

CORRES. CONTROL
INCOMING LTR NO.

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DATE



APR 27 10 16 AM '95

ROCKY FLATS FIELD OFFICE
P.O. BOX 928
GOLDEN, COLORADO 80402-0928

APR 25 1995

95-DOE-08311

EG&G
ROCKY FLATS PLANT
CORRESPONDENCE CONTROL

ADMIN RECORD

ACTION

DIST.	LTR	ENC
BURLINGAME, A.H.		
CARNIVAL, G.J.		
CORDOVA, R.C.		
DAVIS, J.G.		
FENN, T.M.		
FERRERA, D.W.		
FRAY, R.E.		
GHS, J.A.		
GILMARTIN, J.T.		
GINTHER, B.		
GLOVER, W.S.		
GOLAN, P.M.		
HEALY, T.J.		
HEDAHL, T.G.		
HILBIG, J.G.		
HOLLOWELL, L.J.	X	
JACKSON, D.T.		
KELL, R.F.		
LEINWEBER, S.A.		
MARX, G.E.		
MCCART, D.		
MCDONALD, M.M.		
MCGOVERN, L.J.		
MCKENNA, F.G.		
PAUKERT, J.G.		
PIZZUTO, V.M.		
SATT, R.WHIT, D.G.		
SCHNADER, J.C.		
SCHUBERT, A.L.		
STIGER, S.G.	X	
STROBEL, G.L.		
TURNER, K.A.		
VOORHEIS, G.M.		
Reaks	X	

Mr. Marin Hestmark
U. S. Environmental Protection Agency, Region VIII
ATTN: Rocky Flats Project Manager, 8HWM;RI
999 18th Street, Suite 500, 8WM-C
Denver, Colorado 80202-2405

Mr. Joe Schieffelin, Unit Leader
Hazardous Waste Facilities
Colorado Department of Public Health and Environment
4300 Cherry Creek Drive South
Denver, Colorado 80222-1530

Gentlemen:

By letter, dated February 28, 1995, the Department of Energy (DOE) informed the U.S. Environmental Protection Agency (EPA) and the Colorado Department of Public Health and Environment (CDPHE) that the Agencies' Applicable or Relevant and Appropriate Requirements (ARARs) Working Group (Working Group) appeared to have reached an impasse. Specifically, what dispute resolution process should be available to the Working Group was unresolved. It was DOE's position that all parties would commit to work issues to conclusion through some method, (e.g., some process to elevate the issues to management). The DOE, however, has not received any additional communications from the agencies on this matter.

While the DOE is mindful that disagreements among the parties occur, the feasibility study (FS) process must continue in order to meet the Interagency Agreement milestones. Accordingly, DOE will provide the enclosed Master List of Potential ARARs for the Rocky Flats Environmental Technology Site (Master List) to operable unit managers with the following issues identified as unresolved. These are the issues DOE believes were left unresolved at the last meeting of the Working Group on February 16, 1995. The DOE anticipates that those unresolved issues will be the only ARARs disputed in the FS and Record of Decision documents. Following each issue identified is the direction DOE intends to take should the issue arise during an operable unit's feasibility study.

RCVD w/o enc

CORRES. CONTROL	X	X
ADMIN RECORD/080	X	X
PATS/T1303		

Reviewed for Addressee
Corres. Control RFP

4-27-95 RDA
DATE BY

Ref Ltr. #

DOE ORDER # 5400.1

DOCUMENT CLASSIFICATION
REVIEW WAIVER PER
CLASSIFICATION OFFICE

APR 25 1995

1. Nuclear Regulatory Commission (NRC) Standards v. DOE Orders

It is DOE's understanding that EPA and the State believe that NRC standards should be considered relevant and appropriate, regardless of whether a DOE Order exists which covers the same area as a NRC standard. The DOE disagrees because even though NRC regulations may be relevant, they are inappropriate because a DOE site is exempt from the NRC regulations. The exemption and type of facility regulated are factors in determining when a regulation is inappropriate. A requirement (NRC regulation) may also be found relevant but not appropriate when another requirement (DOE Orders) is available that has been designed to apply to that specific situation. (See CERCLA Compliance with Other Laws Manual, EPA/540/G-89/006, p. 1-67.) Moreover, DOE will not list NRC standards as either a potential ARAR or a TBC in its technical memorandums or feasibility studies unless the NRC standard covers an area not addressed by a DOE Order.

