

10/22/03-01381

**Capito, Bonnie P. (EFDLANT)**

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**From:** Harlow, Jeffrey C. (EFDLANT)  
**Sent:** Wednesday, October 22, 2003 3:51 PM  
**To:** Capito, Bonnie P. (EFDLANT)  
**Subject:** Cax Site 1 CERCLA permit exemption resolution with VMRC

Bonnie, Please incorporate in the Admin Record.

Jeffrey Harlow  
Code EV22JH  
1510 Gilbert St  
Norfolk VA, 23511-2699  
757 322 4787  
fax 322 4805

-----Original Message-----

**From:** Bob Grabb [mailto:Bgrabb@mrc.state.va.us]  
**Sent:** Tuesday, October 21, 2003 3:15 PM  
**To:** Smith, Phil N. (EFDLANT)  
**Cc:** Bill Pruitt; Tony Watkinson; cjosephson@oag.state.va.us  
**Subject:** Re: Cheatham Annex Proposed Remedial Action

Phil - Based on your assertion that the remedial action proposed (i.e. installation of offshore breakwaters) for the Cheatham Annex NPL site lies within the areal extent of contamination due to the significant erosion resulting from Hurricane Isabel, we concur in your assertion that all proposed activities are occurring on-site. As a result, the permit exemption of CERCLA §121(e)(1) applies and no permit or authorization from this agency will be required for the remedial action proposed. In the event the remedial action cannot be accomplished in the manner specified, or in accordance with the project design criteria, additional coordination and a reevaluation of our position may be required. It has been a pleasure to work with you over the past few days in an effort to resolve this situation to the mutual satisfaction of all parties concerned.

Robert W. Grabb  
Chief, Habitat Management  
Virginia Marine Resources Commission  
757-247-2250  
757-247-8062 (fax)  
bgrabb@mrc.state.va.us

>>> "Smith, Phil N. (EFDLANT)" <SmithPN@efdlant.navfac.navy.mil>  
10/21/03 02:13PM >>>

Bob, as we discussed previously, the Navy and EPA, Region III, technical, management and legal counsel consider the breakwaters to be "on site" for the purposes of CERCLA section 121(e) and the NCP 40 CFR 300.400(e)(1). Particularly in light of what Hurricane Isabel has uncovered, we believe, as does EPA and VDEQ, that we need to take action quickly to prevent further erosion and release and protect the river and marine resources of the Commonwealth. The ARAR process has been followed in accordance with CERCLA guidelines and the appropriate State, local

community and other Federal agencies consulted throughout the process. The project work will proceed in strict accordance with the design provided to you previously and to which your staff concurred. If future changes are made due to changing site conditions, it will be necessary to get concurrence of all parties involved in the original design.

We appreciate your willingness to work with us on extremely short notice, and I will ensure that we continue to coordinate closely with you on this and future CERCLA work. This email has been coordinated with Hank Sokolowski, EPA Region III, Chief Superfund Enforcement and Federal Facilities. I have provided below a legal opinion from EPA's lead attorney.

P. N. SMITH, P.E.  
Director  
Environmental Division  
Atlantic Division, Naval Facilities Engineering Command  
757-322-4800

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| To: "Shepherd, David S. (EFDLANT)"  
<ShepherdDS@efdlant.navfac.navy.mil>  
|  
| cc: "McBride, Sean A. (EFDLANT)"  
<McBrideSA@efdlant.navfac.navy.mil>, Greyson Franklin/R3/USEPA/US@EPA,  
Margaret |  
| Hottensen/R3/USEPA/US@EPA  
|  
| Subject: On-site for purposes of permit shield under  
CERCLA(Document link: Greyson Franklin) |  
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As you know, the Navy has asked EPA to review and comment for purposes of application of CERCLA Section 121(e), and associated regulation, on the soil erosion control technology the Navy intends to install in the York River along the shore at Site 1 (the Cheatham Annex), Naval Weapons Station Yorktown, Yorktown, VA. As you also know, I am the EPA staff attorney assigned to provide legal counsel on CERCLA activities at Yorktown.

Given the situation as we know it, EPA believes that CERCLA 121(e), as interpreted by 40 CFR 300.400(e)(1), would apply to the breakwater and that no federal or state permit should be required for its installation.

I understand that the Navy plans to install a breakwater in the York River to prevent further erosion of the shoreline at Cheatham Annex, along which a CERCLA-regulated landfill lies. I also understand that debris from the landfill has been exposed as a result of Hurricane

Isabel and that the Navy staff assigned to the matter believe that, without the breakwater, further soil erosion will occur, causing a release (or threat of release) of hazardous substances into the York River. Furthermore, Greyson Franklin, EPA's assigned Remedial Project Manager for Yorktown, has informed me that the Yorktown team has determined that, especially in light of the affects of Hurricane Isabel, installation of the breakwater is by far the best erosion control method available for this Site and this purpose and that the breakwater will be installed as close to the shore as possible to be effective. In fact, Greyson has informed me that the breakwater, when installed, will touch the shoreline at the landfill because a road will be built to move the materials into the river and that, in the end, the road will remain and itself provide protection to the shore.

The National Oil and Hazardous Substances Pollution Contingency Plan (NCP) at 40 CFR 300.400(e)(1) states:

No federal, state, or local permits are required for on-site response actions conducted pursuant to CERCLA sections 104, 106, 120, 121, or 122. The term on-site means the areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action.

If the breakwater will be installed as close to the shore as possible for it to function to prevent the release of hazardous substances from the Site, and if no other technology that would be equally effective in preventing the release of hazardous substance from the Site is available and practicable, then it is EPA's position that the breakwater should be considered "on-site" for purposes of CERCLA 121(e) and 40 CFR 300.400(e)(1). The position of the breakwater, if it is as close to the shore as possible to function, would be, in our view, a suitable area necessary for the implementation of the response action.

If you would like to discuss matters pertaining to the Yorktown Site, please feel free to contact me.

Suzanne M. Parent  
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