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ASTSWMO POSITION PAPER

State Concerns with the Process of Identifying Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) Applicable, or Relevant and Appropriate Requirements

INTRODUCTION

Over the last five years, the Association of State and Territorial Solid Waste Management Officials' (ASTSWMO) CERCLA and Brownfields (CaBS) Subcommittee members have been evaluating State and Territorial (State) roles at CERCLA cleanups. One troubling area has been the process of identifying and accepting States cleanup standards and rules as Applicable or Relevant and Appropriate Requirements (ARARs) in CERCLA cleanups.

ARARs are identified on a site-specific basis based on whether an environmental law is "applicable" or "relevant and appropriate." As defined in the National Contingency Plan (NCP) §300.5, applicable requirements are cleanup standards, standards of control, and other substantive requirements, criteria, or limitations promulgated under federal environmental or State environmental 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 environmental or State environmental 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.

Concisely, ARARs are requirements that assure CERCLA cleanups protect human health and the environment. Therefore, it is essential that the all site-specific State requirements are identified in CERCLA Records of Decision. The NCP and CERCLA §121 say that State standards that are identified in a timely manner and are more stringent than federal requirements may be considered applicable or relevant and appropriate. During the Remedial Investigation (RI) phase of a CERCLA site, the lead and support agencies should work collaboratively to identify preliminary chemical and, possibly, location-specific ARARs. Refinement of chemical- and location-specific ARARs, as well as identification of action-specific ARARs, occurs during the Feasibility Study (FS) stage of the CERCLA process.

STATES' ARAR POLICY CONCERNS

ASTSWMO members have expressed concerns about the process EPA follows to identify and determine if State requirements are ARARs, as well as State guidance that may constitute to-be-considered (TBCs) criteria for fund and enforcement lead CERCLA remedial actions.

The EPA and States have a long history of considering and identifying the substantive portions of State requirements that may constitute ARARs and in many cases there is no disagreement. However, when States and EPA disagree, States across the country have asked EPA to improve consistency and transparency in the ARARs process. Some policy concerns raised by States include:

- Inconsistencies in ARAR determination from one site to another;
- EPA's application of State requirements as ARARs that is inconsistent with how States apply their cleanup requirements and standards;
- EPA's determination that a State requirement is procedural rather than substantive when the State believes it is an ARAR critical to implementation of the chosen remedy;
- Reluctance of other federal entities to recognize State environmental laws and regulations as ARARs;
- Lack of written documentation on an ARAR determination where EPA finds that a State cleanup requirement was not an ARAR; and
- EPA delays when determining whether a State requirement is an ARAR, and as a result, leaving the State inadequate time to challenge the finding.

Similarly, in a limited number of circumstances, there are situations where a State and a Region do not agree that a State ARAR is substantively more stringent than the federal regulation. This category of potential State ARARs may result in protracted discussions delaying a final decision or resulting in prolonged formal dispute resolution.

ARARS AND THE CERCLA PROCESS

ARARs are an important part of the CERCLA process. Entering into a well-informed dialogue on ARARs as early as possible in the Remedial Investigation/Feasibility Study (RI/FS) process to try to identify and begin to resolve potential issues is imperative. Both States and EPA should include legal staff as well as program staff in ARAR discussions early on and throughout the RI/FS process.

On October 20, 2017, EPA's Office of Land and Emergency Management (OLEM) issued Directive 9200.2-187 titled "Best Practice Process for Identifying and Determining State Applicable or Relevant and Appropriate Requirements Status Pilot." Appendix 1 of this EPA Directive is a list of recommended steps States and EPA should follow to effectively identify and determine State ARARs and TBCs during the CERCLA process. These steps are based on the NCP regulations.

The 2017 OLEM Directive identifies three key times in the CERCLA process where States should be asked for a list of ARARs:

1. When site characterization data is available during the Remedial Investigation (chemical and possibly location-specific ARARs and TBCs);
2. During the Detailed Analysis of Alternative stage of the FS (chemical-, action- and location-specific ARARs); and
3. At the Draft Proposed Plan (refining all ARARs).

If after reviewing the State ARAR list EPA identifies any area of disagreement, EPA should communicate with the State as soon as possible. If the State disagrees with EPA's determination of the State ARAR list, then the State should invoke dispute resolution quickly before continuing the RI/FS. Appendix 2 of the OLEM Directive is a list of steps to follow if dispute resolution is required during ARAR identification.

Appendices 1 and 2 were developed during an October 2015 ARARs LEAN event hosted by EPA's Office of Superfund Remediation and Technology Innovation (OSRTI) and Office of General Counsel (OGC), which included participants from the States and EPA headquarters program and regional counsel staff. Four members of the team were from State Agencies representing Regions 3, 6, 8, and 10. The purpose of this event was to help explore possible ways to improve the overall process of State ARAR identification and help ensure the overall transparency and efficiency of the effort. ASTSWMO appreciates EPA holding this important event and their continued support for improving State involvement in all aspects of the CERCLA process, including the identification of States' ARARs.

ASTSWMO ARAR RECOMMENDATIONS

ASTSWMO recommends that States reference OLEM Directive 9200.187 as they work on CERCLA projects to help improve communication between EPA and States. Better transparency and early communication on State ARARs will help ensure meaningful and substantial State involvement during the CERCLA process.

ASTSWMO recommends that EPA provide better training and guidance to Regions on the ARAR identification process and consideration of State requirements. ASTSWMO appreciates EPA inviting representatives from States to participate in these important training events and believes that this type of joint discussion will enhance both State and EPA knowledge. This type of training would also provide States with a better understanding of how EPA determines which aspects of State requirements meet EPA's ARARs criteria. This knowledge would assist States as they evaluate how to revise and update State requirements.

ASTSWMO and EPA should communicate consistently that other federal entities must comply with State environmental laws and regulations to the same extent as non-federal entities when conducting cleanups under CERCLA.

ASTSWMO recommends that EPA update regulations, guidance and policy to make it clear that State environmental covenant and land use control laws are ARARs. These regulations are essential components of many remedial actions, especially those that require ongoing remediation activities and those which utilize risk management cleanup approaches to ensure long-term protection of human health and the environment.

CONCLUSION

Early State involvement, transparency and consistency are essential when determining which State environmental regulations are potential ARARs. Early engagement between EPA, States, and other federal entities is key to preventing unnecessary delays. Any modernization of CERCLA must ensure that the role for State co-regulators in all CERCLA decision-making for sites within their boundaries is enhanced.

As a next step, ASTSWMO recommends the initiation of an open dialog between States and EPA on policy discussions regarding whether or not a State regulation constitutes an ARAR.

Reference:

U.S. EPA 2017, Best Practice Process for Identifying and Determining State Applicable or Relevant and Appropriate Requirements Status Pilot Memorandum. OLEM Directive 9200.2-187. October 20, 2017. <https://semspub.epa.gov/work/HQ/197017.pdf>

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