The DOE requested that EPA and the State prepare an issue paper outlining its position, but to date the agencies have not responded.

2. Colorado Site-Specific Groundwater Standards and Use Classifications

According to Colorado, its site-specific use classification, associated standards, and site-specific standards are of general applicability because the authority given to the Colorado Water Quality Control Commission to establish such classifications and standards cover the entire State. The DOE has not identified the Colorado site-specific use classifications, associated standards, and site-specific standards as potential ARARs because these site-specific standards are not generally applicable. (See letter, dated March 3, 1995, from DOE to EPA and CDPHE, 95-DOE-08194.) The DOE, as lead agency under Executive Order 12580 for CERCLA response actions at the Rocky Flats Environmental Technology Site (RFETS), has raised serious doubts regarding the ARAR status of Colorado's site-specific use classifications, associated standards, and site-specific standards. The burden of going forward is on Colorado to produce a justification that is legally and factually credible for its claim that the site-specific requirements are potential ARARs. The DOE requested such a justification in the letter referenced above but has had no response to date. Consequently, DOE does not intend to identify the Colorado site-specific use classifications, associated standards, and site-specific standards as potential ARARs.

3. Colorado Surface and Ground Water Standards Regarding Radionuclides

The Colorado Water Quality Control Commission has attempted to establish state radionuclide protection standards on RFETS; however, DOE has primary authority for regulating discharges from source, special nuclear and by-product

APR 25 1995

materials from DOE facilities. CERCLA defines "federally permitted releases" as any release of source, special nuclear or by-product material.....in compliance with a legally enforceable license, permit regulation, or order issued pursuant to the Atomic Energy Act. 42 U.S. C. 9601(10)(K). This was supported by the Supreme Court in the *Train v. Colorado Public Interest Research Group, Inc.* 426 U.S. 1 (1976) where the Court stated that under the Atomic Energy Act, the Atomic Energy Commission is "authorized to establish such standards....as [it] may deem necessary or desirable....to protect health or to minimize danger to life or property." *Id.* at 7. The DOE has established radiation protection standards for offsite members of the public under DOE Order 5400.5 and will implement this Order when addressing radiation protection standards.

4. AEA-Regulated Radionuclide Standards for Water

Again, the DOE has primary authority for regulating discharges from source, special nuclear and by-product materials from its facilities. Radiation protection standards for offsite members of the public are established by DOE and under DOE Order 5400.5. The DOE has identified DOE Order 5400.5 as a TBC for AEA-regulated radionuclides for water. Moreover, DOE Order 5400.5 states that the exposure of members of the public to radiation sources as a consequence of all routine DOE activities shall not cause, in a year, an effective dose equivalent greater than 100 mrem. To ensure the offsite radiation dose is maintained below established limits, DOE has developed Derived Concentration Guides (DCGs) for exposures via the drinking water pathway based on an annual dose limit of 100 mrem effective dose equivalent to offsite members of the public.

In EPA comments to Technical Memorandum 1 for Operable Unit 2 (OU2), EPA interpreted DOE Order 5400.5 to specify that 4 mrem effective dose equivalent is the annual dose limit from drinking water exposure. This is an incorrect interpretation with regard to RFETS. Specifically, DOE Order 5400.5 states that "it is the policy of DOE to provide a level of protection for persons consuming water from a public drinking water supply operated by the DOE, either directly or through a DOE contractor, that is equivalent to that provided to the public by the public community drinking water standards to 40 CFR Part 141. These systems shall not cause persons consuming the water to receive an effective dose equivalent greater than 4 mrem in a year." Neither DOE or its contractors operate a public drinking water supply at the RFETS.

