



DEPARTMENT OF THE NAVY  
SOUTHWEST DIVISION  
NAVAL FACILITIES ENGINEERING COMMAND  
1220 PACIFIC HIGHWAY  
SAN DIEGO, CA 92132-5190

M60050.000616  
MCAS EL TORO  
SSIC NO. 5090.3

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Ser 06CC.DG/1031  
December 27, 2000

Mr. John Broderick  
California Regional Quality Control Board  
Santa Ana Region  
3737 Main Street, Suite 500  
Riverside, CA 92501-3339

Subj: DISCHARGE PERMITTING AT IRP SITE 16, MARINE CORPS AIR STATION (MCAS)  
EL TORO

Dear Mr. Broderick:

The purpose of this letter is to notify the Santa Ana Regional Water Quality Control Board (RWQCB) that the Department of the Navy (DON) has determined that Section 121(e)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the corresponding provision in the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) (40 CFR Section 300.400(e)(1)) apply to the discharge of treated groundwater resulting from the pilot study activities at Installation Restoration Program (IRP) Site 16 located at Marine Corps Air Station (MCAS), El Toro and that an National Pollution Discharge Elimination System (NPDES) permit is, therefore, not required for that discharge. The Navy has been conducting pilot study activities at Site 16 since August 2000 in accordance with the "Final Phase II Work Plan Multi-Phase Extraction (MPE) Pilot Study, OU-3 IRP Site 16, Crash Crew Training Pit No. 2, MCAS El Toro, California".

The groundwater treatment system addressed in the pilot study has been constructed and operated entirely on-site and the treated groundwater generated from the pilot study activities is presently being stored on-site as defined under CERCLA and the NCP. The treated groundwater will be discharged at an on-site location into a storm water sewer system, which will transport the treated water and ultimately discharge it into waters of the United States at an off-site location. The United States Environmental Protection Agency has consistently maintained that the migration of treated water beyond site boundaries after the response action has treated the water so that it complies with ARARs is consistent with the on-site permit exclusion in Section 121(e) of CERCLA and does not constitute an "off-site" response action that must obtain an NPDES permit (see In the Matter of the Former Weldon Spring Ordnance Works, Weldon Spring, Missouri, Federal Facility Docket No. VII-90-F-0033, November 1, 1995 – enclosure 1). DON agrees with this interpretation of CERCLA and the NCP.

To summarize, the DON has concluded that an NPDES permit is unnecessary because; the pilot study is a CERCLA response action, that response action is being conducted entirely on-site as defined at 40 CFR Section 300.400(e)(1), and the CERCLA permit exclusion is, therefore, applicable to it. The CERCLA permit exclusion provides the authority for DON to continue this response action at IRP Site 16, in accordance with all applicable or relevant and appropriate Federal and State standards, without subjecting them to the expense and delay associated with applying for and maintaining State permits.

The Final MPE Work Plan noted that the DON intended to obtain a NPDES permit for the discharge of treated groundwater into the on-site storm drain located within IRP Site 16. For the

reasons set forth above, DON will submit replacement pages to the Final MPE Work Plan which indicate that a NPDES permit is not required for the discharge of groundwater on-site, but that the DON will meet the substantive requirements of California Regional Water Quality Control Board Santa Ana Region Order No. 96-18 (NPDES NO. CAG918001). A separate letter will be submitted with these replacement pages in the near future.

The replacement pages will reflect the CERCLA permit exclusion and delete the provisions regarding an NPDES permit for the discharge of treated groundwater. In addition, the revised sections will provide that DON will ensure the discharge of treated groundwater complies with all applicable or relevant and appropriate requirements (ARARs) as provided by Section 121 of CERCLA and the NCP including the beneficial uses and water quality objectives of the Santa Ana Regional Water Quality Control Plan. The Navy plans to achieve compliance with these ARARs by complying with the substantive requirements of Order No. 96-18 and through the preparation of a proposed monitoring and reporting program for the discharge of treated groundwater on-site at IRP Site 16 located at MCAS El Toro (enclosure 2). The proposed program was designed following the guidelines for monitoring and reporting programs in Order No. 96-18 and other monitoring and reporting programs prepared for DON sites by the Executive Officer of the Regional Board. This will ensure that there is no impact to regional water quality from the discharge of the treated groundwater, and permit the discharge activities to commence in support of the BCT Vision to expedite restoration and reuse of MCAS El Toro.

