

ASTSWMO POLICY POSITION PAPER ON THE DSMOA PROGRAM

Issue

The model Defense State Memorandum of Agreement between U.S. Department of Defense (DoD) and States was negotiated in the late 1980's and signed by States in the early 1990's. Once signed, it has been a very rare event that any modifications to the DSMOA language are made, even though the program and States have undergone considerable changes. Significant disagreements between DoD and States have developed as to the intent of portions of the DSMOA language. These disagreements have resulted in delay of reimbursement of State costs, misunderstanding of State responsibilities, and confusion regarding what are DSMOA eligible State services. This has impeded cleanup schedules at DoD facilities, contrary to the intent of the DSMOA program. This paper evaluates and recommends an ASTSWMO position on DSMOA.

Background

In the late 1980's the DoD developed the DSMOA in response to growing State enforcement actions through the application of the Resource Conservation and Recovery Act of 1976, as amended (RCRA), recognition of States role due to Defense Environmental Restoration Act (DERA) and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA), and growing public concerns that DoD was not being held to the same standards as industry. The DSMOA program was undertaken after extensive discussion with the ASTSWMO's Federal Facilities Task Force. Those discussions resulted in DoD's adoption of DSMOA model language, which has been unchanged since that time. This model DSMOA language was acceptable to many States, which have entered into the program and received funding from DoD.

Even at the time that the DSMOA was developed, States had several concerns that they and DoD envisioned would be reviewed after an initial period of working within the program. Through the use of attachment B of the DSMOA, along with clarification letters from DoD that were incorporated into many States' DSMOA, many of these concerns were initially addressed by individual States by modifying attachments to the basic DSMOA.

Unfortunately, recently several new interpretations of the DSMOA and Cooperative Agreement (CA) language have emerged from the U.S. Army Corps of Engineers (USACE), DoD and the military components. A majority of these recent legal analyses directly impact States' ability to adequately administer their statutory requirements as environmental regulators. Threats of withholding reimbursement of State oversight costs have been made to States if they do not comply with these new interpretations. It is likely that States would not have signed-up to the DSMOA program if these attempts by USACE, DoD and military components to force States into a contractor-like relationship had been evident at that time. In



addition to these new interpretations, significant sections of the DSMOA associated with accounting and budgets are no longer applicable and/or contrary to the current DSMOA/CA process.

It has become evident, there now exist significant disagreements between DoD and States as to the intent of the original model language. These disagreements have resulted in delay of reimbursement of State costs, misunderstanding of State responsibilities, and confusion regarding what are DSMOA eligible State services. It has also undermined development of joint State-DoD policy on subjects directly related to DoD cleanup activities. Delay in cleanup schedules at DoD facilities, contrary to the intent of the DSMOA program, has resulted from these new interpretations.

ASTSWMO has supported the DSMOA program since its inception. In fact, in the past ASTSWMO offered to explore an expansion of the DSMOA program to address cleanup activities which do not use DERA or BRAC funds, but are consistent with remedial type activities conducted under DERA or BRAC. It is clear the DSMOA program has facilitated numerous positive impacts, including:

- Cost savings on cleanups
- Reduction of litigation
- Expedited cleanups
- Active participation of States and interested parties including the public at all phases of the clean-up process
- Reducing number of DOD sites on CERCLA National Priorities List
- Expediting site assessment and response actions via coordination among DoD, Federal and State Remedial Project Managers
- Increased public trust in cleanups

ASTSWMO is now concerned that failure to retain an acceptable DSMOA program could lead to States looking for other means of reimbursement of oversight costs, including cost recovery and direct billing under State authorized environmental programs. The consequences of States leaving the DSMOA program include:

- Reduced oversight resulting in unprotective remedies
- Increased litigation over remedy selection/implementation
- Delays in cleanup remedy selection and implementation
- Increased risks to public health and environment
- Expansion of contamination footprint
- Increased costs
- Slow down of property transfers at BRAC sites
- Reduction of national consistency among the States/Territories
- Erosion of public confidence and relationships

