



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105

June 5, 1997

Mr. Joseph Joyce
BRAC Environmental Coordinator
AC/S Environment (1AU)
MCAS El Toro
P.O. Box 95001
Santa Ana, CA 92709-5001

Re: U.S. EPA Comfort Letter Clarifying NPL Listing, Uncontaminated Parcel Identifications, and CERCLA Liability Issues Involving Transfers of Federally Owned Property

Dear Mr. Joyce:

The U.S. Environmental Protection Agency (EPA) recognizes that some potential buyers and redevelopers may be concerned about purchasing and redeveloping property at a military installation part or all of which has been placed on EPA's National Priorities List (NPL) pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). EPA believes that the best way to respond to buyers' and redevelopers' concerns is to address some common misunderstandings about NPL listing and CERCLA liability, and highlight certain provisions about the transfer of federally owned property. Importantly, as is discussed below, whether property is part of an NPL site is unrelated to CERCLA liability.

National Priorities List

The purpose of the NPL is to identify releases of hazardous substances or pollutants and contaminants that are priorities for further evaluation. Hence, the NPL is a list of releases. When a site is added to the NPL, through a federal rulemaking process, it is necessary to define the release (or releases) encompassed within the listing. While sites, including Federal facilities, have sometimes been described in the rulemaking process with reference to a geographic area (e.g., Hanscom Air Force Base), sometimes referred to as "fenceline to fenceline," it is only the areas of

contamination that are part of the NPL site. The boundaries of the installation are not necessarily the "boundaries" of the NPL site. Rather, the site consists of all contaminated areas within the area used to define the site, and any other location to or from which contamination from that area has come to be located. Area types 1 & 2 identified on pages 3-35, 3-36 and on page 3-185 (figure 3-185) of the March, 1997 Base Realignment and Closure Plan (BCP) for MCAS El Toro would therefore not be part of the NPL site.

It should be noted that where there is adequate information for EPA to determine that only certain portions of a military installation are contaminated by these releases, EPA could list only the contamination from those discrete areas of the installation. However, because of the extensive size of most military installations, the military services generally have not completed their assessment of all releases or potential releases to provide EPA with data sufficient to further define the NPL site. Such data are provided as the installations go through subsequent remedial investigations at later dates.

CERCLA Liability

Whether property 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. Placing a site on the NPL 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". CERCLA section 101(9) defines the term "facility" to include "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." Hence, the mere fact that a parcel lies within the area used to describe an NPL site does not impose liability on the owner or subsequent purchaser; liability is based on a release or threatened release of a hazardous substance from a facility.

As for lenders, CERCLA provides that a lender who holds a security interest in contaminated property will not be considered an owner or operator for purposes of CERCLA liability provided the lender does not participate in the management of the facility. See CERCLA section 101(20)(A). Again, the NPL status of the mortgaged property does not impose liability on the lender; liability is based on the actions of the lender in the management of the facility.

Property Transfer, Covenants, and Uncontaminated Parcel Identifications

A Federal agency must comply with the provisions of CERCLA section 120(h)(3) before conveying any real property on which any hazardous substances were known to have been released, or disposed of. Except as noted below, each deed conveying such real property must contain the following:

- 1) Information regarding the hazardous substances;
- 2) A covenant that all remedial action necessary to protect human health and the environment with respect to any hazardous substances remaining on the property has been taken before the date of transfer. (A remedial action "has been taken" if the approved remedy has been constructed and has been demonstrated to EPA to be operating "properly and successfully." In other words, a transfer may occur even if the remediation levels specified for the remedy have not been achieved as, for example, in the case of groundwater remediation, where a pump and treat system has been shown to be working "properly and successfully", but the system may still need to operate for a number of years.) Under certain circumstances, however, contaminated property may be conveyed by deed before all remedial action has been taken. Section 120(h)(3)(C) of CERCLA sets forth the conditions under which the EPA Administrator with the concurrence of the Governor (for property on the National Priorities List) or the Governor (for property not on the NPL) may defer the requirement of providing a covenant that all necessary remedial action has been taken prior to the date of transfer. In such cases, once the United States has completed all necessary remedial action, it must issue a warranty that satisfies that covenant requirement. A transferee of property conveyed under Section 120(h)(3)(C) also receives assurances at the time of transfer that all necessary remedial action will be taken in the future;
- 3) A covenant that additional remedial action found to be necessary after the date of the transfer will be conducted by the United States; and
- 4) A clause granting the United States access to the property in any case in which a response action is found to be necessary after the transfer of such property.

