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To Police the Police: Functional Equivalence to the EIS Requirement and EPA Remedial Actions under Superfund

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Concern for the environment is a compelling current issue.¹ Advances

¹ See, e.g., S. Rep. No. 848, 96th Cong., 2d Sess. 53-54 (1980) (discussion of environmental hazards to be addressed under the Comprehensive Environmental Response, Com-
in technology have brought great benefits, but have produced an unwanted by-product: increasing amounts of hazardous waste.\(^2\) Congress has been impelled to act to head off environmental disaster and to initiate efforts toward environmental improvement.\(^3\)

In 1969 Congress passed the National Environmental Policy Act (NEPA).\(^4\) NEPA has two major purposes: (1) to require careful consideration by each federal agency of the environmental effects of agency action that has a substantial environmental impact, and (2) to provide meaningful opportunity for public participation in the agency's process of reaching its ultimate decision about such an action.\(^5\) To fulfill NEPA's requirements, a federal agency must ordinarily prepare an environmental impact statement (EIS).\(^6\) An EIS is filed with and examined by the Environmental Protec-

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4. Id.

5. Id.

6. The EIS, a structured analytic report, is the ordinary means for NEPA compliance. The report may run several thousand pages and is prepared through a carefully regulated process. See infra notes 52-64 and accompanying text. It is based upon the five core issues set forth in sections 102(2)(C)(i)-(v) of NEPA, 42 U.S.C. §§ 4332(2)(C)(i)-(v) (1982), which provide that an EIS must address the following areas:

(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;
(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and
(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id.

The EIS process exposes the agency's plan to public scrutiny and comment through structured procedures designed to give notice and elicit response. See infra notes 54-61. Regulations governing the preparation of an EIS are codified at 40 C.F.R. pt. 15 (1983). They are promulgated by the President's Council on Environmental Quality (CEQ), a three-member council created pursuant to 42 U.S.C. §§ 4341-4346 (1982). In addition to promulgating the regulations for EIS preparation, the CEQ must report annually to the President on the state of the environment. 42 U.S.C. § 4344 (1982). CEQ regulations provide that under certain circumstances alternatives to the EIS meet NEPA's requirements. For example, in an emergency, streamlined alternative procedures may be employed. See infra notes 63-64 and ac-
tion Agency (EPA). The EIS fulfills the underlying purposes of NEPA in two ways. First, preparation of an EIS requires application of a specific format, set forth in NEPA's section 102(2)(C), to ensure a careful balancing of the adverse environmental effects of the proposed agency action against the benefit sought through that action. Second, the EIS procedure offers an opportunity for public participation in an agency's deliberation and choices, thereby providing useful information to the agency and promoting reasonable agency decisions based on consideration of all responsible views. Through its content and procedural process the EIS is designed, ultimately, to prevent agency errors resulting in avoidable harm to the environment. Thus, the EIS serves Congress's intent in enacting NEPA: to make the federal government a model citizen in its relationship to the environment.

What the EPA must do to comply with NEPA is at the center of a debate over the EPA's planned enforcement of Superfund legislation.

companying text. Or the environmental assessment (EA), the initial evaluation of the environmental impact of the agency's plan, may result in a "finding of no substantial impact" (FONSI), relieving the agency of its obligation to prepare an EIS. See infra notes 52-53.

7. The EPA was established under Reorganization Plan No. 3 of 1970, effective Dec. 2, 1970, 84 Stat. 2086 (noted at 42 U.S.C. § 4321 (1982)). Copies of a final EIS prepared by any federal agency are filed with the EPA. See 40 C.F.R. § 1506.9 (1983); see also infra note 58 and accompanying text.

8. See discussion supra note 6.


10. See, e.g., Weinberger v. Catholic Action of Hawaii Peace Educ. Project, 454 U.S. 139, 143 (1981) (even where defense concerns made full EIS procedure impossible, public must be informed that the environment has been considered); California v. Block, 690 F.2d 753, 761 (9th Cir. 1982) (significant opportunity for public participation must be present for functional equivalence to an EIS).

11. See generally Jackson, supra note 3.


13. Id.

14. Memorandum from EPA General Counsel on Applicability of Section 102(2)(C) of NEPA to Superfund Response Actions, [1982 Transfer Binder] Env't Rep. (BNA) 709 (Sept. 17, 1982) [hereinafter cited as Memorandum]; see Environmental Defense Fund, Inc. v. EPA, No. 82-1224 (D.C. Cir. filed Oct. 14, 1982); New Jersey Dep't of Envtl. Protection v. EPA,
Superfund is a comprehensive statutory scheme authorizing cleanup of abandoned hazardous waste sites where release of hazardous substances into the environment is actually occurring or threatens to occur. Superfund authorizes the EPA to take three types of cleanup actions: removal, planned removal, and remedial. All three actions have a substantial impact upon the environment and thus fall within NEPA.

The EPA's cleanup actions are, of course, intended to enhance the environment. Yet some cleanup methods themselves are a potential source of further harm. An inappropriate choice of cleanup technique can cause actual physical damage equal to, or graver than, the dangerous situation the

No. 82-2238 (D.C. Cir. filed Oct. 14, 1982) (pending NEPA challenges to Superfund regulations).


Section 104 of Superfund authorizes the President to act "consistent with the national contingency plan" to arrange removal or remedial action. 42 U.S.C. § 9604 (1982). See infra note 16 and accompanying text for discussion of types of response actions. This provision, along with language in § 105, providing that the NCP "shall establish procedures and standards for responding to releases of hazardous substances, pollutants, and contaminants (42 U.S.C. § 9605 (1982)), incorporates the NCP into the statute.

16. "Removal" is defined as "actions . . . 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 [of hazardous material]." 42 U.S.C. § 9601(23) (1982). "Release" is defined, in part, as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment . . . ." 42 U.S.C. § 9601(22) (1982). See 40 C.F.R. § 300.65 (1983).

"Planned removal" is not included within the provisions of Superfund, but is defined in the NCP as a permanent, long-term remedy carried out at the site of a removal action once imminent danger has been mitigated. For planned removal, the EPA must determine that there would be "a substantial cost savings by continuing a response action with the equipment and resources mobilized for an immediate removal . . . ." 40 C.F.R. § 300.67(l) (1983).

"Remedial" actions have been described by the EPA as those that normally "address situations that do not require an immediate or expedited response and therefore allow for the time necessary to conduct detailed planning and evaluation." Memorandum, supra note 14, at 711. See 40 C.F.R. § 300.68 (1983).

17. See supra note 12; Memorandum, supra note 14, at 709-10.
agency seeks to ameliorate. Furthermore, choosing unnecessarily expensive cleanup methods depletes the fund so as to foreclose action at other sites and may make impossible the compensation of those damaged by harm incidental to cleanup action. Finally, because private parties (designated as "responsible parties" by the statute) are ultimately liable for costs of Superfund cleanup actions, their rights to due process may be violated if agency choices regarding cleanup methods are reached without adequate notice and opportunity to be heard. Thus, absent emergency conditions at a particular site, the risks inherent in Superfund response actions present a need for exactly the type of procedures mandated by

18. The EPA acknowledges that dangers are inherent in some cleanup actions: "Exhuming wastes from a landfill, for example, may create significant hazards for workers and others who are nearby and may be exposed to wastes." 47 Fed. Reg. 32,315 (1982). The possibility exists that the very action to line [e.g., with a clay liner to retard leaching of wastes] a hazardous landfill or exhume the contaminated soil may itself be "dangerous or impracticable." Id. See infra notes 202-03 and accompanying text; cf. Portland Cement Ass'n v. Ruckelshaus, 486 F.2d at 375 (measures to enforce clean air standard could result in harmful increase in water pollution). For full discussion of Portland Cement, see infra notes 76-95 and accompanying text.

19. See Liability for Claims Against Contractors under Superfund Limited to Available Funds, [1982 Transfer Binder] ENV'T REP. (BNA) 849 (Oct. 22, 1982) [hereinafter cited as Liability for Claims]. Any damage to the persons or businesses of third parties resulting from the cleanup itself may not be fully compensable. See also infra notes 214-16 and accompanying text. Money from Superfund should be expended carefully, to permit cleanup of more sites. The NCP mandates cost-consciousness for all three types of cleanup actions. Even for removal actions, immediate action must terminate after $1 million has been obligated for the action or six months has elapsed since the action was initiated, unless a continued emergency has been established. 40 C.F.R. § 300.65(d) (1983). For planned removal, the initial criterion is that substantial cost savings will result by continuing cleanup response action with equipment and resources already mobilized for an immediate removal action. 40 C.F.R. § 300.67(a)(1) (1983). For remedial actions, the agency must use the “lowest cost alternative that is technologically feasible and reliable and which effectively mitigates and minimizes damage to and provides adequate protection of public health, welfare, or the environment.” 40 C.F.R. § 300.68(j) (1983). The agency is to consider the amount of money available in the Superfund for response at other sites. 40 C.F.R. § 300.68(k) (1983).

