



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

75 Hawthorne Street
San Francisco, CA 94105-3901

March 20, 1996

Mr. Stephen Chao
Naval Facilities Engineering Command
Engineering Field Activity, West
900 Commodore Way, Bldg. 101
San Bruno, CA. 94066-2402

Re: *Draft Operable Unit 5 Record of Decision*, dated February 7, 1996

Dear Mr. Chao,

The U.S. Environmental Protection Agency (EPA) has received the subject document and provides the following comments. If you have any questions, please call me at 415-744-2385.

Sincerely,

A handwritten signature in cursive script that reads "Michael D. Gill".

Michael D. Gill
Remedial Project Manager
Federal Facilities Cleanup Office

Attachment: CWA Section 404 memo dated August 19, 1987 (4 pages)

cc: Michael Bessette (RWQCB)
C. Joseph Chou (DTSC)
Ken Eichstaedt (URS)
Sandy Olliges (NASA)
Peter Strauss (MHB)
Mike Young (PRC) (Fax)

COMMENTS

Draft Operable Unit 5 Record of Decision, dated February 7, 1996

GENERAL COMMENTS

1. The Record of Decision (ROD) is intended to be the document where the final selection of a remedy is recorded, along with that remedy's ARARs. This ROD does not properly define the discharge method to be used at OU5, nor does it provide the level of appropriate detail of the regulations that apply to this portion of the remedy. Each discharge option (i.e., reinjection, surface water discharge, reuse, etc.) will trigger different ARARs. In addition, the ARARs will freeze at the time the ROD is signed; thus, a ROD that does not select a discharge option is not a complete ROD. The Navy should select a discharge method and present it along with its ARARs in this ROD. A table with ARARs (as in the Feasibility Study) should provide appropriate detail and explanation. Describe which ARARs apply to the remedy, where they come from, why they must be attained, indicate whether Federal or State regulations apply and include citations. They should be separated into chemical, location and action specific ARARs.
2. The continued operation of the Building 191 pump station is necessary for the successful implementation of the selected pump and treat alternative at OU5. Without its operation, the northern portion of the base will flood during the rainy season and could change groundwater flow direction. This may cause problems for the pump and treat system. Its absence implies that the remedy is effective without it. The operation of Building 191 needs to be made part of the remedy.

SPECIFIC COMMENTS

3. Statement of Basis and Purpose, page DS-1. The discharge method to be used should be defined and added to discussion of the selected remedial action.
4. Assessment of the Site, page DS-1. Rearrangement and modification of this paragraph is suggested as follows:

"OU5 consists of the aquifers...and vinyl chloride. Actual or threatened releases of these COCs from OU5, if not addressed by implementing the response action selected in this Record of Decision (ROD), may present a current or potential threat to public health, welfare, or the environment. The area that is targeted for treatment is the southern plume at OU5. There is no action required for the northern plume because the groundwater does not satisfy the state's criteria as a potential drinking water source and poses no unacceptable risk to human health or the environment."

5. Description of the Selected Remedy, page DS-2. The selected discharge method should be included in the third bullet.
6. Section 1.2, page 5. A more descriptive title for this section would be "Site History and Summary of Enforcement Activities".
7. Section 1.2, page 7, last para. Please include references to the soils investigation activities and documents for the soils overlying the OU5 aquifers. The OU2-East ROD, signed in December, 1994, determined that no action was necessary for the soils overlying the OU5 aquifers (except for petroleum contaminated areas). The many petroleum related activities performed in this area should also be referenced.
8. Section 1.3, page 9, para 1. This paragraph should be rewritten. EPA's Technical Assistance Grant (TAG) was not awarded to Silicon Valley Toxics Coalition until late 1993. The Technical Review Committee (TRC) was formed prior to the award of the TAG. They both preceded the formation of the RAB. In this paragraph, also mention the publication of miscellaneous site work fact sheets that are used as communication tools for community participation.
9. Section 1.3, page 9, para 2. Please note the size of the mailing list for the proposed plan.
10. Section 1.4, page 10. Please update the Station-wide ROD submittal date to be consistent with that in the Moffett Federal Airfield BRAC Business Plan (May 1997).
11. Section 1.4, page 10, para 4. Mention that Moffett Federal Field has already been transferred to NASA.
12. Section 1.5, page 11, para 2. Please doublecheck these COC concentrations to ensure that they are consistent with those listed in Table 3. Presently, the values of 1,2-DCE, 1,2-DCA and 1,1-DCE are inconsistent.
13. Section 1.5, page 11, para 2. Clarify that it has been determined that the inorganics detected at "ambient concentrations" are naturally occurring.
14. Section 1.6, pages 17, 18, Ecological Risk Summary.

