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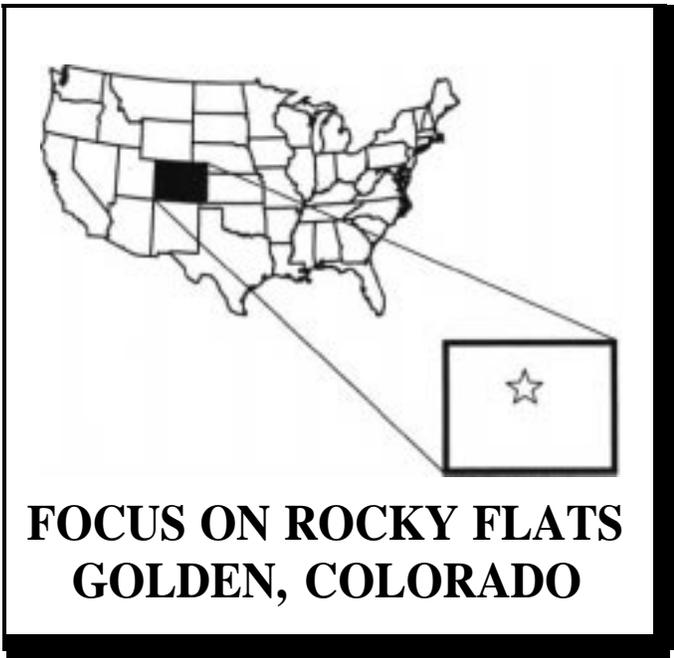
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DOE ENVIRONMENTAL ISSUES BULLETIN

AUGUST-SEPTEMBER 1994



ENERGY DEPARTMENT AGREES TO PAY FINE FOR MISSING DEADLINES

by Laura Perrault

Colorado Office of the Attorney General

The Colorado Attorney General's Office recently negotiated an agreement among the Colorado Department of Public Health and Environment (CDPHE), the U.S. Department of Energy (DOE) and the U.S. Environmental Protection Agency (EPA) settling DOE's liability at Rocky Plats for missing milestones set forth in a 1991 Interagency Agreement (IAG). Under the settlement agreement, referred to as the "Tolling Agreement," DOE will pay

\$350,000 each to CDPHE and the EPA, and will provide \$2.1 million to CDPHE and EPA for "supplemental environmental projects" (SEPs).

The cleanup of Rocky Plats, where the Energy Department once produced plutonium triggers for nuclear weapons, is being conducted pursuant to both the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and the Resource Conservation and Recovery Act (RCRA). These statutes require DOE to perform investigations at the site to characterize the nature, extent and rate of contaminant releases, and to submit reports detailing the results of these investigations to EPA and CDPHE. As part of the IAG, DOE had agreed to submit these reports within a certain timeframe. But, from March 1993 to June 1994, DOE failed to meet deadlines for submitting five reports. DOE anticipates that from July 1994 to January 31, 1995, it will not be able to comply with nine additional deadlines.

Based on these facts, DOE requested that EPA and CDPHE consider accepting a lump sum of money, in the form of cash and SEPs, to simultaneously resolve DOE's liability for all missed milestones from March 1993 to January 31, 1995. The parties agreed that this lump sum settlement concept would be a useful means of allowing DOE, EPA and CDPHE to focus their energy on other important issues at Rocky Plats, particularly on renegotiating a new IAG for the site.

The Tolling Agreement provides that DOE must pay the \$700,000 to CDPHE and EPA, and implement and fund SEPs pursuant to the provisions set forth in the agreement, or pay stipulated penalties for each week of noncompliance. It also contains other conditions concerning the timing and implementation of the SEPs. The SEPs must relate to, and be at or in the vicinity of,

Rocky Flats, and must consist of projects not already specifically required by the IAG or any other legal requirements. If the parties cannot reach mutual agreement on the SEPs before November 1, 1994, then EPA and CDPHE will identify SEPs, and their respective scopes. DOE will then have until January 15, 1995, to submit schedules and cost estimates for each SEP. SEPs must be funded and initiated prior to October 1, 1996.

