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MAY 15 2008

The Honorable Michael B. Mukasey
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Re: Submission of Dispute to Attorney General Pursuant to Executive Order No. 12146

Dear Mr. Attorney General:

This letter submits a dispute between the Department of Defense (DoD) and the Environmental Protection Agency (EPA) for resolution pursuant to paragraph 1-4 of Executive Order No. 12146. As the attached DoD memorandum and EPA Orders indicate, DoD and EPA have conflicting legal views on the authority of EPA to issue these imminent and substantial endangerment Orders under the Resource Conservation and Recovery Act (RCRA) and the Safe Drinking Water Act. DoD has been conducting response actions for decades under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) at the military installations that are the subject of these EPA orders. These response actions have been undertaken with full knowledge and subsequent oversight by EPA. The facilities have been placed on CERCLA's National Priorities List, and are thus required to have a CERCLA interagency agreement. EPA issued these Orders rather than negotiate on these interagency agreements, and not because of any specific imminent and substantial endangerment to human health and the environment.

EPA has suggested that it may impose imminent and substantial endangerment Orders at other DoD facilities that do not have CERCLA interagency agreements in place. Accordingly, we also ask for your assistance in resolving this issue prior to EPA issuing any additional Orders at DoD facilities.

I appreciate your consideration of this matter. If you or your staff should have any questions on this matter, please contact Mr. Roy Wuchitech, Deputy General Counsel (Environment & Installations) at (703) 693-4855.

Sincerely,

Daniel J. Dell'Orto
Acting

cc:
Steven Bradbury, Acting Assistant Attorney General
Jeffrey Rosen, OMB General Counsel
Mary Walker, Air Force General Counsel
Ben Cohen, Army General Counsel
Frank Jimenez, Navy General Counsel
Patricia Hirsch, EPA Acting General Counsel

TABLE OF CONTENTS

Executive Summary Of DoD Memorandum. 1

I. Issuance of the Four Orders.....3

II. CERCLA Is the Proper Mechanism for Cleanup at Federal Facilities on the NPL, Including, in Appropriate Circumstances Where Enforcement Action is Required, Administrative Orders Under Section 106 of CERCLA.....5

A. Special Statutory Provisions Govern the DoD Environmental Cleanup Obligations and Require Cleanup under CERCLA.....5
B. Both Agencies Have Exclusively Utilized CERCLA as the Governing Cleanup Mechanism at All Pertinent Times.....7
C. If Environmental Conditions at a NPL Facility Present an Imminent and Substantial Endangerment, the Appropriate Mechanism is a CERCLA 106 Order, Which Requires Attorney General Concurrence before EPA Issuance.....8
D. EPA Cannot Justify Issuance of Imminent and Substantial Endangerment Orders solely on the Absence of its Preferred Form of an IAG under CERCLA Section 120(e).....9

III. The Orders to McGuire and Tyndall under RCRA § 7003 Are Without Statutory Basis as EPA Has Failed to Establish that Existing Contamination May Present an Imminent and Substantial Endangerment or Limited Actions to the Abatement of such an Endangerment.....11

A. The McGuire and Tyndall Orders Fail to Allege or Describe "Substantial Endangerment".....12
B. An "Imminent endangerment" is not described in the McGuire or Tyndall Orders.....14
C. "Necessary Action" is not tied to Abatement of Imminent and Substantial Endangerment in the McGuire or Tyndall Orders.....16

IV. The Order to Fort Meade under RCRA § 7003 is Inconsistent with CERCLA Response Actions Already Taken and Without Statutory Basis as EPA Has Failed to Establish that Existing Contamination May Present an Imminent and Substantial Endangerment or Limited Actions to the Abatement of such an Endangerment. 17

A. Background on Property Status and Response Actions at Ft. Meade.....17
B. The EPA RCRA 7003 Order for All Current and Former Ft. Meade Property, Issued Notwithstanding all the CERCLA Response Actions Already Taken, Is Inappropriate.....19

V. The Order to Air Force Plant 44 under Section 1431 of the Safe Drinking Water Act is Without Statutory Basis as EPA Has Failed to Establish that Groundwater Contamination May Present an Imminent and Substantial Endangerment.....23

A. Background on AF Plant 44 Groundwater Treatment and Tucson International Airport Area (TIAA) NPL site Groundwater Treatment.....23
B. The Order Is Deficient on Its Face for Failure to Allege an Imminent and Substantial Endangerment Due to AFP 44 DX or TCE Contamination.....24
C. DX levels Are Declining, and Do Not and Will Not Enter the Public Water System at Unacceptable Levels.....25
D. DX Levels of 3ppb Do Not Constitute an Unacceptable Risk to Human Health, Much Less an Imminent and Substantial Endangerment Under § 1431 of the SDWA.....26
E. TCE Levels Do Not Present an Imminent and Substantial Endangerment To Human Health..... 28

VI. Resolution of Interagency Disputes Is An Executive Branch Responsibility Rather Than Citizen Suit Enforcement of the EPA Orders Against a Federal Facility.....28

VII. Conclusion.....30

EXECUTIVE SUMMARY OF DOD MEMORANDUM

In 2007, DoD received four imminent and substantial endangerment Orders from the U.S. Environmental Protection Agency (EPA). Three of these orders are under the Resource Conservation and Recovery Act (RCRA)[1] and one is under the Safe Drinking Water Act (SDWA).[2] These four facilities have been conducting response actions successfully under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) for years.

The four facilities at issue are on CERCLA's National Priorities List (NPL). Accordingly, DoD is required to enter interagency agreements with EPA under CERCLA § 120(e) concerning these response actions. Notwithstanding model language that had been jointly negotiated by EPA and DoD to implement this interagency agreement requirement, EPA has sought to unilaterally include provisions in addition to the model language, which DoD believes are unnecessary, will adversely affect its timely completion of cleanup, and unreasonably expand the scope of the model agreement. Instead of negotiating on an interagency agreement, EPA issued the four Orders in an effort to impose on DoD EPA's preferred version of an interagency agreement.

EPA's issuance of unilateral Orders under statutes other than CERCLA is legally improper in these circumstances. First, issuing such Orders under RCRA or SDWA requires a showing that an imminent and substantial endangerment to human health and the environment may be present. No such endangerment exist at any of these sites and the lack of an interagency agreement does not equate to an imminent and substantial endangerment.

Second, even if environmental conditions at the NPL facilities did in fact present an imminent and substantial endangerment, the appropriate mechanism is a CERCLA Order, which requires Attorney General concurrence before EPA issuance under Executive Order 12580 *Superfund Implementation* (52 Fed. Reg. 2923 (Jan. 23, 1987). In issuing the Orders under RCRA and SDWA, EPA has avoided this review and concurrence, which is essential to the proper functioning of a unified executive branch. Moreover, EPA has presented no basis for issuing non-CERCLA orders where there can be no factual dispute that there is a lengthy history of CERCLA cleanup at these sites, with no past indication from EPA during the CERCLA cleanup process that an imminent threat to human health or the environment existed. CERCLA (e.g., 42 U.S.C. § 9620) directs EPA and Federal facilities to utilize CERCLA processes at NPL sites, and the Defense Environmental Restoration Program (DERP, 10 U.S.C. 2700 *et. seq.*) mandates that DoD perform all hazardous substance response actions at DERP facilities in accordance with CERCLA.

---

[1] McGuire Air Force Base, Tyndall Air Force Base, and the Army's Fort Meade.
[2] Air Force Plant 44.

While DoD objects to switching from CERCLA to RCRA or the SDWA in the circumstances presented, DoD is not asserting that issuance of imminent and substantial endangerment orders under the SDWA or RCRA would always be precluded at a federal facility on the NPL. DoD's objection is limited to EPA's issuance of the Orders in the absence of an imminent and substantial endangerment, and for the purpose of compelling DoD to sign EPA's preferred form of an interagency agreement.

The RCRA Orders are without statutory basis as EPA has not made the required showing that the existing contamination "may present an imminent and substantial endangerment." First, the RCRA Orders fail to allege or describe "substantial endangerment." Mere citation of environmental conditions that existed at the time the sites were placed on the CERCLA NPL, which have been and are being addressed under CERCLA with full regulator participation, does not justify issuance of these unilateral Orders. RCRA Section 7003 orders require a showing of "substantial or serious" endangerment or threat, more than a mere showing that wastes or releases are present at the site. Exposure pathways are looked to as evidence of a substantial endangerment. At these installations, EPA had stated publicly that there are no risks from uncontrolled human exposures.

Second, the RCRA Orders fail to describe an "imminent endangerment." When CERCLA remedial activity has commenced at a site, this reduces the likelihood that a threat to human health or the environment is imminent. Third, RCRA 7003 Orders are required to describe "necessary action" in order to abate an imminent and substantial endangerment. In this case, rather than being tailored to abating a specific endangerment, the RCRA Orders instead seek implementation of a cleanup program throughout the installation. DoD believes that EPA has no authority to order a set of general cleanup procedures throughout these installations; rather any such Orders should be limited to required actions to abate a specific imminent and substantial endangerment under the authority of RCRA § 7003.

The SDWA Order is also without statutory basis as EPA has failed to establish that groundwater contamination may present an imminent and substantial endangerment. Two groundwater extraction and treatment plants have been in place for a number of years. The mere presence of a contaminant in an aquifer does not constitute imminent and substantial endangerment under the SDWA. There is no indication that drinking water will reach consumers at imminent and substantial endangerment levels. EPA stated publicly after issuing the order that "[o]ne thing we want to emphasize, this water is safe to drink". Arizona Star, July 14, 2007.

DoD believes these Orders lack sufficient legal foundation, and thus it is inappropriate for EPA to issue RCRA and SDWA Orders in the circumstances existing at these facilities. DoD requests that the Department of Justice review this matter and facilitate resolution of these issues.

DOD MEMORANDUM

I. Issuance of the Four Orders

DoD has received four imminent and substantial endangerment Orders under the Resource Conservation and Recovery Act (RCRA) and the Safe Drinking Water Act (SDWA) at its facilities that have consistently been conducting response actions under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and have been placed on CERCLA's National Priorities List (NPL). DoD believes these Orders lack sufficient legal foundation. For the reasons described below, DoD requests that the Department of Justice review this matter and facilitate resolution of these issues.

