

# CLEANUP OF NATIONAL PRIORITIES LIST SITES, FUNCTIONAL EQUIVALENCE, AND THE NEPA ENVIRONMENTAL IMPACT STATEMENT

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## I. INTRODUCTION

The National Environmental Policy Act of 1969 (NEPA)<sup>1</sup> was enacted by Congress to establish a framework for environmental review of actions carried out by the federal government.<sup>2</sup> NEPA imposes certain responsibilities on the federal government including an obligation to assure a safe and healthful environment free from degradation and to achieve a wide range of beneficial uses without risk to health or safety.<sup>3</sup> NEPA mandates that all agencies of the federal government prepare an environmental impact statement (EIS) when they undertake or fund "major Federal actions significantly affecting the quality of the human environment."<sup>4</sup>

At the time NEPA was enacted, the Environmental Protection Agency (EPA) did not yet exist.<sup>5</sup> NEPA's reach extended to *all* agencies of the federal government,<sup>6</sup> including those which were ultimately consolidated into what is now EPA.<sup>7</sup> No blanket exemption was granted in NEPA to EPA's predecessor agencies.<sup>8</sup> Following the creation of EPA in 1970, there has been continuing uncertainty with respect to whether EPA must prepare an EIS when it proposes or

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1. 42 U.S.C. §§ 4321-4370(c) (1988 & Supp. 1990).

2. 42 U.S.C. § 4331 (1988).

3. 42 U.S.C. § 4331(b) (1988).

4. 42 U.S.C. § 4332(2)(C) (1988).

5. EPA was created by Reorganization Plan No. 3, which was submitted to Congress on July 9, 1970 and took effect on December 2, 1970. 35 Fed. Reg. 15,623 (1970).

6. 42 U.S.C. § 4332(2) (1988).

7. Among the predecessor agencies which consolidated to form EPA are the Federal Water Quality Administration of the Department of the Interior and the National Air Pollution Control Administration of the Department of Health, Education and Welfare.

8. See Comment, *Halfway There: EPA's "Environmental Explanations" and the Duty to File Impact Statements*, 3 ENVTL. L. REP. 10,139, 10,140 n.2 (1973).

undertakes a major action significantly affecting the quality of the human environment.

In the last two decades, the federal courts have created a doctrine of functional equivalence which permits EPA to bypass NEPA's environmental impact process, provided that its consideration of a proposed action is responsive to the policies underlying NEPA. Congress has also expressly exempted EPA from compliance with NEPA in several environmental statutes that themselves contemplate a review process much like that mandated by NEPA. Where emergency circumstances exist, the EIS requirement may be waived. The question remains, however, whether Congress in fact intended for EPA to be exempt from NEPA's requirements and whether functional equivalence adequately addresses the policies that underlie NEPA.

Functional equivalence has not yet been applied to EPA's cleanup of hazardous waste sites under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),<sup>9</sup> or "Superfund." Enacted in 1980, CERCLA authorizes and provides funding for cleaning up abandoned hazardous waste sites from which (a) a release of hazardous waste into the environment is threatened, or (b) a release of hazardous waste into the environment has occurred or is occurring.<sup>10</sup> Sites which pose an imminent threat or which require prompt cleanup are accorded priority by placement on the National Priorities List (NPL). Since preparation of an EIS in accordance with NEPA may take a year or longer, there is a continuing concern that rather than protecting the environment, preparation of an EIS in compliance with NEPA could actually result in substantial injury through hazardous substance release.

The extent to which EPA's site cleanup and remedy selection procedures are functionally equivalent to a NEPA EIS was first addressed in a law review comment in 1984.<sup>11</sup> It has not been addressed in a law review or journal since. After 1984, EPA revised its procedures to provide earlier public notice of site contamination and proposed remediation, and to allow greater public participation in the selection of a remedy. There have also been several judicial decisions during the intervening decade, arising under statutes other than CERCLA, involving EPA's responsibilities and functional equivalence. This article will examine the underlying policies of NEPA and CERCLA, their legislative histories and the judicial development of

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<sup>9</sup> 42 U.S.C. §§ 9601-9675 (1988).

<sup>10</sup> 42 U.S.C. at § 9604.

<sup>11</sup> Sandra P. Montrose, Comment, *To Police the Police: Functional Equivalence to the EIS Requirement and EPA Remedial Actions Under Superfund*, 33 CATH. U. L. REV. 863 (1984).

the functional equivalence doctrine. Next, it will review EPA's revised public relations procedures, relating to remedy selection and public participation, to determine whether these procedures adequately resolve the deficiencies for which EPA's proposed procedures were criticized in 1984. This article will then review relevant court decisions concerning functional equivalence, particularly those decided since 1984. Lastly, it will address the question of whether EPA is required to prepare a NEPA EIS prior to commencing cleanup of National Priorities List sites.

## II. NEPA

### A. Functions, Purpose & Structure

NEPA was enacted for two principal purposes: to force federal agencies to carefully consider significant environmental impacts arising from projects under agency jurisdiction and to establish a procedure by which members of the public are afforded an opportunity for meaningful participation in the agency's consideration of the proposed action.<sup>12</sup> The EIS is designed to accomplish these purposes by mandating a particular format for presenting the environmental review and by creating opportunities for public comment.<sup>13</sup> Agencies have an obligation to consider environmental consequences identified during the NEPA process, but their review need not elevate environmental concerns above all other issues considered in the agency's ultimate decision on the project.<sup>14</sup> NEPA contemplates balancing a project's environmental costs against its anticipated benefits. Thus, NEPA imposes a procedural obligation, but agencies are not required to mitigate adverse environmental consequences.<sup>15</sup>

NEPA also establishes the Council on Environmental Quality (CEQ) in the Executive Office of the President.<sup>16</sup> CEQ issues regulations relating to the implementation of NEPA and the specific content requirements of an EIS, thus providing a uniform standard for federal

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<sup>12</sup>. 42 U.S.C. §§ 4321-4370 (1988 & Supp. 1990). See also Montrose, *supra* note , at 864; Lawrence Gerschwer, Note, *Informational Standing Under NEPA: Justiciability and the Environmental Decisionmaking Process*, 93 Colum. L. Rev., 996 (1993).

<sup>13</sup>. For requirements relating to the format and contents of a NEPA EIS, see 40 C.F.R. §§ 1502.1-1502.25 (1993). See also *infra* part II.B.1. For requirements relating to public participation and public commenting on the EIS, see 40 C.F.R. §§ 1503.1-1503.4, 1506.6, 1506.10 (1993). See also *infra* part II.B.2.

<sup>14</sup>. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980) (per curiam).

<sup>15</sup>. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

<sup>16</sup>. 42 U.S.C. § 4342 (1988).

agencies to follow when meeting their NEPA obligation. The CEQ regulations, establishing requirements for agency compliance with NEPA,<sup>17</sup> require that particular procedures be adopted by agencies relating to preparation of the EIS<sup>18</sup> and require agencies to hold public hearings whenever appropriate.<sup>19</sup> The regulations are binding on federal agencies<sup>20</sup> and "CEQ's interpretation of NEPA [expressed in its regulations] is entitled to substantial deference."<sup>21</sup>

EPA has administrative and review responsibilities under NEPA, which include receiving and filing completed EISs, publishing notice of filing and overseeing the procedures for public commenting.<sup>22</sup> The Administrator of EPA, under the authority of Section 309 of the Clean Air Act,<sup>23</sup> must review and make publicly available written comments relating to the environmental impact of the proposed action.<sup>24</sup> This express authorization to review, comment and publish a substantive decision confers significant power on the Administrator,<sup>25</sup> which under Section 309 extends to any federal action requiring an EIS, whether or not EPA has direct review authority over that action.<sup>26</sup> Where the Administrator determines that the proposed action "is unsatisfactory from the standpoint of public health or welfare or environmental quality, he shall publish his determination and the matter shall be referred to the [CEQ]."<sup>27</sup> Although CEQ decisions do not bind the involved agencies, they usually lead to modifications or compromise.<sup>28</sup> CEQ is not authorized to prohibit an environmentally unsatisfactory action.<sup>29</sup>

## B. Preparation & Requirements of an NEPA EIS

### 1. Substantive Requirements

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<sup>17</sup> 40 C.F.R. § 1507 (1993).

<sup>18</sup> 40 C.F.R. § 1505 (1993).

<sup>19</sup> 40 C.F.R. § 1506.6(c) (1993).

<sup>20</sup> *Andrus v. Sierra Club*, 442 U.S. 347, 357 (1979).

<sup>21</sup> *Id.* at 358.

