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State Coordination with Civilian Federal Agencies

FINAL REPORT

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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. 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 Remediation and Reuse Focus Group is to identify and investigate issues arising from the remediation, reuse, and long-term management of federal facilities. This includes researching and developing resource documents, issue papers, and other tools on the implementation of alternative or innovative remediation policies and strategies; site closeout and transfer; reuse and redevelopment of federal facilities; and long-term stewardship.

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Region 8: Colorado, Utah
Region 9: California, Hawaii, Northern Mariana Islands
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I. INTRODUCTION

The ASTSWMO Remediation & Reuse Focus Group (RRFG) developed this issue paper to assess the involvement of States and Territories (States) in response actions taken at federal facility cleanups by civilian federal agencies (CFAs) who manage cleanups under the authority of Executive Order (E.O.) 12580. ASTSWMO will use the following terms for the purpose of this report:

- **Federal Facility**: a property, installation, or facility currently or formerly owned by, or constructed or manufactured for the purpose of leasing to, the federal government.

- **Federal Agency:** any federal government agency. A full list of Executive departments and agencies is available at: https://www.loc.gov/rr/news/fedgov.html

- **Civilian Federal Agency (CFA):** any federal government agency except for the Department of Defense (DoD) and the Department of Energy (DOE).

ASTSWMO requested information from all States in 2020 to determine the level of State involvement in CFA response actions at federal facilities and received responses from 22 States (CFA Survey). ASTSWMO also reviewed available regulatory, policies, guidance, and studies from federal agencies and other sources. These resources are compiled in Appendix A.

II. BACKGROUND

For this paper, it is important to understand one statutory provision in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and E.O. 12580:

CERCLA and the Superfund Amendments and Reauthorization Act (SARA) - Section 120

CERCLA Section 120 (42 U.S.C. § 9620) subjects all federal agencies to the provisions of CERCLA and holds them strictly liable for cleaning up contamination at federal facilities if they are a responsible party (RP). As RPs under CERCLA, federal agencies have the responsibility to conduct all necessary assessments, investigations, and remediation of properties they currently or formerly owned, operated, or controlled. States are the only regulatory agencies conducting oversight at these sites unless the sites are included on U.S. Environmental Protection Agency's (US EPA's) National Priorities List (NPL) and for those, US EPA is also a regulator. As a regulator, States can improve and coordinate the environmental efforts conducted at these sites to clean up hazardous wastes from both a practical as well as legal perspective. Increased coordination with States can ensure adequate resources exist to expeditiously remediate the site.

Executive Order 12580

Juxtaposed against CERCLA Section 120 is E.O. 12580. The President issued E.O. 12580 in 1987, which delegates to the heads of federal agencies and departments certain responsibilities vested

in the President for implementing CERCLA as amended by the SARA of 1986. E.O. 12580 states (parentheticals added):

> (1) Subject to subsections (a), (b), (c), and (d) of this Section, the functions vested in the President by Sections 104(a)(removal and other remedial action by President; applicability of NCP; response by PRPs; public health threats; limitations on response; exception), (b)(investigations, monitoring, coordination, etc. by President), and (c)(4)(selection of remedy), and 121(cleanup standards) of the Act are delegated to the heads of Executive departments and agencies, with respect to remedial actions for releases or threatened releases which are not on the National Priorities List ("the NPL") and removal actions other than emergencies, where either the release is on or the sole source of the release is from any facility or vessel under the jurisdiction, custody or control of those departments and agencies….
>
> (2) Subject to subsections (b), (c), and (d) of this Section, the functions vested in the President by Sections 104(b)(2)(coordination of investigation),
>
> 113(k)(administrative record and participation procedures), 117(a)(proposed plan) and (c)(explanation of differences), and 119(response action contractors) of the Act are delegated to the heads of Executive departments and agencies, with respect to releases or threatened releases where either the release is on or the sole source of the release is from any facility or vessel under the jurisdiction, custody or control of those departments and agencies, including vessels bare-boat chartered and operated.

