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MCAS EL TORO
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RESPONSES TO PUBLIC COMMENTS CONCERNING
THE MARINE CORPS AIR STATION (MCAS), EL TORO, CALIFORNIA
FEDERAL FACILITY AGREEMENT
(FEBRUARY 1991)

A. PREAMBLE

The Federal Facility Agreement (FFA) is a document which lays out a procedural framework by which the Marine Corps, as lead agency under the National Contingency Plan (40 CFR Part 300), can consult and coordinate with the Environmental Protection Agency (EPA) and the State of California (the State) in the investigation and cleanup of hazardous substances, pollutants, and contaminants at MCAS El Toro.

These agreements are related to and will eventually satisfy the requirement in §120 (e) of CERCLA, 42 U.S.C. §9620, that a federal facility placed on EPA's National Priorities List (NPL) enter into an interagency agreement with the EPA Administrator, after the Administrator has reviewed the results of the Remedial Investigation and Feasibility Study (RI/FS). The Department of Defense and the Environmental Protection Agency realized that including states as signatories, where possible, and signing such agreements earlier in the process than is legally required would enhance investigation and cleanup efforts.

Accordingly, the EPA, State, and Marine Corps executed the El Toro FFA at the commencement of the RI/FS for the various operable units (OUs). Due to the fact that execution of the FFA occurs so early in the process, data and other information essential to proper selection of remedial action for each OU are not yet available. It is intended that specific technical data and action items not listed within or attached to the FFA (e.g., work plans and community relations plan) will be developed within the context of Project Manager and Technical Review Committee (TRC) meetings.

The MCAS El Toro FFA was executed on October 24, 1990. Shortly thereafter, the public comment process laid out in Section 36 (Effective Date and Public Comment) was initiated. Section B contains the joint response of the FFA parties to comments received during the public comment period.

B. RESPONSES TO SPECIFIC COMMENTS

1. COMMENT: One commenter was concerned that the remedial action (RA) for OUI, the regional groundwater investigation, would not meet the requirement of CERCLA §120 (e)(2), 42 U.S.C. §9620 (e)(2), that RA commence not later than fifteen months after completion of the RI/FS.

RESPONSE: This impression was apparently based on a mistakenly proposed date for commencement placed in the draft RI/FS Work Plan for OUI. This plan has been corrected and the date has been deleted. As pointed out in the preamble, execution of the FFA has occurred early in the investigation process and therefore information essential to proper selection of the RA for OUI is not yet available. For similar reasons, deadlines in Appendix "A" of the FFA only extend to the Proposed Record of Decision (ROD). The type of RA chosen and the volume and complexity of public comments received on the Draft ROD will dictate future deadlines. These deadlines will be developed in accordance with FFA Section 8 (Deadlines) and will comply with CERCLA §120.

2. COMMENT: A commenter suggested that a more detailed schedule of activities to be undertaken at the Site be included in the Work Plan to better gauge progress.

RESPONSE: The Parties believe that the provisions already contained in the FFA are sufficiently detailed to ensure timely progress. In addition to those pre-ROD deadlines listed in Appendix "A", there are procedures and deadlines outlined in Section 7 (Review and Consultation) for review of technical documents by the Parties. Post-ROD deadlines will be developed in accordance with Section 8 (Deadlines) and inserted in Appendix "D".

3. COMMENT: Two commenters stated that the Marine Corps is required to undertake and give priority to groundwater investigation off-base, including the construction of investigation wells at various locations. Concern was expressed for expedited mitigation once the source of TCE is identified and for expedited cleanup after the groundwater investigation has been completed.

RESPONSE: Whether or not MCAS El Toro is ultimately determined to be the party legally responsible for off-base contamination, it has undertaken to conduct studies off-base within the context of OUI. These studies have been given the highest priority by the FFA parties and will be performed in accordance with the NCP. A primary goal of the Parties is to identify any source of TCE contamination (on or off-base) and to stop the migration of the existing plume. After the first round of data is collected and evaluated, a Project Managers' meeting will be held to discuss the necessity for and feasibility of a removal action or other accelerated response action. Groundwater cleanup may be included as part of that response action, concurrent with later segments of the groundwater study, and therefore could occur much earlier than the ultimate response action for OUI. Specific details as to the need or location of additional wells are not normally covered within the FFA provisions themselves. As explained in the preamble, such future action items will be developed within the context of Project Manager and TRC meetings.