Please review the revised monitoring and reporting program attached to this letter. The DON would like to discuss the proposed program with you in a meeting prior to initiating discharge of the stored treated groundwater. Should you have any questions or comments, please feel free to contact myself at (619) 532-0784, or Mr. Marc Smits at (619) 532-0793.

Sincerely,



DEAN GOULD  
Base Realignment and Closure  
Environmental Coordinator  
By direction of the Commander

- Enclosure: 1. EPA Correspondence from EPA Administrator Carol M. Browner to David A. Shorr – Director, Missouri Department of Natural Resources dated November 1, 1995.
2. Proposed Monitoring and Reporting Program for Discharge of Treated Groundwater On-Site at Installation Restoration Program Site 16, Marine Corps Air Station, El Toro, California.

Copy to:  
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**ENCLOSURE 1**

# OAGC INSTALLATIONS & ENVIRONMENT

FIELD FACILITIES

POINTS OF CONTACT

RESOURCE CENTER

WASHINGTON RPT

## OAGC (I&E) HAZARDOUS WASTE E-MAIL HW13

[In a letter dated November 1, 1995, EPA Administrator Carol M. Browner has reaffirmed the CERCLA provision exempting on-site removal or remedial actions from the requirement to obtain permits. The Browner decision was made in response to an attempt by the State of Missouri to require permits for the incinerator, contaminated wastewater treatment, and storm water runoff activities at the Army's cleanup site at Weldon Springs Ordnance Works, in St. Charles County, Missouri. Missouri had elevated the permit dispute in accordance with the 1990 Federal Facility Agreement between Missouri, EPA and the Army. Below is Administrator Browner's decision. Note that the words OUTSIDE and UNDER are capitalized towards the middle of this opinion. In the original letter, these words were underlined for emphasis by EPA. BK sends.]

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

THE ADMINISTRATOR

NOVEMBER 1, 1995

David A. Shorr  
Director  
Missouri Department of Natural Resources  
P.O. Box 176  
Jefferson City, MO 65102-0176

RE: In the matter of The Former Weldon Spring Ordnance Works  
Weldon Spring, Missouri  
Federal Facility Agreement Docket No. VII-90-F-0033

Dear Mr. Shorr:

Thank you for your letter of September 5, 1995, regarding your decision to elevate the above-captioned dispute. Pursuant to the 1990 Federal Facility Agreement (FFA) among the state, the Army, and EPA, this letter is EPA's decision for final resolution of the dispute.

### BACKGROUND

On August 9, 1994, Missouri invoked the FFA's dispute resolution procedures regarding the state's authority to require

permits for the incinerator, contaminated wastewater treatment, and storm water runoff activities that are described in the draft Final Record of Decision (ROD). On September 7, 1994, the Dispute Resolution Committee elevated the matter to the Senior Executive Committee (SEC). Unable to unanimously resolve the dispute at the SEC level, Bill Rice issued a decision document on August 15, 1995. As provided in the dispute resolution procedures of the FFA, Missouri elected to elevate the Region's decision for resolution.

#### ANALYSIS

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Sec. 121(e)(1) provides that no federal, state, or local permit shall be required for the portion of any removal or remedial action conducted entirely on-site. In this case, it is undisputed that the response actions at issue will be constructed entirely within the geographical area considered the NPL site. Nevertheless, we understand Missouri's position to be that because off-site releases and discharges will occur, the state may seek to require the Army to obtain permits. In a February 1, 1995, brief, your Counsel provided EPA with its legal analysis to defend Missouri's position.

Throughout this dispute, the Army has asserted that permits are not required for the subject activities. Specifically, the Army contends that the CERCLA Sec. 121(e)(1) permit waiver allows lead agencies to commence and continue response actions in accordance with applicable state standards, without subjecting them to the expense and delay associated with applying for, and maintaining, state permits. Furthermore, the Army has stated that it is unwilling to jeopardize its ability to carry out its CERCLA responsibilities by agreeing to apply for a state permit that CERCLA does not require.