This E.O. and the National Contingency Plan (NCP) – the implementing regulations of CERCLA – are the basis of the federal agencies' authority to implement CERCLA at certain facilities. Provisions of CERCLA delegated to federal agencies under E.O. 12580 include conducting hazardous substance response activities, which include:

- discovery and notification;
- removal site evaluation;
- removal action;
- preliminary assessment and site investigation (PA/SI);
- establishing remedial priorities;
- Remedial Investigation/Feasibility Study (RI/FS) and remedy selection;
- remedial design/remedial action; and
- operation and maintenance.

E.O. 12580 also delegates to federal agencies procedures for planning and implementing off-site response actions and establishing an administrative record that contains the documents that form the basis for the selection of a response action when the release is on, or the sole source of the release is from any facility or vessel under the control of that federal agency.

Any actions taken by federal agencies under E.O. 12580 are guided by Section 120(a)(2) of CERCLA, which states that "no department, agency, or instrumentality of the United States may adopt or utilize any such guidelines, rules, regulations, or criteria which are inconsistent with the guidelines, rules, regulations, and criteria established by the [EPA] Administrator under this chapter."

III. CLEANUPS AT CFA FEDERAL FACILITIES

The U.S. Government Accountability Office (GAO) has conducted numerous studies and assessments concerning cleanups at federal facilities since the early 1980s. In FY 2017, the GAO added the U.S. Government's environmental liability to its High-Risk List. At the time, the GAO estimated the federal government's environmental liability to be $447 billion. In March 2021, the GAO reported that this figure had increased to $595.4 billion as of FY 2019 and identified the federal government's environmental liability to be a high-risk area requiring significant attention by the executive branch and Congress. While the DOE and DoD account for the largest share of the liability at 98.5% (around $587 billion), other federal agencies were found to have approximately $7.4 billion in environmental liability.

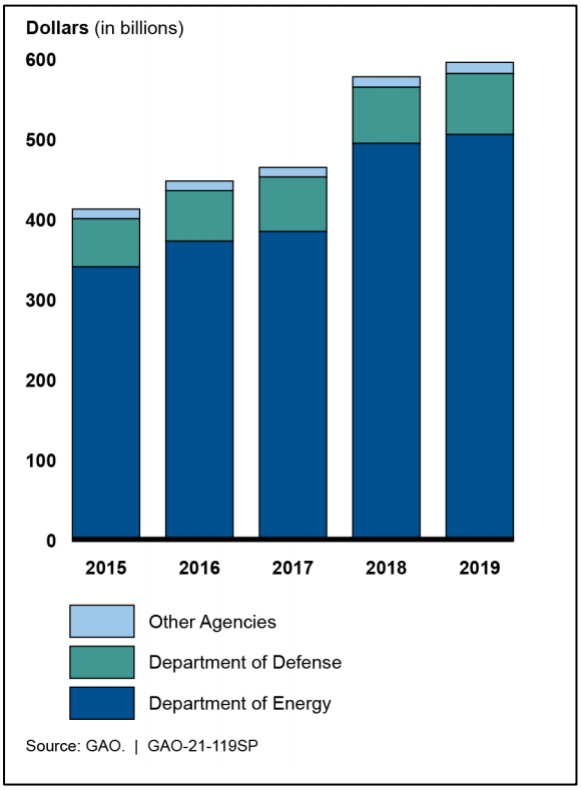

Figure 1: U.S. Government's Environmental Liability, FY 2015 - 2019

In 2015, the GAO reported that the U.S. Department of Agriculture (USDA) and U.S. Department of the Interior (DOI) did not have a complete inventory of contaminated or potentially contaminated sites and recommended that each Department develop plans and procedures for completing its site inventories. The USDA responded to GAO's recommendations by developing a contaminated sites inventory, the National Environmental Accomplishment Tracking (NEAT) System; however, the database is not accessible to States and the public. In a recent report from 2020, the GAO reported that the USDA, DOI, and US EPA have documented at least 140,000 features at abandoned hardrock mining sites but both Departments estimate as many as 390,000 features could exist on federal lands.[1]

GAO reports also recommend that CFAs work closely with US EPA to review the Federal Agency Hazardous Waste Compliance Docket sites for accuracy, in particular the number of sites on the

[1] Examples of "features" described by the GAO include mine tunnels, pits, and waste files. Of the 140,000 identified, 67,000 pose or may pose physical safety hazards and about 22,500 pose or may pose environmental hazards or risks to human health or wildlife from long-term exposure to harmful substances.

docket with no records of preliminary assessments.[2] The EPA's FEDFacts website lists over 600 CFA federal facilities in 48 States that are under CERCLA authority and of these there are over 100 CFA sites waiting on the initiation of a PA/SI. However, this list of sites only includes federal facilities listed on US EPA's Docket list, which is a small subset of CFA federal facilities nationwide. For example, US EPA has a policy established in 2003 that mixed ownership mining or mill sites should not be included on the Docket.

