

**Superfund Report - 04/25/2016**

# **OMB Defers To EPA In Lengthy Dispute Over Army's Perchlorate Cleanup**

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The White House Office of Management & Budget (OMB) has deferred to EPA in a high-level dispute between EPA and the Army over what cleanup standards to apply to perchlorate in groundwater at a Texas site and the extent of EPA's authority to assess stipulated penalties against the military for insufficient documents under an agreement governing the site's cleanup.

EPA and the Army had been locked in a battle over the perchlorate cleanup level and stipulated penalties for nearly five years at the Longhorn Army Ammunition Plant, located near Caddo Lake in Kamack, TX. The dispute was formally initiated in October 2011, and fell under the dispute-resolution process in Longhorn's Federal Facility Agreement (FFA) among EPA, the state of Texas and the Army. The FFA governs the cleanup, following the Comprehensive Environmental Response, Compensation & Liability Act (CERCLA).

While the dispute has been resolved through OMB's conclusion that it would not revisit EPA Administrator Gina McCarthy's final decision to affirm lower-level EPA determinations on the matter, OMB has also called for the two agencies to further discuss federal groundwater cleanup policy in order "to resolve miscommunications that led to Army's concerns," according to an undated letter from OMB officials to Army Assistant Secretary for Installations, Energy and Environment Katherine Hammack. *Relevant documents are available on InsideEPA.com. (Doc. ID: 190757)*

In the letter, obtained by *Inside EPA*, OMB officials go on to say they are "encouraged by the ongoing communications between the agencies on this issue and will be convening a meeting at OMB in the next couple of months to ensure that agencies understand how the policy will be implemented and enforced." An EPA spokeswoman says that the agency "is aware of the OMB letter and will be meeting with DOD and OMB in the coming months to fulfill this request."

A key aspect of the dispute at Longhorn was what cleanup level to apply for perchlorate in groundwater. Army officials had long urged the agency to use the state screening level of 22 parts per billion (ppb), which the state set when it implemented EPA's 2006 health advisory level for perchlorate of 24.5 ppb. But in 2009, EPA strengthened its advisory level for the chemical to 15 ppb and had urged Army officials to use that level in the Longhorn cleanup.

In 2013, EPA then began urging the Army to use Texas's new protective concentration limits (PCLs), developed as groundwater cleanup levels, for the Longhorn site, where groundwater has been designated as a potential drinking water source. The state updated its PCLs June 29, 2012, setting the perchlorate level for residential cleanups at 17 ppb.

The Army, however, resisted EPA's approach, charging that the Texas 22 ppb level trumps EPA's newer health advisory number as an applicable or relevant and appropriate requirement (ARAR), the CERCLA requirement for choosing among various state and federal standards when selecting cleanup levels (*Superfund Report*, April 4, 2014). Further, Texas regulators have been clear that if a cleanup is begun under the old standard, then it is completed under the old standard, a source familiar with previous discussions between EPA and the Army had said.

Under CERCLA, ARARs are one of two threshold requirements that all cleanups must meet, though EPA's policy generally leaves regulators with significant discretion to identify ARARs on a site-specific basis.

An informed source previously said that typically when ARARs are considered, there is a hierarchy as to which types of regulations are considered for application at a site. Federally promulgated standards such as maximum contaminant levels (MCLs) are considered highest priority, followed by state promulgated standards, federal health advisory levels and state health advisories, the source said.

But in this case, there was significant uncertainty about what ARAR to select because there is no federal MCL.

The Army had been concerned that a decision at this site could set a precedent for perchlorate cleanups elsewhere, possibly requiring it to re-open other cleanups in Texas, the source familiar with the discussions said.

While EPA maintains that McCarthy's Oct. 31, 2014, decision settled the matter -- as CERCLA and the FFA both prescribe that the administrator is the final decisionmaker for such disputes -- the Army nonetheless refused to accept her decision and appealed to OMB in November 2014 to intervene and settle the matter.

In her Oct. 31, 2014, letter to the Army, McCarthy noted the significance of the issues at play in the dispute.

"The dispute involves issues of fundamental importance to the federal government's cleanup program, including the restoration of potential sources of drinking water to beneficial use, land-use controls to ensure the long-term effectiveness of the remedy and the EPA's authority to assess stipulated penalties, as well as federal agencies' obligation to comply with the law in the same manner and to the same extent as private parties to protect human health and the environment," she wrote.

McCarthy's final decision affirmed an EPA Region 6 determination that Texas' PCL of 17 ppb for residential groundwater cleanup should be followed, and she upheld a stipulated penalty of \$1.19 million against the Army for submitting to EPA substantively deficient documents under the FFA.

The Army had argued that stipulated penalties only extended to missed deadlines, and that it could not be fined for submitting insufficient documents. While the penalty amount is

significant, McCarthy wrote that "the Army's substantively deficient submittals directly affect a potential source of drinking water and fail to adequately protect against threats at the four operable units" at the site.

In her Nov. 25, 2014, response, Hammack argued that McCarthy's decision contained "numerous inaccurate statements of fact, is contrary to law, and is contrary to well established Federal policy," and requested a decision from OMB.

In its undated letter addressing the issue, OMB says "that the cleanup goals for perchlorate at the public health advisory levels are projected to be achieved in advance of the MCL-driven cleanup goals for trichloroethylene (TCE) at the site due to the nature of those two constituents and [that it expects] that the draft Record of Decision can be modified accordingly.

"Based on these developments, OMB is not revisiting the Administrator's determination."

OMB also calls on the Army to pay \$1.1 million in stipulated penalties assessed under Longhorn's FFA.

A second EPA spokeswoman says that the Army is now revising the three records of decision that were in dispute to reflect McCarthy's decision. -- *Suzanne Yohannan*

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