

ASTSWMO POSITION PAPER ON THE FORMERLY UTILIZED SITE REMEDIAL ACTION PROGRAM

BACKGROUND

The U.S Department of Energy (DOE) started the Formerly Utilized Sites Remedial Action Program (FUSRAP) in 1974 in order to investigate and perform cleanups at sites that were part of the Manhattan Project and early nuclear energy research efforts in the 1940's and 1950's. Almost all FUSRAP sites were privately owned sites that were operated or leased by the government. In many cases these facilities produced components for the first atomic weapons or were test and pilot facilities for what became the weapons complex. By the mid 1950's most of the large Atomic Energy Commission weapon production facilities were on-line and these smaller facilities were no longer needed. When production ended, most of these sites were cleaned up to the standards of the day. However, DOE found that standards had become more stringent since the 1950's and it became necessary to reevaluate and perform additional cleanup at many of these sites.

DOE managed the program until 1997, when Congress then transferred control of the remediation portion of the program to the U.S. Army Corps of Engineers (ACOE). However, portions of the FUSRAP program still remain the responsibility of DOE. These responsibilities include determining the eligibility of new sites and the long-term management of these sites after the evaluation and cleanups are completed by ACOE. It should be noted that there are additional sites that also participated in the weapons production effort but were never selected to be FUSRAP sites because of liability protection afforded to DOE in the contracts with private owners.

DISCUSSION

The history of the FUSRAP program has been one of uneven progress. The program has also been characterized by a lack of opportunity for meaningful State involvement. This has led to frustration on the part of States regarding both the speed and adequacy of the cleanups achieved on FUSRAP sites. The lack of progress caused Congress to move the cleanup decision-making and construction portions of the program from DOE to ACOE. In order to affect this transfer, and to clarify the roles of the agencies, DOE and ACOE entered into a memorandum of agreement in March 1999. In May 1999, the ASTSWMO Radiation Focus Group wrote a letter to both agencies commenting on the deficiencies in the agreement, and the complete lack of a State role in the development of that document. The Focus Group also noted that ASTSWMO had recently completed a survey on the Formerly Utilized Defense Site (FUDS) program, and the federal agencies had an opportunity to avoid many of the problems identified with the FUDS program that were about to be repeated in the FUSRAP program. Unfortunately, the Focus Group received no response from ACOE, and the response from DOE simply referred the group to ACOE.

The ASTSWMO Radiation Focus Group has been meeting with ACOE and DOE representatives to discuss FUSRAP issues since March 2000. However, these meetings have not appreciably changed the program or fostered increased State participation in program decisions. During this period, ACOE

has continued to finalize guidance without addressing state concerns, and to oppose State perspectives and concerns on various issues. The DOE has disengaged from these discussions, despite the fact that several of the issues cross over into DOE program responsibilities. Our interaction with the federal agencies has demonstrated both the lack of acknowledgment for a State role in the program, and the lack of coordination between the two federal agencies implementing the program. In discussions among States, as represented by the ASTSWMO Radiation Focus Group, the following issues have been identified:

- **Coordination between DOE and ACOE** - The allocation of the FUSRAP program between two agencies has created a situation where each agency implements their portion of the program with little or no interaction with the other agency. However, we would assert that there is the need for coordination between DOE and ACOE on FUSRAP sites. This coordination is necessary for the listing of potential new sites so that ACOE can request adequate funding and properly prioritize its workload. Coordination is even more important in the release of cleaned up sites from ACOE to DOE for final long-term stewardship (including institutional controls) at those sites that are not remediated to meet unrestricted use criteria. Because these sites will return to DOE for long-term stewardship, there needs to be coordination between DOE and ACOE at the point of remedy selection. This coordination will be valuable to examine long-term life cycle costs of the various alternatives under consideration. States believe that the lack of coordination between the federal agencies impacts the effectiveness of the program and potentially the degree of cleanup that is achieved.
- **Funding** - When Congress divided the FUSRAP responsibilities, the funding level for DOE did not permit the Department to engage in the type of coordination that is outlined above. We believe that it is necessary for DOE to receive additional funding, so that they may participate in the cleanup decision-making process and protect their long-term interests. In addition, ACOE uses competition for insufficient funding to pressure the States into accepting ACOE positions or risk the redirection of funding to other States/sites. States should be given more information on ACOE funding levels, and funding allocation between regions, so they can address these tactics on the part of ACOE. With the addition of new sites in the FUSRAP pipeline, it is possible that the ACOE may need additional funds to adequately investigate and cleanup these sites.
- **Site Prioritization** – ACOE must have a clear and understandable site prioritization process, which includes State input. The ACOE should schedule a meeting with each State during the planning phase to coordinate and agree on priorities, strategies, workloads, and funding for each of the FUSRAP sites in the State. The effort should also include a general discussion concerning work efforts and budgets for the next 3-5 years at these sites. Similar efforts have been very successful with Ohio and ACOE working together on FUDS.