20. See supra note 15 and accompanying text.

21. The right to due process in such circumstances has been long established. See Londoner v. Denver, 210 U.S. 373 (1908). In Londoner, a Colorado statute empowered the Denver board of public works to pave the city streets and tax abutting landowners for the costs. The tax was apportioned to each landowner according to the extent his property fronted on the improved street. The United States Supreme Court held that, where an assessment affected only specific individuals, they had right to notice and opportunity to be heard before an obligation became irrevocably fixed. Id. at 385-86. See also Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 876 (1st Cir. 1978) (formal hearing required to protect rights of citizens at specific site when effects of agency’s action potentially might deplete shellfish, fish and wildlife at the site); K. Davis, ADMINISTRATIVE LAW TREATISE, § 7.2 (2d ed. 1979) (enforcement affecting specific individuals is “adjudicatory” in nature, triggering due process right to notice and opportunity to be heard before the agency takes significant action).
NEPA.\textsuperscript{22} Left to its discretion, the EPA apparently plans to offer only minimal opportunity for comment within each cleanup locality, and does not intend to publish notice in the \textit{Federal Register} inviting comment when planning for each site is initiated.\textsuperscript{23} Meetings may be held at some sites, but are designed primarily to notify citizens what to expect shortly before, for instance, the bulldozers rumble onto the site. Plans will become available for public inspection only after they are virtually complete, beyond the point when comments could bring about meaningful adjustment.\textsuperscript{24}

Congress has never explicitly imposed the full-fledged EIS requirement across the board on EPA actions. Nor has Congress provided a blanket exemption for the EPA.\textsuperscript{25} Where, as in the Superfund legislation, Con-

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\item[22. ] See 40 C.F.R. § 1506.11 (1983); see also infra notes 198-213 and accompanying text.
\item[23. ] See infra notes 204-07 and accompanying text. For the EPA's statement of its current policy, see draft of chapter on Community Relations Policy from Guidance for Implementing the Superfund Program, pt. III, sec. 4 (May 1983) (unpublished EPA material available from BNA) [hereinafter cited as Community Relations Policy].
\item[24. ] Community Relations Policy, \textit{supra} note 23, at 3-4. Once a site has been identified for remedial action, plans proceed in several stages: (1) development of alternatives; (2) initial screening of alternatives on the basis of costs, effects and engineering feasibility of each alternative; (3) detailed analysis after initial screening has eliminated undesirable alternatives; and (4) final selection of most appropriate alternative. 40 C.F.R. § 300.68(g)-(j) (1983). The EPA indicates, however, that "[i]n the case of simple remedial measures, such as fencing, storing drums, site security, etc., the public should be informed through the public meeting on the RAMP [the Remedial Action Master Plan, which focuses on overall action at the site]." Community Relations Policy, \textit{supra} note 23, at 3-4. It is not clear whether the notification of the community at the RAMP meeting is intended to substitute for an opportunity to inspect the plan and comment on it or is in addition to that opportunity. The EPA indicates that the community should have a three-week period to comment before a final alternative is chosen, but then states that some steps toward cleanup may proceed prior to completion of a full feasibility study. \textit{Id.} See 40 C.F.R. § 300.68(e)(1) (1983) (provision of NCP that would permit initial remedial measures to begin before final selection of appropriate remedial action). Factors permitting such initial actions, however, are threats so imminent and serious that removal action arguably is indicated. 40 C.F.R. § 300.68(e)(1)(i)-(vii) (1983) (factors include, e.g., serious threat of fire or explosion and contaminated water at the drinking tap). \textit{See infra} notes 204-07; see also Jones, \textit{Hazardous Waste Cleanup, a Special Report}, 21 CH\textsuperscript{2}M HILL REPORTS 5-6 (1983) (contractor hired by EPA to carry out remedial action at 85 sites indicates community participation program consists primarily of notifying public of actions as they are to be implemented).
\item[25. ] Some statutes specifically relieve the EPA of any EIS obligation, implying that the obligation otherwise exists. \textit{See infra} note 96 and accompanying text (Amendment to the Clean Air Act relieves the EPA of obligations under NEPA). Other statutes specifically impose the EIS requirement on the EPA, implying that the EPA is generally exempt. \textit{See infra} notes 115, 135-36 and accompanying text (Amendments to the Federal Water Pollution Control Act specifically impose NEPA obligations on the EPA for implementation of the Act). Polar positions are revealed in the early NEPA cases involving the EPA. \textit{Compare} Anaconda Copper Co. \textit{v.} Ruckelshaus, 4 E.R.C. 1817, 1828 (D. Col. 1972) (cited in \textit{Portland Cement}, 486 F.2d at 379) (all federal agencies must file an impact statement; as EPA is a
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gress has been silent regarding exactly how NEPA applies, some courts have required the EPA to provide opportunities for public participation that are functionally equivalent to NEPA's EIS requirement.

Functional equivalence is based upon a court's determination that something akin to, but short of, a full-fledged EIS fulfills the EPA's obligations under NEPA as the agency acts to effectuate a particular environmental statute. Functional equivalence analysis is two-tiered. First, the court considers the urgency of the situation the agency is addressing, and the extent to which its enabling statute and the accompanying regulations themselves require consideration of NEPA's core concerns. Second, it considers the record to see whether, under all the circumstances, there was sufficient opportunity for the public and affected parties to comment, and whether that information was considered by the agency. Courts appear willing to allow more minimal participation procedures where an emergency requires quick EPA action.

Underlying the doctrine of functional equivalence are two competing, crucial policy considerations. First, the goal of protecting the public's health and safety makes it necessary for the EPA to move quickly and avoid the sometimes excruciating delay that attends EIS procedures.

26. See, e.g., discussion by Portland Cement court, infra notes 78-89 and accompanying text; see also infra note 27. Congress is aware that courts generally hold the EPA to some form of NEPA compliance. In an amendment to the Clean Air Act, enacted during the energy crisis created by the Arab oil embargo, Congress created a total exemption from NEPA for EPA's actions under the Act. Pub. L. No. 93-319, § 7, June 22, 1974, 88 Stat. 259 (codified at 15 U.S.C. § 793 (1982)). The highly specific nature of the exemption implies that, in general, Congress does intend that the EPA be bound by NEPA. See infra note 96.

27. Functional equivalence has been extended to the EPA for implementation of the Clean Air Act (in Portland Cement, discussed infra notes 75-95 and accompanying text); the Federal Insecticide, Fungicide and Rodenticide Act (in Environmental Defense Fund, Inc. v. EPA, discussed infra note 97); the Ocean Dumping Act of 1972 (in Maryland v. Train, discussed infra notes 110-118 and accompanying text); the Water Pollution Control Act (in Weyerhaeuser Co. v. Costle, discussed infra notes 134-42 and accompanying text); and the Toxic Substances Control Act (in Warren County v. North Carolina, discussed infra notes 119-31 and accompanying text).

28. See supra note 27.

29. See, e.g., Portland Cement, 486 F.2d at 385, discussed infra note 85 and accompanying text.

30. See, e.g., Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1029 (D.C. Cir. 1978), discussed infra notes 134-42 and accompanying text.


Second, that same goal demands that the EPA consider adequately any information that would prevent serious error in the agency's course of action. To avoid needless harm to the environment, public comment is essential.

With the EPA poised to begin major implementation of Superfund, the precise meaning of functional equivalence is at issue. An analysis of the case law of functional equivalence, as applied to the EPA, reveals that courts have balanced a perceived need for streamlined action in an emergency with a recognition of the values inherent, when circumstances permit, in more extensive procedures. Absent an emergency, courts have, in each instance, scrutinized the record built by the EPA under its equivalent procedures to look for reasoned decisionmaking, that is, for careful consideration of responsible comments. The EPA's current policies for planning remedial actions appear inadequate to build such a record. Thus, for these Superfund actions, agency policies fall short of the requirements of the functional equivalence standard.

This Comment will trace the development of the functional equivalence standard for EPA compliance with NEPA and will show how the agency's policies for planning remedial actions fail to meet that standard. It will propose a public participation program that would carry out NEPA's goals while still permitting expeditious relief. Part I will outline NEPA's underlying goals and the procedure designed to fulfill them—the EIS. Part II will trace the case law of functional equivalence. Part III will examine Superfund's provisions for remedial actions against the backdrop of functional equivalence case law and will propose a four-point program to achieve NEPA compliance. The Comment will conclude that, because urgency is much reduced for remedial actions, the EPA should amend Superfund's regulations to provide a more substantial opportunity for public comment to meet the standard of functional equivalence.

I. THE EIS: MAKING THE ENVIRONMENT A PRIORITY

In enacting NEPA, Congress recognized the profound environmental

33. As the Portland Cement court pointed out, "[A] NEPA statement's procedures, though burdensome, allow for needed input by other federal agencies and simultaneously open up the decision-making [sic] process to scrutiny by the public." 486 F.2d at 384.
34. See infra notes 199-201 and accompanying text.
36. See Portland Cement, 486 F.2d at 402; Weyerhaeuser, 590 F.2d at 1024-25.
impact of federal agency decisionmaking. Prior to NEPA, those decisions had been based almost entirely on economic considerations. Congress intended the federal government, under NEPA, to become a model environmentalist sensitive to public desires and aspirations for a healthy environment.

NEPA's two policy goals are careful consideration of the environment and meaningful opportunity for public participation in a federal action having substantial environmental impact. The procedural device created by NEPA to serve its goals is the environmental impact statement (EIS). In preparing a preliminary EIS, a federal agency analyzes a proposed action in light of the five core issues of NEPA's section 102(2)(C) and allows that action to be scrutinized by the public, other agencies and Congress. Through this analysis, the planning agency must consider the long and short-term benefits and adverse effects of its proposed action, plausible alternatives and their likely effects, and the cost of each alternative. In its final form, the EIS incorporates the agency's responses to the substantive comments drawn forth by its draft EIS. The EIS is designed to ensure that potential environmental problems are considered early in the deci-

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Your committee does not believe that a useful purpose would be served by a recitation of the many environmental problems which confront us today. It is a simple fact of life that policies of agencies of the Federal Government may and do conflict; it is equally true that there are occasions where, without the benefit of conflicting policies, these Government agencies may and do adopt courses that appear to conflict with the general public interest.

Id.

39. See Senate Report on NEPA, supra note 3; Jackson, supra note 3; see also Comment, America's Changing Environment—Is NEPA a Change for the Better, 40 FORDHAM L. REV. 897, 902 (1972).

40. 42 U.S.C. § 4331(a) (1982). See Jackson, supra note 3, at 1081-82:

The needs and aspirations of future generations make it our duty to build a sound and operable foundation of national objectives for the management of our resources and our environment. We hold those resources in trust for our children and their children. The future of succeeding generations in this country will be shaped by the choices we make. We must choose well, for they cannot escape the consequences of our choices.