The Tolling Agreement also provides that DOE's obligations under this agreement shall not affect DOE's commitment to seek funding for, or to perform, its other required environmental activities at Rocky Flats. If the parties are unable to renegotiate a new Rocky Flats IAG by January 31, 1995, and resolve any potential future milestone violations, EPA and CDPHE reserve their right to enforce the existing IAG, including assessing more stipulated penalties for additional missed milestones.

ROCKY FLATS INTERAGENCY AGREEMENT RENEGOTIATION

By Melanie Pearson
Office of Environmental Compliance

Background

The Rocky Flats Plant occupies approximately 6,550 acres near Golden, Colorado. Its current mission is to manage waste materials and to clean up and convert the Rocky Flats site to beneficial use in a manner that is environmentally safe, socially responsible, physically secure, and cost-effective.

The U.S. Department of Energy (DOE), the Region VIII Office of the Environmental Protection Agency (EPA) and the State of Colorado executed an Interagency Agreement (IAG) in January 1991. This IAG superseded the RCRA/CERCLA compliance agreement executed in 1986 among DOE, EPA and Colorado. The current IAG establishes cleanup schedules and attempts to delineate regulatory responsibilities between EPA Region VIII and Colorado.

DOE, EPA, and the Colorado Department of Public Health and Environment (CDPHE) recently negotiated a Settlement Agreement, also known as the "Tolling Agreement" for the Rocky Flats site (see previous article).

Renegotiation Objectives

In order to be more responsive to the concerns of its stakeholder community, DOE has proposed the following objectives during the renegotiation process:

- Coordinating the review of the final remedial/corrective actions by the appropriate State and Federal Natural Resource Trustee;
- Establishing a procedural framework and schedule for developing, implementing, and monitoring appropriate response actions at the site in accordance with the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Resource Conservation and Recovery Act (RCRA) and the Colorado Hazardous Waste Act (CHWA);
- Streamlining the decision process as much as possible to achieve meaningful risk reduction;
- Seeking ways to accelerate cleanup actions and eliminate unnecessary tasks and reviews;
- Recognizing that scopes of work and schedules will evolve as cleanup proceeds and that priorities with specific tasks and schedules will change as the cleanup progresses due to emerging information, on-site conditions, risk priorities and available resources.

In order to minimize the potential for conflicts in administering this agreement, the parties have proposed to recognize a Lead Regulatory Agency (LRA) and a Support Regulatory Agency (SRA) for each Operable Unit (OU) identified. The designation of a LRA and SRA does not change the jurisdictional authorities of the parties under RCRA and CERCLA.

The proposal designates EPA as the LRA for OUs remediated under CERCLA and takes into account the technical requirements of RCRA and CHWA authority. The State would act as the SRA for those specific OUs. Conversely, the State would act as the LRA for OUs remediated under RCRA or CHWA authority and also take into account the technical requirements for the CERCLA remedial investigation/feasibility study process. EPA would act as the SRA for those OUs.

A unique component for this proposed agreement is that OUs in which the State is the LRA will address

both hazardous and radioactive components. EPA will also have the ability to impose requirements pursuant to CERCLA on the radioactive substances if they cannot be segregated out for that portion of the investigative or response process. If the State is the LRA for an OU which has hazardous and radioactive components which cannot be segregated, and the State and EPA cannot reach a unified position on the proper remedial/corrective authority, the parties may invoke the dispute resolution process of the agreement.

Budget Process

Although the parties anticipate that all obligations of DOE arising under the Agreement will be fully funded, the renegotiated agreement proposes the following process:

- In its annual budget request, DOE (based on input from Rocky Flats) will include estimated funding levels required to achieve full compliance with the agreement;
- In determining the scope and schedule for tasks to be included in DOE's budget request, the Parties shall consider the values expressed by the public, including the Citizens Advisory Board.

Additionally, the proposal provides that Departmental budget guidance be distributed to the regulators for informational purposes with the understanding that confidential budget information will not be released to other entities prior to the submission for the President's budget request to Congress. Management briefings will be provided by DOE for the regulators and will include an assessment of the potential impact of inadequate funding on project baseline and/or the requirements of the agreement. EPA and CDPHE will also have the opportunity to review, comment and make recommendations on the budget request, including the work scope, priorities, schedules, milestones, five-year targets and compliance cost/funding projections. The Department will attempt to resolve any outstanding regulator comments prior to submission of the budget to OMB for approval.

