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

FEB 4 2008

ASSISTANT ADMINISTRATOR
FOR ENFORCEMENT AND
COMPLIANCE ASSURANCE

The Honorable Addison D. Davis
Deputy Assistant Secretary of the Army for
Installations and Environment
110 Army Pentagon
Washington, DC 20310-0110

Re: Fort Meade Final Order/Determination

Dear Mr. Davis:

I am writing to convey my determination following our conference held on January 4, 2008, regarding the Fort Meade RCRA Section 7003 order ("Order") issued by the U.S. Environmental Protection Agency on August 27, 2007. The enclosure to this letter provides a written response to the specific issues raised in your written materials, and at the conference.

After full consideration of the issues, EPA has determined that the Order is appropriate and consistent with the law. As a legal matter, EPA's use of non-CERCLA administrative order authority at Fort Meade 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 potential threat to human health and the environment at any site where the statutory pre-requisites are met, including NPL sites. Furthermore, Federal agencies like the Army are subject to EPA's RCRA Section 7003 authority to the same extent as private parties.

Pursuant to Section XXVI of the Order, the Order shall become effective upon receipt of this decision. We request that you please provide an e-mail response to the electronic transmission of this letter to confirm receipt. The Army will then have ten

days, as provided in Section XXIII, to provide a notice of intent to comply with the Order. We look forward to working with the Army to ensure a timely and protective cleanup of contamination at the Fort Meade site.

Sincerely,

Granta Y. Nakayama

Granta Y. Nakayama
Assistant Administrator

Enclosure

cc: Donald S. Welsh (EPA RIII)

EPA RESPONSE TO ISSUES RAISED BY ARMY REGARDING ISSUANCE OF RCRA SECTION 7003 ORDER AT FORT MEADE

Issue 1: What is the legal or other basis for EPA to administratively order the Army to respond to CERCLA releases under Section 7003 of RCRA?

As a legal matter, EPA's use of non-CERCLA administrative order authority at Fort Meade 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 situation which may pose a threat to human health and the environment at any site, including NPL sites, where the statutory pre-requisites are met. 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 Army at Fort Meade. Federal agencies like the Army are subject to EPA's RCRA Section 7003 abatement authority to the same extent as private parties. CERCLA Section 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. Section 6901 et seq.] (including corrective action requirements)."

Issue 2: What is the factual and legal basis for EPA's determination of an imminent and substantial endangerment at the sites addressed in the Order?

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 human 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 RCRA Section 7003 order).

Under RCRA Section 7003, there must be a demonstration that the activities "may present" an imminent and substantial endangerment. 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.

In addition, EPA refers the Army back to the Order and the Fort Meade Administrative Record as EPA's support for issuance of the Order. Specifically, in the Fort Meade Order, the findings of fact detail conditions at the Facility, including hazardous and solid waste present at Fort Meade, as well as the Army's past or present handling, disposal or storage practices. The findings of fact in the Order discuss the Army's findings of exceedances of maximum contaminant levels (MCLs) established under the Safe Drinking Water Act and risk-based concentration (RBC) exceedances in the soil and groundwater at the Facility. These findings were reviewed by an EPA toxicologist (her review memorandum was included in EPA's Administrative Record for the Order) and support EPA's determination that present conditions may present an imminent and substantial endangerment to human health and/or the environment.

One specific example of a potential threat supporting the imminent and substantial endangerment finding was provided to the Army at the January 4 conference. In March 2005, Anne Arundel County officials sampled well water at nineteen homes adjacent to Fort Meade (in the vicinity of the Closed Sanitary Landfill). This action was prompted by the results of Army groundwater testing conducted in June 2004. As stated in Paragraph IV.I of the Order, the Army's Remedial Investigation Report for the Closed Sanitary Landfill groundwater operable unit, dated August 2005, indicates that there are levels of volatile organic compounds and metals which exceed MCLs and RBCs.

Issue 3: 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?

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 Fort Meade. 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 4: Given the Army's lead agency role under CERCLA pursuant to Executive Order 12580 and DERP, as well as sites being addressed under MMRP, how will work proceed pursuant to a RCRA process?

The Order does not negate the Army's lead agency role. EPA's use of its RCRA Section 7003 authority is primarily designed to provide a legally enforceable mechanism to ensure that a protective cleanup occurs in response to EPA's imminent and substantial endangerment finding and that EPA can carry out its appropriate oversight of Army 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 potential threat to human health or the environment and to secure a legally enforceable oversight approach. Where, as here, the Army has refused to enter into an enforceable FFA with EPA under CERCLA Section 120(e), a RCRA Section 7003 order provides EPA with a different enforceable oversight mechanism to secure a protective cleanup. There is no legal barrier to prevent EPA from exercising this authority.

In terms of how work will proceed, 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. The Army must first determine the nature and extent of contamination with respect to each area of the Facility requiring action, assess the risks associated with that contamination, and evaluate potential corrective measures before specific abatement actions and performance standards can be selected.

The Order states at the beginning of Section VI. (WORK TO BE PERFORMED) that "[s]ome of the tasks required by this Order may have already been completed and that the Army may have available some of the information and data required by this Order. This previously completed work may be used to meet the requirements of this Order upon submission to, and formal approval by, EPA under the terms of this Order." EPA has been working with the Army to ensure that submittals are consistent with the RCRA Order.