Id.


43. See supra note 6. The CEQ regulations establish procedures designed to promote public participation in agency decisionmaking. See discussion infra notes 49-62 and accompanying text.


45. See infra notes 55-62 and accompanying text.
sionmaking process, before irrevocable commitments of resources have been made.46

The importance of public participation is clear from the legislative history of NEPA.47 Congress sought, through NEPA, to maintain open lines of communication between agencies and affected segments of society.48 Accordingly, Congress gave the Council on Environmental Quality (CEQ),49 an executive advisory body created by NEPA, the responsibility of implementing the directives of section 102 regarding content of an EIS and provision of an opportunity for public participation in its preparation.50 The EIS was to provide a framework for an agency's planning and its ultimate arrival at a decision.51

The EIS process begins with a federal agency's preliminary assessment of a proposed action's environmental impact.52 If this assessment results in a finding of no substantial impact (that is, only insignificant impact), the action is deemed outside NEPA, and no EIS is required.53 Should the environmental assessment indicate, however, that the proposed action falls within NEPA, an agency must begin the formal EIS process by publishing in the Federal Register a notice of intent to prepare an EIS.54 In its draft EIS, the agency must identify the purpose of and need for the project and evaluate it in light of the five core issues of section 102(2)(C) of NEPA.55 For at least forty-five days, the agency must circulate the draft EIS among relevant federal, state and local environmental agencies, affected Indian tribes, and the public.56

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46. See Jackson, supra note 3, at 1079.
47. See supra note 12 and infra notes 58-59.
49. See supra note 6 and accompanying text.
53. Id. at §§ 1501.4(e), 1508.13. For a discussion of the environmental assessment and criteria for NEPA compliance when the assessment results in a finding of no substantial impact or a finding of irreconcilable conflict with the statute being implemented, see generally, Comment, Environmental Impact Statements: Instruments for Environmental Protection or Endless Litigation?, 11 FORDHAM URB. L.J. 527 (1983). Courts have recognized that a federal agency is exempt from complying with NEPA if compliance would result in a "clear and unavoidable conflict" with the purpose or procedure of the agency's enabling statute. Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776, 788 (1976).
55. Id. §§ 1502.9(a), 1502.13-1502.16.
56. Id. §§ 1503.1, 1506.10(c).
The agency must then issue a final EIS after it has considered the comments received on the draft version. Copies of the final EIS are filed with the EPA, transmitted to agencies that commented on the draft, and made available to the public. In its final EIS, the agency must respond to comments submitted on the draft EIS and discuss responsible opposing views that were considered inadequately in the draft. Before its ultimate decision on the project, the agency must generally wait at least thirty days after the EPA publishes notice of the final EIS in the Federal Register. That decision must be presented in a public record of decisionmaking articulating the basis for the agency's choice, listing the alternatives considered, and identifying any necessary mitigating measures. Thus, the EIS process sets out elaborate steps designed to fulfill NEPA's mandate for careful consideration of the environment.

Exemptions set forth in the CEQ regulations, however, can relieve an agency of its EIS obligations. One such exemption pertains to "emergency" situations. Yet the regulations provide no definition of what constitutes an emergency. They merely provide that an agency acting in an emergency must notify the CEQ of its determination that an emergency exists, and work out appropriate alternatives to the EIS procedure.

Despite the benefits flowing from preparation of an EIS and the specific-
ity of the regulations governing its preparation, courts have viewed the EIS requirement as somewhat elastic, depending on the particular agency and circumstances under which it is acting. The flexibility may be justified in situations where action is urgently needed because preparation of a full-fledged EIS can take considerable time. Therefore, courts have balanced the urgency of an action against the fullness of an agency's five-issue analysis and the opportunity it provided for public participation. Finally, an agency's environmental expertise is weighed in the balance as a court considers the adequacy of the agency's environmental analysis.

Although case law is far from consistent, courts generally look for some form of NEPA compliance in EPA actions, even when the agency's enabling statute does not impose explicit NEPA requirements. Courts have recognized the need for a less rigid standard, however, when the EPA is involved. The EPA is considered entitled to greater deference because the environmental concerns embodied in NEPA involve the kind of balancing that the EPA invariably must carry out in its role as environmental overseer. The accommodation reached by the courts is embodied in the


70. See, e.g., Weyerhaeuser, 590 F.2d at 1051 n.66.

71. See id. at 1051 n.65; see also Train, 415 F. Supp. at 122.
concept of functional equivalence, a judicially created doctrine holding that substantial compliance by EPA with NEPA's requirements is an effective substitute for preparation of an EIS.  

II. FUNCTIONAL EQUIVALENCE TO THE EIS REQUIREMENT


Functional equivalence is a determination by a court that a federal agency has achieved the underlying purposes of NEPA by means parallel to an EIS, where an EIS would, at least technically, be required. Courts look for two factors in the agency's record: first, whether the agency has fulfilled its substantive NEPA duty of balancing environmental costs against benefits; and, second, whether the agency has employed public participation procedures commensurate with the complexity of its proposed action and within the time available for planning. While courts generally hold that functional equivalence satisfies the EPA's obligations under NEPA, exactly what constitutes "equivalence" remains unclear. The standard differs depending upon the facts and circumstances of each case. An examination of the case law offers some insight into the balancing process applied by the courts, and suggests an appropriate framework for functional equivalence analysis for the three types of Superfund cleanup actions.

The functional equivalence standard originated in cases involving EPA enforcement of the Clean Air Act. In the leading case, Portland Cement Ass'n v. Ruckelshaus, a trade association of cement manufacturers challenged the promulgation by the EPA of particulate emission standards for new or modified cement plants. The association charged that the EPA's Administrator violated NEPA by failing to prepare an EIS before promulgating the standards. Consequently, the EPA failed to consider adequately both the economic costs of and the achievability of those

73. See infra notes 75-97 and accompanying text.
74. Weyerhaeuser, 590 F.2d at 1051 nn.65-67. See infra notes 134-42 and accompanying text.
77. Id. at 377-78. The agency was acting pursuant to § 111 of the Clean Air Act, 42 U.S.C. § 1857c-6 (1982), to establish emission standards for stationary sources. Stationary sources include, for instance, factory smokestacks, and exclude moving sources, such as vehicle exhaust systems.
78. Portland Cement, 486 F.2d at 379.
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standards. The EPA contended that, as an environmental protection agency, it was not subject to NEPA, and that even if it were, statutory time constraints relieved it of any NEPA obligations.

The United States Court of Appeals for the District of Columbia Circuit held that EPA's public participation opportunity procedures under the Clean Air Act must be "functionally equivalent" to a full-blown EIS. The court determined that the best solution would be to balance the need for swift action against the need for full deliberation. The court's balancing resulted in its finding a narrow exception, functional equivalence, for EPA's action in promulgating standards under the Clean Air Act. The Portland Cement court reasoned that functional equivalence struck a "workable balance between some of the advantages and disadvantages of full application of NEPA." Section 111 of the Clean Air Act, properly construed, required consideration of the same factors as an EIS. The EPA, using notice and comment rulemaking, had provided ample opportunity for public participation. Indeed, 200 interested parties had actually commented. The EPA's Administrator had published an explanation of how the agency had reached its conclusions concerning the particulate emission standards. A record had thus been built for the court to scruti-

79. Id. The issues raised in Portland Cement were interrelated since economic analysis is required by NEPA (id. at 387 n.49), and feasibility of standards is closely tied to the second core issue of NEPA, adverse effects of the proposed plan. The association offered some evidence that, under then-existing technology, air scrubbers would produce a harmful level of water pollution as part of their operation. Under the technique of air scrubbing, glass fabric bags would capture the harmful gas and particle mixture. The bags were cooled by a water spray to avoid damage from the excessive heat of the smokestacks. The water spray would sometimes combine with the dust to form a gummy residue, which had to be continuously flushed out to keep the filter system operating properly. That flushing procedure produced liquid purge waste, which caused water pollution. Id. at 384, 390-91. The association argued that those adverse effects would have been addressed and opened to public scrutiny by an EIS, and presumably would have altered the EPA's decision. Id. at 384.

80. Id. at 380-81.

81. Id. at 386, 402.

82. The court looked for evidence that the decision had been based on a consideration of the relevant factors, and that there had been no clear error of judgment. Id. at 394, 402.

83. Id. at 387.

84. Id. at 386.

85. Id. at 385.

86. Id. at 378-79.

87. Id. at 386. According to the Portland Cement court, functional equivalence offered more flexibility than the impact statement, but required that the EPA's statement of reasons and criteria be "a fuller presentation than the minimum rule-making requirement of the Administrative Procedure Act." Id. The minimum rulemaking requirement is that the Administrator offer a specific explanation of how he arrived at a particular standard. Id. at 379, 386 (citing Kennecott Copper Corp. v. EPA, 462 F.2d 846 (D.C. Cir. 1972)). Under functional equivalence, the agency must make "appropriate reference" to significant adverse en-
nize, thereby fulfilling an essential purpose of EIS procedure. The court studied that record, as it would an EIS, applying the Administrative Procedure Act's (APA) criteria for reasoned decisionmaking.

Writing for the court, Judge Leventhal surveyed the legislative history and found it inconclusive regarding congressional intent to apply NEPA's constraints to the EPA. He discussed the concerns voiced by NEPA's sponsor during congressional debate, and summarized them as "the endemic question of 'who shall police the police?'" Indeed, the EPA might not always be the "good guys." Furthermore, the agency "might wear blinders when promulgating standards protecting one resource as to effects on other resources." Finally, statutory time constraints (limiting the Administrator to 300 days for identification, development, and promulgation of standards) suggested that abbreviated procedures might be appropriate, but did not relieve the EPA of NEPA obligations.