The DOE recognizes that the DOE Order 5400.5 effective dose equivalent of 100 mrem applies to all exposure modes and all DOE sources of radiation. At OU2, the fact that multiple radionuclides contribute to the radiation dose for a specific exposure scenario will be addressed before final remediation goals are established. The same approach will be taken at other operable units under similar circumstances.

APR 25 1995

5. Point of Compliance (POC)

The definition of POC is a complex issue which does not lend itself easily to one definition, particularly with regards to ground water. The DOE still believes its analysis of POC is accurate with the following corrections to the issue paper, dated January 1995:

- p.4, 3d paragraph, 2d line: change "for permits" to "to protect existing and potential beneficial uses of ground water";
- p.5, 2d paragraph, 2d line: change the cite "5 CCR 1002-8" to "5 CCR 1002-2";
- p.6, 2d full paragraph; citation at end of paragraph: change "Section 264.92" to "Section 264.95";

In the Working Group meeting held on February 2, 1995, to discuss POC, the EPA stated that the DOE's issue paper on POC, dated January 1995, was "fundamentally flawed." The DOE requested that EPA provide written comments on the issue paper. The EPA agreed to do this; however, to date no comments have been received.

6. Additional State Identified ARARs

In addition, the State informed DOE at one of the Working Group meetings that the State had identified some potential state ARARs that were not addressed in the Draft Master List of Potential ARARs for the RFETS (Master List). DOE requested that the State provide DOE with a written list of potential state ARARs not covered in the Master List. To date, no list has been received by DOE.

We appreciate the efforts expended by your agencies in the ARARs Working Group and we will use those resolved issues to move our program forward more efficiently. We regret, however, that the Working Group was not able to reach conclusion.

If you have any questions, please call me at 966-4839.

Sincerely,



Steven W. Slaten
IAG Project Coordinator
Environmental Restoration

Enclosure

M. Hestmark & J. Schieffelin
95-DOE-08311

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APR 25 1995

cc w/o Enclosure:

J. Wienand, ERMSA, RFFO

R. Batra, ERMSA, RFFO

B. Birk, ERMSA, RFFO

B. Fitch, ERMSA, RFFO

D. George, ERMSA, RFFO

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S. Stiger, EG&G

~~L. Brooks, EG&G~~

Admin. Record

**Minutes from the ARARs Working Group Meeting
February 16, 1995**

List of attendees attached.

All references to the "master list" of ARARs transmitted to the regulators on 11/7/94.

• indicates an action taken by DOE.

General Discussion:

DOE proposed the following agenda:

- Discuss the status of the charter of the group.
- Any questions regarding meeting minutes from the February 2, 1995 meeting?
- Follow-up on February 2, 1995 meeting action items
- Review the February 1995 Draft Master List of Potential Federal and State ARARs for the RFETS
- Identify remaining areas of disagreement

Status of the charter for the Working Group:

DOE reviewed the draft charter and sent its comments to EPA on February 3, 1995. Neither the EPA attorney, CDPHE, or the Attorney General's Office received the comments; consequently they did not have an opportunity to review the DOE changes until this meeting. DOE's change to the draft charter would subject disputes that arise via the Working Group to the dispute process outlined in the IAG. EPA and CDPHE wanted the dispute process to stop at the DRC. EPA and CDPHE believe that no parties are giving up any rights regarding the ARAR process.

•DOE accepted the action to review the draft charter and discuss it with DOE management and respond to EPA and CDPHE by 2/23/95.

Meeting minutes from the February 2, 1995 meeting:

There were no comments regarding the February 2, 1995 meeting minutes because neither EPA or the State received copies of the meeting minutes.