ASTSWMO's Concerns with Recent DSMOA Direction

During the development of the July 2006 DSMOA *“Working Together to Achieve Cleanup, a Guide to the Cooperative Agreement Process,”* ASTSWMO was informed by the USACE, DoD and military components of new interpretations of the DSMOA model language. ASTSWMO's principal concern is the legal reading of Section IV of the model DSMOA language, which the federal agencies now interpret as requiring States to “engage in the dispute resolution specified in the DSMOA prior to pursuing any other enforcement authority that may be available to States with regard to any matter in dispute related to the programs and projects included in the DSMOA” (letter from Richard Morgan, DSMOA Grants Officer to Gerald Hardy, Alabama Department of Environmental Management, September 2005). Under this new interpretation of Section IV, failure to use the DSMOA dispute resolution prior to enforcement actions would be considered a breach of the DSMOA and CA. This alleged breach would allow the DSMOA Grants Officer to unilaterally terminate reimbursement of all DSMOA costs to that State.

Requiring dispute resolution prior to enforcement is contrary to RCRA's requirement that States have timely and adequate enforcement actions. It is also contrary to the Federal Facility Compliance Act's mandate that federal agencies be subject to the same requirements and enforcement as private entities (the USACE, DoD and military components now consider “enforcement” to include State issued warning letters and compliance advisories). EPA has informed States and DoD that under this interpretation, States may be non-compliant with the terms of being delegated to enforce its federal regulations.

In addition to the requirement to engage in dispute resolution prior to any enforcement, ASTSWMO was also informed during this time that the USACE, DoD and military components interprets this dispute resolution requirement to extend to all agencies within a State, even those with no knowledge of DSMOA or those not under the jurisdiction of the State DSMOA signatory.

This overly broad definition of “State” requires constant coordination between all State agencies and Departments. Most States agreed to DSMOA provisions only as they relate to environmental remediation. DSMOA signatories may have no authority to control the actions of all State agencies and ultimately could lose DSMOA funding due to uninformed actions of agencies with no knowledge of the DSMOA program.

Also, in a DSMOA-related claim against the USACE, the DSMOA Grants Officer informed the State of Colorado in an August 8, 2006, and again in a January 8, 2007 letter, that attendance at ASTSWMO meetings, and billing DSMOA for labor charges while participating in ASTSWMO meetings was no longer DSMOA eligible. The DSMOA Grants Officer concluded attendance and participation at ASTSWMO functions are DSMOA ineligible because, among other things, ASTSWMO: 1) exists for purposes unrelated to the completion of environmental programs and projects of DoD and the components, 2) lobbies Congress for legislation and federal agencies regarding federal contracts and agreements, and 3) develops State regulations. In addition, DoD has determined that ASTSWMO is not a grant eligible organization pursuant to 10 United States Code (USC) 2701 (i.e., the Defense Environmental Restoration Statute), as it does not meet the eligibility requirements of Section 2701(d) because the organization is not a federal agency, or a State or local government agency, or an Indian tribe.

This has led to the disbanding, after five constructive years, of the Munitions Response Committee, a forum between ASTSWMO State representatives, DoD, military components, federal land managers, and EPA to discuss and formulate a consistent approach to unexploded ordnance from site identification to closeout. In addition, the Grant Officer's opinion has removed ASTSWMO representatives from the DSMOA Steering Committee, a group of ASTSWMO representatives, USACE, DoD and military components with a goal to improve the implementation of the DSMOA/CA process. Only members of the federal government now attend the DSMOA Steering Committee, with no input from State DSMOA project managers.

It is evident that the decision of the Grants Officer was without adequate research and communication with ASTSWMO and EPA. Each of the three referenced reasons by the Grants Officer for ASTSWMO being DSMOA ineligible is without merit. Numerous attempts by ASTSWMO, EPA and the State of Colorado to better inform the Grants Officer on the structure of the Association have been unsuccessful.

Finally, States have been informed by the USACE that training of State staff that will be billed to the DSMOA program must first be approved by individual military components. In addition, training and attendance at workshops or national symposiums must only be related to site-specific oversight; policy and guidance development specific to DoD and DSMOA is no longer eligible.

DoD and military components do not have the authority or the understanding of State environmental programs to dictate what training may be necessary. In addition, this opinion could logically extend to all staff time for work done under ECOS, ITRC, or other auspices that may be related to environmental restoration, but are not site-specific. It will lead to a reduction in policy and guidance that States rely on nationally to promote more uniform and mutually agreeable cleanup actions resulting in benefits to DOD such as reduced costs, increased efficiency, avoiding expensive delays and State enforcement actions.