A. Please explain how the discharge option will affect the ecological risk.

B. Clarification - Section 404(f)(1) of the Clean Water Act provides a permit exemption for the maintenance of drainage ditches. However, it does mean the area is not a wetland; it is still a jurisdictional wetland which is subject to the ecological risk assessment. In addition, pursuant to section 404(f)(1), ditch maintenance does not include filling in the ditch or expanding it. See attached

memo for clarification (dated August 19, 1987). EPA suggests you remove the phrase "...and thus, are not considered jurisdictional wetlands." from the bottom of page 17.

C. Clarification - Any remedial action affecting the drainage ditches will not require a permit if the ditch is on site pursuant to a CERCLA cleanup. However, the substantive requirements of a permit will have to be met.

D. Are you considering Section 404(f)(1) to be an ARAR? If so, you should include in the ARARs section of the ROD.

E. Please explain how and why Section 402 of the Clean Water Act exempts the pond area from being a jurisdictional wetland. In order to avoid confusion, similar to above, we suggest you remove the phrase "...the area is not a jurisdictional wetland under Section 404 of the Clean Water Act" and reorganize the sentence.

15. Table 3, page 19, 20. Same as comment #12.
16. Section 2.0, page 23, para 3. Please clarify the future treatment option. The ARARs would need to be determined for this treatment option in order for it to be a viable remedial alternative in the ROD.
17. Section 3.0, page 26. Once again, the selection of a discharge method, along with identification of associated ARARs should be made in this document. We suggest providing these ARARs in a table, as was done in the FS.
18. Section 3.1, page 26, Chemical-Specific ARARs.
 - a. Include citations.
 - b. What are the MCLs? Are they stricter than the state counterpart?
 - c. What sections of the Porter-Cologne Water Quality Control Act are applicable or relevant and appropriate?
19. Section 3.2, page 27, Location-Specific ARARs. You indicate that there are some endangered species on the base, yet you do not include the Endangered Species Act or the state equivalent as an ARAR.
20. Section 3.3, page 27, Action-Specific ARARs.
 - a. Your references to ARARs are too general (i.e., "The air stripper generates an air stream that must meet the BAAQMD substantive requirements..."). Please

identify with specificity the ARARs, with citations, and indicate why they apply.

b. The ARARs for the selected discharge option must be identified in the ROD.

21. Table 5, page 30. Please provide the selected discharge method in this table.
22. Section 4.0, page 31, last para. Clarify that it has been determined that the inorganics detected at "ambient concentrations" are naturally occurring.
23. Table 6, page 33. If the information is available, please break the costs out into capital, program and O&M costs.
24. Section 6.0, page 35, para 2. The paragraph states "...the nearest residential area is far from the OU5 area". Please quantify this distance.

