

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

SAN FRANCISCO BAY REGION
1800 HARRISON STREET, SUITE 700
LAND, CA 94612

GEORGE DE N00296.001030
MOFFETT FIELD
SSIC NO. 5090.3

Phone: Area Code 415
464-1255



December 19, 1990
File No. 2189.8009 (WKB)

Commander
Western Division
Naval Facilities Engineering Command
Attn: Stephen Chao, Code 1813SC
900 Commodore Way, Building 1012
San Bruno, CA 94066-072

Dear Mr. Chao:

This is in response to a November 29, 1990 submittal by your consultant, IT Corp., containing Tables 24.4-1, -2, and -3 for the Moffett Field Characterization Report. We recommend that the following be added to the list of ARARs for this site.

1. The Porter-Cologne Water Quality Control Act, which begins with Section 13000 of the California Water Code.
2. The State's nondegradation policy (State Board Resolution 68-16) is also considered an ARAR. The attached memo from our Chief Counsel addresses the legal aspects of this position. In essence this policy requires cleanup to background levels unless it is shown to be not technically or economically feasible and/or that higher concentrations are for the maximum benefit of the people of the State.

If you have any questions please call Wil Bruhns at 415-464-0838.

Sincerely,

Steve Morse, Chief
South Bay Division

attachment

cc: Lewis Mitani, EPA
Lynn Nakashima, DHS-TSCD
Tom Iwamura, SCVWD
Lee Esquibel, SCCHD
Russ Frazer, City of Mountain View

Attn: [unclear]

1030

R/N 40

State of California

Memorandum

To : Steven R. Ritchie
Executive Officer
San Francisco Bay Regional Board

Date: JUL 30 1990

for William R. Attwater
William R. Attwater
Chief Counsel
OFFICE OF THE CHIEF COUNSEL
From : STATE WATER RESOURCES CONTROL BOARD

Subject: USE OF STATE BOARD RESOLUTION NO. 68-16 AS AN ARAR FOR SUPERFUND SITE CLEANUPS

ISSUE

Is State Board Resolution No. 68-16, Statement of Policy with Respect to Maintaining High Quality of Waters in California, an "applicable or relevant and appropriate requirement" (ARAR) for use in Superfund site ground water cleanups?

CONCLUSION

State Board Resolution No. 68-16 is a promulgated state standard which meets the criteria of an ARAR to be applied in Superfund site ground water cleanups.

DISCUSSION

The Use of State Standards in Superfund Cleanups

In 1980, the Congress adopted the Comprehensive Environmental Response, Compensation, and Liability Act.¹ CERCLA was meant to comprise a comprehensive approach to many sites where releases of hazardous substances were threatening humans and the environment. Cleanup was to occur by short-term "removal" actions and by long-term "remedial actions."² Cleanup could be accomplished by persons who were liable under the Act³ or by

¹ Title 42, U.S.C. Section 9601 et seq. The Act is commonly referred to as CERCLA or Superfund, and these terms will be used interchangeably in this memorandum.

² Title 42, U.S.C., Section 9601.

³ Title 42, U.S.C. Section 9607.

JUL 30 1990

use of the Superfund, a fund which is controlled by the Environmental Protection Agency (EPA).⁴ A central focus of CERCLA is EPA's regulation which provides guidance for the manner in which CERCLA cleanups must be carried out, the National Contingency Plan (NCP).⁵

In 1986, CERCLA was substantially revised to clarify many of the details regarding its application.⁶ One of the major sections of SARA, Section 121,⁷ establishes cleanup standards for remedial actions taken pursuant to CERCLA. Section 121 requires that remedial actions must comply with this section and, to the extent feasible, with the NCP. A significant change in SARA is that through Section 121 Congress clarified that, with a few narrow exceptions, state standards were to be applied in CERCLA cleanups.

With respect to the degree of cleanup required under CERCLA, Section 121(d) provides as follows:

"(1) Remedial actions...shall attain a degree of cleanup of hazardous substances, pollutants, and contaminants released into the environment and of control of further release at a minimum which assures protection of human health and the environment. Such remedial actions shall be relevant and appropriate under the circumstances presented by the release or threatened release of such substance, pollutant, or contaminant.

"(2)(A) With respect to any hazardous substance, pollutant or contaminant that will remain onsite, if--

"...

" (ii) any promulgated standard, requirement, criteria, or limitation under a State environmental or facility siting law that is more stringent than any Federal standard, requirement, criteria, or limitation, ..., and that has been identified to the President by the State in a timely manner,

⁴ Title 42, U.S.C. Section 9611.

⁵ 40 CFR Section 300 et seq.

⁶ The 1986 Act is entitled the "Superfund Amendments and Reauthorization Act of 1986" and is commonly known as SARA.

⁷ Title 42, U.S.C. Section 9621.