ASTSWMO POSITION

- ASTSWMO commends DoD and USACE for its successful implementation and continued improvements in the administration of the DSMOA program. When managed cooperatively, the DSMOA is a proactive program that facilitates coordination and communication between DoD and States.
- ASTSWMO advocates that the DSMOA program reflect State oversight as critical to the successful investigation and clean-up of military facilities. This State role is confirmed by the Federal Facilities Compliance Act of 1992 and as provided in Section 121(f) of CERCLA.
- It has been several years since most State DSMOA's language was negotiated and finalized. Significant disagreements between DoD and States have developed as to the intent of portions of the DSMOA language. These disagreements have resulted in delay of reimbursement of State costs, misunderstanding of State responsibilities, and confusion regarding what are DSMOA eligible State services. This has impeded cleanup schedules at DoD facilities, contrary to the intent of the DSMOA program.

- These recent interpretations include, but may not be limited to: a) eligible State services, b) use of dispute resolution versus enforcement, c) State agencies bound by the terms of the DSMOA, and d) defining which DoD sites are eligible for DSMOA reimbursement.
- ASTSWMO advocates States consider reopening individual DSMOA's in order to initiate negotiation with DoD regarding these and other recent interpretations. Failure to clarify the terms of the DSMOA may leave States exposed to future unnecessary audits, disputes regarding interpretation of the DSMOA and the CA process, and delays in cleanup at DoD facilities. In addition, States should consider whether to revise their DSMOA to represent current accounting, billing, and reimbursement procedures. Attached is model re-opener letter.

Adopted by the ASTSWMO Board of Directors April 23, 2007 in Providence, RI.

Date

Mr. Alex A. Beehler
Department of Defense
Assistant Deputy Under Secretary of Defense
(Environment, Safety, and Occupational Health)
3400 Defense Pentagon, Room 3E792
Washington, DC 20301-3400

Dear Mr. Beehler:

The **(State)** is seeking concurrence from the Department of Defense (DoD) to reopen our Department of Defense and State Memorandum of Agreement (DSMOA). As per Section V of the DSMOA, the terms of **(State's)** DSMOA may be modified at any time by mutual agreement of the parties. Section V also states that if a party does not concur with a request to reopen, the matter will be referred to an individual designated in writing by the signatories to the DSMOA.

The Department/Agency believes that significant sections of the DSMOA are no longer applicable and/or contrary to the current DSMOA and Cooperative Agreement (CA) process. **(List examples, for example)** In its current version, and in contrast to sites listed on our Attachment A, Section I A of **(State)** DSMOA does not cover reimbursement of BRAC V or BRAC 2005 sites. In addition, **(State's)** "Maximum Reimbursement" and "Annual Budget Limits," Sections I D and I E respectively, identify limits to our reimbursement and annual spending that are no longer applicable. Finally, based on recent policy interpretations, there is disagreement between the Department and the U.S. Army Corps of Engineers' DSMOA Office (USACE) regarding the scope of "State Services" and "Dispute Resolution" (Section 1 B and Section IV). We believe these new interpretations significantly impact our ability to provide timely and adequately productive assistance in expediting the cleanup, closure and transfer of DoD facilities. In addition, we maintain they limit the Department's ability to meet our obligations as environmental regulators, specifically to ensure DoD compliance with state and federal environmental laws. Without this capability, we are concerned about preserving our responsibility of protecting public health and the environment at active, inactive, closed, realigned and formerly used defense sites.

In order to resolve current disagreements and to avoid future disputes, the Department believes the terms of these sections, and possibly others, needs to be discussed and clarified. Without reopening the DSMOA and reaching mutual agreement on its terms, the Department is concerned that it is increasingly vulnerable to future unnecessary audits and disputes regarding interpretation of the DSMOA (especially eligible State Services) and the CA process. These issues have the potential of causing significant delays in the clean-up at DERA and BRAC sites.

We look forward to your concurrence, or in the alternative, the name of an individual within DoD that this matter will be referred.

Sincerely,
Mr./Ms. Director
cc: