



DEPARTMENT OF THE NAVY

NAVAL FACILITIES ENGINEERING COMMAND

200 STOVALL STREET

ALEXANDRIA, VA 22332-2300

IN REPLY REFER TO

08.01-02/02/90-00472  
February 2, 1990

Edythe McKinney  
Assistant Secretary for  
Environmental Protection  
Department of Environment,  
Health and Natural Resources  
P.O. Box 27687  
Raleigh, NC 27611-7687

Re: Federal Facility Agreement for  
Marine Corps Base Camp Lejeune

Dear Ms. McKinney:

I am an environmental attorney in the Office of Counsel at the headquarters of the Naval Facilities Engineering Command (NAVFAC). My job duties include coordinating and supporting the efforts in the field to negotiate environmental compliance agreements with state and federal regulatory agencies. NAVFAC is the command within the U.S. Department of the Navy which has been delegated responsibility for negotiating Federal Facility Agreements (FFAs), pursuant to Section 120 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), with the States and the U.S. Environmental Protection Agency (EPA). NAVFAC Headquarters has largely delegated this responsibility to its Engineering Field Divisions.

An FFA is an agreement which governs the clean-up process for hazardous waste sites at federal facilities which are on the National Priorities List (NPL). The NPL is a list prepared by EPA of hazardous waste sites that have a higher priority with regard to their relative risk to human health and the environment. Although an FFA can be entered into between just the Navy and EPA, it is the policy of the Department of Defense (DoD) and the Navy to encourage the State to also become a party to an FFA. The Department of the Navy generally takes the position that the clean-up and dispute resolution process in an FFA is a sound method to structure the Navy's relationships with both the State and EPA during the remediation of CERCLA sites at Navy and Marine Corps installations.

Marine Corps Base (MCB) Camp Lejeune is on the NPL. As you know, since last summer, representatives from your Department have been meeting with representatives of EPA Region IV and the Department of the Navy to negotiate an FFA for MCB Camp Lejeune. The negotiating team from the Department of the Navy included attorneys and environmental engineers from MCB Camp Lejeune and from NAVFAC's Atlantic Division ("LANTDIV") which is located in Norfolk, Virginia. From the beginning the Navy and the Marine Corps have appreciated the hard work and good will that your Department brought to the negotiating table.

Last December a tentative agreement was successfully reached on the language for an FFA for MCB Camp Lejeune. The draft FFA, which is more than 100 pages long, is the result of an extensive collaboration between attorneys and environmental engineers. The negotiating process required the expenditure of a significant amount of time and resources. The draft FFA includes a provision for the reimbursement of the oversight costs of the State of North Carolina. The draft FFA also includes a provision for a non-judicial dispute resolution process. The negotiations were particularly successful in that the draft FFA includes both MCB Camp Lejeune and Marine Corps Air Station (MCAS) New River.

LANTDIV formally sent the draft FFA up the chain of command for review and approval by higher headquarters in the Marine Corps and the Navy. The formal review and approval process includes a review by engineering and counsel's offices at NAVFAC headquarters, at Marine Corps headquarters, and at the Office of the Assistant Secretary of the Navy. It is also DoD policy to allow the other military services an opportunity to review and comment on all proposed FFAs.

As you can tell, there are a large number of steps in our hierarchy between the field and the signatory to an FFA. We try very hard to flag all issues and to have draft FFAs reviewed and approved informally to avoid the need to suggest any changes that result from the formal review and approval process. However, in this case, I have been asked to suggest to the State of North Carolina a technical change in the draft FFA. I have already informally brought this proposal to the attention of Nancy Scott at the North Carolina Department of Justice and to an engineer in William Meyer's office at the Solid Waste Management Division of your Department.

Every completed FFA to date has been signed and then put out for public comment. In this case, however, an alternative procedure was agreed upon. Instead of signing the FFA, and then putting it out for public comment, it was agreed that that a Letter of Intent (LoI) would be signed first, and then the FFA would be officially signed after the public comment period was completed. While the formal review and approval process within the Marine Corps and the Navy was occurring, both EPA Region IV and your Department apparently approved the draft FFA and signed the LoI. As a result, I am now unfortunately in the somewhat problematical position of requesting a minor change to the FFA in order for the Department of the Navy to be able to add its signature to the LoI.

The issue was raised during the formal review and approval process whether the draft FFA expressly includes the State of North Carolina as a party to the agreement. It could be argued, that on the face of the agreement, the parties are the Navy, EPA, and the Department of Environment, Health and Natural Resources (DEHNR). In every other FFA that has been entered into by a federal agency, the State as a "State" has been the official party to the agreement.

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There are many ways to reflect that a State is the official party to an FFA. The most common method is to have the agreement refer throughout to the relevant state agency (in this case DEHNR) and then to have the "Definitions" and "Parties" sections and the signature block expressly reflect that the relevant state agency is representing the State for purposes of the FFA.

This problem with the draft FFA can legally be called a technical "glitch". I think that your negotiators probably intended for DEHNR to represent the State of North Carolina in this matter because it is my understanding that no other state governmental entity outside of your Department has jurisdiction over a CERCLA clean-up at a federal facility. In addition, the State of North Carolina is expressly referenced at several places in the draft FFA. See, Paragraph III.FF (definition of State); Section XXIV (The State's Reservation of Rights); Section XXXVI (Recovery of USEPA and State Expenses).

I am enclosing a proposal to make a few minor amendments to the LoI and the draft FFA. I think that this is the minimum number of changes which would clarify the issue of the State of North Carolina's participation as a party to the FFA. However, as I mentioned above, there are many ways to indicate that a State is a party to an FFA and the Department of the Navy is quite willing to discuss any alternative language that might be suggested by your Department.

I think that this a simple matter that could be resolved quickly, perhaps over the telephone. I can be reached at (703) 325-8553. I would also be glad to come to North Carolina for additional negotiations on this issue, if necessary. I feel certain that our two organizations can successfully resolve this technical problem, so that the Navy and the Marine Corps can continue to work directly with the State of North Carolina on the important process of remediation of hazardous waste sites at MCB Camp Lejeune and MCAS New River.

Please feel free to call me to discuss this matter further. I appreciate your cooperation in this matter and look forward to hearing from you.

Sincerely yours,



RAY GOLDSTEIN  
Assistant Counsel (Environmental)

Enclosure

cc: William Meyer  
Nancy Scott  
Gordon Davidson  
Beverly Spagg  
Elaine Lavine  
Bob Warren  
LtCol P. Wilbur  
LtCol J. Wellington  
Elsie Munsell  
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John Wittmann  
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