



**Testimony**

**“Oversight of Federal Facility Cleanup under CERCLA”**

**Subcommittee on Environment and the Economy**

**U.S. House of Representatives Committee on Energy and Commerce**

**Wednesday, September 16, 2015**

**by**

**Elizabeth A. Dieck, Secretary/Treasurer**

**Environmental Council of the States**

**Main Points**

1. ECOS appreciates the Subcommittee’s continued attention to the important issue of how to most effectively and expeditiously achieve cleanup of contaminated federal facilities, which are present in nearly every state and territory. State environmental agencies play a critical role in the identification, oversight, and cleanup of contaminated federal facilities.
2. While progress has been made, there is significant room for improvement in how the federal government and states work together to remediate contaminated federal facility sites and return them when possible to productive use. These include:
  - a. strengthening the state voice in cleanup decisions;
  - b. reducing unilateral changes to cleanup schedules by federal agencies;
  - c. ensuring that the Administration and relevant federal agencies request sufficient, stable funding for site investigation, oversight, interim risk management, and clean up;
  - d. establishing a baseline of all contaminated sites with risk informed prioritization for cleanup.
3. ECOS supports amendment of CERCLA to acknowledge state authority and regulatory responsibility for oversight of removal and cleanup actions at current and formerly owned or operated federal facilities, and clarification that federal facilities are subject to appropriate state regulations and not unduly shielded by sovereign immunity and lead agency authority.

Chairman Shimkus, Ranking Member Tonko, and Members of the Subcommittee, good afternoon. My name is Elizabeth Dieck, and I am here today in my capacity as Secretary-Treasurer of the Environmental Council of the States (ECOS), whose members are the leaders of the state and territorial environmental protection agencies. I serve as Director of Environmental Affairs for the South Carolina Department of Health and Environmental Control. I appreciate the opportunity to share with you the states' views on the progress of the cleanup of contaminated federal facilities, and what solutions may help address the related challenges.

ECOS commends the Subcommittee for holding these hearings on the state of federal facility cleanups in our nation. Your attention to these sites is relevant to nearly every state and territory in our nation, where contaminated sites exist on lands managed by federal agencies, such as the U.S. Department of Defense (DOD), Department of Energy (DOE), Department of Agriculture (USDA), and the Department of the Interior (DOI). Your oversight of the status of these cleanups, the resources being devoted to them, and the legislative actions that can be taken to advance cleanup progress is critical – as all Americans have a collective interest in seeing the hundreds of millions of dollars we allocate to these sites annually yield the most effective results.

State environmental regulators are involved in every stage of the cleanup process, from identifying and reporting sites to staffing and overseeing cleanup efforts. We are on the front lines of answering questions from our citizens about the risks that these sites may pose to their health and welfare, the scope of contamination, the status of cleanup progress, and the management of waste streams from building debris to more hazardous material. We share with you and our federal partners a priority interest in responding to these complex sites as expeditiously as possible, and when we can, returning them to productive use.

**Recent Progress.** In recent years, states have seen an improvement in the communication with us by federal agencies and in remediation progress. This progress is due not only to thoughtful process improvements within the agencies, but also in response to your oversight, legislation which passed the House of Representatives, and a series of Government Accountability Office (GAO) reports calling into question whether the federal government is moving expeditiously - and with sufficient resources - to achieve the needed results at these sites. The creation of state-federal groups, such as the Munitions Response Dialogue, the Formerly Used Defense Sites (FUDS) Forum, and the Defense State Memorandum of Agreement (DSMOA), has allowed states and DOD to work towards mutually-acceptable cleanup solutions. DSMOA, for example, allows DOD to provide funding for state oversight of cleanup activities at DOD sites.<sup>1</sup> Through this program, states and DOD have worked together to promote streamlined investigative techniques and implement protective remedies, saving DOD hundreds of millions of dollars and expediting remedy implementation. DOD also has made significant strides working with states to establish risk-based priorities for cleanup of contaminated sites. States support risk informed cleanups – which allows sites with higher risk and equity concerns to receive expedited attention in the face of limited human and capital resources. The FUDS Forum and Munitions Response Dialogue allow states to work with DOD to develop solutions to the unique challenges during the cleanup process of defense sites.