In subsequent Clean Air Act cases, several courts applied the Portland Cement standard and found functional equivalence in procedures that were similar to those employed in Portland Cement. Moreover, shortly

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nit. See Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir.), cert. denied, 426 U.S. 941 (1976) (120-day comment period, with public hearings in Washington, D.C., Dallas, and Los Angeles; court required to engage in searching and substantial inquiry into facts, particularly in
after *Portland Cement*, federal courts began applying the functional equivalence standard to EPA actions under other environmental statutes.\(^9\) Some courts were reluctant to impose the standard, however, where the EPA had demonstrated a need for emergency action.

### B. Functional Equivalence and Emergencies

In *Wyoming v. Hathaway*,\(^9\) decided three years after *Portland Cement*, the United States Court of Appeals for the Tenth Circuit considered the functional equivalence standard in the context of a NEPA challenge to EPA deregistration of three substances under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).\(^9\) In *Hathaway*, the substances in question were chemical toxicants used by sheep herders for coyote control.\(^10\) At issue was whether an emergency existed: evidence showed that endangered wildlife had perished from indiscriminate baiting with the toxicants.\(^10\) Finding an imminent threat of irremediable loss of threatened

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highly technical cases); South Terminal Corp. v. EPA, 504 F.2d 646 (1st Cir. 1974) (two days of public hearings held in mid-comment period; court closely analyzed evidence relied upon by agency in holding that EPA had committed no clear error of judgment in computing need for emission reductions); Amoco Oil Co. v. EPA, 501 F.2d 722 (D. Cir. 1974) (public hearings held in three cities; court extensively analyzed agency's findings to conclude that reasoning was sound); Essex Chem. Corp. v. Ruckelshaus, 486 F.2d 427 (D. Cir. 1973), *cert. denied*, 416 U.S. 969 (1974) (over 200 comments considered; record remanded because agency had insufficiently considered damage to water from waste produced by air scrubbers).

In 1974 Congress amended the Clean Air Act to exempt EPA's actions under that Act from NEPA. The amendment provides that such actions are not to be deemed “major Federal Action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.” Pub. L. No. 93-319, § 7, June 22, 1974, 88 Stat. 259 (codified at 15 U.S.C. § 793 (1982)). Responding to the energy crisis created by the Arab oil embargo, Congress was seeking to facilitate industrial conversion to coal, favoring economic factors, at least temporarily, over environmental concerns. H.R. Rep. No. 1013, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 3281. The limited nature of the exemption arguably affirms the *Portland Cement* court's determination that Congress intended that the EPA generally comply with NEPA.


100. 525 F.2d at 67.

101. *Id.* at 68. The court spoke of “grave concern” over the reported deaths of twenty eagles who had consumed bait intended for coyotes. Other endangered species threatened by the poisons were bald and golden eagles, California condors, black-footed ferrets, moun-
wildlife, the EPA had acted immediately to ban the three substances. The district court granted an injunction permitting continued use of the substances, finding that the EPA violated NEPA by neither filing an EIS nor providing its functional equivalent prior to deregistration. On appeal, the Tenth Circuit reversed, holding that under the urgent circumstances, the EPA’s procedures satisfied its NEPA obligations. The Hathaway court determined that EPA’s procedures had been functionally equivalent to the preparation of an EIS. In its functional equivalence analysis, the court implied that a rigorous consideration of all five core NEPA issues may not have been essential. The EPA had, in fact, based its deregistration order on a single study, the Cain Committee Report.

The court noted that because the Cain Committee Report (commissioned by the CEQ and the Department of the Interior) contained some environmental balancing and discussion of alternatives, it constituted the functional equivalent of an EIS.

The Hathaway court softened the hard look of the Clean Air Act cases to

tain lions, grizzly bears, Rocky Mountain and red wolves. The court viewed diminution of these species as immediate and irreparable harm. Id. at 69.

102. The Hathaway court noted that “[e]ach death to that population [of endangered species] is an irremediable loss and renders such species closer to extinction.” Id. at 68 n.2. The court thus appears to be applying the direct conflict doctrine, which relieves an agency of NEPA obligations. See Pacific Legal Found. v. Andrus, 657 F.2d 829, discussed supra note 64; see also Flint Ridge Dev. Co. v. Scenic River Ass’n, 426 U.S. 776, 788 (1976) (federal agency is exempt from complying with NEPA if compliance would result in a “clear and unavoidable conflict” with the purpose or procedure of the agency’s enabling statute).

Wildlife conservation, while the immediate responsibility of the Fish and Wildlife Service, is closely intertwined with the EPA’s concerns. See Weyerhaeuser, 590 F.2d at 1051-52 (EPA has responsibility to consider effects of its actions upon wildlife).

103. 525 F.2d at 67.

104. Id. at 68-69.

105. Id. at 71.

106. Id. at 72.

107. Id. at 69. The Cain Committee Report was issued by the Advisory Committee on Predator Control at the University of Michigan.

108. Id. As a sharp dissent pointed out, however, the Cain Committee Report purported only to present one side, the conservation viewpoint. Id. at 73-74 (Seth, J., dissenting). Furthermore, the right to a hearing, provided in FIFRA, was available only to a registrant. In Wyoming, the sole registrant for use of the deregistered substances was a federal agency, the Bureau of Sport Fisheries and Wildlife. Thus the state and its stockgrowers, who merely benefitted from the Bureau’s use of the substances on their behalf, had no standing to seek a hearing. The opportunity to comment on an EIS or its equivalent was their only means of placing their concerns before the EPA. The Cain Committee’s refusal to include the opposing views in its Report, according to the dissent, rendered that study inadequate to serve a major purpose of NEPA, the provision of fair opportunity for all sides to be heard. Id. at 73-74. Moreover, a clear caveat in the Cain Committee Report indicated that its data was not drawn from carefully designed research directed to the pertinent question of harm to wildlife balanced against economic benefit to herders. Id. at 73-74.
a deferential complaisance. Although *Portland Cements*’s functional equivalence standard was not met, Hathaway’s outcome can be justified on the basis of an existing emergency. Nevertheless, the Tenth Circuit failed to develop adequately the emergency ground.

In *Maryland v. Train,* the United States District Court for the District of Maryland found functional equivalence in public participation procedures instituted under the Ocean Dumping Act of 1972. The EPA, without preparing an EIS, extended the sewage sludge dumping permit it had granted to Camden, New Jersey. Maryland, fearing pollution of its ocean beaches, raised a NEPA challenge to EPA’s action.

Considering several factors, the court held that functional equivalence met NEPA’s requirements. First, the Ocean Dumping Act contained no language specifically requiring EPA’s compliance with NEPA. Second, the exigent circumstances mandated swift action by the EPA. Without the dumping permit, Camden would have to dump its accumulated sludge in the Delaware River, thereby creating immediate health hazards to those living along the river. Third, the expertise of the EPA substituted for formal adherence to NEPA’s five core issue analysis. Finally, the court considered hearings held pursuant to the granting of previous dumping permits to Camden an opportunity for public comment adequate to satisfy NEPA’s goals. *Train* thus perpetuated Hathaway’s pattern of deference to the EPA when the agency persuades the court that an emergency exists.

The presence of an emergency also explains two recent decisions by the United States District Court for the District of North Carolina that effec-

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109. *Id.* at 68-69.
112. 415 F. Supp. at 122.
113. *Id.* at 121.
114. *Id.*
115. *Id.* at 122. The court found significant the fact that Congress specifically provided that the EPA must comply with NEPA in similar legislation, the Federal Water Pollution Control Act Amendments of 1972. See 33 U.S.C. § 1371(c) (1982). The absence of such language in the Ocean Dumping Act, the *Train* court indicated, raised a presumption that the EPA was exempt from filing an EIS under that Act. 415 F. Supp. at 122. The court evidently interpreted the doctrine of functional equivalence as placing an agency’s action outside NEPA, rather than offering an alternative means of NEPA compliance.
116. *Id.* at 122, 124.
117. *Id.* at 122.
118. *Id.* at 119-20, 123. The EPA had conducted two public hearings before issuance of two earlier permits to Camden. The *Train* court held that the EPA was required to hold a hearing on the renewal of Camden’s sludge dumping permit because the Ocean Dumping Act specifically provided for one. In the interim, however, dumping could continue. *Id.* at 123-24.
tively weakened the functional equivalence standard developed in Portland Cement. These cases, Warren County v. North Carolina and Twitty v. North Carolina arose from the discovery of waste containing polychlorinated biphenyls (PCBs), a highly carcinogenic substance, along miles of North Carolina's roadsides. To eliminate the danger presented, the state planned to remove the PCB-saturated soil and deposit it in a landfill in Warren County. The county and private parties who were adjoining landowners filed suits against North Carolina and the EPA to enjoin use of the site. A NEPA challenge was raised in both suits.

In both cases the district court held that functional equivalence satisfied EPA's obligation under NEPA, thus relieving the agency of any duty to prepare a site-specific EIS. The Warren County court adopted a two-pronged test: first, whether there was a fair and adequate opportunity for public participation in the decisionmaking; and second, whether EPA considered all matters brought to its attention before making a final decision. Applying this test, the court concluded that functional equivalence was met in both Warren County and Twitty.

In each case the district court found that there had been a fair and adequate opportunity for public participation, thus satisfying the first prong. North Carolina had prepared an EIS in accord with the state's environmental protection act, which was nearly identical to NEPA. Warren County and private citizens had commented extensively, and the state had responded to those comments. In addition to adopting the state's comprehensive EIS, the EPA had held a hearing to consider citizen complaints.

