



Department of Energy

Washington, DC 20585

December 3, 2015

The Honorable John Shimkus
Chairman
Subcommittee on Environment and Economy
Committee on Energy and Commerce
U. S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

On September 11, 2015, Mark Whitney, Principal Deputy Assistant Secretary for Energy Environment, testified regarding "Oversight of Federal Facility Cleanup under CERCLA."

Enclosed are answers to questions submitted by Representative Frank Pallone and you to complete the hearing record.

If you need any additional information or further assistance, please contact me or Fahiyeh Yusuf, Office of Congressional and Intergovernmental Affairs at (202) 586-5450.

Sincerely,

A handwritten signature in blue ink, appearing to read "Janine Benner".

Janine Benner
Deputy Assistant Secretary for House Affairs
Congressional and Intergovernmental Affairs

Enclosures

cc: The Honorable Paul Tonko
Ranking Member



QUESTIONS FROM CHAIRMAN JOHN SHIMKUS

- Q1. At the hearing on September 11, 2015 you testified that for Department of Energy sites, while DOE is the lead agency for cleanup, that DOE does not have a regulatory role. Will you please explain what you mean by that?

Please explain what it means when DOE asserts "lead agency authority" pursuant to E.O. 12580.

- A1. Executive Order (E.O.) 12580 delegates the President's response authorities to Federal agencies for releases at facilities under their jurisdiction. As provided in E.O. 12580, the President delegated to the Secretary of Energy Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) "lead agency" authority at the Department of Energy (DOE) sites to conduct removal actions, remedial actions, and "any other response measures" consistent with the National Contingency Plan (NCP).

The NCP is the set of implementing regulations for conducting CERCLA response actions. The NCP describes the steps that responsible parties (including Federal agencies) must follow in reporting and responding to situations in which hazardous substances, pollutants, or contaminants are released into the environment. The NCP, and associated guidance, establishes the criteria, methods, and procedures the Environmental Protection Agency (EPA) uses to characterize sites, evaluate response alternatives, and select and implement a remedy. The national goal described in the NCP is to select remedies that are protective of human health and the environment, that remain protective over time, comply with applicable, or relevant and appropriate requirements, and that minimize untreated waste.

There are two basic types of response actions related to environmental cleanup: remedial actions and removal actions. Removal actions may be initiated at the (DOE) sites when DOE determines the immediate or interim action will prevent, minimize, stabilize, or eliminate a risk to health or the environment. If DOE identifies a threat of exposure to or migration of hazardous substances, pollutants, or contaminants that poses a risk to health, welfare, or the environment, DOE is authorized by CERCLA and the NCP to exercise its removal action authority to implement an appropriate response to the risks posed.

As the lead cleanup agency, while DOE can implement removal actions, consistent with CERCLA requirements, without prior EPA or state approval, DOE shares its planned removal responses with the states and EPA, in accordance with the provisions of the interagency agreement where included. While removal actions address short-term, immediate risk to human health and the environment, remedial actions are long-term actions to achieve a permanent remedy. EPA (and the states in most situations) have authority to comment on and approve (jointly sign with DOE) remedial action decision documents (e.g. Records of Decisions). At National Priorities List (NPL) sites, EPA must concur in a DOE Record of Decision for remedial action.

Q1b. You noted in your testimony that the regulatory role is assumed by EPA and/or the States. Does that mean then that EPA and/or the state has control over cleanup decisions?

A1b. Cleanup assessments and decisions take place within site-specific regulatory frameworks that involve DOE, EPA, and the majority of states. At CERCLA sites listed on the NPL, DOE, EPA and most states enter into interagency agreements, otherwise known as Federal Facility Agreements (FFAs). The FFAs are multi-party agreements which govern investigation and remediation activities, the roles and responsibilities of each party, cleanup schedules, enforceable milestones, and penalties. FFAs form the basis of DOE's cleanup program for CERCLA NPL sites. As part of the cleanup decision process, EPA jointly selects remedies with DOE and the state has an opportunity to concur on remedies memorialized in Records of Decision (RODs). EPA and the state provide oversight over federal agency activities at NPL sites in accordance with the NCP and the environmental compliance agreements. Also, as noted, at NPL sites, EPA must concur in a DOE Record of Decision for remedial action. If the parties cannot agree on a remedy, CERCLA gives the EPA Administrator the authority to select the remedy.

Q1c. When DOE asserts "lead agency authority" please explain how assessment and cleanup decisions are made.

