CONF-891098--9

CONF-891098--9

DE91 001922

NEPA/CERCLA/RCRA INTEGRATION

Frances E. Sharples
Ellen D. Smith

Environmental Sciences Division
Oak Ridge National Laboratory*
P. O. Box 2008
Oak Ridge, Tennessee 37831-6038

DISCLAIMER

* Operated by Martin Marietta Energy Systems, Inc., under Contract No. DE-AC05-84OR21400 with the U. S. Department of Energy. Publication No. ____, Environmental Sciences Division, ORNL.

NEPA/CERCLA/RCRA INTEGRATION

Frances E. Sharples
Ellen D. Smith

INTRODUCTION

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) requires that decisions concerning remedial actions at Superfund sites be made through a formal decisionmaking process known as a Remedial Investigation/Feasibility Study (RI/FS). Many of the elements of this process are similar to the steps in the process required to comply with the National Environmental Policy Act (NEPA). Both processes, for example, involve the identification and analysis of alternative courses of action, provide for public disclosure and participation in the processes, and are documented by Records of Decision.

Decisions by federal agencies that affect the quality of the environment are subject to NEPA, which requires that environmental impact statements (EISs) be prepared for major federal actions that significantly affect the quality of the human environment. Actions undertaken by the Environmental Protection Agency (EPA), however, are usually treated as exempt from EIS requirements because of the doctrine of "functional equivalence." This doctrine recognizes that EPA's organic legislation mandates procedures that are functionally equivalent to those of NEPA, in that they ensure adequate substantive and procedural consideration of environmental issues and afford public participation. The functional equivalence of certain EPA actions has been established by court decisions and by amendments to the Clean Air and Clean Water Acts (Mandelker 1984). As a result of the functional equivalence doctrine, the NEPA process is not normally followed when EPA undertakes CERCLA remedial actions at nonfederal sites.

Remedial responses at CERCLA National Priorities List (NPL) sites on federal land or at federal facilities are the responsibility of the agency with jurisdiction over the site, subject to review and approval by the EPA under the provisions of the Superfund Amendments and

Reauthorization Act of 1986 (SARA). Because decisions on remedial responses at these sites must by law follow the RI/FS process that is exempt from NEPA when conducted by EPA, there has been some uncertainty as to whether NEPA applies to CERCLA actions undertaken by agencies other than EPA. Furthermore, because the two processes are similar but not identical, there has been concern that implementation of both the NEPA and CERCLA processes will result in unnecessary duplication of effort, delay, and possible legal conflicts.

Similar questions are expected to arise as federal facilities are required to conduct corrective actions under the Resource Conservation and Recovery Act (RCRA). Under RCRA, facilities that manage hazardous wastes may be required to take action to correct past releases from their solid waste management units as a condition of their RCRA hazardous waste permits. The decisionmaking process for RCRA corrective actions is expected to be similar to that for CERCLA remedial actions.

Generally, application of functional equivalence has been seen as being limited to actions by EPA alone because EPA is administering statutes that are environmentally protective. The courts have declined to apply the doctrine of functional equivalence to agencies other than EPA, including agencies with substantial environmental responsibilities (e.g., the National Marine Fisheries Service). The doctrine can thus be interpreted as relieving only EPA of the obligation to comply with NEPA's procedural requirements. It has, however, been suggested that functional equivalence is conferred on the RI/FS process when it is conducted by other agencies through EPA's oversight and involvement. No court has ruled on the validity of this argument, and the debate here may come down to the question of which agency, EPA or the agency over which EPA has oversight, has the primary decisionmaking responsibility in conducting the process and selecting a remedy.

In the absence of clear legal direction on the applicability of NEPA to CERCLA remedial actions at federal facilities, several federal agencies have adopted policies calling for the

environmental planning and review procedures of the RI/FS to be integrated with the NEPA process. Similar policies are likely to apply to RCRA corrective actions. This approach is consistent with the CEQ directive to "Integrate the requirements of NEPA with other planning and environmental review procedures . . . so that all such procedures run concurrently rather than consecutively" (40 CFR §1500.2(c)).

