



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 15 2010

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

Lt. Gen. Robert L. Van Antwerp
Chief of Engineers
Headquarters, U.S. Army Corps of Engineers
441 G St., NW
Washington, D.C. 20314-1000

Mr. Michael J. Linder
Director
Nebraska Department of Environmental Quality
1200 N St., Suite 400
Lincoln, NE 68509-8922

Re: In the Matter of the U.S. Department of the Army, Former Naval Ammunition Depot, Hastings, Nebraska, Interagency Agreement Under CERCLA Section 120, Docket No. VII-98-F-0021

Dear General Van Antwerp and Director Linder:

On June 7, 2010, Mr. James Balocki, Chief of Environmental Programs, U.S. Army Corps of Engineers, wrote a letter (the "Army Elevation Letter") in which he elevated a dispute to Administrator Jackson regarding remedy selection at the Former Naval Ammunition Depot, Hastings, Nebraska (FNAD Hastings or Site). I have conferred with Administrator Jackson, and she asked that I convey her decision to you under the Federal Facilities Agreement (FFA) entered into pursuant to section 120 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

FNAD Hastings is a Formerly Utilized Defense Site with groundwater contamination. The Army National Guard owns a portion of the Site. The rest is owned by the U.S. Department of Agriculture, an industrial park, a community college, and approximately ten private residences. This dispute relates to appropriate language that is to be incorporated into the CERCLA Record of Decision for Sitewide Groundwater cleanup (the ROD). In particular, it involves the specific language setting forth the U.S. Army's responsibilities concerning land use controls (LUC), such as restrictions on installing drinking water wells, designed to ensure that people do not drink contaminated groundwater at the Site.

On May 1, 2010, EPA Region 7 Regional Administrator Karl Brooks issued the EPA position regarding this dispute, as provided by section XI.E. of the FFA (the "EPA Position"). See enclosure 1. I have conferred with the Administrator regarding that decision, and the materials submitted by Mr. Balocki, and the Administrator has decided that the final FNAD Hastings ROD will contain the specific LUC language in the three ROD paragraphs as stated on pages 3 – 4 in Mr. Brooks' May 1, 2010, letter.

Based on the materials submitted by Mr. Balocki, it appears that the Army has raised an issue regarding perceived limits on its authority for land use controls at the site. The Administrator does not find the Army's position to be well-founded or legally persuasive. The record, and our review of the facts at this site, indicate that:

- 1) The final FNAD Hastings ROD land use control language required by this decision is consistent with the Army's legal authority. The Army has the authority to implement, maintain, monitor, report on, and enforce land use controls at the portion of the site owned by the Army National Guard pursuant to its land management authority under federal law. Thus, the final FNAD Hastings ROD land use control language which requires the Army to implement and enforce land use requirements for the Army National Guard property is consistent with the Army's own Installation Management Plan and subparagraph 12-4.a.(12) of Army Regulation 200-1, *Environmental Protection and Enhancement*.
- 2) Furthermore, subsection 2(d) of Executive Order 12580, *Superfund Implementation* delegates the broad response authority Congress gave to the President under CERCLA subsection 104(a) to the Department of Defense (DoD) for releases on DoD property, such as the portion of the site owned by the Army National Guard.
- 3) EPA has not suggested, nor does it expect, that the Army would be required to enforce land use controls on its property that are based on state or local law.
- 4) The Army has the authority to monitor and report on land use controls at portions of the site it does not own pursuant to the President's broad information gathering and access authority contained in CERCLA subsection 104(e); for purposes of carrying out the cleanup at this site, that section 104(e) authority has been delegated to the Army under subsection 2(j)(2) of Executive Order 12580.

Land use controls necessary to protect human health and the environment are an integral part of the CERCLA remedy. While there may be more than one land use control at a site to ensure that no-one will be exposed to contaminated groundwater, each land use control selected is an integral and important part of the CERCLA remedy. EPA expects that where a federal agency like the Army is responsible for cleaning up contamination, it will act to the full extent of its authority to protect human health and the environment. This is consistent with EPA's longstanding "polluter pays" policy for Superfund cleanups, which applies to the federal government to the same extent as private parties. Moreover, the public information elements of the ROD's land use controls requirements are consistent with EPA's recently announced Community Engagement Initiative, which emphasizes the importance of effective outreach to communities impacted by contamination.

Pursuant to FNAD Hastings FFA Section XI.K, this decision is the final resolution of this dispute. The Army shall revise the FNAD Hastings ROD for Sitewide Groundwater as stated in the EPA Position within 21 days of this decision pursuant to FNAD Hastings FFA Section XI.J.

EPA, the State of Nebraska, and the Army have a joint interest in completing this cleanup. I ask that the Army, consistent with the provisions of the Administrator's decision and the FFA, now promptly implement a groundwater remedy at the site that protects human health and the environment.

