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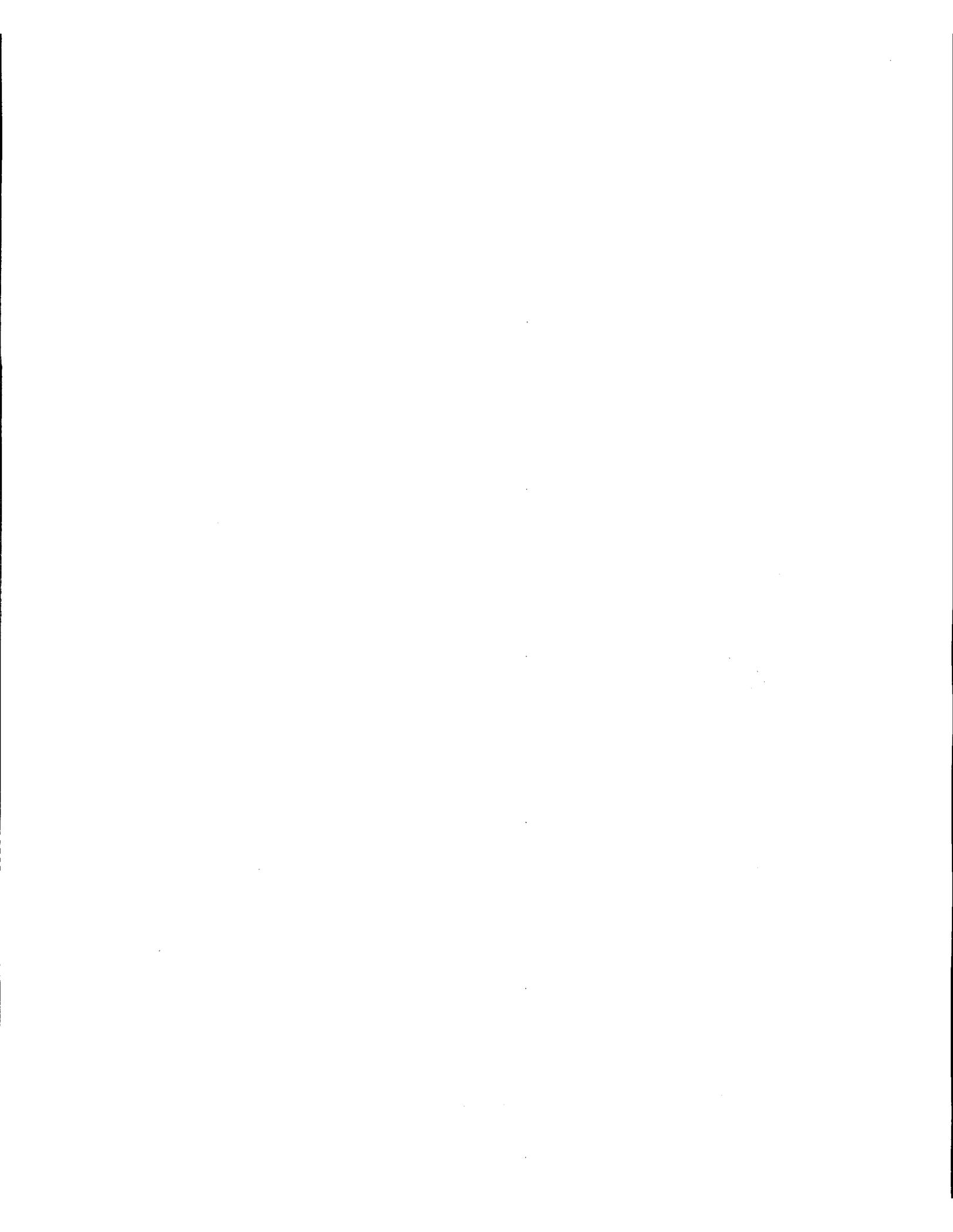
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SUBJECT: Applicability of the National Environmental Policy Act to Remedial
Actions at ORNL

TO: T. E. Myrick

FROM: F. E. Sharples, 1505, MS-038, ORNL (6-0524)



Applicability of the National Environmental Policy Act
to Remedial Actions at ORNL

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ORNL Remedial Action Program

Introduction

The National Environmental Policy Act (NEPA) declares that it is the policy of the federal government to preserve and protect the environment. To implement this policy, NEPA directs federal agencies to incorporate considerations of the effects of their actions on the quality of the human environment into their decision-making processes. NEPA's Environmental Impact Statement (EIS) requirement has two major thrusts. First, it places a nondiscretionary duty on federal agencies to evaluate the environmental effects of their decisions so that alteration and use of the environment is planned and controlled rather than arbitrary (Mandelker, 1984). Second, NEPA serves as a "disclosure" law, ensuring that information on the environmental costs of federal actions is available to the public.