<sup>22</sup> 40 C.F.R. §§ 1506.9, 1506.10 (1993). See generally VALERIE M. FOGLEMAN, GUIDE TO THE NATIONAL ENVIRONMENTAL POLICY ACT § 2.9, at 41 (1990).

<sup>23</sup> 42 U.S.C. §§ 7401-7642 (1988 & Supp. 1990).

<sup>24</sup> 42 U.S.C. § 7609(a) (1988). See generally Martin Healy, *The Environmental Protection Agency's Duty to Oversee NEPA's Implementation: Section 309 of the Clean Air Act*, 3 ENVTL. L. REP. 50,071 (1973).

<sup>25</sup> FOGLEMAN, *supra* note , § 2.10, at 42.

<sup>26</sup> DANIEL R. MANDELKER, NEPA LAW & LITIGATION § 2:12, at 2-20 (1984 & Supp. 1991).

<sup>27</sup> 42 U.S.C. § 7609(b) (1988). See 40 C.F.R. § 1504 (1993).

<sup>28</sup> See FOGLEMAN, *supra* note 22, at 46 (citing cases).

<sup>29</sup> MANDELKER, *supra* note 26, at 2-20.

When an action is subject to NEPA, the first step is to determine whether an EIS will be required. The agency with approval authority over the project, which in this case would be EPA, must prepare an environmental assessment (EA).<sup>30</sup> The EA documents the need for the project, the potential environmental effects arising from it and alternatives to the proposed action, thereby functioning as a basis for evaluating the project and determining whether an EIS must be prepared.<sup>31</sup> If EPA determines that the action will result in no significant environmental effects, it issues a finding of no significant impact (FONSI)<sup>32</sup> and its NEPA obligations are completed. Actions that result in no change to existing environmental conditions are considered not to have significant environmental effects.<sup>33</sup> Thus, a decision to fence and cap a site, without removing existing contamination, would arguably not require an EIS. If EPA determines that the project will result in potentially significant environmental effects, it must prepare an EIS.<sup>34</sup>

The first step in the preparation of an EIS is scoping, which identifies the issues that the EIS will address in depth<sup>35</sup> and eliminates from consideration others that are not likely to have significant impacts. Thus, scoping is the stage at which the broad content of the EIS is determined, which then serves as a roadmap for preparation of the EIS. NEPA contemplates a two-step process in which an initial draft EIS is prepared, followed by a final EIS which responds to public comments. Since the substantive requirements are essentially the same, the discussion that follows does not distinguish between the draft and final EIS. The key difference is that the final EIS is envisioned to be a more complete and comprehensive document, since it must reflect issues that were developed during the public hearing and comment process.

The EIS is a concise document which "provide[s] a full and fair discussion of significant environmental impacts" and "inform[s] decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts."<sup>36</sup> It must "[r]igorously explore and objectively evaluate all reasonable alternatives" and "[d]evote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their

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<sup>30</sup> 40 C.F.R. § 1501.3(a) (1993).

<sup>31</sup> 40 C.F.R. § 1508.9 (1993).

<sup>32</sup> 40 C.F.R. §§ 1501.4(e), 1508.13 (1993).

<sup>33</sup> MANDELKER, *supra* note 26, at 8-121.

<sup>34</sup> 40 C.F.R. § 1501.4(c) (1993).

<sup>35</sup> 40 C.F.R. § 1501.7 (1993).

<sup>36</sup> 40 C.F.R. § 1502.1 (1993).

comparative merits."<sup>37</sup> The EIS must consider and evaluate the no action alternative,<sup>38</sup> identify the environment affected by the proposed action<sup>39</sup> and indicate the direct and indirect effects of the proposed action and each alternative, together with their significance on various environmental values.<sup>40</sup> It must evaluate impacts proportionately with respect to their significance and must consider a range of alternatives that will be considered by EPA.<sup>41</sup> Perhaps most importantly, the EIS must fairly analyze potential impacts of the proposed action at a level of detail sufficient to permit meaningful analysis.<sup>42</sup> It is not intended to serve as a means for justifying a prior decision to proceed with the project.

## 2. Procedural Requirements

Procedurally, NEPA requires that opportunities for public participation be provided at the important stages of the environmental review process. The single exception is determining whether to prepare an EIS. The environmental assessment on which this determination is based is a public document, but NEPA does not require a public hearing prior to a decision by EPA to prepare an EIS or issue a FONSI.<sup>43</sup>

Once the decision is made to prepare an EIS, public participation is encouraged at each subsequent step during its preparation. Beginning with the scoping process, the public is apprised that the EIS process has commenced through publication of notice in the Federal Register.<sup>44</sup> When the draft EIS is completed, EPA must again publish notice in the Federal Register.<sup>45</sup> EPA must circulate the draft EIS<sup>46</sup> and must obtain comments from appropriate federal, state and local agencies that have an interest in the project. It also has an obligation to "affirmatively solicit[] comments from those persons or organizations who may be interested or affected."<sup>47</sup>

EPA must consider the comments received and respond to them in its final EIS.<sup>48</sup> Responses can take a variety of forms, including

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<sup>37</sup> 40 C.F.R. § 1502.14(a), (b) (1993).

<sup>38</sup> 40 C.F.R. § 1502.14(d) (1993).

<sup>39</sup> 40 C.F.R. § 1502.15 (1993).

<sup>40</sup> 40 C.F.R. § 1502.16(a), (b), (d) (1993).

<sup>41</sup> 40 C.F.R. § 1502.2(b), (c) (1993).

<sup>42</sup> 40 C.F.R. § 1502.9(a) (1993).

<sup>43</sup> 40 C.F.R. §§ 1501.4, 1508.13 (1993).

<sup>44</sup> 40 C.F.R. §§ 1501.7, 1508.22 (1993).

<sup>45</sup> 40 C.F.R. § 1506.10(a) (1993).

<sup>46</sup> 40 C.F.R. § 1502.19 (1993).

<sup>47</sup> 40 C.F.R. § 1503.1(4) (1993).

<sup>48</sup> 40 C.F.R. § 1503.4(a) (1993).

modifications to the proposed action or the alternatives considered, consideration of new alternatives, revisions to the analysis presented in the draft EIS, corrections to factual errors, or explanations concerning why comments received do not warrant response.<sup>49</sup> The responses are incorporated into the final EIS, which must be circulated to interested persons and agencies and specifically to individuals, organizations or agencies that commented on the draft EIS.<sup>50</sup> EPA may request and accept comments on the final EIS, although it is not obligated to solicit them.<sup>51</sup> The public is guaranteed a minimum of forty-five days to comment following publication of notice of completion of the draft EIS before EPA can make a decision concerning the project.<sup>52</sup> Moreover, EPA is under a general mandate to "[m]ake diligent efforts to involve the public in preparing and implementing . . . NEPA procedures."<sup>53</sup> EPA must conduct public hearings for actions which are controversial and must provide public notice of such hearings or other related meetings.<sup>54</sup> Thus, NEPA provides substantial opportunities for meaningful public participation in the decisionmaking process.

### C. When Does NEPA Apply?

All federal agencies are subject to NEPA. A federal agency acting in compliance with its own substantive statute or regulations is not exempt from NEPA or the EIS requirement.<sup>55</sup> Similarly, compliance with NEPA does not relieve an agency of its own statutory duties to comply with environmental quality standards or to consult with other federal or state agencies.<sup>56</sup> In certain limited circumstances, where an agency's own statute or regulations conflict with NEPA, compliance with NEPA may be excused.<sup>57</sup>

NEPA applies to all "'major' 'federal actions' 'significantly affecting' the quality of the human environment."<sup>58</sup> Federal participation is

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<sup>49</sup> 40 C.F.R. § 1503.4(a) (1993).

<sup>50</sup> 40 C.F.R. § 1502.19(d) (1993).

<sup>51</sup> 40 C.F.R. § 1503.1(b) (1993).

<sup>52</sup> 40 C.F.R. § 1506.10(b), (c) (1993).

<sup>53</sup> 40 C.F.R. § 1506.6(a) (1993).

<sup>54</sup> 40 C.F.R. § 1506.6(b), (c)(1) (1993).

<sup>55</sup> MANDELKER, *supra* note 26, at 1-2. NEPA expressly indicates that its policies and goals "are supplementary to those set forth in existing authorizations of Federal agencies." 42 U.S.C. § 4335 (1988). Recall that EPA did not yet exist at the time NEPA was enacted. *See supra* note 5.

<sup>56</sup> 42 U.S.C. § 4334 (1988).

<sup>57</sup> *See Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 788 (1976). *See also* MANDELKER, *supra* note 26, at 5-18 to 5-25.

