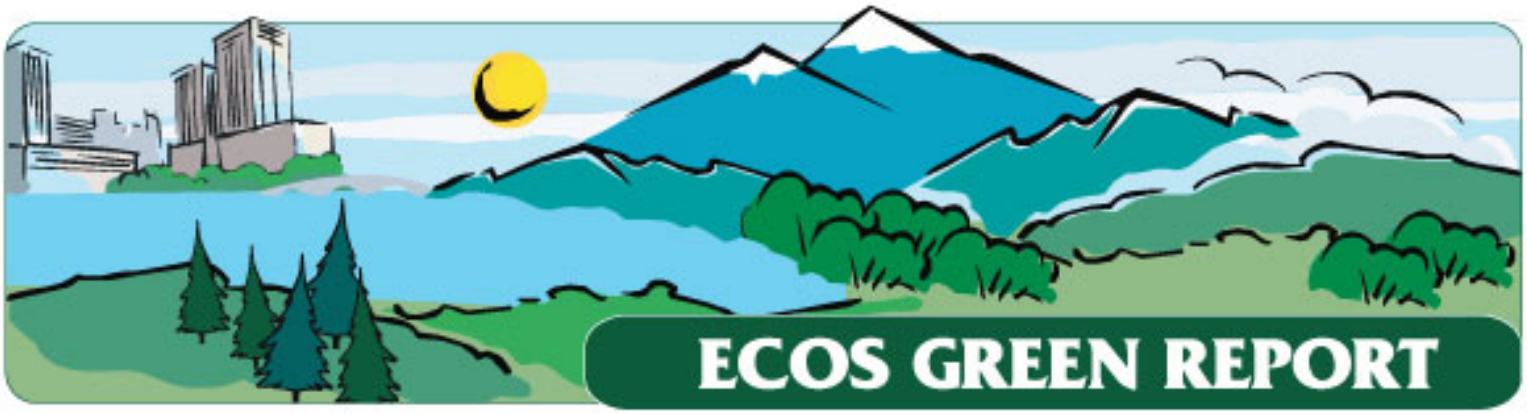

DEFENSE STATE MEMORANDUM OF AGREEMENT (DSMOA) ISSUES AND EFFECTS ON STATES

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STATEMENT OF ISSUE

Over the past 12 to 18 months, changes in the Department of Defense's (DOD's) interpretation of DSMOA policy have caused a variety of problems for some states overseeing cleanup of DOD facilities.

SUMMARY

New DOD interpretations of DSMOA policy are limiting state enforcement, are restricting the type of work that is eligible for DSMOA payment, are inconsistent from state to state, and are undermining development of joint state-DOD policy on subjects directly related to DOD cleanup activities.

- DOD's new policy withholds **all** DSMOA reimbursements when states use enforcement authority at a site in its DSMOA.
- DOD now has determined that DSMOA can only fund state employees for site-specific oversight work—national policy and guidance development work specific to DOD is no longer DSMOA eligible. Additionally, work related to property transfer recently has been deemed ineligible.
- DOD's new interpretation has determined that Defense Environmental Restoration Account (DERA) funds cannot be used to fund state associations, such as the Association of State and Territorial State Management Officials (ASTSWMO), working on national policy activities specific to DOD such as the Munitions Response Committee (MRC) or DSMOA Steering Committee.

REPORT

Background

Federal law (i.e., RCRA and CERCLA) requires DOD to pay for state oversight of environmental cleanup activities. In addition, many states have their own authorities that contain cost recovery requirements. DOD established the DSMOA Program in the late 1980s as a vehicle for reimbursement of these costs to states. DSMOA replaced a system

which impeded cleanups, where funding was not available for document review and oversight, or where inefficient cost-recovery mechanisms were the only alternative.

