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Federal Facilities Issues Paper

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Remediation and Reuse Focus Group
Federal Facilities Subcommittee

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ASTSWMO is an organization supporting the environmental agencies of the States and Territories (States). ASTSWMO's mission is to enhance and promote effective State and Territorial programs and to affect relevant national policies for waste and materials management, environmentally sustainable practices, and environmental restoration. The mission of the Federal Facilities Subcommittee is to promote and enhance State and Territory involvement in the cleanup and reuse of contaminated federal facilities and to facilitate information exchange by and between States, Territories, and federal agencies. This includes identifying and researching emerging issues related to State and federal cleanup programs at federal facilities; producing and disseminating resource documents, tools, and policy positions; reviewing and commenting on federal regulation and policy development; and working with EPA, DoD, and other federal agencies on variety of federal facilities issues and forums.

ASTSWMO thanks the following members for their participation in developing this report:

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I. BACKGROUND

Environmental compliance and remediation at active, closed, and transferred federal facilities continues to be one of the most complex and controversial issues in the State-Federal relationship. The Association of State and Territorial Solid Waste Management Officials (ASTSWMO) has consistently supported the individual efforts of States and Territories (hereinafter collectively referred to as States) to implement both State and federal waste management mandates on federal facilities located within their jurisdiction. With the ongoing national debate concerning the States' environmental rights and responsibilities relating to federal facilities such that federal facilities are not unduly shielded by sovereign immunity and lead agency authority, the ASTSWMO Federal Facilities Subcommittee believes that it is necessary to define our positions relative to the environmental restoration and waste management efforts at all federal facilities.

For over 20 years, the Final Report on the Federal Facilities Environmental Restoration Dialogue (FFERDC) released in April 1996 has served as the blueprint for the implementation of the federal facility cleanup programs. The Federal Facilities Subcommittee recommends that State and federal agencies continue to adopt and implement the findings of the FFERDC Final Report in the environmental restoration of all federal facilities. The federal agencies when practicable can develop consensus policy recommendations aimed at improving the process by which federal facility environmental decisions are made so that these decisions reflect the priorities and concerns of all stakeholders. We further recommend that State and federal agencies be mindful of current Environmental Council of the States (ECOS) Resolutions relevant to federal facility cleanups.

Over the years States have worked with federal agencies to address a variety of issues including some that are not discussed in this paper, such as Defense State Memoranda of Agreements (DSMOA), risk communication, and community involvement. The topics highlighted in this paper are not meant to diminish or discount the importance of other issues not included. Rather, with this paper, ASTSWMO members have identified issues that are current priorities for State federal facility programs. For each of the following topics, ASTSWMO briefly summarizes the issues or programs, describes current challenges identified by our membership, and offers recommendations for States and federal agencies. Additional information about the subjects discussed below, including issue papers, research projects, and fact sheets, are available on the ASTSWMO website and provided in the References section. ASTSWMO encourages its membership to utilize these informational resources to further inform and improve its work with federal facilities.

II. APPLICABLE OR RELEVANT AND APPROPRIATE REQUIREMENTS

The process of identifying, determining, and accepting or rejecting State(s) laws and guidance as Applicable or Relevant and Appropriate Requirements (ARARs) in Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) cleanups by the Environmental Protection Agency (EPA) and lead federal agencies is problematic. CERCLA §121(d)(2)(A) states that any State promulgated standard, requirement criteria, or limitation that is identified in a timely

manner and that is more stringent than any federal standard, requirement, criteria or limitation may be considered applicable or relevant and appropriate. However, there are several ongoing disputes between States and the federal government nationwide concerning ARARs at federal facilities. In particular, EPA and/or the lead federal agency may assert that some State requirements are procedural or administrative in nature rather than substantive and resist including them as ARARs in decision documents over the objection of States.