<sup>58</sup> 42 U.S.C. § 4332(2)(C) (1988).

itself sufficient to qualify an action as a "major" action,<sup>59</sup> although a major action has been defined as one that "requires substantial planning, time, resources or expenditure."<sup>60</sup> Alternatively, major actions have also been defined as projects costing over one million dollars, or requiring a substantial amount of time for planning and construction, the displacement of people or animals, or the topographical reshaping of large areas.<sup>61</sup> Under any of these definitions, the vast majority of cleanups at NPL sites would seem to qualify as major actions.

A "federal action" exists within the meaning of NEPA "not only when an agency proposes to build a facility itself, but also when an agency makes a decision which permits action by other parties which will affect the quality of the environment."<sup>62</sup> A decision by EPA requiring cleanup of an NPL site would constitute a federal action.

The third criterion, whether the action "significantly affects" the quality of the human environment, has received relatively little treatment in the courts.<sup>63</sup> CEQ regulations define "significantly" with respect to context and intensity and require consideration of the effects of the proposed action on public health or safety, the extent to which such effects are likely to be controversial and the degree to which such effects are unknown or uncertain.<sup>64</sup> The regulations now take the position that "[m]ajor reinforces but does not have meaning independent of significantly."<sup>65</sup> Courts have interpreted the significance requirement to include direct as well as indirect effects on the human environment.<sup>66</sup> The potential impacts of cleaning up an NPL site would be encompassed by any of these definitions.

#### D. Exemptions

NEPA itself contains no statutory exemptions. It requires that all federal agencies prepare EISs for proposals to undertake "major federal actions significantly affecting the quality of the human environ-

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<sup>59</sup> MANDELKER, *supra* note 26, at 8-79.

<sup>60</sup> Natural Resources Defense Council, Inc. v. Grant, 341 F. Supp. 356, 366-67 (E.D.N.C. 1972).

<sup>61</sup> Ridley v. Blanchette, 421 F. Supp. 435, 445-46 (E.D. Pa. 1976).

<sup>62</sup> Scientists' Institute for Public Information, Inc. v. Atomic Energy Comm'n, 481 F.2d 1079, 1088 (D.C. Cir. 1973).

<sup>63</sup> MANDELKER, *supra* note 26, at 8-83.

<sup>64</sup> 40 C.F.R. § 1508.27 (1993).

<sup>65</sup> 40 C.F.R. § 1508.18 (1993).

<sup>66</sup> See Minnesota Public Interest Research Group v. Butz, 498 F.2d 1314 (8th Cir. 1974) (stating any action that substantially affects soil, beneficially or detrimentally, is an action significantly affecting the quality of the human environment); Natural Resources Defense Council, Inc., v. Grant, 341 F. Supp. 356 (E.D.N.C. 1972).

ment."<sup>67</sup> Nonetheless, three types of exemptions have developed: (1) provisions in other statutes expressly exempting certain activities from preparation of an EIS; (2) the judicially created "functional equivalence" doctrine, which provides an exemption for EPA if its review and comment procedures offer an effective substitute to an EIS; and (3) an exemption from preparation of an EIS in "emergency circumstances."

### 1. Statutory

All actions taken by EPA under the Clean Air Act<sup>68</sup> are expressly deemed not to constitute "major Federal actions significantly affecting the quality of the human environment"<sup>69</sup> within the meaning of NEPA,<sup>70</sup> so that EPA need not prepare an EIS. Similarly, actions taken by EPA under the Clean Water Act,<sup>71</sup> except issuance of discharge permits for new sources of water pollution and the provision of grants for publicly-owned treatment works, are also deemed not to constitute major federal actions within the meaning of NEPA.<sup>72</sup> Thus, EPA is obligated to prepare an EIS under the Clean Water Act only when issuing new source discharge permits or providing grants for publicly-owned treatment works; its other activities are exempt from the EIS requirement.

By its express exemption from preparation of an EIS for all EPA activities under the Clean Air Act and for some EPA activities under the Clean Water Act, Congress has created an inference that EPA is ordinarily required to prepare an EIS unless it has been granted a specific exemption.<sup>73</sup> But conversely, by imposing an express obligation to prepare an EIS when issuing new source discharge permits or providing grants for publicly-owned treatment works, Congress has created a contrary inference that EPA is ordinarily exempt from preparation of an EIS unless a specific obligation to do so is imposed.<sup>74</sup> The courts have been troubled by these conflicting infer-

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<sup>67</sup>. 42 U.S.C. § 4332(2)(C) (1988).

<sup>68</sup>. 42 U.S.C. §§ 7401-7642 (1988 & Supp. 1990).

<sup>69</sup>. 42 U.S.C. § 4332(2)(C) (1988).

<sup>70</sup>. Energy Supply and Environmental Coordination Act of 1974, 15 U.S.C. § 793(c)(1) (1988). This legislation represents a codification of the "functional equivalence" exception to the preparation of an EIS for actions under the Clean Air Act. See *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973).

<sup>71</sup>. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1988 & Supp. 1990).

<sup>72</sup>. 33 U.S.C. § 1371(c)(1) (1988 & Supp. 1990).

<sup>73</sup>. See generally *Montrose*, *supra* note 11, at 868-69 n.25, 877-78 n.96.

<sup>74</sup>. *Id.* at 868-69 n.25, 880 n.115. See also *Simons v. Gorsuch*, 715 F.2d 1248 (7th Cir. 1983) (excluding from NEPA all but two categories of activities under the Clean Water Act was not intended to include others as a matter of law).

ences. In some cases, courts have held that since all federal agencies must file an EIS and EPA is a federal agency, it must file an EIS.<sup>75</sup> But other courts have concluded that requiring EPA to file an EIS with itself would be pointless.<sup>76</sup> One court viewed EPA's express exemption from NEPA in the Clean Air Act and the Clean Water Act as "Congress's way of making more obvious what would likely occur as a matter of judicial construction."<sup>77</sup>

## 2. Functional Equivalence

During the last two decades, the federal courts have recognized and developed an exemption from NEPA's EIS requirement where EPA's adherence to "substantive and procedural standards ensure[s] full and adequate consideration of environmental issues."<sup>78</sup> Where this occurs, "formal compliance with NEPA is not necessary, but functional compliance is sufficient."<sup>79</sup> The rationale behind the functional equivalence doctrine lies in the belief that EPA is entitled to greater deference and flexibility with respect to preparation of an EIS because EPA's sole purpose is protection of the environment.<sup>80</sup> Therefore, its actions and decisions necessarily reflect an awareness of environmental considerations.<sup>81</sup> Many courts have held that NEPA compliance is unnecessary where the agency is independently required to consider environmental issues.<sup>82</sup>

The functional equivalence standard was originally articulated in *Portland Cement Ass'n v. Ruckelshaus*<sup>83</sup> and was further developed in *Weyerhaeuser Co. v. Costle*.<sup>84</sup> To satisfy the functional equivalence standard, agency procedures must adequately address the substantive

<sup>75</sup>. *E.g.*, *Anaconda Copper Co. v. Ruckelshaus*, 352 F. Supp. 697, 713 (D. Colo. 1972), *rev'd on other grounds*, 482 F.2d 1301, 1306 (10th Cir. 1973) (stating in dicta that requiring EPA to file an EIS would frustrate NEPA's objectives, but that EPA nevertheless has an obligation to weigh and consider the environmental effects of its decisions).

<sup>76</sup>. *E.g.*, *Buckeye Power, Inc. v. EPA*, 481 F.2d 162, 174 (6th Cir. 1973).

<sup>77</sup>. *Alabama ex rel. Siegelman v. EPA*, 911 F.2d 499, 505 (11th Cir. 1990).

<sup>78</sup>. *Environmental Defense Fund, Inc. v. EPA*, 489 F.2d 1247, 1257 (D.C. Cir. 1973).

<sup>79</sup>. *Id.*

<sup>80</sup>. *E.g.*, *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 650 n.130 (D.C. Cir. 1973).

<sup>81</sup>. *Id.*

<sup>82</sup>. *Alabama ex rel. Siegelman v. EPA*, 911 F.2d 499, 504 (11th Cir. 1990).

<sup>83</sup>. 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974) (granting EPA a narrow exemption from NEPA's EIS requirement because review procedures for New Source Performance Standards were the functional equivalent of an EIS, on the basis that (a) the Clean Air Act required consideration of the same factors as an EIS, and (b) EPA's notice and comment rulemaking procedures provided an adequate opportunity for public participation). *See also supra* notes 68-70 and accompanying text.

