

# APPLYING THE NATIONAL ENVIRONMENTAL POLICY ACT'S (NEPA) FUNCTIONAL EQUIVALENCE DOCTRINE TO THE NATIONAL OIL AND HAZARDOUS SUBSTANCES POLLUTION CONTINGENCY PLAN (NCP)

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## ABSTRACT

*NEPA is a policy and procedural statute that makes environmental protection a part of the mandate of every federal agency and department. NEPA was enacted to establish a framework for public review of the environmental impacts of actions carried out by the federal government. NEPA anticipates that most federal actions are planned in detail and are implemented over the course of months or years. This planning and implementation cycle, allows detailed analysis of specific project impacts. Environmental response actions taken by the United States Environmental Protection Agency (EPA) or the United States Coast Guard (CG) under the regulatory authorities established by the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) are also considered specific federal actions. However, the nature of these specific actions varies greatly depending on the exact nature of each incident; therefore traditional NEPA planning is neither possible nor appropriate. The NCP establishes a mechanism of continuous environmental assessment and review through the network of Regional Response Teams (RRT), local emergency area planning committees, Area Contingency Planning (ACP) Committees, and the availability of local area contingency plans to the public on a contingency basis for review or comment. Federal courts have allowed functional equivalence doctrine to apply exclusively to EPA because of their adherence to "substantive and procedural standards ensuring full and adequate consideration of environmental issues." These decisions have held up the interpretation that NEPA compliance is unnecessary where the agency is independently required to consider environmental issues. The EPA and the CG share the responsibility of protecting public health, welfare, and environment from discharges or threats of discharges of oil and/or releases or threats of a releases of hazardous substances, pollutants and/or contaminants under the planning, preparedness, and response scheme established by the NCP and carried out by those working within the National Response System (NRS). For this reason any planning, preparedness, and response activities undertaken by EPA and CG personnel to mitigate accidental or intentional discharges of oil or releases of hazardous*

*substances, pollutants, and/or contaminants within the purview of the NCP should be interpreted as functionally equivalent to the requirements found within NEPA.*

## DISCUSSION

### Statutory Requirements of NEPA

NEPA was enacted by Congress to establish a framework for environmental review of actions carried out by the Federal government. To fully understand the legislative intent behind NEPA, it is helpful to review Title I of NEPA also known as the Declaration of National Environmental Policy, where "Congress...declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." (Bear: 10061).

Further, NEPA's three major components are (1) collection of environmental and related socio-economic information pertinent to an agency proposal to undertake a major federal action significantly affecting the quality of the human environment; (2) public participation in developing environmental information related to the proposal; and, (3) providing for judicial review of the substance of such environmental information and the public process before the action commences.

NEPA is a policy and procedural statute that has been interpreted by the courts to make environmental protection a part of the mandate of every federal agency and department. NEPA has no substantive requirements; rather, it seeks to advance environmental protection by establishing a set of procedures that all agencies are to follow. Title II of NEPA created the President's Council on Environmental Quality (CEQ) that was established to regulate the implementation of NEPA. The procedural requirements set by CEQ and reviewed by the courts ensure that there is informed decision-making for all federal actions significantly affecting the quality of the human environment. Among the chief requirements of NEPA are the agencies or departments duty to consider environmental issues and present the environmental impacts of their activities to the public. The preparation of appropriate and specific types of documentation is intended to disclose all reasonably

foreseeable impacts. The cornerstone requirement of NEPA is the requirement to prepare an environmental impact statement (EIS) prior to any actions taken by the federal government. Essentially, NEPA requires that all federal agencies prepare an environmental impact statement (EIS) when undertaking or funding "major federal actions significantly affecting the quality of the human environment." (Bear: 10061). The EIS is designed to accomplish the purposes of NEPA by mandating a particular format for presenting the environmental review and by creating opportunities for public comment.