States have seen an increasingly immoveable position by lead federal agencies that many State regulations are procedural or administrative, without providing a rationale, and do not qualify as ARARs. Federal agencies sometimes extend assurances that the State requirements will be met during the development and implementation of remedies; however, this assurance, rather than the adoption of the ARARs, does not coincide with the importance CERCLA places on ARARs at cleanup sites. A specific example of this is failure to accept a State's promulgated risk range as an ARAR. States assert that risk ranges are substantive and are ARARs at CERCLA cleanups. Components of the Department of Defense (DoD) have claimed that an acceptable cumulative cancer risk threshold that is less than the upper end of EPA's acceptable cancer risk rank (10^{-4}) (e.g., 10^{-5} in some States) is not an ARAR. Their stance is that risk range regulations are not contaminant specific and that EPA's acceptable cancer risk range is 10^{-6} to 10^{-4}; therefore, if the cumulative risk of site contaminants is less than 10^{-4}, then the risk is acceptable and no action is necessary. DoD Components have argued this approach is consistent with EPA and DoD guidance, which identifies a target excess, cumulative, upper-bound lifetime cancer risk to an individual to be between 10^{-6} and 10^{-4} (per 40 Code of Federal Regulations [CFR] Section 300.430[e][2][i]][A][2] and EPA Office of Solid Waste and Emergency Response [OSWER] Directive 9355.0-30 [EPA 1991a]). ASTSWMO has previously provided its position on this issue in a letter dated February 6, 2012, in response to an Air Force proposed policy and guidance on the role of human health risk.

Additionally, States have noted that ARARs (mainly action specific requirements) are being rejected by DoD Components in documents. The back and forth communication and a failure to give States detailed rationale for the rejection that States can respond to extends finalizing documents for over a year in some instances.

The Federal Facilities Subcommittee recommends that States, EPA, and lead federal agencies review and implement the recommendations outlined in our 2018 position paper, *State Concerns with the Process of Identifying CERCLA ARARs* and reference EPA OLEM Directive 9200.187 to ensure meaningful and substantial State involvement during the CERCLA process. States, EPA, and lead federal agencies should be communicating early in the decision process to discuss how decision documents will comply with state ARARs and to discuss differing perspectives on ARAR applicability. The Subcommittee also recommends that States and EPA communicate consistently that other federal agencies must comply with State environmental laws and regulations to the same extent as non-federal entities when conducting cleanups under CERCLA.

III. CONTAMINANTS OF EMERGING CONCERN

Contaminants of Emerging Concern (CECs) are chemical compounds that have recently been discovered in the environment for which there is a perceived or real threat to human health or the environment, and for which there is no currently published enforceable federal environmental or health standard or the existing standard is evolving or being re-evaluated. Many States are promulgating standards for CECs that vary from State to State, which may lead to disputes between States and the federal agencies and confusion among local communities. Recent examples include perchlorate, per- and polyfluoroalkyl substances (PFAS) and 1,4-dioxane.

States and federal agencies must work collaboratively to address CECs at federal facilities in a timely manner. ASTSWMO understands that CECs pose difficulties for States and federal agencies, for instance when a new non-promulgated health advisory is established for CECs. When a federal or State standard for a CEC is initially established, the CEC may transition to a standard Chemical of Concern (COC) that must be evaluated at all federal facility sites as required by the CERCLA process. The initial priority for all parties should be to protect citizens from CECs within their drinking water supply. Federal agencies have the added difficulty of reallocating the limited funds from a previously approved budget among an increased number of sites to ensure protection of human health and the environment.

It is paramount that States and federal agencies work together to identify concerns to address an imminent risk to human health and the environment. Open communication between the parties will achieve the initial goal of best utilizing federal funds to eliminate exposure pathways. Continued communication must occur after the initial response phase because States may establish new promulgated standards for CECs in additional media. These communications will help federal facilities prepare budgets and assign staff to properly and promptly conduct the remaining activities. Some federal facilities provide monthly status reports or calls that explain any delays and are useful to States when responding to public inquires.

