

memorandum

DATE: July 11, 2002

REPLY TO

ATTN OF: Office of NEPA Policy and Compliance:Osborne:202-586-4596

SUBJECT: DOE Policies on Application of NEPA to CERCLA and RCRA Cleanup Actions

TO: Secretarial Officers and Heads of Field Organizations

This memorandum, prepared in consultation with the Assistant General Counsel for Environment, reiterates and clarifies Department of Energy (DOE) policies to streamline the environmental review of actions to be taken under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA). This is in response to the streamlining initiatives emphasized in Environmental Management's recent Top-to-Bottom Review ("A Review of the Environmental Management Program," February 4, 2002). In brief, and as described below, CERCLA actions and RCRA corrective actions generally do not require a separate NEPA analysis (that is, do not require an environmental assessment or environmental impact statement).

CERCLA/NEPA Policy¹

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 or 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 basis for DOE's CERCLA/NEPA policy is a determination by the Department of Justice that there is a statutory conflict between NEPA and CERCLA, and that NEPA, as a matter of law, does not apply to CERCLA cleanups. The statutory conflict is that, whereas NEPA

¹ See Secretarial Policy Statement on the National Environmental Policy Act, Department of Energy, June 1994. See tis.eh.doe.gov/nepa; under NEPA Tools, click on NEPA Policy. Note that under this policy, NEPA reviews are undertaken for siting, construction, and operation of treatment, storage, and disposal facilities that, in addition to supporting Comprehensive Environmental Response, Compensation, and Liability Act actions, also serve waste management or other purposes.

allows judicial review (under the Administrative Procedure Act) before an agency takes action, CERCLA seeks to achieve expeditious cleanups and generally bars such “pre-enforcement” review. (See CERCLA section 113(h).) A 1995 memorandum from the Assistant Attorney General, Environment and Natural Resources Division, Department of Justice, to DOE, the Environmental Protection Agency (EPA), the Department of Defense, and the Council on Environmental Quality, memorialized agency consensus on DOE’s CERCLA/NEPA policy.²

In planning waste management activities, DOE managers should implement DOE’s CERCLA/NEPA policy to the fullest extent possible where it affords a means to accelerate DOE’s cleanup work, that is, rely on the CERCLA process for environmental review of CERCLA actions.

RCRA Corrective Actions³

We have taken another look at the guidance the Office of Environment, Safety and Health issued in 1997 and find that it is sound. DOE’s approach to NEPA review for RCRA corrective actions is project-specific, allowing DOE to consider the circumstances associated with specific RCRA corrective actions and streamline the environmental review process accordingly. The Department of Justice has not determined that RCRA corrective actions, like CERCLA cleanups, are not subject to NEPA, so DOE cannot establish a broad RCRA/NEPA policy that parallels the DOE CERCLA/NEPA policy.

Based on experience to date, most DOE RCRA actions fall within the scope of a categorical exclusion and do not require NEPA analysis. (For example, the categorical exclusion for small-scale, short-term cleanup actions under RCRA, the Atomic Energy Act, or other authorities, in the DOE NEPA regulations, Appendix B 6.1, to 10 CFR Part 1021, has been frequently applied to RCRA corrective actions.) In the rare instance where a proposed RCRA corrective action does not qualify for a categorical exclusion, DOE may be able to rely

² The January 23, 1995, Department of Justice memorandum summarized the consensus reached by the Environmental Protection Agency, the Council on Environmental Quality, and the Department of Energy at a March 31, 1994, meeting.

³ See Guidance on National Environmental Policy Act (NEPA) Review for Corrective Actions under the Resource Conservation and Recovery Act (RCRA). Memorandum from the Deputy Assistant Secretary for Environment to NEPA Compliance Officers and Assistant Managers for Environmental Management, December 13, 1997. See tis.eh.doe.gov/nepa/; under NEPA Compliance Guide Volume II, click on Part V, NEPA Process Improvement, and open item V.3. Both the 1997 guidance and this guidance are directed at NEPA review for corrective actions (cleanup actions), not the NEPA review that would be conducted for new treatment, storage, or disposal units permitted under RCRA.

on the CERCLA process (as described above) if the action is to be taken under a compliance agreement for a DOE site on the CERCLA National Priorities List that integrates the requirements of RCRA and CERCLA to such an extent that the requirements are largely inseparable in a practical sense. Project managers should consult with DOE counsel and the cognizant NEPA Compliance Officer in evaluating NEPA compliance requirements for RCRA corrective actions.

Functional Equivalence

“Functional equivalence” is often cited incorrectly with regard to DOE’s reliance on the CERCLA or CERCLA/RCRA process to incorporate NEPA values to the extent practicable into the environmental review process when appropriate. The term “functional equivalence” was coined by the District of Columbia Circuit Court concerning EPA’s role under NEPA. In general, the Court found that EPA is exempt from preparing NEPA documents for regulatory actions where that Agency’s work product (e.g., environmental evaluation and public participation procedures provided under other environmental laws or regulations) constitutes the functional equivalent of a NEPA review. This ruling was based on EPA’s mission of environmental protection. DOE’s CERCLA/NEPA and RCRA/NEPA policies are not based on functional equivalence.

Please direct any questions regarding this guidance on how to streamline environmental review of actions to be taken under CERCLA and RCRA to Carol Borgstrom, Director, Office of NEPA Policy and Compliance, at (202) 586-4600.



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