



INTEROFFICE CORRESPONDENCE

DATE: December 20, 1994

TO: Distribution

FROM: *LMB*
L. M. Brooks, ERPD Program Support, Building 080, X6973

SUBJECT: UPDATE ON AGENCIES APPLICABLE OR RELEVANT AND APPROPRIATE
REQUIREMENTS (ARARS) WORKING GROUP - LMB-032-94

DOE Order: 4700.1

Action: For your information only - no action required.

Attached is a copy of the meeting minutes from an Agencies ARARs Working Group meeting held on December 1, 1994. Also attached is a copy of the response summary to the minutes. The Department of Energy, Rocky Flats Field Office (DOE, RFFO) is requesting that the agencies have bi-weekly meetings beginning in January 1995. For the next meeting, DOE, RFFO is planning on discussing the response summary. Once again, if I need anyone's particular expertise, I will be contacting you and requesting that you attend. Thanks!

If you have any questions or comments, please do not hesitate to contact me on extension 6973 or digital page 6166.

kld

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ERPD Project File (2)

Attachments:
As Stated (2)

**Minutes from the ARAR Working Group Meeting
December 1, 1994, 2-4 p.m.**

List of attendees attached.

Note: all references are the "master list" of ARARS transmitted to the regulators on 11/7/94.

• indicates an action taken by DOE.

General Discussion:

DOE suggested the following agenda: The group will flag:

- 1) areas of obvious agreement
- 2) areas of clear non-agreement
 - determine which are legal only and refer to counsel
 - determine which are technical and try to work later
- 3) determine scope of working group
- 4) determine end goal of working group

It was confirmed at the meeting that the final ARARs decision would be EPA's. This is consistent with the IAG which states that EPA and the State will determine ARARs to be applied at the RFETS.

The group agreed that the intent of the working group is to work things out. If the working group has a legal problem the working group may have to refer it to dispute. There was a discussion on if there was anything that would be formally disputable. Conclusion was that it may have to wait until the ROD. There was a discussion on whether it would be possible to get consensus on the universe of potential ARARs. If the contentious ones are included, the agencies could then defer the fights to the individual RODs. The agencies don't want to have the arguments twice; either decide them now or defer the deadlocks.

Discussion on if the charter of the working group should be to resolve the issues. It was agreed that each of the project leads would go back to their agencies and get authorization to finally resolve these issues within this group.

DOE suggested to set a time limit for the group to resolve an issue. If the group fails, the issue should automatically go to the DRC. Agreed by the group.

Page-by-page review of the document:

Page vi:

It sounds like DOE would allow a DOE Order to supersede a statute. A Statutory requirement can not be "knocked out" by an order.

DOE explained that it was an indication that if there was a conflict, then the DOE contractors would have to get relief: either a waiver from DOE of the order, or a waiver of the ARAR from the agencies if the order was more restrictive. It was pointed out that it was likely if the orders were more restrictive, then complying with the order probably would also comply with the ARAR.

The group still needs to work out the difference between the ARAR waiver and the contractual waiver.

•DOE committed to clarify the language.

Page ix:

The law says a regulation is applicable if it specifically addresses the situation. Here DOE states "fully addresses" which is less inclusive. Please change to the NCP language.

Page 1:

EPA does not have a problem with the NRC regulations being typed as TBC.

The group would like a further explanation of why DOE thought that they would not be relevant and appropriate.

EG&G explained that at other DOE sites, most NRC regulations (but not all) are considered not appropriate because the underlying assumptions for the regulation development were that they were for an operating power facility. A utility setting is considerably different than most of DOE operations and certainly different than environmental restoration.

Page 3:

10 CFR 61 - why is it a TBC? (Should it be considered relevant and appropriate?)

•DOE agreed to clarify/justify.

Add 6 CCR 1007-1 Part 14.

There was a discussion on whether, in order to get a better consensus, the group should agree on the list without deciding if it is applicable, relevant & appropriate, or a TBC? CDPHE would like to know which ones are TBCs, but do not really don't care if it is applicable or relevant & appropriate.