The Missouri brief refers to U.S. v. Colorado, 990 F.2d 1565, at 1582 (10th Cir. 1993), where CERCLA Sec. 121(e)(1) was held not to bar enforcement of a state's compliance order issued under that state's EPA-authorized hazardous waste law. Missouri concludes from that ruling that CERCLA Sec. 121(e)(1) does not bar Missouri from enforcing its laws through its permitting requirements, including Missouri laws authorized by EPA in lieu of RCRA, the Clean Air Act, and the Clean Water Act.

However, U.S. v. Colorado addresses only enforcement of state law OUTSIDE the CERCLA process. It does not address the meaning of "on-site" under CERCLA Sec. 121(e)(1), and what permits are required UNDER CERCLA.

Similarly, Missouri's brief states that the National Contingency Plan (NCP) definition at 40 CFR Sec. 300.400(e)(2) of what constitutes "on-site" is indeterminate, and that the Court of Appeals for the District of Columbia Circuit has concluded only that the regulation on its face is not unlawful. Ohio v. U.S. EPA, 997 F.2d 1520, at 1549 (D.C. Cir. 1993). Missouri contends that what constitutes "on-site" in EPA's view is overbroad and that the response actions under the selected remedy will inevitably result in extended off-site discharges beyond the "on-site" area, and thus require state permits.

Nothing in the statutory language requires that substances discharged or releases from response actions on-site must remain entirely on-site for the actions to qualify for the permit exemption. EPA has long viewed response actions that may have discharges or releases which subsequently migrate beyond site boundaries as qualifying for the CERCLA 121(e)(1) exemption. This position was clearly stated in the preamble to the 1988 NCP proposal (see 53 FR at 51407 (December 21, 1988)), when EPA stated that:

'on-site' further includes situations where the remedial activity occurs entirely on-site but the effect of such activity cannot be strictly limited to the site. For example, a direct discharge of CERCLA wastewater would be an on-site activity if the receiving water body is in the area of contamination or is in very close proximity to the site, even if the water flows off-site.

This interpretation was not changed in the preamble to the Final NCP, where EPA cites an example of an on-site response action exempt from permit requirements, an incinerator built on upland as a remedy for contamination located in a lowland marshy area 55 FR 8666 at 8689 (March 8, 1990). Moreover, even though the court in *Ohio v. EPA* does not directly reach the current question, it references EPA's incinerator example to show why the NCP definition of on-site is not unreasonable on its face.

Therefore, EPA interprets CERCLA section 121(e)(1) and the corresponding provision of the NCP (300.400(e)(1)) as exempting response actions conducted entirely on-site even if the actions involve discharges or emissions that result in some subsequent migration of contaminants beyond the site boundaries. We believe this interpretation best serves the purpose of CERCLA section 121(e)(1); namely, that it avoids redundant procedural permitting steps that could delay cleanups. Furthermore, since some off-site migration is likely to occur in virtually all cases where there is an on-site discharge or emission, adopting the state's interpretation would greatly narrow the kinds of permits to which the exemption applies, a result I do not think is consistent with the intent of Congress. The legislative history of the Superfund Amendments and Reauthorization Act of 1986 shows that an earlier version of the Bill would have required permits to be obtained for on-site actions under certain specified laws, including the Clean Air Act and the Clean Water Act. This requirement was eliminated in the conference committee in favor of a blanket waiver. Since Congress clearly chose to exempt on-site actions from permits specifically under these Acts, an interpretation that effectively required permits under these Acts in most or all cases, would be inconsistent with the intent of Congress.

Last, the brief states that Missouri citizens are entitled to the same notice and opportunity for public hearing and comment on federal activities at the site as Missouri provides for response activities involving the state.

Missouri law may indeed provide different public involvement mechanisms than those provided by CERCLA and the

NCP. However, so long as the Army fulfills CERCLA and related federal requirements, the Army will be providing a full and fair opportunity for public participation. For example, the Army has provided the public hearing comment period at the Proposed Plan stage. Additionally, consistent with EPA's Strategy for Hazardous Waste Minimization and Combustion, EPA intends to allow further opportunity for public participation while the incinerator is designed and constructed, including public notice of the trial burn plan and opportunity for local citizens to participate during the risk assessment process.