All states have some mechanism within their DSMOA against which state management and administrative function costs associated with overseeing DOD cleanups are reimbursed. As a component of these management and administrative functions, states generally include the costs of development and resolution of DOD-specific national environmental restoration and cleanup policy issues and projects being addressed through ASTSWMO, the Interstate Technology and Regulatory Council (ITRC), and the Environmental Council of the States (ECOS). States believe that the specific language of many individual State DSMOA agreements allows funding to work on such broader issues related to DOD environmental cleanup activities. DSMOA funding has historically allowed for these and similar activities, like training.

Overview of Issues

New DOD interpretations of DSMOA policy are limiting state enforcement, are restricting the type of work that is eligible for DSMOA payment, are inconsistent from state to state, and are undermining development of joint state-DOD policy on subjects directly related to DOD cleanup activities. These changes in policy have affected states in their oversight of the cleanup of DOD facilities. Appendix A contains examples of these effects.

- DOD's new policy withholds **all** DSMOA reimbursements when states use enforcement authority at a site in its DSMOA.
- DOD now has determined that DSMOA can only fund state employees for site-specific oversight work—national policy and guidance development work specific to DOD is no longer DSMOA eligible. Additionally, work related to property transfer recently has been deemed ineligible.
- DOD's new interpretation has determined that DERA funds cannot be used for associations representing states, such as ASTSWMO, working on national policy activities specific to DOD such as the MRC or DSMOA Steering Committee.

In a survey of the states about changes in DSMOA policy, 11 of 23 states responding indicated that they have been told that they must use the DSMOA dispute resolution process before exercising enforcement authority at any DOD facility regardless of the funding mechanism or media affected. Also, 15 of the 23 states responding indicated that they have been told that DSMOA funds cannot be used to pay for staff involvement in national policy and guidance development work specific to DOD. In addition, seven of the states responding had been told that site-specific work which they believe is DSMOA-eligible is not. A complete summary of the responses to the survey is provided in Appendix B.

In an effort to receive clarification on these new interpretations, ECOS sent a letter to DOD in April 2007 asking for written policy on these issues. In July, DOD sent a response stating that there had been no changes in interpretation of DSMOA policy.

Enforcement and Dispute Resolution
DOD's new policy prohibits states from exercising enforcement authority at any DOD facility, regardless of the funding mechanism or media affected (e.g., the issuance of a Notice of Violation for violation of an installation's NPDES permit) without going through formal dispute resolution, and regards this enforcement as a violation of the DSMOA. DOD may then withhold all DSMOA funds to the state. This linkage of DSMOA funding to state enforcement amounts to economic coercion, undermines basic state authorities, and has many states considering returning to expensive cost recovery actions.

While the DSMOA has no specific prohibition against state enforcement, it is clear that a state cannot use DSMOA funds for enforcement at sites covered by the DSMOA. When taking any type of enforcement action, such as a notice of violation or compliance order, states must use other state funding sources. Title 10 USC 2701 which governs DSMOA is clear that "DOD may not provide reimbursement of the agency for regulatory enforcement activities," but there is no language that directs DOD to withhold all DSMOA funding for other environmental oversight work when any enforcement action is taken. As a result, states disagree with DOD's interpretation of Defense Environmental Restoration Program (DERP) statutes regarding this issue. Also, state DSMOAs do not contain any reference that would restrict or limit states taking an enforcement action when DOD has violated state laws and regulations. Dispute resolution is designed to handle issues of disagreement such as the number of samples, location of monitoring wells, and other technical issues; it is not designed to handle clear violations of state laws and regulations, which warrant enforcement actions.