A1c. DOE is designated as the lead CERCLA agency by the President at DOE sites. As noted above, for CERCLA removal actions, although DOE can proceed without direct EPA or state approvals, the Department may share our response actions with the EPA and the state

in advance of undertaking them. Remedial actions are taken with the approval of EPA and the state.

Remedial actions involve routine collaboration with both EPA and the states throughout the entire remedy selection process, beginning with the development of work plans to characterize a site, through the evaluation of viable response alternatives to any identified problems, to final remedy selection. If differences of opinion arise between one or more of the three agencies on how best to address an identified problem (e.g., contaminated groundwater), DOE must negotiate a viable solution acceptable to all before proceeding with the remedial action (i.e., unlike removal actions, DOE is not authorized to conduct remedial actions without both EPA and state support/concurrence).

Q2. Does DOE allow EPA or a State to provide regulatory oversight over DoE cleanups at non-NPL sites when DoE invokes lead agency authority under E.O. 12580?

A2. Most non-NPL DOE sites (e.g., Los Alamos, Portsmouth) are regulated by states under their RCRA authorities. EPA involvement at non-NPL DOE sites occurs on a case-by-case basis. DOE may elect to use its CERCLA authority to address contamination at non-NPL sites. DOE also has the option of using its Atomic Energy Act (AEA) authorities to address legacy contamination at DOE sites. The latter requires DOE to follow the National Environmental Policy Act (NEPA) requirements prior to initiating a cleanup under its AEA authority.

Q3. Of the DOE sites being cleaned up under CERCLA, for what percentage of sites has DOE asserted lead agency authority under E.O. 12580?

A3. DOE has “lead agency” response authority at all DOE sites to conduct CERCLA response actions via Presidential delegation.

Q3a. What is the role of EPA at those sites?

A3a. At NPL sites, EPA generally serves as the lead oversight entity, although it may defer portions of the site eligible for RCRA corrective action to the state as part of a FFA, as was done for some portions of the Hanford site.

Q3b. What is the role of the States at those sites?

- A3b. DOE coordinates with EPA and the state at NPL sites regardless if the state is a signatory to a FFA. As such, states are involved throughout the entire investigation and remedy selection process. If portions of an NPL site are subject to RCRA, states can serve as the lead authority under RCRA for those portions of the site eligible for deferral to RCRA corrective action.
- Q4. Does DOE recognize and comply with State land use control laws and regulations related to environmental cleanups? Why or why not?
- A4. As required by CERCLA, DOE must comply with all applicable or relevant and appropriate state and federal regulatory requirements (ARARs) unless one of the ARAR waivers provided under CERCLA or another legal restriction justify non-compliance with a requirement. CERCLA section 121(d)(4) specifies the circumstances under which a lead response agency can select a remedial action that is not equivalent to a legally applicable or relevant and appropriate requirement. The six ARAR waivers provided by CERCLA include: 1. Interim measures; 2. Equivalent Standard of Performance; 3. Greater Risk to Health and the Environment; 4. Technical Impracticability; 5. Inconsistent Application of State Standard Waiver; and 6. Fund-Balancing.
- Q4a. Does DOE view State land use control laws related to environmental cleanups, such as those requiring restrictive covenants and restrictive notices, as being applicable and relevant and appropriate requirements under CERCLA? Why or why not?
- A4a. To the extent that state laws are determined to constitute an ARAR, DOE must either meet the substantive portion(s) as an ARAR(s) or justify a waiver. Based on the EPA Guidance on ICs/LUCs, state Uniform Environmental Covenants Act (UECA) laws are not considered ARARS except for the state of Colorado. Even if they are not ARARS, DOE may negotiate the incorporation of environmental covenants into environmental compliance agreements on a case-by-case basis as appropriate.
- Q5. How does DOE address and comply with State environmental laws that are more stringent than Federal laws?

A5. Under CERCLA, state environmental laws that are more stringent than Federal laws and meet the standards to constitute an ARAR must be complied with unless a CERCLA ARAR waiver is justified.

Q5a. Does DOE recognize a role for State environmental agencies in determining what State requirements are applicable and relevant and appropriate to DOE's environmental assessment and cleanup activities?

A5a. Yes

Q6. Does DOE invoke sovereign immunity with respect to cleanups under CERCLA:

Q6a. With respect to deciding what is an Applicable or Relevant and Appropriate Requirement (ARAR)?

A6a. Generally no, provided that the ARAR, or any other requirement based on state law, is valid and can be applied consistent with CERCLA's waiver of sovereign immunity.

Q6b. With respect to determining the appropriate cleanup standards?