Within 30 days after the President's submission of the budget to Congress, DOE will brief EPA and CDPHE on the appropriated funding level for Rocky Flats. If there are any differences between target and compliance funding levels, DOE will notify the regulators and provide them with an assessment of the impacts such differences

may have on the Department's ability to meet all milestones or requirements.

Although the budget proposal gives EPA and CDPHE an opportunity to participate in DOE planning and budget formulation, the Department's authority over its budget and funding submission is not affected.

The Department is committed to working with both EPA and CDPHE in a cooperative spirit that facilitates the cost effective cleanup of the Rocky Flats Site and maximizes the effectiveness of monies expended to that end; promotes an orderly, effective investigation and cleanup of contamination at the Site; and avoids the need for litigation and enforcement actions.

For additional information regarding the status of the Rocky Flats renegotiations, contact James Sanderson, DOE Office of Environmental Compliance, at (202) 586-1402.

INITIAL NAAG/DOE/EPA CONFERENCE HELD

On May 17-19, 1994, the National Association of Attorneys General (NAAG), DOE, and EPA hosted the first conference under a cooperative agreement on environmental compliance and legislative issues for DOE facilities. The goal of this initial conference was to establish a dialogue between the offices of the Attorneys General and DOE.

Prior to the conference, state representatives had formed subgroups with the purpose of developing draft suggested language for compliance agreements between states and DOE. States created eight subgroups, on the issues *force majeure*, releases from liability, stipulated penalties, budget/Keystone issues, Atomic Energy Act Resource Conservation and Recovery Act (AEA/RCRA) overlap, Resource Conservation and Recovery Act/Comprehensive Environmental Response, Compensation, and Recovery Act (RCRA/CERCLA) overlap, and the Anti-Deficiency Act.

First Day Discussion

DOE presentations on several issues for the first day included a general welcome and discussion of DOE's Environmental Vision by Dan Reicher, Deputy Chief of

Staff, Office of the Secretary. Mr. Reicher focused on four issues for the Department: openness, transfer of environmental management to external control, contract reform, and disposition of excess property. Mr. Reicher's frank and open discussion of DOE's emerging approach to environmental issues and emphasis on communication was well received by the audience.

Other presentations by DOE on the first day of the conference included:

- Overview of DOE's environmental structure, presented by Ray Pelletier, Director, Office of Environmental Guidance;
- Relationship between DOE and the M & O contractors, presented by Joe Odum of Westinghouse Savannah River Company and Nancy Cames, Attorney, Oak Ridge Operations Office of the Chief Counsel;
- Overview of DOE's budget process, presented by Adrian Gardner, Budget Analyst, Office of the Chief Financial Officer; and
- Overview of DOE's Office of Field Management, presented by Don Peatman, Associate Deputy Secretary of Field Management.

Second Day Discussion

The second day of the conference began with discussion of legislative issues. Brian Zwit, Environment Counsel at NAAG, and Martha Crosland of DOE's Office of Environmental Management presented snapshots of CERCLA reauthorization activity. CERCLA discussion focused on sovereign immunity, state authorization, and radionuclides issues.

DOE representatives David Moses of the Office of Policy, Planning, and Program Evaluation and Kathy Martin, Attorney in the Office of General Counsel, in conjunction with Jim Payne, an Assistant Attorney General in Ohio, led discussion of Clean Water Act reauthorization issues. These issues focused primarily on sovereign immunity, groundwater issues, and radionuclides.

The next topic of discussion was AEA/RCRA overlap. Betty Shackelford, of DOE's Office of Waste Management, defined the types of wastes generated by the Department. Vivian Bowie of DOE's Office of

Environmental Compliance, raised a number of issues that an interagency working group on mixed waste has been studying, and she also discussed the issue of Materials Not Classified as Waste (MNCWA). States noted that some of these issues had been raised in the past, and they stressed the importance of including states as co-regulators with EPA in discussions.

