



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

NOV 13 2007

THE ADMINISTRATOR

The Honorable Michael W. Wynne
Secretary of the Air Force
Room 4E874
1670 Air Force Pentagon
Washington, DC 20330-1670

Re: Administrative Order, U.S. EPA Docket Number RCRA-02-2007-7308, McGuire Air Force Base, New Hanover Township, Burlington County, New Jersey

Dear Secretary Wynne:

This letter conveys my determination as to the finality of the Resource Conservation and Recovery Act (RCRA) section 7003 order (Order) issued by the U.S. Environmental Protection Agency on July 13, 2007, to the Air Force for contamination on the McGuire Air Force Base. After full and fair consideration of the points raised by the Air Force, EPA has concluded that the presence of hazardous and solid waste at McGuire Air Force Base may present an imminent and substantial endangerment, that the Order issued is appropriate and necessary to abate that endangerment, and that the Order is final in the form issued on July 13, 2007.

Under 42 U.S.C. § 6961(b)(2), "no [RCRA] administrative order issued to . . . a department . . . shall become final until such department . . . has had the opportunity to confer with the Administrator." You requested this opportunity by letter dated August 18, 2007. On September 25, 2007, we conferred briefly and you indicated that the Air Force intended to fully comply with the Order and that our discussion would satisfy your conference opportunity. This understanding was further confirmed in a phone conversation between Air Force Assistant Secretary William Anderson and EPA Assistant Administrator Granta Nakayama, as well as, in a subsequent letter from Mr. Nakayama to Assistant Secretary Anderson dated October 23, 2007.

As you know, McGuire Air Force Base was placed on the National Priorities List (NPL) eight years ago. Since that time, the Air Force has made insufficient progress in investigating and addressing the contamination at the site. 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 Federal Facility Agreement (FFA) with the Air Force have been unsuccessful to date.

Under the law, federal agencies are required to respond to NPL sites to the same extent and in the same manner as private parties. EPA attempted to negotiate a comprehensive and enforceable FFA that would govern the selection and implementation of the Air Force response

at this site. These agreements have been successfully entered into at approximately 150 out of 172 federal facility NPL sites. Given the Air Force's resistance to sign an acceptable FFA with essential provisions to ensure appropriate oversight and protectiveness, the imminent endangerment at the site necessitates that EPA move forward with the Order. As Congress specifically provided, nothing in the Superfund law affects the obligation of a federal agency to comply with any requirement under RCRA.

As stated above, after full and fair consideration of the points raised by the Air Force in its oral discussions and written materials, EPA has concluded that the presence of hazardous and solid waste at McGuire Air Force Base may present an imminent and substantial endangerment, that the Order issued is appropriate and necessary to abate that endangerment, and that the Order is final in the form issued on July 13, 2007. A written summary of the issues you raised along with EPA's response is enclosed. In accordance with Section XXVI, Paragraph 111 of the Order, the Order becomes effective within five (5) calendar days of the Air Force's receipt of my determination. According to Section XXIII of the Order, the Air Force then has 15 calendar days from the effective date of the Order to notify EPA in writing of its intent to comply.

We continue to stand ready to enter into the standard, model-based FFA that EPA requires at all federal sites. EPA's review of all Air Force alternative agreements received to date reveal continued omissions of key provisions, including some of the provisions clearly agreed to in the older 1988 and 1999 model language. We once again ask that you consider signing the FFA that EPA sent you last April. In the meantime, the final McGuire Order ensures that the Air Force responds to the imminent and substantial endangerment at McGuire Air Force Base in a timely and protective manner pursuant to EPA's oversight. Finally, we thank you for your commitment to comply with the Order to ensure timely and appropriate development of this important cleanup at the McGuire Air Force Base.

Sincerely,

A handwritten signature in black ink, appearing to read "S. L. Johnson", written over the printed name.

Stephen L. Johnson

Enclosure

**EPA RESPONSE TO ISSUES RAISED BY AIR FORCE REGARDING
ISSUANCE OF RCRA 7003 ORDER AT MCGUIRE AIR FORCE BASE**

Issue 1: EPA has the legal authority to issue non-CERCLA orders at NPL sites.

