

**ALL Agreement States Letter – FSME-14-039
ML14224A004**

ENCLOSURE

April 22, 2014

ALL AGREEMENT STATES

CLARIFICATION ON THE DETERMINATION OF REGULATORY JURISDICTION OF NON-FEDERAL ENTITIES CONDUCTING CLEANUP ACTIVITIES ON FEDERAL PROPERTY IN AGREEMENT STATES (FSME-14-039)

Purpose: To provide the Agreement States additional guidance to that in SA-500, "Jurisdiction Determinations" (Agencywide Documents and Access Management System Accession number ML110600350) to assist in making determinations of regulatory jurisdiction involving non-federal entities conducting cleanup activities on federal property in Agreement States.

Background: There are several military and former military sites around the country where the responsible Federal agency, i.e., U.S. Department of the Air Force, U.S. Department of the Army, or U.S. Department of the Navy, is implementing site reclamation activities to address the removal or remediation of hazardous materials, including radiological material, under the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. §§ 9601 *et seq.*, also known as Superfund. The U.S. Nuclear Regulatory Commission's (NRC) Office of Federal and State Materials and Environmental Management Programs (FSME) has received a number of inquiries into its regulatory jurisdiction at various sites where the responsible Federal agency utilizes non-federal entities, i.e., private service providers, to conduct remediation activities involving Atomic Energy Act, of 1954, as amended (AEA), 42 U.S.C. §§ 2011-2297h (2006), regulated radioactive materials (byproduct, source, or special nuclear materials) on federal property located in an Agreement States. To assist it in making future determinations, NRC staff has developed a decision process that is consistent with the procedures in SA-500.

Discussion: In AEA Section 274b., Congress authorized the NRC and States to enter into agreements where a State assumes, and the NRC relinquishes regulatory authority over specified radiological materials to protect public health and safety. To the extent that a State has entered into an 274b. Agreement with the NRC, the Agreement State has the ability to regulate the use of such AEA radioactive material within its borders, subject to some limitations. One such limitation is that under a Section 274b Agreement, as implemented by 10 CFR Part 150, an Agreement State does not have the ability to regulate a Federal entity. Another limitation is that depending upon the jurisdictional status of the land on which a private-entity is working; an Agreement State may not have regulatory authority over the private entity's use or possession of byproduct, source, or special nuclear material while on that land. FSME staff have recently evaluated whether an Agreement State has the ability to regulate a private entity's use or possession of AEA radioactive material on Federally-owned or Federally-controlled property.

As stated in SA-500, the determination of jurisdiction in these cases depends on whether the Federal government exercises exclusive legislative jurisdiction over the property or some other lesser degree of legislative jurisdiction, i.e., concurrent jurisdiction, partial jurisdiction, or proprietary jurisdiction. SA-500 provides the basic process for determining whether regulatory jurisdiction for Federally-owned or Federally-controlled property rests with the NRC or the Agreement State.

FSME staff has recently developed a more detailed process for determining jurisdiction at sites within Agreement States, particularly at current or former military facilities. Attachment 1 outlines a process to assist in determining whether the Agreement State or the NRC has regulatory jurisdiction over a non-federal entity working at a federal facility in an Agreement State. Since these determinations can be complex, Agreement States and licensees are encouraged to contact FSME staff if they have questions or need clarification on the process in Attachment 1.

If you have any questions regarding the correspondence, please contact me at 301-415-3340 or the individual named below.

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Attachment:
Jurisdiction Decision Process

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Attachment:
 Jurisdiction Decision Process

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The NRC's regulatory authority over a service provider licensee performing work under a contract with a Federal entity is determined using the following decision process. Figure 1 provides a flow chart of the process. The process involves three determinations: 1) the regulatory jurisdiction for the radioactive material; 2) the contractor's relationship with the Federal entity; and 3) the regulatory jurisdiction of the land where the activity will be conducted.

This decision process is used by the NRC staff to determine the regulatory jurisdiction for the service provider contractor and does not change the regulatory jurisdiction for the radioactive material or remediation process.

