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

SEP 22 1992

MEMORANDUM

SUBJECT: Facilitating Property Transfers at Federal Facilities

FROM: Don R. Clay
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TO: Daniel McGovern
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This responds to your memoranda, dated January 28 and May 26, 1992, suggesting approaches for facilitating transfers of property at closing military installations by focusing on the extent or "boundary" of the NPL site. We found your suggestions helpful, and based upon them we have developed the following approaches which, we believe, may be useful in expediting property transfers without hindering any ongoing environmental response action.

In addition, as discussed in more detail below, we believe that confusion about the consequences of NPL listing is a factor that may impede property transfers. Therefore, we believe that careful explanation to potential property buyers of what NPL listing does and does not mean can remove artificial barriers to re-use of closing bases.

I. Site definition at listing

Your first suggestion is that the approach to defining future NPL sites be changed so that the site does not automatically encompass the entire installation. It is possible that some federal sites have been defined too broadly in the

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past, and we believe that your suggestion has merit. We encourage your staff to examine the possibility of defining sites more precisely as they go through the process of listing additional military installations.

To avoid confusion, it is important to discuss in detail how such an approach should be carried out. As you know, the NPL is a list of releases. Therefore, when a site is listed, it is necessary to define the release (or releases) encompassed within the listing. The approach generally used at federal facilities is to delineate a geographic area (usually the area within the installation boundaries) and define the site by reference to that area. As a legal matter, the site is not coextensive with that area, and the boundaries of the installation are not the "boundaries" of the site. Rather, the site consists of all contaminated areas within the area used to define the site, and any other location to which contamination from that area may have migrated or from which the contamination in that area may have come.[1]

As you have pointed out, the boundaries used to define the site at a federal installation need not be the same as the installation boundaries. A smaller (or larger) area could be used instead. Your suggestion, as we understand it, is to delineate the defining area more narrowly, so that less than the entire installation is included. In the past, this approach has not been used because of concerns that the information available at the date of listing was too sketchy to determine with any confidence where releases were or were not likely to have occurred. To ensure that all releases were addressed, and avoid the need for a subsequent rulemaking to enlarge the site, the entire installation was included.

However, federal sites may be defined more narrowly in appropriate cases. For example, where information is available indicating that releases are unlikely to have occurred within some portion of an installation, EPA could choose to exclude that portion in selecting the area that will define the site. As you pointed out in your May 26, 1992 memorandum, this possibility will be dependent, in large part, on the quality of site data furnished by the federal facility. The precise nature of the information required to make such a decision will have to be examined on a site-specific basis. In the absence of affirmative evidence showing releases to be unlikely in some area (which could range from records on historic uses to sampling data), the traditional approach of including the entire installation would

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[1] For purposes of the permit waiver in Section 121(e)(1) of CERCLA, the site also includes any area in very close proximity to the contaminated area that is necessary for implementation of the response action. See 40 CFR 300.400(e).

generally be appropriate for the reasons discussed above. Since the site listing process involves both Regional and headquarters staff, definitional approaches at individual sites should be coordinated.[2]

We wish to make clear that a decision to use a defining area smaller than the entire installation does not guarantee that some part of the remaining portion may not be part of the site. As noted above, the site includes any location outside the defining area to which contaminants from within the defining area have spread.

In addition, a decision not to include portions of an installation is not irrevocable. An area not initially included within the site might be determined on the basis of later information to warrant inclusion. In that case, EPA could change the defining area, or could list the new area as a separate site; in either case, a rulemaking would be required.

II. <u>Defining the extent of currently listed sites</u>

Your second suggestion relates to facilitating transfer of parcels that are not part of the "site" by determining that those parcels are not contaminated and thus not part of the site as defined. Your point is based on the fact that, as noted above, the "site" at a federal installation usually consists of the contaminated portion of the installation, so that a noncontaminated parcel is not, by definition, part of the site.