As a legal matter, EPA's use of non-CERCLA administrative order authority at McGuire Air Force Base is not limited, prohibited, or restricted in any way by any provision in CERCLA, other laws, regulations or Executive Orders. EPA may use its RCRA section 7003 order authority to address a threat to human health and the environment at any site where the statutory pre-requisites are met, including NPL sites. There is no irreconcilable conflict between CERCLA and RCRA. In such circumstances, courts have long recognized that there is no implied repeal of a statute by a later enactment. When two statutes are capable of co-existence, absent a clearly expressed congressional intention to the contrary, each is to be regarded as effective. *Morton v. Mancari*, 417 U.S. 535, 550-551 (1974); *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 264 (1992), *United States v. Waste Industries, Inc.*, 734 F.2d 159, 160 (4th Cir. 1984) (RCRA section 7003 order available to EPA regardless of availability of CERCLA remedy).

RCRA sections 7003 and 6001 provide EPA with the legal authority to issue the Order to the Air Force at McGuire Air Force Base (AFB). Federal agencies like the Air Force are subject to EPA's section 7003 abatement authority to the same extent as private parties. CERCLA § 120(i) expressly provides that "[n]othing in this section shall affect or impair the obligation of any department, agency, or instrumentality of the United States to comply with any requirement of the Solid Waste Disposal Act [42 U.S.C.A. section 6901 et seq.] (including corrective action requirements)."

Issue 2: The standard for Imminent and Substantial Endangerment for RCRA 7003.

In general, to find an imminent and substantial endangerment (ISE), the Agency does not need proof of actual harm. A reasonable cause for concern that health or the environment may be at risk is enough. EPA need only show that there is a potential for imminent threat. See, e.g., *United States v. Waste Industries, Inc.*, 734 F.2d 159 (4th Cir. 1984) (unnecessary for EPA to show that an emergency exists to establish basis for section 7003 order).

Under RCRA section 7003, there must be a demonstration that the activities "may present" an imminent and substantial threat. Similarly, the term "endangerment" means a threatened or potential harm, and does not require proof of actual harm. The endangerment must also be "imminent," meaning the factors giving rise to the future harm are present even though the harm may not be realized for years. Because the operative phrase is "may present," however, there must only be a showing that there is a potential for imminent threat of a substantial or serious harm. Regarding "substantial," there is no requirement to show a level of contamination above a statutory level or to quantify the risk, level of contamination, or numbers of people who may be threatened

with harm. Finally, the presence of a threat to either human health or the environment is enough to meet the threshold.

Issue 3: The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) § 120 and Defense Environmental Restoration Program (DERP) (10 USC § 2701) require the Air Force to conduct response actions under CERCLA. What is the legal or other basis for Environmental Protection Agency (EPA) to administratively order the Air Force to respond to such releases under Section 7003 of Resource Conservation and Recovery Act (RCRA)?

EPA agrees that CERCLA provides broad discretionary authority to take response actions in order to protect human health and the environment. CERCLA section 120 mandates federal facility agreements and other steps once a site is on the National Priorities List (NPL). After years of trying to convince the Air Force to sign an agreement to move the cleanup forward, the imminent and substantial threats at McGuire required EPA to consider other actions. In the absence of an acceptable FFA, EPA is using an appropriate legal authority to ensure timely and protective cleanup.

Issue 4: What is the basis(es) and authority for EPA negating the Air Force's lead agency role under CERCLA pursuant to Executive Order 12580 and DERP by assuming a complete oversight/enforcement role under RCRA?

The Order does not negate the Air Force's lead agency role. It merely provides a legally enforceable mechanism to ensure a response to the imminent and substantial endangerment with appropriate EPA oversight of Air Force actions. Nothing in CERCLA, other laws, regulations or Executive Orders limits, supersedes or prohibits EPA from using RCRA section 7003 abatement authority to address a threat to human health or the environment and to secure a legally enforceable oversight approach. Where, as here, the Air Force has refused to enter into an enforceable FFA with EPA under CERCLA 120(e) – and where, as here, site investigation and cleanup have not proceeded in a timely manner – there is no legal barrier to prevent EPA from securing a different enforceable oversight mechanism that a RCRA section 7003 order provides. EPA's ensuring that it has adequate oversight (through the RCRA section 7003 Order at McGuire) is consistent with the purpose and intent of CERCLA section 120. EPA's oversight (whether through a CERCLA section 120 FFA or an order issued under other federal environmental statutory authority) does not negate the Air Force's lead agency status.