Sincerely,



Cynthia Giles

Enclosure

cc: Lisa P. Jackson
Robert M. Sussman
Mathy Stanislaus
Scott C. Fulton.
Karl Brooks
James B. Balocki



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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OFFICE OF
REGIONAL ADMINISTRATOR

MAY 1 2010

Via UPS®

Mr. James B. Balocki
Chief
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RE: In the Matter of the U.S. Department of the Army, former Naval
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CERCLA Section 120, Docket No. VII-98-F-0021

Dear Messrs. Balocki and Linder:

This letter sets forth my decision providing the U.S. Environmental Protection Agency's (EPA) position in the dispute related to appropriate language in the Record of Decision for Sitewide Groundwater (the ROD) at the former Naval Ammunition Depot, Hastings, Nebraska (NAD Hastings or Site), regarding the U.S. Army's responsibilities for land use controls intended to ensure that people do not drink contaminated groundwater at the Site.

Background:

On February 22, 2010, the EPA invoked formal dispute resolution on the land use control language issue pursuant to Paragraph XI.A of the Interagency Agreement Under CERCLA Section 120 (hereinafter Federal Facility Agreement (FFA)) for NAD Hastings. See Statement of Formal Dispute (Enclosed as Attachment 1). The Army submitted its Response to the EPA Statement of Dispute on March 12, 2010 (Enclosed as Attachment 2). The Dispute Resolution Committee (DRC), and then the Senior Executive Committee (SEC), both consisting of representatives from EPA Region 7, the Army, and the Nebraska Department of Environmental Quality (DEQ), diligently attempted to resolve the dispute, but were not able to do so. The DRC

and SEC discussions included review of multiple revised drafts of the disputed land use controls language, but the parties did not unanimously agree on substitute language. Consequently, pursuant to Paragraph XI.E of the FFA, this letter is EPA's position on the dispute. It will be the final decision on the dispute unless it is elevated by the Army or DEQ to the EPA Administrator within 21 days of the issuance of this letter pursuant to FFA Paragraph XI.E.

During the course of the SEC deliberations, the parties identified a second issue related to the dispute – that sections 2.10.3 and 2.12 of the Draft Final ROD, which describe the selected remedy, did not clearly state that the land use controls described earlier in section 2.10 are part of the preferred groundwater remedy for the Site. The SEC members agreed that sections 2.10.3 and 2.12 of the Final ROD should be amended to include that information. Those changes are also part of my decision.

Discussion of EPA's Position:

Paragraph V.A.2 of the NAD Hastings FFA requires the Army to comply with the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund), 42 U.S.C. §§ 9601 et seq., the National Contingency Plan (NCP), 40 C.F.R. Part 300, and Superfund guidance and policy. Land use controls, such as providing alternate water supplies, the current and proposed well-drilling restrictions in Site areas with contaminated groundwater, zoning restrictions to prevent new residential development at the Site, and the other actions described in section 2.10 of the Draft Final ROD, are an integral part of the proposed groundwater remedy for the Site. See CERCLA definition of "remedy," 42 U.S.C. §9601(24), which includes, "provision of alternate water supplies, and any monitoring reasonably required to ensure that such [remedial] actions protect the public health and welfare and the environment," and the NCP definition of "remedy," 40 C.F.R. §300.405, which also includes "post-removal site control activities."

The NCP requires an analysis of various factors, including the remedy's short- and long-term effectiveness, when selecting the remedy. See 40 C.F.R. § 300.430(f)(1)(ii)(D). EPA has to be assured that the land use controls described in the ROD will be implemented and enforced. Consequently, the ROD has to clearly describe the Army's land use control responsibilities.

EPA guidance also stresses the importance of the site manager's (the Army) responsibility to ensure land use controls are implemented and enforced. It says, "The site manager's responsibilities for [institutional controls] ICs does not end once the ICs are selected. Site managers also should ensure that the ICs are actually implemented, are reliable, are enforced, and remain effective." See Institutional Controls: A Site Manager's Guide to Identifying, Evaluating and Selecting Institutional Controls at Superfund and RCRA Corrective Action Cleanups (the Site Manager's Guide), (OSWER 9355.0-74FS-P, September 2000) (Enclosed as Attachment 3). The Site Manager's Guide gives examples of actions to take, including coordination with federal, state and local governments and site residents, to ensure the institutional controls are implemented and enforced, and remain effective.

The EPA Sample Federal Facility Land Use Control ROD Checklist with Suggested Language (October 2006) (the LUC Checklist), which is Attachment 3 to the EPA Statement of Dispute, says at Checklist Item 7 that the ROD should, "Include language that the [federal agency] is responsible for implementing, maintaining, reporting on, and enforcing the land use controls. This may be modified to include another party should the site-specific circumstances warrant it." Similarly, the October 2, 2003, letter from the Deputy Under Secretary of Defense (Installations and Environment) to the Acting EPA Administrator, which sent the U.S. Navy's Principles and Procedures for Specifying, Monitoring, and Enforcement of Land Use Controls and Other Post-ROD Actions (the Navy Principles), which are enclosed with the Army's Response to Statement of Dispute, also says the ROD should identify who will implement, monitor, report on, and enforce the LUCs. See Navy Principles at pages 2 and 4.