The activities of the Remedial Action Program at ORNL are directed at identifying the existence and extent of environmental problems resulting

from the Laboratory's inventory of inactive radioactively and chemically contaminated facilities and sites, and at identifying, selecting, and conducting remedial actions where necessary to correct these problems. Both the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) regulate these kinds of activities. In addition, there are requirements for the evaluation and public disclosure of the environmental impacts of remedial actions associated with both regulatory statutes. Responsibilities under RCRA, CERCLA, and NEPA therefore overlap to some extent. A number of questions consequently arise about the applicability of the specific requirements of each statute, particularly NEPA, to ORNL's remedial action program in light of these overlaps.

The purposes of this report are to (1) identify similarities and differences between the environmental evaluation and disclosure requirements of NEPA, CERCLA, and RCRA; (2) discuss the applicability of the provisions of each statute and its implementing regulations and guidance to ORNL's remedial action activities; and (3) provide recommendations on what actions should be taken to ensure that all applicable requirements are satisfied.

Overview of Statutory and Regulatory Requirements

NEPA

The major "action forcing" provision of NEPA resides in Section 102(2)(C) - "[A]ll agencies of the Federal government shall...include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on- (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action...."

The statutory requirements of NEPA are, however, briefly stated and often vaguely worded. NEPA does not, for example, address the timing or scope of an EIS, whether or not hearings must be held, if and when an agency may elect not to prepare an EIS, nor does it provide for judicial review. Few of the key terms in NEPA are provided with definitions. The statute's brevity and vagueness have consequently given the federal courts the opportunity to create an extensive body of NEPA "common law" based on litigation (Mandeiker, 1984).

Title II of NEPA created the Council on Environmental Quality (CEQ) in the Executive Office of the President. The statutory responsibilities of the CEQ are limited, but Executive Orders have given CEQ the authority to adopt regulations to implement the statute. CEQ's regulations are

codified at 40 CFR Parts 1500-1508. They amplify the statute's requirements by defining terms and outlining a process for conducting environmental evaluations under NEPA. Highlights of the NEPA process include the following (R. M. Reed, pers. comm. to F. E. Sharples, ORNL, May, 1987):

Planning and timing - The NEPA process is to be integrated into project planning at the "earliest possible time" so that decisions reflect consideration of environmental values and so that delays due to lack of consideration are avoided later on. Planning should involve a "systematic, interdisciplinary approach" to evaluating the full range of environmental consequences, including economic and social effects as well as physical and natural effects.

Alternatives - CEQ's regulations place a major emphasis on developing and analysing reasonable alternatives, of which the proposed action is one. In fact, CEQ considers the analysis of alternatives to be "the heart of the EIS." This analysis should "present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public" (40 CFR 1502.12). The range of alternatives covered should be "all reasonable alternatives." An agency should "devote substantial treatment" to each alternative considered in detail so that the comparative merits of each can be evaluated. The reasons for eliminating some alternatives from further detailed study

should be briefly discussed. An analysis of a "no action" alternative should be included.

Public participation - Providing the public, state, other federal agencies, and other interested parties an opportunity to present their views and comments on a proposed federal action and its alternatives is a major goal of NEPA. CEQ's regulations promote public participation by creating a "scoping" process, which is to be initiated as soon as the need for an EIS has been determined; requiring that public notice (a Notice of Intent, or NOI) be given that an agency plans to prepare an EIS and soliciting public comment; encouraging participation during the scoping process via public meetings; and providing time for public comments and objections to be received after draft and final EISs are published.

Scoping - 40 CFR 1501.7 defines scoping as "an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action." The scoping process is initiated by the publication of an NOI in the Federal Register. The process often involves one to several public meetings during which the agency describes its approach to preparation of the EIS and receives both verbal and written comments from interested parties. Although scoping is typically started at the earliest stages of the NEPA process, it is nevertheless a continuous process throughout the preparation of the EIS in that agency determinations made during early scoping activities are to be revised if the proposed action is later substantially changed or if significant new circumstances or information arise.

