RCRA-CERCLA Integration Webinar for ASTSWMO

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How We Got Here

- CERCLA amended in 1986 by the Superfund Amendments and Reauthorization Act to add CERCLA Section 120 (Federal Facilities)
  - Provided process for listing certain federal facilities on the NPL
  - Added new mandatory requirement that federal owners/operators at NPL federal sites enter into interagency agreements which are commonly referred to as Federal Facility Agreements—CERCLA 120(e)(2)
  - Waiver of Sovereign Immunity in 120(a)(1)
  - CERCLA 120(e)(4) --Remedy jointly selected unless there is a dispute, in which case, Administrator selects
  - CERCLA 120(a)(4)—states laws regarding remedial and removal actions including enforcement apply at federal facilities not on the NPL
  - CERCLA 120(i)—nothing in 120 shall affect or impair the obligation of any federal agency to comply with any requirement of RCRA, including corrective action requirements.

How We Got Here (continued)

- EPA issued its 1989 federal facilities NPL listing policy determining that EPA will list federal RCRA treatment, storage, and disposal facilities on the National Priorities List (54 Fed. Reg. 10520 (March 13, 1989)).
- RCRA amended to waive sovereign immunity in October 1992.
- Later, in the FY 1997 National Defense Authorization Act (NDAA) Section 330, Congress amended CERCLA 120 to allow deferral of cleanup to other statutes, like at private sites.

DOE's Hanford Reservation (WA) is a RCRA TSD and NPL site.

How We Got Here (continued)

- As of 1997, when the NDAA amended CERCLA 120 to clarify that EPA could defer to other response authorities for federal facilities, there were already 165 federal facilities listed on the NPL.
- As of 2023, there are 175 federal facilities on the NPL.
- Thus, the vast majority of federal facility listings occurred BEFORE the 1997 amendments (prior to deferral).

Mustard gas storage at Aberdeen Proving Ground (MD)

Approximately, How Many Federal Facilities on the NPL have RCRA Permits?

- There are approximately 95 federal facility NPL sites with RCRA permits (from a quick review).
- Link to interactive map *Federal Facilities on the National Priorities List in Your Area*-- https://19january2017snapshot.epa.gov/fedfac/federal-facilities-national-priorities-list-npl-your-area_.html
- RCRAInfo web: https://rcrapublic.epa.gov/rcrainfoweb/action/main-menu/view provides a link to permitting and hazardous waste sites

Early Issue: Does CERCLA Preempt RCRA? *No, See US v. Colorado*, 10th Circuit case (990 F. 2d 1565 (10th Cir. 1993)

- Rocky Mountain Arsenal covered 27 square miles
- CO received RCRA authorization in 1984
- Precedent-setting case establishing that CERCLA does not preempt RCRA
- Enforcing state hazardous waste laws is not a challenge to a CERCLA remedy—not subject to 113(h) prohibition on pre-enforcement review
- Placement on the NPL has no bearing on a federal facility's obligation to comply with EPA-delegated state hazardous waste law or a state's ability to enforce its RCRA law
- Nothing in CERCLA supports argument that Congress intended ARARs to be the singular method of state contribution to hazardous waste cleanup
- Since RCRA applies during closure of regulated facility, the ARARs process CANNOT be the exclusive means of state participation in cleanup subject to both RCRA and CERCLA
- Heavy reliance on two CERCLA savings clauses: 42 USC §§ 9652(d) and 9614(a)

Rocky Mountain Arsenal (CO) with Denver in the background.

CERCLA 121(e)(1) Permit Exemption

- How does this affect (if at all) the requirement to get a RCRA treatment, storage, or disposal permit?
- How does this affect (if at all) the requirement for a closure or post-closure permit for RCRA regulated units? (e.g., DOE's Oak Ridge (TN) and post-closure permits for regulated units)
- **(e)PERMITS AND ENFORCEMENT**

(1) No Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite, where such remedial action is selected and carried out in compliance with this section.

- Administrator Carol Browner issued FFA dispute resolution decision at Weldon Springs(MO) (Permit not required for on-site response/applies to permits that arise solely due to CERCLA cleanup—not independent of CERCLA)

Oak Ridge Y-12 Plant

What Did EPA Do About the Overlap Between RCRA and CERCLA at Federal Facilities?