On July 13, 2007, EPA issued an administrative order (Attachment A) to the Air Force under section 7003 of RCRA to compel the Air Force to establish a new cleanup process to address environmental contamination throughout McGuire Air Force Base ("McGuire"), in New Jersey. EPA did not include any specific allegation of imminent and substantial endangerment; when the Air Force asked EPA Region II to identify any specific action(s) that needed to be taken immediately, EPA did not identify any such actions. The Air Force has been conducting environmental response actions at McGuire for more than 25 years, expending $55 million to date. In 1999, McGuire was listed on the NPL under CERCLA. EPA's issuance of the RCRA imminent and substantial endangerment Order followed a protracted and ultimately unsuccessful effort by the Air Force to consensually resolve the agencies' dispute over the form and content of the Interagency Agreement (IAG) required by Section 120(e) of the CERCLA. EPA Region II indicated the Air Force could sign EPA's preferred version of the IAG to avoid the order.

Also on July 13, 2007, EPA issued an administrative order (Attachment B) to the Air Force and Raytheon Corporation under section 1431 of the Safe Drinking Water Act (SDWA) to require the installation of an additional groundwater treatment facility. This Order alleges that contamination in groundwater is migrating from Air Force Plant 44 (AFP 44) into the Tucson public drinking water system thereby causing an imminent and substantial endangerment. The Air Force has been conducting CERCLA response actions at AFP 44 for more than 20 years, expending $75 million to date. Plant 44 was listed on the CERCLA NPL in 1983. AFP 44 installed a groundwater treatment system in 1987. The EPA, the Air Force, Raytheon and the State of Arizona had already conceptually agreed upon an additional treatment technology, but this had not been memorialized in a written settlement agreement at least partially because of EPA's refusal to sign such an agreement in the absence of an IAG. The Department of Justice (DOJ) was fully involved in these settlement discussions. Again, the EPA Regional office indicated that if the Air Force entered into EPA's preferred version of an IAG, it could avoid the order.

On August 27, 2007, EPA issued an administrative order (Attachment C) to the Army under RCRA section 7003 to compel the Army to continue to implement ongoing response actions and to prepare a plan to determine if any additional response actions are needed at areas on the Army's Fort Meade property in Maryland and on areas that were transferred to the Department of the Interior (DOI) in 1991 and 1993. Ft. Meade was listed on the NPL in 1998, based on evaluation and scoring of four areas on the Army property. Since 1980, the Army has performed response actions at numerous locations on Ft. Meade and on the DOI property and has expended over $82 million to date. The EPA order acknowledges that numerous sites require no further action beyond the site inspection phase and that response actions have been completed on a number of sites. Notwithstanding this, the EPA order purports to impose obligations at some of these completed sites. The Order was issued after the Army would not sign an IAG that extended to NPL-delisted property or non-NPL listed DOI property and included other objectionable additional provisions.

On November 21, 2007, EPA issued an administrative order (Attachment D) to the Air Force under Section 7003 of RCRA to compel the Air Force to establish a new cleanup process to address environmental contamination at Tyndall Air Force Base ("Tyndall") in Panama City, Florida. Tyndall has been conducting cleanup under CERCLA since 1981, and has spent $24 million to date. EPA placed Tyndall on the NPL in April 1997. Final remedies are in place at 27 out of 39 sites (69%). Again, EPA's issuance of the RCRA imminent and substantial endangerment Order followed a protracted and ultimately unsuccessful effort by the Air Force to consensually resolve the agencies' dispute over the form and content of the IAG.

EPA's issuance of unilateral Orders under statutes other than CERCLA applies legally improper authorities in these circumstances, with the consequence, among others, that EPA has circumvented applicable Executive Branch limitations on issuing orders to federal agencies, and in so doing has impermissibly narrowed DOJ's authority. The Orders are also without statutory basis as EPA has not made a showing that the remaining contamination "may present an imminent and substantial endangerment," and the RCRA Orders are not limited to abating a specific endangerment, but instead seek implementation of a cleanup program throughout the installation. Mere citation of environmental conditions that existed at the time of an NPL listing, which have been and are being addressed under CERCLA with full regulator participation, does not justify issuance of these unilateral Orders.

Although DoD objects to switching from CERCLA to RCRA or the SDWA in the circumstances presented, DoD is not asserting that issuance of imminent and substantial endangerment orders under the SDWA or RCRA would always be precluded at a federal facility. However, EPA cannot justify issuance of imminent and substantial endangerment orders based on the absence of its preferred form

of an IAG under CERCLA Section 120(e), has presented no basis for issuing non-CERCLA orders where there has been a lengthy history of CERCLA cleanup, the Defense Environmental Restoration Program (10 U.S.C. 2700 *et. seq.*) and CERCLA require DoD to conduct these response actions in accordance with CERCLA, and no past indication from EPA during the CERCLA cleanup process that an imminent threat to human health or the environment exists. CERCLA section 120(e)(4) mandates specific provisions that must be included in an IAG; there is no legal basis for EPA to unilaterally insist on provisions beyond these, much less to premise the issuance of imminent and substantial endangerment orders under these legal authorities on DoD's failure to accede to EPA's preferred form of an interagency agreement.

II. CERCLA Is the Proper Mechanism for Cleanup at Federal Facilities on the NPL, Including, in Appropriate Circumstances Where Enforcement Action is Required, Administrative Orders Under Section 106 of CERCLA.

A. Special Statutory Provisions Govern the DoD Environmental Cleanup Obligations and Require Cleanup under CERCLA.

In 1986, Congress enacted special, tailored provisions governing DoD's cleanup of contaminants at its installations. 10 U.S.C. §§ 2700-2710. These Defense Environmental Restoration Program (DERP) provisions, expressly require that DoD and its Components carry out DERP response actions "subject to, and in a manner consistent with, section 120. . . of CERCLA." 10 U.S.C. § 2701(a)(2). DERP further reinforces that all DoD response actions for hazardous substance releases shall be conducted in accordance with DERP and CERCLA. 10 U.S.C. §2701(c)(1). CERCLA is the predominant federal cleanup program.

In addition, Congress created specific provisions in CERCLA Section 120 that govern federal facilities and provide, among other things, that CERCLA requirements govern response actions at such facilities. Section 120(a) requires "each department, agency, and instrumentality of the United States . . . [to] be subject to, and comply with this chapter in the same manner and to the same extent, both procedurally and substantively, as a nongovernmental entity . . . ." The same section provides generally that "all guidelines, rules, regulations, and criteria which are applicable to . . .facilities at which hazardous substances are located" shall also be applicable to federal facilities "in the same manner." 42 U.S.C. § 9620(a)(2). Uniquely for Federal facilities, CERCLA section 120 mandates placement of certain facilities and information on such facilities on the Federal Agency Hazardous Waste Compliance Docket. 42 U.S.C. § 9620(c). EPA "shall take steps to assure that a preliminary assessment is conducted for each facility on the docket" and "shall, where appropriate, evaluate such facilities in accordance with the criteria established . . . under the [CERCLA regulations] for

determining priorities among releases; and include such facility on the [NPL] if the facility meets such criteria." 42 U.S.C. § 9620(d)(1).

Unlike privately-owned NPL sites, section 120(e) mandates CERCLA actions by both EPA and the responsible Federal agency for sites listed on the NPL: for example, the federal agency which owns or operates the facility "shall, in consultation with the Administrator and appropriate State authorities, commence a remedial investigation and feasibility study" within six months of NPL listing, and "substantial continuous physical onsite remedial action shall be commenced" within fifteen months after completing investigation and study. 42 U.S.C. § 9620(e). Other requirements differ for Federal facilities, for example, the requirement for entry into IAGs in section 120(e), and the requirement that EPA and the responsible Federal agency provide for State and local participation in the planning and selection of the remedial action. 42 U.S.C. § 9620(e) and (f).

EPA acknowledges that "CERCLA and its legislative history indicate that Congress clearly intended that Federal facility sites generally be placed on the NPL and addressed under the process set out in CERCLA section 120(e)." EPA Notice of Policy Statement, 54 Fed. Reg. 10520, 10521 (Mar. 13, 1989). That Congressional intent "is evidenced by the nature of the comprehensive system of site identification and evaluation set up by CERCLA section 120, added by SARA." *Id.* CERCLA section 120(d) clarifies that EPA shall consider whether a response can be appropriately conducted under non-CERCLA authorities when determining whether to list a facility on the NPL. 42 U.S.C. § 9620(d)(2)(B). By enacting this provision, Congress reinforced that, although it could be appropriate for a federal facility to clean up under a non-CERCLA authority prior to NPL listing, once listed by EPA on the NPL, response actions must be taken under CERCLA and CERCLA's implementing regulation.

CERCLA section 120 also directs that an IAG between EPA and the federal facility be the primary mechanism for expediting the completion of all necessary remedial action at NPL facilities. 42 U.S.C. § 9620(e). Such agreement must include a review of alternative remedial actions and joint remedy selection by the federal agency and EPA, or sole selection by EPA if EPA and the federal agency cannot reach agreement. The IAG must also include a schedule for completing remedial action, and arrangements for long-term operation and maintenance. 42 U.S.C. § 9620(e)(4). Admittedly, the DoD Components and EPA have had difficulty arriving at mutually agreeable IAGs in the past few years at certain facilities; in that situation, CERCLA requires reporting to Congress "an explanation of the reasons why no agreement was reached." 42 U.S.C. § 9620 (e)(5).

Thus, CERCLA directs EPA and Federal facilities to utilize CERCLA processes at NPL facilities, and the DERP mandates that DoD perform all hazardous substance response actions at DERP sites in accordance with CERCLA. Congress established a fairly elaborate set of requirements in CERCLA section 120 for both EPA and the responsible Federal agency with regard to

Federal facilities, to ensure that appropriate response actions were taken, to mandate response actions even beyond the requirements for privately-owned NPL sites, to require the involvement of State and local officials with the Federal agencies, and to report to Congress in the event of certain disagreements between the agencies.

The President has by Executive Order 12580, *Superfund Implementation* (52 Fed. Reg. 2923 (Jan. 23, 1987)), as amended, directed the affected agencies, including EPA and the DoD, to exercise their CERCLA authorities in coordination for releases on their facilities. Thus, CERCLA, DERP and Executive Order 12580 direct that hazardous substance response actions on military installations are subject to and must comply with CERCLA. It is inconsistent with the language and the intent of the Congress and the President for EPA to step outside of these required response processes.