Jim Payne presented state perspectives on AEA/RCRA issues. In order to facilitate dialogue, states presented some draft language for use in addressing AEA/RCRA overlap issues. This language included provisions on "agreeing to disagree" on state authority for requiring information on radionuclides. Specific scenarios in which states need radionuclide data were presented by individual states, and a lively discussion followed these presentations.

As a final discussion point, Lindsay Lovejoy of New Mexico led several states in presenting the types of issues being discussed by the *force majeure* subgroup. States approach this issue in significantly differing ways: some states do not recognize *force majeure* as a defense; others are willing to agree that some events constitute *force majeure*.

Third Day Discussion

On the third day of the conference, DOE hosted a demonstration of two Management Information Systems. First, the Federal Facility Agreement Archive was demonstrated by Tony Lombardi, Lisa Ward, and Glenna Shields of Pacific Northwest Laboratory (who work under support contract to DOE's Office of Environmental Compliance). The Federal Facility Archive System houses the full text of 114 enforceable documents, including all of DOE's Federal Facility Agreements, and has numerous search capabilities. It is currently being tested and will ultimately be available, via modem, to NAAG members.

Arnold Gritzke of DOE's Office of Environmental Management and Robert Alexander of BDM, Inc., demonstrated the second information system, the Progress Tracking System (PTS), which tracks progress on milestones and other information from enforceable agreements.

Next Steps

Several topics were discussed for future activity by the participants. A brainstorming session was held on pilot project issues. The pilot project will focus on a

single DOE site and will evaluate compliance and enforcement issues specific to that site. Suggestions included bringing together all participants to track the progress of the pilot project.

The participants agreed to focus on several key issues for the next meeting:

- The National Environmental Policy Act;
- RCRA implications for DOE, especially for mixed waste;
- Materials Not Classified as Waste;

- Information requests by states and issues related to these requests; and
- Radionuclide regulation under the Clean Water Act.

The next meeting is planned for October 25-27 1994, at the Hanford facility in Richland, Washington. Please contact Wib Chesser, Environment Counsel at NAAG, at (202) 434-8062 or Melanie Pearson of DOE at (202) 586-0939 for more information.

NEWS BRIEFS

Unless otherwise indicated, please call DOE News Media contact Amber Jones at 202-586-5819 or Wib Chesser of NAAG at 202-434-8062 for further information on News Briefs.

- *Governor Criticizes Superfund Listing for Pantex* In a May 27, 1994, letter to EPA Administrator Carol Browner, Texas Governor Ann Richards criticized the Agency's decision to list DOE's Pantex facility as a Superfund site. The letter asserts that the state's Resource Conservation and Recovery Act authority is sufficient to handle problems at the facility.
- *DOE to Increase EPA and State Oversight of Cleanups* In a June 1, 1994, memorandum from DOE Assistant Secretary Thomas Grumbly to the DOE Rocky Flats Manager, Mr. Grumbly affirmed DOE's position that CERCLA applies to DOE activities at NPL sites and that DOE's activities need to include appropriate regulator oversight and stakeholder participation. This position reverses the Department's traditional stance of opposing EPA and state oversight of decontamination and decommissioning activities.
- *New Mexico Governor Sends Letter on SNF to Clinton* On June 1, 1994, New Mexico Governor Bruce King sent President Clinton a letter recommending that the administration develop a national nuclear waste management policy. The letter was sent in response to recent efforts to house a monitored retrievable storage facility for spent nuclear fuel (SNF) on Mescalero Apache Tribe land in New Mexico.
- *NRC Suggests 15 Millirem Dose Limit* In a draft Nuclear Regulatory Commission (NRC) rulemaking presented June 6, 1994, the NRC has proposed a dose limit of 15 millirem per year for unrestricted future use for decommissioning facilities. For information on obtaining the draft rulemaking, call the NRC at (301) 504-2240.
- *DOE Uses Risk-Sharing Contract for Cleanup* On June 6, 1994, Thomas Grumbly announced that the Department has reached agreement for risk-sharing with Martin Marietta, a cleanup contractor, for Oak Ridge Laboratory in Tennessee. Under the contract, Martin Marietta will have greater liability for cleanup violations.
- *DOE Announces NEPA Reform* On June 16, 1994, Energy Secretary Hazel O'Leary announced a new DOE policy to improve compliance with the National Environmental Policy Act (NEPA), under which the Department has a number of requirements, including those for preparing Environmental Impact Statements (EISs). The new process, which will include enhanced public participation and increased field office responsibility, is intended to cut EIS preparation time from 33 months to 15 months.
- *States Sue DOE Over HLW Disposal* On June 17, 1994, Michigan and several other states filed suit against the Department arguing that DOE has responsibility under the Nuclear Waste Policy Act for accepting high-level nuclear waste (HLW) beginning no later than 1998. The complaint also requests six-month progress reports and that the court hold ratepayer funds (collected to develop disposal capacity) in escrow.

