ONE HUNDRED TENTH CONGRESS

U.S. House of Representatives
Committee on Energy and Commerce
Washington, DC 20515–6115

JOHN D. DINGELL, MICHIGAN
CHAIRMAN

June 25, 2008

The Honorable Stephen L. Johnson
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Administrator Johnson:

In 2007, the Environmental Protection Agency (EPA) issued four orders to Department of Defense (DOD) facilities directing response actions to abate an imminent and substantial endangerment to health and the environment. Three orders were issued under Section 7003 of the Resource Conservation and Recovery Act to Fort Meade, Maryland (8/27/07), McGuire Air Force Base, New Jersey (7/13/07), and Tyndall Air Force Base, Florida (11/21/07). The fourth order was issued under Section 1431 of the Safe Drinking Water Act to Air Force Plant 44, Tucson, Arizona (7/12/07).

We understand that after hearing protests from the DOD and considering the evidence and information provided to EPA, you or your designee, Assistant Administrator Nakayama, issued final orders to each of the four named facilities. Air Force Plant 44 in Tucson has notified EPA that it intends to comply with the Safe Drinking Water Act order and is apparently carrying out the abatement actions required. We understand, however, that the other three DOD facilities are in direct and flagrant violation of final orders issued by you in your capacity as EPA Administrator. The Resource Conservation and Recovery Act (RCRA) orders at McGuire AFB, Fort Meade, and Tyndall AFB were final on November 13, 2007, February 4, 2008, and May 7, 2008, respectively. In the final order issued by you on November 13, 2007, to Secretary of the Air Force Michael W. Wynne regarding McGuire AFB, you noted that he had informed you in a conversation on September 25, 2007, that "the Air Force intended to fully comply with the Order." McGuire AFB has now been in defiance of your order for more than eight months.

Approximately one month ago, DOD sent a letter to the Department of Justice (DOJ) challenging the "authority of EPA to issue these imminent and substantial endangerment orders" and a separate letter to the Office of Management and the Budget (OMB) seeking "intervention

and assistance in resolving a dispute over the terms of interagency agreements regarding cleanup at DOD facilities."

DOD informed OMB that it "currently has eleven installations that have been listed on the NPL for which we have not been able to reach agreement with EPA on the terms of a CERCLA interagency agreement." It appears that at least 10 of the DOD facilities are in clear violation of Section 120(e)(2) of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) which requires an interagency agreement to be entered into within 180 days after the Administrator has reviewed the remedial investigation and feasibility study for the facility. This section states:

> (2) COMMENCEMENT OF REMEDIAL ACTION; INTERAGENCY AGREEMENT.—The Administrator shall review the results of each investigation and study conducted as provided in paragraph (1). Within 180 days thereafter, the head of the department, agency, or instrumentality concerned shall enter into an interagency agreement with the Administrator for the expeditious completion by such department, agency, or instrumentality of all necessary remedial action at such facility. CERCLA Section 120(e)(2)

Of these 11 facilities, 7 are Air Force facilities on the National Priorities List (NPL). We further understand that the Air Force has not signed an interagency agreement with EPA since 1993. In contrast, the Army has completed and signed off on an interagency agreement with EPA as recently as March 2008 at Fort Eustis, Virginia.

The DOD failure to enter interagency agreements at these facilities also stands in stark contrast to the position apparently taken by civilian agencies such as the Department of Energy and Department of Interior with facilities on the Superfund NPL. We have been informed that an interagency agreement has been entered into at every civilian agency NPL site, with the exception of the Coast Guard facility at Curtis Bay where EPA and the Coast Guard have agreed to a Federal Facilities Agreement but the formal signature process is not yet complete.

In addition to the failure by DOD to comply with three RCRA imminent and substantial endangerment orders and the violation of CERCLA Section 120(e)(2) for not having an interagency agreement at a significant number of facilities, we understand that two DOD facilities, Langley AFB in Virginia and U.S. Army Ft. Meade, have issued "unilateral" Records of Decision (RODs) for remedial actions in direct violation of CERCLA Section 120(e)(4).

In the Superfund Amendments and Reauthorization Act of 1986, Congress explicitly provided for EPA concurrence in remedy selection at Federal facilities and in case of a disagreement gave the EPA Administrator the authority to select the remedial action. CERCLA Section 120(e)(4) states as follows:

> (4) CONTENTS OF AGREEMENT.—Each interagency agreement under this subsection shall include, but shall not be limited to, each of the following:
>
> (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, or, if unable to reach agreement on selection of a remedial action, selection by the Administrator.