Record of Decision (ROD) - On completion of an EIS, an agency is required to publish a ROD summarizing the environmental considerations that went into the agency's selection of its preferred alternative. The ROD states what the agency's decision is, what alternatives were considered, which alternative was considered to be environmentally preferable, and whether the agency has adopted "all practicable means to avoid or minimize environmental harm" from the selected alternative. The ROD requirement helps ensure that an agency factors consideration of environmental consequences into its decisionmaking and makes a public disclosure of these considerations. Although there is no requirement that an agency select the environmentally preferred alternative, the need for consideration of environmental consequences is clear. The ROD is published in the Federal Register after publication of the final EIS.

CERCLA

CERCLA establishes a national program for responding to uncontrolled releases of hazardous substances into the environment. The operational centerpiece of EPA's remedial action program under CERCLA is the National Oil and Hazardous Substances Contingency Plan (NCP) (EPA, 1985b), which is codified at 40 CFR 300 Subpart F. The NCP lays out a framework for identifying, evaluating, and selecting remedial actions and describes the factors to be considered in the process. More detailed analytical structures for this framework are provided in various EPA guidance manuals (e.g., EPA, 1985a and b).

The NCP remedial response process has five basic steps or phases. Some of the terminology of NEPA - e.g., scoping, analysis of alternatives, and ROD - is also used for elements of the NCP process, but the meanings of the terms may actually be quite different. The five phases are as follows:

Site discovery and notification - This phase is primarily concerned with the identification of hazardous substance sites and reporting of these sites to EPA via various forms of notification.

Preliminary assessment and site inspection (PA/SI) - The overall goal of this phase is to collect sufficient information to determine whether there have been any environmental releases from sites containing hazardous substances. The PA involves the collection of existing data and information on a site, including a characterization of the substances it contains and of the site's environmental features. Should the nature and quantity of available information on a site be inadequate to draw valid conclusions about any actual or potential hazardous substance releases, EPA may refer the site for further action or an SI. In the past, EPA has referred an average of only one out of four sites for SI activities (Hedemann, pers. comm.). SIs routinely include collection of actual environmental samples. Such sampling is an additional step directed at determining whether a release or potential release creates a problem justifying still further action.

Establishing priorities for remedial action - In this phase, sites are

scored using the Hazard Ranking System and data from the PA/SI. The scoring process is the primary mechanism for EPA to identify sites for potential inclusion on the National Priorities List (NPL). Detailed remedial investigation and feasibility study activities are required for all sites that are listed on the NPL. It should also be mentioned that the Superfund Amendments and Reauthorization Act (SARA) of 1986 contains provisions for the inclusion of federal facilities on the NPL. EPA is interpreting these statutory provisions as a mandate to include both CERCLA remedial action and RCRA corrective action sites at federal facilities on the NPL (EPA, 1987).

Remedial investigation and feasibility study (RI/FS) - The emphasis of the RI part of this phase is on characterizing the extent of problems identified in the PA/SI. Following the formulation of an RI Sampling Plan for the collection of data for this purpose, the RI itself is conducted to acquire the needed information. This information is then used to develop, screen, analyze, and select appropriate remedial actions in the FS.

EPA uses the term "scoping" to describe part of the RI activities. In this context, scoping, or "Level I characterization," involves the analysis of existing data to set the basis for developing a sampling plan designed to fulfill specific data needs (EPA, 1985a). In other words, scoping in the NCP process is primarily a method of defining what additional information is needed to evaluate the potential effects of a site on public health, welfare, and the environment. The data evaluated in the NCP scoping process may be regional or site specific, and will

generally include reports from the PA/SI or their equivalent. The purpose of Level I characterization is to "allow a determination of potential hazards, including the known or suspected sources of contamination, the probable pathways by which these contaminants can migrate, and the potential receptors that are affected by contaminant migration" (EPA, 1985a). Data gaps and insufficiencies are noted, and after scoping, the RI activities necessary to collect the missing data are identified and conducted. Thus, "scoping" in this process differs considerably from that in the NEPA process, especially in terms of involving the public.