IV. IMPLEMENTATION OF CERCLA AT CFA FEDERAL FACILITIES

Response actions at federal facilities must follow the requirements of CERCLA. In the case of most CFA facilities sites are non-NPL, which eliminates US EPA's regulatory oversight. It is then left to the State regulatory agency to ensure that CFA's follow federal and State requirements. ASTSWMO identified the following issues of concern to States regarding the cleanup of contamination at CFA federal facilities. Each subsection below addresses issues identified by the Focus Group during its review of responses to our CFA Survey and additional research.

Site Assessments

Site discovery, tracking, and notification to State regulatory agencies of possible releases of hazardous substances are major challenges at federal facilities delegated to CFAs. Multiple GAO reports identify these challenges as a "significant gap" in estimating current and future environmental liabilities. According to the results of the CFA Survey, several States are unaware of CFA federal facilities existing in their State even though US EPA's FEDFacts database includes information for facilities in 48 states. ASTSWMO encourages CFAs to provide States with an accurate inventory of CFA federal facilities and cleanup sites. It is also important for States to understand the diversity of sites with potential contamination that may be present at CFA federal facilities. While most of the attention from the GAO and federal agencies in recent years have been on abandoned hardrock mining sites, other examples of CFA federal facilities include:

- landfills and waste dumps;
- shooting ranges;
- Underground Storage Tank (UST) facilities and release sites;
- Industrial facilities;
- former grain storage facilities;
- cattle dip vats; and
- methamphetamine laboratories.

[2] Section 120(c) of CERCLA requires US EPA to establish a listing, known as the Federal Facility Hazardous Waste Compliance Docket (Docket), of federal facilities which are managing or have managed hazardous waste; or have had a release of hazardous waste. The Docket is developed from information submitted by the federal agencies under Section 103 of CERCLA, and Sections 3005, 3010, and 3016 of the Resource Conservation and Recovery Act (RCRA). US EPA includes on the docket facilities which have provided information to US EPA through documents such as a report under a federal agency's environmental restoration program, regardless of the absence of section 103 reporting.

For States responding to the CFA Survey that are aware of CFA federal facilities in their State, their involvement in site assessment and early response actions – pre-CERCLA Screenings, PAs, and SIs – appears mixed. Approximately 60% of responding States are involved in remedial activities for at least one CFA in their State. State activities identified in the survey included: document reviews and approvals, meetings and calls, site inspections, and other oversight activities. For States that are not involved in these activities but would like to be, contacting the relevant CFA could assist in beginning the conversation about involvement. Web resources and program documentation with contact information for several federal environmental programs are available on the ASTSWMO website and in Appendix A of this report.

Response Actions

CFAs are obligated to meet the requirements of CERCLA and the NCP when conducting cleanup actions in response to a completed PA/SI. However, in some cases, CFAs are applying the CERCLA requirements in ways not consistent with CERCLA's process and that could have a negative impact on the protectiveness of human health and the environment.

CERCLA response actions fall under two categories: removal actions and remedial actions. State responses to ASTSWMO's CFA Survey indicate that in some States the CFAs give preference to conducting removal actions and do not follow up with subsequent remedial actions. Though removal actions are an effective means of reducing risks, they should not be viewed as final remedies. Conducting removal actions to the exclusion of remedial actions raises five primary concerns for States:

1. CFAs are only required to comply with applicable or relevant and appropriate requirements (ARARs) to the extent practicable for removal actions under CERCLA;
2. Removal actions allow for less State involvement;
3. Removal actions may leave wastes in place at sites;
4. Ecological risk assessments are often not conducted for removal actions; and
5. Removals do not trigger five-year reviews (FYR) under CERCLA.