#### CONCLUSION

I affirm Region VII's decision. The incinerator, contaminated wastewater treatment, and storm water runoff activities are on-site activities within the meaning of CERCLA Sec. 121(e)(1) and the NCP 40 CFR Sec. 300.400(e), and, therefore state permits are not required. Accordingly, the Draft Final Record of Decision will not require state permits for those activities.

Sincerely,

Carol M. Browner

cc: Steven A. Herman, Assistant Administrator  
Ray Fatz, Acting Deputy Assistant Secretary of the Army  
Dennis Grams, P.E., Regional Administrator



**ENCLOSURE 2**

**PROPOSED MONITORING AND REPORTING PROGRAM  
FOR DISCHARGE OF TREATED GROUNDWATER ON-SITE  
AT  
INSTALLATION RESTORATION PROGRAM SITE 16  
MARINE CORPS AIR STATION, EL TORO, CALIFORNIA**

**A. INFLUENT MONITORING**

1. The influent to the treatment system shall be monitored on a monthly basis for volatile organic compounds (VOCs) and on a quarterly basis for semivolatile organic compounds (SVOCs) and total petroleum hydrocarbons benzene (TPH).

**B. EFFLUENT MONITORING**

1. The analyses specified in Table 1 below have been selected for monitoring of the effluent from Site 16.
2. All analysis shall be conducted at a laboratory certified for such analysis by the State Department of Health Services or at laboratories approved by the Executive Officer of the Santa Ana Regional Water Quality Control Board.
3. All samples shall be representative of the waste discharged under the conditions of peak load.
4. Samples will be collected from the discharge point from the storage tank directly adjacent to the onsite storm drain location where representative grab samples of the discharge can be obtained. The following analytes and methods of analysis shall constitute the effluent monitoring program:

TABLE 1  
EFFLUENT MONITORING ANALYTES AND FREQUENCY

<b>ANALYTES/ MEASUREMENT</b>	<b>METHOD OF ANALYSIS</b>	<b>UNITS</b>	<b>MINIMUM FREQUENCY OF ANALYSIS</b>
Flow	---	Gallons per Day	Weekly
VOCs (halogenated and aromatic)	U.S. EPA Method 8021B	µg/L	Weekly
SVOCs	U.S. EPA Method 8270C	µg/L	Quarterly
TPH	U.S. EPA Method 8015M	µg/L	Quarterly
Toxicity Testing	LCSO 96 HR FISH	---	Annual

**PROPOSED MONITORING AND REPORTING PROGRAM  
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5. Weekly sampling will occur during routine maintenance and inspection of the multi-phase extraction system operating at Site 16.
6. Annual sampling will occur prior to the initial discharge of treated groundwater on site and every 12 months following the initial test, if necessary (i.e., if discharge activities last longer than 12 months).
7. Analysis for VOCs, SVOCs, and TPH will be conducted prior to the initial discharge of the treated groundwater. Weekly and quarterly sampling will begin after the results from the initial sampling have indicated the water can be safely discharged to the on-site storm drain.
8. After the water in the storage tanks have been discharged to the storm drain, the treated groundwater will be discharged directly to the on-site storm drain.

**C. REPORTING**

1. The results of the above analysis shall be reported to the Regional Board within 24 hours of finding any discharge that is in violation of the general permit (Order No. 96-18, NPDES No. CAG918001).
2. Monitoring reports shall be submitted by the 30<sup>th</sup> day of each month and shall include:
  - a. The results of all chemical analysis for the previous month and any annual sampling conducted;
  - b. The flow data recorded;
  - c. Summary of monthly activities; and
  - d. In the event that a discharge is found to be in violation, a statement of actions undertaken or proposed to bring a discharge into full compliance with requirements at the earliest time and submit a timetable for correction shall be included in the monitoring report.
3. If no discharge occurs during the previous monitoring period, a letter to that effect shall be submitted in lieu of a monitoring report.
4. At the completion of discharge activities at the site, a letter will be submitted to the Regional Board to inform them that discharges of treated groundwater at the site have ceased and that no further monitoring reports will be submitted.