A close approximation of "scoping" in NEPA's sense is, however, found in the NCP regulations on community relations. As required by 40 CFR 300.67, the lead agency is to develop and implement a community relations plan (CRP) for remedial action projects. A CRP details how EPA, a state, or presumably another federal agency that is involved in a project, will inform an affected community about a site and elicit public input in remedial action decisions. The CRP must be prepared and implemented before the RI begins. A CRP should specify two types of activities: (1) providing periodic progress reports on the findings of the RI; and (2) eliciting and documenting comments and concerns from citizens, local officials, and community or environmental groups. EPA's RI guidance manual states that citizens should be encouraged to ask questions and suggest response actions. "The issues raised by the community may affect subsequent investigatory actions or suggest important issues for EPA or the state to consider in selecting an appropriate remedy for the site." This statement is strongly reminiscent of CEQ's regulation (40 CFR 1501.7)

on scoping ("as part of the scoping process the lead agency shall...determine the scope and significant issues to be analyzed in depth in the environmental impact statement" with the participation of all interested parties).

Public participation is also encouraged in the FS. As required by 40 CFR 300.67(d), for actions at NPL sites, a 21 day period must be provided for public review and comment on the FS outline of alternative remedial measures. This review and comment period must precede actual selection of remedy. Public notice and an additional 30 day comment period is required after the responsible parties agree to the selected remedy. Finally, a responsiveness summary describing all comments and concerns raised by the community during the RI/FS process must be prepared by the lead agency, explaining how these concerns were addressed in the selection of remedy. The regulatory requirements in 40 CFR 300 have now been reinforced by statutory provisions for public participation in the remedial action process in new Section 117 of SARA.

Similarly, the "analysis of alternatives" concept in the context of the NCP process differs somewhat from NEPA's, although there are strong parallels. Alternatives for remedial action are developed, screened, analysed, and selected as part of the FS. As required by 40 CFR 300.68(f), to the extent possible and appropriate, one alternative for each of five categories of alternatives should be developed. These five categories are:

(1) Alternatives for treatment or disposal at an off-site facility approved by EPA. [NOTE: SARA contains the directive that off-site transport and disposal of hazardous substances without treatment is to be regarded as the least favored alternative for remedial action where treatment technologies are available. EPA is currently revising the NCP in light of SARA, and this first category of alternatives may be modified or eliminated as a consequence.]

(2) Alternatives that attain applicable or relevant and appropriate federal public health and environmental requirements. [NOTE: SARA also adds a requirement for consideration and use of applicable state standards.]

(3) Alternatives that exceed applicable or relevant and appropriate federal public health and environmental requirements.

(4) Alternatives that do not attain applicable or relevant and appropriate federal public health and environmental requirements but will reduce the likelihood of present or future threat from the hazardous substances and that provide significant protection to public health and welfare and the environment. This must include an alternative that closely approaches the level of protection provided by the applicable or relevant and appropriate standards. [NOTE: Section 121(d)(4) imposes certain limitations on the selection of remedial actions in this category. The revised NCP is therefore likely to reflect changes in this alternative category.]

(5) A no action alternative. [NOTE: The addition of Section 121 of SARA covering cleanup standards could result in the elimination of the no action alternative from EPA's list of categories.]

Thus, EPA's NCP regulations are a great deal more specific in describing the universe of alternatives to be evaluated in the FS than is CEQ's directive to evaluate "all reasonable alternatives." One element that the two processes currently have in common, however, is the necessity to evaluate a "no action" alternative. [But see note above under 5.]

Screening of alternatives is addressed in 40 CFR 300.68(g). The purpose of screening is to narrow the list of potential remedial actions for further detailed analysis, and eliminate those that are inappropriate. Three broad criteria are used in screening - cost, acceptable engineering practices, and effectiveness. When an alternative is eliminated in screening, the rationale for this elimination is to be documented in the FS.

Following screening, the remaining alternatives are next subjected to detailed analyses. It is here that the parallels with the NEPA process are strongest. 40 CFR 300.68(h)(2)(vi) requires that for each alternative analysed in detail, an element of this analysis must be an evaluation of any adverse environmental impacts, methods for mitigating these impacts, and costs of mitigation be performed. In other words, the detailed technical analysis of each alternative remaining after screening includes an environmental impact assessment. EPA's FS guidance manual contains a

