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07/16/99

VIA FACSIMILE

Date: July 15, 1999

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To: Polin ModanJou
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From: Sally A. Drach and John Schlotterbeck

Re: County of Orange – MCAS El Toro
Comments Upon Draft Final ROD for Sites 2 and 17

At your request, we have prepared the following preliminary comments on behalf of the Orange County Local Redevelopment Authority ("LRA") concerning the June 1999 Draft Record of Decision, Operable Unit 2B, Landfill Sites 2 and 17, Marine Corps Air Station El Toro, California ("Draft ROD") prepared by and on behalf of the Department of Navy, U.S. Marine Corps ("DON/USMC"). These comments are intended to supplement the July 1999 draft memorandum regarding the Draft ROD prepared by GeoSyntec Consultants ("GeoSyntec").

As you know, DON/USMC originally contemplated transferring ownership and control of a significant portion (approximately 1,000 acres) of MCAS El Toro, including Sites 2 and 17, to the Department of Interior ("DOI"). We understand that DOI is reconsidering this proposal, and that DON/USMC may consider alternative conveyances to the Federal Aviation Administration ("FAA"). The precise details of the transfer of the ownership, operation and use of such property are the topic of ongoing discussions by and among DON/USMC, the DOI, and FAA.

It is our understanding that you have discussed this issue with DON/USMC. DON/USMC has agreed to meet with the LRA and its representatives in late July or early August 1999. DON/USMC further has agreed to accept and consider any comments submitted by or on behalf of the LRA on the Draft ROD up to and including the date of the (presently unscheduled) meeting, or any subsequent date that may be agreed upon by the parties.

In anticipation of the upcoming meeting with DON/USMC, you have requested McCutchen and GeoSyntec to prepare draft memoranda summarizing in general terms key concerns with the Draft ROD that the LRA has identified to date. As additional information and

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clarification is obtained with respect to the transfer of ownership and control of Sites 2 and 17, GeoSyntec and McCutchen, acting on behalf of the LRA, may have additional comments on the Draft ROD. In addition, at your request, we would be pleased to prepare specific proposed revisions to the Draft ROD to discuss with DON/USMC at the upcoming meeting of the parties.

A. FUTURE LAND USE: TRANSFER OF SITES 2 AND 17

In various sections of the Draft ROD DON/USMC (a) refers to the transfer of Sites 2 and 17 to the United States Fish and Wildlife Service ("USFWS") by means of a Federal agency to Federal Agency transfer, and (b) identifies the USFWS as the subsequent owner of Sites 2 and 17. See, e.g., Draft ROD at §§ 1.7 and 7.2.1. If DON/USMC considers alternative conveyances, we recommend that DON/USMC ~~revise the Draft ROD to document potential changes in the status of the proposed transfer~~ to the USFWS. At a minimum, DON/USMC should revise the Draft ROD to acknowledge potential alternative conveyances (i.e., that some or all of Sites 2 and 17 may be transferred by DON/USMC to an entity other than USFWS) and to ensure that the proposed remedies do not unduly impair the entities' anticipated uses of the sites.

In addition, it is our understanding that DON/USMC is aware of the anticipated use of property located adjacent to or in the vicinity of Site 17 by the FAA. We recommend that DON/USMC ~~revise the Draft ROD~~ (a) to identify and describe anticipated uses of the relevant property by the FAA, and (b) to memorialize its commitment to meet and confer with the FAA to ensure that the proposed remedy for Site 17 does not unduly impair the FAA's anticipated use of the relevant property.

B. INSTITUTIONAL CONTROLS

The following provides a number of general comments concerning the discussion of institutional controls set forth in the Draft ROD. As discussions among DON/USMC, the DOI, LRA and FAA proceed, additional comments concerning proposed institutional controls may be presented to DON/USMC for consideration.

1. Restriction on the Construction of Structures Located Within 1,000 Feet of the Landfill Perimeters; Conduct of Land-Disturbing Activities On Adjacent Properties

In comments submitted by the LRA to DON/USMC in January 1999 (concerning a preceding (November 1998) version of the Draft ROD), the LRA raised a number of questions and concerns regarding the areal extent of proposed institutional controls applicable to Sites 2 and 17. In particular, the LRA raised concerns regarding the potential impact of proposed institutional controls upon the construction of the Alton Parkway, located within 1,000 feet of the perimeter of Site 2. See generally the letter from Courtney C. Wiercioch, LRA to Joseph Joyce,

DON/USMC (Jan. 29, 1999). In addition, the County raised more detailed concerns regarding the impact of proposed institutional controls upon the construction of the Alton Parkway. See the letter from Kenneth R. Smith, County Public Facilities & Resources Department to Joseph Joyce, DON/USMC (Jan. 28, 1999).