- As a matter of practice, EPA invited states to be full parties to the CERCLA 120 Federal Facility Agreement which helps foster our working together.
- States are parties to approximately 90% of the FFAs. In contrast, at private sites, states are parties to less than 10% of consent decrees.
- EPA saw it as good government to include states because EPA and states would work together in partnership providing consistent and single direction to federal agencies. If there were disagreements (which are unavoidable with grown-ups), we could work them out through the FFA's dispute resolution provision.
- Goal--one cleanup satisfies EPA and state requirements.

What is in the FFA to Address the RCRA-CERCLA Overlap

- RCRA-CERCLA Integration language stating that the preference is for the cleanup to be a CERCLA cleanup which should satisfy RCRA cleanup as well (both have protection of public health and environment as their standard).
- This provision is a model provision developed in 1988 and it is typically included in every FFA.

FFAs Have Flexibility to Allow States to be Lead Regulator Where Desired

- Examples include:
- Hanford: EPA and WA have divided up the Operable Units (OU)—RCRA TSD work (e.g., single-shell tanks) to Ecology and Past Practice Units to EPA (flexibility here)
- Puget Sound (Bremerton) with Navy and WA (in fact we switched one OU back to EPA at state's request through modifying the FFA)
- Rocky Flats Plant—Divided site up between CO lead and EPA lead (historical example)

Puget Sound Naval Shipyard

EPA Guidances that Apply

- *Coordination Between RCRA Corrective Action and Closure and CERCLA Site Activities* (September 24, 1996) https://www.epa.gov/sites/default/files/2013-10/documents/rcracorraction-mem.pdf
- *Lead Regulator Policy for Cleanup Activities at Federal Facilities on the National Priorities List (November 6, 1997)* *https://www.epa.gov/fedfac/lead-regulator-policy-cleanup-activities-federal-facilities-national-priorities-list*
- *Improving RCRA/CERCLA Coordination at Federal Facilities (Dec. 21, 2005)* https://www.epa.gov/sites/default/files/documents/oswerdir9272_0-22.pdf
  - "[G]enerally, cleanup conducted pursuant to RCRA corrective action or CERCLA will substantively satisfy the requirements of both programs." (page 2)
  - This guidance encourages early planning to provide for the release of a completed CERCLA cleanup from a RCRA permit to encourage efficient property transfer.

Case Study: Robins Air Force Base (AFB)