chapter on evaluating environmental impacts that describes the scope, focus, and contents of such an assessment. Much of the information described in this guidance is similar to that normally collected for an EIS, although the focus may be somewhat narrower. For example, the manual states, "The environmental assessment should focus on the site problems and pathways of contamination actually addressed by the alternatives identified through screening. The environmental assessment will help determine which remedial alternative(s) will achieve adequate protection and improvement of the environment at those sites where environmental damage is an important consideration. A detailed analysis of environmental effects need not be performed when they are not within the scope of those alternatives. However, any known environmental problems not addressed by the remedial alternatives should be clearly described." In addition, the guidance manual states that "The user can forego detailed analysis of the adverse effects of any remedial alternatives under consideration if the preliminary analysis conducted during the screening stage shows that implementation will not result in any of the following: a substantial increase in airborne emissions; a new discharge to surface or ground waters; an increase in the volume of loading of a pollutant from existing sources or a new facility to receiving waters; known or expected significant adverse effects on the environment or on human use of environmental resources; known or expected direct or indirect adverse effects on environmentally sensitive resources or areas, such as wetlands, aquifer recharge zones, archeological and historical sites, and endangered and threatened species." EPA states that it has based this last guidance on concepts for categorical exclusion under NEPA. It would appear that

the FS phase of the NCP process accomodates, if not requires, a NEPA-style environmental analysis.

Remedial action design and construction - This final phase of the NCP process entails the actual design of the remedial action selected as the result of the FS. The remedial action is then implemented through construction.

One more item deserves mention before the discussion of pertinent points of comparison in procedures is complete. Although not actually a part of EPA's regulatory framework for the NCP, the remedy selection process under CERCLA, like that of NEPA, must be documented by a ROD. In this case, the ROD is normally written by EPA, although responsible parties in CERCLA enforcement actions evidently do occasionally write the ROD for EPA approval and concurrence. In any event, EPA is now formulating new NCP procedures in light of the 1986 Superfund amendments. Because of the addition of Section 120 of SARA dealing with federal facilities, EPA is developing new procedural protocols. Some of these will pertain specifically to the interagency agreements for remedial action that SARA requires. Recent conversations with various EPA personnel have indicated that, for federal facilities, the agency that owns the facility will be expected to select its remedies and write its ROD for EPA's approval. SARA specifically states that the EPA Administrator will select the remedial action for an agency if EPA and the agency are unable to reach agreement on the selection. Barring such disagreements, however, the Department of Energy may be able, and may in

fact be expected to, write its own RODs.

RCRA

The regulation of hazardous waste management systems is implemented and enforced through RCRA's permitting system. Owners and operators of facilities that treat, store, or dispose of hazardous waste are required to obtain permits for these activities. RCRA's statutory and regulatory requirements for public participation are largely related to the permitting process. Section 7004 of RCRA (1) allows "any person" to petition the EPA Administrator for the promulgation, amendment, or repeal of any RCRA regulation, and (2) provides for public participation in the process of issuing a RCRA permit. The EPA Administrator is required to give public notice of his intention to issue a permit and solicit public comments on whether or not it should be issued. EPA has codified administrative procedures for permit issuance and public participation in 40 CFR 124. These regulations cover issuing public notices, inviting public comment, and holding public hearings on draft permits. Thus, regulations currently in place under RCRA are much more narrowly focused than are those for either NEPA or CERCLA.

The Hazardous and Solid Waste Amendments of 1984, however, added a significant new component to RCRA in Section 3004(u). This amendment gave EPA the authority to require corrective action for "all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage, or disposal facility seeking a permit...." EPA is now

requiring RCRA permit applicants to submit information on all solid waste management units, either closed or operating, at their facilities. RCRA permits issued in the future will contain compliance schedules for corrective action from any releases that EPA identifies in a process highly similar to that laid out in the NCP under CERCLA. In fact, the RCRA corrective actions program is strongly modelled after the NCP process. Although EPA has not yet issued regulations for its corrective action program, it is likely that this program will ultimately be nearly identical to that of the NCP. Therefore, although the regulations supporting RCRA currently do not parallel either NEPA or CERCLA in regard to environmental evaluations and public disclosure, they are very likely to do so in the future.