An agency is required to prepare an EIS before taking a major federal action falling within the mandate of NEPA. Included in the EIS process is the Environmental Assessment (EA). The EA documents the need for the project, the potential environmental effects arising from it, and alternatives to the proposed action. An EA provides a basis for evaluating the project and determining whether an EIS must be prepared. The EA is supposed to be a concise public document designed to achieve any of the following: Analysis for determining whether to prepare an EIS; to aid an agency's compliance with NEPA when no EIS is necessary; and to facilitate preparation of an EIS if one is necessary. An EA is followed by one of two conclusions: either a finding of no significant impact (FONSI) or a decision to prepare an EIS. A FONSI briefly presents the reasons why an action, not otherwise categorically excluded, will not have a significant effect on the human environment. Categorical Exclusions refer to acts falling within a pre-designated category of actions that do not individually or cumulatively have a significant effect on the human environment. Thus, no documentation of environmental analysis is required. A categorical exclusion is NOT an exemption from compliance with NEPA, but merely an administrative tool to avoid paperwork for those actions without significant environmental effects. If an agency determines that the proposed action will result in no significant environmental effects, it issues a FONSI and NEPA obligations are completed. However, if the agency determines that the project will result in potentially significant environmental effects, it must prepare an EIS.

When first implemented in 1970, many agencies panicked over threatened litigation, and produced EISs that were useless volumes of material that no one read or wanted to deal with. Since that time CEQ has developed guidelines that emphasize the need to reduce paperwork and focus on the essential information that is needed by decision makers and the public.

NEPA has changed over the years from something that opponents to major federal actions could use to delay or stop projects indefinitely to something more reasonable and useful, that is a comprehensive framework for documenting and integrating essential environmental information in the federal decision making process.

Given the goal of Congress when passing NEPA, the overarching requirements placed on the federal government when planning for projects that could impact the environment, and the policy guidelines set by CEQ, it is easy to see how NEPA has become interwoven into the fabric of federal level decision-making. However, following the events of September 11, 2001, those agencies responsible for the safety and security of our nation have vigorously reviewed their policies and procedures to align with the mission of homeland security. It has become clear that environmental laws, regulations, and policy directed at routine operations in non-emergency conditions, if strictly enforced in an emergency, could slow or stall an immediate response to an intentional or accidental release that creates an imminent and substantial threat to public health, welfare or the environment.

#### **Review of Regulatory Requirements under the NCP**

Among many other missions, the EPA and the CG are tasked with providing environmental response oversight and actual direction of

cleanup efforts for discharge(s) of oil into the navigable waters of the United States or releases of hazardous substances, pollutants, and/or contaminants into the environment. This important mission carries with it the responsibility for ensuring that cleanup efforts are carried out in a manner sensitive to the environment and protective of public health. The NCP regulatory authority stems from the Clean Water Act (CWA) that specifically prohibits discharges of oil into navigable waters of the United States and the Comprehensive Environmental Response, Compensation, and Liabilities Act (CERCLA) or SUPERFUND that specifically establishes a mechanism for federal authorities to clean up abandoned hazardous waste sites. The NCP identifies one of the key aspects of environmental response as being the removal and/or remediation of hazardous substances and/or oil from the environment.

Federal officials responsible for controlling discharge and release response operations are known as Federal On Scene Coordinators (OSCs). The OSC is defined as the official "pre-designated by the EPA or the CG to coordinate and direct Federal discharge removal efforts...at the scene of an oil or hazardous substance discharge." The OSC is the federal official pre-designated by EPA or the CG to coordinate and direct federal responses under subpart D, or the official designated by the lead agency to coordinate and direct removal actions under subpart E of the NCP. The OSC is tasked with coordinating spill cleanup activities among various governmental and private entities operating at the site of a discharge of oil or a release of hazardous substances. CG regulations describe the OSC as the person, "solely responsible to determine the threat to public health and welfare, to authorize the expenditure of federal funds, and to ensure that necessary response actions are performed." (CG Marine Safety Manual, Volume 6: 7-2).