Status of Action Items from the February 2, 1995 meeting:

NRC standards:

EPA reviewed and compared DOE Orders with NRC standards. EPA stated that the DOE Orders appear to cover the same areas as the NRC standards and as such there did not appear to be a gap between the two. EPA pointed out that there was no DOE Order addressing occupational standards. DOE stated that occupational standards are addressed in 10 CFR 835 and that these regulations had been added to the Draft Master List. EPA believes that NRC standards are relevant and appropriate for the RFETS. DOE's believes that NRC standards may be TBCs where DOE Orders do not cover areas that the NRC standards cover.

The AGO's office stated that TBCs do not usually trump ARARs. The AGO's office referred to the 1988 and 1990 preamble language to the NCP regarding jurisdictional questions.

Jurisdictional questions are discussed in the context of applicability while relevant and appropriate issues examine the physical or chemical aspects of a regulation, not the legal aspects. The AGO's office agrees with EPA's position.

DOE does not understand EPA's position and requested an issue paper outlining EPA's position. EPA accepted the action to prepare an issue paper. The DOE also reminded the EPA and the State that the NCP preamble is only guidance; it is not statutory authority.

General Applicability:

DOE attorney's have discussed the issue of general applicability and will meet with DOE management to discuss the issue further the week of 2/20/95.

•DOE is planning to have a written product discussing the issue to EPA and CDPHE by the end of the week of 2/20/95.

The State wanted confirmation that the comment on p.9 may not be the working group's final position, particularly with regards to AEA regulated radionuclides. The State is still working on this issue.

RCRA language:

DOE drafted and included in the February 1995 draft of the Master List language to address the States concern. The State will review the proposed language to determine if it satisfies their concerns.

CHWA Subpart E:

DOE reviewed subpart E and included provisions in the February 1995 draft of the Master List.

RCRA permit-is it an ARAR:

EPA has researched this issue and has found no authority either way on the issue. Since the permit will be addressed anyway, EPA will not make an issue out of whether the RCRA permit should be listed as an ARAR.

The State is still considering this issue and will provide an answer at the next meeting.

Review the February 1995 Draft Master List of Potential Federal and State ARARs for the RFETS:

Because so many of the members of the Working Group did not receive the February 1995 draft of the Master List or have sufficient time to review the draft, it was agreed by all members of the group to complete their review of the draft and be prepared to discuss changes at the next meeting.

Identify remaining areas of disagreement:

•Each agency agreed to identify and list areas of disagreement regarding the draft Master List. These lists will be discussed at the next meeting.

New Items:

EPA suggested working Point of Compliance (POC) into the Master List for each potential ARAR that has a specified POC in its regulation by inserting a brief discussion regarding POC in the comment column.

•DOE accepted the action to review potential ARARs, identified as applicable, that have a regulatorily defined POC.

The State has identified additional potential ARARs and will forward their list to EPA and DOE for review.

The next meeting is scheduled for March 1, 1995 at 2:30 at the EPA Conference Center.

**AREAS OF DISAGREEMENT
IDENTIFIED BY DOE
REGARDING**

Draft

**THE DRAFT MASTER LIST OF POTENTIAL FEDERAL AND STATE ARARS
FOR THE ROCKY FLATS ENVIRONMENTAL TECHNOLOGY SITE**

1. DOE Orders v. NRC standards. Both should be listed as TBCs. If a NRC standard exists for an area not covered by a DOE Order then the NRC standard may be considered relevant and appropriate. EPA and the State believe that NRC standards should be considered relevant and appropriate, regardless of whether a DOE Order exists which covers the same area as a NRC standard. (The real issue is whether a Congressional exemption only applies to applicability or to applicability and appropriateness.)
2. General Applicability. The State site-specific groundwater standards and the standards associated with a use classification are not identified by DOE as potential ARARs because the standards have not been generally applied throughout the State and therefore, do not meet the definition of an ARAR.

Other areas of potential disagreement:

- A. AEA regulated radionuclides. The State is unclear as to what are AEA regulated radionuclides.
- B. RCRA permit as an ARAR (State is still considering issue.)
- C. Substantive v. administrative requirements. (Unclear whether State is comfortable with this yet.)