<sup>84</sup>. 590 F.2d 1011 (D.C. Cir. 1978).

and procedural considerations mandated by NEPA.<sup>85</sup> Thus, the *Portland Cement* functional equivalence standard requires (a) a balancing of environmental costs and benefits; (b) meaningful public participation at key points during the decisionmaking process; and (c) consideration of substantive comments received.<sup>86</sup> The *Weyerhaeuser* court, in a challenge to notice and comment rulemaking, relied on the *Portland Cement* standard in articulating a four-part test to gauge functional equivalence. According to the court's functional equivalence test, EPA had to (a) explain the rationale used in reaching its decision; (b) show some basis for facts in the record; (c) show that the information in the record could allow a reasonable person to reach the same decision EPA did; and (d) permit a level of participation required by sound administrative law.<sup>87</sup> The *Portland Cement/Weyerhaeuser* standard remains the standard used by courts today. Functional equivalence does not exist where each element of the standard is not satisfied.<sup>88</sup>

To the extent that EPA's review process adequately considers environmental impacts and provides an opportunity for public comment, courts will usually grant EPA an exemption based on a finding that EPA's procedures are functionally equivalent to and serve as an effective substitute for, preparing a complete EIS.<sup>89</sup> Courts have recognized that procedures which are functionally equivalent may not "import the complete advantages of the structured determinations of NEPA," but that they do "strike a workable balance between some of the advantages and disadvantages of a full application of NEPA."<sup>90</sup> Many courts generally agree that "an organization like EPA whose regulatory activities are necessarily concerned with environmental consequences need not stop in the middle of its proceedings in order to issue a separate and distinct impact statement."<sup>91</sup>

Functional equivalence does not require duplication of substantive NEPA requirements. Courts will usually grant an exemption based on functional equivalence even where EPA's review is not as rigorous or the opportunities for public participation are not as plentiful as an

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<sup>85</sup> See *Montrose*, *supra* note 11, at 875-78.

<sup>86</sup> *Id.* at 882.

<sup>87</sup> 590 F.2d at 1026-27. See also *Montrose*, *supra* note 11, at 882-83.

<sup>88</sup> 590 F.2d at 1028-30.

<sup>89</sup> See *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973).

<sup>90</sup> *Id.* at 386.

<sup>91</sup> *Wyoming v. Hathaway*, 525 F.2d 66, 71-72 (10th Cir. 1975), *cert. denied*, 426 U.S. 906 (1976).

EIS would ordinarily require.<sup>92</sup> The courts have specifically avoided the question of whether EPA enjoys a blanket exemption from filing an EIS where its procedures are functionally equivalent.<sup>93</sup> They have also limited the functional equivalence doctrine to EPA, refusing to apply it to other federal agencies that administer statutes designed to protect the environment.<sup>94</sup>

Functional equivalence has been held to exempt EPA from preparing an EIS under a variety of environmental statutes.<sup>95</sup> Most recently, EPA's permitting procedure for hazardous waste landfills under the Resource Conservation and Recovery Act (RCRA)<sup>96</sup> was held to be an effective substitute for an EIS.<sup>97</sup> The court found that "RCRA's substantive and procedural standards are intended to ensure that EPA considers fully, with the assistance of meaningful public comment, environmental issues involved in the permitting of hazardous waste management facilities."<sup>98</sup>

### 3. *Emergency Situations*

NEPA recognizes that actions falling within its mandate are occasionally of such an exigent nature that preparation of an EIS would result in a delay that could cause significant environmental harm. An exemption in NEPA permits federal agencies to undertake "alternative arrangements" in emergency situations, provided that they consult with the CEQ and that such arrangements are limited "to

<sup>92</sup>. See *Environmental Defense Fund, Inc. v. Blum*, 458 F. Supp. 650 (D. D.C. 1978) (holding functional equivalence exemption applies even if EPA's action is not environmentally protective).

<sup>93</sup>. See *Wyoming v. Hathaway*, 525 F.2d 66, 72 (10th Cir. 1975), *cert. denied*, 426 U.S. 906 (1976).

<sup>94</sup>. See, e.g., *Jones v. Gordon*, 621 F. Supp. 7 (D. Alaska 1985), *aff'd in part and rev'd in part*, 792 F.2d 821 (9th Cir. 1986) (refusing to extend functional equivalence doctrine to the National Marine Fisheries Service's failure to prepare an EIS under the Marine Mammal Protection Act); *Texas Committee on Natural Resources v. Bergland*, 573 F.2d 201 (5th Cir. 1978), *cert. denied*, 439 U.S. 966 (1978) (refusing to apply functional equivalence doctrine to Forest Service under the National Forest Management Act).

<sup>95</sup>. See, e.g., *Wyoming v. Hathaway*, 525 F.2d 66 (10th Cir. 1975), *cert. denied*, 426 U.S. 906 (1976) (Federal Insecticide, Fungicide and Rodenticide Act); *Warren County v. North Carolina*, 528 F. Supp. 276 (E.D.N.C. 1981) (Toxic Substances Control Act); *Maryland v. Train*, 415 F. Supp. 116 (D. Md. 1976) (Ocean Dumping Act).

<sup>96</sup> 42 U.S.C. §§ 6901-6987 (1988).

<sup>97</sup> *Alabama ex rel. Siegelman v. EPA*, 911 F.2d 499 (11th Cir. 1990).

<sup>98</sup> *Id.* at 505. The court's holding validated the position taken by EPA in its regulations, which state that "all RCRA . . . permits are not subject to the environmental impact statement provisions" of NEPA. 40 C.F.R. § 124.9(b)(6) (1993). Acceptance of this position by the court is noteworthy because RCRA does not grant EPA an exemption. See 42 U.S.C. §§ 6901-6987 (1988). See also Kristina Hauenstein, Comment, *RCRA Immunity From NEPA: The EPA Has Exceeded the Scope of its Authority*, 24 San Diego L. Rev. 1249 (1987) (arguing that EPA overstepped its authority by categorically exempting its RCRA activities from NEPA).

actions necessary to control the immediate impacts of the emergency."<sup>99</sup> The term "emergency" is not defined in the NEPA regulations, resulting in ambiguity with respect to the extent of imminent harm necessary to activate the exemption.

Courts have generally accorded EPA greater leeway where exigent circumstances exist,<sup>100</sup> and may be more willing to find functional equivalence in an emergency,<sup>101</sup> particularly if immediate action is required or an immediate health hazard exists.<sup>102</sup> Thus, EPA will be held to a lesser functional equivalence standard where an emergency exists.<sup>103</sup> Any such hazard must be real and not advanced solely to avoid compliance with NEPA. Where EPA gave inadequate notice of its proposed action and did not adequately solicit public comment, but took seven months to consider the comments that were received, EPA could not realistically argue that an emergency justified its failure to give notice and solicit comments.<sup>104</sup> If a real emergency exists, EPA's technical expertise may be allowed to substitute for specific considerations required by NEPA.<sup>105</sup>

Although the courts have yet to decide whether NEPA applies to cleanup of NPL sites, two courts have held that functional equivalence satisfies EPA's obligations under NEPA arising from the removal of waste containing polychlorinated biphenyls (PCBs).<sup>106</sup> The waste was found along miles of North Carolina highways and had contaminated the soil with PCBs, creating an imminent hazard. The court found that an EIS prepared by North Carolina, under an environmental statute<sup>107</sup> almost identical to NEPA, satisfied the functional equivalence doctrine because (a) there had been extensive public comment, which the state had responded to;<sup>108</sup> (b) EPA held its own hearing;<sup>109</sup> and (c) EPA reviewed the North Carolina EIS and made changes to the plan to achieve better conformity with federal regulations.<sup>110</sup> Because the procedures undertaken arguably fulfilled

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<sup>99</sup> 40 C.F.R. § 1506.11 (1993).

<sup>100</sup> See *Montrose*, *supra* note 11, at 878-82.

<sup>101</sup> See, e.g., *Wyoming v. Hathaway*, 525 F.2d 66 (10th Cir. 1975), *cert. denied*, 426 U.S. 906 (1976).

<sup>102</sup> See *Maryland v. Train*, 415 F. Supp. 116 (D. Md. 1976).

<sup>103</sup> *Id.* See also *Wyoming v. Hathaway*, 525 F.2d 66; *Montrose*, *supra* note 11, at 878-82.

<sup>104</sup> *Environmental Defense Fund v. Blum*, 458 F. Supp. 650, 659-61 (D. D.C. 1978).

<sup>105</sup> *Maryland v. Train*, 415 F. Supp. at 122-23.