- **CERCLA Compliance**

- In FUSRAP, ACOE has taken the position that they only have to meet promulgated standards, and they can ignore any guidance that has been developed to implement these standards. An example is ACOE utilizing 40CFR192 for radium in soil cleanup standards, but ignoring EPA's February, 1998 guidance (Directive No. 9200.4-25) which suggests that the entire standard should only be applied as written at uranium mill sites. The guidance goes on to explain the limited circumstances under which various parts of the standard should be used on other sites. ACOE has ignored this guidance and applied parts of the standards at sites where the EPA guidance indicates they are not appropriate.
- Since the ACOE is using delegated CERCLA authority, it is important that the entire CERCLA guidance for radioactive sites developed by EPA is applied. ACOE should coordinate with the States and EPA to select appropriate guidance and ARARs that will be utilized at each site. Further, use of other federal standards to establish cleanup levels outside of EPA rules and regulations is inappropriate. While these other federal standards may be used as guidance or used if an explanation of how the standards meet or comply with the CERCLA process is provided, they should not be used as equivalents of risk assessments or to determine compliance with cleanup levels (i.e., radiological cleanups are based on the risk from contaminant concentrations, not direct exposure).
- In addition, ACOE does not follow the CERCLA definition of a site (on-site), which includes the areal extent of contamination. In FUSRAP, ACOE sometimes defines the site as ending at the property boundary, regardless of whether the contamination continues past that boundary. Since the ACOE is using CERCLA authority as a basis for this cleanup program, it is important that they use CERCLA definitions in determining site boundaries to ensure complete investigation and remediation of these sites. Our goal in site cleanup should be to address the site once, and not have to revisit sites to clean up areas or contaminants not previously addressed.

- **State and Community Involvement** - The States and communities need to be involved in the entire cleanup process including the evaluation and selection of remedial action alternatives. State and community acceptance are an important part of the nine criteria to be evaluated in the CERCLA remedy selection process. Although there is currently some State involvement in the program, ACOE does not acknowledge that they have to work in agreement with States or follow State recommendations. The dynamics of the relationship between the States and the ACOE need to develop into a more meaningful partnership. The failure to satisfy the States' concerns can result in remediated sites that do not meet State requirements. This shifts the burden for full remediation of these sites to the States and the private landowner. It is critical that all parties (Federal, State, and local governments, stakeholders) be in agreement on cleanup levels, future uses, institutional controls, etc. Only with this approach can we avoid revisiting and questioning whether or not these remediations were completed in a protective manner.

- **Other Potential FUSRAP Sites** - With the recent findings by DOE concerning other sites that also participated in the Manhattan Project or early cold war research production, DOE, ACOE and the States need to meet to discuss a possible path forward to address issues that have been raised and will continue to be raised about these other sites. As part of these discussions, the agencies should address the potential need to re-evaluate sites where DOE has determined that no action is necessary. In many cases, these determinations were completed by a paper review, legal review, or a “drive-by” inspection. Experience in the FUDS program has shown that many of these sites may in fact require remediation. The issue of determining that a site did not require further action based on the type of contract or lease agreement with the government also warrants further discussion. These exclusions from the program leave sites that may need cleanup to avoid future public exposure to existing contamination unaddressed.
- **Institutional Controls** - It is not evident in FUSRAP that the ACOE has an adequate understanding of the cost and complexities of relying on institutional controls when sites are not remediated to criteria that allow unrestricted use. Further, the segregation of responsibilities between DOE and ACOE has created a situation where decisions on institutional controls are being made without consultation from the agency that will be required to implement those controls. Given the current State experiences regarding institutional controls, this situation is ripe for failure. The State programs would like to meet with both DOE and ACOE to discuss how institutional controls/long-term stewardship will be addressed and enforced at those FUSRAP sites where it is needed.

Also, it is not clear that ACOE understands the threshold question of when a remedy requires institutional controls at all. ACOE currently believes that unrestricted use cleanup levels are based on the current property use. They believe that if an industrial area is cleaned up to an industrial use risk level, no institutional control is necessary. States believe that such a cleanup is not protective unless there are restrictive covenants and other land use controls in place that ensure continued industrial use of the property. These controls must be durable, reliable, and enforceable. Although this can be a difficult issue for ACOE to address, since in most cases they do not own the property, this cannot be an excuse to completely misunderstand the issue and abrogate their responsibility to provide a protective cleanup. ACOE needs to adopt the same definition for unrestricted use that all of the other States and federal agencies use.

ASTSWMO POSITION

ASTSWMO recommends the following actions on the part of DOE and ACOE in order to improve its relationship with States and increase the effective implementation of the FUSRAP program:

- Establish an open and cooperative working relationship between DOE, ACOE and States in all phases of FUSRAP. The parties need to discuss and agree on the scope of program issues, and the methodology for resolving those issues. Lessons learned from the FUDS program should be applied as warranted to provide a relationship structure that has proven to be successful in a similar program involving the same parties.
- Ensure adequate funding of federal agencies for DOE to participate, and for ACOE to fund

projects in all States and regions as necessary. Ensure States have adequate information regarding the funding levels of the federal agencies and adequate funding for oversight.

- Ensure early State involvement in the FUSRAP process, especially in the preliminary scoping activities, budgetary planning, site prioritization and cleanup levels. Support the establishment of a States' working group to discuss State issues with DOE and ACOE. Improve community outreach and involvement.
- Ensure ACOE recognition and compliance with EPA's CERCLA guidance, State clean-up statutes, regulations, guidance and enforcement authorities. Involve EPA to ensure ACOE compliance with CERCLA requirements.
- Ensure the use of institutional controls as appropriate and in compliance with State law, and sufficient coordination among entities responsible for implementing those controls.

The ASTSWMO Board of Directors encourages its membership to pursue these common goals in voicing their support for, or opposition to, specific provisions of the many policy and legislative proposals that relate to the FUSRAP program. The Association will continue to operate in close coordination with other State associations in seeking to realize these goals.

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