A **removal action** is the cleanup of hazardous substances from the environment as necessary to prevent, minimize or mitigate damage to human health and the environment. Removal actions are meant to provide protection in the short-term, often not removing all contamination present in the environment but removing the immediate risks and exposure to human health and the environment. In most cases, further investigation is needed following a removal action to evaluate whether additional remedial actions are required (CERCLA,46 U.S.C. 9601(23)).

A **remedial action** is the cleanup of hazardous substances from the environment such that those actions are a permanent remedy to minimize or mitigate releases that pose unacceptable risks to human health and the environment. Successful completion of a remedial action requires multiple phases: RI/FS, remedy selection, remedial design and implementation, operation and maintenance/long-term response action, and site close out. This multi-stepped process means that the site is thoroughly assessed such that a comprehensive and permanent remedy is implemented and monitored (CERCLA, 46 U.S.C. 9601(24)).

Federal agencies may prefer removal actions over remedial actions because they require less steps to complete, but they also result in less opportunities for State involvement. 40 C.F.R. § 300.525 of the NCP describes States' involvement in removal actions:

1) States should identify State ARARs and provide them to the lead agency in a timely manner, and
2) the lead federal agency must consult with States on all removal actions to be conducted.

Both of these requirements present problems for States. First, according to the NCP (40 C.F.R. § 300.400(g)), removal actions should comply with State and federal ARARs "to the extent practicable" as long as it does not cause unreasonable delays. Unfortunately, this language is vague and allows federal agencies too much opportunity to ignore State ARARs. Additionally, because of the short duration between proposal for a removal and the actual removal, States have limited time to push for ARAR compliance before the removal action is complete. To assist with this requirement and minimize the potential for delays, federal agencies would need to provide early notification to States of an impending removal action and consult with States per the second requirement above.

The States' only other opportunities for involvement in removal actions are:

1) during the required public comment periods and community involvement activities in accordance with the NCP (40 C.F.R. § 300.415(n)), and
2) review of the removal action memorandum.

In the case of a time-critical removal action, the NCP, 40 C.F.R. § 300.415(n)(2)(ii), states that the proponent must "provide a public comment period, *as appropriate*, of not less than 30 days from the time the administrative record file is made public… (emphasis added). The NCP § 300.415(n)(4)(iii) requires a public comment period for non-time-critical removal actions (NTCRA) (a public comment period is required prior to approval of the Engineering Evaluation and Cost Assessment (EE/CA)). NTCRAs provide an opportunity for State involvement at removal action sites since the EE/CA must be done before implementation of the removal action. Action memorandums are the decision documents for removal actions. CFAs should submit action memorandums to States for review.

The amount of State participation provided for removal actions is minimal compared to State participation in remedial action sites. CERCLA 42 U.S.C. § 9617 sets out the public notice and comment period requirements for remedy selection and the NCP at 40 C.F.R. § 300.515 describes the requirements for State involvement throughout the remedial process. In contrast to removal actions, for remedial actions, the NCP provides for State involvement in discussions on remedial alternatives and development of the proposed plan. Additionally, 42 U.S.C. § 121(f) of CERCLA provides State opportunities for involvement in all major phases of a remedial action from the PA/SI phase to record of decision. These requirements are reiterated as they apply to federal facilities and include consultation with States when conducting the RI/FS and opportunities to participate in planning and selection of the remedial action.

States are also concerned with the use of only removal actions because removal actions are not typically designed to characterize or remediate all wastes at a site. When CFAs opt to conduct a removal action they often may not follow up with a complete investigation to define nature and extent of contamination, which means that some contamination may still exist at a site. Additionally, removal actions do not require CFAs to meet certain risk thresholds. Therefore, the CFA cannot be certain that the entire area of contamination was removed or that it achieved appropriate cleanup levels. Also, if the selected remedy for a remedial action site leaves wastes in place, CERCLA would require land-use controls (LUCs) to ensure that site conditions are maintained and protective of human health and the environment. However, without determining if all wastes have been removed or cleaned up to protective levels, LUCs may not be implemented at removal action sites where they may be needed.