"is legally applicable to the hazardous substance or pollutant or contaminant concerned or is relevant and appropriate under the circumstances of the release or threatened release of such hazardous substance or pollutant or contaminant, the remedial action...shall require, at the completion of the remedial action, a level or standard of control for such hazardous substance or pollutant or contaminant which at least attains such legally applicable or relevant and appropriate standard, requirement, criteria, or limitation. Such remedial action shall require a level or standard of control which at least attains...water quality criteria...."⁸

Thus, Section 121 of SARA clarified that Superfund cleanups must attain state standards which qualify as applicable or relevant and appropriate requirements (ARARs). Following the adoption of SARA, EPA made substantial revisions to the NCP.⁹ Included within these amendments is a section regarding identification of ARARs.¹⁰ Of import is Section 300.400(g)(4), which describes the method for determining whether a state standard is an ARAR:

"Only those state standards that are promulgated, are identified by the state in a timely manner, and are more stringent than federal requirements may be applicable or relevant and appropriate. For purposes of identification and notification of promulgated state standards, the term "promulgated" means that the standards are of general applicability and are legally enforceable."

The issues of identification by the state and stringency compared to federal standards should not present great problems. However, the issue of whether a standard has been "promulgated" is expected to engender some controversy, and is, in fact, at the center of Intersil's argument that Resolution No. 68-16 is not an ARAR.

EPA has provided some clarification regarding the meaning of the term "promulgated" in the preamble to the proposed NCP¹¹ and in its response to comments regarding the final rule.¹² In the

⁸ Title 42, U.S.C. Section 9621(d).

⁹ Volume 55, Federal Register, pages 8666 and following.

¹⁰ 40 CFR Section 300.400(g).

¹¹ See, 53 Federal Register 51437-38.

¹² 55 Federal Register 8746.

preamble, EPA described "legally enforceable" as being those state regulations or statutes which contain specific enforcement provisions or are otherwise enforceable under state law. EPA further stated that "legally enforceable" standards must have been issued pursuant to state procedural requirements. Regarding the requirement of "general applicability," the preamble states that an ARAR cannot be promulgated specifically for one or more CERCLA sites, but instead should apply to non-CERCLA sites as well. Finally, the preamble adds that general state goals are potential ARARs. Specifically mentioned are antidegradation rules. The preamble explains that in applying such general goals as ARARs, the lead agency must engage in interpretation of compliance within the context of the implementing regulations, the site, and alternatives.

In adopting the final NCP, which retained the same definition of "promulgated" as in the proposed rule, EPA again stated that "legally enforceable" means that the state laws or standards "must be issued in accordance with state procedural requirements and contain specific enforcement provisions or be otherwise enforceable under state law."¹³ EPA also repeated its explanation of the term "of general applicability." Finally, EPA responded to several comments regarding its statement, in the preamble, that general goals could be ARARs and its specific example of state nondegradation goals. EPA replied as follows:

"General goals that merely express legislative intent about desired outcomes or conditions but are non-binding are not ARARs. EPA believes, however, that general goals, such as nondegradation laws, can be potential ARARs if they are promulgated, and therefore legally enforceable, and if they are directive in intent."¹⁴

EPA went on to explain that an interpretation of a general nondegradation goal would be accomplished by using the State's designation of beneficial uses and any water quality standards (or objectives) which set specific concentration levels. EPA also stated that even if there were no implementing regulations, the general goal would still be an ARAR, but EPA would have latitude in determining how to comply with the goal.

¹³ 55 Federal Register 8746. It is interesting to note that while in the preamble EPA spoke of "statutes and regulations," the language in the final rule speaks of "laws or standards". This terminology is broader in scope and would clearly allow for documents such as Resolution No. 68-16, which are not adopted as a regulation or a statute. In fact, the State Board made comment to EPA regarding this point, and the change in the language may be a result of that comment.

¹⁴ 55 Federal Register 8746.

JUL 30 1980

Resolution No. 68-16 as an ARAR

As is explained above, a key issue in determining whether a state standard is an ARAR is whether it has been "promulgated."¹⁵ To be "promulgated" the standard must be legally enforceable and must be generally applicable. In order to determine whether Resolution No. 68-16 meets these criteria it is necessary to review the adoption of this policy and also its application over the years.

The State Board adopted Resolution No. 68-16 in 1968, as part of state policy for water quality control, in response to a 1968 Department of Interior directive calling for adoption of state policies. (In 1974, EPA adopted its own antidegradation policy in response to the same directive.) The state policy is similar to the federal antidegradation policy, but has broader applicability, since it applies to all waters of the State. Specifically, the State policy applies to ground water, whereas the federal policy applies only to surface water. Resolution No. 68-16 contains the following statements:

"1. Whenever the existing quality of water is better than the quality established in policies as of the date on which such policies become effective, such existing high quality will be maintained until it has been demonstrated to the State that any change will be consistent with maximum benefit to the people of the State, will not unreasonably affect present and anticipated beneficial use of such water and will not result in water quality less than that prescribed in the policies.