Regulatory Jurisdiction for the Radioactive Material - Is it AEA material? (1)

The first step of the decision process is to determine whether the NRC is authorized to regulate the specific radioactive material under the Atomic Energy Act of 1954, as amended (AEA). Note that some Federal sites, or areas within a site, could have atomic weapons material that is not under NRC's regulatory jurisdiction. In other cases the radioactive material may not be AEA radioactive material and the State has regulatory authority (e.g., radon).

Contractor Relationship with the Federal entity (2)

The second step in the decision process is to determine the contractor's relationship with the Federal entity. A determination needs to be made as to whether the contractor is an extension of Federal staff (federal entity subject to sovereign immunity) or is a private, independent contractor separate from Federal staff. In the case of Federal remediation/decommissioning actions, the Federal entity may conduct the work by: 1) Federal employees; 2) Federal contract staff whose detailed physical performance is controlled by the Federal agency; or 3) an independent contractor whose day-to-day operations are not supervised or directed by the Federal entity. The major issue is the distinction between Federal in-house contract staff and independent contractors. In all three cases, the radioactive material would continue to be owned by, and be the responsibility of, the Federal entity. Therefore, the determination of the contractor's relationship with the Federal entity is based on the degree of control the Federal entity exercises over the day-to-day operations and personnel of the decommissioning service provider.

What does it take for contractor staff to be considered as an extension of Federal staff (Federal employees) for the purposes of determining regulatory jurisdiction under sovereign immunity?

The contractor would be considered an extension of Federal staff if the Federal agency had the ability to physically supervise the contractor and the contract staff's operations and work activities. This determination would need to be made on a case-by-case basis depending upon the terms and conditions of the contract(s) under which the work is being performed. A requirement that the contractor comply with Federal standards does not authorize the Federal agency to supervise the contract staff.

If it is determined that the Federal entity has the ability to control the operations and day-to-day physical activities of the contractor and the contract staff, then the contractor staff would be considered an extension of staff for the Federal entity and subject to sovereign immunity. This means that States could not regulate the contractor absent the Federal entity's express waiver

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of sovereign immunity. Sovereign immunity has not been waived by any Federal entities for materials regulated under the AEA. In these situations, the contractor is subject to Federal entity's control while conducting activities under the specific contract. This would be the case regardless of the jurisdictional status of the land on the site where the remediation is being conducted.

Jurisdiction Based on Land Status (3)

There are four types of jurisdiction or interest with respect to land or property within a State that is Federally-owned or Federally-controlled by a Federal entity. They are: 1) exclusive federal jurisdiction; 2) concurrent jurisdiction; 3) partial/limited jurisdiction; and 4) proprietorial interest. Each is briefly discussed below. The Federal entity is responsible for providing the jurisdiction status of their land or property.

- 1) For sites or areas that are within exclusive federal jurisdiction, the AEA radioactive materials are subject to the NRC's regulatory authority regardless of whether the person conducting the activity is a Federal or private entity.
- 2) For sites or areas that are within concurrent jurisdiction, the activities of private persons are subject to both the Federal and State regulatory authority under their respective regulatory programs. Where the NRC has relinquished its regulatory authority through an AEA Section 274b. Agreement, the State would regulate the AEA radioactive materials and the private contractor to the extent provided for under the Section 274b. Agreement.
- 3) For sites or areas that are within partial/limited jurisdiction, if the State retained, or was retroceded by the Federal government, authority over public health and safety issues, the Agreement State would have jurisdiction over private entities using AEA material to the extent provided for under the Section 274b. Agreement. However, if the partial/limited jurisdiction for the land or property provides for Federal jurisdiction for public health and safety, then this portion of the land would be treated the same as exclusive Federal jurisdiction and the NRC would have regulatory jurisdiction over the AEA radioactive materials.
- 4) For sites or areas in Agreement States where the federal government has as that proprietorial interest over the land or property, the Agreement State would have regulatory jurisdiction to the extent provided for under their Section 274b. Agreement. A proprietorial interest can cover lands or property where the Federal government has acquired some right or title to an area in a State but has not obtained any measure of the State's authority over the area. .

For sites or areas in non-Agreement States, the NRC has regulatory jurisdiction regardless of the land status.

