U.S. Department of Justice

Office of Legal Counsel

Office of the Principal Deputy Assistant Attorney General

Washington, D.C. 20530

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Principal Deputy General Counsel
Department of Defense
1600 Defense Pentagon
Washington, D.C. 20301-1600

Re: Issuance of Imminent and Substantial Endangerment Orders at Department of Defense Facilities

Dear Dan:

This letter responds to your letter of May 15, 2008, in which you asked the Attorney General to resolve a dispute between the Environmental Protection Agency ("EPA") and the Department of Defense ("DoD") concerning four "imminent and substantial endangerment" orders issued by EPA under the Resource Conservation and Recovery Act ("RCRA") and the Safe Drinking Water Act ("SDWA") at DoD facilities listed on the National Priorities List ("NPL") pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").

Because the request presented a number of factual disputes, which our Office is not in a position to resolve, we worked with your office to narrow the request to four legal questions agreed upon by our two offices: (1) Whether EPA may issue an imminent and substantial endangerment order under RCRA or the SDWA with respect to a DoD facility on the NPL where EPA has indicated that it would not issue the order if DoD executes an interagency agreement under CERCLA section 120(e); (2) whether EPA may issue an order under section 7003 of RCRA that is not limited to measures to abate a specific threat, but instead seeks the implementation of a facility-wide clean up process; (3) whether EPA may insist on the inclusion in an interagency agreement of additional terms beyond those required by section 120(e)(4) of CERCLA, and whether DoD may refuse to agree to terms that go beyond those required by that provision; and (4) whether EPA may require DoD to address releases in a CERCLA interagency agreement on property that was not identified in the NPL listing and is no longer owned by DoD. On July 31, 2008, DoD identified portions of its May 15, 2008 submission that addressed these questions, and EPA submitted its written views on the questions on October 10, 2008. After receiving EPA's submission, DoD provided a further, written submission on November 18, 2008 that addressed each of the four questions and EPA's responses.

During the course of our consideration of your request, the State of Maryland filed a notice of intent to sue DoD under section 7002(a)(1) of RCRA (42 U.S.C. § 6972(a)(1) (2000)) to enforce EPA's imminent and substantial endangerment order issued with respect to Fort

Meade. In light of the overlap between the issues presented by your request and this potential litigation, we have been coordinating our response with the Environmental and Natural Resources Division of the Department. Because that Division soon may have primary responsibility for addressing this matter in litigation, we believe it is most appropriate for us to provide our response in summary form. Moreover, independent of the potential litigation, we do not believe that issuance of a formal opinion by this Office is warranted or necessary. Having carefully reviewed and considered DoD's and EPA's submissions, we provide below our brief views on each question.

(1) May EPA issue an imminent and substantial endangerment order under RCRA or the SDWA with respect to a DoD facility on the NPL where EPA has indicated that it would not issue the order if DoD executes an interagency agreement under CERCLA section 120(e)?

We believe that EPA may issue an imminent and substantial endangerment order under RCRA section 7003 (42 U.S.C. § 6973 (2000)) or section 1431 of the SDWA (42 U.S.C. § 300i (2000 & Supp. II 2002)), even if it would not have done so had DoD executed an interagency agreement under CERCLA, provided that EPA has established the legal basis for the order required by RCRA or the SDWA. We see no reason why EPA, in making an enforcement decision, may not take into consideration whether DoD has entered into an interagency agreement with respect to the facilities at issue.

You have urged that DoD's failure to sign an interagency agreement—or a "federal facilities agreement" ("FFA")—may not serve as the basis of an imminent and substantial endangerment order on the ground that these agreements are procedural documents and do not address any specific site conditions or potential imminent and substantial endangerments. EPA's administrative orders, however, do not assert DoD's failure to sign an interagency agreement as the basis for issuance of the orders; rather, the orders identify contaminants and areas of concern within each of the facilities and contain findings by the EPA Administrator that the past and present handling, storage, and disposal of solid and hazardous waste may present an imminent and substantial endangerment to human health or the environment. Whether the facts identified in each order present a sufficient basis to support the Administrator's finding of an imminent and substantial endangerment is a factual issue that we are unable to address. Assuming that the orders rest on a sufficient factual basis, we do not believe that they become invalid because EPA has indicated it would withdraw them if an FFA were concluded. Whether or not an FFA is a purely procedural document, we see no reason why EPA may not take into account the existence of such procedures when it makes enforcement decisions.