Page 4:

Add Reg. 3 of the States, includes:

- toxic substances
- reporting
- air quality
- visibility lists

Page 5:

NESHAPS may also be a chemical specific ARAR.

40 CFR 61.192 could be waived.

Question over second comment.

Page 6:

Water quality, Gold book
EPA thinks it is relevant and appropriate.

AGO is still considering.

Page 7:

Does this mean statewide standards can be left out if they are AEA related?

•DOE agreed to put them into two sentences to clarify meaning.

AGO: Disagrees with the exceptions. "General applicability" means that standards are generally applied within the state rather than applied generally throughout the state. Besides, it is not a determination of applicability, it is a basis for waiver.

EPA: There is a very clear Supreme Court case stating that the Atomic Energy Act standards are not enforceable by the state.

AGO is still considering the AEA exception.

EPA would agree with DOE on the AEA under the Clean Water Act.

EPA felt that the change of use classification should be taken up with the board rather than be here.

CDPHE indicated that if we are only using it as a place-holder to help out the managers, we should at least state that DOE will petition to change the use classification. That way it doesn't sound so automatic.

•DOE will rephrase. Suggested tying the two sentences closer together.

Page 7 & 8:

EPA would probably see the point of compliance at the edge of the plume or anywhere throughout the plume.

AGO indicated that if you have several sources contributing to one plume you are allowed to group them together and set the point of compliance further out.

DOE stated that because RFETS is one NPL site it is appropriate to set it at the facility boundary. Plus, the plume edge is not very well defined. The NPDES will have segments 4/5 redone.

CDPHE stated that the RFETS boundary is just bogus! If you read the NCP and the guidance documents the RFETS boundary can't meet any of those definitions. There is no hydrogeological boundary at Indiana Street.

EPA feels that we do know the boundary of the plume.

EPA believes that what DOE has proposed is inconsistent with both the NCP and Subpart S.

CDPHE: It is just inconsistent with what we are doing at RFETS. If we do this - why clean up Rocky Flats at all??

DOE asked where would the regulators put the point of compliance?

EPA and CDPHE agreed that they should keep our things flexible. They could not say that a specific location would always work.

DOE pointed out that the groundwater standards are unclear on the point of compliance.

EPA pointed out that the Water Quality Control Commission won't set them, it is a site specific determination.

EPA asked whether point of compliance is an ARAR issue? What is the ARAR at issue? Can we agree that the standards apply and then in the ROD decide where the point of compliance is?

AGO would like to have a discussion with just the attorneys. We may be able to resolve this quickly.

There was a discussion on how specific the citations should be. The general recommendation was to leave off the final (a)s and (b)s of the cites.

Page 8:

AGO: most of these issues are legal in nature:

- enforceability
- applicability
- promulgation

The AGO provided DOE with the latest in site specific regulations. Several were done in August 1994. (3-12)

EPA would like to have more specifics on the assertions that DOE is making. Please show us the evidence that supports these assertions.

AGO disagrees with the last sentence. Even if the regulations were not applying elsewhere, does not make them "not generally applied".

AGO has the same issues here as under the CWA on enforceability and applicability.

Why are the Toxic Pollutant Effluent Standards listed as action specific standards? {rather than chemical specific} Couldn't it be both Action specific and Chemical specific?

Page 9:

Why is the NPDES permit considered substantive?

CDPHE: They already have a permit so they have to comply with it.

AGO: It must be consistent with CERCLA §121(e)(1).

EPA: Wetlands, how does this fit with NEPA not applying to CERCLA? This may raise a broader question given DOE's NEPA/CERCLA integration policy.

•DOE will provide an explanation.

Page 10:

EPA: How is interagency cooperation considered substantive?

•DOE will provide an explanation.

no comments on pgs 11 - 16

Page 17:

Why aren't the SDWA regulations applicable? Plus, please explain the last sentence.

•DOE will provide an explanation.

Shouldn't the Safe Drinking Water Act also apply to groundwater?

Page 18:

The explanation of on-site actions - can you explain that this applies only to the CERCLA ARARs? The IAG requires compliance with all of RCRA.