DON/USMC generally responded to these comments by indicating that the Draft ROD would be revised to clarify that institutional controls for Sites 2 and 17 would (a) prohibit the construction of structures within 1,000 feet of the landfill perimeters without the prior approval of the California Integrated Waste Management Board ("CIWMB"), and (b) prohibit land-disturbing activities on lands adjacent to the landfill that may cause adverse effects upon the cap through erosion of the cap or diversion of off-site surface water onto the cap unless the adjacent land owner provides for mitigation of such effects and obtains the prior approval of DON/USMC and the signatories to the Federal Facilities Agreement ("FFA") applicable to MCAS El Toro. See, e.g., DON/USMC, "Response to Comments: Draft Record of Decision, Operable Unit 2B (OU-2B), Landfill Sites 2 and 17, MCAS El Toro" ("DON/USMC Response to Comments"), Response to January 29, 1999 letter from Courtney C. Wiercioch at 1-2. Consistent with these comments, DON/USMC revised the Draft ROD to include a more detailed description of proposed institutional controls. See, e.g., Draft ROD at §§ 7.2.1.1 and 7.3.2.

In May 1999 DON/USMC met with the LRA, the County and key regulatory agencies to discuss the construction of the Alton Parkway and related issues. On the basis of discussions with regulatory agencies DON/USMC agreed that the proposed institutional controls summarized above (in the preceding paragraph) are neither required nor warranted for Sites 2 and 17.¹ This understanding is confirmed in a May 19, 1999 letter from the County to DON/USMC, and in the meeting minutes prepared by DON/USMC. See letter from Kenneth R. Smith, Deputy Director/Chief Engineer, County Public Facilities & Resources Department to Joseph Joyce, DON/USMC (May 19, 1999) at 1; and DON/USMC, "Alton Parkway Meeting Minutes, SWDivision BRAC Office, 13 May 1999" at 2. (Copies of these documents are attached to this memorandum and incorporated by reference herein.)

In light of these developments, DON/USMC should revise the Draft ROD to memorialize the understandings reached at the May 13, 1999 meeting of DON/USMC, the LRA and key regulatory agencies. More specifically, all references to the restriction on the construction of structures within 1,000 feet of the landfill perimeters and to the restriction on the

¹ It is our understanding that DON/USMC has reached a similar conclusion with respect to institutional controls for Landfill Sites 3 and 5. See the letter from the LRA to DON/USMC providing comments on the Draft ROD for Sites 3 and 5 (June 17, 1999).

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conduct of land-disturbing activities on adjacent land should be deleted from the Draft ROD. See, e.g., Draft ROD at §§ 7.2.1.1 and 7.3.2. In addition, DON/USMC should revise the Draft ROD to address with specificity the proposed construction of the Alton Parkway. In particular, DON/USMC should (a) acknowledge and describe the anticipated construction, (b) memorialize its conclusion that the construction of Alton Parkway does not require the approval of DON/USMC or the FFA signatories, and is not precluded by the proposed institutional controls for Sites 2 and 17, (c) memorialize its commitment to cooperate with the County in the design of the landfill caps and Alton Parkway, and (d) identify certain responsibilities and liabilities that it has agreed to assume in connection with the anticipated construction of Alton Parkway. (See Section C of this memorandum.)

Similar issues should be discussed and confirmed with DON/USMC concerning anticipated uses of property adjacent to Site 17 by the FAA. In particular, deletion of proposed institutional controls restricting the construction of structures within 1,000 feet of the landfill perimeters and restricting the conduct of land-disturbing activities on adjacent land should minimize the potential impacts of the proposed remedy on the conduct of activities by the FAA.

2. Development of a LUCICP for Sites 2 and 17

In February 1999 The United States Environmental Protection Agency ("EPA") requested DON/USMC to provide information concerning the development of a Land-Use Control Implementation and Certification Plan ("LUCICP"). According to EPA, the purpose of the LUCICP is to outline monitoring and compliance steps necessary to achieve the land-use restrictions/controls established in the ROD. See generally the DON/USMC Response to Comments, Response to Glenn Kistner letter of February 4, 1999.

