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Abstract

Through this grant, the National Association of Attorneys General (NAAG) and the Department of Energy (DOE) have established a working group of Assistant Attorneys General and key DOE staff to seek agreement on current regulatory and statutory enforcement and compliance issues at DOE facilities. This workgroup provides an ongoing forum for direct communication that utilizes alternative dispute resolution techniques rather than expensive litigation in hopes of resolving differing views between the Department and the States. This Workgroup facilitates cooperation as the parties work towards their common goals of ensuring the protection of human health and the environment through the clean-up and the proper management of DOE facilities and the wastes they have generated.

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I. Executive Summary

Complex legal and technical issues regarding management and clean up of wastes, and compliance with, and enforcement of, State laws at Department of Energy (DOE) facilities continue to arise as DOE reconfigures its weapons complexes. Plans that strive to promote regulatory flexibility in order to expedite clean-up and reduce long-term mortgage costs have been developed for most of DOE's field sites. These facilities have attracted substantial state resources for operating regulatory compliance and enforcement programs and they will continue to require considerable expertise, time, and resources of the states. DOE has demonstrated its commitment to remediating and effectively managing these sites in coordination with the states. The Attorneys General, as chief legal officers of the states, play a pivotal role in ensuring compliance of these clean-up and management efforts and participate as important stakeholders regarding environmental management, cleanup, and enforcement and compliance issues at DOE facilities.

NAAG facilitates this effort in various ways. NAAG develops and organizes Workgroup Meetings and site visits at DOE facilities for its members. The Workgroup, in general, rotates the meeting location between DOE Headquarters in Washington, DC and a DOE facility in the States. When possible, tours of the sites are arranged for the members to get a first-hand look at the magnitude and scope of environmental management issues that are particular to that site and observe similarities with their own home state DOE site.

When relevant, the Workgroup has the capability to develop research papers and working documents that contribute to the utility of the Workgroup. For instance in the second year of this project, a NAAG and DOE members of the Workgroup identified the need for an analysis of institutional controls at DOE facilities. The Workgroup has been developing the report, *Inventory and Analysis of State Law Related to Institutional Controls* which will be produced during the next grant period. In addition, the flexibility of the project allows its state members to participate in various meetings and workshops developed by DOE when it is desirable for States to contribute their expertise and analysis of an emerging issue. Finally, NAAG distributes relevant and current information to and among the Workgroup members on a regular basis and utilizes conference calls for discussion of emerging issues within DOE or in a particular state.

II. Experimental

No experimental research methods were used during this project.

III. Results and Discussion

A. Workgroup Meetings and Site Visits

On April 29- May 1, 1998, NAAG hosted a DOE Site visit and Workgroup Meeting in Denver, Colorado. The agenda included a discussion regarding DOE's recent publication "Accelerating Cleanup: Paths to Closure," cross-complex integration such as intersite transfer of waste and implementing strategies, waste transportation planning among DOE Sites, DOE external regulation pilot projects, and the NAAG/DOE Radionuclide Sharing Guidance. The tour of Rocky Flats included Building 123, Trench One, Building 664, and a video presentation of various buffer zones.

On December 9-10, 1998, NAAG hosted the Workgroup Meeting in Washington DC, near DOE Headquarters. The agenda was developed in cooperation with DOE project staff from DOE's Office of Environmental Management. The agenda included items of mutual interest such as the current DOE budget request, waste disposition issues, decommissioning of nuclear facilities, institutional controls and a stewardship dialogue. Other agenda items included external regulation of DOE facilities, a WIPP update, discussion of the waiver of sovereign immunity in CERCLA, and natural resource damages. The work group meeting was productive and useful for the state assistant attorneys general to communicate their concerns and discuss the possibilities of mutually beneficial solutions. The Department of Defense was represented at the meeting as well as the National Governor's Association, and US EPA.

On November 15-17, 1999, the Workgroup held a Workgroup meeting in Oak Ridge Tennessee. The first day included a tour of the DOE Oak Ridge facility. The participants viewed the RCRA waste piles, S-3 Ponds, and On-site Disposal Cells in the Y-12 area. In the afternoon, the group toured ORNL and stopped at the graphite reactor, gunite tanks, solid waste storage area 5, and TRU pits to name a few. Finally, the group viewed the East Tennessee Technology Park and saw the UF6 cylinder Storage Yard and the TSCA incinerator. The second day of the meeting focused on substantive discussions between DOE staff and Office of the Attorney General Staff. Agenda topics included DOE's pending reorganization and budget, stewardship issues, transportation of high level and low level nuclear wastes, and case studies of external regulation for the Department.