Why won't the RCRA permit be an ARAR?

You need to add Part 261 to the list.

Page 21:

Subpart E of 264 - don't you think operating records should be included? Plus we may have a point of compliance problem here and on page 22. CAMU is promulgated by Colorado, but EPA is litigating CAMU at the federal level. Colorado will not be designating any CAMUs until the litigation is resolved.

DOE agreed to bring in the other RCRA standards except the ones for wastepiles, because CDPHE won't allow wastepiles. CDPHE stated that DOE might as well put wastepiles in, because who knows if we will need them.

Page 22:

ACLs - Does DOE have plans to establish ACLs? ACLs are extremely difficult to get.

DOE explained that this list just shows the possibilities.

AGO: Then we should take that comment out "that we will", and just say that it is planned or intended.

"Standard not exceeded for three consecutive years" - Where did this come from?

•DOE will provide an explanation.

Page 23:

There was confusion regarding the comment.

•DOE will provide explanation.

Page 24:

On the closure and post-closure care - why is DOE talking about "substantive"?

Page 26:

CAMU can not be a shield. You need to have the standards.

Page 36:

The spill cleanup policy is promulgated, so it may be a "C."

•DOE will check on why it was a TBC.

CDPHE: As a general comment, we haven't done a review for completeness. For example, RH 4.35 the State Radiation Standard for Plutonium in Soil is not here. I don't know if it should be an ARAR or a TBC. The Health Department will discuss it and let you know our position. Also look at RH 4.60.

Everyone agreed to talk with their respective managements before the next meeting is planned.

Response Summary to the ARAR Working Group Meeting, 12/1/94

- Indicates that DOE committed to an action.

p.viii Discussion about TBC is not consistent with that specified in the IAG.

Clarification: The sentence in question reads "However, provisions which dictate how ARARs and TBCs are to be identified are not specified in the IAG." The intent of the sentence was that "how" ARARs are to be identified is not specified in the IAG, i.e., what guidelines, etc. should be followed, not that which party is ultimately responsible for the ARARs determination is not specified in the IAG. For further clarification, suggest adding the sentence from the IAG "EPA, after consultation with the State, will determine the ARARs to be applied at the Rocky Flats Site" to the paragraph in question.

- **p.vi Clarification of language regarding DOE Orders and environmental statutes.**

Clarification: Suggest changing paragraph in question to read: Of particular importance to the RFETS is the inclusion of DOE Orders along with ~~or in lieu of~~ other identified ARARs and TBCs. Since DOE Orders are not promulgated standards, they do not qualify as ARARs under the CERCLA definitions. However, DOE Orders may be contractually enforceable on contractors that operate or manage a DOE facility. To the extent that DOE Orders supplement the implementation of an identified ARAR, they will be treated as TBCs to develop a protective remedy. Where DOE Orders conflict with an identified ARAR, either contractual relief from DOE, or a waiver from the ARAR from the agencies if the DOE Order is more restrictive ~~regulatory variance, statutory inconsistency determinations (i.e., RCRA Section 1006), or a CERCLA waiver~~ may be required. Generally, it is anticipated that if a DOE Order is more restrictive than an identified ARAR, then compliance with the DOE Order will also mean compliance the ARAR.

[This raises additional issues: If the DOE Order is also protective of public health and the environment, then why should ER funds be spent to go beyond what CERCLA requires? Also, is the DOE Order necessary and sufficient?]

p.ix "specifically addresses" v. "fully addresses"

Correction: The basic criterion for determining if a requirement is applicable is that it directly and ~~fully~~ specifically addresses or regulates

Also on p.ix, cite at bottom of page contains a typographical error. It should read 55 FR 8743 instead of 58 FR 8743.

p.1 Further explanation of why NRC standards are not relevant and appropriate.

Clarification: NRC regulations state that DOE is exempt from NRC regulations. Consequently, where EPA (and presumably Congress) has explicitly decided that a requirement is not appropriate to a situation, that requirement will not be appropriate for such a situation at a CERCLA site. However, if DOE Orders do not address an action or containment covered by a NRC

standard, then the NRC standard may be appropriate.