B. Both Agencies Have Exclusively Utilized CERCLA as the Governing Cleanup Mechanism at All Pertinent Times.

The Orders represent an abrupt break in the agencies' decades-long history of addressing cleanup at these sites exclusively under CERCLA. For example, in 1999, EPA placed McGuire on the CERCLA NPL. Since listing, McGuire AFB has been conducting response actions with EPA's full knowledge, participation, and agreement. Even prior to listing, the Air Force had been conducting environmental responses at McGuire, and has a 25-year CERCLA cleanup history. The same is true for AFP 44, which comprises one portion of a large site, the Tucson International Airport Area, which was listed on the NPL in 1983; Tyndall AFB, which was listed on the NPL in 1997: and at Fort Meade, of which a portion was listed on the NPL in 1998. The DoD Components and EPA, as well as the affected states, have continued to work toward cleaning up these facilities, including, for example, developing mutual schedules and work plans reviewed and concurred in by regulators. At Ft. Meade for example, the Army, the State of Maryland, and EPA have formed a project team that develops overall management action plans for the environmental response actions throughout the installation, and the project team has worked together since NPL listing in 1998.

Prior to the impasse on an IAG at each of these installations and up to issuance of the Orders, EPA has not requested or suggested cleanup under another legal authority, nor indicated it believes there is any current threat requiring immediate response, such as by a CERCLA removal or interim remedial action. To the contrary, EPA had informed the public on its websites for these facilities that "under current conditions at this site, potential or actual human exposures are under control" and "all or a portion of this site is ready for reuse." See, Fort Meade (http://cfpub1.epa.gov/supercpad/cursites/csitinfo.cfm?id+0300435, as of October 16, 2007); Air Force Plant 44 (http://cfpub.epa.gov/supercpad/cursites/csitinfo.cfm?id=0900684 as of November

20, 2007), McGuire Air Force Base (http://www.epa.gov/region02/waste/fsmcguir.htm as of November 20, 2007; full report at http://www.epa.gov/region02/waste/mcgui725.pdf), and Tyndall Air Force base (http://cfpub.epa.gov/supercpad/cursites/csitinfo.cfm?id=0401205 as of November 26, 2007).[3]

C. If Environmental Conditions at a NPL Facility Present an Imminent and Substantial Endangerment, the Appropriate Mechanism is a CERCLA 106 Order, Which Requires Attorney General Concurrence before EPA Issuance.

Executive Order No. 12580, which implements the United States' CERCLA program, allocates key cleanup responsibilities between EPA and other federal agencies. With some exceptions, CERCLA authorizes the President to exercise the authorities and take the actions that are required by CERCLA. *See*, for example, section 104(a)(1) regarding removal or remedial actions and section 121(a) regarding selection of remedial actions. 42 U.S.C. §§ 9604(a)(1) and 9621(a). In Executive Order 12580, the President has delegated these authorities and responsibilities according to the subsections of the statute and, for Federal facilities, to the agency with jurisdiction, custody and control. For DoD installations, response action and remedy selection authority under CERCLA Sections 104 and 121, as well as other CERCLA authorities, are delegated to the Secretary of Defense, whether listed on the NPL or not. Ex. Order 12580, Section 2(d).

This Executive Order also established the procedures EPA must follow before it may take the extraordinary step of issuing an administrative order against another Federal agency to respond to hazardous substance releases under CERCLA. Section 4(e) of Executive Order 12580 requires EPA to obtain the concurrence of the Attorney General before issuing an administrative order under CERCLA. ("[T]he authority under Sections . . . 106(a) of [CERCLA] to seek . . . response actions from Executive departments . . . may be exercised only with the concurrence of the Attorney General.") EPA's own direction on Federal facility enforcement indicates "Section 106 orders should be used where needed to assure compliance with Federal facility requirements for response action." *Enforcement Actions Under RCRA and CERCLA at Federal Facilities,* USEPA, OSWER 9992.0, 1988 WL 1099666 (Jan. 26, 1988). It is noteworthy that this EPA document only references CERCLA Section 106 (not RCRA 7003 or SDWA 1431) as available under the category of "Imminent and Substantial Endangerment Orders". *Id.*

In a decision issued by the DOJ Office of Legal Counsel (OLC) regarding EPA's authority to issue an order under a provision of the Clean Air Act, OLC

[3] These statements have been recently changed. For example, the Ft. Meade website citation was current on the date provided above but was changed by EPA in January 2008. EPA's websites for the Air Force sites also have recently been changed.

found that EPA did have the authority to issue an Order to a Federal facility, but it was subject to the President's authority to decide whether an order is appropriate if disputed by the agency receiving the order and after compliance with the procedural protections of the consultations provided in the law, and an opportunity to confer between senior officials of the two agencies and the Attorney General. "Administrative Assessment of Civil Penalties Against Federal Agencies Under the Clean Air Act", Office of Legal Counsel, U.S. Department of Justice, July 16, 1997, Section IV.A, pg. 6 of 9, available at http://www.usdoj.gov/olc/cleanair_op.htm. While recognizing that the Clean Air Act provides certain enforcement authority to EPA, this authority is not vested without limitation in EPA but is subject to the supervision of the President and the authority of the Attorney General both as provided by statute and as the President's legal advisor. EPA's administrative order authority under CERCLA is similarly limited by the procedures established in the statute and the terms of the President's delegation of authority in the implementing Executive Order, as well as the inherent supervisory authority of the President, with the legal advice of the Attorney General.

EPA appears to be seeking to circumvent the mandates of the law and the limitations of its authority within the Executive Branch by stepping outside of the CERCLA process required by the DERP statute and CERCLA Section 120, and resorting to a RCRA or SDWA order without involving the Attorney General or any other Executive Branch entity. While CERCLA §120(i) contains a savings clause regarding the obligations of Federal agencies to comply with RCRA, this provision does not exempt EPA or DoD from the requirements of CERCLA Section 120, the DERP, or Executive Order 12580.

D. EPA Cannot Justify Issuance of Imminent and Substantial Endangerment Orders Solely on the Absence of its Preferred Form of an IAG under CERCLA Section 120(e)

Although the Orders issued by EPA on their face do not mention the IAG required by CERCLA Section 120, EPA on April 5, 2007 indicated that only EPA's draft of an IAG/Federal Facilities Agreement ("FFA") or a unilateral order were "acceptable vehicle[s] to guide the investigation and cleanup" at McGuire. Subsequently, including at both of the regional conferences held on the McGuire and AFP 44 Orders, EPA has stated that the Air Force could enter into EPA's proffered version of an IAG in lieu of having the orders be effective. ". . .EPA continues to be willing to enter into the FFA that we provided to the Air Force in April 2007. . .If EPA and the Air Force enter into such an FFA for McGuire, the FFA, once in effect, would take the place of the Order." USEPA, Region II Administrator letter to Air Force, dated Aug 9, 2007. In the Administrator's final decision on McGuire, EPA again states that "EPA issued the Order because the Air Force must accelerate the study and cleanup of this NPL site and because our efforts to enter into a [FFA] with the Air Force have been unsuccessful to date." November 13, 2007 letter from EPA Administrator Johnson to Air Force Secretary

Wynne, p. 1 (received November 21, 2007). The letter then states that EPA "continues to stand ready to enter into the standard, model-based FFA that EPA requires at all federal sites" but "in the meantime" the final McGuire order remains in effect. *Id.* p. 2. Similar statements were made to the Army in the context of the Fort Meade order. In EPA's reply letter to the Army regarding this order, EPA states it issued the order because of lack of agreement by the Army to EPA's FFA terms as the basis for issuance of the order, not because of any public health threat on the sites included in the order. USEPA Region III, letter to the Army, dated Oct. 29, 2007.

DoD believes that the primary basis for EPA's unilateral issuance of these orders is as EPA has stated: the DoD Component's refusal to enter into EPA's preferred version of a CERCLA IAG. That is an insufficient basis for issuing unilateral orders at all, and certainly not through an instrument other than a CERCLA 106 order, with DOJ concurrence. EPA has no legal foundation for mandating provisions in an IAG beyond what CERCLA requires.

CERCLA itself only mandates three provisions in an IAG that is to be signed at the time of remedy selection:

> "(A) A review of alternative remedial actions and selection of a remedial action by the head of the relevant department, agency, or instrumentality and the Administrator, of, if unable to reach agreement on selection of a remedial action, selection by the Administrator;
>
> (B) A schedule for the completion of each such remedial action;
>
> (C) Arrangements for long-term operation and maintenance of the facility."

42 U.S.C. 9620(e)(4).

CERCLA states that an agency that has not entered into an IAG with EPA must report to Congress "an explanation of the reasons why no agreement was reached." 42 U.S.C. § 9620 (e)(5). In addition, the Conference Report for the Superfund Amendments and Reauthorization Act of 1986, which added the IAG requirement, states that a remedial action decision document, called a Record of Decision, can even be used to satisfy the CERCLA IAG requirement:

> A site-specific Record of Decision (ROD) signed by the Administrator and the relevant Federal department or agency can be used to meet the requirements of this section regarding a site-specific interagency agreement (IAG) where such ROD incorporates a review of alternative remedial actions and selection of the remedial action, a schedule for completion of the remedial action, and provides for a long-term operation and maintenance of the facility. These elements of the ROD are identical to those required by subsection (e)(4), and such a ROD would serve as the

interagency agreement. H.R. Conf. Rep. No. 962, 99th Congress, 2d Session (1986), page 242.

Further background information on CERCLA IAG's and the DoD-EPA Model FFA is presented in Attachment E.

III. The Orders to McGuire and Tyndall under RCRA § 7003 Are Without Statutory Basis as EPA Has Failed to Establish that Existing Contamination May Present an Imminent and Substantial Endangerment or Limited Actions to the Abatement of such an Endangerment

DoD does not believe there is evidence to support the requirements for issuance of Orders under RCRA § 7003 at McGuire and Tyndall Air Force Bases. RCRA § 7003 requires "evidence" that contamination "may present an imminent and substantial endangerment to health or the environment." 42 USC § 6973(a). EPA has made no such showing, and instead at McGuire has only referenced that soil and groundwater contamination exists generally throughout the site (see paragraphs 9-23 of the McGuire Order). For Tyndall, EPA has referenced findings from a 1994 document, rather than current conditions. Under RCRA § 7003, the EPA Administrator may "order such person to take such other action as may be necessary." Instead of describing "necessary actions" required to abate an imminent and substantial endangerment, these sections of the Orders require McGuire and Tyndall to generally establish a long-term cleanup program under RCRA. Therefore as discussed below, these Orders are without statutory basis.