The OSC is the key federal responder to incidents involving oil or hazardous substances and is the local responders access to the NRS. The NRS, as established by the NCP, ensures that these threats are effectively managed through its network of people, plans, and resources, which are coordinated by the National Response Team (NRT) and a network of 16 RRTs. The NRT and each of the 16 RRTs are made up of 16 federal agencies, each with responsibilities and expertise in various aspects of emergency response to pollution incidents. The EPA serves as the chair of the NRT and the CG serves as the vice chair ensuring interagency planning and coordination that is replicated at the regional and local levels. The only difference between the OSC/NCP authorities promulgated by the CG and EPA relates to where the discharge or release occurs. Specifically, Coast Guard OSCs are responsible for oil discharges, including discharges from facilities and vessels under the jurisdiction of another federal agency, within or threatening the coastal zone. Additionally, the CG has the regulatory responsibility to prepare for and respond to a release of hazardous substances, pollutants, or contaminants into or threatening the coastal zone. The coastal zone, as defined for the purposes of the NCP, means all United States waters subject to the tide, United States waters of the Great Lakes, specified ports and harbors on inland rivers, water of the contiguous zone, other waters of the high seas subject to the NCP, and the land surface or land substrata, ground waters, and ambient air proximal to those waters. The term coastal zone delineates an area of federal responsibility for response action. Precise boundaries are determined by EPA/CG agreements and identified in ACP.

As the preceding discussion reveals, the CG's and EPA's environmental response, removal, and remediation responsibilities and procedures are well identified and documented under law and regulation. The NCP creates the NRS that is designed to plan and prepare for discharges of oil into the navigable waters of the United States and releases of hazardous substances environment, as well as accommodate public concerns. An Area Committee, composed of federal, state, and local agency representatives, creates ACPs for specific areas of the country. For instance, there

is an ACP for the Los Angeles/Long Beach area, the San Francisco area, and for the San Diego area, and in turn all of these plans are overseen and coordinated by the RRT for that region. The public has an opportunity to participate in the development and approval of ACPs throughout the country. Individual ACPs describe the strategies specific for a coordinated federal, state and local response to a discharge or substantial threat of discharge of oil or a release of a hazardous substance(s) into the environment. Members of the area committee have significant input into the procedures to be followed in the event of an oil discharge or release of hazardous substances, pollutants, and/or contaminants in their area.

### NEPA, NCP, and Functional Equivalence Doctrine

Unfortunately, there are no statutory exemptions contained in NEPA itself. However, there are several statutory exemptions found in environmental laws outside of NEPA. For example, Congress provided EPA an exemption from preparation of an EIS for all activities under the Clean Air Act, and for some activities under the CWA. Under the latter, an EIS is only required when issuing new source discharge permit or when providing grants for publicly owned treatment works. Some other examples of statutory exemptions are also found in CERCLA, the Base Realignment and Closure Act, and the Federal Insecticide, Fungicide, and Rodenticide Act.

While not precisely an "exemption" to NEPA requirements, the doctrine of functional equivalence holds that some procedures currently existing within agency regulations are functionally equivalent to those prescribed by NEPA. Federal courts recognize the doctrine where adherence to "substantive and procedural standards ensures full and adequate consideration of environmental issues." In many cases, the courts stated that "formal compliance with NEPA is not necessary, but functional compliance is sufficient." based on the fact that EPA is entitled to greater deference and flexibility because the agency's sole purpose is protection of the environment (*Environmental Defense Fund v. EPA*). Similarly, courts have held that "NEPA compliance is unnecessary where the agency is independently required to consider environmental issues." (*Alabama ex rel. Siegelman v. EPA*).

Recalling the public participation component of NEPA, the creation of such an Area Committee satisfies NEPA's public participation requirement. This same analysis applies to CG NCP/ACP environmental response activities. The NCP/ACP process requires the CG to "independently . . . consider environmental issues" in carrying out these missions. For example, 40 C.F.R. § 300.210(C) specifically requires the CG to identify potential environmental effects on fish and wildlife, their habitat, and other sensitive environments resulting from removal actions or countermeasures, including the option of not removing the spilled substance at all. "As 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." (*Amoco Oil v. EPA*).

The NCP and more specifically, individual ACPs establish a framework of substantive and procedural considerations and requirements to follow when undertaking clean-up activities. The NCP describes the process where upon receipt of notification of release of a hazardous substance into the environment or a discharge of oil into the navigable waters of the United States, the responding agency must evaluate whether to commence a site evaluation based on the exigencies of the incident and the time available to plan for the removal or remedial action. A preliminary assessment/site inspection 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. This preliminary assessment is similar to the EA required by NEPA because it evaluates the environmental impact of the operation on the environment.