In addition to DOD sites, states have played a major role working with DOE in the cleanup of heavily contaminated sites affected by the “nuclear weapons complex” (the complex). State environmental administrators work closely with DOE and the U.S. Environmental Protection Agency (EPA) to eliminate risks posed by these sites, and oversee the cleanup of sites

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<sup>1</sup> See ECOS Resolution 15-5, *On Department of Defense’s Environmental Response Programs* (September 2, 2015).

within the complex as established by Federal Facility Agreements (FFAs), permits, and consent orders under the Federal Facilities Compliance Act (FFCA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Resource Conservation and Recovery Act (RCRA), and other laws. Collaboration between the states and federal agencies has resulted in significant financial savings from reduced future maintenance costs that can be put towards further cleanup of sites within the complex.<sup>2</sup>

The FFCA is a positive example of how legislation has spurred cleanups. This legislation required DOE to inventory legacy radioactive and hazardous waste stockpiles, create a plan and schedule for treatment, and get state approval and enforcement for that plan, and gave states a strong voice in how these legacy waste streams would be managed. As a result, many of these stockpiles have been treated and disposed of or are on an enforceable schedule for final disposition.

**Remaining Concerns.** While ECOS commends the federal agencies on contaminated federal facility cleanup progress, we are concerned that there are instances where the interests of the states are not being considered as thoughtfully as needed.

**First**, the state voice in cleanup decision making should be further strengthened. Where states have clear regulatory and enforcement authority - such as under the RCRA cleanup process and the FFCA - much progress has been made at DOD and DOE sites across the nation, as DOD and DOE representatives have testified. States are concerned, however, that assertions of sovereign immunity and CERCLA lead agency authority under Executive Order 12580 by federal agencies have led to inappropriate or inconsistent interpretations of state law and have not supported cleanup to the same standards as private parties. This hampers states' abilities to

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<sup>2</sup> See ECOS Resolution 10-3, *Cleanup Budgets for the Nuclear Weapons Complex* (March 24, 2010).

oversee effective cleanup efforts and be accountable to their citizens. For many years, ECOS has been seeking revision of the Executive Order to clarify that federal facilities are subject to appropriate state regulations and are not unduly shielded by sovereign immunity and lead agency authority.<sup>3</sup> We encourage Congress to implement legislation that will acknowledge state authority and regulatory responsibility for oversight of removal and cleanup actions at current and formerly owned or operated federal facilities and fully recognize states' regulatory role at federal facilities. There is no reason for federal agency environmental cleanup activities to be subject to less oversight than private parties.

**Second**, states frequently see the federal agencies unilaterally changing site cleanup schedules or goals, pushing ultimate completion out by years - and in some cases decades - and compromising the site's ultimate usability. Federal agencies effectively change cleanup schedules by failing to seek or allocate sufficient funding for their cleanup commitments. When a federal agency unilaterally changes the terms of a cleanup by extending a deadline or changing other goals, the trust-based relationship breaks down and can lead to tension and then to costly litigation, taking funds away from cleanup efforts. Federal agencies should consult meaningfully with states before seeking to change schedules or cleanup goals. This provides opportunity for states to work with our federal partners on alternatives to delay, promotes a fulsome consideration – and possible mitigation – of the impacts of delays on neighboring communities and resources, and allows evaluation of possible ultimate site uses.

**Third**, states are concerned that the available budget determines the remedial approach at some sites, meaning we may not be implementing the most effective and appropriate cleanup approach at a site. Due to the complexity of the contamination at these sites, and the proximity of many of them to communities, states recommend that the federal agencies, in consultation

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<sup>3</sup> See ECOS Resolution 00-9, *Clarification of CERCLA Sovereign Immunity Waiver for Federal Facilities* (April 12, 2000).

with states, determine the most appropriate remedy, and then work together to pursue sufficient and stable funding solutions to implement the remedy. Transparent statements about the actual funding necessary to achieve results are imperative.

Mr. Chairman and Members of the Subcommittee, I hope that my testimony today sheds light both on the progress that has been made, as well as additional areas that are in need of attention, in the area of federal facilities. We look forward to working with you as you study a variety of approaches to these important matters. I look forward to any questions you may have. Thank you.

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Resolution 15-5  
September 2, 2015  
Newport, Rhode Island

As certified by  
Alexandra Dapolito Dunn  
Executive Director

## **ON DEPARTMENT OF DEFENSE'S ENVIRONMENTAL RESPONSE PROGRAMS**

WHEREAS, the U.S. Department of Defense (DOD) is responsible for thousands of contaminated sites at active facilities and on properties no longer owned by, under the control of, or managed by DOD; and

WHEREAS, many of these sites contain uncontrolled releases of hazardous substances, petroleum, radioactive and mixed wastes, historic disposal areas, and building debris that may pose threats to public health and the environment; and

WHEREAS, many of these sites contain or are suspected to contain unexploded ordnance, munitions chemical constituents, and discarded military munitions referred to as munitions and explosives of concern (MEC) and exposure to the presence of MEC poses an unacceptable risk and danger to human health, safety, and the environment; and

WHEREAS, to address the contamination at these sites, DOD needs adequate funding for its environmental restoration programs including the Formerly Used Defense Sites (FUDS) program which based on current funding levels will need to continue beyond 2050 to complete its work; and