EPA disputed this paragraph from page 2-22 of the Draft Final ROD:

As most of the current property is not owned by the Army, compliance with institutional control objectives will involve actions by the current property owners in accordance with zoning ordinances or other agreements and by the State of Nebraska. Responsibility for assuring that the remedy is protective of human health and the environment remains with the Army. The Army will fulfill its responsibility and obligations under CERCLA and the NCP as it implements, maintains, and when necessary, reviews the selected remedy.

EPA disputed this paragraph because it does not clearly describe what the Army will do regarding land use controls, either at the portion of the Site owned by the Army National Guard, or the areas owned by the U.S. Department of Agriculture, the community college, industrial park, and other private landowners. The EPA Statement of Dispute has a detailed explanation of why this paragraph is inadequate. This paragraph gives EPA no assurance regarding the Army's ongoing actions to be taken to ensure the short- or long-term effectiveness of the land use controls, contrary to the NCP's remedy-selection requirements, the Site Manager's Guide, and the LUC Checklist.

The Army shall delete the above-quoted paragraph from page 2-22 of the Draft Final ROD, and insert the following in its place in the Final ROD:

The Army will implement, maintain, monitor, report on and enforce land use controls at Army-owned property. The Army shall perform those actions related to land use control activities described in this ROD and in the Remedial Design for the ROD. For portions of the Site subject to land use controls that are not owned by the Army, the Army will monitor and report on the implementation, maintenance, and enforcement of land use controls, and coordinate with federal, state, and local governments and owners and occupants of properties subject to land use controls. The Army will provide notice of the groundwater contamination and any land use restrictions referenced in the ROD. The Army will send these notices to the federal, state and local governments involved at this site and the owners and occupants of the properties subject to those use restrictions and land use controls. The Army shall provide the initial notice

within 90 days of ROD signature. The frequency of subsequent notifications will be described in the Remedial design for the ROD. The Army remains responsible for ensuring that the remedy remains protective of human health and the environment. The Army will fulfill its responsibility and obligations under CERCLA and the NCP as it implements, maintains, and reviews the selected remedy.

This first sentence in this paragraph describes more precisely what the Army will do at the portion of the Site it owns. The Army has the authority to do all of these actions. The first sentence and the last two sentences in this paragraph are substantially the same as the EPA-approved language used nationwide in Army, Navy, Air Force, and Department of Energy RODs. This language was developed to describe key responsibilities to ensure land use controls are protective. EPA is not inclined to modify this language absent a compelling reason, which the Army did not provide during the dispute resolution process. Disputes over EPA-approved ROD language do not serve the public interest because they delay remedy selection. These three sentences are consistent with the Site Manager's Guide and LUC Checklist, and help assure EPA and the public about the short- and long-term effectiveness of the LUC portions of the ROD, as required by the NCP.

The second through seventh sentences are tailored to the specific land use control needs at the Site. The Site is a Formerly Utilized Defense Site, and large portions of the Site were transferred to other owners. Even though the Army does not currently own most of the Site, it has the authority to take all these actions pursuant to Executive Order 12580, which delegated certain CERCLA authorities to the Department of Defense, including CERCLA Section 104(a), (b), and (e) access, information request, and order authority. They, too, are consistent with the Site Manager's Guide and LUC Checklist, and help assure EPA about the short- and long-term effectiveness of the LUC portions of the ROD, as required by the NCP.

In addition, as requested by the Army during the SEC discussions, the Army may insert in the Final ROD the following sentence at the end of the paragraph that begins with "The area east of Glenvil ..." at the bottom of page 2-21 of the Draft Final ROD:

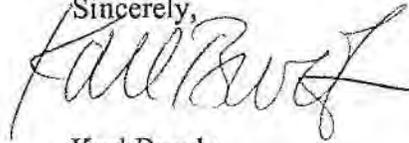
Private property owners have an independent obligation to comply with applicable statutes, regulations, and zoning requirements.

However, the failure of a private property owner does not excuse the Army from performing its LUC responsibilities or the Army's ultimate responsibility to ensure the remedy remains protective.

Lastly, as noted above, the parties agreed during SEC deliberations that the Land Use Controls are a part of the selected remedy. Appropriate language to be included in the final ROD to address this issue in sections 2.10.3 and 2.12 of the Final ROD is as follows: "The land use controls described in section 2.10 are part of the selected groundwater remedy for the Site."

I want to thank you for your participation in the dispute resolution process. I hope that we will be able to move forward promptly to complete selection and implementation of the groundwater remedy at the Site that protects human health and the environment.

Sincerely,

A handwritten signature in black ink, appearing to read "Karl Brooks". The signature is fluid and cursive, with a large initial "K" and "B".

Karl Brooks
Regional Administrator

Enclosures EPA's Statement of Formal Dispute (Attachment 1)
Army's March 12, 2010, Response to EPA Statement of Dispute (Attachment 2)
The Site Manager's Guide, (Attachment 3)