

April 6, 2004

Lt. General Robert B. Flowers  
Chief of Engineers  
Office of the Chief of Engineers  
2600 Army Pentagon  
Washington, DC 20310-2600

Dear General Flowers:

The Association of State and Territorial Solid Waste Management Officials (ASTSWMO) is a national non-profit organization representing the managers of solid waste, hazardous waste, remediation, and underground storage tank programs of the State and Territories. The ASTSWMO Radiation Focus Group is tasked with working with the Army Corps of Engineers (ACOE) and the Department of Energy (DOE) to ensure that State Managers have meaningful input prior to development of any proposed rulemaking/policy that may significantly affect the State role regarding Formerly Used Site Remedial Action Program (FUSRAP).

We are writing this letter to express our concern that the ACOE is not implementing FUSRAP in the manner intended by Congress. Specifically the ACOE is reassessing the federal responsibility to clean up sites that have already been through that analysis by DOE and included in FUSRAP. As a result, the ACOE is reneging on commitments made by Congress to clean up these sites. We are recommending that the ACOE cease these "federal responsibility reviews" and focus on their program responsibilities to perform all necessary cleanup on sites already included in the FUSRAP program by the DOE.

As you are aware, the FUSRAP program was established in 1974 to investigate, and remediate as necessary, sites that were previously owned, leased, or otherwise used by the Atomic Energy Commission or the Manhattan Engineering District for operations involving radioactive materials used for the nation's nuclear weapons complex. Under this program, the Department of Energy evaluated hundreds of sites, and determined that approximately 46 sites met the criteria for program inclusion. By 1997, DOE had completed remediation at 25 sites, and remediation was expected or underway at 21 others. In addition, there were 18 sites that DOE considered potential new FUSRAP sites. There are currently FUSRAP sites that require remediation, investigation, or long-term stewardship in twelve States.

In October 1997, the Energy and Water Development Appropriations Act transferred responsibility for the cleanup portion of the FUSRAP program from DOE to the ACOE. Language in the Act authorized the ACOE "...For expenses necessary to administer and execute the Formerly Utilized Sites Remedial Action Program to clean up contaminated sites..." We believe that this language specifically provides funding for the ACOE to (only) perform the



cleanup activities required on the sites that DOE included in the program. The Department of Energy remains responsible for including sites in the program, and for long-term operation and maintenance of the sites.

The limitation on the scope of ACOE activities is further evidenced by the fact that in March of 1999, the ACOE and DOE signed a Memorandum of Understanding regarding roles and responsibilities in the FUSRAP program. That agreement clearly states that DOE will make the eligibility determination for new sites, which it does using an established screening protocol. The responsibility of the ACOE is limited to performance of necessary investigation and cleanup activities.

Recently, the ACOE has unilaterally decided that their responsibilities included a reevaluation of each site to determine whether the federal government has any responsibility for cleanup. In August 2003, the ACOE issued Regulation No. 200-1-4, *Formerly Utilized Sites Remedial Action Program (FUSRAP) - Site Designation, Remediation Scope, and Recovering Costs*. In this regulation, the ACOE describes four tests that must be met before the ACOE will remediate a FUSRAP site. Criterion (4) states: "The ACOE must decide that they have authority to respond under CERCLA." We believe this authority is derived from the Congressional Appropriation, and does not relate to the current site-specific analysis that the ACOE has initiated. Further, we believe that the basis for this action is a misinterpretation of the 1998 appropriation language, which stated:

[R]esponse actions by the United States Army Corps of Engineers under this program shall be subject to the administrative, procedural, and regulatory provisions of the comprehensive Environmental Response, Compensation and Liability Act and the National Oil and Hazardous Substance Pollution Contingency Plan, 40 CFR Chapter 1, Part 300.

It is our understanding that the ACOE believes that this language requires them to re-evaluate site inclusion, under some pretext of "federal responsibility" pertaining to the liability provisions of CERCLA. We believe the language requires the ACOE to follow CERCLA as it pertains to site cleanup ("response actions"). We further believe that it allows the ACOE to pursue responsible parties for cleanup costs. However, we do not believe that it allows the ACOE to decide that a site does not belong in the program.

In meetings we have had with your staff and especially with the Districts, it also appears that they feel this mechanism is needed to keep them from cleaning up sites that do not need cleanup. State Program Managers acknowledge that there may be sites that have been included in the program, for which "No Action" may be the proper alternative. However, this determination should be based on a technical evaluation of site characterization data, and not on a re-evaluation of CERCLA liability.

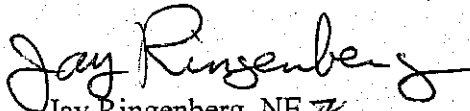
We believe that the ACOE position is a misinterpretation of the legislation, and a reversal of long-standing commitments made by the federal government to States, local governments, and landowners. The impacts of this decision by the ACOE are already being felt. Work has been stopped at the Niagara Seaway site in New York, pending a decision by the ACOE on "federal responsibility." We have also heard that portions of the Luckey and Painesville sites in Ohio

will not be addressed due to this new policy. If these sites are not investigated and cleaned up under FUSRAP, there are no other programs to take responsibility for these sites. With the threats to public health and the environment posed by these sites, we cannot afford to leave this contamination unaddressed.

We also believe that Congress was clear in giving this mission to the ACOE. It intended for the ACOE to complete the necessary investigations and cleanups at these sites, not to reverse decisions regarding the federal government's responsibility. Therefore, we do recommend that the ACOE amend Reg. 200-1-4 to remove references to their response authority, and that the ACOE cease any current or future "federal responsibility" investigations.

We would like to thank you for your attention to this matter. If you would like to discuss this issue further, please contact either myself at (402) 471-3372 or Jeff Deckler, CO, Chair of the ASTSWMO Radiation Focus Group, at (303) 692-2287.

Sincerely,

A handwritten signature in cursive script that reads "Jay Ringenberg".

Jay Ringenberg, NE ~~7~~  
ASTSWMO President