<sup>106</sup> *Twitty v. North Carolina*, 527 F. Supp. 778 (E.D.N.C. 1981), *aff'd*, 696 F.2d 992 (4th Cir. 1982); *Warren County v. North Carolina*, 528 F. Supp. 276 (E.D.N.C. 1981).

<sup>107</sup> See N.C. Gen. Stat. §§ 113A-1 to 113A-4 (1978).

<sup>108</sup> 528 F. Supp. at 287, 291.

<sup>109</sup> *Id.* at 287.

<sup>110</sup> *Id.* at 293-96.

the substantive and procedural requirements of NEPA, this outcome is not necessarily dispositive of instances in which no EIS is prepared.

### III. CERCLA

#### A. Statutory Framework

Congress enacted CERCLA to protect the environment from the release or threatened release of hazardous substances. CERCLA established the National Contingency Plan (NCP), which provides a mechanism for the discovery, reporting, investigation and assessment of sites where hazardous wastes are located<sup>111</sup> and for response to releases of hazardous materials.<sup>112</sup> The sites posing the greatest risk, according to a hazard ranking system<sup>113</sup> or designation by the state in which they are located,<sup>114</sup> are identified and placed on the NPL.<sup>115</sup> The NPL is the list of "uncontrolled hazardous substance releases in the United States that are priorities for long-term remedial evaluation and response."<sup>116</sup> EPA's response actions must be consistent with the NCP.<sup>117</sup> Cleanup may be undertaken by the parties who own or operate the contaminated site or were responsible for its contamination, or EPA may undertake the cleanup, finance it through Superfund and seek recovery of costs from responsible parties.<sup>118</sup>

CERCLA contemplates two levels of response. Removal actions are short-term measures intended to prevent continuing or threatened releases of hazardous materials into the environment and may include monitoring, evaluating and securing the site.<sup>119</sup> Examples of removal measures include fencing, warning signs, drainage controls, containment, treatment and removal of drums or other containers.<sup>120</sup> Remedial actions are long-term measures intended to mitigate future

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<sup>111</sup>. 42 U.S.C. § 9605 (1988 & Supp. 1990); 40 C.F.R. § 300 (1993).

<sup>112</sup>. 40 C.F.R. § 300.3(b) (1993).

<sup>113</sup>. See 42 U.S.C. § 9605(8)(A) (1988 & Supp. 1990); 40 C.F.R. § 300, app. A (1993).

<sup>114</sup>. 40 C.F.R. § 300.425(c)(2) (1993).

<sup>115</sup>. 42 U.S.C. § 9605(8)(B) (1988 & Supp. 1990). See also 40 C.F.R. § 300 (1993).

<sup>116</sup>. 40 C.F.R. § 300.5 (1993).

<sup>117</sup>. 42 U.S.C. § 9604 (1988).

<sup>118</sup>. 42 U.S.C. § 9607 (1988 & Supp. 1990).

<sup>119</sup>. 42 U.S.C. § 9601(23) (1988 & Supp. 1990). "Removal actions" are defined in CERCLA as "such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances . . . or . . . such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release." *Id.*

<sup>120</sup>. 40 C.F.R. § 300.415(d) (1993).

potential harm to the public health through storage, neutralization, cleanup, treatment and other activities.<sup>121</sup> Because a release or threatened release of hazardous materials may pose an imminent threat to the public health, an element of exigency exists in EPA's Superfund cleanup activities, particularly those at NPL sites.

### *B. Cleanup Procedures*

The NCP establishes a framework of substantive and procedural considerations and requirements which EPA must follow when undertaking cleanup activities. When EPA receives notification of a release of a hazardous substance into the environment, it must commence a removal or remedial site evaluation, as appropriate.<sup>122</sup> The procedures vary depending on the type of response, as discussed below.

#### *1. Removal Actions*

The first step in a removal action is a removal site evaluation, which begins with a preliminary assessment.<sup>123</sup> The preliminary assessment generally includes an identification of the source and the nature of the release, an evaluation of the magnitude of the threat to the public health and an evaluation of factors to use in determining whether to perform a removal site inspection.<sup>124</sup> A site inspection, if conducted, may terminate when EPA determines that there was no release; the source is not a facility covered within the meaning of CERCLA; the release is not hazardous or does not pose an imminent threat to public health or welfare or is of insufficient quantity to pose such a threat; the release is of a type that CERCLA does not cover; the party responsible for the release is undertaking appropriate response actions; or all desired information is obtained.<sup>125</sup> Based on the site evaluation, EPA may conclude that remediation is a more appropriate response, in which case it must conduct a remedial site evaluation.<sup>126</sup>

The next step in a removal action is to analyze the site evaluation and ascertain whether the parties responsible for the release will un-

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<sup>121</sup> 42 U.S.C. § 9601(24) (1988 & Supp. 1990). "Remedial actions" are defined in CERCLA as "those actions consistent with permanent remedy taken . . . to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment." *Id.*

<sup>122</sup> 40 C.F.R. § 300.405(f) (1993).

<sup>123</sup> 40 C.F.R. § 300.410(a) (1993).

<sup>124</sup> 40 C.F.R. § 300.410(c)(1)-(d) (1993).

<sup>125</sup> 40 C.F.R. § 300.410(e)(1-7) (1993).

<sup>126</sup> 40 C.F.R. § 300.410(h) (1993).

dertake appropriate cleanup activities.<sup>127</sup> EPA may take removal action, irrespective of whether the site is listed on the NPL, "to abate, prevent, minimize, stabilize, mitigate or eliminate the release or the threat of release."<sup>128</sup> In fashioning an appropriate response action EPA must consider a variety of factors, including potential exposure to humans and animals, actual or potential contamination of ecosystems or water supplies, likelihood that stored materials will be released, potential migration of hazardous substances and threat of fire or explosion.<sup>129</sup> If an exigency exists, EPA may take immediate removal actions.<sup>130</sup> But if the response permits a planning period of at least six months, EPA must conduct an engineering evaluation/cost analysis, which is an analysis of removal alternatives.<sup>131</sup> Removal actions should be designed to contribute to the efficacy of long-term remediation<sup>132</sup> and to the greatest possible extent, must seek to comply with applicable federal or state environmental laws.<sup>133</sup> In determining whether the removal action will so comply, EPA may consider the urgency of the situation and the scope of the action to be conducted.<sup>134</sup>

Procedurally, EPA adheres to a community relations program<sup>135</sup> relating to response actions.<sup>136</sup> Where the proposed action is removal, EPA must designate a site spokesperson to indicate that a release has occurred, provide information concerning the actions taken and respond to public inquiries.<sup>137</sup> If on-site removal activities will begin in less than six months, EPA must establish and advertise the availability of the administrative record within sixty days of commencement of the action<sup>138</sup> and must provide no less than a thirty-day comment period beginning on the day the administrative record is made available.<sup>139</sup> EPA must respond in writing to significant public comments.<sup>140</sup>

<sup>127</sup> 40 C.F.R. § 300.415(a)(1-2) (1993).

<sup>128</sup> 40 C.F.R. § 300.415(b)(1) (1993).

<sup>129</sup> 40 C.F.R. § 300.415(b)(2) (1993).

<sup>130</sup> 40 C.F.R. § 300.415(b)(3) (1993).

<sup>131</sup> 40 C.F.R. § 300.415(b)(4)(i) (1993).

<sup>132</sup> 40 C.F.R. § 300.415(c) (1993).

<sup>133</sup> 40 C.F.R. § 300.415(i) (1993).

<sup>134</sup> 40 C.F.R. § 300.415(i)(1-2) (1993).

<sup>135</sup> EPA defines "community relations" as a program "to inform and encourage public participation in the Superfund process and to respond to community concerns." 40 C.F.R. § 300.5 (1993).

<sup>136</sup> See OFFICE OF EMERGENCY AND REMEDIAL RESPONSE, U.S. ENVIRONMENTAL PROTECTION AGENCY, COMMUNITY RELATIONS IN SUPERFUND: A HANDBOOK (1992).

<sup>137</sup> 40 C.F.R. § 300.415(m)(1) (1993).

<sup>138</sup> 40 C.F.R. §§ 300.415(m)(2)(i), 300.820(b)(1) (1993).

<sup>139</sup> 40 C.F.R. § 300.415(m)(2)(ii) (1993).

<sup>140</sup> 40 C.F.R. § 300.415(m)(2)(iii) (1993).