Furthermore, the record indicated that EPA's procedures met the court's second prong for functional equivalence. Pursuant to its responsibilities under the Toxic Substances Control Act, the EPA had reviewed North

122. Both Twitty and Warren County were decided by Judge Brit on Nov. 25, 1981. Both cases arose from the same set of facts. Twitty, 527 F. Supp. at 780-81; Warren County, 528 F. Supp. at 280-81.
123. Twitty, 527 F. Supp. at 780; Warren County, 528 F. Supp. at 280.
125. Warren County, 528 F. Supp. at 287.
126. Id. at 284, 290-91. See N.C. GEN. STAT. §§ 113A-1 to 113A-4 (1978).
127. Warren County, 528 F. Supp. at 290-96. The court reviewed in detail both the contentions of the plaintiffs and the response of the state environmental agency.
128. Id. at 287. It is not clear at what stage of planning the hearing was held.
Carolina’s EIS.\textsuperscript{129} The EIS specified the manner in which the landfill would comply with Toxic Substances Control Act regulations. Responding to concerns raised in the comments, the EPA had required that the plan proposed in the state EIS be modified to conform more precisely with federal regulations.\textsuperscript{130} Under the urgent conditions present in the case—the continued presence of the PCBs along the roadways—the court found that the EPA’s use of the state-prepared EIS met the functional equivalence standard.\textsuperscript{131}

The “emergency” line of cases—\textit{Hathaway}, \textit{Train}, \textit{Warren County}, and \textit{Twitty}—appear to have stamped functional equivalence as an imprimatur on whatever environmental balancing and procedures had been provided by the EPA. In each case, however, the urgency of the situation required the agency to exercise broad discretion, arguably consistent with the emergency exemption built into the CEQ regulations.\textsuperscript{132} In other functional equivalence cases where the urgency element was absent or less compelling, courts have adopted the thorough analysis of \textit{Portland Cement} and scrutinized the EPA’s procedures more closely.

\section*{C. The Evolution of the Portland Cement Standard}

More recent cases have helped develop the contours of the \textit{Portland Cement} standard. In these cases, courts have found functional equivalence only where the agency had (1) balanced environmental costs and benefits; (2) fairly provided for public participation at a meaningful time in the decisionmaking process; and (3) considered any substantive comments elicited.\textsuperscript{133}

In \textit{Weyerhaeuser Co. v. Costle},\textsuperscript{134} the United States Court of Appeals for the District of Columbia Circuit considered a NEPA challenge to EPA’s use of notice and comment rulemaking to set new industrial effluent standards under the Federal Water Pollution Control Act.\textsuperscript{135} The EPA, despite a provision of the Water Pollution Control Act Amendments that could be construed as imposing that obligation, failed to file an EIS.\textsuperscript{136} The court made an initial determination that, under the statute, functional

\textsuperscript{129} \textit{Id.} at 293-94.
\textsuperscript{130} \textit{Id.} at 293-96.
\textsuperscript{131} \textit{Id.} at 287; \textit{Twitty}, 527 F. Supp. at 783. The court emphasized the urgency of the situation, at one point asking rhetorically, “What, then, [if no county would accept it] would North Carolina do with the PCB laced soil?” \textit{Warren County}, 528 F. Supp. at 290.
\textsuperscript{132} See \textit{supra} notes 63-64 and accompanying text.
\textsuperscript{133} See \textit{supra} notes 76-97 and accompanying text.
\textsuperscript{134} 590 F.2d 1011 (D.C. Cir. 1978).
\textsuperscript{135} 33 U.S.C. §§ 1251-1376 (1982).
\textsuperscript{136} 590 F.2d at 1051 & n.65. See 33 U.S.C. § 1371(c) (1982).
equivalence would satisfy NEPA's requirements. The court then specified its criteria for functional equivalence. The criteria, drawn from the Administrative Procedure Act (APA), required: (1) an explanation of the facts and policies relied on by the agency in making its decision; (2) some basis for those facts apparent in the record; (3) a basis for concluding that the facts and legislative concerns could lead a reasonable person to make the judgment that the agency made; and (4) that degree of openness, explanation, and participatory democracy required under sound administrative law.

Although the EPA was relieved of its obligation to prepare a full EIS, the record built through functional equivalence had to pass muster under the court's four criteria. Under this analysis, the court found that the EPA's procedures were inadequate to justify their setting one of three effluent standards. Procedures were found unsound because the industry was not provided an opportunity to comment on cost calculations based on meager data, used by the EPA to support the standard. The Weyerhaeuser court thus espoused the view that functional equivalence must serve sound administrative law purposes by meeting the three goals set forth in Portland Cement. The agency must have balanced environmental costs and benefits, provided a meaningful opportunity for public participation, and considered any substantive comments elicited. Where a component of the agency's action fell short of those goals, the standard of functional equivalence was not met.

Immediately following Weyerhaeuser, in Environmental Defense Fund,

137. 590 F.2d at 1051-52 & n.66.
138. Id. at 1027-28. The court applied its criteria to the record built under the functionally equivalent procedures.
139. Id. at 1028.
140. Id. at 1029-30.
141. Id. at 1030-31. The court indicated that the EPA's duties under NEPA are more attenuated than those of any other agency, based on the willingness of Congress and the courts to place some trust in the EPA's commitment to the environment. Id. at 1051 nn.65-66. Nevertheless, the court declared that those affected must be accorded "their procedural due" through an opportunity to participate in the agency's choice of action. Id. at 1024. The Weyerhaeuser standard continues to be applied to the EPA. See Small Ref. Lead Phase-Down Task Force v. U.S.E.P.A., 705 F.2d 506, 549-50 (D.C. Cir. 1983), where the court, citing Weyerhaeuser, held that the agency's notice to the public must fairly apprise interested parties of the issue involved. Notice must not demand an elaborate "treasure hunt," but should make important data easily accessible to interested parties. Careful consideration of comments received permits the "EPA to get its facts straight." 705 F.2d at 549-50.
142. As in Portland Cement, the Weyerhaeuser court scrutinized the record built under functional equivalence and pinpointed an area where procedures had been deficient and where the agency's decision was questionable. 590 F.2d 1028-30. See supra note 79 and accompanying text.
Inc. v. Blum\(^{143}\) the United States District Court for the District of Columbia applied the functional equivalence standard as expanded in Weyerhaeuser. Blum arose from the EPA's approval, without an EIS filing, of a new pesticide, Ferriamicide, to control fire ants in Mississippi.\(^{144}\) The agency contended that its action was functionally equivalent under emergency conditions, based on danger to humans from the severe, occasionally fatal reaction to the ant's sting.\(^{145}\) The EPA, however, took seven months to consider extensive comment.\(^{146}\) Therefore, the court reasoned, the EPA could not claim that an emergency justified its failure to publicize sufficiently its planning stage, and to make available for public scrutiny the ex parte comments upon which it had relied.\(^{147}\) The agency's flawed procedures, the court found, had deprived the Environmental Defense Fund of the opportunity to offer timely comments for the agency to consider it in its final order.\(^{148}\)

The court, accordingly, strictly scrutinized the record produced against the Weyerhaeuser functional equivalence standard.\(^{149}\) The agency had balanced environmental costs and benefits to meet the standard's first component: all five core NEPA issues had been considered, perhaps somewhat perfunctorily.\(^{150}\) However, by giving inadequate notice of its planned action and by relying on ex parte comments, the EPA had not provided opportunity for fair and meaningful public participation or considered all substantive comments, thereby failing to meet the standard's second and third components.\(^{151}\) As in Weyerhaeuser, the Blum court ultimately examined the record under administrative law criteria to determine whether there had been the requisite open and reasoned decisionmaking.\(^{152}\) While


\(^{144}\) Id. at 661.

\(^{145}\) Id. at 656, 659.

\(^{146}\) Id. at 661.

\(^{147}\) Id. at 656, 662-63.

\(^{148}\) Id. at 657, 659-61. Mississippi had requested that use of Ferriamicide be permitted on schoolyards, playgrounds and river embankments (levees), as well as agricultural fields. As the plaintiff pointed out, the EPA had approved the request without considering the potential risk such use would create for children, women of childbearing age, and others who unwittingly came in contact with treated ground. Id. at 660-61.

\(^{149}\) The Blum court quoted Weyerhaeuser's language calling for deference to the EPA's judgment in environmental matters when Congress has required it to act quickly and decisively. Id. at 657 (citing Weyerhaeuser, 590 F.2d at 1026). The Blum court indicated that the agency's record, built under functional equivalence, must be scrutinized for all three indicia of sound environmental decisionmaking. Id. at 657 (citing Citizens to Preserve Overton Park v. Volpe, 401 U.S. at 416-17).

\(^{150}\) Blum, 458 F. Supp. at 661-62.

\(^{151}\) Id. at 659-61.