A6b. Same response to Question 6.A. Generally no, provided that the ARAR, or any other requirement based on state law, is valid and can be applied consistent with CERCLA's waiver of sovereign immunity.

Q6c. With respect applying land use controls or restrictions?

A6c. Same response to Question 6.A. Generally no, provided that the ARAR, or any other requirement based on state law, is valid and can be applied consistent with CERCLA's waiver of sovereign immunity.

Q7. Explain the role State environmental agencies have in the decision-making process regarding prioritization, assessments and cleanups conducted by DOE for sites not listed on the NPL?

A7. On a case-by-case basis, states may have the lead role in the decision-making process regarding prioritization, assessments and cleanups for hazardous waste under RCRA regardless of whether the site is listed on the NPL. When the site is not listed on the NPL, authorized states take the lead for Subtitle C cleanup and waste management.

Q7a. Your written testimony noted that jointly-arrived at decisions with the States are memorialized in Federal Facilities Agreements. What is DOE's policy regarding changes to the FFAs? Are changes made unilaterally?

A7a. DOE cannot make changes to the FFAs unilaterally. Should any party to the FFA like to revisit the terms of the agreement, that party would follow the change process as articulated in the subject FFA.

Q7b. What about decisions where there is not a jointly-arrived at decision and DOE disagrees with a recommendation made by the State – what happens then?

A7b. In the event a jointly-arrived at decision cannot be achieved, any party to the interagency agreement can invoke the dispute resolution procedures stipulated in the requisite FFA. These procedures include an informal dispute process and if the matter is still not resolved, it is followed by formal dispute process that involves a sequential elevation in agency management until a resolution is reached.

Q7c. Does DOE have any non-NPL sites where EPA provides oversight or other assistance? If so, what kind of assistance does EPA provide?

A7c. Yes. EPA maintains some role at all DOE sites; however, for those not listed on the NPL EPA typically defers to the State to provide oversight support. On a case-by-case basis when a state, potentially responsible party (PRP), or community requests EPA assistance, EPA will provide guidance on interpretation of regulations or assistance in evaluating the efficacy of remediation techniques as they have been applied at other sites. In the case of the Energy Technology Engineering Center site, for example, EPA conducted a radiological survey.

Q8. DOE's written testimony identified the cleanup at Rocky Flats as a success story, what was different about that cleanup that made it successful?

A8. The Rocky Flats cleanup program benefitted from a contract structured to provide incentives for a higher level of performance, a community that did not view the site as a long-term enterprise for economic prosperity, a land use determination made by Congress, and designation as a closure site, which provided funding priority. In addition, DOE was able to find off-site recipients to take those wastes that could not be left on site for protectiveness

reasons, an atypical situation in that challenges often exist with respect to off-site waste disposition.

Q8a. Is Rocky Flats a model for other cleanups why or why not?

A8a. Creating all the aspects that made Rocky Flats a success would be challenging at other cleanup sites.

QUESTIONS FROM REPRESENTATIVE FRANK PALLONE

- Q1. During the second day of this hearing, state witnesses testified about potential issues related to agencies that are responsible parties asserting “Lead Agency Authority”

Can you explain what this authority is and why your Department makes use of this authority?

- A1. Executive Order 12580, among other things, delegates CERCLA response authorities to DOE and DOD subject to the requirements of CERCLA section 120, which provide for EPA oversight at NPL sites. The “lead agency” and its authorities are determined in accordance with the NCP. In the case of a release of a hazardous substance, pollutant, or contaminant, where the release is on, or the sole source of the release is from, any facility or vessel under the jurisdiction, custody, or control of Department of Defense (DOD) or Department of Energy (DOE), then DOD or DOE will be the lead agency. Where the release is on, or the sole source of the release is from, any facility or vessel under the jurisdiction, custody, or control of a federal agency other than EPA, the USCG, DOD, or DOE, then that agency will be the lead agency for remedial actions and removal actions other than emergencies. The federal agency maintains its lead agency responsibilities whether the remedy is selected by the federal agency for non-NPL sites or by EPA and the federal agency or by EPA alone under CERCLA section 120. The lead agency will consult with the support agency, if one exists, throughout the response process. DOE uses its mandated authority to effect protective cleanups at sites under its jurisdiction, custody, and control. Within the DOE’s jurisdiction, the Office of Environmental Management (EM) delegates environmental authorities to field offices in accordance with the EM’s Standing Operating Policies and Procedures.