Another concern States have is that due to the nature of removal actions, ecological risk assessments are rarely, if ever, conducted. If CFAs perform removal actions without following up with a remedial action, many ecological receptors may be negatively impacted, particularly in ecologically-sensitive areas.

Finally, there are two types of FYRs recognized by EPA: statutory and policy. While CERCLA 46 U.S.C. § 9621(c) and NCP 40 C.F.R. § 300.430(f)(4) require FYRs for remedial actions where waste is left in place; this is not the case for removal actions. As discussed above, removal action sites could potentially leave wastes in place at levels that could pose unacceptable risks to human health and the environment. Without the requirement for FYRs, these risks may remain at the site indefinitely. Policy reviews, though not required by statute, can be required by EPA at NPL removal action sites where wastes are left in place. ASTSWMO recommends that CFAs follow this same policy for non-NPL removal action sites.

Land Use and Institutional Controls

LUCs include engineering controls (ex., fences, signage, and landfill caps) and non-engineered instruments, commonly referred to as institutional controls (ICs) (ex., administrative and legal restrictions) (these are collectively referred to as LUCs in this paper). LUCs are used to limit land or resource use, to modify or guide human behavior at a site, and to minimize exposure to contamination and/or protect the integrity of a response action at a site. LUCs are useful tools when contamination is first discovered, while cleanup is ongoing, or when residual contamination remains on site at a level that does not allow for unlimited use and unrestricted exposure (UU/UE) after cleanup. Whatever control is used at a site, the LUCs

Learn More about Land Use and Institutional Controls:

For in-depth guidance on implementing and managing LUCs and ICs in cleanup processes, the Focus Group recommends the following resources developed by the Interstate Technology & Regulatory Council (ITRC):

An Overview of Land Use Control Management Systems, December 2008

Long-term Contaminant Management Using Institutional Controls, December 2016

themselves need to be managed to ensure their effectiveness.

Many sites at CFA federal facilities are not cleaned up to UU/UE. The ASTSWMO CFA Survey noted that the use of LUCs by CFAs varies. Responses note that CFAs implement ICs, including environmental easements, notices of environmental use restrictions, facility plans, and deed restrictions. Several States also mentioned the use of Uniform Environmental Covenants Act (UECA). While CFAs may implement these restrictions, most CFAs do not have methods for managing or tracking LUCs long term and as a result, sites can require more State intervention. It is imperative that CFAs develop systems to manage and track LUCs, as DoD and DOE have. While State oversight can assist in ensuring that LUCs are being managed appropriately and continue to be an effective tool in managing exposure risks, this does not alleviate the CFAs responsibility to manage its own land.

Applicable or Relevant and Appropriate Requirements

ARARs are identified on a site-specific basis based on whether an environmental law is "applicable" or "relevant and appropriate." CERCLA § 46 U.S.C. 9621(d)(2)(A) provides 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.

EPA has identified three key times in the CERCLA process where States should be providing ARARs:

1. When site characterization data is available during the RI (chemical and possibly location-specific ARARs and TBCs);

2. During the detailed analysis of alternative stage of the Feasibility Study (chemical-, action- and location-specific ARARs); and

3. At the draft Proposed Plan stage and in the Record of Decision (refining all ARARs).

The federal agency may also assert that an ARAR waiver is appropriate at a site. CERCLA § 46 U.S.C. 9621(d) provides that, under certain circumstances, an ARAR may be waived.[3]

As defined in the NCP §300.5, "**applicable requirements**" are cleanup standards, standards of control, and other substantive requirements, criteria, or limitations promulgated under federal or state environmental laws or facility siting laws that specifically address a hazardous substance, pollutant, contaminant, remedial action, location, or other circumstance found at a CERCLA site.

"**Relevant and appropriate requirements**" are cleanup standards, standards of control, and other substantive requirements, criteria, or limitations promulgated under federal or state environmental laws or facility siting laws that, while not ''applicable'' to a hazardous substance, pollutant, contaminant, remedial action, location, or other circumstance at a CERCLA site, address problems or situations sufficiently similar to those encountered at the CERCLA site that their use is well suited to the particular site.

[3] The six statutory waivers are: Interim Measure, Greater Risk to Health and the Environment, Technical Impracticability, Equivalent Standard of Performance, Inconsistent Application of State Requirements, and Fund-Balancing.