This point also has merit, and can be used as the basis for efforts to facilitate transfers in ways that will be discussed in detail below. At the same time, it is essential that all parties involved (including DOD and any potential purchasers) understand the distinction between re-defining the site (which can be done only by rulemaking) and expressing the Agency's view, based on available information, as to whether a particular parcel appears to be contaminated and thus falls within the site as defined.

The definition of an NPL site is established by rulemaking. A federal site is typically defined to include all contaminated areas within the boundaries of the facility, and all areas to

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[2] One site-specific consideration will be weighing the value of obtaining additional information against any delays in listing that may result. For some federal facility sites, EPA is potentially subject to litigation if a listing decision is delayed.

which or from which that contamination has spread.[3] Changing the definition of the site would require amending the rule.[4] While such an amendment might theoretically be possible, it is generally not advisable and we do not understand this to be your proposal.[5]

Rather, your suggestion is that "when a consensus is reached that a given property on a closing base is uncontaminated", EPA should "go on the record that the clean property is not, nor has been, part of the NPL site." This is a useful insight, and as discussed below an approach along these lines may be valuable.

Any such statement by EPA would not, of course, be a rulemaking, and thus would not alter the legal definition of the site. The site would still consist of the contaminated areas within the boundaries of the installation (or the prior boundaries, if the parcel were transferred). Rather, a statement as to whether a particular parcel is contaminated would amount to an opinion by the agency, based on its understanding of the facts, as to whether the "rule" (that is, the site listing) applied to a given parcel. Providing such a statement would be similar to advising a regulated party whether its activity was in compliance with an EPA regulation. As you know, the Agency is generally cautious about giving such opinions, and the scope of

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[3] Listing packages may not be this precise; however, this is how EPA would interpret a listing that designates an identified installation as an NPL site and does not expressly limit the site to a smaller portion of the installation.

[4] To avoid confusion, such an amendment would not be a "deletion"; sites are deleted from the NPL only under the criteria in 40 CFR 300.425(e), which in general requires either that remedial action under CERCLA have been completed, or that a finding be made after completion of the remedial investigation that the site does not present a significant threat. Moreover, it is the Agency's policy not to delete portions of sites.

[5] No such amendment of a site definition has ever been adopted in the past. Amending the site definition would be administratively burdensome. As discussed below, it is very difficult to establish definitively that a parcel is uncontaminated, and should the parcel be found contaminated after an amendment, it would take yet another rulemaking to make it part of the site again. Finally, it may be more attractive to prospective purchasers to have the assurance that, if a transferred parcel is found to be contaminated, it will be addressed as part of an ongoing response action pursuant to an IAG between EPA and DOD rather than as a non-NPL site which may have lower priority for DOD and at which EPA would have little or no role.

any such opinion is limited to EPA's understanding of the facts. EPA would also be free to revise its opinion if its understanding of the facts changed.

EPA's ability to provide such an opinion will depend upon how certain the Agency is of the facts at the site. Where there is a consensus that property is clean, as presumed in your proposal, a fairly strong opinion could be stated. In other cases, it may be difficult if not impossible to determine with any certainty where contamination is located both in soil and in groundwater. The latter is particularly likely to be the case at facilities where a variety of activities potentially involving releases of hazardous substances have taken place over a long period of time, and where it is difficult from available records to determine with certainty where all such activities occurred. Furthermore, because contamination can migrate a statement at any given time as to the location of the "site" would not necessarily be accurate later.

In short, EPA may be able to assist DOD and its prospective transferees by providing its current view as to whether a particular parcel is, or is likely to be, contaminated. At the same time, the precise content of any such statement will necessarily depend on the nature and the extent of the information available at the time the advice is given. Where the information available to EPA warrants, a relatively strong statement might be made indicating, for example, that based on the known history of the site and the location of all known contamination, EPA has no reason to believe that the parcel is contaminated. Where the information is more limited, the advice would necessarily have to be qualified accordingly. In any case, it should be noted that if the parcel should later be found to be contaminated it would still be considered part of the site.