Site activities performed under a site-specific State approved work plan with a mutually agreed upon schedule are more likely to obtain the necessary data to advance a site to the next phase. Lead federal agency sampling programs at some sites are required to comply with a nationwide generic scope of work that limits investigations at the facility and does not permit modifications to the sampling program. This practice eliminates State comments that could save the federal agencies time and money. Conversely, some federal agencies have performed CEC evaluations as part of current remedial activities due to historical activities at the site. This proactive step of modifying the ongoing activities (e.g., long-term monitoring) prior to a State requiring it is encouraged. Performing these proactive evaluations eliminates the need to immediately perform CEC sampling evaluations when standards are established for the CEC by a State or federal agency and permits facilities to take the appropriate mitigative actions necessary in a timely manner.

The nationwide policies and actions for federal facilities must clearly recognize State laws and regulations requiring remedial investigation and remediation of COCs, including CECs and related

ARARs, when contaminants are impacting or threatening human health or the environment. This will create a consistent approach and eliminate confusion by States as seen recently with some federal facilities conducting remedial investigations for PFAS, while most facilities have remained in the site inspection phase. Federal agencies are encouraged to include interim remedial measures within their policy to address COCs, including CECs.

IV. MILITARY MUNITIONS RESPONSE PROGRAM

States and EPA are tasked with oversight of the Military Munitions Response Program (MMRP). The investigation and cleanup of munitions and explosives of concern (MEC) at former and active DoD facilities present unique risks. In addition to potential chemical constituent hazards that may be assessed for chronic exposure hazards there is the acute risk of injury or death that may occur by interaction with an MEC item. However, neither CERCLA nor RCRA directly address acute explosive hazard risks. States must continue their involvement throughout the implementation of the MMRP, including the Munitions Response Site Prioritization Protocol (MRSPR) process. Early participation in decisions at all critical phases of the cleanups, such as setting Remedial Action Objectives (RAOs); selecting best available and appropriate technology, interim and long-term risk management activities; and site closeout (defining clean) are essential.

Munitions Response Dialogue (MRD): ASTSWMO's Federal Facilities Subcommittee supports the collaboration among States and federal agencies on DoD's MRD and encourages DoD to continue organizing this forum to improve the implementation of the MMRP.

Munitions Response Technologies: The Federal Facilities Subcommittee recommends that DoD continues to provide resources for improving and developing technologies, and training and guidance to States on new technologies, and that States, federal agencies, and contractors work together to ensure the appropriate technologies are used at each munitions response site (MRS). For example, DoD developed the Advanced Geophysical Classification (AGC) to improve the efficiency and effectiveness of munitions cleanup, and requested input from several parties including EPA, States, technical experts, and contractors. In 2017, ASTSWMO adopted a position that AGC for munitions response is an acceptable technology for use at MRSs and recommends that DoD provide guidance and training to States during the implementation of AGC. However, DoD and contractors must ensure that AGC is used only when site conditions are appropriate and that States are involved throughout the implementation process.

Unrestricted Use/Unlimited Exposure (UU/UE): The goal of any removal or remedial action is to remove all munitions detected; however, it is generally not feasible to remove 100% of MEC items and determine that a MRS is "clear" for UU/UE due to technical limitations and costs. In order to achieve site closeout, DoD must work closely with the States and EPA to determine current and future anticipated land use at each MRS due to varying State and local regulations. Some States have worked with DoD to use differing standards for approving site closures at MRSs. For example, some States maintain that there is no reason to achieve UU/UE for a site that will be used for habitat or open space while other States may agree to UU/UE closures depending on the site's historical use, remediation technologies used, and QA/QC protocols in place.

In addition, site cleanup may have occurred in multiple stages over several years with varying degrees of quality control. Prior to close-out of a site, States and DoD must agree whether a Post-Remedial Verification assessment of the site is a necessary and appropriate remedial action objective (RAO).