A Federal agency planning to terminate operations on real property which the United States owns -- including military base closures -- must comply with the provisions of CERCLA section 120(h)(4). Specifically, section 120(h)(4)(A) directs a Federal agency to identify parcels of land at the discontinuing installation (e.g., the closing base) where no hazardous substances or petroleum products or their derivatives were known to have been released, or disposed of. For parcels that are part of a site on the NPL, EPA must concur in the parcel identification. For parcels that are not part of a site on the NPL, the appropriate State official must concur in the parcel identification. A Federal agency seeking to convey real property identified as uncontaminated under section 120(h)(4), must include in the deed conveying such property a covenant that any response action found to be necessary after the date of transfer will be conducted by the United States.

Therefore, a purchaser of real property that was part of a closing base receives from the Federal government a deed covenant that if any further remedial action is found to be necessary after the date of transfer, the United States will conduct such actions. Importantly, CERCLA section 120(h)(3) and (4) requirements apply regardless of whether the real property being conveyed is part of an NPL site. Additionally, a Federal agency would continue to have obligations under CERCLA section 120(e) ("Required Action by Department") and any existing applicable Federal Facility Agreement for conveyed real property that is part of an NPL site.

In conjunction with its obligation to concur on uncontaminated parcel identifications at NPL sites under CERCLA section 120(h)(4), EPA issued on May 27, 1997, a policy entitled, "Military Base Closures: Revised Guidance on EPA Concurrence in the Identification of Uncontaminated Parcels under CERCLA Section 120(h)(4)" (copy enclosed). EPA notes in the policy that there may be instances in which it would be appropriate to concur with the military service that certain parcels can be identified as uncontaminated under CERCLA section 120(h)(4), although some limited quantity of hazardous substances or petroleum products have been released or disposed of on the parcel. The policy reflects EPA's commitment to protect human health and the environment while also achieving Congress's goal of expeditiously transferring uncontaminated real property to communities for economic redevelopment. EPA's CERCLA section 120(h)(3) determination that a remedy is operating properly and successfully, and concurrence on uncontaminated parcel identifications under CERCLA section 120(h)(4) do not affect NPL

status, because such actions do not constitute Agency rulemaking, but are, instead, Agency statements based on the facts known to exist at that time. Property that has not been contaminated (i.e., no releases), unlike property where a response has been completed, can be characterized as never having been part of the NPL site.

Leasing of Property

EPA supports the leasing of real property that is not available for immediate deed conveyance as a mechanism for providing expeditious appropriate civilian use of such property. EPA and the Department of Defense (DoD) have entered into a Memorandum of Understanding in which there is an agreement to use the September 9, 1993 "DoD Policy on the Environmental Review Process to Reach a Finding of Suitability to Lease (FOSL)" to ensure that the leasing of property at closing bases does not result in an unacceptable risk to human health or the environment. The procedures laid out in that guidance calls for regulatory agency participation in DoD's FOSL conclusions. The procedures apply to all leasing of property at closing bases, regardless of whether the property is part of an NPL site.

Indemnification

Although not part of CERCLA, additional protection is afforded to transferees of base closure property by Section 330 of the National Defense Authorization Act for Fiscal Year 1993, as amended. Section 330 provides indemnification of such transferees for claims arising from the release or threatened release of any hazardous substance, pollutant, petroleum product or contaminant as a result of Department of Defense activities at any military installation (or portion thereof) that is closed pursuant to a base closure law.

EPA's Programs with Mortgage and Banking Associations

In response to expressed concerns, EPA is initiating programs with both Federal agencies and national mortgage and banking associations to address the often unwarranted alleged stigma of NPL listing. We are emphasizing that the listing only includes those areas that are contaminated. We do not believe that NPL listing should hinder appropriate redevelopment of uncontaminated portions of military installations. In fact, a number of redevelopers have indicated that NPL listing is not a hindrance to such redevelopment because, as discussed above, the Department of Defense, or other

responsible Federal agency, remains responsible for any additional necessary remedial actions should contamination subsequently be found at these sites.