WHEREAS, contaminated DOD sites are located in all 50 states and 6 territories so that all states have an interest in cleanup of these sites; and

WHEREAS, states, territories, and federal agencies have found regular interactions to exchange views, information, and advice to facilitate response actions at these sites to be helpful; and

WHEREAS, states have supported the creation of state-federal groups to foster communication and collaboration, to evaluate policy issues, and to work towards mutually-acceptable solutions related to cleanup of these sites such as the Munitions Response Dialogue, the FUDS Forum, and the Defense State Memorandum of Agreement (DSMOA) Steering Committee; and

WHEREAS, DOD provides funding for state oversight of cleanup activities at DOD sites through the Defense State Memorandum of Agreement (DSMOA) program and this funding may be used for state staff costs to participate in the national workgroups listed above; and

WHEREAS, DOD has determined that the DSMOA may not provide funding for other venues related to the DOD environmental restoration program, including ECOS and the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) but States believe these groups support state work related to DOD's environmental restoration programs at the facilities in their states; and

WHEREAS, state-DOD cooperation and coordination through these various groups has supported the ability of states and DOD to promote streamlined investigative techniques and implement protective remedies, which has saved DOD hundreds of millions of dollars and expedited implementation of remedies; and

WHEREAS, as successful as these state-DOD cooperative activities have been, there remain issues to be addressed.

NOW, THEREFORE, BE IT RESOLVED THAT THE ENVIRONMENTAL COUNCIL OF THE STATES (ECOS):

Commends DOD for their commitment to funding States' involvement in the cleanup of its sites through the DSMOA and working with states to improve the state-DOD relationship and for supporting state involvement in these groups;

Requests that U.S. EPA, DOD, and the Federal Land Managers continue to engage and communicate regularly with all states and territories regarding investigation and cleanup at all potentially contaminated current and former DOD sites, including munitions response sites and on munitions related issues;

Supports continued collaboration and cooperation between the states, territories, DOD, U.S. EPA, and the federal land managers on investigation and cleanup of the sites for which DOD is responsible through groups such as the Munitions Response Dialogue, the FUDS Forum, and the DSMOA Steering Committee;

Applauds DOD for working with states through these groups and following up on their recommendations to make progress on addressing:

- Interim risk management communication at munitions sites,
- DSMOA Eligibility
- DSMOA Dispute Resolution
- Challenges to help expedite the clean-up of FUDS;

Urges DOD to continue to work with states, territories, U.S. EPA, and the federal land managers to address outstanding issues such as:

- Continued coordination with states on investigating and treating complex groundwater contamination,
- Ensuring DSMOA and DERA funds may be used for any state association, including ASTSWMO and ECOS, to support state involvement in their work with DOD on activities related to DOD environmental cleanup activities, policy, and technology,
- Responding to emerging contaminant releases in a prompt and pro-active manner,
- Conducting interim risk management communications at FUDS munitions sites,
- Addressing underwater munitions sites that pose additional challenges with evaluation, investigation, and eventual removal,
- Developing policy and other issues around the use of advanced classification technologies at munitions response sites;



Requests DOD to seek adequate baseline funding for all environmental response programs including the FUDS program; and

Encourages the U.S. Congress to appropriate as much funding as possible for DOD environmental response programs given the current budget climate.

\*Replaces Resolution 6-10 Department of Defense's Formerly Used Defense Sites Program Budget; Resolution 07-6 DSMOA and Federal-State Collaboration; and Resolution 12-7 Dialogue on Munitions Response



Resolution Number 00-9  
Approved April 12, 2000  
Philadelphia, Pennsylvania

Retained April 4, 2003  
By mail vote

Retained March 17, 2006  
By mail vote

Revised March 23, 2009  
Alexandria, Virginia

Revised March 20, 2012  
Austin, Texas

Renewed March 18, 2015  
Washington, DC

As certified by  
Alexandra Dapolito Dunn  
Executive Director

## **CLARIFICATION OF CERCLA SOVEREIGN IMMUNITY WAIVER FOR FEDERAL FACILITIES**

WHEREAS, current and former federal facilities have some of the most pressing environmental problems, such as hazardous substances, unexploded ordnance, radioactive materials, and abandoned mines; and

WHEREAS, problems associated with some of these federal facilities pose substantial threats to public health, safety, and the environment; and

WHEREAS, ECOS believes the States' regulatory role at federal facilities should be recognized and that federal agency environmental cleanup activities are subject to and should receive the same regulatory oversight as private entities; and

WHEREAS, for many contamination actions the federal agencies assert Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) lead agency authority under Executive Order 12580; and

WHEREAS, state experience for many contamination actions has shown that assertions of sovereign immunity and CERCLA lead agency authority have led to inappropriate and/or inconsistent interpretation of state law and have not supported cleanup to the same standards as private parties; and

WHEREAS, assertions of sovereign immunity and CERCLA lead agency authority hamper consistent state regulatory oversight and responsibility to its citizens; and

WHEREAS, a clarification of Executive Order 12580 and/or federal legislation would aid states in implementing regulations which have been duly enacted by the states; and

WHEREAS, this resolution fully supports Policy NR-03 (specifically Section 3.5 on “Natural Resources”) executed by the National Governors' Association.