The State can invoke dispute resolution if there is disagreement over whether a State regulation is an ARAR or whether a waiver is appropriate where there is a federal facilities agreement that contains dispute resolution provisions. In fact, there are several ongoing disputes between States and federal agencies nationwide concerning ARARs at federal facilities. At CFA federal facilities where there is no agreement in place and where the federal lead agency is making decisions about the cleanup goals is also the polluter, the CFA is the final decision maker as to ARARs. If the CFA makes a determination that State laws do not meet the criteria of ARARs, then the State has little recourse since there is no third agency to mediate the dispute and no dispute resolution process. Some CFAs have also been known to side-step the issue of ARARs altogether by selecting a removal action rather than a remedial action and then declaring a project complete without State concurrence. Clearly it is preferable to have in place an agreement between the State and the CFA that provides for some form of fair dispute resolution.

Reimbursement of States Regulatory Oversight Costs

CERCLA 46 U.S.C. § 9620 requires federal agencies to comply with substantive and procedural CERCLA requirements to the same extent as private entities. Additionally, CERLCA subjects federal agencies to 46 U.S.C. § 9607 liability. Under this section, liable parties include, among others, the owner or operator of a facility or vessel. The term "facility" as defined in 46 U.S.C. § 9601(9) of CERCLA includes any "area where a hazardous substance has been deposited, stored, disposed of, or placed." As a result, if there is contamination on a federal facility that is owned by a CFA, that CFA is liable. As liable parties, the CFAs are responsible for all removal and remedial action costs incurred by the United States government, a State, or an Indian tribe consistent with the NCP. Under CERCLA 46 U.S.C. § 9607(a)(4)(A), costs include a State's oversight costs at a CFA site that a State incurs in overseeing removal or remedial actions undertaken by the CFA.

Although vital to environmental cleanups, a State's oversight cost recovery is often secondary to the remediation efforts and often not recovered, in direct contradiction to CERCLA requirements. According to E.O. 12088, issued in 1978, federal agencies are required "...to request sufficient funds from the Office of Budget and Management to cover their operating costs, which includes the cost associated with pollution abatement." These cost requests should include payment of State oversight costs.

To receive costs related to oversight, States can pursue cost recovery agreements with CFAs. These agreements can range from cooperative agreements to grants and purchase and/or administrative orders. Eleven of the 22 States that responded to the CFA Survey and reported active CFA site remediation in their State have established an oversight cost reimbursement agreement with a CFA. Examples of these agreements are provided in Appendix B. The CFA Survey also affirmed findings of an inconsistent oversight cost recovery policy across the nation. For example, some CFAs may reimburse the State for its cost, but a CFA in another State denies the same reimbursement. Some CFAs have also told States that they are "unable" to reimburse costs while other CFAs in the same State have mechanisms to provide the same reimbursement. Finally, the survey brought to light the fact that many States are unaware of the CFA's responsibility to reimburse States for oversight costs incurred.

Site Access for Compliance Activities

States are actively involved in ensuring that federal facilities are complying with both federal and State environmental requirements. To perform compliance activities, access to federal facilities is essential. State credentials verify the inspectors' identity, qualifications, training, and authority to conduct the inspection. Upon presentation of credentials, the facility should allow entry and not place conditions either upon the entry or on the scope of the inspection. Generally, once the federal facility understands the broad scope of inspection authorities, and the facility or area to be inspected is not classified, State personnel may then typically enter the facility. For some States, site access is restricted for visitors without federal identification to certain areas of the facility. In these instances, escorts (personnel with clearance) are required at all times, and State ID's permit access.

The CFA Survey responses indicate that States do not generally have problems with access to CFA sites. Most States can gain access to the facilities without access agreements through coordination with the facility's environmental manager. On rare occasions, CFAs have discouraged access to sites, primarily through the CFA stating that it will not reimburse State staff time or travel related expenses. For example, United States Forest Service (USFS) invited the Alaska Department of Environmental Conservation (ADEC) on a site visit but declined paying for State oversight costs including travel. In another case, the USFS also informed ADEC that they were not invited to attend a site visit with its contractors. Inspectors should immediately seek advice from their counsel's office if it appears that access issues may not be easily resolved with the CFA at federal facilities.