While § 7003 has been interpreted as an "expansive" provision, *U.S. v. Price*, 688 F.2d 204 (3rd Cir. 1982), there are limits on its scope. As the Supreme Court stated, in describing RCRA § 7002, which contains identical language to RCRA § 7003 ("may present an imminent and substantial endangerment to health or the environment"),

> an "endangerment can only be 'imminent' if it 'threatens to occur immediately' and the reference to waste which 'may present' imminent harm quite clearly excludes waste that no longer presents such a danger. As the Ninth Circuit intimated in *Price v. United States Navy*, 39 F.3d 1011, 1019 (1994), this language 'implies that there must be a threat which is present now, although the impact of the threat may not be felt until later.' It follows that [7002(a)] was designed to provide a remedy that ameliorates present or obviates the risk of future 'imminent' harms, not a remedy that compensates for past cleanup efforts." *Meghrig v. KFC Western, Inc.*, 516 U.S. at 486.

"Also, endangerment must be substantial or serious, and there must be some necessity for the action." *Price v. United States Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994).

A. The McGuire and Tyndall Orders Fail to Allege or Describe "Substantial Endangerment".

While the McGuire Order mentions detections of several constituents, it does not reference any levels that would indicate the presence of a substantial endangerment. Several courts have found a significant exceedance of a federal or state promulgated standard (e.g., Maximum Contaminant Level for public drinking water under the Safe Drinking Water Act) useful in determining whether there is an imminent and substantial endangerment, when the standard is based on similar exposure (e.g., point of drinking water use). *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248 (3rd. Cir. 2005); *Kara Holding Corp. v. Getty Petroleum Mktg.*, 2004 U.S. Dist. LEXIS 15864 (S.D.N.Y. 2004); *Rose v. Union Oil Co.*, 1999 U.S. Dist. LEXIS 967 (N.D. Cal. 1999); *Potter v. ASARCO, Inc.*, 49 ERC 1088 (D. Neb. 1999). There is no exceedance of Maximum Contaminant Levels (MCLs) in drinking water at McGuire, and no current evidence that hazardous substances have impacted drinking water sources.

With regard to specific allegations of imminent and substantial endangerment at Tyndall, the Tyndall Order alleges only that (1) DDT and metabolites present in the Shoal Point Bayou and the surrounding area may present an imminent and substantial endangerment to workers and public from exposure to sediments and the consumption of contaminated aquatic life (Order, page 8, paragraph 16); and (2) Munitions Response Areas (all 24 of them) "pose an imminent and substantial endangerment" (Order, page 10, paragraph 20). The Order otherwise merely references the presence of contaminants and potential exposure pathways without alleging any specific imminent and substantial endangerment, similar to the McGuire Order.

While releases of constituents into the environment are sufficient to cause an investigation on the need for cleanup, these releases alone are not sufficient to show that they present a "substantial endangerment." Otherwise, all sites undergoing a cleanup under RCRA corrective action or CERCLA would also qualify under their respective imminent and substantial endangerment provisions. Instead, as stated above, courts have interpreted Section 7003 as requiring a "substantial or serious" "endangerment or threat" *Price v. United States Navy*, 39 F.3d at 1019. As explained in *Foster v. United States*, 922 F. Supp. 642 (D.D.C. 1996), "While there can be no question that the levels of contamination present at the Site may warrant future response action, the plaintiff cannot establish either a current risk of 'substantial or serious' threatened harm, or 'some necessity for action.'" *Id.* at 661. The court made clear that RCRA § 7002 "requires more than a mere showing that solid or hazardous wastes are present at the Site." *Id.* Courts have typically looked at federal or state standards and migration/exposure pathways to determine if the threat is substantial. For example, in *Interfaith Cmty. Org v. Honeywell Int'l, Inc.*, 399 F.3d at 261 (3d. Cir. 2005), the court found that groundwater contamination ranged from 200 to 8000 times higher than the state

standard and found an imminent and substantial endangerment (applying Section 7002).

Courts also look to exposure pathways as evidence of a substantial endangerment. For example, the court in *Raymond Hoxsie Real Estate Trust v. Exxon Educ. Found.*, 81 F. Supp. 2d 359 (D.R.I. 2000) stated that "a history of migration and the potential for future migration of the contamination is also a relevant consideration in an imminent and substantial endangerment inquiry. This court concludes that plaintiffs' evidence of contamination in excess of state standards and evidence of migration of that contamination is sufficient to establish a genuine issue of material fact as to whether the contamination presents an imminent and substantial endangerment to health or the environment." *Id.* at 368. In *Kara Holding Corp. v. Getty Petroleum Mktg.*, 2004 U.S. Dist. LEXIS 15864, *27 (S.D.N.Y. 2004), the court stated that "in order for there to be an imminent and substantial endangerment" under RCRA 7002(a), "there must be a pathway of exposure." See also the following cases, which held that an imminent and substantial endangerment was not present because there was no exposure pathway. *Petrovic v. AMOCO Oil Co.*, 200 F.3d 1140, 1150 (8th Cir. 1999); *Price v. United States Navy*, 39 F.3d at 1013; *Foster v. United States*, 922 F. Supp. at 647.

The McGuire Order also fails to describe nine of the ten factors that EPA identifies as appropriate to determine potential endangerment in its *Guidance on the Use of Section 7003 of RCRA*, (Oct. 20, 1997, page 11); it only alleges the presence of contaminants in various media and notes a history of releases at the facility. It does not discuss other factors such as the levels of contaminants in soil or groundwater; or the pathway(s) of exposure. Thus, where there are low levels of contamination, water is not being used for drinking, residents are aware of the contamination, and/or alternative water supplies are available, the presence of waste in ground and surface water, even cancer-causing agents, is insufficient to establish imminent and substantial endangerment. *Petrovic,* 200 F.3d at 1150; *Davis v. National Coop. Refinery Ass'n.*, 963 F. Supp. 990, 993 (D. Kan. 1996). The Tyndall Order also fails to reflect most of the factors under this guidance as well.

The alleged imminent and substantial endangerment at Shoal Point Bayou in the Tyndall Order is from the RCRA Facility Assessment performed in 1994. This was the primary area upon which EPA based NPL listing. For this area, the Agency for Toxic Substances & Disease Registry (ATSDR) conducted a Public Health Assessment issued July 24, 2000. It concluded that there was "no apparent public health hazard" (Summary and p.1.) It added: "Based on the evaluation of over-protective ingestion estimates of DDT, DDD, and DDE, the fact that warning signs are posted to discourage eating fish from Fred Bayou [also known as Shoal Point Bayou], and the relative low concentrations of PAHs as compared to screening values, ATSDR considers that the consumption of contaminated fish from the bayou in the past, present or future poses no apparent

public health hazard to recreational and subsistence consumers." (p. 8) ATSDR listed the actions taken and proposed for the bayou and concluded "No additional actions are needed to protect public health". *Id.* The Air Force has conducted multiple investigations and studies in this area from the early 1990s through submission of a draft feasibility study to EPA on March 28, 2007. Yet the Order does not reflect this more recent data and thus does not accurately capture the current status of environmental releases and potential threat to human health and the environment at Tyndall AFB.

As for the Munitions Response Areas alleged as an imminent and substantial endangerment in the Tyndall Order, EPA does not specify why any of these areas may present an imminent and substantial endangerment. Further, Congress in 10 U.S.C. § 2710, as part of DERP, authorized and directed DoD to conduct a program of inventorying, prioritizing, and responding to "defense sites" (other than operational ranges) known or suspected to contain unexploded ordnance, discarded military munitions, or munitions constituents. Congress identified several factors to consider in prioritization of munitions response sites, such as public exposure (e.g., whether public access is controlled, and the potential for direct human contact). 10 U.S.C. § 2710(b)(2). Thus EPA's attempt to characterize all munitions response areas as imminent and substantial endangerment is unsubstantiated under the case law cited herein and also conflicts with explicit Congressional direction that similarly distinguishes high priority response sites due to exposure pathways, from lower priority munition responses.[4]

B. An "Imminent Endangerment" is Not Described in the McGuire or Tyndall Orders.

Additionally, EPA has not alleged any threatened harm from current or threatened exposures. For example, EPA has not alleged that contamination from McGuire AFB is migrating off the installation into public drinking water supplies such that a substantial or serious threatened harm requires abatement action. As the Supreme Court has stated, an "endangerment can only be 'imminent' if it 'threatens to occur immediately' and . . .this language 'implies that there must be a threat which is present now, although the impact of the threat may not be felt until later." *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 486 (1996). "An 'imminent hazard' may be declared at any point in a chain of events which may ultimately result in harm to the public." *Price v. United States Navy,* 39 F.3d at 1019. "[E]ndangerment means a threatened or potential harm and does not require proof of actual harm... However, at the very least, endangerment or a threat must be shown." *Id.*

McGuire, however, has been conducting CERCLA response actions to investigate and address its releases of hazardous substances since 1982. Under

[4] Additional legal concerns are involved with military munitions and RCRA's definition of solid waste.

the Defense Environmental Restoration Program, DoD uses a relative-risk evaluation to prioritize and sequence response actions so that relatively higher risks are generally addressed first. There is only one high relative risk site at McGuire (ST-09, the Bulk Fuel Storage Area). Remedial Investigation field work is complete at this site, the draft RI report is being prepared, and there are no current exposures at this high risk site. At EPA request, the medium risk landfill sites were addressed before this ST-09 site. Thus the EPA Region II and New Jersey regulators have concurred on priorities and how time and resources should be spent at McGuire. "The fact that remedial activity in accordance with CERCLA has commenced at a site greatly reduces the likelihood that a threat to human health or the environment is imminent." *OSI, Inc. v. United States*, 2007 U.S. Dist. LEXIS 683, *27 (D. Ala. 2007).