To reiterate, the fact that a parcel lies within the area used to describe an NPL site does not impose liability on the purchaser; liability is based on the presence of contamination.

In conclusion, we believe that the above explanations should help resolve most questions about NPL site listing issues and a purchaser's or redeveloper's potential liability involving the reuse of closing military bases. If you have any questions concerning these issues, please contact Glenn Kistner of my staff, who can be reached at (415) 744-2210.

Sincerely,



Daniel D. Opalski
Chief
Federal Facilities Cleanup Branch

Enclosure

cc: Tayseer Mahmoud, DTSC
Larry Vitale, RWQCB



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

MAR 27 1997

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

MEMORANDUM

SUBJECT: Military Base Closures: Revised Guidance on EPA Concurrence in the Identification of Uncontaminated Parcels under CERCLA Section 120 (h)(4)

FROM: Timothy Fields, Jr. *Timothy Fields, Jr.*
Acting Assistant Administrator

TO: Regional Superfund Policy Managers, Region I-X
Regional RCRA Policy Managers, Region I-X
Regional Counsels, Regions I-X
Federal Facilities Leadership Council
Base Realignment and Closure Program Managers, Region I-X

This memorandum is intended to provide guidance concerning the implementation of CERCLA section 120 (h)(4), as amended in 1996. Specifically, it addresses the approach EPA should use in determining whether to concur that a parcel has been properly identified by a military service as "uncontaminated" and therefore transferrable pursuant to CERCLA section 120 (h)(4).

Background

In October 1992, Congress enacted the Community Environmental Response Facilitation Act (CERFA) which, among other things, added a new subsection (4) to CERCLA section 120 (h). Congress found that the closure of Federal facilities is having adverse effects on the economies of local communities and that environmental remediation requirements are frequently a constraint to the reuse of the facilities. The Act further states that Federal agencies should "expeditiously identify real property that offers the greatest opportunity for reuse and redevelopment..." CERCLA section 120 (h)(4) directed Federal agencies with jurisdiction over real property on which Federal government operations are to be terminated to identify parcels of the real property:

"on which no hazardous substances and no petroleum products or their derivatives were stored for one year or more, known to have been released, or disposed of."



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October 1996. Congress amended this language via the Defense Authorization Act of 1997, by deleting the "storage" provision. The language now reads:

"on which no hazardous substances and no petroleum products or their derivatives were known to have been released, or disposed of."

ERFA and this guidance refer to such parcels as "uncontaminated". The reference to "storage" was deleted to allow property where hazardous substances or petroleum products had been stored with no release or disposal had occurred, to meet the "uncontaminated" criteria in order to facilitate the transfer, reuse and redevelopment of real property. The identification must be based on an investigation of the property including minimum requirements set forth in CERCLA section 120 (h)(4)(A). For parcels of property that are part of a facility on the National Priorities List, the identification is not complete until the EPA concurs in the results. For other parcels, the identification is not complete until the appropriate State official concurs in the results.

The identification of a parcel is based on a review of available information. The military service remains obligated to address any contamination found to pose a threat to human health or the environment. Although parcels that are identified as satisfying the CERCLA section 120 (h) (4) requirements can be sold or otherwise transferred expeditiously, any such transfer must include a covenant committing the United States to perform any remedial action or corrective action found to be necessary after the date of the transfer.

For real property that is part of a military base which was slated for closure prior to CERFA's enactment, the identification and concurrence is to be completed within 18 months of CERFA's enactment. For real property on military bases designated for closing subsequent to CERFA, the identification and concurrence is to be completed within 18 months of the designation.¹ The mandated period for BRAC 1995 installations to identify parcels expires March 28, 1997. For parcels not identified prior to the statutory deadline the military service has continuing opportunity to identify these parcels and seek regulatory concurrence. EPA believes that the identification of such parcels by the military service, with regulatory concurrence, will facilitate their reuse by providing the transferee with the CERCLA section 120 (h)(4) covenant. This position is consistent with DoD's May 18, 1996 policy statement on CERFA implementation.