NOW, THEREFORE, BE IT RESOLVED THAT THE ENVIRONMENTAL COUNCIL OF THE STATES (ECOS):

Requests the Administration revise Executive Order 12580 to clarify that federal facilities are subject to appropriate state regulations and are not unduly shielded by sovereign immunity and lead agency authority;

Encourages the U.S. Congress act to support the States by the implementation of specific legislation which will without equivocation acknowledge state authority and regulatory responsibility for oversight of removal and cleanup actions at current and formerly owned or operated federal facilities; and

Authorizes the transmittal of this resolution to the Administration, appropriate congressional committees, federal agencies, and other interested organizations and individuals.



Resolution Number 10-3  
Approved March 24, 2010  
Sausalito, California

Revised March 6, 2013  
Scottsdale, Arizona

As certified by  
R. Steven Brown  
Executive Director

### **CLEANUP BUDGETS FOR THE NUCLEAR WEAPONS COMPLEX**

WHEREAS, the nation's nuclear weapons production and research and development activities, conducted largely between the 1940s and 1980s, have left a legacy of hazardous, radiological, and mixed wastes scattered across sites widely referred to as the "nuclear weapons complex" (the "complex"); and

WHEREAS, proper cleanup of the complex is critical for protecting human health and to ensure that damages to natural resources are mitigated and/or compensated for; and

WHEREAS, the complex formerly consisted of over 100 sites in 33 states, thereby comprising one of the largest environmental cleanup operations being undertaken in the U.S.; and

WHEREAS, at least 11 states currently host active cleanup operations spearheaded by the U.S. Department of Energy (U.S. DOE) Office of Environmental Management (EM) and the U.S. Army Corps of Engineers (Corps); and

WHEREAS, state environmental agencies are regulators with U.S. EPA and U.S. DOE, and may oversee cleanup operations within the complex as established by Federal Facility Agreements (FFAs), permits, and consent orders under FFCA, CERCLA, RCRA, and other laws; and

WHEREAS, some sites within the complex, including the Ohio Fernald and Colorado Rocky Flats sites, have benefited from accelerated cleanups that have generated cost savings from reduced future maintenance costs that were not redirected towards other site cleanups within the complex; and

WHEREAS, in 1999 the U.S. Congress transferred the cleanup operations of over 24 radiologically contaminated sites in 10 states under the U.S. DOE's Formerly Utilized Remedial Action Program (FUSRAP) to the Corps; and

WHEREAS, the influx of funding from the American Recovery and Reinvestment Act of 2009 (ARRA) has provided for further acceleration of nuclear and hazardous waste cleanups as well as decontamination and demolition of obsolete facilities within the complex; and

WHEREAS, recently-completed cleanups have shrunk the footprint and overall size and presence of nuclear weapons complex sites within the states; and

WHEREAS, notwithstanding these recent successes, continued cleanup of the complex remains a priority issue for the States; and

WHEREAS, stable funding leads to greater efficiencies in cleanup cost and schedule for the U.S. DOE, the Corps, and the States.

NOW, THEREFORE, BE IT RESOLVED THAT:

ECOS strongly supports continued environmental cleanup of the nuclear weapons complex.

ECOS recommends that U.S. DOE continue cleaning up the nuclear weapons complex and maintain a strong forum for communication and planning with state oversight officials via ECOS.

ECOS urges U.S. DOE and Corps officials to request *annual budgets* for the EM and FUSRAP programs, as well as for the National Nuclear Security Administration (NNSA) and the U.S. DOE Office of Legacy Management (LM), to ensure enough funds are provided to all sites to achieve cleanup milestones on schedule as required by FFAs, permits, and consent orders.

ECOS urges the U.S. Congress to appropriate the levels of funding necessary to ensure EM, LM, NNSA and FUSRAP annual budgets are fully funded and fully compliant as just described.

ECOS urges U.S. DOE and the Corps to establish mechanisms whereby any cost savings that result from accelerated cleanups are recouped and redirected toward funding other site cleanups within the nuclear weapons complex, and

This resolution will be transmitted to the U.S. Congress, the White House Office of Management and Budget, the Secretary of Energy, senior Corps management, the U.S. DOE Senior Advisor for Environmental Management, the Under Secretary for Nuclear Security, the National Governors Association, and other stakeholder groups.