PANEL DISCUSSION

There are sufficient legal ambiguities and practical questions surrounding this subject to allow continuing disagreement over the applicability of NEPA to federal facility remedial actions and the advisability of integrating the NEPA process with the CERCLA and RCRA processes. "NEPA/CERCLA/RCRA Integration" was the subject of a panel discussion conducted during a plenary session of this NEPA symposium. The discussion addressed the questions of (1) whether NEPA applies to CERCLA and RCRA remedial-action decisions and (2) whether and how the two processes should be integrated. The panel members were:

- Dinah Bear, General Counsel, President's Council on Environmental Quality (CEQ);
- Carol Borgstrom, Director, Office of NEPA Oversight, U.S. Department of Energy (DOE);
- David Durham, Special Assistant to the Administrator, U.S. EPA;
- Raymond Pelletier, Director, Office of Environmental Guidance, U.S. DOE; and
- Gary Vest, Deputy Assistant Secretary, Environment, Safety, and Occupational Health, U.S. Air Force.

Frances Sharples of the Oak Ridge National Laboratory (ORNL) served as panel moderator. The main points addressed by each of the panelists are summarized below, followed by a synopsis of the discussion during the question-and-answer period and a brief update on developments since the October 1989 symposium.

David Durham, EPA

Mr. Durham stated that EPA currently has no formal position on integrating the NEPA and CERCLA processes. In discussing the agency's views on the applicability of NEPA, he was careful to draw a distinction between actions taken by EPA itself and actions taken by other agencies that are conducting remedial actions under EPA's oversight. Since 1982, EPA has treated its own removal actions under CERCLA as not being subject to NEPA. Similarly, EPA deems the agency's own conduct of the RI/FS process to be functionally equivalent to NEPA. EPA's interpretation that internally conducted removal actions and RI/FS activities do not trigger NEPA is consistent with the agency's general approach to its own decisionmaking and with findings in court cases.

EPA's views on integration by other agencies are not resolved, but as expressed by Mr. Durham, they appear to be strongly influenced by arguments set forth in a letter from Donald A. Carr, Acting Assistant Attorney General, Land and Natural Resources Division, U. S. Department of Justice (DOJ), to Dinah Bear, General Counsel, Council on Environmental Quality on March 6, 1989. In this letter, DOJ stated its position that NEPA does not apply when federal agencies are performing cleanups under CERCLA's authorities. The DOJ believes this view is supported by the language, legislative history, and principles of CERCLA "and does not turn on a 'functional equivalent' analysis." Mr. Durham summarized the major points of DOJ's analysis, as follows:

1. Based on a review of the various versions of SARA that were under consideration prior to enactment, DOJ concluded that Congress intended for SARA to stand apart from other environmental laws except as expressly provided. In addition, DOJ believes that the intent for federal agencies to follow the same rules as EPA in selecting response actions

has in effect eliminated most additional requirements that might otherwise apply for these agencies.

2. Where Congress wanted federal agencies to be subject to other federal statutory requirements, DOJ notes, these were explicitly stated in SARA. For example, Section 120(i) of SARA obligates federal agencies to comply with all substantive requirements of RCRA and Section 121 requires that CERCLA cleanups meet any standards, requirements, criteria, or limitation under any federal environmental law, including the Toxic Substances Control Act, the Safe Drinking Water Act, the Clean Air and Clean Water Acts, etc. Because NEPA was not specifically enumerated in this list, DOJ makes the case that the Congress did not intend for NEPA to apply.

3. Congress expressly rejected the application of state NEPA-like procedures to Superfund cleanups.

4. Because CERCLA/SARA gives decisionmaking authority to the President, and it is "well-settled" that NEPA does not apply to Presidential decisionmaking, DOJ makes the interpretation that Congress could not have intended for CERCLA cleanups to be subject to NEPA.

5. DOJ also believes that it is significant that Congress established specific public participation requirements under CERCLA "which render compliance with the public participation requirements of NEPA superfluous."