In a July 2007 letter to ECOS with regards to the enforcement issue, DOD quoted section IV.B of the DSMOA and stated, "It has always been the position of the Department that a refusal by a state to engage in dispute resolution pursuant to the DSMOA before engaging in an enforcement action would result in the suspension of all DSMOA payments. This position is not a change in interpretation." However, in a letter to South Carolina from the DSMOA Grants Officer in May 2006, DOD stated that the dispute resolution process is intended to "resolve any disputes related to an environmental restoration process;" "does not apply to unrelated compliance inspections at an installation;" and "does not require a state to waive or change any enforcement authority it may have." In the May 2006 letter, they emphasized that the dispute resolution process was "an opportunity to resolve disagreements through negotiation." Additionally, a letter to ECOS from Alex Beehler, Assistant Deputy Under Secretary for Defense, in May 2006 stated, "Alternative Dispute Resolution is intended to apply to enforcement actions by state media program offices only where the enforcement actions impact restoration activities at DERP sites, not to enforcement actions at non-DERP sites, or even at DERP sites where the enforcement action is unrelated to the DERP response."

Changes in DSMOA-Eligible Work
DOD's new interpretation that DSMOA may only be used for site-specific work is counter to the goal of the program to promote policy that states and DOD can use nationally at DERA and Base Realignment and Closure (BRAC) cleanups. In DOD's response to ECOS' letter about changes in DSMOA, DOD quoted part of Section 6 of the standard

DSMOA cooperative agreement and stated, "Other than a state's administration of the DSMOA or cooperative agreement, a state can only be reimbursed for work related to the installations listed in Attachment A of the cooperative agreement." While DOD states that this is not a change in policy, since many states had been using DSMOA funds to support involvement in DOD-related activities that were not site-specific, DOD's new interpretation on this is effectively a change in policy.

DOD's determination means that state staff cannot charge to their DSMOAs for time spent in meetings on DOD issues. This is a problem for many states, which have staff members dedicated to DOD sites and issues who are fully funded by DSMOAs. For example, under this interpretation, the staff person could charge time to work on a site that has unexploded ordnance on it, but could not charge time to go to a national meeting that discusses technologies for cleanup of unexploded ordnance. This change by DOD is limiting State participation on national policy issues through the Munitions Response Committee (MRC) the Formerly Used Defense Sites (FUDS) Forum, and the DSMOA Steering Committee – work that would result in mutually agreeable solutions to DOD concerns. This view would logically extend to all staff time for work done under ECOS, ASTSWMO, ITRC, or other auspices that may be related to environmental restoration at DOD sites, but is not site-specific. This change will prevent states from collectively providing input on national policy and guidance and will create delays in the cleanup and reuse of DOD sites. Although there is no language in 10 USC 2701 which governs the DSMOA program that prevents DOD from reimbursing states for non site-specific work, the solution that states support is modification to 10 USC 2701 to specifically allow reimbursement of state costs when working on discussion of policy and technical issues that relate to DOD environmental restoration program.

In addition to the limitations to site-specific work, DOD recently has told several states that work related to property transfer which states believed was DSMOA-eligible is not. This has included the review of Community Environmental Response Facilitation Act (CERFA) and Finding of Suitability to Lease (FOSL) documents. If funding for review of these documents is not available through DSMOA, there may be delays that keep the property from moving back into productive reuse, which is counter to the goals of DOD and the states. Again, states would recommend a change to 10 USC 2701 to clearly define these activities as allowable reimbursable expenses.

State Associations not Eligible for Funding

DOD has determined that ASTSWMO and ECOS are not grant-eligible organizations based on their interpretation of 10 USC 2701(d) which states that "the Secretary may enter into agreements…with any other federal agency, any state or local government agency, any Indian tribe, or any nonprofit conservation organization." DOD has asserted that ECOS and ASTSWMO do not qualify as nonprofit conservation organizations. Consequently, DOD will not continue to award cooperative agreements to ASTSWMO or ECOS for activities like the MRC and DSMOA Steering Committee where ASTSWMO has provided broad state representation to develop national policies and guidance that states will implement at DOD environmental cleanup sites.