Petroleum Remediation

The Energy Policy Act of 2005 required reporting by federal agencies regarding the status of USTs owned or operated by federal agencies or located on federal lands. These one-time reports were provided to Congress and the US EPA in 2006. While dated, these reports can provide a general assessment about the locations and numbers of USTs on CFA federal facilities.

Although CFAs are required to address releases of hazardous substances under CERCLA, the CERCLA process does not cover all potential releases at a federal facility. With the CERCLA petroleum exclusion in place, States have developed various programs or policies to address the investigation and cleanup of known or suspected petroleum contamination at CFAs. The majority of States either actively oversee or propose to oversee petroleum cleanup at CFAs in the same manner as they address petroleum remediation at DoD and DOE sites or at non-federal facilities.

At CFAs, one tool States can use to address petroleum releases is the Resource Conservation Recovery Act (RCRA) Subtitle I of the Solid Waste Disposal Act. While petroleum is not considered a hazardous substance under CERCLA, it is considered a hazardous

> The term "hazardous substance" is defined in CERCLA, 46 U.S.C.§9601(14), to include substances listed under four other environmental statutes (as well as those designated under CERCLA 46 U.S.C. §9602(a)). The definition excludes "petroleum, including crude oil or any fraction thereof," unless specifically listed or designated under CERCLA.

waste under RCRA. For non-tank related petroleum contamination, RCRA can also allow States to address petroleum contamination on CFA sites due to the Federal Facility Compliance Act, Public Law 102-386, in which "Congress has expressly waived sovereign immunity for Federal facilities with respect to any substantive or procedural requirements regarding the control, abatement, or management of solid or hazardous waste."

As stated above, petroleum is considered a hazardous waste under RCRA, so the sovereign immunity waiver allows States to impose State requirements for cleanup on CFAs. The sovereign immunity waiver is not limited to releases from leaking USTs and can address petroleum contamination from any source. CFAs may also be offered the opportunity to enter State voluntary cleanup programs which allow for a more streamlined, results-based remedial process for cleaning up petroleum.

V. DISPUTE RESOLUTION

Most DoD sites are listed on the Defense State Memorandum of Agreement (DSMOA), which allow States the opportunity to participate in dispute resolution if project managers cannot agree on resolution of an issue. These dispute resolution procedures (either specifically negotiated between States and DoD, or the generic dispute resolution process set out in the DSMOA) allow for step up levels for involvement of increasingly senior leaders once project managers have been unable to resolve the issue. Most CFAs do not have such agreements or processes with States. As a result, if an issue cannot be resolved at the project manager level, States have little recourse except to appeal to their own leadership to engage with leadership at the CFA.

Of the 22 States who responded to our survey, one has been involved in informal or formal dispute processes with a CFA: Alaska. In Alaska, the ADEC has been able to develop broad memoranda of understanding with some federal agencies which provide for dispute resolution. For example, ADEC has a Memorandum of Agreement (MOA) with the Federal Aviation Administration (FAA) providing for a dispute resolution process to be developed at a later time but states that a decision is final unless it is timely appealed to the FAA administrator, whose decision is not subject to further administrative review and is final and binding. ADEC also has an MOA with the United States Coast Guard (USCG) which provides detailed tiers of dispute resolution for issues that project managers cannot resolve. ADEC does not currently have these agreements with other CFAs. In the past, ADEC had an MOA with the Bureau of Land Management and the National Park Service, which came about when the State sued these agencies for cost recovery. These had provisions for dispute resolution, however ADEC terminated these MOAs when they became unworkable due to increasing restrictions on what was eligible for cost recovery imposed by the federal agencies.

Disputes arise in a number of contexts surrounding the investigation and remediation of sites. It is beneficial to have a process already in place to address these disputes when they arise. If a State has few federal facility sites that are being addressed, the implementation of a process to resolve disputes may not be necessary. However, the Focus Group recommends that for States involved with oversight of several sites lead by one CFA, the State should seek to incorporate a dispute resolution process into an agreement with the Agency.