6. Finally, DOJ notes that Congress has built substantial constraints into the CERCLA remedy selection process, such as limiting the consideration of alternatives to those based on health and environmental cleanup standards, and a prohibition on judicial review prior to completion of the remedy. Accordingly, DOJ views compliance with NEPA as having the potential to violate Congressional intent by requiring additional considerations to be made that might interfere with the responsibility of EPA and other agencies to conduct expeditious cleanups.

The Justice Department's letter concludes by stating, "In sum,...we conclude that cleanups conducted by EPA and federal agencies under CERCLA are not subject to NEPA." Mr. Durham's conclusion was, nevertheless, that it is not entirely clear whether NEPA applies to CERCLA cleanups. This conclusion suggests that EPA is not yet convinced that DOJ's arguments resolve the legal ambiguities.

Dinah Bear, CEQ

Ms. Bear stated that the relationship between NEPA and CERCLA had been the most common subject of questions received by her office in recent months. She pointed out that the DOJ letter represented a theory being submitted to CEQ for its response, and that it had no legal status as guidance. She reiterated that the DOJ letter did not make a functional equivalence argument, but that CEQ in any case would oppose the extension of functional equivalence to federal agencies other than EPA. Furthermore, she noted, the courts have held that CEQ (not DOJ) is "in charge" with respect to setting NEPA requirements. Much of her subsequent discussion addressed her reasons for disagreeing with the theory of legislative intent expressed in the DOJ letter.

First, Ms. Bear stated the opinion that all other environmental statutes apply under CERCLA unless specifically excluded. Although, for example, the wording of Section 121(d) of the statute does not mention NEPA, it uses the phrase "including, but not limited to" when enumerating other applicable laws, making it clear that the list of laws is not exhaustive. She mentioned that at least one Senate Committee report in the legislative history of SARA had indicated that NEPA could apply. In addition, she asserted that the omission of NEPA from the CERCLA list of substantive requirements of other laws is not meaningful because NEPA is procedural and not substantive. One would not, therefore, expect it to appear on a list of statutes with substantive requirements. Second, she contested DOJ's assertion that Congress' rejection of state NEPA-like procedures could be construed to mean that Congress also rejected the application of the federal NEPA. Instead, she interpreted this as a limitation on the authority of states over federal actions, and asserted that the absence of such a specific rejection indicates that NEPA may apply.

Third, although she agreed that NEPA does not apply to presidential actions, she disagreed with the interpretation that EPA's CERCLA cleanup activities represent presidential actions. Many presidential responsibilities are delegated to executive agencies, and most such delegated responsibilities are clearly subject to NEPA as federal actions. She also disagreed with DOJ's interpretation that the establishment of specific public participation requirements under CERCLA makes the NEPA public participation process superfluous, saying that there is no reason CERCLA's requirements cannot be supplemented with those of NEPA.

Finally, on the DOJ argument that preparation of an EIS would delay the remedial action process, she stated that this was based on a wrong assumption by DOJ, i.e., that an EIS would be prepared after completion of the RI/FS. The advice of CEQ is that the RI/FS and EIS processes not be conducted consecutively, but as a single integrated process. Taking an integrated approach should alleviate the potential problem of delays.

Ms. Bear also addressed the question of whether compliance with NEPA would subject CERCLA remedy selections to citizen lawsuits that are otherwise barred under CERCLA. To prevent CERCLA actions from being delayed by legal action, a provision of SARA bars most citizen suits until after the remedial action has been implemented. It has been suggested, however, that integration of NEPA with CERCLA could lead to delays in remedial action by permitting lawsuits under NEPA. Because NEPA is silent on the question of timing of judicial review, it was Ms. Bear's opinion that the CERCLA prohibition on citizen suits would take precedence over NEPA when the two processes are integrated. Thus citizen suits over an allegedly inadequate EIS would be barred until after remedial action is complete.

Ms. Bear concluded by stating that CEQ would further examine the integration of the NEPA and CERCLA processes, which CEQ clearly supports, and that CEQ expected to issue guidance for other federal agencies.