Suggest adding 10 CFR 835 to the Master List as applicable.

• **p.3 Why is 10 CFR 61 a TBC rather than relevant and appropriate?**

The Part 61 regulations establish the procedures, criteria, and terms and conditions that apply to the issuing of licenses for the land disposal of radioactive wastes received from other persons. The application of these requirements to the cleanup of RFETS is inappropriate because DOE has been exempted from these regulations. See above comment for further clarification.

p.3 Add 6 CCR 1007-1 part 14.

Part 14: Licensing Requirements for Land Disposal of Low Level Radioactive Waste. Establishes procedures, criteria, and terms and conditions upon which the Department issues licenses for the land disposal of low-level radioactive wastes received from other persons.

Colorado regulations establish standards for protection against ionizing radiation resulting from activities conducted pursuant to licenses or registrations issued by CDPHE. To the extent that RFETS is exempted from CDPHE license or registration requirements, the Standards for Protection Against Radiation are not applicable.

It may appear that certain regulations from the Standards for Protection Against Radiation are relevant to CERCLA actions at RFETS; however, application of these requirements to the cleanup of RFETS is inappropriate because DOE has been exempted from these regulations.

p.4 Add Regulation No. 3 (5 CCR 1001-5)

Agree, Regulation No. 3 will be added to the Master List.

p.5 NESHAPS may also be a chemical specific ARAR

Agree, Master List will reflect that NESHAPS may also be chemical-specific.

p.5 Comment regarding the accuracy of the second paragraph under comments.

Suggest deleting second paragraph under comments.

p.6 Water Quality-Gold Book as relevant and appropriate.

Section 121(d)(2)(B)(i) of CERCLA as implemented by the NCP (40 CFR 300.430(e)(2)(i)(E) specifies that WQC established under Sections 303 and 304 of the CWA shall be attained where relevant and appropriate under the circumstances of the release.

Suggest no changes because the comment states that WQC may be appropriate.

- **p.7 Clarification regarding the AEA exception. DOE agreed to put them into two sentences to clarify meaning.**

Clarification: The question is "Does this mean statewide standards can be left out if they are AEA related?" Statewide surface water standards which address AEA regulated radionuclides will not be considered potential ARARs. Non-AEA regulated radionuclides that have statewide surface water standards and that are associated with a use classification will be considered potential ARARs.

The Master List will reflect the change in order of the statements regarding filing a petition with the WQCC and "when permanent structures are put in place"

The sentence "When permanent structures are put in place . . ." will be changed to a "if" and "then" statement.

General legal issue of "general applicability."

p.7 and 8 "Point of Compliance" A suggestion was made to discuss this issue with just the legal people.

General legal issues of enforceability, applicability, promulgation.

p.8 Why are the Toxic Pollutant Effluent Standards listed as A rather than C?

The Toxic Pollutant Effluent Standards are related to the NPDES permit provisions. Agree to change type from action-specific to chemical-specific potential ARAR; however, DOE also suggests adding a note in the comment section stating that if the permitted units were used, the NPDES permit discharge standards would have to be met.

p.9 Why is the NPDES permit considered substantive?

Permit itself is substantive? Not intent of comment language. An on-site discharge from a CERCLA site to surface waters must meet the substantive NPDES requirements, but need not obtain an NPDES permit nor comply with the administrative requirements of the permitting process, consistent with CERCLA section 121(e)(1). An offsite discharge from a CERCLA site to surface waters is required to obtain an NPDES permit and to meet both the substantive and the administrative NPDES requirements.

When a NPDES permit has been issued to a site, the effluent limitations under the discharge permit would have to be met. Compliance is determined by whether the permit holder is exceeding its effluent limits, not by whether water quality in the stream exceeds the water quality standards. An example is OU6: Two terminal ponds that are covered by the existing, although expired but extended, NPDES permit are located within OU6. In developing the potential ARARs for OU6, effluent limitations within the NPDES permit and the Federal Facilities Compliance Agreement were considered as potential ARARs.

actions taken upon hazardous substances (e. g. incinerator standards requiring particular destruction and removal efficiency), and restrictions upon activities in certain special locations (e. g. standards prohibiting certain types of facilities in floodplains).