¹ For property subject to Public Law 103-160, Base Closure Community Assistance Act, Section 2910 (November 30, 1993) concurrence may be mandated at an earlier point in time. This section provides that "the concurrence required under Section 120 (h)(4)(b) of such Act, shall be made not later than the earlier of--(1) the date that is 9 months after the day of submittal, if any, to the transition coordinator for the installation concerned of a specific use proposed for all or a portion of the real property of the installation; or (2) the date specified in Section 120 (h)(4)(C)(iii) of such Act".

II. Purpose

In meeting its obligation under CERCLA section 120 (h)(4), EPA is concerned with both protecting human health and the environment and achieving Congress' goal of expeditiously transferring uncontaminated real property to communities for economic redevelopment. Interpreting CERCLA section 120 (h)(4) to allow the expeditious transfer of parcels where there is no indication that the release or disposal of hazardous substances or petroleum products poses a threat to human health or the environment would aid Congress' intent by increasing the amount of real property which would be available for expedited reuse and redevelopment.

EPA believes that there may be instances in which it would be appropriate to concur with military service that certain parcels can be identified as uncontaminated under CERCLA section 120 (h)(4) although some limited quantity of hazardous substances or petroleum products have been released or disposed of on the parcel. If the information available indicates that the release or disposal was associated with activities which would not be expected to pose a threat to human health or the environment, such parcels should be eligible for expeditious reuse and redevelopment.

III. Guidance

The determination of whether to concur in the identification of an uncontaminated parcel, where the information provided by the military service reveals some level of release or disposal of hazardous substances or petroleum products, should be made on a case-by-case basis. The decision-maker should apply best professional judgement based on the available information in making determinations under CERCLA section 120 (h)(4). The objective should be to include parcels where there is no indication that the release or disposal of hazardous substances or petroleum products has resulted in an environmental condition that poses a threat to human health or the environment. The decision-maker should assume that the real property may be transferred to the public or private sector without any environmental response action being taken on the property.

EPA's ability to concur with the identification of parcels will depend on the information available concerning the current and historical uses of the parcel, the proximity of the parcel to sources of contamination requiring response actions, and the nature of the threat, if any, reasonably associated with the type of activity or contamination associated with the parcel. Where the information presented by the military service does not provide a sufficient basis for concurrence, the EPA Region may elect to withhold concurrence until sufficient information is available. EPA's response to the request for concurrence should specify the additional information required to support concurrence.

The following are examples of three categories of parcels where EPA would generally concur:

Housing: In housing areas, it is likely that hazardous substances and petroleum products contained in heating oil and household products have been released or disposed of; but it is unlikely that, in the absence of evidence of significant releases (e.g. fuel spills), such materials would pose a threat to human health or the environment.

Stained Pavement: There may be evidence of incidental releases of petroleum products on roadways and parking lots, but no indication that such releases pose a threat to human health or the environment.

Pesticides: In the absence of evidence indicating a threat to human health or the environment, e.g., contamination of surface or groundwater, or proximity to sensitive habitat, the routine application of pesticides in a manner consistent with the standards for licensed application should not disqualify a parcel under CERCLA section 120 (h)(4). If information concerning the use of the parcel indicates extensive application of pesticides, EPA may determine that the particular circumstances require that its concurrence be conditioned on further information concerning the nature and quantities of pesticides applied or the results of confirmatory sampling to assure that residual levels do not pose a threat to human health or the environment.

The examples and guidance described above are intended to provide assistance to the decision-maker, but not to strictly limit the application of the policy. The authority to make these determinations has been delegated to the Regions. For questions or further information concerning this revised guidance, please contact Lisa Tychsen at 202/260-9926.

NOTICE: The policies set out in this memorandum do not represent final agency action and are intended solely as guidance. They are not intended, nor can they be relied upon, to create any rights enforceable by any party in litigation with the United States. EPA officials may decide to follow the guidance provided in this memorandum, or to act at variance with the guidance, based on an analysis of specific site circumstances. Remedy selection decisions are made and justified on a case-specific basis. The Agency also reserves the right to change this guidance at any time without public notice .

cc: S. Herman
J. Cannon
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