Risk Management: At sites where MEC remains, States, EPA, and DoD must work together to ensure that DoD is providing adequate risk management at every stage of the project. In 2014, DoD established the Interim Risk Management Notification and Safety Education initiative in response to requests from ECOS and ASTSWMO, which identifies FUDS MMRP properties where investigations, removal, or remedial actions are not planned to be conducted for an extended period. The Federal Facilities Subcommittee credits DoD for the creation of this program and recommends that DoD continue this initiative. The Subcommittee also recommends that DoD contact States about its notification activities prior to engaging with property owners.

At sites where human activities will occur (residential, agricultural, recreational), States may require DoD to provide additional long-term management (public outreach, signage, construction support, etc.) to ensure the maximum safety of residents, their families, and other site users. Depending on site use and the length of time needed to complete site remediation, such management may be required both during and after the site investigation and cleanup.

Explosive Ordnance Disposal (EOD) Reporting: The Federal Facilities Subcommittee recommends that DoD creates a system to notify its environmental restoration program staff and State regulators when EOD or law enforcement respond to the discovery of UXO. States have expressed concerns that the discovery of some UXO have not been promptly communicated to critical stakeholders, including DoD's environmental staff. Increasing communication between EOD, law enforcement, DoD environmental staff, and State regulators regarding the discovery of UXO can help both DoD and States to identify previously unknown MRS evaluate the efficacy removal actions that have already been performed, and help in determinations as to whether conditions where the item was found warrant interim action. The need for such a system will only increase as similar reporting requirements have been incorporated into RODs with more frequency.

V. FORMERLY USED DEFENSE SITES PROGRAM

Formerly Used Defense Sites (FUDS) properties can offer unique challenges in getting to remediation goals because the federal government no longer owns or controls many of these properties. The States and DoD have spent considerable time determining what these challenges are and how to resolve them. At the FUDS Forum Working Group, DoD and States collaborate to address issues such as ARARs, multiple potentially responsible party (PRP) sites, the PRP site process, interim risk management at MMRP sites, rights of entry, policy disputes, State Management Action Plans, and State and federal roles, responsibilities, and authorities at these properties. The FUDS Forum Working Group is a productive forum for working on these issues; however, the Federal Facilities Subcommittee is concerned about the length of time some of these issues remain unresolved. We recommend that DoD utilize the FUDS Forum Portal to

provide regular updates on the Working Group's discussions and solicit feedback from all States on issues being discussed during its meetings. Below are two issues that ASTSWMO has identified as needing resolution.

Land Use Controls (LUCs)/Institutional Controls (ICs): In situations where the chosen remedy for a FUDS include LUCs such as ICs, DoD takes the position that land restricting ICs cannot be implemented because the federal government no longer owns the property and therefore cannot put ICs on the property. This practice fails to recognize that DoD had a choice in selecting a remedy that utilizes ICs or completing cleanup to UU/UE. It is therefore the responsibility of DoD to ensure that the remedy is properly implemented so that it is protective. In some circumstances, DoD may need to negotiate and perhaps compensate the current landowner to enact ICs on private property for a loss of use of the land due to implementation of the ICs.

FUDS Rights of Entry: ASTSWMO understands that DoD has one right of entry form that is utilized nationwide in all circumstances at FUDS. The right of entry form states that if an action of the government occurs which damages the real property such as a release of a contaminant during work at the site, the government will, at its discretion, either clean up the property or pay fair market value (FMV) for the property in damages.

It is not fair to property owners for DoD to condition the work of addressing contamination caused by DoD on a property owner's agreement that the remedy is either cleanup or FMV, at DoD's discretion. For example, in some States, DoD performs cleanups on remote properties owned by the State where the FMV may be very low. The State may prefer that if DoD causes a new release at the site then it cleans the property instead of paying FMV. The State as the property owner should make this choice not the party which is liable for cleaning up the contamination.