Gary Vest, Air Force

According to Mr. Vest, the United States Air Force believes that NEPA applies to its CERCLA remedial actions and that "functional equivalency" is valid only for EPA. NEPA compliance is therefore incorporated into Air Force Installation Restoration Program projects. Mr. Vest expressed the view that NEPA fosters informed decisionmaking on remedial action questions. He also suggested that the vast cost of federal facility environmental restoration activities make it foolish to ignore NEPA. He observed that the NEPA process is necessary for considering remedial action issues and impacts that involve several sites or geographic regions, such as transportation of cleanup wastes to a different location.

Although the Air Force has in the past conducted some remedial actions with separate CERCLA and NEPA documentation, integration of the processes is preferred because it is seen as saving time, money, and effort. Integrated documents must, of course, be designed to fulfill the

requirements of both laws. Mr. Vest noted many similarities between NEPA and CERCLA that facilitate integration of the processes. Both processes call for analysis and comparison of alternatives, including the alternative of no action; public involvement; and issuance of a record of decision. It is the CERCLA RI/FS process that is integrated with NEPA; the Air Force has classified Preliminary Assessment/Site Investigation activities, which precede the RI/FS under CERCLA, as NEPA categorical exclusions.

Mr. Vest mentioned a few practical aspects of integrating NEPA and CERCLA. For example, he noted that the intent to conduct an integrated process should be emphasized at all public and interagency meetings concerned with a remedial action project.

Mr. Vest stated his belief that NEPA would apply to corrective action projects under RCRA, although EPA's rule establishing the requirements for this process had not been issued. The Air Force had had little experience to date in integrating the NEPA and RCRA corrective action processes.

Carol Borgstrom, DOE

The DOE is another agency that has been proactive in establishing a policy calling for the NEPA and CERCLA processes to be integrated. Ms. Borgstrom's presentation reviewed this policy. In August of 1988, the Department issued DOE Notice 5400.4, "Integration of Compliance Processes." This Notice established that it is DOE policy is to integrate the requirements of the NEPA and RI/FS processes for remedial actions under CERCLA. Ms. Borgstrom emphasized that the processes are to run concurrently rather than consecutively, thereby reducing the level of resources that would be needed to implement both processes separately. The primary instrument for integration is to be the RI/FS process, "supplemented, as needed, to meet the procedural and documentational requirements of NEPA." She emphasized that the policy is subject to revision pending guidance from CEQ.

Ms. Borgstrom also stressed that a key element of the integrated process is making early determinations on the level of NEPA documentation needed prior to entering into the RI/FS scoping process or as soon thereafter as possible. She stated that the policy is not entirely mandatory. For example, if a project is already committed to conducting the two processes separately, it is not required to integrate. Also, integration might not be practical where the aggregation of remedial action and non-remedial action activities would overly complicate one process or the other.

Ms. Borgstrom then discussed some of the problems DOE was encountering in implementing this policy. She noted that few people in the Department understand both NEPA and CERCLA, and that there was a general lack of understanding within DOE on how to integrate. Internal opposition to the policy was motivated by the fear that NEPA compliance would delay CERCLA actions. The Office of NEPA Project Oversight recognized that guidance on implementing the policy was needed, and Ms. Borgstrom stated that such guidance would be developed. In addition, DOE intended to expand its list of categorical exclusions to relieve some activities associated with the remedial action process from the need for NEPA documentation.

Ray Pelletier, DOE

Mr. Pelletier focused his remarks on some practical problems that may arise in implementing DOE's integration policy. First he noted that there is a great deal of public and political pressure on EPA to produce results from the CERCLA program and that numbers of completed and signed CERCLA Records of Decision (RODs) are often used as a measure of progress. As a result, he suggested, EPA has an incentive to divide large remedial action sites, such as DOE facilities, into many small "operable units," each covered by a separate ROD under CERCLA. For example, the DOE Hanford Reservation in Washington State has 78 CERCLA operable units. This perceived pressure to divide remedial action projects into many small units

would appear to conflict with the NEPA mandates to assess connected actions together and to evaluate cumulative impacts. He also noted that if operable units are grouped together for analysis, NEPA would generally call for grouping by the type or focus of impact, whereas CERCLA would probably require grouping by type of remedial response technology.