\(^{152}\) Id. at 663.
the need for streamlined procedures absolved the agency from the full EIS requirement, it nonetheless was required to provide an adequate opportunity for public participation and to address all substantive comments in its final order.\footnote{153}{Some streamlining of procedures is permissible. \textit{Id.} at 662 n.6. But the agency must offer fair notice and a meaningful opportunity to be heard. \textit{Id.} at 663-64.}

Under the case law as applied to the EPA, functional equivalence has merged with administrative law criteria. The courts show deference to EPA's environmental expertise, presuming that the agency's analysis preparatory to an action accomplishes the balancing mandated by NEPA's five core issues.\footnote{154}{\textit{See supra} notes 85, 106, 117 and accompanying text.} Absent an emergency, however, the agency must follow procedures that offer an opportunity for public participation analogous to that provided under EIS procedures. That is, the agency's proposed action must be publicized sufficiently to elicit comments early enough in the planning stage to help shape the ultimate decision.\footnote{155}{Furthermore, the record must reveal that the EPA responded adequately to comments raising substantial concerns.\footnote{156}{Functional equivalence, therefore, is sound administrative law with an environmental fulcrum.\footnote{157}{Two federal courts of appeals have applied functional equivalence analysis to actions of another agency, the Forest Service. In \textit{Texas Committee on Natural Resources v. Bergland,}\footnote{158}{573 F.2d 201 (5th Cir.), \textit{cert. denied}, 439 U.S. 966 (1978).} the United States Court of Appeals for the Fifth Circuit, citing \textit{Portland Cement}, applied functional equivalence to the Forest Service's promulgation of interim guidelines for clearcutting in Texas forests.\footnote{159}{\textit{Id} at 207, 211.} The guidelines set temporary criteria for the harvesting of trees, applicable until an overall plan could be established pursuant to the National Forest Management Act (NFMA).\footnote{160}{16 U.S.C. §§ 1601-1614 (1982). The section on clearcutting is found at § 1604(g).} NFMA provides that regulations promulgated under it must comply with NEPA.\footnote{161}{Id. at 207-08. The NFMA provides that the Forest Service must prepare its major program for forest management in compliance with NEPA. 16 U.S.C. § 1602 (1982). The Forest Service had been given two years from the date of passage of the NFMA to prepare the overall plan. At issue in \textit{Texas Committee} was the Forest Service's application of congressional guidelines for the interim period. 573 F.2d at 207-08.} Nevertheless, the Forest Service did not prepare a programmatic EIS for actions under the interim guidelines.\footnote{162}{\textit{Id.}}} The courts show deference to EPA's environmental expertise, presuming that the agency's analysis preparatory to an action accomplishes the balancing mandated by NEPA's five core issues. Absent an emergency, however, the agency must follow procedures that offer an opportunity for public participation analogous to that provided under EIS procedures. That is, the agency's proposed action must be publicized sufficiently to elicit comments early enough in the planning stage to help shape the ultimate decision. Furthermore, the record must reveal that the EPA responded adequately to comments raising substantial concerns. Functional equivalence, therefore, is sound administrative law with an environmental fulcrum.

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The Texas Committee court held that, under the circumstances, functional equivalence relieved the Forest Service of its EIS obligation.\textsuperscript{163} In deciding to permit clearcutting under the interim guidelines, Congress did the cost-benefit balancing requisite under NEPA's five core issue analysis.\textsuperscript{164} Furthermore, Forest Service procedures paralleled NEPA's public participation component: the agency publicized its specific application of the guidelines and considered comments at meetings held throughout the state, where environmentalists and the lumber industry were equally represented.\textsuperscript{165} The record indicated that the Forest Service considered comments elicited in shaping its final plans for lumber harvesting at particular sites.\textsuperscript{166} Thus, the agency produced a record which passed muster under NEPA.\textsuperscript{167}

In California \textit{v.} Block,\textsuperscript{168} the United States Court of Appeals for the Ninth Circuit applied functional equivalence analysis to the Forest Service's designations of forest land in California as wilderness, further planning, or nonwilderness areas.\textsuperscript{169} The Forest Service, acting under NFMA, was required to comply with NEPA.\textsuperscript{170} No urgency element was present.\textsuperscript{171} The Forest Service had prepared an EIS for the overall program, and argued that the programmatic EIS was the functional equivalent of a site-specific EIS for each wilderness area.\textsuperscript{172} The Block court held that the programmatic EIS was not functionally equivalent because it did not pro-

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163. \textit{Id.} at 208. The court indicated that it would not ordinarily apply functional equivalence to the Forest Service, because its role was economic, as well as environmentally protective. \textit{Id.} Yet the tight constraints upon the agency's discretion (\textit{see supra} note 162) and the procedures it provided did comply with NEPA. 573 F.2d at 211.

164. Congress chose to permit clearcutting under the interim guidelines. \textit{Id.} at 208, 211. Clearcutting involves harvesting all the timber within a designated area in one cut. All trees in the area are leveled within inches of the ground, and the area is prepared for natural regeneration, artificial seeding, or planting of nursery-grown trees. Plaintiffs favored selective cutting, that is, the harvesting of selected trees of only a certain age. \textit{Id.} at 205.

165. The Forest Service prepared an arguably flawed EIS for one area, the Conroe Unit of Sam Houston National Forest. \textit{Id.} at 204. In preparing that EIS, the Forest Service held "charettes," small group public discussions, in compliance with the NFMA. \textit{Id.} at 211 n.9.

166. \textit{Id.} at 211.

167. \textit{Id.}

168. 690 F.2d 753 (9th Cir. 1982).

169. \textit{Id.} at 757. The Forest Service planned to allocate all roadless areas within the National Forest System into three categories. "Wilderness" areas were to be left in their primitive state. "Further Planning" areas were to be protected pending completion of site-specific plans which would consider whether to recommend that the area be left undeveloped. "Nonwilderness" areas were to be opened for potential development. \textit{Id.} at 758.

170. \textit{Id.} at 757-58 n.2. \textit{See supra} note 161 and accompanying text.

171. The Forest Service and the Block court both recognized that the project was "protracted." 690 F.2d at 768.

172. \textit{Id.} at 760-62.
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vide adequate opportunity for comment regarding the particular interests to be weighed at each site.\textsuperscript{173} Any site designated as nonwilderness, thus permitting development, probably could never be reclaimed as wilderness. Affected citizens, therefore, had a statutory right under NEPA to participate in agency deliberations regarding each site.\textsuperscript{174}

Although not involving the EPA, \textit{Block} applies to the EPA to the extent that it is a reaffirmation of the stewardship principle articulated in the legislative history of NEPA: absent an emergency, that statute guarantees the right of the public to participate meaningfully in decisions affecting the environment.\textsuperscript{175} According to the \textit{Block} court, the exact extent of the public participation opportunity needed to satisfy NEPA varies with the urgency of the action.\textsuperscript{176} Under functional equivalence, the courts have balanced the need for expeditious action with the need for full deliberation and public participation to reduce agency error and to increase public confidence in agency choices. For EPA's response actions under Superfund, the same underlying values compete. \textit{Block} reemphasized NEPA's mandate of early, meaningful public participation in site-specific agency planning. The issue under Superfund is what, under the circumstances of each of the three types of cleanup actions, is adequate environmental analysis and adequate opportunity for comment to meet the functional equivalence criteria of reasonableness and fairness.

\section*{III. Remedial Actions Under Superfund: The Measure of Equivalence}

\subsection*{A. Cleanup Actions Under Superfund}

Superfund is a comprehensive body of legislation intended to improve and protect the environment from the release of hazardous wastes.\textsuperscript{177} The

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 773-75 (citing \textit{Texas Comm.}, 573 F.2d at 211). A programmatic EIS sets forth national planning alternatives and criteria. In \textit{Block}, the agency solicited comment concerning its overall decisional criteria, the land allocations that resulted from its proposed alternatives, and possible alternatives not considered in the draft. Over 264,000 comments were submitted. \textit{Id.} at 758. The court nevertheless held that a site-specific EIS was required before any area could be designated as nonwilderness. A site-specific EIS focuses on the exact area to be affected, identifying the unique attributes of the area and permitting those most affected to comment meaningfully "prior to the first significant point of decision in the agency review process." \textit{Id.} at 770.
\item \textit{Id.} at 773.
\item \textit{Id.} at 772.
\item \textit{Id.} at 765, 774-75. The magnitude of the task of preparing a site-specific EIS for each area does not create an exemption from NEPA, as would a direct statutory conflict. \textit{Id.} at 775 (citing \textit{Flint Ridge Dev. Co. v. Scenic River Ass'n}, 426 U.S. 776, 788 (1976)).
\item 42 U.S.C. \S\S 9601-9657 (1982). Superfund establishes the Hazardous Substances Response Fund, which may be used by the EPA to effect cleanup of inactive sites. 42 U.S.C.
\end{enumerate}
\end{footnotesize}
statute authorizes cleanup of abandoned hazardous waste sites, while its companion statute, the Resource Conservation and Recovery Act (RCRA),\textsuperscript{178} regulates current and future disposal of hazardous waste at operating waste disposal sites. Superfund and the National Contingency Plan (NCP) establish an extensive reporting and investigative system through which abandoned waste sites may be identified.\textsuperscript{179} Once identified, a site is evaluated by the EPA to determine its priority for cleanup, depending on the danger of release of hazardous waste into the environment. Accordingly, the agency classifies a site for one of three types of cleanup action—removal, planned removal, or remedial action.\textsuperscript{180}

Based on that classification, the EPA initiates site-specific planning in accord with the NCP.\textsuperscript{181} Superfund requires only that the response not be inconsistent with the NCP.\textsuperscript{182} Because the response is a federal action having significant impact on the environment, NEPA, as the EPA acknowledges, also applies.\textsuperscript{183} The question remaining is the manner in which NEPA must be incorporated in Superfund response planning. In short, the issue is whether a court will stamp its imprimatur on whatever the EPA has done and label it functional equivalence, or engage in a balancing process to determine what is equivalent under all the circumstances.


\textsuperscript{179} The NCP contains provisions for discovery of abandoned hazardous waste disposal sites and notification of the EPA of their location, followed by a preliminary assessment of the hazard each site presents. 40 C.F.R. §§ 300.63, 300.64 (1983).

\textsuperscript{180} Once a site has been identified, the agency prepares a preliminary assessment, examining a variety of factors, such as proximity of the hazardous site to a drinking water supply, and the fire or explosion hazards posed by the abandoned waste. See 40 C.F.R. pt. 300, app. A (1983) (uncontrolled hazardous waste site-ranking systems under the NCP). Based on the data in its preliminary assessment, the EPA identifies the site as requiring removal or remedial action, with planned removal a future possibility where removal is the appropriate initial action. See supra note 16. The agency has begun the identification and classification of sites. See supra note 35. An article published in Oct. 1983 states that 184 sites in the 29 western states and territories (Ohio to American Samoa) are on the Superfund list for remedial action. Jones, \textit{Hazardous Waste Cleanup, a Special Report}, 21 CH2M HILL REPS., 5-6 (1983); see supra note 24.