In addition, most of the detections mentioned in the McGuire Order are from samples taken in 1984-1998 (see paragraphs 11-16 of the Order). Detections of constituents and their levels from this sampling data are not relevant ten years later as evidence of a current imminent endangerment. *Abundiz v. Explorer Pipeline Co.*, 2003 U.S. Dist. LEXIS 22688 (D.N.D. Tex. 2003) (Four-year old reports of contamination do not show current evidence of a RCRA imminent and substantial endangerment).

Similarly, paragraph 15 of the Tyndall Order summarizes findings from an EPA May 1994 visual site inspection of Tyndall AFB, documented in an October 1994 EPA RCRA Facility Assessment. EPA's primary reliance in the Tyndall Order on these preliminary and outdated assessments conducted over thirteen years before the Order neither accurately captures the current status of environmental releases and potential threats to human health and the environment at Tyndall AFB, nor reflects the extensive investigatory and cleanup actions that have significantly delineated and addressed such releases and threats. For an environmental release to constitute an imminent and substantial endangerment, the threat must be current, and abatement actions are not warranted to address past threats. *Price v. United States Navy*, 39 F.3d 1011 at 1019.

EPA listed 58 units/sites as requiring further investigation (Appendix A of the Tyndall Order). However, EPA has formally concurred that 37 of these listed units/sites require neither any further investigation nor response action. At eight sites,[5] the Air Force has conducted remedial actions that have addressed environmental releases and significantly reduced or eliminated any unacceptable risk to human health and the environment. For the remaining sites, the Air Force

[5] Site/unit description conforms to the EPA Order: Sewage Plant Vicinity Landfill (IRP Site 6), Spray Field Vicinity Landfill (IRP Site 7), POL Area B (IRP Site 15A) including POL Area B Sludge Trenches, Shell Bank Fire Training Area (IRP Site 16) including Fire Training Pit, Original POL Holding Tanks, New POL Holding Tanks, Highway 98 Fire Training Areas (IRP Sites 17 and 27) includes Fire Training Area, Former PCB Transformer Site, AAFES Service Station Former UST Area (IRP Site 19), Former Active Fire Training Area (IRP Site 23) including Fire Training Pit, Fuel Storage Tank, Oil/Water Separator, Vehicle Maintenance Area (IRP Site 26) including numerous sub-units and –sites.

has completed or has made significant progress in investigating and characterizing site/unit releases and threats, as well as assessing remedial alternatives to address risk. The Order fails to describe or account for these actions. In addition, none of the remaining sites have significant environmental releases confirmed or even suspected.

C. "Necessary Action" is not tied to Abatement of Imminent and Substantial Endangerment in the McGuire or Tyndall Orders.

The lack of a statutory basis in RCRA § 7003 for the McGuire and Tyndall Orders is highlighted by the requested "work to be performed" (paragraphs 34-58 of the McGuire Order; paragraphs 38-66 of the Tyndall Order). Instead of describing "necessary actions" required to abate an imminent and substantial endangerment, these sections of the Orders require McGuire and Tyndall to generally establish a long-term cleanup program under RCRA (i.e., RCRA corrective action) throughout the installation. Under RCRA § 7003, the EPA Administrator may "order such person to take such other action as may be necessary" and issue "such orders as may be necessary to protect public health and the environment." 42 U.S.C. § 6973(a). These orders extend "only to ordering such actions as are necessary to correct a potential imminent and substantial endangerment." *87th St. Owners Corp. v. Carnegie Hill-87th St. Corp.*, 251 F. Supp. 2d 1215, 1219-20 (S.D.N.Y. 2003). "The Court is mindful that it is ultimately charged with crafting an injunctive remedy that will abate the substantial and imminent endangerment. " *City of Bangor v. Citizens Commun.*, 437 F. Supp. 2d 180, 219 (D. Maine. 2006). See also *Avondale Federal Sav. Bank v. Amoco Oil Co., 170 F.3d 692, 694 (7th Cir. 1999):* "Congress deliberately limited RCRA's remedies to injunctive relief—more specifically, injunctive relief obtained before the property is cleaned up, while the danger to health or the environment is 'imminent and substantial'."

It is thus legally tenuous whether EPA can order a set of general cleanup procedures throughout McGuire rather than actions to abate a specific imminent and substantial endangerment under the authority of RCRA § 7003. As noted in dicta, the court in *W.R. Grace & Co v. United States EPA*, 261 F.3d 330 (3d Cir. 2001), questioned whether the imminent and substantial endangerment provision in the Safe Drinking Water Act (SDWA) could be used beyond abating the danger:

> "We have carefully considered whether the EPA would ever have the authority to order long-term remediation of an aquifer pursuant to section 1431 of SDWA *when alternative interim measures are sufficient to abate the immediate threat to the public.* While there exists substantial support for the view that, under those circumstances, the EPA should order only interim measures under SDWA *and pursue long-term remediation pursuant to CERCLA*, we do not decide this issue here."

Id. at 340, note 3 (emphasis added). See also *City of Bangor v. Citizens Commun.*, 437 F. Supp. 2d at 219 ("if a cleanup of only sixty percent of the contamination would actually abate the imminent and substantial endangerment, then arguably this might be the entire cleanup required by the mandatory RCRA injunction.")

While the legislative history of RCRA § 7003 recognizes that it may take some long-term actions to abate an imminent and substantial endangerment, the "necessary actions" are tied to the abatement of the imminent and substantial endangerment. "This section's broad authority to 'take such other actions as may be necessary' includes both short and long-term injunctive relief, ranging from construction of dikes to the adoption of certain treatment technologies, upgrading of disposal facilities, and removal and incineration." H.R. Committee Print No. 96-IFC 31, 96th Cong., 1st Sess. at 32 (1979). "There is no doubt, however, that it authorizes the cleanup of a site, even a dormant one, if that action is necessary to abate a present threat to the public health or the environment." S. Rep. No 96-848, 96th Cong., 2d Sess. at 11 (1980).

EPA's own RCRA section 7003 guidance requires 7003 orders to "relate them to actions required to abate conditions that may present an imminent and substantial endangerment. It is important that the findings of fact support each element of the relief sought." USEPA, *Guidance on the Use of Section 7003 of RCRA* (Oct. 20, 1997, at 25). In contrast, both Orders fail to identify any specific cleanup actions necessary to address the alleged imminent and substantial endangerment; rather, they only describe a generic and long-term cleanup process. Because the Orders do not include either "evidence" that specific contamination "may present an imminent and substantial endangerment to health or the environment" or the "necessary actions" to abate a specific imminent and substantial endangerment, the Orders are not supported by the statutory authority of RCRA § 7003.

IV. The Order to Fort Meade under RCRA Section 7003 is Inconsistent with CERCLA Response Actions Already Taken and Without Statutory Basis as EPA Has Failed to Establish that Existing Contamination May Present an Imminent and Substantial Endangerment or Limited Actions to the Abatement of such an Endangerment

A. Background on Property Status and Response Actions at Ft. Meade.

The Army has been performing CERCLA response actions at various areas on Ft. Meade since 1980. In 1990 and 1992, Congress mandated the transfer of certain lands on Ft. Meade from the Secretary of the Army to the Secretary of the Interior to be used only for wildlife conservation purposes. Military Construction

Appropriations Act, P.L. 101-519, Section 126 (1990), and Military Construction Appropriations Act, P.L. 102-136, Section 127 (1992). In both instances, the DOI is prohibited from conveying, leasing, transferring, declaring excess, or otherwise disposing of this land without further statutory approval. P.L. 101-519, Section 126(c), and P.L. 102-136, Section 127(c). In 1991 and 1993, the Secretary of the Army transferred the specified lands to DOI pursuant to these laws, with an explicit acknowledgement that unexploded ordnance (UXO) was present on these lands associated with a military firing range, that the Army had not completed environmental restoration work on the property, that the Army would take certain actions to clear the UXO on these lands to particular depths and would remain responsible for any necessary environmental remediation associated with releases on the lands that occurred during the period it was under Army jurisdiction, and that Army would have access to the land as necessary to accomplish its purposes. DOI expressly agreed to prohibit the use of the groundwater until it is determined to be "safe for use" and not to conduct excavation in any area or removal of soil without conducting a survey for UXO. *See* Transfer Assemblies for Fort George G. Meade Military Reservation to the Department of the Interior, dated October 16, 1991 and January 12, 1993.

In 1997, EPA prepared a Hazard Ranking System (HRS) Documentation Record for Ft. Meade. EPA evaluated four source areas and scored them using the HRS. It also noted six other source areas on the installation but did not evaluate and score them using the HRS. *See* Ft. Meade HRS Package, page 13. Based on the HRS scores for the four areas, in 1997 EPA proposed listing these releases on the Federal Facilities section of the NPL. 62 Fed. Reg. 15594 (April 1, 1997). Consistent with CERCLA, this proposed rule described the proposed sites as the geographic limits of the releases that were evaluated for listing, with the proviso that the nature and extent of these releases would be further determined during the remedial investigation (RI) and feasibility study (FS). *Id.* at 15595. The Army commented on the proposed listing of these areas, objecting to the listing of any part of Ft. Meade and further noting that the "site" is only the four areas scored in the HRS package. In response, EPA agreed that only four areas had been scored and six additional potential source areas had been identified, and that two of these additional areas are on DOI property, one of which was scored and the other which might be evaluated during the RI. EPA Response to Comments on Ft. George G. Meade, page 2.1-3. In fact, the Clean Fill Dump area that EPA evaluated and scored and believed was on DOI land was not transferred by Army to the DOI with the other property and is still under Army jurisdiction. Transfer Assembly, para. 1 (Oct. 16, 1991).