The Conference Report reaffirmed the plain statutory text by stating:

> Responsibility for selection of a remedial action is shared by the head of the relevant department, agency, or instrumentality and the Administrator. However, the Administrator has the additional responsibility to make an independent determination that the selected remedial action is consistent with the National Contingency Plan and is the most appropriate remedial action for the affected facility. The Administrator is required to select the remedial action where there is disagreement.

We also observe that Congress clearly has not preempted or prohibited the use of RCRA authorities at Superfund NPL sites. On the contrary, in the 1986 amendments Congress adopted statutory language in CERCLA Section 120(i) that reaffirms Congressional intent that the Federal facilities provisions of CERCLA were not intended to affect or diminish the obligations of Federal agencies such as DOD to comply with any requirements of the Solid Waste Disposal Act. Congressional intent that EPA enforce RCRA against Federal agencies in the same manner and to the same extent as private industry was further evidenced with the passage of the Federal Facilities Compliance Act of 1992 (P.L. 102-368). This law added a new provision in RCRA Section 6001(b) as follows:

> (b) ADMINISTRATIVE ENFORCEMENT ACTIONS.—(1) The Administrator may commence an administrative enforcement action against any department, agency, or instrumentality of the executive, legislative, or judicial branch of the Federal Government pursuant to the enforcement authorities contained in this Act....

The current DOD resistance to EPA regulatory oversight is eerily reminiscent of their efforts in 1987 to assure a self-policing role and invest either OMB or the Office of Legal Counsel at the Department of Justice as judge and jury. The double standard that would be created between Federal facilities and private companies finds no support in the legislative history or in the statutory schemes created by Congress. Their actions at that time necessitated a Congressional hearing ("Environmental Compliance by Federal Agencies," Subcommittee on Oversight and Investigations, Committee on Energy and Commerce) and spurred Congress to ultimately pass the Federal Facilities Compliance Act of 1992.

When President Bush was seeking the Presidency in April 2000, he promised the American people that he would "end the double standard that has the Federal Government acting as environmental enforcer while, at the same time, polluting the environment" and stated that we will:

> "Direct active federal facilities to comply with all environmental protection laws and hold them accountable." (Speech, April 3, 2000, Pittsburgh, PA)

It is long past time for this pledge to be honored.

Please inform us of the actions you have taken to insure that the lawful orders issued by EPA to the three DOD facilities are complied with. Further, please indicate whether EPA has been contacted, formally or informally, by OMB or DOJ officials with respect to the DOD letters to OMB (May 14, 2008) and the Attorney General (May 15, 2008). If so, please describe what, if anything, has been requested of EPA in the way of a response and if not, please indicate when you intend to respond to the DOD letters.

Finally, please also provide responses to the attached questions by no later than Monday, July 7, 2008.

If you have any questions, please contact us or have your staff contact Richard A. Frandsen with the Committee on Energy and Commerce staff at (202) 225-2927.

Sincerely,

John D. Dingell
Chairman

Gene Green
Chairman-designee
Subcommittee on
Environment
and Hazardous Materials

Hilda L. Solis
Vice Chair
Subcommittee on
Environment
and Hazardous Materials

cc: The Honorable Joe Barton, Ranking Member
Committee on Energy and Commerce

The Honorable John Shadegg, Ranking Member
Subcommittee on Environment and Hazardous Materials

Attachment

1. When the EPA issued the final orders at McGuire AFB, Fort Meade, and Tyndall AFB, did either EPA Headquarters or the Regional offices issue a press notice, press release, or other public statement? If not, why not? What is EPA's press policy and public notification policy with respect to orders issued by the Agency?

2. Has any Department of Defense facility or any other Federal facility ever refused to comply with a final order issued by EPA alleging an imminent and substantial endangerment to health and the environment? If so, please describe the final order, identify the Agency that received the final order, and indicate the resolution of the matter.

3. For each of the DOD facilities that have not entered into an interagency agreement with EPA, please indicate the date when EPA had completed the results of each remedial investigation and feasibility study.

4. Please identify each Army, Navy or Marine NPL facility where a Federal Facilities interagency agreement has been signed between the facility and EPA since 2003 and provide the date of the Federal Facility Agreement.

5. Please provide any correspondence or other communication from the Air Force to EPA in response to the final orders issued to McGuire AFB on November 13, 2007, and Tyndall AFB on May 7, 2008.

6. Please provide any correspondence or other communication from the Army to EPA in response to the final order issued to Fort Meade on February 4, 2008.

7. Does EPA believe the Office of Legal Counsel at the Department of Justice has any role or authority in reviewing EPA's determination under RCRA 7003 that the facts demonstrate an imminent and substantial endangerment may be present?