If on-site removal action will extend beyond 120 days, EPA must prepare a Community Relations Plan (CRP) within 120 days of the commencement of on-site activities, based on community interviews with affected and interested individuals.<sup>141</sup> The CRP must identify the nature of the community relations that EPA will provide for the duration of the response action.<sup>142</sup> EPA must establish an information repository at or near the site where the administrative record will be available for public viewing and must inform the public of the repository's existence.<sup>143</sup>

For removal actions that will not commence on-site activities for more than six months, EPA must complete its community interviews prior to conducting the engineering evaluation/cost analysis.<sup>144</sup> Next, EPA must publish notice announcing completion of the engineering evaluation/cost analysis, establish an information repository at or near the site and provide a comment period of at least thirty days.<sup>145</sup> EPA must respond in writing to significant public comments.<sup>146</sup>

## 2. Remedial Actions

The first step in a remedial action is to conduct a preliminary remedial assessment which is intended to identify and eliminate from consideration sites which pose no threat to the environment, determine whether a removal action is required and gather data to facilitate classification under the hazard ranking system.<sup>147</sup> EPA then conducts a remedial site inspection which serves as the basis for a report describing the type, nature and migration pattern of the contamination and recommends future action if appropriate.<sup>148</sup> Sites which attain high scores according to the hazard ranking system, or which meet certain other statutory criteria, are included on the NPL.<sup>149</sup>

Formulation of the ultimate remedial action begins with the remedial investigation/feasibility study (RI/FS). The RI/FS involves scoping, which identifies the type, quality and quantity of the data collection and methods of analysis and sampling that will be undertaken;<sup>150</sup> outlines data collection and treatability studies to adequately

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141. 40 C.F.R. § 300.415(m)(3)(i-ii) (1993).

142. 40 C.F.R. § 300.415(m)(3)(ii) (1993).

143. 40 C.F.R. § 300.415(m)(3)(iii) (1993).

144. 40 C.F.R. § 300.415(m)(4)(i) (1993).

145. 40 C.F.R. § 300.415(m)(4)(i-iii) (1993).

146. 40 C.F.R. § 300.415(m)(4)(iv) (1993).

147. 40 C.F.R. § 300.420(b)(1)(i-iv) (1993).

148. 40 C.F.R. § 300.420(c)(1) (1993).

149. 40 C.F.R. § 300.425(c)(1),(d) (1993).

150. 40 C.F.R. § 300.430(b)(5), (8) (1993).

identify the nature, character and extent of contamination and the risks to human health arising therefrom;<sup>151</sup> and includes analysis of remedial alternatives to ensure that an appropriate remedy is selected.<sup>152</sup> In considering alternatives, EPA must evaluate their effectiveness, feasibility of implementation and cost.<sup>153</sup> A detailed analysis must be conducted to determine the extent to which the most feasible alternatives are consistent with the following nine criteria: protection of human health and environment; compliance with state and federal environmental laws and standards; long-term effectiveness and permanence; reduction of toxicity, mobility or volume through treatment; short-term effectiveness; implementability; cost; state acceptance; and community acceptance.<sup>154</sup>

Procedurally, the community relations requirements for remedial actions are more detailed and involved than those for removal actions. Prior to beginning the RI/FS, EPA must conduct community interviews which become the basis for the CRP.<sup>155</sup> It must also establish an information repository at or near the site.<sup>156</sup> Following commencement of the RI/FS, EPA must establish an administrative record.<sup>157</sup>

Upon completion of the RI/FS, EPA selects a remedial action in accordance with a two-step process consisting of: (a) identification by EPA of a preferred alternative and publication of a notice announcing its completion and availability for public review and comment;<sup>158</sup> and (b) evaluation of comments received to determine whether the preferred alternative remains effective and appropriate.<sup>159</sup> Much like a draft EIS, the proposed plan must describe the environmental conditions at the site, identify the proposed remedial action and the reasons supporting it, indicate the alternatives analyzed in the RI/FS and respond to any formal comments received.<sup>160</sup> EPA must provide a thirty-day comment period,<sup>161</sup> during which the opportunity for a public hearing must be provided.<sup>162</sup> A transcript of the hearing becomes a part of the administrative record.<sup>163</sup> If new information

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151. 40 C.F.R. § 300.430(d)(1), (2) (1993).

152. 40 C.F.R. § 300.430(e) (1993).

153. 40 C.F.R. § 300.430(e)(7)(i-iii) (1993).

154. 40 C.F.R. § 300.430(e)(9)(iii)(A-I) (1993).

155. 40 C.F.R. § 300.430(c)(2)(i), (ii)(A-C) (1993).

156. 40 C.F.R. § 300.430(c)(2)(iii) (1993).

157. 40 C.F.R. § 300.815(a) (1993).

158. 42 U.S.C. § 9617(a), (d) (1988); 40 C.F.R. § 300.430(f)(3)(i)(A) (1993).

159. 40 C.F.R. § 300.430(f)(1)(ii) (1993).

160. 40 C.F.R. § 300.430(f)(2)(i-iii) (1993).

161. 40 C.F.R. § 300.430(f)(3)(i)(C) (1993).

162. 40 C.F.R. § 300.430(f)(3)(i)(D) (1993).

163. 40 C.F.R. § 300.430(f)(3)(i)(E) (1993).

significantly changes the features of the proposed remedy prior to its adoption, EPA must discuss the changes in its record of decision (ROD), or must solicit additional public comments if the changes were not of a foreseeable nature.<sup>164</sup> EPA must also provide public notice upon adoption of a final plan.

The final step in the remedy selection process requires EPA to evaluate its preferred alternative in light of the public comments received.<sup>165</sup> It may adopt the preferred alternative with or without modifications, or may select another alternative.<sup>166</sup> The decision becomes a part of the ROD which sets forth EPA's basis for its decision and the extent to which the decision is consistent with applicable requirements and regulations.<sup>167</sup> Finally, EPA must publish a notice of decision and make the ROD available for public inspection.<sup>168</sup>

#### IV. APPLICATION OF NEPA TO NATIONAL PRIORITIES LIST SITES

##### A. General Considerations

###### 1. Legislative Intent

Consistent with the "emergency circumstances" exemption, EPA takes the position that it need not prepare an EIS for cleanup actions it undertakes under CERCLA.<sup>169</sup> The legislative history of CERCLA indicates that preparation of an EIS was intended in non-emergency situations, as described in this Senate Report:

In some instances, remedial actions are but a continuation of actions necessary to resolve the emergency and such actions can only prevent injury only if they proceed without delay. For example, the construction of dikes around a hazardous waste disposal facility in anticipation of rising waters from melting spring snows, the provision of permanent alternative drinking water supplies to replace water supplies contaminated by released hazardous substances, and the transport, storage, treatment, destruction, or secure disposition offsite of hazardous substances which are explosive, radioactive, or otherwise dangerous if left on-site, are remedial actions which can only prevent harm only if executed without delay. In developing

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<sup>164</sup> 40 C.F.R. § 300.430(f)(3)(ii)(B) (1993).

<sup>165</sup> 40 C.F.R. § 300.430(f)(4)(i) (1993).

<sup>166</sup> *Id.*

<sup>167</sup> 40 C.F.R. § 300.430(f)(5)(i-ii) (1993).

<sup>168</sup> 40 C.F.R. § 300.430(f)(6)(i-ii) (1993).

<sup>169</sup> MANDELKER, *supra* note 26, at 62 n.10 (1991 Supp.). See *Memorandum From EPA General Counsel on Applicability of Section 102(2)(C) of NEPA to Superfund Response Actions*, 13 ENV'T REP. (BNA) 709 (Sept. 17, 1982).

this bill, a number of similar such situations have been reviewed by the Committee. In such circumstances, *remedial actions should not be delayed by the imposition of formal EIS requirements.*

In other circumstances, removal actions can effectively postpone any emergency and provide for a longer lead time and a planning process before remedial actions must be undertaken. In such circumstances, *it is anticipated that a written assessment of proposed alternatives would be prepared along with measures for mitigating adverse environmental effects of the proposed remedial actions and opportunity for public comment and consultation in the decision-making process would be provided.* This requirement is not intended to unduly delay action necessary to protect public health, welfare or the environment, nor are formal hearings necessarily required. In some such circumstances, formal Environmental Impact Statement requirements may be determined to be applicable.<sup>170</sup>

Although the Senate Report to some extent blurs the distinction between removal and remedial actions as they are defined in the act, it does envision a scheme in which an EIS is ordinarily required. The Senate Report indicates that a departure from this standard was contemplated only where an imminent hazard created an emergency, in which case formal EIS requirements were not to be imposed. Yet even for emergency situations, the legislative history does not approve of a wholesale suspension of the environmental attentiveness and public participation which NEPA contemplates. Emergency circumstances merely dispense with formal preparation of an EIS.