\textsuperscript{181} Section 104 of Superfund, which authorizes cleanup, provides that plans must be consistent with the NCP, while § 107, which authorizes recovery of costs, provides that plans may not be inconsistent with the NCP. 42 U.S.C. §§ 9604, 9607 (1982).

\textsuperscript{182} Id.

\textsuperscript{183} See Memorandum, supra note 14.
B. NEPA Compliance Under Superfund

Neither Superfund nor the NCP establishes specific procedures for public participation in EPA's decisionmaking process. Superfund is silent on the issue, providing only that the EPA must act consistently with the NCP. The NCP provides merely that "[i]n determining the need for and in planning or undertaking Fund-financed action, response personnel should, to the extent practicable . . . [b]e sensitive to local community concerns (in accordance with applicable guidance)." The NCP's provision, promulgated by the EPA, is vague and leaves public participation totally within the agency's discretion.

As a result, under the NCP's provisions for remedial actions, NEPA's two major goals are only partially implemented. While planning for remedial action requires steps that arguably parallel the environmental balancing of NEPA's five core issues, no specific provision sets forth procedures to ensure an adequate public participation opportunity. For remedial actions the NCP focuses on three of the five core issues: (1) the evaluation of all feasible alternatives (including taking no action); (2) the

184. The legislative history of Superfund suggests that Congress intended NEPA to apply to Superfund nonemergency cleanup actions. The Senate Report indicates that removal actions constitute emergency actions within the meaning of NEPA. S. Rep. No. 848, 96th Cong., 2d Sess. 54 (1980). Therefore, the emergency exemption to the EIS requirement is triggered. See Memorandum, supra note 14, at 710; see also infra notes 63-64 and accompanying text. However, for remedial actions, the Senate Report states that the relatively long lead time and allowance for planning requires the EPA to provide a written assessment of alternatives, possibly a full EIS. S. Rep. No. 848, 96th Cong., 2d Sess. 61 (1980).

The EPA has acknowledged that NEPA does apply to its response actions under Superfund. The agency has interpreted the legislative history to mean that removal actions fit within the "emergency" exception to the EIS requirement and that remedial actions require a functional equivalent to an EIS. The agency indicates, however, that "equivalence" is a concept broad enough to encompass the procedures it plans to provide. See Memorandum, supra note 14; Community Relations Policy, supra note 23 and accompanying text. The Memorandum suggests the incorporation of "procedures that afford the public a meaningful opportunity to comment on environmental issues before the final selection of a remedial alternative," yet are more informal than the holding of a formal public hearing. Memorandum, supra note 14, at 712. But a study of the Community Relations Policy raises serious questions regarding whether the agency has followed the advice expressed in the Memorandum. See supra notes 23-24, infra notes 191-92 and accompanying text.

185. 40 C.F.R. § 300.61(c)(3) (1983).
186. Id.
187. See supra notes 5-6, 40-41 and accompanying text.
188. See 42 U.S.C. § 9605(8)(a) (1982); 40 C.F.R. § 300.68(e) (mandating consideration of environmental impact); 40 C.F.R. §§ 300.68(e)(3), 300.68(g) (mandating consideration of adverse environmental effects of proposal); 40 C.F.R. §§ 300.68(d), 300.68(g), 300.68(h), 300.68(i) (mandating consideration of alternatives); 40 C.F.R. § 300.68(h)(2) (mandating weighing of short-term versus long-term effects); 40 C.F.R. §§ 300.68(h)(1), 300.68(i)(2)(B) (mandating consideration of costs).
weighing of short-term benefits against long-term harm that the cleanup itself might cause; and (3) analysis of costs. Thus, although the NCP's provisions track the content of an EIS, there is a significant omission regarding procedures. Without provision for an adequate comment period, the agency's data and conclusions may not be tested against the critical comments of affected parties.

Under its Community Relations Policy, the EPA has indicated it plans to offer the public only a three-week, on-site comment period to review the feasibility study before a remedial action is selected. At some sites, only a two-week period will be offered to review the draft study of components of remedial actions (e.g., moving drums offsite) before such actions are begun. The EPA's major concern in its Community Relations Policy appears to be public relations: to tell the community what to expect after important decisions have already been made, rather than to provide a meaningful opportunity to offer opposing views. This aim could be viewed as weak and self-serving, and unlikely to achieve even a public relations purpose in communities with some sophistication regarding environmental concerns.

NEPA imposes two types of restraints upon the EPA's actions under Superfund: the EPA must structure its consideration of the environment to accomplish the same balancing achieved through NEPA's five core issue analysis, and it must provide meaningful opportunity for public participation as it reaches a decision regarding a method of cleanup. These restraints must, of course, be analyzed in the light of each type of Superfund response action. There is at least an argument that removal actions, designed to mitigate immediate health hazards, fit into CEQ's emergency provision, thereby permitting the EPA to dispense with a comment

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189. Id. The EPA must choose the least costly effective cleanup method. See supra note 19.
190. See supra notes 23-24, 184; see also infra notes 191-92 and accompanying text.
191. See Community Relations Policy, supra note 23, at 4. The Policy raises concern for several reasons. While the agency acknowledges the importance of giving the community an "adequate" opportunity to comment before the final site-specific plan is selected, the Policy provides only a two or three week period for comment. Further, it fails to provide specific guidelines regarding notification of interested parties to enable them to gather documentation to support their comments. Id. at 2-4. The Policy's greatest flaw, however, is that it is totally discretionary: any procedures the EPA has decided to make available, it can rescind. In no functional equivalence case, absent the emergency or statutory conflict rationale, has the agency been totally free to provide or dispense with opportunity for public participation. Rather, the agency has been held to compliance within its enabling statute or regulations. See generally supra notes 75-176 and accompanying text.
192. See Community Relations Policy, supra note 23.
193. See supra notes 6-10 and accompanying text.
Similarly, for a planned removal, which is a long-term cleanup following an emergency removal action, the response to the emergency has placed equipment and personnel at the site. Economic benefits of proceeding with the full cleanup at that point must be weighed against the possibility that the method being employed could cause further environmental harm. It might be difficult to justify an argument that the EPA should be halted, steamshovel already poised over corroding chemical drums, while further comment is heard and considered. Even for planned removal, however, streamlined procedures for comment may be appropriate and feasible. Dissemination of plans to environmental groups and responsible parties could produce comments that might prevent agency error. The agency could hold a brief, informal meeting to discuss plans and make available a file into which comments could be inserted. Without losing momentum or incurring great cost, the EPA could meet, in part, NEPA's public participation requirement in planned removal actions.

C. Failure to Meet NEPA's Standard

The procedures for public participation that the EPA proposes for Superfund remedial actions fall far short of the functional equivalence standard. That standard, developed by the District of Columbia Circuit in *Portland Cement* and *Weyerhaeuser*, requires that the agency (1) balance environmental costs and benefits; (2) fairly provide for public participation at a meaningful time in the decisionmaking process; and (3) consider any substantive comments elicited.

The proposed EPA procedures for remedial actions fail to meet the standard in several major ways. First, there is no clearly structured means to provide adequate notice that planning has commenced for a specific site.

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194. Congress evidently contemplated such hazards as leaking chemical drums next to a playground. The Senate Report states that the intent of the legislation is “to authorize removal with a minimum of delay in order to assure that injury to the public health, welfare and the environment are prevented or minimized and mitigated.” *S. REP. No. 848, 96th Cong., 2d Sess. 61 (1980); see 40 C.F.R. §§ 300.65 to 300.66 (1983).*

195. 40 C.F.R. §§ 300.66 to 300.67 (1983). Even though authorization for planned removal is not provided under Superfund, the Senate Report indicates congressional intent to achieve cost savings wherever possible by permitting “the more permanent, costly measures which may be necessary after the need for emergency action has terminated.” *S. REP. No. 848, 96th Cong., 2d Sess. 54 (1980).* The Senate Report contains no finding regarding the need for an EIS for planned removal.

196. *See id.*

Second, no regulation mandates an opportunity for public comment early enough in the agency's planning to be meaningful. Third, the opportunity planned for community inspection of agency plans is far too brief to permit affected or interested parties to gather documentation to support their concerns. Finally, no regulation requires the agency to respond to comments. There is, therefore, no adequate safeguard to uphold NEPA's mandate for meaningful public participation.

The EPA cannot properly argue that the emergency nature of remedial actions justifies minimal public participation in its decisionmaking. By classifying a site as requiring remedial action, the EPA already has determined that the situation does not pose an imminent hazard to health, welfare and the environment. The agency has foreclosed application of the emergency exception underlying functional equivalence cases, such as Hathaway, Train, Warren County, and Twitty, which have deemed seriously abbreviated procedures adequate under urgent circumstances. For remedial action, where such urgency is absent, there is time to plan with sufficient care.

The benefits of public participation are more than theoretical. In Portland Cement, Weyerhaeuser, and Blum, public comments drew attention to significant factors requiring further research, analysis, and planning. Case law reveals that even the most expert and best-intentioned agency can overlook important considerations. An open channel from the public to the agency can reduce the possibility of potentially tragic and costly error. Some cleanup techniques carry their own risks of harm based on conditions peculiar to the site. The potential for harm is great in

198. See 40 C.F.R. §§ 300.66 & 300.68 (1983); Memorandum, supra note 14, at 711.

199. Adequate comment opportunity is not a mere exercise in open government: it serves an essential purpose. Comment helps deter the agency from hasty or erroneous choices. In Portland Cement, for instance, comments raised the spectre of water pollution that could cancel out the gains from cleaner air. See supra note 79 and accompanying text. In Weyerhaeuser, comments deterred a course of action which threatened economic harm to industry out of proportion to incremental gains in water standards. See supra notes 140-41 and accompanying text. And in Blum, comments forced the agency to reconsider an action permitting the application of fire ant poison where it might cause harm to children and pregnant women. See supra note 148.