"2. Any activity which produces or may produce a waste or increased volume or concentration of waste and which discharges or proposes to discharge to existing high quality waters will be required to meet waste discharge requirements which will result in the best practicable treatment or control of the discharge necessary to assure that (a) a pollution or nuisance will not occur and (b) the highest water quality consistent with maximum benefit to the people of the State will be maintained."

In addition to being adopted by the State Board as a state policy for water quality control, Resolution No. 68-16 has also been incorporated into each of the Regional Boards' water

¹⁵ To be an ARAR for a specific site, the standard must also be legally applicable or relevant and appropriate. Intersil is not contesting these grounds for identification of Resolution No. 68-16 as an ARAR.

JUL 30 1990

quality control plans. These provisions in the water quality control plans have in turn been accepted by EPA as the state's antidegradation policy, which is a part of its water quality standards.

In determining whether Resolution No. 68-16 is "legally enforceable," the NCP requires that the standard be issued in accordance with state procedural requirements and either contain specific enforcement provisions or be otherwise enforceable under state law. Water Code Section 13140 specifically authorizes the State Board to adopt state policies for water quality control. It requires such policies to be adopted in conformance with the procedural requirements contained within the Water Code, which include hearing and notice. Resolution No. 68-16 was adopted properly, following a public hearing by the State Board. Overmore, each Regional Board then followed the statutory procedural requirements in adopting the Resolution as a water quality objective in its Basin Plan. These requirements, which also include notice, hearing, and formal approval by the State Board, are contained in Water Code Section 13240 and following. Upon adoption as a part of the water quality control plan, Resolution No. 68-16 became a legally enforceable document under state law. Water Code Section 13263 requires the regional boards to implement the basin plans in waste discharge requirements. The enforcement provisions of the Water Code (including Sections 13301 and 13350) allow for enforcement of all provisions of waste discharge requirements. In addition, pursuant to Health and Safety Code Section 25187, the Department of Health Services must require compliance with policies for water quality control and water quality control plans in its corrective action orders for hazardous substance releases, except in limited situations.

Intersil argues that Resolution No. 68-16 is not legally enforceable based on its claim that it is "a general statement of policy." This argument is curious in that EPA stated in its preamble, and repeated in its final rule, that "general goals, such as nondegradation laws, can be potential ARARs if they are promulgated, and therefore legally enforceable, and if they are directive in intent."¹⁶ As was discussed above, Resolution No. 68-16 was promulgated, and it is directive, containing specific limits on degradation of water. As was explained in EPA's example, reference must be had to other provisions of the Basin Plan to determine beneficial uses which must be protected, but that is not a reason to determine that the Resolution is not an ARAR.

To determine that a state standard is "of general applicability" it must be applicable to all remedial situations covered by the

JUL 30 1990

requirement, and not just CERCLA sites. On its face, Resolution No. 68-16 applies to all waters within the State, and to all situations in which those waters may be degraded. The Regional Boards have frequently applied the Resolution in the context of ground water cleanup. In two State Board orders, the State Board applied the test established in the Resolution in considering issues concerning appropriate cleanup levels for ground water contamination.¹⁷ These cleanups were being conducted pursuant to state law, and not to CERCLA. It is clear from reading the NCP that EPA's sole concern in the "general applicability" requirement is that cleanups performed pursuant to CERCLA not have more stringent remedial standards than non-CERCLA cleanups. This is the case with Resolution No. 68-16 and Intersil's protestations that the resolution may not have been applicable or relevant and appropriate in some other CERCLA cleanups is simply immaterial.

In summary, Resolution No. 68-16 is quite similar to the nondegradation requirements which EPA addressed in the NCP and it is an appropriate ARAR. In its implementation as an ARAR, some interpretation is necessary, especially as concerns the relevant water body. The issue of interpretation is discussed below.

Implementation of Resolution No. 68-16 as an ARAR

Intersil claims that the Regional Board required an alternative be discussed which would return ground water to background levels. As is discussed in the NCP, once a standard is determined to be an ARAR, it must be interpreted in order to be implemented in the remedial action. This process occurs through the decision on the remedial action. In the case of Resolution No. 68-16, it is necessary to make a determination regarding whether any degradation will be consistent with maximum benefit to the people of the State, and whether such degradation will not unreasonably affect present and anticipated beneficial uses of the water. It is appropriate to review prior State Board decisions, such as Order No. 86-16, in making this decision.¹⁸ Again, while decisions regarding interpretation of Resolution No. 68-16 may be difficult, this is not a reason to decide that it is not an ARAR.

¹⁷ State Board Orders Nos. WQ 86-8 and WQ 86-16.

¹⁸ EPA states, at 55 Federal Register 8746, that it "may consider guidelines the state has developed related to the provision, as well as state practices in applying the goal, but such guidance or documents would be TBCs (to be considered), not ARARs.