However, by definition in 10 USC 2710(d), a nonprofit conservation organization is "any non-governmental nonprofit organization whose primary purpose is conservation of open space or natural resources. The federal government's definition of natural resources found in 40 CFR 300.5 is "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources." Given this definition and the role of ECOS and ASTSWMO in improving the capability of state environmental agencies' leaders in protecting human health and the environment, these state associations should be eligible for funding. In September 2007, ECOS and ASTSWMO sent a joint letter to DOD asserting the organizations' eligibility for DERA funding under 10 USC 2710.

NEXT STEPS

At the ECOS Spring Meeting in March 2007, the membership passed resolution 07-6 "DSMOA and Federal-State Collaboration" which outlined three issues that should be championed.

- DOD cannot condition DSMOA funding based on the manner in which a state exercises its enforcement authority, or its willingness to enter into dispute resolution prior to exercising that enforcement authority;
- DSMOA funding may be used for state staff costs to participate in national workgroups and other venues related to DOD environmental restoration program, and;
- DERA funds may be used for any trade association supporting state involvement in their collaborative work with DOD on activities related to DOD environmental cleanup activities, policy, and technology.

Since that time, DOD has identified site-specific work related to property transfer, such as CERFAs, FOSETs, and FOSLs, as ineligible. This has added an item that the states should work to address. As CERCLA 120(h) requires state concurrence on CERFA parcels and early dirty property transfers, DSMOA funding should be allowed for state staff costs associated with their review.

In order to move these issues forward, the states should engage in discussions with DOD about changing the DSMOA Cooperative Agreement language. Solving these issues would allow the DSMOA program to once again promote cooperation between states and DOD on both environmental cleanup actions and development of policy and technology. This cooperation has and will continue to save DOD hundreds of millions of dollars through mutual cooperation between states and DOD to promote streamlined investigative techniques, implement protective remedies requiring state flexibility, and reduce state enforcement by cooperation and coordination.

As necessary, ECOS and the states should ask the United States Environmental Protection Agency and the Office of Management and Budget for support of our position on these issues.

If these actions do not resolve the issues, the following simple amendments to 10 USC 2701 have been identified as a possible solution to correct the issues with DSMOA-eligible activities identified in this paper. 2701(d) could be amended to read:

(d) Services of Other Entities.

(1) In general. --Subject to paragraph (3), the Secretary may enter into agreements on a reimbursable or other basis with any other federal agency, any state or local government agency, any association representing states**,** any Indian tribe, or any nonprofit conservation organization to obtain the services of the agency, state or local government agency, association representing states, Indian tribe, or organization to assist the Secretary in carrying out any of the Secretary's responsibilities under this section. Services which may be obtained under this subsection include the identification, investigation, and cleanup of any off-site contamination resulting from the release of a hazardous substance or waste at a facility under the Secretary's jurisdiction**,** the transfer of property after cleanup, as well as discussion of policy and technical issues under this section**.**

New (4) State enforcement authority. --DOD cannot condition DSMOA funding based on the manner in which a state exercises its enforcement authority, or its willingness to enter into dispute resolution prior to exercising that enforcement authority.

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Appendix A – Examples of Effects of Policy Changes on States

Enforcement and Dispute Resolution

Colorado

Colorado has had ongoing problems with the Air Force and its DSMOA as a result of an enforcement action. In 2003, the State of Colorado issued an enforcement action against the Air Force Base Realignment and Closure Office to remediate friable asbestos from a demolished Air Force hospital found in a residential neighborhood. The state had no opportunity to invoke dispute resolution due to the immediate risk of exposure of asbestos to families living on contaminated properties. According to Colorado Department of Public Health and Environment staff, although DSMOA funds were not withheld, the Air Force initially used, and has continued to use, the DSMOA program and reimbursement of State costs as a means to retaliate for the State's actions. Hundreds of Air Force and state staff hours and tens of thousands of federal dollars have been spent arguing DSMOA-related issues such as eligible state services and accounting.