On October 3-5, 2000, NAAG, the National Governor's Association (NGA) and the Energy Communities Alliance (ECA) jointly held a Workgroup Meeting with DOE in Idaho Falls, ID. The purpose of the meeting was to provide a forum for an open and effective dialogue between state and local representatives and U.S. DOE management on their respective concerns and priorities, as well as recent developments and decisions at DOE Headquarters. The meeting also focused on DOE's Environmental Management (EM) budget, EM's Office of Integration and Disposition activities, and long-term stewardship issues.

1. Other Relevant Meetings

Throughout the project, the Senior Environment Counsel attended meetings of the DOE Environmental Management Advisory Board's committee on long-term stewardship, meetings of various non-governmental organizations interested in DOE matters, and the National Governors' Association Federal Facilities Workgroup Meetings.

As an example of another relevant type of meeting, the Association, NAAG held its Annual Spring 2000 Meeting of the State Attorneys General in Washington, DC. A subset of this group, the Conference of Western Attorneys General decided to host a break-out session with speakers from DOE to discuss the DOE's reorganization as well as the DOD-EPA Unexploded Ordnance Management Principles. The Senior Environment Counsel as well as some of the Workgroup members were able to provide background information and help identify speakers through association with the NAAG/DOE Workgroup. In April of 2000, NAAG's Deputy Director wrote to Mary Anne Sullivan, DOE's General Council regarding the possibility of DOE and NAAG, as well as NGA participating in an annual dialogue of relevant issues. This idea was adopted at NAAG's Summer Meeting as a resolution.

Finally, the project provides funds to assist assistant attorneys' general participation in various DOE meetings that they could not otherwise attend due to budgetary constraints. For example, NAAG assisted an Assistant Attorney General from Texas to represent the NAAG/DOE Workgroup at the Western Stakeholders' Forum on Land Use Controls in Federal Facilities Cleanup, held June 18-20, 2000 in San Francisco, California.

B. Working documents and informal opinion and/or comment letters

After four years of development, NAAG and DOE published, *Sharing of Radionuclide Information with States* in September 1998. This document was developed for the office of the state attorney general office and DOE field office personnel to agree upon the availability of radionuclide information that can be expected to be shared. The publication is considered a success for the NAAG/DOE workgroup to find solutions acceptable to both the Department and the States, regarding the enforcement of environmental statutes at DOE facilities.

In August 2000, NAAG was pleased to announce the publication of "Natural Resource Damages Under CERCLA, OPA and CWA." This publication was distributed to the Workgroup members, DOE contacts, and the State Attorneys General themselves. The next substantive publication will be regarding institutional controls which has been under development for approximately one year and is expected to be published in 2002.

In addition, the Workgroup provides ongoing comment and feedback to the Department on various emerging policies and regulation. These may be informal comments, letters to the Secretary of Energy, or more formal sign-on letters from the State Attorneys General.

C. Conference calls and distribution of information

The following is a log of NAAG Workgroup Conference calls.

November 14, 1997, a joint DOE/State conference call was held to discuss the status and scope of DOE's External Regulation Pilot Program.

January 6, 1998, A states only conference call was held to develop a preliminary agenda for the upcoming Workgroup Meeting, tentatively scheduled for mid-April. A summary of the call was prepared and distributed to state contacts. DOE was informed about topics of state interest for the meeting. Preliminary logistics for the Meeting site and DOE facility tour have been initiated.

On January 13, three of the Workgroup members and NAAG staff held a conference call to discuss their upcoming presentation on the use of "institutional controls" at Federal Facilities, i.e. DOE and DOD sites. Their talks were presented to the Defense Environmental Restoration Task Force at their February 3, 1999 meeting in San Francisco.