DOE developed a joint policy with EPA in 1995 to use its removal authority — specifically use of the non-time critical removal action process for almost all of its decommissioning work on buildings. This policy was established primarily because the range of approaches to decommission a building are very limited and thus does not require the same level of rigor or breadth of an assessment as when addressing contaminated media (e.g., soil and ground water). Other than buildings, DOE historically has used its removal action authorities to quickly address an imminent risk (e.g., providing communities with an

alternate water supply when their drinking water has been impacted by contamination emanating from a DOE site) or expedite the removal of contamination where the need and type of action required is relatively straight forward (excavating discreet areas of surficial contamination such as removal of lead contaminated soils around a shooting range).

- Q2. Does this authority apply differently at National Priority List sites and non-NPL sites?
- A2. DOE's authorities among NPL and non-NPL sites are different only in the sense that at non-NPL sites, EPA does not have a formal role. Nonetheless, DOE involves both the states and EPA in these actions even though the delegated lead agency authority does not require the DOE to do so.
- Q3. According to state testimony, assertions of lead agency authority were more of a problem before 2008. Please explain what your Department has done since 2008 to improve working relationships with states when your Department leads cleanups?
- A3. DOE is committed to working collaboratively and constructively with its the various response action oversight authorities and local communities. We routinely engage response action oversight authorities, early and often, to discuss priorities, report progress, and find solutions to challenges faced by our program. EM posts much of its cleanup data and status on its webpage and hosts numerous public meetings with response action authorities, state and local elected officials, tribal nations, and other stakeholders to solicit feedback on cleanup decisions. We also have site specific advisory boards, established under the Federal Advisory Committee Act, that provide advice to our program.
- Q4. Similarly, state witnesses expressed concerns that, primarily before 2008, agency claims of sovereign immunity frustrated cleanup efforts. When and why might your Department or employees of your Department claim sovereign immunity in the context of Superfund cleanups?
- A4. This question is difficult to answer because it is highly speculative outside the context of a particular case or matter. To the best of our knowledge, in litigation on behalf of the Department of Energy, the United States Department of Justice has argued that sovereign immunity has not been waived for the cleanup of facilities that it does not currently own or operate.

- Q5. What has your Department done since 2008 to limit claims of sovereign immunity?
- A5. DOE has been working constructively with the states and EPA under its environmental compliance agreements to reach mutually agreed upon cleanup remedies.
- Q6. What factors does the Department consider in making funding decisions for cleanups across your inventory of contaminated sites?
- A6. Funding decisions take into consideration what is needed to be protective of human health, the environment, and worker safety; applicable laws (e.g., CERCLA, RCRA, NEPA); site-specific Federal Facility Agreements inclusive of enforceable cleanup milestone schedules; work program commitments (e.g. multi-year construction contracts such as Hanford's Waste Treatment Plant); risk-profiles of cleanup activities and projected reductions of risk; safety surveillance and maintenance, infrastructure, and site security needs; Congressional input; community input and technology development. When determining cleanup schedules, input from all relevant state and federal authorities plays an important role as they have a significant voice in defining enforceable milestone schedules.
- Q7. What does your Department do to ensure that contaminated sites posing serious or immediate threats to human health are cleaned up quickly and effectively?
- A7. DOE addressed immediate threats to human health known at the time early in our cleanup program's history. Serious hazards at sites remain (e.g., liquid wastes in tanks, residual contamination in groundwater), DOE is taking steps to address these hazards, such as implementing access controls prevent potential exposures to surrounding communities. Where immediate threats arise, DOE will work with our regulators to develop an appropriate response to mitigate the treat as quickly and effectively as possible.
- Q8. How does your Department ensure that budget requests will be sufficient to cover pressing cleanup needs?
- A8. EM continues to pursue its cleanup objectives safely within a framework of regulatory compliance commitments and best business practices. The rationale for cleanup prioritization is based on achieving the highest risk reduction benefit per radioactive content (activities focused on wastes that contain the highest concentrations of radionuclides and sites with the highest radionuclide contamination). When developing its budget requests,

the Department takes many variables into account, including prioritization of cleanup activities as follows:

- Activities to maintain a safe, secure, and compliant posture in the EM complex
- Radioactive tank waste stabilization, treatment, and disposal
- Spent (used) nuclear fuel storage, receipt, and disposition
- Special nuclear material consolidation, stabilization, and disposition
- Transuranic and mixed/low-level waste disposition
- Soil and groundwater remediation
- Excess facilities deactivation and decommissioning

Q9. Did the 2013 government shutdown affect your ability to meet your cleanup obligations on schedule?

A9. No, the FY 2014 government shutdown did not affect our ability to meet cleanup obligations on schedule.