Applicability of Statutory and Regulatory Requirements of RCRA and CERCLA to ORNL's Remedial Action Activities

RCRA - At the moment, RCRA is the only one of the three statutes under discussion whose applicability to ORNL's activities is very clear. Originally, ORNL's strategy was to conduct its remedial action activities under Department of Energy (DOE) Order 5480.14. The process laid out in this Order is heavily modeled on CERCLA's NCP. In April, 1986, however, EPA regional personnel elected to enforce requirements for remedial actions at ORNL through its RCRA corrective action authority (Trabalka and Myrick, 1987). ORNL is therefore currently pursuing a program of RCRA Facility Assessment/RCRA Facility Investigation/RCRA Corrective Measures which is more or less equivalent to the NCP's PA/SI-RI/FS-Remedial

Measures process. In fact, the site investigation phase just getting underway is still referred to internally as the "RI/FS," despite the jurisdictional change. Because EPA has not yet promulgated regulations for corrective action programs, the RCRA permit-related administrative procedures are the only ones that are currently clearly operable with regard to public participation and environmental evaluation requirements.

CERCLA - EPA's NCP regulations appear, at the moment, to be inapplicable to ORNL's program for remedial action. There is, however, considerable uncertainty as to whether this will remain true for very long. Section 120(d) of SARA states the following:

"ASSESSMENT AND EVALUATION - Not later than 18 months after the enactment of the Superfund Amendments and Reauthorization Act of 1986, the Administrator shall take steps to assure that a preliminary assessment is conducted for each facility on the [Federal Agency Hazardous Waste Compliance] docket. Following such preliminary assessment, the Administrator shall, where appropriate -

(1) evaluate such facilities in accordance with the criteria established in accordance with Section 105 under the National Contingency Plan for determining priorities among releases;

and

(2) include such facilities on the National Priorities List maintained under such plan if the facility meets such criteria."

This statutory language can be interpreted to mean that EPA has little choice but to apply the NCP regulatory process to remedial action programs at federal facilities. EPA has, in fact, indicated that it intends to place appropriate federal facilities on the NPL, regardless of their regulatory status under RCRA (EPA, 1987). EPA has stated that failure to list federal facilities that qualify for the NPL "would be inconsistent with the spirit and intent of Section 120 of SARA. The Statute and its legislative history indicate that Congress intended the Agency to place Federal facility sites on the NPL and to effect cleanup at those sites." The extent to which a facility's inclusion on the NPL would trigger a necessity for partial or full compliance with the NCP process is, nevertheless, unclear at this time. It is also unclear as to whether any currently substantive differences between the NCP process and the RCRA corrective action process will survive EPA's next round of rulemaking.

Applicability of NEPA

A determination of the applicability of NEPA to ORNL's program for remedial action must consider several different lines of argument. First, there is the standard issue of whether remedial action activities satisfy the "threshold question" for when an EIS must be prepared. Second, there must be consideration of the doctrine of "functional equivalence" and how it might apply. Third, is a consideration of the risks of not

specifically performing activities directed at NEPA compliance vs the costs of doing so.

The Threshold Question - NEPA requires that federal agencies prepare EISs on "proposals for...major federal actions significantly affecting the quality of the human environment." Because NEPA itself does not define any of the key terms in this statement, the federal courts have determined how it applies through a substantial body of case law. Whether a federal agency must prepare an EIS in any specific instance has come to be known as the "threshold question" in NEPA case law (Mandelker, 1984). In considering the threshold question, the courts have had to interpret each term. Is there an agency "proposal" for an "action." Is the action "federal"? Is it "major"? Is it "significant"? Will it affect the "quality of the human environment"?

A detailed discussion of judicial review and case law for these questions is beyond the scope of this document. Such a review is available in Mandelker (1984). Answers to some of the above questions, however, seem relatively clear. The expenditure of DOE funds for required remedial actions will undoubtedly constitute a "federal action." The magnitude of this expenditure could easily be construed as making this action "major." The most problematic question may be whether or not this action will significantly affect the environment. CEQ has provided guidance in its regulations for determining the meaning of "significantly," and it may be worth pointing out that the courts generally give considerable weight to CEQ's interpretations in NEPA

litigation. CEQ's regulations require that the interpretation of "significantly" consider both context (significance on various scales, e.g., society as a whole, regional, local) and intensity (referring to the severity of impact). Aspects of evaluating intensity (40 CFR 1508.27) that may be pertinent to ORNL's specific concerns are as follows:

"(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial." Thus, although it may be argued that remedial action will improve the environment, such beneficial impacts do not offset the "significance" of the action.

"(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial." The degree of controversy likely to arise over the conduct of remedial action is, at the moment, unknown, but is likely to depend on the specific nature of the remedies selected. That is, some proposed remedies may be more controversial than others. At this time, however, "significance" could not be dismissed on the grounds of lack of controversy.