Substantive information concerning the content of the proposed LUCICP would inform the LRA and the public of this very important component of the proposed remedy. In addition, receipt of comments on the general scope and content of the LUCICP would enhance and expedite the development of the plan by DON/USMC subsequent to the finalization of the ROD for Sites 2 and 17.

While DON/USMC has described the components of the LUCICP, additional information and detail should be included in the Draft ROD.² More specifically, it would be

² DON/USMC indicates in response to EPA's concerns regarding the LUCICP that Section 9 of the Draft ROD has been expanded to include discussion of the LUCICP. We are not aware of
(Footnote Continued on Next Page.)

useful to include information concerning the content -- not simply the components -- of the LUCICP in the Draft ROD. Consistent with EPA's recommendations, such information should include substantive information concerning the nature of the particular controls and mechanisms that will be required to achieve the ROD objectives and restrictions, the entities responsible for carrying out the monitoring and inspections, the methods for certifying the conditions of the Sites and the surrounding areas, and other relevant information.

EPA also recommended in its February 1999 comments that DON/USMC provide a draft LUCICP to the FFA signatories, the LRA, the Local Enforcement Agency, and the U.S. Department of Interior for review. Id. We recommend that the Draft ROD be revised to memorialize EPA's comment.

3. Implementation of Institutional Controls By USFWS

DON/USMC refers in the Draft ROD to the role of the USFWS in the development and implementation of the institutional controls and the LUCICP for Sites 2 and 17. See, e.g., Draft ROD at § 7.2.1.1. As noted above, in Section A of this memorandum, such references should be revised, at a minimum, to refer more generically to the transferee(s) of Sites 2 and 17.

4. Development of Land Use Covenants

In connection with its review of the Draft ROD for MCAS El Toro Landfill Sites 3 and 5, the Department of Toxic Substances Control ("DTSC") informed DON/USMC that it will be unable to approve the ROD or concur in the transfer of relevant property unless DON/USMC or the future land owner is willing to enter into a Land Use Covenant ("LUC") or a consent agreement for environmental restrictions. See, e.g., the letters from Tayseer Mahmoud, DTSC to Joseph Joyce, DON/USMC (Mar. 12 and June 17, 1999). We anticipate that DTSC's position regarding institutional controls for Sites 2 and 17 will be similar.

We recommend that prior to finalization of the ROD for Sites 2 and 17 DON/USMC, the LRA, the FAA, and key regulatory agencies meet and confer to discuss in greater detail the scope and content of the proposed institutional controls. Consistent with our

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any specific reference to the LUCICP in Section 9 of the Draft ROD. We recommend that such a reference be included. Id.

comments on the Draft ROD for Landfill Sites 3 and 5, we recommend that understandings reached with DON/USMC generally be described and memorialized in the ROD.

C. CONSTRUCTION OF THE ALTON PARKWAY AND IMPROVEMENTS TO THE BORREGO CANYON WASH

As noted above, in a May 13, 1999 meeting DON/USMC, the LRA, the County and various regulatory agencies met and conferred regarding construction issues anticipated in the immediate vicinity of Site 2. By letter dated May 19, 1999 the County memorialized certain understandings reached by and among the parties concerning such construction activities. These understandings include, for example:

- Pre-construction coordination of the design of the gas probe monitoring system by and between DON/USMC and the County.
- Further consideration of the installation of a gas collection system as a part of the landfill cap, if deemed necessary by the parties.
- Preparation of a suitable hydrologic and hydraulic analysis as a part of the landfill cap design process to ensure that Site 2 and the future Alton Parkway are protected against flooding and erosion from the Borrego Canyon Wash.
- Design and implementation of channel improvements by DON/USMC, with a right of review and approval by the County.
- DON/USMC's commitment to assume responsibility for the management of any contaminated groundwater generated in connection or association with the County's construction of the Alton Parkway any improvements made by the County to the Borrego Canyon Wash.

These issues are of significant importance to the County and the LRA. Consistent with the recommendations set forth in the May 19, 1999 letter from the County to DON/USMC, these understandings should be memorialized in the final version of the ROD for Sites 2 and 17.

D. SUMMARY

We look forward to working with you to address outstanding issues concerning the proposed remedy for Sites 2 and 17. We also look forward to discussing these and related issues with DON/USMC in late July or early August.

S.A.D. J.S.