COMMENTS ON RESPONSIVENESS SUMMARY

25. Section 3.1, Comment 2. Bldg 191. If Building 191 is necessary for successful implementation of the remedy, it should be part of the remedy and discussed in the body of the ROD.
26. Section 3.1, Comment 3. This question asks about ongoing Navy financial responsibility and the answer doesn't address that subject. The U.S. government retains responsibility, unless otherwise negotiated. EPA suggests changing the last sentence in the response to: "Any transfer of financial responsibility from the U.S. government would be negotiated and documented as part of the terms and consideration for the conveyance."
27. Section 3.1, Comment 4. Adding the following sentence to the response will provide more clarity: "Cleanup of COCs in OU5 will occur wherever groundwater is a potential drinking water source."
28. Section 3.2, Comment 1. Please briefly elaborate on what EPA and DOD guidance suggest for post-ROD public participation. Exactly how will people who do not attend the RAB be informed? Fact Sheets? RAB member updates to the community?
29. Section 3.3, Comment 1. Please provide a reference to the document in which the leaching evaluation can be found.
30. Section 3.3, Comment 6. If Building 191 is necessary for successful implementation of the remedy, it should be part of the remedy and discussed in the body of the ROD.
31. Section 3.4, Comment 1. Please add that the east side soils at Moffett Field (e.g. OU2-East) were not necessary to remediate because they presented no unacceptable risk for

an industrial scenario use, as noted in the no action OU-2 East ROD. The use of that land is presently not restricted for industrial use.

32. Section 3.5, Comment 3. Please add a statement that clarifies that "EPA Region 9 reserves the right to take site specific risk reduction or remedial measures when contaminant concentrations are estimated to pose risks in this range".
33. Section 3.5, Comment 4. Please clarify in the last sentence that "...there were no unacceptable risks to site workers...".

EDITORIAL COMMENTS

34. Page DS-3. The correct spelling of the Executive Officer's name is "Barsamian".
35. Section 1.4, page 10, para 1, last sentence. Grammatical correction: "The remaining sites are planned to be addressed...".
36. Responsiveness Summary, Section 3.12, Comment 1. We suggest the following grammatical changes to sentences in the third paragraph:

Sentence 2: "There are other Superfund or non-Superfund sites that are comparable to OU5 in size and area."

Sentence 3: "But the extent of contamination at OU5 is different and is therefore addressed accordingly."

Sentence 5: "The selected remedy, treatment of groundwater using air stripping, is anticipated to achieve the cleanup goals over the duration of the remediation period."



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

AUG 19 1987

OFFICE OF
WATER

PROGRAM GUIDANCE MEMO 87-1

SUBJECT: Section 404(f)(1)(C) Statutory Exemption
for Drainage Ditch Maintenance

FROM: David G. Davis, Director
Office of Wetlands Protection

TO: Regional Division Directors/ARAs (Wetlands Program)

Attached for your attention and implementation is OWP Program Guidance Memo 87-1 on the Section 404(f)(1)(C) statutory exemption for drainage ditch maintenance. This guidance was developed jointly by EPA and the Corps of Engineers to address questions regarding the interpretation of the drainage ditch exemption. The Corps of Engineers is concurrently issuing a Regulatory Guidance Letter to their field offices transmitting this same guidance.

If questions arise regarding the implementation of this guidance, please contact Greg Peck at (FTS) 475-8794.

Attachment

cc: Regional Wetlands Coordinators
OGC/Water
OECM/Water
WPC



DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF ENGINEERS
WASHINGTON, D.C. 20314



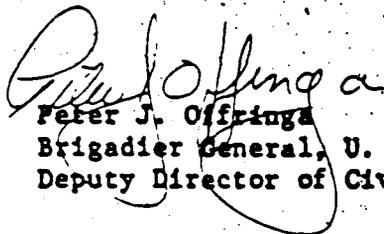
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WASHINGTON, D.C. 20460

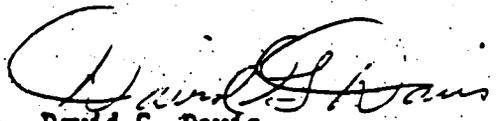
SUBJECT: Section 404(f)(1)(C) Statutory
Exemption for Drainage Ditch Maintenance