EPA listed Ft. Meade on the NPL by final rule in 1998. 63 Fed. Reg. 40182 (July 28, 1998). The Preamble explained that "the NPL site would include all releases evaluated as part of that HRS analysis" and "[a]s a legal matter, the site is not coextensive with. . .the boundaries of the installation." *Id.* at 40183. Soon thereafter, EPA proposed to delete the Tipton Army Airfield portion of Ft. Meade from the NPL as a partial site deletion, even though this area had not been

identified by EPA as either an evaluated source area or a potential source area in the HRS package for Ft. Meade or in the proposed or final NPL listings. 64 Fed. Reg. 50477 (Sept. 17, 1999). EPA acknowledged the fact it had not considered the Tipton AAF in the scoring package, and noted that two Records of Decision (RODs) had been issued by the Army and EPA for the Tipton AAF in 1998 and 1999. *Id.* at 50481. EPA also stated that the releases at the Tipton AAF "do not pose an unacceptable risk to human health and the environment as long as the land use restrictions selected and established" in the two RODs remain in effect. *Id.* Risk at this site is stated to be "within the EPA's acceptable risk range." *Id.* EPA finalized the partial deletion of the Tipton AAF from the Ft. Meade NPL listing just two months later. 64 Fed. Reg. 61526 (Nov. 12, 1999). Thereafter, in 2001, the Army transferred title to the Tipton Army Airfield real property from the United States to Anne Arundel County, Maryland, subject to use restrictions stated in the deed. These restrictions allow the property to be used only for a municipal airport, limited new airport construction and restricted subsurface use, allow United States access to the property for inspections and necessary response actions, and provide for reversion of the title back to the United States if certain of the use restrictions are violated.

All the areas evaluated and scored for the Ft. Meade NPL listing have had substantial CERCLA response actions taken by the Army, including a ROD jointly issued by the two agencies for the Clean Fill Dump in 2000 which is fully implemented, RIs and FSs which have been completed or are underway for many areas, and one removal action completed for a munitions response site. CERCLA response actions through RI/FS and removal actions have been taken by the Army for the sitewide groundwater and other areas on the installation and the DOI property.

In early 2007, EPA demanded that the Army enter an FFA with EPA for the entire area of Ft. Meade and the DOI property and all releases in any part of this property. The Army offered to enter an FFA based on the EPA and DoD Model FFA for Ft. Meade property under current Army jurisdiction, and to continue to perform CERCLA response actions in consultation with EPA, DOI and the State and local officials as required by the DERP for the DOI property. EPA rejected this offer.

B. The EPA RCRA Section 7003 Order for All Current and Former Ft. Meade Property, Issued Notwithstanding all the CERCLA Response Actions Already Taken, Is Inappropriate

In the RCRA section 7003 Order for Ft. Meade issued on August 27, 2007, Section VI. Work To Be Performed, EPA begins by stating that some actions required by the Order have already been taken and completion of the Order may be demonstrated by submission of that work to EPA subject to their formal approval. The Order then requires a Site Management Plan with proposed work

and schedules for all areas identified in Section VI. It requires unspecified Interim Measures "as are necessary and appropriate to protect human health and the environment" at areas including the Tipton AAF, the Clean Fill Dump, a Closed Sanitary Landfill which was evaluated and scored for the NPL listing, and an area on the DOI property that was a potential source area not evaluated for the NPL listing and recently the subject of an Army decision document selecting a monitored natural attenuation final remedy. The Order also requires UXO investigations at certain areas of the DOI land, that Army "continue the planned remediation" of certain sites, and the submission of a series of RCRA reports including an Interim Measures Assessment Report, a RCRA Facility Investigation, a Final Basewide Cleanup Plan, a Corrective Measures Study, followed by EPA's receipt and consideration of public comment and EPA's selection of corrective measures, a Corrective Measures Workplan and Design, and Corrective Measures Assessment Reports, all for unspecified areas of the entire current and former Ft. Meade property. EPA does not associate any of the required actions with a specific release alleged to be a current or possible imminent and substantial endangerment.

Further, in the Work To Be Performed section, EPA does not state how this work complies with the DERP mandate that DoD conduct response actions subject to and consistent with CERCLA, the mandate of CERCLA and Executive Order 12580 that DoD conduct response actions at DoD installations and select remedial actions consistent with CERCLA and the CERCLA implementing regulation, and in coordination with EPA for releases listed on the NPL. Nor does EPA describe how this Order comports with the procedural requirements for EPA to issue an order on a Federal facility under CERCLA, or how any of the requirements of this Order satisfy the legal mandates of CERCLA Section 120 concerning Federal facilities with releases subject to CERCLA.

The RCRA Section 7003 Order alleges in general terms that there may be an imminent and substantial endangerment related to handling or disposal of solid or hazardous waste at or from some part of "the Facility", defined as all parts of the current and former Ft. Meade lands. Order, Section V.E, and Section III. It does not make a finding of fact regarding a specific actual or potential imminent and substantial endangerment. As previously discussed in this memorandum, the emergency authority of RCRA Section 7003 is not to be used "where the risk of harm is remote in time, completely speculative in nature, or de minimis in degree." *W. R. Grace & Co. v. EPA,* 261 F.3d at 340), citing H.R.Rep. No. 93-1185 (1974), 1974 U.S.C.C.A.N. 6454, at 6488. EPA may not order abatement of a site which poses no threat, and must make specific findings of fact with regard to the alleged imminent and substantial endangerment. *Id.* An imminent and substantial endangerment does not exist when the contamination has been sufficiently remedied or does not present a danger. *Prisco v. New York*, 902 F. Supp 374, 395 (S.D.N.Y. 1995). "A vague possibility of future harm cannot satisfy the statute, which applies to dangers that are both 'imminent and substantial'." *Chemical*

Weapons Working Group, Inc. v. U.S. DoD, 61 Fed.Appx. 556, 561 (10th Cir. 2003).

While DoD recognizes that there is no specific quantitative standard that must be exceeded in order for an imminent and substantial endangerment to exist, as discussed previously, these cases support the proposition that where a site poses no uncontrolled threat to human health or the environment and at areas where remedial actions are already in place, there is no basis for a RCRA 7003 Order. This is the situation at the current and former areas of Ft. Meade. All areas evaluated for listing on the NPL either have remedies in place or are close to the selection of a final remedy. The four sites evaluated for the NPL listing demonstrate the substantial progress that Army has made on these sites at Ft. Meade. The Defense Property Disposal Office Salvage Yard (also known as the Defense Reutilization and Marketing Office, "DRMO", drum site), has a completed RI and draft final Focused FS now under review with a groundwater monitoring remedy likely to be proposed as the final remedy action in the near future. The Active Sanitary Landfill (now known as the Closed Sanitary Landfill due to its changed permitted status) has been capped and closed under a State of Maryland solid waste management permit. The RI has been completed and groundwater has been investigated in this area. A no further action remedy decision is likely for this site. The Clean Fill Dump is on Army retained property that was identified for transfer to DOI but has not yet been transferred pending completion of environmental response actions. A ROD was issued for this site which provided for cover of the area, monitored natural attenuation with long term groundwater monitoring and no other action. One five-year review has been completed. At the request of DOI, some debris and waste was removed in early 2007 in a removal action which is completed. Other than the monitoring, Army anticipates no further remedial action will be necessary at this site. The Post Laundry Facility has been the subject of extensive soil and groundwater investigation, including satisfaction of a State order for site investigation issued in 1994. A comprehensive RI/FS has now been submitted to the regulatory agencies for review. An in-situ groundwater treatment remedy is under consideration for this site. There is no uncontrolled exposure pathway at any of these sites and they are all on property under Army accountability.

All areas of concern on the DOI property that was formerly part of Ft. Meade and at the Tipton AAF either have selected remedial actions in place or are actively engaged in the CERCLA response process, to include military munitions response actions by the Army. The DOI land is subject to a very restrictive statutory land use control and to land use controls in the Transfer Assemblies for the groundwater and the soils where UXO or other contamination may be present.

EPA has informed the public that there is no uncontrolled actual or potential unacceptable human exposure at the current or former Ft. Meade property. Therefore, there can be no imminent and substantial endangerment justifying a RCRA 7003 Order on any part of the current or former Ft. Meade.

In addition, CERCLA only requires an IAG for Federal facility NPL sites. 42 U.S.C. § 9620(e). EPA is improperly attempting to expand the NPL listing to other property, and likewise the CERCLA IAG requirement. EPA initially identified specific releases at Fort Meade for the Federal facility portion of the NPL. Consistent with the decision of the District of Columbia Circuit in *Mead Corp. v. Browner,* 100 F.3d 152 (D.C. Cir. 1996), EPA listed only those evaluated releases and cannot now rely on its invalidated aggregation policy to extend the listing to a boundary to boundary area. EPA cannot expand an NPL listing by internal memoranda, and such documents do not have the effect of promulgating a revision to a site listing. *Montrose Chemical Corp. of California v. EPA,* 132 F.3d 90, 95 (D.C. Cir. 1998). EPA is required to provide an opportunity for notice and comment before changing its analysis of a site for purposes of inclusion on the NPL. *Anne Arundel County, MD v. EPA,* 963 F.2d 412, 418 (D.C. Cir. 1992).

In its own listing policy, EPA states, "When a site is listed, it is necessary to define the release (or releases) encompassed within the listing. The approach generally used is to delineate a geographical area (usually the area within the installation or plant boundaries) and define the site by reference to that area. As a legal matter, the site is not coextensive with that area, and the boundaries of the installation or plant are not the 'boundaries' of the site. Rather, the site consists of all contaminated areas within the area used to define the site, and any other location to which contamination from that area has come to be located." "Clarification of NPL Listing Policy", US EPA, Office of Solid Waste and Emergency Response, Attachment pg. 1 (Aug. 3, 1995).

EPA has attempted to change the areas included in its NPL listing for Ft. Meade a number of times over the years. EPA first evaluated four specific releases and noted six other potential release areas in its NPL listing decision. EPA then deleted from the NPL the Tipton AAF, even though it was never considered as an actual or potential release area for this purpose prior to the notice of deletion. EPA then considered all areas of the current or former installation boundaries of Ft. Meade as included within the NPL listing when demanding an FFA for this entire area and in direct contravention of the ruling in *Mead Corp. v. Browner*, 100 F.3d 152 (D.C. Cir 1996) and its current policies for NPL listing. "Clarification of NPL Listing Policy", US EPA, Office of Solid Waste and Emergency Response, Attachment pg. 1 (Aug. 3, 1995). EPA now seeks to impose an entirely different process for cleanup under the RCRA 7003 Order without any reconciliation of its previous actions or of the authorities of DoD, the Attorney General, and EPA at a Federal facility where response actions are being conducted or were completed under CERCLA Sections 120 and 104 and the DERP. Even more significantly, EPA takes this route without alleging any specific imminent and substantial endangerment or correlating broad-sweeping RCRA relief to abating such endangerment.

V. The Order to Air Force Plant 44 under Section 1431 of the Safe Drinking Water Act is Without Statutory Basis as EPA Has Failed to Establish that Groundwater Contamination May Present an Imminent and Substantial Endangerment .