With respect to non-emergency actions, the Senate Report at a minimum contemplates a written assessment of alternatives and mitigation measures and an opportunity for public comment. This standard sounds much like functional equivalence, particularly since the Senate Report expresses an intention to avoid unnecessary delay. The report further indicates that an EIS may be required in some circumstances, but it does not identify what these circumstances might be. An earlier section of the Senate Report describes remedial action as "long-lasting response which may include the construction of major facilities and which must often be preceded by considerable study, investigation, planning and engineering before the appropriate actions can be determined."<sup>171</sup>

Though the precise standard which Congress intended is not altogether clear, the Senate Report does indicate the following: (a) for emergency actions, a formal EIS is not required, but the policies un-

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<sup>170</sup> S. REP. NO. 848, 96th Cong., 2d Sess. 61 (1980)(emphasis added).

<sup>171</sup> *Id.* at 54.

derpinning NEPA necessitate some lesser standard of review; (b) for non-emergency actions, a functional equivalence standard may suffice, provided there is some mechanism for receiving public comment, identifying alternatives and presenting mitigation measures; and (c) some actions will require a formal EIS. This interpretation is supported by an opinion from the General Accounting Office, which concluded that "there is nothing in NEPA's legislative history which would require countermanding the conclusion derived from the plain words of the Act that all federal agencies, including EPA, are required, in appropriate circumstances, to file environmental impact statements."<sup>172</sup>

## 2. Policy Considerations

Some observers have suggested that EPA prepare EISs precisely because EPA is an environmental agency and should set an example for other agencies by its own procedural and substantive compliance with NEPA.<sup>173</sup> Other observers have expressed concern that an exemption from NEPA could become a "shield for wholesale backtracking on the part of EPA and the Administration."<sup>174</sup> This sentiment was echoed by Senator Jackson, a sponsor of NEPA, who warned that "it cannot be assumed that EPA will always be the good guy,"<sup>175</sup> implying that NEPA might serve a policing function over EPA should it ever come under the control of those it is currently charged with regulating.<sup>176</sup>

Policy considerations would also seem to implicate preparation of an EIS to ensure that the broad range of activities undertaken as part of a cleanup action are adequately evaluated. Cleanup of NPL sites may involve a variety of activities, including both on-site remediation and off-site removal of contaminated materials. Any cleanup action, or non-action, may result in significant injury to the surrounding area (e.g. through groundwater contamination) or to the site receiving removed hazardous materials. There is also a potential for environmental harm while hazardous materials are in transit to uncontaminated areas for disposal. Moreover, the cleanup method which is selected often determines whether the potential exists for

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<sup>172</sup>. 119 CONG. REC. H8305-08 (1973)(opinion of Comptroller General) *quoted in EPA's Responsibilities Under the National Environmental Policy Act: Further Developments*, 3 ENVTL. L. REP. 10,157 (1973).

<sup>173</sup>. Comment, *supra* note 8, at 10,142.

<sup>174</sup>. *Id.*

<sup>175</sup>. 118 CONG. REC. 16,878, 16,887 (daily ed. Oct. 4, 1972).

<sup>176</sup>. *Id.*

additional environmental harm.<sup>177</sup> Thus, cleanup of an NPL site would seem to be the type of action "significantly affecting the quality of the human environment"<sup>178</sup> that requires an EIS according to NEPA.<sup>179</sup>

### 3. *Significance of Congressional Appropriations*

In situations where Congress has appropriated funds to finance an ongoing project, agencies have argued that the appropriation relieves the agency from its obligation to comply with NEPA. The rationale underlying this argument is that in granting the appropriation, Congress has considered environmental concerns but decided to approve and finance the project anyway.<sup>180</sup> Appropriations that support a broad program like CERCLA, without funding any particular project, do not impliedly repeal regulatory statutes with respect to those programs or projects.<sup>181</sup> The lower courts have extended this doctrine to hold that appropriations do not exempt federal agencies from compliance with NEPA.<sup>182</sup> Since congressional appropriations under CERCLA support the program itself, rather than particular projects conducted under its mandate, such appropriations do not relieve EPA from NEPA compliance. Nevertheless, where Congress has expressed an intention to allow a particular action if the implementing agency conforms to guidelines articulated in the statute, courts may find an implied repeal of NEPA.<sup>183</sup> It does not appear that this approach has been used with respect to CERCLA, but it might be effective since the CERCLA cleanup provisions are arguably detailed enough to constitute an implied repeal of NEPA. However, the Clean Water Act is equally detailed yet this argument does not appear to have been raised, perhaps because many actions under the Clean Water Act enjoy statutory exemptions from NEPA.

### B. *Response Actions*

The analysis used to determine whether EPA's procedures are functionally equivalent to NEPA was cogently set out by a court which found that RCRA procedures are functionally equivalent to a

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<sup>177</sup> Montrose, *supra* note 11, at 866-67.

<sup>178</sup> 42 U.S.C. § 4332(2)(C) (1988).

<sup>179</sup> Montrose, *supra* note 11, at 867-68.

<sup>180</sup> See MANDELKER, *supra* note 26, at 5-12.

<sup>181</sup> Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978) (holding congressional appropriation did not impliedly repeal Endangered Species Act as applied to Tellico Dam).

<sup>182</sup> See MANDELKER, *supra* note 26, at 5-14 n.4.

<sup>183</sup> Texas Committee on Natural Resources v. Bergland, 573 F.2d 201 (5th Cir. 1978), *cert. denied*, 439 U.S. 966 (1978).

NEPA EIS.<sup>184</sup> The court examined "whether EPA's action . . . is circumscribed by procedural . . . safeguards in a manner which ensures that the basic purposes and policies behind the environmental impact statement will be carried out in the absence of a formal EIS."<sup>185</sup> The court was satisfied that "[a]s long as the statutory and regulatory framework . . . provides for orderly consideration of diverse environmental factors and . . . strikes a workable balance between some of the advantages and disadvantages of full application of NEPA, the functional equivalent doctrine applies."<sup>186</sup> This analysis is used below to address the present inquiry.

### 1. Removal Actions

A removal action could arguably be considered an emergency action giving rise to an exemption from preparation of an EIS<sup>187</sup> or to a more lenient functional equivalence standard.<sup>188</sup> This is particularly true where the action must be undertaken promptly in response to an imminent hazard. In these circumstances, exemption from the EIS requirement is surely justified, both according to legislative history and CEQ regulations relating to emergencies. But even if a removal action is classified as an emergency, EPA still has an obligation to consult with CEQ and to undertake alternative arrangements "to control the immediate impacts of the emergency."<sup>189</sup> It is extremely unlikely, in light of NEPA's purposes and intent, that the alternative arrangements contemplated for use in emergency circumstances were intended to entirely suspend EPA's obligation to solicit and consider public participation and comment. It is reasonable to view the alternative arrangements provision as contemplating a less formal, more expedited review consistent with NEPA's objectives, except perhaps for those rare instances where the emergency circumstances are particularly grave.

Substantively, EPA's removal site evaluation procedures seem adequate in light of its technical experience and the exigent nature of a release which poses an imminent threat. Since EPA is familiar with the types and likely success of various removal actions, it seems

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<sup>184</sup> *Alabamians for a Clean Environment v. Thomas*, 18 ENVTL. L. REP. 20,460 (N.D. Ala. 1987).

<sup>185</sup> *Id.* at 20,462.

<sup>186</sup> *Id.* (citing *Amoco Oil Co. v. EPA*, 501 F.2d 722, 750 (D.C. Cir. 1974) and *Portland Cement*, 486 F.2d at 386).

<sup>187</sup> See 40 C.F.R. § 1506.11 (1993).

<sup>188</sup> See *Maryland v. Train*, 415 F. Supp. 116, 121 (D. Md. 1976); *Wyoming v. Hathaway*, 525 F.2d 66, 73 (10th Cir. 1975), *cert. denied*, 426 U.S. 906 (1976); *supra* part II.D.3.

<sup>189</sup> 40 C.F.R. § 1506.11 (1993).

qualified to commence on-site removal based on fewer formal evaluation procedures. Procedurally, due to limited lead time, there is little EPA can do other than provide a spokesperson to function as liaison between EPA and the community, answer questions and provide information where appropriate. Thus, where a removal action will occur with less than six months planning time, EPA's procedures are sufficient to satisfy NEPA, when balanced in light of the exigent circumstances.