Please note, in all of the types of jurisdictions above, the Agreement State does not have regulatory jurisdiction over Federal entities, without an explicit waiver of sovereign immunity. Therefore, only Federal government agencies, such as the NRC, can regulate Federal entities' activities under the AEA.

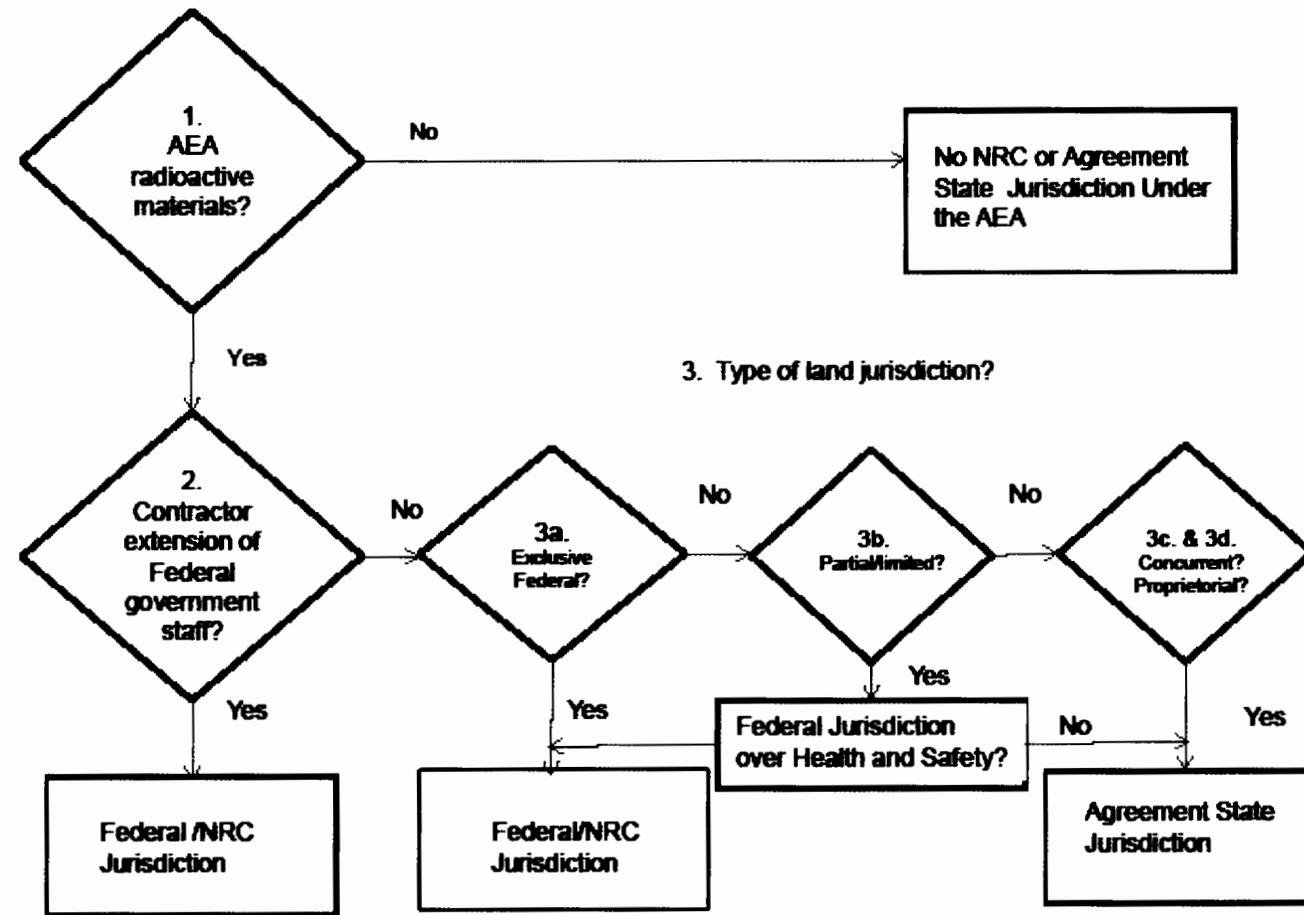


Figure 1. Decision Process for Determining Regulatory Jurisdiction for Federal Contractors Involved with Federal Remediation