NEWS BRIEFS (cont.)

- **DOE Issues NOI for Weapons-Usable Fissile Materials.** On June 21, 1994, DOE issued a Notice of Intent (NOI) to prepare a Programmatic Environmental Impact Statement (PEIS) for the storage and disposition of weapons-usable Fissile materials. The NOI marks the first step in the President's policy to eliminate the nation's stockpile of these materials.
- **DOE Issues Draft EIS for SNF and INEL.** On June 23, 1994, DOE released a two-part draft EIS. Part I of the draft addresses SNF management for the entire Department. Part II covers cleanup and waste management at the Idaho National Engineering Laboratory (INEL).
- **Department of Energy Declassifies Documents.** DOE has declassified some 1.7 million pages of documents relating to nuclear testing that are stored at the National Archives and Records Administration's (NARA) Regional Archive in Laguna Niguel, California. The move followed a request by the National Association of Atomic Veterans, seeking information about human radiation exposures resulting from nuclear tests conducted in the 1950s and 1960s. The contact for research on the files is Diane Nixon, NARA Director, (714) 643-4241.
- **Federal Facility Compliance Act Draft Site Treatment Plans.** DOE has released draft plans proposing treatment of stored mixed radioactive and hazardous waste at 48 sites in 22 states, treating 90 percent of the waste on site. The waste, generated over the last 40 years, is primarily from research and production of nuclear weapons. The draft plans contain preferred options for developing needed treatment capacity and technologies. Proposed treatments include solidifying liquids, removing metals, using high heat or incineration to destroy chemicals, and chemical processes to change the characteristics of the waste. The plans, incorporating public input, are scheduled for submittal to EPA in February 1995. Site plans are available by calling (800) 736-3282. The deadline for comments is October 31, 1994.
- **Tailings Cleanup.** A ceremony was held September 8, 1994, marking the closing of the former Climax uranium processing site in Colorado. The ceremony recognized the completion of surface remediation of the site for future use as a public park along the Colorado River. The Climax site is the 12th to be completed under the congressionally mandated Uranium Mill Tailings Remedial Action program. More than 4.6 million cubic yards of tailings, building debris and other material, plus radioactive materials from vicinity properties, were removed from the site.
- **DOE Inspector General Reports.** A report titled "Audit of Costs and Management of the Yucca Mountain Project" (DOE/IG-0351) is available from the DOE Office of the Inspector General. To obtain a copy of this report contact the Inspector General's Office at (202) 586-4128.
- **DOE Americorps National Direct Grant.** DOE received one of only 15 Americorps Federal Grants from the Corporation for National Service to initiate the "Salmon Corps" project. Americorps' mission is to engage young Americans in community-based service projects. The Salmon Corps project was developed as a partnership between DOE's Offices of Environmental Management and Science Education and Technical Information, the Earth Conservation Corps, the Columbia River Inter-Tribal Fish Commission, and the Shoshone-Bannock Tribes. Corps members will be selected from the Nez Perce, Yakama, Warm Springs and Umatilla Nations, who are residents of the Columbia River Inter-Tribal Fish Commission, and the Shoshone-Bannock Tribe. Activities will be centered along the Columbia River and its tributaries, to rejuvenate historic salmon breeding grounds. The Richland and Idaho Operations Offices and Bonneville Power Administration are participating in the project.

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