Maine

Maine is experiencing problems with DOD's interpretation of policy related to dispute resolution. According to Maine Department of Environmental Protection staff, Maine and EPA Region 1 are currently involved in "informal dispute resolution" with the Navy, but the disagreements they are having may not be resolved prior to using the formal dispute resolution process. During a recent meeting, Navy personnel claimed that dispute resolution costs are not covered by DSMOA. This assertion contradicts Section 7.3 of the 2006 DSMOA Cooperative Agreement guide, which provides information to DOD and the States on administration of the DSMOA program.

Changes in DSMOA-Eligible Work

Colorado

In addition to their issues with DOD on enforcement, Colorado has been told that review of property transfer documents is not a DSMOA-eligible activity. According to Colorado Department of Public Health and Environment (CDPHE) staff, recent interpretations by United States Army Corps of Engineers regarding DSMOA-eligible state services have prohibited the state from performing its statutory/regulatory responsibilities since the state has been told that their review and concurrence of a Community Environmental Response Facilitation Act (CERFA) document is not eligible for DSMOA reimbursement. CDPHE staff indicate that this interpretation causes significant concern, since 1) state concurrence is required under CERCLA 120(h)(4)(B) and is intended to identify uncontaminated parcels, and 2) until there is state regulatory concurrence, the parcels will not be identified as CERFA clean, and by default, must go through the regulatory processes set forth in CERCLA 120(h)(3). The State of Colorado does not have funding sources other than DSMOA to review these documents. CDPHE staff report that without the opportunity to review and discuss the findings of the report with military components, they may be left with no option other than to not concur with a CERFA determination. This would result in

unnecessary expenditure of federal funds for investigations and administration along with delays in property transfer.

Massachusetts

Massachusetts also is experiencing issues related to DSMOA eligibility of work related to property transfer documents. According to Massachusetts Department of Environmental Protection staff, DOD fiscal staff have determined that early property transfer documents/finding of suitability to transfer documents are legal documents and not remediation reports associated with cleanup. Massachusetts has been told it cannot charge for its time for review of such documents, which are provided by DOD. Massachusetts indicates that this is a problem for states since they spend many hours helping structure a property transfer to make sure the property is actually going to be cleaned up.

Montana

Montana has experienced difficulties with DOD identifying site-specific activities as ineligible. According to Montana Department of Environmental Quality staff, DOD has not specifically stated that only site oversight work is DSMOA-eligible, but it has deemed many other site-specific activities ineligible. Examples of site-specific work that Montana believes is DSMOA eligible but which DOD has determined ineligible include investigation or cleanup work performed by the state, and any meeting where a member of DOD is not present.

Ohio

Like several many other states, Ohio has been experiencing issues related to whether activities are or are not DSMOA eligible. The Ohio Environmental Protection Agency has been told that some site-specific work such as CERFAs and FOSETs and involvement in national policy work is not DSMOA-eligible. Ohio also has been told that training costs are not reimbursable unless they are specified in the Joint Execution Plan (JEP). The state has also been informed that site-specific activities are reimbursable, but these activities have to be listed in the JEP. If they are not, the JEP must be revised to include these activities. According to Ohio Environmental Protection Agency staff, the state is having problems getting the installation to revise the JEPs in order to get these activities included.

State Associations Not Eligible for Funding

Michigan

Michigan identified ASTSWMO's funding ineligibility as an issue, since without funding ASTSWMO is unable to support state involvement in activities such as the DSMOA Steering Committee and the Munitions Response Committee. Michigan Department of Environmental Quality staff stated, "The loss of ASTSWMO as a national forum on the grants program is a major problem. There needs to be a forum for the many states to interact with DOD leadership and each other." They indicated that lower level DOD staff frequently have argued inaccurate policy statements which in the past have been cleared up by working with upper management of DOD through national forums such as ASTSWMO.

Nebraska

Nebraska also identified ASTSWMO's funding ineligibility as a challenge. Nebraska Department of Environmental Quality staff stated that not being able to participate with ASTSWMO on national policy issues would make it more difficult for the state to stay informed of current issues that may affect the quality of its oversight work on site-specific cleanups.