Another potential problem identified by Mr. Pelletier is that integrated RI/FS-EIS documents are subject to different and potentially conflicting review requirements. Two completely different parts of the EPA both have review responsibilities: CERCLA program personnel must review and approve all draft RI/FS documents, while the EPA Office of Federal Activities reviews and rates published EISs under Sect. 1504 of the CEQ NEPA regulations. This dual review by EPA could be inefficient and might lead to internal conflicts when one branch of EPA is called upon to evaluate the work of another branch. Another concern related to EPA's role under CERCLA is that Federal Facilities Agreements between EPA and other federal agencies spelling out CERCLA responsibilities do not typically address NEPA integration. As a result, compliance schedules may not allow sufficient time for NEPA document reviews (by EPA and the public) that are different from required CERCLA reviews.

The conflict of interest provisions of the CEQ regulations pose another potential problem for DOE in its efforts to integrate NEPA and CERCLA, as they would have the effect of barring DOE management and operation contractors from preparing RI/FS documents that will also serve as NEPA documents. Mr. Pelletier also noted that the two processes have different expectations and requirements for the length, focus, and readability of documents, and that it may be difficult to prepare documents that meet both sets of requirements. EPA guidance on CERCLA calls for reporting of essentially all available information in RI/FS reports, which can be quite lengthy and are not necessarily intended to be readable by the lay public. In contrast, the NEPA regulations call for EISs to be readable documents that focus on significant issues, omit unnecessary detail, and are limited to no more than 300 pages. Another concern Mr. Pelletier expressed is that the

significant beneficial impacts of most remedial action projects might mean that an EIS would be the required level of NEPA documentation for virtually every project.

Mr. Pelletier concluded by stating that DOE's biggest problem to date in integrating NEPA and CERCLA has arisen from failures to begin NEPA implementation early in the decision process. In most instances, the binding interagency compliance agreements that DOE is signing for its remedial action sites fail to allow for NEPA. He stressed that a NEPA strategy should be developed before the agencies begin negotiations so that agreements can include any features needed to accommodate NEPA integration. The Hanford agreement dealing with 78 operable units, for example, leaves no room for the preparation of programmatic or other forms of tiered EISs. It is too late to start planning a NEPA compliance strategy after an agreement has already been negotiated and signed.

Discussion

A period of questions, answers, and discussion followed the panelists' initial presentations. One topic of discussion was the policies of other federal agencies with respect to the application of NEPA to remedial actions. The Department of the Army was named as another agency that has issued regulations adopting an integrated approach to NEPA and CERCLA. Ms. Bear noted that the Department of the Interior (DOI) had conducted a remedial action at a wildlife refuge without following NEPA, based on an interpretation that functional equivalency did apply to that particular action. She also knew about instances of federal agencies making remedial action decisions under NEPA alone. Another meeting participant said that on lands belonging to DOI's Bureau of Land Management, functional equivalence is deemed to apply only to actions undertaken by EPA. The EPA's Region VIII was cited as having supported the successful integration of NEPA with RCRA for actions in the state of Utah.

Several participants addressed themselves to the question of whether the expected environmental benefits of CERCLA and RCRA remedial actions should exempt these actions from NEPA. Ms. Bear remarked that other agencies have argued that highways and dams are entirely beneficial in their impacts and should be exempt from NEPA, but it is now well accepted that these projects also have adverse impacts and are subject to NEPA. A member of the audience suggested that it is probably invalid to assume that the impacts of a remedial action will always be beneficial. He compared remedial actions to the federal program of financing sewage treatment plant construction, which was also undertaken to improve the environment. According to his statements, the application of NEPA to sewage treatment plant construction has been found to have reduced the adverse impacts of these projects, for example, by reducing impacts on floodplains and wetlands. Mr. Vest observed that the alternative supported by RI/FS analysis is not always the best choice environmentally. At one Air Force CERCLA site, application of the NEPA process led to a decision to select the no-action alternative, which would have been rejected if the decision had been made under CERCLA alone.