Issue 5: Given the significant cleanup work that has already occurred at the site, including deletion of a parcel, how can EPA allege an imminent and substantial endangerment continues to exist at the site?

The performance of certain response work by the Army at Fort Meade to address certain areas of concern does not eliminate the fact that an imminent and substantial endangerment exists. To make a finding of imminent and substantial endangerment, EPA need only show that there is a reasonable cause for concern that health or the environment may be at risk. The Agency does not have to establish that an emergency exists before it issues a RCRA Section 7003 order, and the Agency may issue such an order even if there is another potential remedy and even if remediation may have been commenced at the site. *See, e.g., United States v Waste Industries, Inc.*, 734 F.2d 159 (4th Cir. 1984); *87th St. Owners Corp. v. Carnegie Hill-87th St. Corp.*, 251 F.Supp.2d 1215, 1219 (S.D.N.Y. 2002); *Kara Holding Corp. v. Getty Petroleum Marketing*, 67 F. Supp. 2d 302, 311-2 (S.D. N.Y. 1999)("endangerment that may justify RCRA relief continues to exist until 'the cleanup is complete.'"). *See also, Interfaith Community Org. v. Honeywell Int'l. Inc.*, 399 F.3d 248 (3d Cir. 2005)

Even where response work is significantly advanced, the conditions may still present an imminent and substantial endangerment. For example, the Tipton Parcel remains contaminated with unexploded ordnance (UXO). We recognize that the Army removed some UXO but only to a depth of four feet; as such, without maintenance and proper long-term control commitments in place, the remaining contamination could be

brought to the surface and thus still may present an endangerment. Similar threats exist along the Little Patuxent River where the Army continues to recover UXO during its periodic sweeps.

Issue 6: The RCRA Section 7003 Order is EPA's effort to force the Army to accede to the EPA's preference on the scope of the FFA by using the RCRA Section 7003 Order as the alternative to the demanded FFA.

CERCLA Section 120 mandates federal facility agreements and other steps once a site is on the National Priorities List (NPL), and the Army has thus far refused to enter into such an agreement. To move the cleanup forward and address the imminent and substantial threats at Fort Meade, EPA decided to consider other options available to it. There is no dispute that the contamination at the Fort Meade installation was and is significant, that it demands a significant amount of cleanup, and that almost all of the contamination was created by the activities conducted by the Army. Responsibility for performing a comprehensive cleanup of its contamination does not change due to the fact that certain parcels that were formerly part of the installation have been transferred to the Department of the Interior, Anne Arundel County, and others.

In the absence of an acceptable FFA that provides for a comprehensive cleanup of all areas where contamination has come to be located, EPA is using an appropriate legal authority to ensure timely and protective cleanup.

Issue 7: The Army alleges that it bears no responsibility for cleaning up any transferred parcels since based on the transfer of ownership of certain parcels, these parcels legally cannot be part of the NPL site.

While not relevant to the RCRA order, we would point out that in a proposed rulemaking to add a site to the NPL, the act of listing a release does not define the boundaries of a site. Instead, the NPL process, including the scoring of sites with the Hazard Ranking System (HRS), represents the initial determination that an area may need to be addressed under CERCLA. In other words, the NPL is merely a tool used to quickly and efficiently identify areas that merit closer environmental scrutiny.

The NPL "site" will include areas where a hazardous substance has been deposited, stored, disposed, or placed, or has otherwise come to be located. Such areas may include multiple sources and may include the areas between sources. (*See* definition of "site," 40 CFR 300 App. A, Section 1.1). Under established law, the EPA may include specific parcels of land within a NPL site so long as they are within the broad compass of the notice provided by the initial NPL listing. (*See Washington State DOT v. EPA*, 917 F.2d 1309, 1310 (D.C. Cir. 1990)). Furthermore, EPA may alter or expand the boundaries of a NPL site if subsequent study reveals wider-than-expected scope of contamination. (*See id.; Eagle-Picher Indus. v. EPA*, 822 F.2d 132, 144 (DC Cir. 1987)).

In addition, EPA gave sufficient notice in the proposed HRS documentation package that the Fort Meade NPL site would include the transferred parcels. (*See* HRS

Documentation Record, Fort George G. Meade, page 13). For example, in its responses to public comments on the proposed listing, EPA states that, for NPL purposes, the site consists of the areas currently occupied by Fort Meade plus several contiguous areas annexed to the neighboring Patuxent Wildlife Research Center. (See Responses to Comments, Fort George G. Meade, pages 2.1-1, 2.1-3). Pursuant to *Washington State DOT*, the Army had sufficient notice that the transferred parcels would be "within the broad compass" of the Fort Meade NPL site described in the initial NPL listing. Accordingly, these parcels are legally part of the Fort Meade NPL site regardless of the transfer of ownership.

Issue 8: The Army alleges that EPA's website contradicts the Order's finding of an imminent and substantial endangerment since it indicates that exposures are under control for the Fort Meade NPL site.

The standard for determining the existence of an imminent and substantial endangerment as the basis for issuing an administrative order is based on the language in RCRA Section 7003 and has been the subject of a number of court decisions. That standard is not dependent on program management descriptions, updated periodically based upon additional information, that EPA may use for current circumstances (including some control measures) at an NPL site. As noted above, EPA need only show that there is a potential for a threat, and a reasonable cause for concern that human health or the environment may be at risk is enough to establish an imminent and substantial endangerment for purposes of RCRA Section 7003.