To further elucidate the courts decisions on functional equivalence doctrine, the following several cases have found that EPA's activities in furtherance of various environmental statutes are the functional equivalent of compliance with NEPA and therefore EPA is not required to comply with NEPA in those circumstances. Ultimately, the courts have found functional equivalency based on three criteria:

- a. The agency's organic statute must provide "substantive and procedural standards that ensure full and adequate consideration of environmental issues."
- b. The agency must afford public participation before a final alternative is selected.
- c. C. The action must be undertaken by an agency engaged primarily in the examination of environmental issues.

It should be noted that courts have continued to decline any attempt to apply the doctrine to any other agency other than EPA, including departments that have substantial environmental responsibilities (Functional Equivalence Doctrine).

Recall that NEPA requires that the impacts and the alternatives to action be carefully considered in the decision making process. Similarly, the NCP requires the Federal OSC to consider many different response alternatives. The alternatives considered which are dependant on local or regional needs, can include mechanical cleanup, dispersant use, a combination of both, fire in-situ, and even the effects of taking no action. Each alternative must be weighed while taking into consideration the local environment, the location of the oil spill, weather and sea conditions and resources available.

Ultimately, the general goals, duties, and authority of OSCs tasked with oil spill response or hazardous substance response missions are very similar. The CG and EPA are companion federal agencies tasked with similar missions in corresponding areas of jurisdiction. Given that several of the NEPA functional requirements are more than satisfied by the processes already inherent within the NRS and specifically the ACP process, it is logical to extend the doctrine of functional equivalence to the CG's NCP/NRS activities, and therefore excluding ANY NCP/ACP planning, preparedness, response and mitigation activities from NEPA review.

### CONCLUSION

The cornerstone requirement of NEPA is the requirement to prepare an environmental impact statement (EIS) prior to any actions taken by the federal government. Federal courts have allowed for a functional equivalence exemption for specific NEPA requirements for the EPA and because of their adherence to "substantive and procedural standards ensure full and adequate consideration of environmental issues." The court rational was based on the fact 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. Many courts have held that NEPA compliance is unnecessary where the agency is independently required to consider environmental issues.

It would be practically impossible to conduct NEPA analysis for the clean up of every oil discharge and/or the release of hazardous substances to the environment. Spills require immediate response and cannot wait for the drawn out NEPA process. Instead, these actions are contemplated in advance, through the NCP via the NRS and the considerable pre-planning via individual ACPs. The NRS is over 30 years old now and is a time tested pre-approval planning process that provides the same, if not greater, procedural protections as is afforded by the goals laid out within

NEPA. NEPA requires informed decision-making and outreach to affected communities. In developing ACP plans under the NCP, the public, industry and especially local community comments are vital to constructing the plan.

Therefore, U.S. Coast Guard planning, preparedness, and response efforts, which take place under the NCP more than satisfy NEPA requirements for public participation, environmental analysis, and planning. The existing procedures exceed any possible NEPA requirements for exigent circumstances under the NCP. In that the U.S. Coast Guard has the same responsibilities and authorities under the NCP as the EPA, and that one of the U.S. Coast Guard's primary missions is protection of the environment; U.S. Coast Guard preparedness and response efforts, which are undertaken in conjunction with the responsibilities and authorities found in the NCP, should be interpreted to satisfy NEPA requirements for public participation, environmental assessment and analysis, and planning in that these requirements are functionally equivalent to those found within NEPA.

### BIOGRAPHY

LTJG Jereme M. Altendorf has a BS in Chemistry with a double major in Environmental Science from Creighton University in Omaha, NE. While working as a Federal On Scene Coordinator for 3.5 years at EPA's Region 7 headquarters, he also completed a Masters in Engineering with an emphasis in Environmental coursework. Mr. Altendorf was accepted into the Coast Guard's Officer Candidate School in February of 2002, and once commissioned, assigned to Coast Guard Headquarters in Washington, DC where he was the Hazardous Materials Response Policy Officer.

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