1. The discharge of dredged or fill material in waters of the United States associated with specific agricultural and silvicultural activities identified in Sections 404(f)(1)(A)-(F) is not prohibited by or otherwise subject to regulation under Section 404, 301, or 402 of the Clean Water Act (CWA) except; (1) as provided under Section 404(f)(2), or (2) if a discharge resulting from a 404(f)(1) activity contains a toxic pollutant listed under Section 307 of the CWA.
2. Section 404(f)(1)(C) specifically provides that dredge or fill discharges for the purpose of maintenance (but not construction) of drainage ditches are exempt under Section 404.
3. Section 404(f)(2), referred to as the "recapture provision," provides that any discharge of dredged or fill material in waters of the United States incidental to the maintenance of drainage ditches (or other activities listed under 404(f)(1)) must be authorized by permit if it is part of an activity whose purpose is to convert an area of the waters of the United States to a use to which it was not previously subject, where the flow or circulation of such waters may be impaired or their reach reduced.
4. In order to conclude that a given discharge activity associated with ditch maintenance is exempt from regulation, it must be determined both that the proposed activity falls within Section 404(f)(1)(C) and that it is not recaptured under Section 404(f)(2).
5. For purposes of determining whether or not a proposed activity falls under the provision for ditch maintenance at 404(f)(1)(C), the following interpretations will apply:
 - a) maintenance of a drainage ditch means the physical preservation of the original, as built configuration of the ditch. (The District may wish to consider issuance of a General Permit to allow for alteration of ditch side slopes in order to provide Best Management Practices to protect water quality. Such General Permit would allow this construction in association with exempted maintenance so long as the bottom depths and widths of the ditches are not otherwise altered.)
 - b) maintenance includes the removal of accumulated sediment and debris.
 - c) Unlike Section 404(f)(1)(A), there is no "ongoing" requirement associated with Section 404(f)(1)(C). However, facts relating to the current use of an area could be relevant under Section 404(f)(2), and therefore pertinent to whether or not an exemption applies.

- d) Because the statute clearly does not exempt "construction" of drainage ditches from regulation under the CWA, ditches being built for the dual function of irrigation and drainage are considered drainage ditches and their construction is not exempt.
6. For the 404(f)(2) recapture provision to apply, both the "change in use" requirement and the "reduction in reach/impairment of flow or circulation" requirement must be met.
 7. For purposes of determining whether or not the 404(f)(2) recapture provision is triggered, the following interpretations will apply:
 - a) the discharge of dredged or fill material itself does not need to be the sole cause of the destruction of the waters of the United States (e.g., wetlands) or other change in use or the sole cause of the reduction in or impairment of, reach, flow or circulation of such waters. The discharge need only be "incidental to" or "part of" an activity that is intended to or will foreseeably bring about that result.
 - b) A discharge of dredged or fill material which converts a Section 404 wetland to a non-wetland is a change in use of an area of the waters of the United States (33 CFR §323.4(c)). For purposes of determining whether a discharge associated with the maintenance of a drainage ditch is recaptured under 404(f)(2), it is necessary to determine whether such maintenance activities would convert wetlands to a use to which the area was not previously subject. Determining the previous use requires a case-by-case assessment which applies a rule of reason to the facts. For example, if an area has been farmed following ditch construction and an effort has been made to farm the land within the originally constructed ditch drainage area on a regular but not necessarily continuous basis, the fact that wetland vegetation has temporarily reestablished does not mean that a continuation of farming after ditch maintenance will result in bringing the area under a new use. That is, the temporary establishment of wetland vegetation within an area benefitted by original ditch construction does not automatically mean that the use to which the area was previously subject should be considered "wetland." On the other hand, a discharge which results in the farming of wetlands for which there is no reasonable evidence that they were ever farmed or where farming was abandoned following original ditch construction, will be considered a new use even where such land was within the original drainage area. For the purposes of this paragraph, an area will not be considered abandoned where farming has occurred on a regular but not necessarily continuous basis.
 - c) where the proposed discharge will result in significant discernible alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration.

8. In situations where the potential applicability of a proposed discharge to the exemption under Section 404(f)(1)(C) has been raised to the District, and where the District cannot make a determination due to a lack of pertinent factual information, it is incumbent on those seeking exemption to provide the documentation necessary to establish the facts on a case-by-case basis.


Peter J. Offringa
Brigadier General, U. S. Army
Deputy Director of Civil Works


David G. Davis
Director
Office of Wetlands Protection