Audience member Dan Reicher of the Natural Resources Defense Council questioned whether a decision not to prepare an EIS (i.e., the issuance of a finding of no significant impact) for a CERCLA action would be exempt from judicial review as a result of the CERCLA prohibition of citizen suits. He suggested that some provision for judicial review of such decisions might be necessary to enforce NEPA. In considering the question, Ms. Bear indicated that CEQ would have to study further the important issue of the effect of the CERCLA prohibition on litigation as it relates to NEPA-CERCLA integration.

RECENT DEVELOPMENTS

Developments since October 1989 have included (1) release of a CEQ memorandum on the applicability of NEPA to CERCLA remedial action decisions, (2) formalization of the DOE

policy calling for integration of NEPA and CERCLA, and (3) publication by EPA of a proposed rule setting out procedures for conducting corrective actions under RCRA (55 *Federal Register* 30798; July 27, 1990). In addition, ORNL issued a report (Levine et al. 1990) that discusses NEPA-CERCLA integration and presents recommendations on practical aspects of conducting an integrated RI/FS-EIS process and preparing integrated documentation.

The CEQ memorandum (Swartz 1990) was sent to EPA with a proposal that CEQ and EPA work together to draft guidance on the legal and practical aspects of integrating NEPA and CERCLA (D. Bear, CEQ; letter to E. D. Elliott and J. M. Strock, U.S. EPA, August 1, 1990). The memorandum presents CEQ's analysis of the legal arguments concerning the applicability of NEPA to CERCLA actions. The conclusion of this analysis is that the NEPA process applies to federal agency actions under CERCLA "because (1) Congress did not expressly or impliedly repeal the application of NEPA in CERCLA/SARA, (2) the goals of NEPA and CERCLA do not conflict fundamentally, and (3) the functional equivalence doctrine does not apply to actions taken by federal agencies other than EPA." Furthermore, the memorandum states that "EPA's review and approval of the remedy selected is not a sufficient nexus to allow other federal agencies to disregard the requirements of NEPA." In reaching these conclusions, the memorandum makes, expands upon, and provides legal citations in support of the arguments given by Dinah Bear in the presentation summarized above. Other topics discussed by Swartz (1990) include the theory of functional equivalence and the expectation that implementing NEPA for CERCLA actions will enhance the decision process by providing for earlier and more effective public participation.

The DOE policy on NEPA-CERCLA integration has been formalized in DOE Order 5400.4 (CERCLA Requirements), issued October 6, 1989. In a related action, DOE listed certain actions taken under CERCLA and RCRA as NEPA categorical exclusions (proposed on April 6, 1990, 55 FR 13064; final publication on September 7, 1990, 55 FR 37174). Actions by DOE that

are now categorically excluded from NEPA documentation (i.e., actions that do not normally require either an EIS or an EA) include most removal actions under CERCLA or RCRA, improvements to environmental control systems to comply with environmental permit requirements, and site characterization and environmental monitoring activities under CERCLA and RCRA.

REFERENCES

Levine, M. B., E. D. Smith, F. E. Sharples, and G. K. Eddlemon. 1990. Integrating NEPA and CERCLA requirements during remedial responses at DOE facilities. ORNL/TM-11564, Oak Ridge National Laboratory, Oak Ridge, Tennessee.

Mandelker, D. R. 1984. NEPA Law and Litigation. Callaghan and Company, Wilmette, Illinois.

Swartz, L. L. 1990. Application of the National Environmental Policy Act to federal agency actions under the Comprehensive Environmental Response, Compensation, and Liability Act. CEQ internal memorandum to D. Bear, General Counsel, July 30, 1990. Council on Environmental Quality, Washington, DC.

END

DATE FILMED

12/13/90