A. Background on AF Plant 44 Groundwater Treatment and Tucson International Airport Area (TIAA) NPL site Groundwater Treatment.

In its Safe Drinking Water Act (SDWA) § 1431 Order issued to the Air Force at Plant 44 (AFP 44), EPA alleges that 1,4-dioxane (DX) and trichloroethylene (TCE) contamination in groundwater migrating from AFP 44 may present an imminent and substantial endangerment "...to the health of persons receiving water through . . . the Public Water System in the City of Tucson." (Order, page 9, paragraph 28).

AFP 44 is but one portion of a large (ten square miles) Superfund site called the Tucson International Airport Area (TIAA) placed on the NPL in 1983 (see 40 CFR Part 300, Appendix B). The groundwater flow at the TIAA site is generally from AFP 44 (south) to the rest of the TIAA site (north). For purposes of understanding the geographic layout described in this section, see the map at Attachment F.

The Air Force in 1987 installed a groundwater extraction and treatment plant at AFP 44. Due to the nature of that system, it treats TCE but not DX. DX contamination was not detected until 2002 when advances in technology lowered the detection limit to one part per billion (ppb).

Another groundwater extraction and treatment system was installed by responsible parties, including the Air Force, at a northern portion of the TIAA site to treat groundwater contamination, and it is known as the Tucson Airport Remediation Project (TARP). This contamination originates both from sources on AFP 44 as well as other sources within the TIAA. The TARP system extracts groundwater contamination from two different areas – the south well field and the north well field. There is DX contamination in the south well field that has migrated from AFP 44, whereas there has been no DX detected in the north well field. Water is blended from both well fields before being treated at TARP.

Pursuant to a consent decree entered among the responsible parties with EPA at the TIAA site, treated water from the TARP system is then pumped into the Tucson public drinking water system, and comprises approximately 9% of the municipal water supply needs.

B. The Order Is Deficient on Its Face for Failure to Allege an Imminent and Substantial Endangerment Due to AFP 44 DX or TCE Contamination.

The sole basis of EPA's conclusions of law and determinations is that TCE and DX contamination at and migrating from AFP 44 "...may present an imminent and substantial endangerment to the health of person's receiving water through TARP and the public drinking water system in the City of Tucson." (Order, page 9, paragraph 28 and page 10, paragraph 32). In reviewing an agency order, it can only be upheld on the same basis the agency articulated in the order; a court may not uphold the order unless sustainable by the agency findings and reasons stated in the order. *W.R. Grace & Co. v. EPA*, 261 F.3d at 338.

EPA states that a 3 ppb level for DX and a 5 ppb level for TCE in the Order "may endanger the health of persons". (Order, page 9, paragraph 29). Thus, EPA implicitly equates 3 ppb DX (a risk-based level) and 5 ppb TCE (as a Maximum Contaminant Level) in the groundwater as presenting an imminent and substantial endangerment (Order, page 8). However, the Order only alleges the presence of DX and TCE in groundwater at or near AFP 44, or that such contaminants are "likely to enter the aquifer that serves water through TARP and the public water system to the City of Tucson." (Order, page 9, Paragraph 26)

The Order never provides evidence or alleges that DX or TCE has entered or will enter the public water supply or the TARP plant at levels exceeding 3 ppb for DX or 5 ppb for TCE, or at levels exceeding TARP plant treatment capacities. Further, the Order does not allege that any consumer has or may receive drinking water that exceeds these levels. This failure to allege exposure contrasts sharply with orders upheld by courts as to groundwater contamination. *See, e.g., Interfaith Cmty. Org. v. Honeywell Int'l Inc.*, 399 F.3d at 261 (groundwater contamination ranged from 200 to 8,000 times the state MCLs, and the Court upheld EPA's imminent and substantial endangerment order under its parallel authority under RCRA § 7003).

The mere presence of a contaminant in an aquifer does not constitute imminent and substantial endangerment under the Safe Drinking Water Act. Even the mere exceedance of an MCL or risk-based level in a drinking water aquifer, standing alone, does not equate to an imminent and substantial endangerment without showing endangerment to the user. Safe Drinking Water Act MCLs generally regulate the level of contaminant in publicly supplied drinking water as measured at the tap of the consumer (see generally 40 CFR Part 141 and http://www.epa.gov/safewater/standard/setting.html). Relevant case law supports the conclusion that merely exceeding an MCL in an aquifer that is a drinking water source does not constitute an imminent and substantial endangerment unless there are exceedances at the point of use. For example, in *U.S. v. Midway Heights County Water Dist.*, 695 F. Supp. 1072, 1074-76 (E.D. Cal. 1988), EPA was able to establish in its SDWA imminent and substantial endangerment Order that the defendant had for years provided water to consumers that exceeded

MCLs for micro-biological contaminants *at the point of use* in customer domiciles. The Court upheld the Order on the basis that EPA had established MCLs were being exceeded for years at the point of use and that the contaminants in question were "...accepted indicators of the potential for the spread of serious disease..." *Id.* at 1076. In contrast to the *Midway* case, it is clear that the drinking water in Tucson is not at risk. In response to public inquiries after issuance of the Order, EPA confirmed that "[o]ne thing we want to emphasize, this water is safe to drink". Arizona Star, July 14, 2007.

Furthermore, numerous cases have noted that if CERCLA response actions to address contamination at a site have commenced, this "...greatly reduces the likelihood that a threat to human health or the environment is imminent." *OSI, Inc. v. United States*, 2007 U.S. Dist. LEXIS 683, 1, 26-7 (D. Ala. 2007), 64 ERC (BNA) 1794; see also *Adams v. NVR Homes, Inc.*, 135 F. Supp.2d 675, 688 (D. Md. 2001); *Christie-Spencer Corp. v. Hausman Realty Co.*, Inc., 118 F. Supp. 2d 408, 419-23 (S.D.N.Y. 2000). Here EPA's Order acknowledges that CERCLA response actions have been conducted by the Air Force at AFP 44 since 1986, and by responsible parties at TIAA, under the direct supervision of EPA under a CERCLA consent decree, since 1991 to remediate groundwater contamination (See Pages 4-5, Order). Accordingly, these actions have even further reduced any risk to human health, whether it was ever an imminent and substantial endangerment or rather just an unacceptable risk.

C. DX levels Are Declining, and Do Not and Will Not Enter the Public Water System at Unacceptable Levels

EPA in its Order selectively identifies sampling data that do not reflect the current nature of DX contamination potentially impacting the Tucson public drinking water system. For example, at pages four and six of the Order it cites to the highest DX samples in 2006 at AFP 44 of 298 ppb at well M-98, and yet fails to explain that this is in a limited groundwater hot spot approximately three miles south of the TARP south well field, that the sample for this site in 2007 had declined to 170 ppb and has been steadily decreasing since 2002, and that this hot spot is in an area with no known hydrological connection to the groundwater plume that migrates north.

A more thorough and representational review of sampling data from extraction and sampling wells at AFP 44 and similar wells at TARP, shows that while DX average numbers and ranges have fluctuated 1-2 ppb since 2002, the overall trend has been declining and that the levels decreased markedly in 2007. For example, in the TARP south well field the average level of DX, from 2002-2006, had been approximately 8 ppb. However, in February 2007 the average decreased to approximately 6 ppb. Simple mathematical computations of the extraction rates from the north and south well fields show there is no danger of

TARP effluent exceeding 3 ppb unless the average DX levels in the south well field exceeds 11 ppb (See Attachment G).

Beyond the sampling analysis, it is clear that water will not be delivered to the City of Tucson water system with DX levels exceeding 3 ppb. First, the water from the two TARP water fields is blended before sending it through the TARP system (Order, page 6). Because the water is blended, levels of DX have not exceeded 3 ppb in the public drinking water supply in Tucson. EPA's stated primary, if not sole, public health concern, is that "...if the North field extraction wells shut down for any reason, including routine maintenance, then the South Field extraction well also must shut down. This balancing of extraction fields reduces the efficiency of the TARP to extract and treat groundwater." (Order, pages 6-7).

Second, EPA acknowledges in the Order that the City of Tucson will not accept treated water from TARP if it exceeds 3 ppb of DX, and if the north well field was shut down for any reason, the south well field would also be shut down (Order, pages 6-7). Accordingly, there is factually no possibility of DX being introduced into the City of Tucson's public water system at levels exceeding 3 ppb of DX, the very level EPA apparently equates with endangerment. Therefore, the Order itself establishes that persons receiving water through the public water system will not be exposed to DX exceeding 3ppb.

D. DX Levels of 3 ppb Do Not Constitute an Unacceptable Risk to Human Health, Much Less an Imminent and Substantial Endangerment Under § 1431 of the SDWA

EPA seemingly equates 3 ppb, a level it asserts equates to an excess 1 x 10(-6) cancer risk, as a "bright line" in that any level of DX that may potentially enter the public water supply above this level is inherently an imminent and substantial endangerment (Order, page 8). This position is not supported by the facts, law or science.

There is no federal or state public drinking water standard for DX. The City of Tucson "...has publicly stated that it will not serve drinking water with DX concentrations above 3 ppb." (Order, page 6). The basis for Tucson's position is not stated in the Order, but inferentially it is that "EPA has determined that lifetime exposure to DX at a concentration greater than 3 ppb in drinking water is associated with an excess cancer risk of greater than 1 x 10(-6)." (Order, page 8). The basis of or source for this "determination" is not specified in the Order, nor is EPA's basis for concluding that contamination levels above a 10(-6) risk (i.e., 1 additional cancer in 1,000,000 people could occur) constitute an imminent and substantial endangerment.

The 3 ppb level for DX is not a promulgated and enforceable standard, such as an MCL, but rather is a risk-based concentration derived from toxicity values – here the cancer oral slope factor contained in EPA's National Center for Environmental Assessment's Integrated Risk Information System (see http://www.epa.gov/iris/subst/0326.htm). This website lists drinking water concentrations of DX that constitute a 10(-6) cancer risk – 3ppb; a 10(-5) risk – 30 ppb; and a 10(-4) risk – 300 ppb (see § II. B.1.). EPA has consistently taken the position that contamination levels within the 10(-4) to 10(-6) excess cancer risk are acceptable, safe and protective of human health, both for MCLs under the SDWA and under cleanup statutes such as CERCLA (see 56 Fed. Reg. 3535 (Jan. 30, 1991) and 55 Fed. Reg. 8666, 8716 (Mar. 8, 1990)). Thus, DX concentrations between 3 to 300 ppb would be within the acceptable risk range.