Appendix B – Questionnaire on DSMOA and Summary of Responses

Questionnaire

1. Has your state been informed of any changes in the past year about what are and are not DSMOA-eligible activities?
   ____ Yes ____ No

2. Has your state been told that funds from the DSMOA can only pay for site-specific oversight work?
   ____ Yes ____ No

3. Has your state been told that site-specific work which you believe is DSMOA-eligible is not? (i.e., review of Finding of Suitability for Early Transfer (FOSET) or Community Environmental Response Facilitation Act (CERFA) documents)
   ____ Yes ____ No

4. Has your state been told that DSMOA funds cannot be used to pay for staff to be involved in national policy and guidance development work specific to DOD? (i.e., Munitions Response Committee (MRC), DSMOA Steering Committee)
   ____ Yes ____ No

5. Has your state been told you must use the DSMOA dispute resolution process before exercising enforcement authority at any DOD facility, regardless of the funding mechanism or media affected?
   ____ Yes ____ No

6. Has your state had DSMOA reimbursements withheld because of enforcement actions by the state at a DOD site?
   ____ Yes ____ No

7. Does your state have any ongoing fiscal or administrative disputes with the DSMOA Grants Office?
   ____ Yes ____ No

8. If you have seen changes in DSMOA-eligible activities or had problems with DSMOA reimbursements in the past year, please provide a brief description of the change or problem.

9. If you have seen changes in DSMOA-eligible activities or had problems with DSMOA reimbursements in the past year, please indicate what the impact of these changes or problems is on your state's ability to address cleanup at DOD sites.

Summary of Responses

	Has your state been informed of any changes in the past year about what are and are not DSMOA-eligible activities?	Has your state been told that funds from the DSMOA can only pay for site-specific oversight work?	Has your state been told that site-specific work which you believe is DSMOA-eligible is not?	Has your state been told that DSMOA funds cannot be used to pay for staff to be involved in national policy and guidance development work specific to DOD?	Has your state been told you must use the DSMOA dispute resolution process before exercising enforcement authority at any DOD facility, regardless of the funding mechanism or media affected?	Has your state had DSMOA reimbursements withheld because of enforcement actions by the state at a DOD site?	Does your state have any ongoing fiscal or administrative disputes with the DSMOA Grants Office?
State							
Alabama	✓	✓	✓	✓	✓	✓	✓
California	✓	✓	✓	✓	✓		✓
Colorado	✓	✓	✓	✓	✓	✓	✓
Connecticut							
Florida							
Illinois	✓		✓	✓	✓		
Kentucky							
Maine				✓			
Michigan					✓		
Minnesota	✓	✓		✓	✓		
Missouri	✓			✓	✓		
Montana			✓				
Nebraska							
Nevada				✓	✓		
Ohio	✓	✓	✓	✓			✓
Oregon	✓			✓			
Rhode Island					✓		
South Carolina	✓	✓		✓			
South Dakota	✓	✓		✓	✓		
Tennessee							
Utah				✓			
Virginia	✓	✓	✓	✓	✓		
Washington				✓			

List of Acronyms

ASTSMWO – Association of State and Territorial Solid Waste Management Officials

BRAC – Base Realignment and Closure

CERCLA – Comprehensive Environmental Response, Compensation, and Liability Act (Superfund)

CERFA – Community Environmental Response Facilitation Act

DERA – Defense Environmental Restoration Account

DERP – Defense Environmental Restoration Program

DOD – United States Department of Defense

DSMOA – Defense State Memorandum of Agreement

ECOS – Environmental Council of the States

FOSET – Finding of Suitability for Early Transfer

FOSL – Finding of Suitability to Lease

FUDS – Formerly Utilized Defense Sites

ITRC – Interstate Technology and Regulatory Council

JEP – Joint Execution Plan

MRC – Munitions Response Committee

RCRA – Resource Conservation and Recovery Act