Issue 5: On what authority and rationale has EPA issued an order in lieu of the remedy specified for failure to enter into an IAG (Congressional notification), and on what authority does it seek elements that are not specified in the statutory IAG?

The annual reporting mechanism in CERCLA section 120(e)(5) covers many aspects of cleanup progress for purposes of keeping Congress informed. Where no FFA has been signed, the report offers an opportunity to explain why no agreement was reached. Nothing in this section suggests or states that an annual reporting mechanism is

intended to replace EPA's oversight responsibilities for ensuring protective and timely cleanup of a federal facility that is on the NPL, nor does the language in the statute suggest that reporting to Congress is the sole vehicle for ensuring cleanup where DoD refuses to sign an FFA. CERCLA section 120(a) requires that federal agencies comply with CERCLA in the same manner as private parties, and section 120(e)(4) is clear that the FFA shall "include, but shall not be limited to," the three minimum elements referred to in the statute. Based on many years of experience overseeing private party and federal facility cleanups, EPA has included in the Order those terms and conditions needed to ensure proper oversight so that the Air Force can complete the necessary cleanup work in an efficient and timely manner.

Issue 6: On what basis(es) and authority can EPA justify use of a RCRA order in lieu of a CERCLA Section 106 order, which requires DOJ concurrence? How does EPA reconcile this approach with its own guidance, which generally prefers CERCLA Section 106 orders at National Priorities List (NPL) sites? [If DOJ has been consulted in issuance of the McGuire order, please indicate with whom EPA consulted.]

As a legal matter, EPA is authorized to use the enforcement authorities (including RCRA section 7003) it believes are necessary and appropriate to achieve proper oversight of the cleanup at McGuire. Nothing in any statute requires EPA to choose one abatement authority over another in deciding which approach will be most effective. Furthermore, EPA has issued guidance encouraging the selection of the most appropriate ISE authority for the situation at hand; that guidance clearly recommends that the most appropriate statutory authority should be used under the circumstances presented at a site.

Issue 7: Given that the McGuire cleanup has proceeded under CERCLA since the beginning (and certainly since its listing on the NPL in 1999), with full participation by EPA, what is the legal or factual basis for compelling cleanup under RCRA?

As an enforcement matter, EPA has determined that the Order is appropriate given that the presence of hazardous waste at the site may present an imminent and substantial endangerment to human health or the environment.

Issue 8: What is the legal and factual basis for EPA's determination of imminent and substantial endangerment (e.g., nature/level and extent of contamination, specific environmental and human health receptors and nature of harm or threat), and has this determination ever been communicated to the Air Force previously (if so, to whom and in what form)?

What evidence supports the finding (EPA Office of Solid Waste and Emergency Response guidance on 7003 orders requires such evidence prior to issuance of a unilateral order, p. 24)?

Which areas of concern and/or substances may constitute an imminent and substantial endangerment (applying the 10 factors listed in EPA's RCRA 7003 guidance, p. 10)?

Is there any current solid or hazardous waste activity that may constitute imminent and substantial endangerment?

EPA refers the Air Force back to the Order, the McGuire Administrative Record, and EPA's response to issue number two in this enclosure as EPA's support for issuance of the Order. Specifically, in the McGuire RCRA Order, the findings of fact detail conditions at the Base including hazardous and solid waste present at McGuire as well as detail its past or present handling, disposal or storage practices. The findings of fact also support EPA's determination that present conditions may present an imminent and substantial endangerment to human health and/or the environment.

Issue 9: The order does not identify any actions required to abate conditions that may present an imminent and substantial endangerment (it only appears to identify documents, plans and other deliverables but no actions). What are the actions required to abate? What is EPA's basis for not following its own guidance that requires any RCRA Section 7003 order to have findings of fact that describe the problems at the site or facility, relate them to the actions required to abate the conditions that may present an imminent and substantial endangerment, and have the findings of fact support each element of the relief sought.

a. The failure to require performance standards in lieu of dictating processes implies that the Air Force is uncooperative or lacks the sophistication and technical capabilities to perform work under EPA's own RCRA Section 7003 guidance. What is the basis for such a conclusion? If there is no such conclusion, then what is EPA's rationale for departing from its own guidance to require site-specific performance standards for cooperative respondents?