4. COMMENT: Some commenters suggested inclusion of language providing for the reimbursement of the Orange County Water District (OCWD) and the City of Irvine for groundwater investigations conducted in the vicinity of MCAS El Toro.

RESPONSE: Because this matter falls outside the scope of the FFA and involves non-parties to this agreement, the Parties believe that such matters should be discussed directly between the Marine Corps, the City of Irvine, and the OCWD.

Additionally, MCAS El Toro and the OCWD executed a Memorandum of Understanding (MOU) in November-December 1988, which specifically provided for coordination of on-base and off-base groundwater investigations between those parties. The MOU indicates that OCWD's right to reimbursement (and the extent of same) would be the subject of future negotiations between the MOU parties, as a follow-up to performance under the MOU. Therefore, the Parties to the FFA agree that amendment of the MOU, rather than the FFA, would be the more appropriate vehicle for OCWD reimbursement.

5. COMMENT: Another commenter stated that the FFA does not adequately address the possible necessity for the performance of emergency response actions. It expressed concern over the mechanism in Section 11.3 (f) by which a Party may request that the Marine Corps take such response actions as may be necessary to abate endangerment to public health or welfare or the environment due to actual or threatened releases at the Site. The commenter was further concerned that disputes, over whether or not the Marine Corps will take a removal action as requested pursuant to Section 11.3 (f), would be resolved, pursuant to Section 11.6, by the Navy's Secretariat representative rather than the EPA Administrator. The commenter suggested that Section 11.6 be stricken.

RESPONSE: As noted in the preamble, the Marine Corps is the lead agency for the investigation and cleanup of MCAS El Toro, in accordance with the NCP. As provided in CERCLA §120 (e)(4), 42 U.S.C. §9620 (e)(4), remedial action at federal facilities on the NPL is jointly selected by the head of federal department and the EPA Administrator. Only if the two cannot agree does the Administrator make the selection alone. This section is silent with respect to decisionmaking responsibility for removal actions at federal facilities.

While §120 sets out investigation and cleanup procedures for federal facilities, the actual authority to undertake removal or remedial actions derives from the President's authority under CERCLA §104 to respond to releases or substantial threats of release of hazardous substances, pollutants, or contaminants.

Through Executive Order (EO) 12580, the President delegated different portions of this authority to EPA and other federal agencies and departments. In particular, §2 (d) of EO 12580 delegates to the Secretary of Defense the Presidential authority to take removal and remedial actions and related investigations pursuant to §104 (a), (b), and (c)(4), when the release is on or the sole source of the release is from any facility under the jurisdiction, custody, and control of the Secretary of Defense. The Executive Order does not grant similar authority to EPA with respect to such property under the jurisdiction of the Secretary of Defense.

Similarly, 10 U.S.C. §2705 (b)(2) recognizes the authority of the Secretary (or his delegates) to take an emergency removal action, without first consulting with EPA and appropriate State and local officials, where there is imminent and substantial endangerment to human health or the environment and consultation would be impractical.

In recognition of these authorities, the FFA Parties have agreed that the Assistant Secretary of the Navy (Installations and the Environment) would be the final arbiter in dispute resolution for removal action decisions under FFA §11.3 (f). In order to take into account that time is of the essence in many of these situations, the Parties agreed to an expedited dispute resolution procedure in §11.6. Moreover, in FFA §31.1, EPA and the State have specifically reserved their rights to take further action after exhausting the procedures of §11.6.

Therefore, the Parties believe that the current FFA provisions adequately address the commenter's stated concerns. Therefore, FFA §11.6 will not be stricken.

7. COMMENT: Another commenter suggested that a proposed rule by the California Air Resources Board (CARB), to designate TCE a toxic air contaminant, should be evaluated as a potential ARAR.

RESPONSE: Any CARB requirements, including proposed rules, will be duly considered through the ARARs process set forth in §7.6 of the FFA.