CERCLA Applicable, or Relevant and Appropriate Requirements: ASTSWMO Position Paper Addressing State Concerns

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The Association of State and Territorial Solid Waste Management Officials ("ASTSWMO") issued a position paper titled:

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

The *Position Paper* is described as a continuation of ASTSWMO's evaluation of state and territorial roles at Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") cleanups.

The referenced review is undertaken by ASTSWMO's CERCLA and Brownfields Subcommittee. Arkansas Department of Energy & Environment – Division of Environmental Quality Office of Land Resources Technical Branch Manager Dianna Kilburn serves on the Subcommittee.

ASTSWMO describes itself as representing the 50 states, five territories, and the District of Columbia in an effort to enhance and promote effective state and territorial programs and to affect relevant national policies for waste and materials management, environmentally sustainable practices, and environmental restoration.

Section 121(d) of CERCLA requires that on-site remedial actions attain or wave federal Applicable or Relevant and Appropriate Requirements ("ARARs"), or more stringent state environmental ARARs, upon the completion of the remedial action. The National Oil and Hazardous Substances Pollution Contingent Plan also requires compliance with ARARs during removal and remedial actions to the extent practicable.

Another way to describe an ARAR is:

- A promulgated federal or more stringent state law or regulation;
- aimed at protecting human health and the environment during the cleanup at a site; and that
- has been evaluated and found to be legally applicable or relevant and appropriate for the site.

ARARs are identified on a site-by-site basis. That can involve a two-part analysis:

1. A determination of whether a given requirement is applicable;
2. then, if it is not applicable, a determination of whether it is both relevant and appropriate.

Generally, there are three types of ARARs:

1. Ambient or chemical-specific requirements
2. Action-specific requirements
3. Location-specific requirements

Different ARARs may apply to a site and be identified at multiple points in the remedy selection process.

The ASTSWMO *Position Paper* initially provides additional background on ARARs and the phase process for selecting them.

ASTSWMO members are stated to have expressed concerns about the process that the United States Environmental Protection Agency ("EPA") follows to identify and determine if state requirements are ARARs for fund and enforcement lead CERCLA remedial actions.

A further concern identified by the *Position Paper* is:

. . . recognizing when State guidance may constitute to-be-considered (TBCs) criteria.

TBCs are described as non-promulgated advisories or guidance issued by Federal or State government that are:

- Not legally binding
- Do not have the status of potential ARARs

Nevertheless, the *Position Paper* states that in "many circumstances" TBCs will be considered along with ARARs as part of the site risk assessment. Further, they are stated to be potentially used in determining the necessary level of cleanup for protection of human health and the environment.

Examples of TBCs are stated to include:

- State advisories
- State guidance
- State policies

State policy concerns identified by the *Position Paper* 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;
- Lack of written documentation on an ARAR determination where EPA finds that a State cleanup requirement was not an ARAR;
- EPA delays when determining whether a State requirement is an ARAR, and as a result, leaving the State inadequate time to challenge the finding; and
- EPA and States interpretation of the term "promulgated" in CERCLA §121(d)(2)(A)

A section of the *Position Paper* also addresses "ARARs and the CERCLA Process." Suggestions include EPA and the relevant State:

. . . Entering into a well-informed dialogue on ARARs as early as possible, but no later than during the Remedial Investigation/Feasibility Study (RI/FS) process to try to identify and begin to resolve potential issues is imperative.

In addition, EPA is advised to identify any areas of disagreement with the State ARAR list as soon as possible. Additional suggestions include:

- Better transparency and early communication on State ARARs
- Substantial involvement in the CERCLA process

- Provision of better training and guidance to Regions and States on the ARAR identification process
- Communicating to other federal entities that they must comply with State environmental laws to the same extent as non-federal entities when conducting CERCLA cleanups
- Update of EPA regulations, guidance, and policy to make it clear that State environmental covenant and land use control laws are ARARs

ASTSWMO requests that EPA initiate an open dialogue between it and the States on policy discussions regarding whether or not a State regulation constitutes an ARAR.

A copy of the *Position Paper* can be found here.