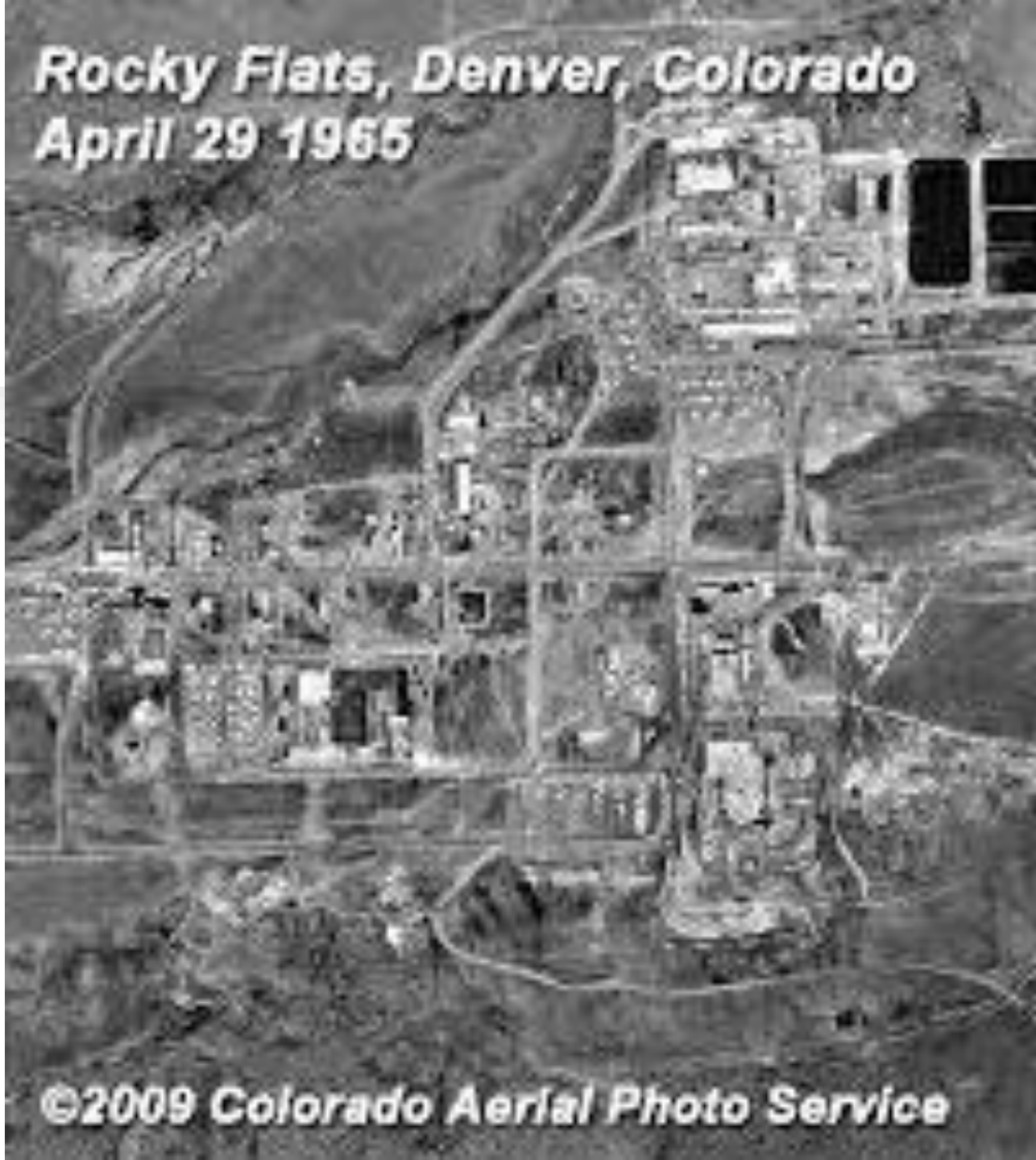
- Robins listed on the NPL in 1987
- Georgia first state in nation to have RCRA corrective action authority
- FFA includes RCRA-CERCLA integration language
- GA incorporated FFA into its permit by reference
- Robins FFA references the Robins RCRA permit

Robins AFB continued

- The former landfill and sludge lagoon comprise OU1 under CERCLA while both are listed as solid waste management units under the RCRA permit
- GA has no post-closure plans for OU1 under RCRA
- If the cleanup is protective under CERCLA, it is protective under RCRA
- But what if GA had disagreed with the selected remedy?
- GA can challenge in court after exhaustion of FFA dispute resolution
- Fortunately, it never came to that.

Rocky Flats Plant (CO) and its RCRA Permit

- At Rocky Flats Plant, in 2007, EPA, DOE, and CO entered into a legacy agreement that supersedes the original FFA from 1996-it provides a framework for implementation of the final remedy and long-term protectiveness
- CO is the primary lead and has enforcement authority under RCRA
- Cleanup complete (primary focus on land use controls and RCRA closure) and is a huge success—in 2007, 25,000 acres deleted from NPL. 5,000 acres transferred to FWS to manage the area as wildlife refuge.
- Agreement meets CO law of being enforceable and “in-lieu” of post-closure permit.



Case Study: Fort Wainwright (AK)—Tanana River

EPA is the direct implementing authority for RCRA in Alaska

EPA issued a RCRA hazardous waste permit to the Army at Fort Wainwright which was effective in 2013

Permit included a definition of solid waste management unit (SWMU)

Permit incorporated the FFA by reference and included the FFA as an attachment to the permit

The permit recognized that RCRA corrective action requirements would be satisfied through the FFA EXCEPT for certain SWMUs specified in the permit as not covered by the FFA (e.g., including those newly discovered not included in the FFA)

These SWMUs would fall under the permit

Tanana River, AK

Squatter Camp at Tanana River

Squatters began camping on the Tanana River to remove brass from munitions originating from Fort Wainwright.

Tanana River Continued

- CERCLA FFA and RCRA hazardous waste permit included requirements to notify EPA of new solid waste management units/operable units.
- The Army was aware of this activity and did not notify EPA for over a year.
- The Army and EPA resolved the violations in 2015. The Army paid approximately a $59,000 RCRA penalty for failure to notify and for failure to develop a SWMU Assessment report as required by the permit

Munitions Debris on Riverbank