VI. CONCLUSIONS

States identified concerns that primarily focused on discovery and notification, removal action, and operation and maintenance provisions of CERCLA that are delegated to CFAs under E.O. 12580. One of the main challenges for States regarding CFA response actions is the actual identification of sites and response actions being conducted. While these sites are found on the Federal Docket, the Docket is not a complete inventory of CFA sites. As a result, there is potential for sites to exist without States' being informed by CFAs. In addition, States should not have to search the Docket to determine what CFA sites they have in their jurisdiction. CFAs should be reaching out to States to coordinate the cleanup process at these sites.

For those States that are familiar with CFA sites, an issue identified in the CFA Survey is the lack of communication, especially early in the process when all stakeholders should be acknowledged and involved. States in the CFA Survey identified this lack of constructive engagement and minimal responsiveness by CFAs as challenges that need to be addressed to facilitate cleanups. States must be involved in response activities conducted by federal agencies as required by CERCLA. State involvement is vital as federal agencies need help navigating State requirements. States have a wealth of experience, which can be used by federal agencies to save time and money by focusing available resources. It is essential that States be involved to confirm that activities are conducted in a manner that addresses public health and environmental concerns. This will eliminate partial clean-ups utilizing removal actions without long-term site management. This cooperative effort allows States to respond appropriately when communicating with the public, which, in turn, maintains the public trust as the CFA making remedial decisions is also the polluter.

One example of an agreement that incorporates many elements of concern for States is the DoD's nationwide DSMOA. DSMOA is based on the CERLCA process and designed to include States as active stakeholders in DoD remediation projects and processes. DSMOA incorporates cost recovery for oversight functions performed by States. DSMOA also has built in functions which fosters transparency and cooperation between the DoD components and the State, enhanced communication between agencies through partnering meetings and pathways for dispute resolutions. Most of all, DSMOA provides a robust process for establishing a bi-annual State regulatory oversight cost reimbursement budget for all Defense Environmental Restoration Program (DERP) eligible DoD remediation efforts in a State as well as the timely reimbursement of such oversight costs.

When States are brought in early in the cleanup process of CFA sites, fewer issues arise and there are successes. Examples of successes include:

- National Aeronautics and Space Administration (NASA) is actively engaged with the Florida Department of Environmental Protection on cleanup projects at the Kennedy Space Center. FDEP participates in meetings/calls, conducts site visits as needed, provides cleanup related document reviews, and comments on construction projects that could or will impact cleanup. Similar coordination is also being performed between the NASA

Stennis Space Center facility and the Mississippi Department of Environmental Quality as well as the NASA Michoud Assembly Facility and the Louisiana Department of Environmental Quality.

- In Nebraska, the United States Department of Agriculture (USDA) conducted remedial activities at multiple grain storage facilities that were fumigated with carbon tetrachloride. These activities have followed the CERCLA process and have been coordinated with the Nebraska Department of Environment and Energy (NDEE). USDA and NDEE continue to work together to prioritize and address the remaining former storage facilities.

- In Alaska, the FAA has identified over 300 contaminated sites, many of which are in rural and remote areas of Alaska, presenting logistical challenges. FAA has pursued an aggressive cleanup program and involved the ADEC with these cleanups, which are conducted under State oil and hazardous substance pollution control laws. ADEC staff review work plans and reports, conduct field inspections, and issue site closure determinations. The working relationship is collaborative, engaged, and focused on protection of human health and the environment. To date, over 170 FAA sites in Alaska have been closed, almost all of which are 'Cleanup Complete' without institutional controls.

- The FAA regularly works with multiple States (e.g. Alaska, Hawaii, Iowa, New Jersey, New York, and Oklahoma) to conduct remedial activities for petroleum related contamination.

History has shown that a State's participation in the CFA's remediation project(s) in their State resulted in greater understanding of the challenges faced by their respective agencies, which then resulted in greater success in resolving these challenges. History has also shown early State participation at CFA site remediation projects reduces the CFA's overall environmental liability as well as providing substantial cost savings to the CFA and to future interest holders in the property. This cooperative approach also leads to more effective long-term solutions, as in many situations, transfer of federal real property cannot occur without a State's approval of the final remedial action at that property.

APPENDIX A: RESOURCES

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