To the extent that the removal action is one which contemplates a planning period of six months or longer, it would be difficult to realistically argue that the emergency justifies a broad exemption from NEPA's mandates. EPA has apparently recognized this, as evidenced by its requirement that a CRP be established where on-site activities are to last longer than 120 days or lead time for planning exceeds six months.<sup>190</sup> EPA's technical expertise seems to justify its selection of a remedy and its engineering evaluation/cost analysis adequately compares alternatives, but its procedural standards seem deficient. Although community interviews occur prior to the engineering evaluation/cost analysis, where on-site activities will not begin for at least six months, it does not appear that an adequate mechanism exists to inform interested individuals that EPA is conducting interviews.<sup>191</sup> Though the EPA spokesperson must inform "immediately affected citizens,"<sup>192</sup> other interested individuals or organizations have no direct opportunity to receive notice. Moreover, the thirty-day comment period which is provided following completion of the engineering evaluation/cost analysis is insufficient, standing alone, to assure adequate opportunities for public participation. A public hearing, which is required both by NEPA and by EPA for remedial actions, is an essential element of the public participation process. Thus, for removal actions commencing more than six months hence, EPA's procedures are not functionally equivalent to a NEPA EIS because no opportunity for a public hearing is provided.

## 2. Remedial Actions

EPA's procedures for remedial actions closely parallel the requirements of NEPA. Substantively, a detailed analysis of alternatives according to nine criteria, which focus on long and short-term effects on the environment and on human health, assure that a remedy will be selected only after appropriate consideration of alternatives.

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<sup>190</sup>. 40 C.F.R. § 300.415(m)(3) (1993).

<sup>191</sup>. Montrose, *supra* note 11, at 876-77.

<sup>192</sup>. 40 C.F.R. § 300.415(m)(1) (1993).

Furthermore, the detailed nature of the RI/FS process and the sampling and analysis methods utilized are at least as substantively sensitive to the environment as NEPA requires.

Procedurally, EPA's public participation program is also sensitive to the demands of NEPA. It provides opportunities for public participation and public inspection of documents throughout the remedy selection process. An opportunity for a public hearing is provided and EPA must consider public comments before reaching a final decision. Moreover, it must provide supplemental opportunities for comment if the preferred alternative is modified in unforeseeable ways following the original comment period.

The one area in which the EPA public participation program is deficient, as discussed in the preceding section, is its failure to publish notice that community interviews are being conducted. While notice is ultimately provided prior to the comment period and public hearing which follow completion of the RI/FS, by this phase it is too late to have any meaningful impact on the development of the preferred alternative. By contrast, NEPA requires public notice when the EIS scoping process commences. This allows interested individuals and organizations to contribute their input into defining the bounds of the investigation that will be conducted at a time when such input may have an important influence on the analysis undertaken. Because EPA's community relations program does not notify the public that the remedy selection process has begun and does not provide for public participation in the scoping process, it is not functionally equivalent to NEPA.

### *3. Challenging Functional Equivalence: Standing & Jurisdiction*

Individuals who believe that EPA's procedures are inadequate lack any meaningful opportunity to obtain judicial review. Challenges to NEPA compliance are normally reviewable based on federal question jurisdiction.<sup>193</sup> Although Superfund expressly grants jurisdiction to the district courts over controversies arising thereunder,<sup>194</sup> it specifically deprives the federal courts of jurisdiction to review challenges relating to the selection of removal or remedial actions.<sup>195</sup> Exceptions permit suits for reimbursement, recovery of response costs and challenges alleging that "the removal or remedial actions *taken*" are in violation of Superfund provisions.<sup>196</sup> This

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<sup>193</sup>. 28 U.S.C. § 1331 (1988).

<sup>194</sup>. 42 U.S.C. § 9613(b) (1988).

<sup>195</sup>. 42 U.S.C. § 9613(h) (1988).

<sup>196</sup>. 42 U.S.C. § 9613(h)(1-4) (1988) (emphasis added).

provision precludes challenges to EPA's failure to comply with NEPA prior to completion of the response action.

Recent decisions in three circuits point to the conclusion that federal courts do not have jurisdiction to entertain such challenges. In the most recent of these decisions, a court was without jurisdiction to hear a challenge arising from EPA's failure to comply with the National Historic Preservation Act (NHPA)<sup>197</sup> in conjunction with the cleanup of a Superfund site.<sup>198</sup> An owner of property, part of which contained an Indian burial ground, released toxic waste onto the property and sued EPA to delay response activities based on EPA's alleged failure to comply with NHPA. The court expressed concern that "delayed review may mean no effective review at all," potentially diminishing the site's historical value.<sup>199</sup> Perhaps the court would have been more sympathetic had the historic resources not already been contaminated by the litigant then seeking relief.

This outcome was consistent with two prior decisions. In the earlier of the two, private citizens of Alabama challenged EPA's plan to import hazardous waste from a site in Texas for disposal in Alabama.<sup>200</sup> EPA failed to issue public notice of the remedial action and did not provide the public (at the receiving site in Alabama) with an opportunity to participate in development of the ROD, despite a specific statutory directive to do so.<sup>201</sup> Relying on substantial authority, the court held that jurisdiction was lacking until the response action was completed.<sup>202</sup>

The other case was a direct challenge to EPA's failure to prepare an EIS in conjunction with the cleanup of two landfills that were contaminated with PCBs.<sup>203</sup> Following "intensive public scrutiny" EPA entered into a consent decree which involved surface excavation, capping of the sites and burning of the hazardous wastes in an incinerator.<sup>204</sup> The court held that it lacked jurisdiction to consider the plaintiffs' allegations that EPA acted illegally by failing to prepare an EIS or an RI/FS.

The denial of jurisdiction until response actions are completed was "designed to preclude piecemeal review and excessive delay of

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<sup>197</sup>. 16 U.S.C. § 470 to 470w-6 (1988 & Supp. 1990).

<sup>198</sup>. *Boarhead Corp. v. Erickson*, 923 F.2d 1011 (3d Cir. 1991).

<sup>199</sup>. *Id.* at 1021.

<sup>200</sup>. *Alabama v. EPA*, 871 F.2d 1548, 1551 (11th Cir. 1989), *cert. denied*, 493 U.S. 991 (1989).

<sup>201</sup>. 42 U.S.C. § 9613(k)(2)(B) (1988).

<sup>202</sup>. *Alabama v. EPA*, 871 F.2d at 1558.

<sup>203</sup>. *Schalk v. Reilly*, 900 F.2d 1091, 1093 (7th Cir. 1990), *cert. denied*, 498 U.S. 981 (1990). It is assumed that the sites were listed on the NPL since cleanup proceeded according to the NCP, although the opinion does not so indicate.

<sup>204</sup>. *Id.*

cleanup."<sup>205</sup> CERCLA's legislative history indicates that the section denying jurisdiction was intended to mandate that "there is no right of judicial review of the Administrator's selection and implementation of response actions until after the response action [sic] have been completed."<sup>206</sup> While minimizing delay in selecting an appropriate response action is a legitimate goal, doing so without providing exceptions for challenges brought under NEPA, NHPA and other similar statutes may negate EPA's overriding obligation to protect the environment. If this possibility is to be averted, the remedy must come from Congress.

## V. CONCLUSION

EPA's community relations program has become much more consistent with NEPA, due in part to the requirements of the Superfund Amendments and Reauthorization Act of 1986 (SARA),<sup>207</sup> since it was first proposed a decade ago.<sup>208</sup> As a result, the most serious criticisms originally leveled against EPA's community relations policy are no longer problematic.<sup>209</sup> Although much progress has been made, the current public participation policies succumb to some of the same criticisms that were directed at EPA's original proposals.<sup>210</sup> The deficiencies which remain are minor and can be cured by (a) publishing notice that EPA has commenced the response selection and/or community interview process, for both removal and remedial actions and (b) providing an opportunity for a public hearing where removal actions will commence in more than six months. If these amendments are made, EPA's community relations procedures will be functionally equivalent to a NEPA EIS, thereby relieving EPA of the obligation to prepare an EIS. Since courts lack jurisdiction to address these deficiencies, the remedy must come from Congress through new legislation, or from EPA itself through amendments to its regulations.

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<sup>205</sup>. *Chemical Waste Management, Inc. v. EPA*, 673 F. Supp. 1043, 1055 (D. Kan. 1987).

<sup>206</sup>. H.R. REP. No. 253 (I), 99th Cong., 2d Sess. 81 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2863.

<sup>207</sup>. Pub. L. No. 99-499, 1986 U.S.C.C.A.N. (100 Stat.) 1613 (relevant portion codified at 42 U.S.C. §§ 9613, 9617) (1988).

<sup>208</sup>. *Montrose*, *supra* note 11, at 869.

<sup>209</sup>. *Id.* at 891-92.

<sup>210</sup>. *Id.*