(2) May EPA issue an order under section 7003 of RCRA that is not limited to measures to abate a specific threat, but instead seeks the implementation of a facility-wide clean up process?

We think EPA may do so. Where EPA can show that the actions of DoD "may present an imminent and substantial endangerment to health or the environment," EPA is permitted to issue "such orders as may be necessary to protect public health and the environment." 42 U.S.C. § 6973(a). If implementation of a facility-wide clean up "may be necessary" to provide such protection, EPA appears to have the authority to order DoD to undertake such a clean up. *See*

United States v. Price, 688 F.2d 204, 214 (3d Cir. 1982) (noting that "[t]here is no doubt" that section 7003 of RCRA "authorizes the cleanup of a site . . . if that action is necessary to abate a present threat to the public health or the environment").

Your submission maintains that EPA's authority is limited to actions that are "necessary" to abate a specific endangerment, and that the ordered actions must be "tailored" to that endangerment. The statutory language of RCRA section 7003, however, does not require that the ordered actions "*be* necessary"; it requires only that the actions "*may be* necessary" to protect human health or the environment. *Id.* (emphasis added). The standard of "necess[ity]" in this context thus does not mean that a remedial measure is justified only if, in its absence, the endangerment would necessarily continue. Nor does the statutory language support a requirement of narrow tailoring between a specifically identified threat and the actions ordered by EPA, particularly given that the endangerment need only present a potential threat, not an actual one. *See* 42 U.S.C. § 6973(a) (authorizing Administrator, after presentation of evidence that past or present handling, etc., of waste "may present an imminent and substantial endangerment," to "issu[e] such orders as may be necessary to protect public health and the environment"). Congress, in enacting RCRA section 7003, invoked the broad equitable powers of federal courts to order measures to protect health and the environment, and courts generally have not insisted upon a showing of a close fit between a specifically identified threat and the ordered remedy, but rather have given substantial deference to the EPA's determination of an imminent and substantial endangerment and the appropriateness of the relief sought. *See, e.g., Maine People's Alliance & Natural Res. Defense Council v. Mallinckrodt, Inc.*, 471 F.3d 277, 287-88 (1st Cir. 2006); *Interfaith Community Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 258 (3d Cir. 2005); *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1015 (11th Cir. 2004); *Price*, 688 F.2d at 214 ("Congress, by enacting section 7003, intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risks posed by toxic wastes.").

(3) May EPA insist on the inclusion in an interagency agreement of additional terms beyond those required by section 120(e)(4) of CERCLA, and may DoD refuse to agree to terms that go beyond those required by that provision?

We believe that EPA may demand the inclusion in an interagency agreement of additional terms not listed in CERCLA section 120(e)(4). Section 120 of CERCLA requires the head of an agency or department that owns or operates a facility on the NPL to "enter into an interagency agreement with the Administrator for the expeditious completion . . . of all necessary remedial action at such facility" and provides that "[e]ach interagency agreement . . . shall include, *but shall not be limited to*," certain statutory elements. 42 U.S.C. § 9620(e)(2), (4) (2000) (emphasis added). However, because an interagency "agreement" denotes a consensual undertaking, we do not think that DoD necessarily is required to agree to all extra-statutory terms demanded by EPA.