And finally, "(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks." To the extent that the risks and benefits associated with remedial action are currently uncharacterized, it is reasonable to conclude that this factor does apply.

In short, it appears very likely that ORNL's remedial action activities should be interpreted to require the preparation of an EIS on grounds of meeting the "threshold" requirements.

Functional Equivalence - NEPA does not itself contain any exemptions from the requirement to prepare an EIS. The courts have, however, fashioned narrow exemptions when environmental evaluation and public participation procedures in federal agency legislation and regulations are equivalent to those of NEPA (Mandelker, 1984). Exemptions from NEPA were established soon after its enactment by court cases concerning the duties of EPA, and the courts have limited such exemptions to programs administered by EPA. EPA was excused from the preparation of EISs, first by the courts, and later by legislative amendments, for agency actions taken under the Clean Air Act and actions related to the issuance of discharge permits for existing sources of water pollution under the Clean Water Act. Even when exempt from the EIS requirement, however, EPA may still be subject to the other environmental decision-making responsibilities imposed by NEPA.

Whether EPA actions under other statutes it administers or the actions of other agencies can also be exempt from the EIS requirement involves the doctrine of "functional equivalence." Generally, the application of functional equivalence is seen as being limited to actions by environmental agencies administering statutes that are environmentally protective. Based on case law, it is unlikely that DOE itself would qualify for a functional equivalence exemption from NEPA's EIS

requirement. This situation does, however, bring up a somewhat broader issue - which agency, EPA or DOE, actually has the decision-making responsibility in the selection of remedial actions? If it is EPA's responsibility, then functional equivalence may apply. If DOE is the responsible agency, however, functional equivalence is unlikely to apply.

Arguments can be made for either point of view. For example, if EPA ultimately makes the selection of the specific remedial actions to be conducted at ORNL, either through its RCRA permitting authorities or because DOE and EPA fail to agree on the selection under CERCLA/SARA, EPA could be construed as the decision-making agency. If, however, DOE selects the remedies, either under a CERCLA interagency agreement or under some other form of non-enforcement compliance agreement, and simply obtains EPA's concurrence and approval, then the decision-making responsibility can be interpreted to reside with DOE. Will DOE's actions represent proactive decisionmaking or merely enforcement of another agency's decisions? What is involved is a question of mandatory vs discretionary action on the part of DOE. A number of court cases have found that federal agencies may be exempt from preparing an EIS under certain conditions related to the existence of other constraining requirements (Mandelker, 1984). Many of these cases have dealt with fine mandatory-discretionary distinctions. But Mandelker states, "The mandatory-discretionary distinction may explain these cases, but it is not satisfactory. The distinction is illusory. An agency always exercises discretion when it takes action, even if only to determine that clearly specified statutory factors have been met." It probably should also be

pointed out that, thus far, the Justice Department has interpreted EPA's enforcement authorities as limited in regard to other federal agencies. This being the case, EPA's ability to preempt DOE from making its own decisions may be severely constrained except in rare instances.

Finally, the viewpoint of CEQ on the question of functional equivalence merits consideration. Dinah Bear, the General Counsel of CEQ, stated in a telephone conversation in April, 1987, that CEQ sees no real grounds for exempting federal facility remedial action programs under CERCLA from NEPA's requirements. In addition, the lack of a process equivalent to the NCP's for RCRA-regulated corrective action programs furnishes even less of a reason, in CEQ's view, to apply functional equivalence to these kinds of activities. On the other hand, CEQ does not expect federal agencies to pursue two separate but parallel efforts. Rather, CEQ intends to take the position that an RI/FS and an EIS, for example, can be combined into a single document by meshing the two separate processes and using the more extensive procedural requirements where such requirements overlap. For example, where the two processes specify comment periods of differing lengths, the longer one should be selected to satisfy both requirements.

Risks vs Costs - If, as CEQ suggests, it is possible to combine processes and documents so that an RI/FS and an EIS are, in effect, the same thing, the additional costs of complying with both NEPA and CERCLA (or RCRA) should be rather minimal. In any event, these costs must be weighed against the potential for court challenges if DOE elected not to

prepare a remedial action program EIS. Mandelker (1984) asserts that federal agencies almost always win in litigation that raises primarily factual issues about the adequacy of an EIS. On the other hand, court challenges are more likely to be won by intervenors when the major issue is whether an agency has failed to comply with NEPA, e.g. in electing not to prepare an EIS. Mandelker states, "An agency's decision not to prepare an impact statement carries considerable risk because this decision may be challenged in court. If the court decides that an impact statement must be prepared, the agency will have expended time and resources on the litigation process only to find that an impact statement is required after all."