VI. LONG-TERM STEWARDSHIP

According to ECOS, long-term stewardship (LTS) "generally includes the establishment and maintenance of physical and non-physical controls, implementation entities, authorities, accountability mechanisms, information and data management systems and resources that are necessary to ensure that cleanup sites with residual contamination that does not allow for unrestricted use or with ongoing waste management responsibilities after completion of response action remain protective." As environmental restoration programs have matured at federally-owned facilities, the focus has shifted from cleaning up sites that are relatively quick and straight-forward to those that are more complex. Many of these complex sites cannot feasibly be restored to UU/UE and, therefore, will require long-term maintenance, monitoring, and other controls. Many sites will require LTS for decades and for some, in perpetuity. This creates a hefty burden for both federal and State agencies to track, maintain, and enforce the ever growing LTS demands.

Specific LTS challenges at federal facilities include, but are not limited to:

- Federally-owned facilities will not agree to comply with the States' Uniform

Environmental Covenants Act (UECA) legislation claiming that the Federal Government cannot create an interest in real property prior to transferring the property out of federal hands. Some states have tried to circumvent this issue by modifying the UECA language to require a notice of environmental use restrictions as opposed to a covenant; however, federal facilities claim the issue of interest in real property still exists;

- At active installations, the DoD relies heavily on facility Base Master Plans (BMPs) as a tool to implement LUCs. However, these BMPs on their own are not enforceable by regulatory agencies and are subject to change without notification as the services' missions evolve;
- Five Year Review (FYR) recommendations are not being addressed prior to subsequent FYRs. A mechanism to track recommendations and target dates is needed to ensure they are addressed appropriately. In addition, CECs need to continue to be evaluated as part of FYR protectiveness determinations and added as site COCs, if necessary;
- Conflicts when the lead federal agency opts for remedies that do not allow for UU/UE, but also cannot implement LUCs and ICs because the U.S. government does not own the property. Non-federal property owners should have full concurrence on the selected remedy and any LUCs and IC requirements to ensure protectiveness of the remedy;
- Stakeholders' roles and responsibilities to implement, maintain, monitor, report, enforce, and fund LUCs/ICs are often undefined or misunderstood. These roles and responsibilities become even more uncertain as original stakeholders are succeeded or replaced; and
- Many states lack the resources to develop their own mechanisms to track the continually growing number of sites requiring LTS, and, therefore, must rely on tools developed by DoD (e.g., Navy's LUCIS database).

Federal, State, and local agencies must work collaboratively in conducting timely FYRs and establishing LTS decisions to ensure that remedies that do not achieve UU/UE remain protective. Prior to the selection of any final remedy all parties must engage in a thorough analysis to ensure the remedy is implementable, enforceable, and fully funded. LUCs and ICs are integral to LTS. Therefore, State and local authorities regarding these controls must be recognized by the federal agencies, including such things as the UECA or similar State legislation or regulations.

VII. PERFORMANCE-BASED CONTRACTING

Performance-based contracting (PBC) has great potential for moving sites through the environmental restoration process more quickly and cost-effectively. The most common challenges States encounter with PBCs include: (1) lack of early and ongoing regulator involvement, (2) use of PBC for all sites, regardless if appropriate for the project, (3) lack of contractor oversight, and (4) project delays due to contract modifications. It is important that there is coordination with States both to ensure involvement of States at key stages of the PBC process at federal facilities and to ensure that there is sufficient DSMOA funding for State involvement, which includes adequate resources to meet an accelerated schedule. In addition, federal agency oversight of contractors must be rigorous in order to minimize possible conflicts with State regulators concerning performance standards and completion of performance objectives.

In 2017, ASTSWMO developed a position paper with recommendations to overcome challenges as well as a checklist that outlines key stages for regulator involvement. ASTSWMO recommends that States and DoD adopt and use the checklist at each site under consideration for PBC, which will help ensure that PBC is implemented consistently according to DoD guidance and help resolve the challenges encountered during the PBC process. The checklist has been a successful tool used by both DoD and States. For example, with early regulator involvement being one of the most important components on the checklist, States are being engaged early in the acquisition process as the Air Force prepares its next rounds of PBC. The position paper and checklist were also recognized during testimony before the U.S. Senate Committee on Environment and Public Works hearing on “Cleaning up Our Nation's Cold War Legacy Sites.”

APPENDIX A: RESOURCES

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