U.S. Department of Justice

Environment and Natural Resources Division

Assistant Attorney General

Washington, D.C. 20530

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MEMORANDUM

TO: Steven Herman, EPA
Jean Nelson, EPA
Scott Fulton, EPA
Geoffrey Garver, EPA
Robert Nordhaus, DOE
Mary Anne Sullivan, DOE
Ellen Livingston Behan, DOE
Katie McGinty, CEQ
Ray Clark, CEQ
Elisabeth Blaug, CEQ
Sherri Wasserman Goodman, DOD
Patricia Rivers, DOD

FROM: Lois J. Schiffer
Assistant Attorney General
Environment & Natural Resources Division

CD

SUBJECT: Agreed to Report of March 31, 1994 Meeting Regarding The Application of NEPA to CERCLA Cleanups

On March 31, 1994, officials from the Department of Energy (DOE), the Environmental Protection Agency (EPA), and the Council on Environmental Quality (CEQ) met with then Acting Assistant Attorney General Lois Schiffer and other representatives of the Department of Justice (DOJ) to discuss the issue of the relationship of the National Environmental Policy Act (NEPA) to the cleanup of federal facilities under the CERCLA Superfund Program. The meeting focused on proposals for addressing problems that have arisen from DOE's attempts to integrate the procedural and analytical approaches of NEPA into the CERCLA cleanup process. The following describes what was discussed at the meeting and the consensus reached there.

DOE representatives explained that, in the past, DOE sought to integrate the NEPA and CERCLA processes in the cleanup of its federal facilities because it was concerned about possible legal challenges if it did not and because it generally felt that integration could be beneficial for the cleanups. They said,

however, that such policy has met with resistance from some EPA regional offices on the grounds that DOE's attempts to integrate NEPA and CERCLA have at times delayed cleanup.

The DOE representatives stated that the agency was proposing to change its policy so that integration of the NEPA and CERCLA processes would not be attempted "across the board," but, rather, that a decision would be made on a case-by-case basis to determine whether integration is appropriate at a given site (e.g., when off-site incineration is involved). At the meeting, DOE sought an assurance from DOJ that a decision not to integrate the NEPA and CERCLA processes at a given site would be defended if challenged in court, and an assurance from the EPA and CEQ that the agencies would concur in a policy of site-specific decisions as to whether to integrate the NEPA and CERCLA processes.

As background, Ms. Schiffer analyzed the major components of NEPA as 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 development of environmental information related to the agency's proposal; and, 3) generally providing, under the APA, for judicial review of the substance of such environmental information and the public process before the action commences. Ms. Schiffer stated that the first two components were valuable in the CERCLA cleanup process and that federal agencies, including EPA, should be encouraged to incorporate public participation and relevant data collection into the CERCLA process.

She explained that the CERCLA cleanup process itself incorporated these values to some degree (and noted that the proposed reauthorization bill required greater community involvement than the current statute). But Ms. Schiffer also emphasized that agencies should feel free, if they chose, to go beyond what is generally expected and required under CERCLA. She said, however, that CERCLA's Section 113(h) bar on pre-enforcement review, which is vital to obtaining expeditious cleanups, clearly conflicts with the third component of NEPA which generally permits judicial review prior to the commencement of the agency action.

In her view, this irreconcilable conflict supports DOJ's historic position that NEPA, as a matter of law, does not apply to CERCLA cleanups. Ms. Schiffer said that, in any event, CERCLA's Section 113(h) bar on pre-enforcement review would prevent pre-enforcement review of any NEPA analysis prepared in conjunction with a cleanup.

In light of the above, the Ms. Schiffer stated that DOJ

would defend DOE's decision at a given site not to apply NEPA as part of the CERCLA cleanup process. She said that the issue of applying NEPA values to CERCLA cleanups can best be addressed by EPA's evaluating whether to require additional public participation and data gathering within the CERCLA process, if necessary by amending the National Contingency Plan. The EPA representatives stated that the agency would not oppose DOE's attempts to integrate a voluntary NEPA process with the CERCLA process on a case-by-case basis, provided the integration does not impede the timely cleanup of a site. EPA agreed that it would inform both Headquarters and regional offices of this approach, and assure compliance so that DOE would not face impediments to the approach within EPA. The EPA representatives agreed to address those concerns and report back to DOJ.

Finally, representatives from CEQ voiced no objection to the outlined approach and stressed that federal agencies should integrate NEPA values into the CERCLA process where feasible and appropriate.