Conclusions and Recommendations

The conclusions of this report are as follows:

1. There are strong arguments for the applicability of NEPA to ORNL's remedial action program. Conducting a process that meets the requirements of NEPA, including preparation of an EIS, is advisable. This report has not discussed the issue of how an EIS addressing ORNL's facility-specific remedial action program might relate to the off-site EIS currently being planned. The presumption is, however, that these efforts, as well as any other facility-specific EIS activities conducted at Martin Marietta Energy Systems plants, should be closely coordinated.

2. Although ORNL's remedial actions are currently being conducted under RCRA authority, there are, as yet, no clearly codified RCRA procedures equivalent to either NEPA or the NCP. In light of the absence of such procedural regulations, the basic steps in the NCP process, which are clearly defined, should be used as the basis for designing ORNL's environmental evaluation and public participation procedures.

3. The NCP process should be meshed with that of NEPA, so that the requirements of both are met and so that the final product serves as an EIS as well as a documentation of the results of the RI/FS. The step requiring evaluations of the environmental impacts associated with each remedial action alternative analysed in detail during the FS can, and should be, used to accommodate a NEPA-oriented environmental impact analysis.

Specific recommendations for action at this time are the following:

1. Initiate the NEPA process as soon as possible by conducting the formal steps for doing so. These formal steps include issuing an NOI and beginning activities to fulfill NEPA's scoping requirements. Discussions with the Oak Ridge Operations Office of DOE will be necessary on this point because these actions are federal agency obligations, which must be undertaken by DOE.

2. Develop and implement a formal CRP, detailing mechanisms for informing the public and eliciting comments on progress and decision

making in the selection and conduct of remedial actions. Preparation of the CRP should focus on determining in detail how the environmental assessment and public information procedures of both NEPA and the NCP can be meshed or combined to satisfy both sets of requirements in a single process.

3. Assure that the environmental analyses performed as part of the detailed evaluation of remedial action alternatives in the FS encompasses the full scope of impact assessment required for adequate NEPA, as well as NCP, compliance.

4. Combine the RODs from the NCP and NEPA processes, using as a working assumption that DOE will write its own ROD for EPA's concurrence and approval.

References

U. S. Environmental Protection Agency. 1985a. Guidance on Remedial Investigations Under CERCLA. Draft manual prepared for the Hazardous Waste Engineering Research Laboratory, Office of Research and Development, and the Offices of Emergency and Remedial Response and Waste Programs Enforcement, U. S. EPA, Washington, D.C. 20460.

U. S. Environmental Protection Agency. 1985b. Guidance on Feasibility Studies Under CERCLA. Draft manual prepared for the Hazardous Waste Engineering Research Laboratory, Office of Research and Development, and

the Offices of Emergency and Remedial Response and Waste Programs Enforcement, U. S. EPA, Washington, D.C. 20460.

U. S. Environmental Protection Agency. 1987. The National Priorities List - Listing Policy for Federal Facilities. Federal Register, Vol. 52, pp. 17991-17993, May 13, 1987.

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

Trabalka, J. R. and T. E. Myrick. 1987. ORNL Remedial Action Program Strategy, FY 1987-1992. ORNL/TM-10244. (draft)



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| 2. J. S. Baldwin | 23. C. E. Nix |
| 3. T. W. Burwinkle | 24-27. P. T. Owen |
| 4. J. B. Cannon | 28. T. P. A. Perry |
| 5-7. K. W. Cook | 29. R. M. Reed |
| 8. N. H. Cutshall | 30. D. E. Reichle |
| 9. L. D. Eyman | 31. T. H. Row |
| 10. R. B. Fitts | 32-34. F. E. Sharples |
| 11. C. W. Gehrs | 35. L. E. Stratton |
| 12. S. G. Hildebrand | 36. J. H. Swanks |
| 13. D. D. Huff | 37. J. R. Trabalka |
| 14. F. J. Homan | 38. R. I. Van Hook |
| 15. L. W. Long | 39. L. D. Voorhees |
| 16. L. E. McNeese | 40. Laboratory Records - RC |
| 17-21. T. E. Myrick | |