Administrative requirements are those mechanisms that facilitate the implementation of the substantive requirements of a statute or regulation. Administrative requirements include the approval of, or consultation with administrative bodies, consultation, issuance of permits, documentation, reporting, recordkeeping, and enforcement. In general, administrative requirements prescribe methods and procedures by which substantive requirements are made effective for purposes of a particular environmental or public health program. On-site response actions must comply with substantive requirements and not administrative requirements.

Suggest adding the following language to page 18 for further clarification: "This list is for CERCLA ARAR purposes only."

p.18 Why won't the RCRA permit be an ARAR.

Only the substantive sections of RCRA are required to be met when identified as a potential ARAR during a CERCLA remedial action. In most instances, areas of the facility that are covered under an existing RCRA permit will not be included within a CERCLA remedial action.

p.18 Add Part 261 to the list.

Following Part 261 is referenced in the comments to generator standards; however, the Master List will be revised to include Part 261.

p.21 Subpart E of 264-Should operating records be included?

Subpart E of 264: Manifest System, Recordkeeping and Reporting

No, operating records fit the definition of administrative requirements rather than substantive requirements and are not required to be followed for on-site remedial actions. (From a practical perspective some sort of recordkeeping may be done as part of the ROD but it is not an ARAR.)

p.22 Alternative Concentration Limits.

The comment from the meeting was to revise comment on the Master List and remove references of "that we will" and just that it is planned or intended. Suggest revising comment reads: DOE plans to seek ACLs that will maintain the designated use of the water quality at the RFETS boundary.

• **p.22 "Standard not exceeded for three consecutive years" - Where did this come from?**

6 CCR 1007-3, 264.96(c) Compliance period. If the owner or operator is engaged in a

corrective action program at the end of the compliance period specified in paragraph (a) of this section, the compliance period is extended until the owner or operator can demonstrate that the ground water protection standard of Section 264.92 has not been exceeded for a period of three consecutive years.

• **p.23 Why is this comment included?**

The purpose of the comment is to address potential concerns of the integration of RCRA Corrective Action provisions and CERCLA remedial action provisions.

• **p.24 Closure and Post-Closure Care - Why is DOE referring to "substantive?"**

Only substantive requirements are required to be followed for CERCLA on-site remedial actions.

The comment to "Use and Management of Containers" will be deleted from the Master List.

• **p.26 Revise Master List to include the RCRA standards for waste piles, land treatment, landfills.**

Revision will be made. The RCRA standards for these types of units will be typed as potential action specific ARARs.

p.26 CAMU cannot be a shield. (Landfills)

Suggest deleting comment.

• **p.36 DOE will check on why the TSCA Spill Cleanup policy is typed as a TBC rather than relevant and appropriate since the policy is promulgated. (Why not C?)**

The PCB Spill Cleanup Policy describes the level of cleanup required for PCB spills occurring after May 4, 1987. Because it is not a regulation and only applies to recent spills (reported within 24 hours of occurrence), the Spill Policy is not ARAR for Superfund response actions . . . (Guidance on Remedial Actions for Superfund Sites with PCB Contamination)

The CERCLA Compliance with Other Laws Manual: Part II states that the requirements under 40 CFR Part 61 (761), Subpart G, while not potential ARARs, are TBCs for CERCLA actions, particularly with respect to cleanup of soils contaminated with PCBs.

RH 4.35 State Radiation Standard for Plutonium in Soil

Unclear on area CDPHE referencing. 4.35=Disposal by Release into Sanitary Sewerage.

RH 4.60 Permissible Levels of Radioactive Material in Uncontrolled Areas

This requirement states that special construction techniques be used where contamination of the soil is in excess of 2.0 disintegrations per minute of plutonium per gram of dry or square centimeter of surface area. There are no DOE Orders which address this area; consequently, this requirement will be added to the Master List and typed as a potential action-specific ARAR.