Also in January 1998, NAAG's Senior Counsel arranged a schedule for the Workgroup's monthly conference calls. These dates included: January 20, February 17, March 17, April 21, May 19 and June 16. The February call included discussion regarding a report prepared by DOE and DOD about the waiver of sovereign immunity in the CERCLA statute. Other issues discussed on the conference calls included waste disposition, transportation, and stewardship. A summary of these concerns was sent to the DOE project manager, Doug Frost, in late February.

July 13, 1999 – update on issues related to sovereign immunity as applied to the Departments of Defense and Energy, the potential future of external regulation, discussion of June meeting between attorneys General Salazar, Heitkamp and Sorrell and Mary Anne Sullivan, General Counsel for the Department of Energy.

August 12, 1999 – subjects were agenda development for the November meeting, extension/modification of workgroup projects, tracking the progress of the bill creating the National Nuclear Security Administration (NNSA), developments of the investigation at the Paducah site, and general state news, including Thomas Edwards' visit to Pantex.

September 9, 1999 – subjects were *Tennessee v. U.S. Air Pollution Control Board* (No. 97-5715), technical assistance, information sharing on various states' reactions to creation of the NNSA, tracking Congressional action (NAAG legislative liaison sat in for updating on legislative matters), upcoming activities related to the plutonium found at the Paducah site, and other state update matters, including a New York case *F.A.C.T.S. (For A Clean Tonawanda) v. USNRC, DOE, Army Corps of Engineers, et al.* (FUSRAP issues).

September 23, 1999 – subject was in-depth, detailed discussion of the agenda for the November Workgroup meeting, assignment of topics, distribution of materials.

October 12, 1999, as part of a general Comprehensive Environmental Response Compensation and Liability Act (CERCLA) update, to report on the development of potential amendments to CERCLA governing the waiver of sovereign immunity by federal facilities (including DOE sites). Several states briefed others as to ongoing initiatives.

October 18, 1999 to report on the development of potential amendments to the Clean Water Act (CWA) governing the waiver of sovereign immunity by federal facilities (including DOE sites), and to report on a Senate hearing held on the CWA issues. Several states briefed others as to ongoing initiatives tied to CWA application at DOE sites.

December 2, 1999, to discuss further developments and status of the ongoing projects in states with DOE facilities and if any new issues have arisen.

December 9, 1999, to discuss the possible creation of the National Nuclear Security Administration and how that might affect the waivers of sovereign immunity in CERCLA as applied to DOE.

1/6/00 to discuss DOE's progress towards implementation of the National Nuclear Security Administration (NNSA) and the developments regarding the investigations at the Ohio Piketon Site and Kentucky Paducah Site.

January 13, 2000 to discuss further the implementation and effects of implementing the NNSA, as well as Long-Term Stewardship and institutional controls with regard to Department sites.

February 29, 2000 to discuss the NRC License Closure and again regarding the NNSA and accountability of the Department as the Office's implementation was proposed. In addition, transportation of DOE waste to various sites and facilities was discussed.

4/6/00 - A call was held to discuss current updates from the state members of DOE/State activity.

May 12, 2000 - A conference call was held to discuss the recently created National Nuclear Security Administration (NNSA) and DOE privatization efforts of private businesses near their sites.

June 1, 2000 - A call was held to discuss the long-term stewardship project with the workgroup and developing ARARs, as well as RCRA Corrective Action Issues under CERCLA.

July 3, 2000 A call was held to discuss the upcoming Workgroup Meeting in October 2000.

In 2001, NAAG decided to suspend formally scheduled conference calls in favor of an enhanced document circulation and dissemination process using broadcast e-mail and fax. Although conference calls are still held, and can be very useful, they are on an ad hoc basis and minutes are usually not kept.

IV. Conclusion

Among the many outcomes of this project, some key benefits include:

1. enhancing the relationship between DOE and the Attorneys General by facilitating an open dialogue and exchange of information.
2. providing a forum for DOE and the offices of the state Attorneys General to discuss legal and other issues arising from DOE facilities;
3. resolving questions regarding the interface between federal and state laws;
4. ensuring that state Attorneys General have the opportunity to comment on DOE policy, guidance, and/or rulemakings;
5. ensuring timely exchange of information between the states and DOE; and
6. facilitating dialogue among the States, DOE and Federal representatives outside DOE which have parallel legal concerns, especially concerning site closure.

V. References

None