The RCRA Order's findings of fact support EPA's determination that present conditions at McGuire may present an imminent and substantial endangerment to human health and/or the environment. In addition, Section VI of the Order (Work to be Performed) sets forth the actions needed to be taken by the Air Force to address the human health and environmental threats posed by McGuire. The Air Force must first determine the nature and extent of contamination with respect to each Area of Concern at McGuire, assess the risks associated with that contamination, and evaluate potential corrective measures before specific abatement actions and performance standards can be selected.

Issue 10: On what basis does EPA make its guidance documents mandatory, enforceable provisions in the order when such documents themselves indicate they are not legal requirements or enforceable?

As a legal matter, EPA is authorized to include the terms and conditions it determines are necessary to ensure protection of human health and the environment when it issues a RCRA section 7003 abatement order. Nothing in any law or regulation limits EPA's ability to draw on policy guidance when determining appropriate terms and conditions for an order.

Issue 11: EPA has indicated willingness to streamline the cleanup effort, yet the order fails to identify performance criteria and adds many documents and processes that are not required for CERCLA cleanups, or in a typical (model) RCRA order.

a. How will this order expedite cleanup and allow the Air Force to meet a 2012 completion goal?

b. What time frames will EPA commit to in reviewing and responding to deliverables?

c. How does EPA propose to reconcile the previously done and already agreed-to work (including existing documents such as work plans) with the provisions of the order?

The model FFA developed and agreed to by EPA and DoD ensures effective and efficient cleanups of federal Superfund sites. The Region has consistently communicated to the Air Force its position that an FFA based on the model would be the best vehicle to use to address the cleanup of McGuire. Absent such an FFA, the RCRA Order issued to the Air Force is an effective option. The RCRA Order does provide for a timely cleanup of McGuire.

One of the first submittals under the Order is a Site Management Plan (SMP) which must include proposed schedules and deadlines for the completion of all tasks to be performed at the 41 Areas of Concern. Therefore, to a large extent, the Air Force determines, subject to EPA review and approval, how quickly it carries out its response work.

The RCRA Order states at Paragraph 34 that "(i)f any of the items required by Section VI. (Work To Be Performed) have already been submitted or completed, Respondent may propose that any such submitted or completed item be used to satisfy the requirements of this Administrative Order." Moreover, the Air Force has submitted and continues to submit documents, including work plans, to EPA for its review and approval. EPA has been working with the Air Force to ensure that submittals are consistent with the RCRA Order. EPA has not caused delay to any response work taking place at McGuire.

Issue 12: The order contains no provision for work completion or termination. How will this order interact and not duplicate procedures agreed to between EPA and DoD in the Joint Remedial Action Completion Report guidance issued in January 2006 for NPL sites?

Paragraphs 52, 53 and 54 of the McGuire Order address the completion of corrective measures for the Areas of Concern. For instance, the Air Force shall prepare and submit to EPA a "Final Corrective Measures Implementation Completion Report" at the completion of all corrective measures for McGuire. In addition, Section XX of the Order addresses the termination of the Order. The process required in RCRA is very similar to the process used under CERCLA.

Issue 13: Under paragraph 91 of the order, what permits does EPA view as required in light of the CERCLA Section 121(e) exemption?

The McGuire Order relies solely on RCRA authorities and thus the CERCLA Section 121(e) permit exemption is not implicated by this Order. The Air Force, working with the respective permit-issuing authorities will need to identify any permits that are needed for response work.

Issue 14: Provide the basis for concluding that McGuire is the "highest priority" site in terms of posing serious risks compared to all of the sites in New Jersey where no order has been issued? If McGuire does not present the "highest priority" risk then explain why EPA is not following its guidance on RCRA Section 7003, indicating that unilateral orders should be prioritized on a risk basis.

It is not necessary for EPA to determine that McGuire is the "highest priority site" in New Jersey. McGuire Air Force Base was placed on the National Priorities List on October 22, 1999. By definition, the cleanup of McGuire is a priority. Section 105(a)(8)(B) of CERCLA establishes criteria to prepare the list of national priorities among the known releases or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States. In addition, since its listing on the NPL in 1999, not a single remedial investigation/feasibility study has been completed and the Air Force has not entered into an FFA for McGuire. It is, therefore, a priority for the Region to ensure the investigation and cleanup proceed apace.