Under CERCLA and similar federal remediation/cleanup programs administered by EPA, EPA generally determines unacceptable risk in groundwater that is an actual drinking water source by comparing contaminant levels to MCLs (see EPA OSWER 9355.0-30, *Role of the Baseline Risk Assessment in Superfund Remedy Selection Decisions*, pages 1, 4, at http://www.epa.gov/oswer/riskassessment/baseline.htm). If an MCL does not exist for a particular contaminant, then EPA uses toxicological values, such as IRIS toxicity values, to establish acceptable risk-based levels. Where the excess cancer risk at the site does not exceed 10(-4), action is generally not warranted *Id.* Here, as noted above, the 10(-4) cancer risk concentration level for DX is 300 ppb, whereas the 10(-5) concentration is 30 ppb. In its 2006 Edition of the Drinking Water Standards and Health Advisories, EPA 822-R-06-013, EPA lists 300 ppb of DX as the 10(-4) cancer risk based health advisory level (see http://www.epa.gov/waterscience/criteria/drinking/dwstandards.pdf).

Therefore, there is no actual or potential risk from DX in groundwater that even closely approaches the 300 ppb, 10(-4) excess cancer risk that normally triggers the need to take CERCLA remedial action. Stated otherwise, the cancer risk from DX levels in groundwater that enters the public drinking water system does not, and will not, require response action under the general standard of CERCLA and other federal remedial statutes, which set standards as actual or potential risk that poses unacceptable risk to human health. In contrast, an imminent and substantial endangerment standard requires that the risk or endangerment to the health of those who may use the public water system be shown to be substantial or serious and there must be some necessity for the action ordered. *W.R Grace & Co. v. U.S. EPA*, 261 F. 3d at 338-40 and *Price v. United States Navy*, 39 F. 3d at 1019. EPA has failed to establish an unacceptable risk to human health from DX or TCE at AFP 44, much less a serious and substantial one that constitutes imminent and substantial endangerment.

E. TCE Levels Do Not Present an Imminent and Substantial Endangerment To Human Health

EPA in the Order does not allege there are or may be levels of TCE migrating from AFP 44 into public drinking water that exceed drinking water standards or the treatment capacity of the TARP plant (Order, pages 4-10) . In fact, EPA does not even specify any levels of TCE that have been detected in either TARP well field. Accordingly, the Order is deficient as it fails to articulate any basis for EPA's conclusion that TCE has or will be delivered in the Tucson public water system at levels that create an imminent and substantial endangerment.

EPA's general assertion in the Order that TCE may present an imminent and substantial endangerment is not supported by actual data. First, again in the Order EPA refers to the highest sample of TCE at AFP 44 in 2006 of 3,400 ppb (Pages 4 and 7). While the Order does not specify the location of this sample, the location apparently is M-99, shown on the above referenced and attached map, which is located approximately 3.5 miles from the TARP south well field, is a very limited point of contamination, and lacks any known hydrological connection to the plume being treated at TARP. The area of the detection is being treated by the groundwater extraction and treatment plant at AF Plant 44. Therefore, there are no current or threatened exposures from this limited and isolated detection, and it is already addressed in an ongoing remedy.

The TARP treatment plant can treat TCE levels up to 150 ppb and meet a TCE effluent level of 1.5 ppb. The blended influent levels into the TARP plant from both the south and north well fields of TCE have averaged 16 ppb over the last 5 years, and there is no increasing trend apparent. Accordingly, there is a complete lack of evidence that TCE in groundwater migrating from AFP 44 may present any risk to customers of the City of Tucson public drinking water system, much less an imminent and substantial endangerment.

VI. Resolution of Interagency Disputes Is An Executive Branch Responsibility Rather Than Citizen Suit Enforcement of the EPA Orders Against a Federal Facility

In a recent letter to the Air Force, EPA stated that the Air Force is "in violation of a number of the Order's provisions", and "violations of the Order may be enforced by citizens or states under RCRA Section 7002." EPA Letter to AF, dated March 19, 2008, p. 2 (Attachment H). Similar statements were also made orally to the Army and DoD. DoD's analysis leads to the conclusion that EPA and DoD must enter into dispute resolution discussions under the auspices of the Department of Justice (DOJ) for any legal disputes between our agencies, as a result of the authority delegated by the President to the Attorney General and DOJ in Executive Order 12146, dated July 18, 1979, sec. 1-401. For disputes of a non-

legal nature, the Office of Management and Budget has been delegated the President's authority to resolve interagency conflicts regarding pollution control matters when the Administrator of EPA and the interested Federal agency are unable to resolve the conflict. Executive Order 12088, dated Oct. 13, 1978, sec. 1-602.

RCRA Section 7003 by its terms provides for enforcement through a Federal District Court. "[U]pon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment" the EPA Administrator "may bring suit on behalf of the United States in the appropriate district court against any person ... who has contributed or who is contributing to such handling, storage, treatment, transportation or disposal to restrain such person from such handling, storage, treatment, transportation, or disposal, to order such person to take such other action as may be necessary, or both." 42 U.S.C. § 6973(a). This section authorizes the EPA, after notice to the affected State, to take other action "including but not limited to, issuing such orders as may be necessary to protect public health and the environment." *Id.* The statute provides further that "any person who willfully violates, or fails or refuses to comply with, any order of the Administrator under subsection (a) of this section may, *in an action brought in the appropriate United States district court to enforce such order*, be fined not more than $5,000 for each day in which such violation occurs or such failure to comply continues." 42 U.S.C. § 6973(b), emphasis added. Section 1431 of the Safe Drinking Water Act contains language regarding enforcement in Federal court that is similar to RCRA Section 7003. 42 U.S.C. § 300i(b).

The Department of Justice has made clear in decisions, letters, and testimony to Congress that disputes between Federal agencies are a matter of the President's Executive Branch responsibility under the United States Constitution. Resort to Courts is not available to EPA to enforce these orders. Rather they must seek resolution within the Executive Branch under the Executive Orders identified above, with both agencies having ultimate resort to the President if necessary. "Conflicts within the Executive Branch are resolved internally, under the supervision of the President or his delegate, and not in the courts." Testimony of Asst. Attorney General Henry Habicht, II, Before the House Subcommittee on 28 April 1987, reprinted in Federal Facilities Compliance Strategy, EPA, OECM, No. 130/4-89/003, November 1988, Appendix H, at pg. 28. This principle has been applied in a number of opinions by the DOJ Office of Legal Counsel involving disputes between Federal agencies related to enforcement authority. *See, for example,* "EPA Assessment of Penalties Against Federal Agencies for Violation of the Underground Storage Tank Requirements of the Resource Conservation and Recovery Act", Memorandum Opinion of OLC to the General Counsel, DoD, and the General Counsel, EPA (June 14, 2000).

EPA's reference in a letter and oral communications to the Air Force, Army, and DoD to enforcement of these Orders through citizen suits is inappropriate. These statements could be viewed as EPA encouraging citizen suit enforcement against the United States. It is at best unusual that EPA would warn the DoD Components about citizen suits rather than seeking review within the Executive Branch from the President's delegates, the Attorney General or the Director of the Office of Management and Budget. Being subject to the President's constitutional authority the same as DoD, EPA's venue for resolution of such disputes is to the Executive Branch agencies that have been delegated this authority by the President. EPA itself should refer these disputes to DOJ or OMB if it desires to enforce its Orders against a DoD Component.

There are statutory bars that should prevent the justiciability of these matters in citizen suits (e.g. CERCLA section 113(h)). However, the prospect of a Federal court, in a citizen suit, taking on the role of determining an interagency dispute between two Federal agencies raises serious constitutional separation of powers concerns. Assistant Attorney General Habicht addressed this in his remarks to the Congress, stating that the President would establish the position of the Executive Branch, and only then could a citizen sue to compel compliance with that standard. "When there is legitimate dispute as to the meaning or application of such requirements, the ultimate responsibility for resolution lies with the President." Testimony of Asst. Attorney General Henry Habicht, II, Before the House Subcommittee on 28 April 1987, reprinted in Federal Facilities Compliance Strategy, EPA, OECM, No. 130/4-89/003, November 1988, Appendix H, at pg. 32.

VII. Conclusion

A close look at the installations involved in this matter reveals that there is no imminent and substantial endangerment at any of these installations that would justify a RCRA section 7003 Order or a SDWA section 1431 Order. At all of these installations, the Air Force and the Army have worked in close consultation with EPA and the appropriate State to plan and conduct CERCLA response actions. All have conducted numerous removal and remedial actions and are in the process of carrying out additional response actions as necessary under CERCLA. EPA has inappropriately used its RCRA and SDWA authority by issuing these orders.

For the above described reasons, it is requested that the Department of Justice review this matter and advise if it is in agreement that it is inappropriate for EPA to issue RCRA section 7003 and SDWA section 1431 Orders in the circumstances existing at McGuire AFB, AFP 44, Tyndall AFB, and Ft. Meade. Specific legal issues include:

(1) Whether an imminent and substantial endangerment order must be based on specific and supported findings of fact that demonstrate an imminent and substantial endangerment may be present.

(2) Whether the "necessary action" (i.e., required response) in such Orders can extend beyond abatement of a specific endangerment to an installation-wide cleanup program.

(3) Whether EPA can circumvent the established CERCLA response process for a NPL site, including circumventing the DOJ approval process under E.O. 12580 for a CERCLA imminent and substantial endangerment order, by issuing similar orders under other statutory authorities which do not require DOJ concurrence.

(4) Whether EPA can include property in a Federal facility NPL listing that was transferred to another Federal agency several years prior to the NPL listing, and where no releases were evaluated and scored during the listing.

(5) Whether EPA can unilaterally force the inclusion of terms in an Interagency Agreement or a Federal Facility Agreement that extend beyond the legal requirements in CERCLA § 120(e).

(6) Whether the requirements in CERCLA § 120(e) can be satisfied through inclusion in a Record of Decision.

(7) Whether EPA can base an imminent and substantial endangerment order on the lack of an IAG that is required by CERCLA § 120(e).