We think that EPA nonetheless may require DoD to agree in the FFA to follow, "in the same manner and to the same extent" as they apply to private parties, any "guidelines, rules, regulations, and criteria" established by the Administrator and made applicable to non-federal facilities under CERCLA. *Id.* § 9620(a)(2). Model agreements, including those that serve as the

basis of negotiations with federal facilities or with private parties under CERCLA section 122, may provide useful guidance as to the content of such terms insofar as these model agreements reflect "guidelines, rules, regulations, and criteria" established by the Administrator under CERCLA and made applicable by CERCLA to private parties.

(4) May EPA require DoD to address releases in a CERCLA interagency agreement on property that was not identified in the NPL listing and is no longer owned by DoD?

EPA may require DoD to address in an interagency agreement all property contaminated by a release listed on the NPL as long as the property is "within the broad compass of the notice provided by the initial NPL listing." *Wash. State Dep't of Transp. v. EPA*, 917 F.2d 1309, 1311 (D.C. Cir. 1990) ("EPA may alter or expand the boundaries of a NPL site if subsequent study reveals a wider-than-expected scope of contamination."). Whether each of the particular parcels of land in question is "within the broad compass" of the notice provided by one of the initial NPL listings is a factual question we are not in a position to resolve. Citing *Mead Corp. v. Browner*, 100 F.3d 152, 156 (D.C. Cir. 1996), you have urged that EPA may not rely on its authority to modify the geographic boundaries of an NPL site to add new releases to the NPL without satisfying the statutory NPL-listing criteria contained in 42 U.S.C. § 9605(a)(8). It is not clear to us from DoD's and EPA's submissions whether inclusion of the property in question in the FFA would effectively add new releases or whether it would represent the enlargement of the geographic boundaries of releases already listed on the NPL. This issue, too, raises factual questions we are unable to answer.

Assuming the property is properly treated as within the NPL listing, we do not believe that DoD is relieved of its obligation to enter into an interagency agreement with respect to those affected parcels of property at an NPL site that have been transferred to another federal agency, such as the Department of the Interior. Section 120(a)(1) provides in general that a federal agency shall be subject to all the provisions of CERCLA, including the liability provisions of section 107, in the same manner and to the same extent as a private party. 42 U.S.C. § 9620(a)(1). Section 107 imposes liability for cleanup costs not only on the current owner and operator of a facility but also on any person who owned or operated the facility at the time of disposal of the hazardous substances and on other persons potentially responsible for the hazardous releases. *See id.* § 9607(a). For purposes of identifying federal facilities to be evaluated by the EPA for inclusion on the NPL, each federal agency must provide EPA with information about contamination from each facility owned or operated by the agency "if such contamination affects contiguous or adjacent property owned by [the agency] *or by any other person*." *Id.* § 9620(b) (emphasis added); *see id.* § 9620(c), (d). Within six months after a federal facility is included in an NPL listing, the federal agency that owns or operates the facility is required to commence a remedial investigation and feasibility study for such facility. *Id.* § 9620(e)(1). Following the remedial investigation and feasibility study, "the head of the department, agency, or instrumentality *concerned* shall enter into an interagency agreement with the Administrator for the expeditious completion by such department, agency, or instrumentality of all necessary remedial action at such facility." *Id.* § 9620(e)(2) (emphasis added). CERCLA defines a "facility" broadly to include not only the structure or installation that may have been the source of the hazardous releases, but also the entire surrounding area where the hazardous substances have come to be located, *see id.* § 9601(9), and nothing in the statute requires that a

facility have only one owner or operator. We think that the import of these provisions, taken together, is that a federal agency that continues to own and operate part of a site listed on the NPL and is the federal agency potentially responsible for the hazardous releases contaminating the site is a federal agency "concerned" in the cleanup of the site for purposes of the interagency agreement requirements of section 120(e)(2). Where more than one federal agency may own various parcels of property that comprise the NPL site, we see no reason why EPA may not involve other agencies in discussions concerning an interagency agreement. *Cf.* 42 U.S.C. § 9620(e)(6) (providing for agreements with other potentially responsible parties).

* * *

Please let us know if you have any questions or if we can be of further assistance.

Sincerely,

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