To avoid excessive administrative burdens, it would be desirable to limit the occasions for providing such statements. The most appropriate vehicle for giving such advice is the process currently being developed by EPA and DOD for identifying parcels suitable for transfer under section 120(h) of CERCLA. It is envisioned that this process will, among other things, identify parcels at which the transferring agency may properly conclude that section 120(h) does not apply because there has been no storage of hazardous substances for a year or more, no known release, and no disposal of hazardous substances. In connection with that process EPA may, if the evidence warrants, provide a statement, as discussed above, as to its current view of whether the property appears to have been contaminated. As you note, such a determination is linked to a specific statutory requirement for federal property transfers, and would not set a precedent for defining site "boundaries" at other sites.

Again, it is important to note that such a statement would not alter the legal definition of the site. For the same reason, a determination by DOD that a parcel is transferable for purposes of section 120(h) would not constitute a definitive finding that the parcel is not part of the "site."[6]

We recognize that the kind of statement suggested here may be less attractive to potential buyers of property than a binding determination that the parcel in question is not part of the NPL site. However, the Agency cannot make such a determination without a rulemaking which, for reasons discussed above, we would not consider generally advisable. We believe that the best way to address remaining concerns is to correct some common misunderstandings about CERCLA liability, which are likely the source of the concern private parties have about purchasing property that is considered "part of" an NPL site.

Most important, whether a parcel is part of an NPL site is unrelated to CERCLA liability. Liability under CERCLA is determined under section 107, which makes no reference to NPL listing (or, for that matter, to the status of property under section 120(h)). NPL listing does not create CERCLA liability where it would not otherwise exist. Rather, liability on the basis of property ownership arises if the property is part of a CERCLA "facility" (i.e., an area to which contamination has come to be located).

Confusion may arise because, where a release has been listed on the NPL, whether a particular parcel is part of the "site", and whether it is contaminated (and thus part of a CERCLA facility), amount to the same question. Such confusion may be compounded where a geographic area is used to define an NPL site; in such cases, the entire area is commonly, but incorrectly, referred to as "the site". However, the fact that a parcel lies within the area used to define an NPL site does not impose liability on the purchaser; what imposes liability is the presence of contamination. Therefore, what purchasers should be concerned about is not whether the parcel is within the area used to define a "site", but whether the parcel is contaminated.

The presence or absence of contamination is a factual matter that can be assessed by purchasers or by selling agencies, as well as by EPA. While EPA's informal view of the facts may be of interest, it is not a regulatory determination that would alter the definition of the site.

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[6] Nothing in CERCLA precludes transfer of parcel that is, or may be, part of an NPL "site," so a finding of transferability is not inconsistent with considering the parcel to remain potentially part of the site.

To the extent that purchasers still have concerns about liability due to the possibility that a parcel thought to be clean is in fact contaminated, we believe that those concerns can best be addressed by pointing out that DOD would almost certainly remain liable for any contamination it caused, even after the transfer occurred. Moreover, the transferred parcel would presumably remain part of the facility for purposes of section 120(e) of CERCLA, so that DOD would be required under that provision as well (and under the IAG for the site) to address any newly discovered contamination as part of the response at the NPL site. Since the principal damages recoverable under CERCLA are response costs, and most response costs at a former DOD property would be incurred by DOD itself, a scenario under which cost recovery would be sought from such purchasers seems extremely remote. Moreover, purchasers may, depending upon the degree of investigation prior to the transfer, be able to argue that they are "innocent landowners" protected from liability under section 101(35) of CERCLA. Finally, any residual concerns could be resolved to the extent that selling agencies have the ability to offer indemnification against claims for CERCLA response costs (and agree to assume the burden of undertaking future response actions).

In short, we believe that to facilitate transfers careful explanation to potential buyers of what NPL listing does and does not mean may be as effective as, or even more effective than, than efforts simply to declare certain parcels not to be part of an NPL site.