200. Id.

201. As the Small Ref. Lead Phase-Down Task Force court asserted, comment forces the agency to get its facts straight. 705 F.2d at 550. See supra note 141.

202. See Maugh, Just How Hazardous Are Dumps?, 215 Sci. 490, 491 (1982). Each site is chemically and geologically unique. Where potential groundwater contamination is involved, hazards can be presented by the very procedures employed to assess the problem, for instance, the digging of monitoring wells. Maugh states that there is no consensus on drilling methods, sampling frequency or protocol, or standard quality assurance procedures, or the number of wells needed to define the
Superfund cleanup actions. Superfund is designed to neutralize highly hazardous wastes. No matter how well intentioned, a hastily conceived remedial action could exacerbate a hazardous condition the agency meant to eliminate. Depending on conditions at a site, a remedial technique could disperse the contaminant into the air or speed its release into the groundwater. Yet the EPA plans to hear those who might have significant, peculiarly local information to offer only after its choice of action, for all practical purposes, has been made.

D. Toward a Functionally Equivalent Process

To ensure a sound choice of remedial cleanup technique, the EPA should entertain comment throughout an adequate period, one more closely approaching equivalence to an EIS comment period than the two to three on-site weeks now planned. The EPA has indicated that the opportunity for public comment may be extended upon reasonable requests by citizens (for example, if copies of agency materials have been late in arriving in the locality). An extension of the comment period, however, is to be granted only so long as it “does not exacerbate threats to public health, welfare, or the environment at the site.” If the problem at the site is in danger of exacerbation from so brief a delay, however, it is arguably an imminent hazard, and should have been classified as a removal action. Thus, the EPA’s Community Relations Policy reflects inconsistent reasoning with regard to handling remedial actions.

On balance, the EPA has more to gain from reduced likelihood of error than it has to lose from chance of delay. While the danger exists that responsible parties may use EIS-type comment procedures to delay remedial

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problem. Many drillers are also unfamiliar with the specific techniques required for working with hazardous wastes, and they run the risk of contaminating clean aquifers while drilling into polluted ones.

Id.

The upper-lower aquifer geologic configuration is not uncommon. It exists, for example, at the Western Processing Co., Inc., waste storage site at Kent, Washington. A shallow aquifer lies five to six feet below the surface, above a deep water aquifer 30-40 feet below the surface. The city of Kent plans to develop the deep aquifer as a major drinking water source for the city. During October and November of 1982, the EPA drilled wells at the Kent site to sample the upper aquifer below the site. See In the Matter of Western Processing Co., EPA Reg. 10 Order No. X83-03-23-106 (Apr. 11, 1983).

203. See supra note 18.

204. As the Community Relations Policy indicates, action may begin at some sites before the feasibility study has been completed. See supra notes 23-24, 191-92 and accompanying text.

205. See supra note 24.


207. Id.; see also supra note 24.
cleanup, an action's classification as remedial suggests that time is available. Furthermore, response to comments need not be burdensome because the EPA must consider only those comments "significant enough to step over a threshold requirement of materiality." Responsible parties, ultimately liable for cleanup costs, have great motivation to undertake studies regarding potential adverse effects of agency-planned actions. Local residents may need time to document facts they believe are significant to the agency's decision. Both groups are a potentially valuable source of information to the agency.

Moreover, the agency's consideration of comments during a more extensive period would satisfy due process concerns and build a fuller record for judicial review. The use of Superfund money for remedial cleanup requires that such a record be built, for the agency essentially is using the money of private individuals who ultimately are handed the bill. The EPA's action operates concretely on individuals in their individual capacity, triggering their due process right to a meaningful opportunity to be heard, and the requirement that a record be built for judicial review. Superfund's compensation scheme imposes strict liability on responsible parties and directly affects their property rights. To many, that state of affairs rings of poetic justice: those who at one time enjoyed economic benefit from use of the dumpsite must now pay for damage done to the environment. There is, however, a catch. Rather than mitigating a potential danger, agency error could exacerbate the harm to the environment.

Under a standard clause in Superfund cleanup contracts, the government agrees to cover third-party claims. Liability for harm resulting from

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208. See supra notes 15, 88. The NCP authorizes the EPA to permit responsible parties to carry out remedial cleanup, with the agency required to evaluate the adequacy of their remedial proposals according to the NCP's criteria. 40 C.F.R. § 300.68(c) (1983). The agency, however, has indicated that it will itself conduct cleanup and later seek recovery of costs from responsible parties. See 'Far-Reaching' Changes to RCRA, Superfund to Shift Authority, Remove Planning Costs, [1983 Transfer Binder] Env't Rep. (BNA) 91 (May 20, 1983).

209. The "threshold of materiality" test requires that a comment must do more than state that the agency made a particular mistake in its basis for a decision. Rather, the comment must show why the mistake was significant enough to affect the outcome of the agency's deliberation. Portland Cement, 486 F.2d at 394 (cited with approval in K. Davis, Administrative Law Treatise, § 6.26 (2d ed. 1978)); see also supra note 88.

210. See supra notes 15, 208 and accompanying text.


212. See supra notes 15, 21.

an improperly conducted cleanup may not extend to the parties originally responsible for the harm. Such compensation evidently would have to come from Superfund. Contractors hired under Superfund are concerned about the extent to which the government can indemnify them against third-party claims. Indemnification is limited, however, to unobligated funds available in the applicable appropriations under Superfund.

The contracts include language stating that there is no implication that Congress will appropriate additional money if funds available are insufficient to settle any such claims. Should substantial harm result from a poorly executed cleanup, the result might well be a bureaucratic nightmare, with cleanup contractors rendered insolvent and some damaged third parties left uncompensated.

Because the dangers of error can be reduced if the EPA offers structured opportunity for comment, and because the nature of remedial actions makes time for comment feasible, the NCP should be amended to incorporate four provisions that would render its procedures the functional equivalent of an EIS:

1. Notice should be required in the Federal Register when planning for remedial action is initiated at a site.

2. Notice should be required in the Federal Register when preliminary plans are available for examination. The notice should include specific information regarding where the plans and their supporting data will be available. The NCP currently provides that remedial planning be done in several stages. The early phases involve elimination of any cleanup techniques that are not technologically feasible, are prohibitively expensive, or are otherwise unsuitable. The plans considered most feasible after the weeding out process would be those made available for comment.

3. The comment period should be of reasonable length—not less than thirty days. As discussed above, by designating a site for remedial action, the EPA has judged that lead time is available. The relative brevity of this proposed comment period would maintain agency momentum.

4. Notice of the final plan should be published in the Federal Register. This plan should incorporate response to comments meeting the “threshold of materiality” test. At this point, the procedures now contemplated by the EPA (two to three weeks of on-site inspection of the plans and pub-

214. See Liability for Claims, supra note 19.
215. Id.
216. Id.
218. See Memorandum, supra note 14, at 711.
219. See supra note 209 and accompanying text.
lic informational meetings) would be appropriate for presentation of the
final plan. 220

Unless regulations ensure adequate opportunity for public participation,
courts should require such opportunity under the functional equivalence
standard for Superfund remedial actions. Requiring more extensive par-
ticipation procedures for remedial actions would serve three ends. First,
the agency would receive the benefit of "free" information—those expert
studies financed by responsible parties. Second, the availability of critical
comment would minimize the chance of serious agency error and develop
a fuller record for judicial review. 221 Third, due process interests would be
served by ensuring responsible parties the opportunity to be

Re-
quire true EIS equivalence for Superfund remedial actions would strike
a workable balance between the need to move forward expeditiously and
the need to make decisions carefully while affording due process to af-

ected persons.

IV. Conclusion

Superfund offers a unique opportunity to improve the quality of life and
safeguard the environment. Along with this opportunity, however, there is
danger of creating further harm through faulty choices of cleanup actions.

As emphasized in Portland Cement, one cannot always assume that the
EPA will be the "good guy." 222 And even good guys, acting in good faith,
need the full information made available through an opportunity for pub-
lic comment. It is foolhardy to presume that an agency is omniscient.
Critical comment by affected parties improves the quality of decisionmak-
ing, helping to prevent agency error.

220. See Community Relations Policy, supra note 23.
221. The EPA now plans to emphasize recovery of costs from the liable parties, rather
than first giving those parties the opportunity to perform cleanup. See 'Far-Reaching'
Changes to RCRA, Superfund, supra note 208, at 92. Thus, the agency is choosing its action
at its own discretion. It is generating on its own, without meaningful exposure to public
comment, analysis preliminary to its choice of actions. No regulation now requires the EPA
to make any mandatory period of time available for response to its proposal. See Community
Relations Policy, supra note 23. In contrast, principles of administrative law, in general,
and NEPA, in particular, require that an opportunity for responsible comment be provided
early in the agency's planning. See supra notes 21, 175 and accompanying text. The more
carefully reasoned functional equivalence cases reflect that view; the cases appearing most
differential arguably have been applying the "emergency" exemption of the CEQ regula-
tions. Absent an emergency, the courts have looked for provisions limiting the agency's
discretion, guaranteeing the right of the public to participate meaningfully in the agency's
choices.
222. See supra notes 15, 21.
223. 486 F.2d at 384.
The NCP currently does not adequately restrain potentially arbitrary and capricious action. Nor is there functional equivalence in the opportunity for public comment the EPA plans to make available. Yet Superfund remedial actions offer time for careful, deliberate decisionmaking. With a truly equivalent participation opportunity, made mandatory by regulations, the agency would: (1) receive useful information, (2) reduce the likelihood of environmental error; (3) produce a fuller record for judicial review, thereby serving due process interests. Superfund's unprecedented opportunity for environmental improvement should not be squandered by permitting hasty decisionmaking by an agency unfettered, yet unassisted, by meaningful public participation.

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