CERCLA/NEPA Policy, established in 1994, DOE relies on the CERCLA process for review of actions to be taken under CERCLA, i.e., no separate NEPA document or NEPA process is ordinarily required. In conducting the CERCLA process, DOE addresses NEPA values (such as analysis of cumulative, off-site, ecological, and socioeconomic impacts) to the extent practicable and includes a brief discussion of impacts in CERCLA documents of other site environmental

documents as appropriate. Under this policy, DOE also takes steps to ensure early public involvement in the CERCLA process and makes CERCLA documents available to the public as early as possible.” The memorandum also states that DOE managers should rely on the CERCLA process to implement the CERCLA NEPA policy when it does not slow DOE cleanup actions.

US Department of Justice

The January 23, 1995 Assistant Attorney General, Environment & Natural Resources Division Memorandum states “...CERCLA’s Section 113(h) bar on pre-enforcement review, which is vital to obtaining expeditious cleanups, clearly conflicts with the third component of NEPA which generally permit judicial review prior to the commencement of the agency action” and also “...this irreconcilable conflict supports DOJ’s historic position that NEPA, as a matter of law, does not apply to CERCLA cleanups.”

US Coast Guard

The US Coast Guard NEPA policy is published in Commandant Instruction Manual 16475.1D subject titled National Environmental Policy Act Implementing Procedures and Policy for Considering Environmental Impacts, dated November 29, 2000. Chapter 2 – Coast Guard Implementing Instructions, Section D – Special Areas of Consideration, Enclosure (11) identifies CERCLA as an “environmental and historic and cultural resource mandates that may fall under the umbrella of the NEPA environmental planning process.” The Coast Guard policy does not elaborate further on NEPA applicability to CERCLA response actions.

In light of review of USDOE and USDOJ positions and or policy on NEPA applicability to CERCLA response actions, US Coast Guard should, at the next revision of the NEPA policy in CIM 16475.1D, clarify the extent which the US Coast Guard will address the NEPA process for CERCLA response actions.

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