



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS TX 75202-2733

MAR 30 2011

NOTICE OF DECISION NOT TO USE SPECIAL NOTICE PROCEDURES
DEMAND LETTER
URGENT LEGAL MATTER
CERTIFIED MAIL; RETURN RECEIPT REQUESTED

General Craig R. McKinley
Chief, National Guard Bureau
1411 Jefferson Davis Highway
Arlington, VA 22202-3231

Re: Griggs and Walnut Ground Water Plume Superfund Site, City of Las Cruces, Doña Ana County, New Mexico; Site ID No.: 06HZ; CERCLIS #NM0002271286

Dear General McKinley:

The purpose of this letter is to request the National Guard Bureau's participation in the cleanup of contaminated ground water at the Griggs and Walnut Ground Water Plume Site (the Site). The U.S. Environmental Protection Agency (EPA), the U.S. Department of Justice, the New Mexico Environment Department (NMED), the City of Las Cruces (the City), and Doña Ana County (the County) are currently negotiating a settlement of U.S. and NMED claims regarding the cleanup of the contaminated ground water that underlies the City. This is also to notify you that EPA has decided not to use its special notice negotiation procedures as we work toward settlement of our claims.

The Site ground water is contaminated with tetrachloroethylene at concentrations that exceed the Maximum Contaminant Level (MCL) established under the U.S. Safe Drinking Water Act. Several other contaminants were detected in ground water, but, currently, most of the concentrations of these contaminants have remained below their respective MCLs. The tetrachloroethylene, also known as perchloroethylene, perc or PCE, has expanded into the aquifer that the City of Las Cruces uses for drinking water. EPA's claims are based on its authority under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

On February 3, 2010, EPA issued a CERCLA Section 106, 42 U.S.C. § 9606, order to the City and County that requires them to undertake a remedial design for the implementation of EPA's selected remedy for the ground water contamination. EPA's selected remedy is documented in EPA's 2007 Record of Decision for the Site ("ROD") (copy enclosed).

On February 14, 2011, EPA issued another CERCLA Section 106 order to the City and County for completion of the remedial action. The February 14 order requires the City and County to undertake a remedial action that addresses the contaminated ground water according to the remedial design, after the design is approved by EPA. EPA expects that the remedial design will be completed in May 2011. Upon EPA final approval of the remedial design, the February 14th order becomes effective.

The EPA believes the National Guard Bureau is a potentially responsible party (PRP) because the National Guard Bureau is a former operator of the property at 700 North Solano Drive in Las Cruces that was the location of the former Las Cruces Armory, and because, at the time the National Guard Bureau operated at the property, the hazardous substance tetrachloroethylene was disposed on the property. Although the City and County are being asked to remediate the Site under EPA orders, EPA intends to continue to negotiate a settlement of its claims with all PRPs under CERCLA, including the National Guard Bureau, the New Mexico State Armory Board, and the City and County. Our intention is to work with the New Mexico Environment Department (NMED) and the U.S. Department of Justice toward a judicial consent decree that resolves EPA, NMED and U.S. Government claims related to the release of the PCE at the Site.

I. DECISION NOT TO USE SPECIAL NOTICE

EPA has decided not to use Special Notice procedures. In this case, using special notice procedures may not facilitate an agreement between EPA and the National Guard Bureau, nor expedite the response action at the Site. Under CERCLA, EPA may use special notice negotiation procedures when EPA determines that a period of negotiation under the provisions of CERCLA Section 122(e), 42 U.S.C. § 9622(e), would facilitate an agreement with PRPs for taking a response action and would expedite remedial action. When EPA decides not to use the settlement procedures in Section 122, as in this case, the EPA must notify PRPs in writing of its decision and the reasons why its use is inappropriate. A decision by EPA to use or not use special notice procedures is not subject to judicial review. In this case, our decision not to use special notice procedures is based on the fact that negotiations with the City and County are already underway. We are asking that the National Guard Bureau to join these negotiations.

The EPA's decision not to use the special notice procedures does not preclude you from entering into discussions with EPA regarding your participation in response activities at the Site. This decision does mean that EPA will not invoke a moratorium on Site activity at this time (*see* 42 U.S.C. § 9622(e)(2)(A)). If EPA does not reach a settlement with the National Guard Bureau, EPA may seek approval from the Department of Justice to issue a CERCLA Section 106 administrative order to the National Guard Bureau, requiring it to perform response actions to address the contamination in this drinking water aquifer.

II. PAYMENT OF EPA COSTS

The demand in this section is based on EPA's authority under CERCLA. EPA also has the authority to enter into negotiations to settle the claims described in this section. Our offer to

negotiate is further described in section III, below.

In accordance with Section 104 of CERCLA, 42 U.S.C. § 9604, EPA has taken response actions and incurred costs in response to conditions at the Site. Under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), the National Guard Bureau is responsible for reimbursing the U. S. Government for the response costs associated with these actions. These response actions include without limitation: a preliminary assessment and site investigation, site ranking for the National Priorities List (NPL), part of the remedial investigation and feasibility study (RI/FS), and the development of the ROD. These response activities also include associated administrative, finance, and enforcement activities and costs. The EPA is seeking to recover from the National Guard Bureau, its response costs and all authorized and accrued interest to be recovered under Section 107(a) of CERCLA. As of February 17, 2011, the approximate total unreimbursed response costs identified for the Site are \$5,947,917.65.

Under Section 107(a) of CERCLA, EPA hereby makes a demand for payment from the National Guard Bureau for \$5,947,917.65, plus all interest authorized to be recovered under Section 107(a). A summary of these costs is enclosed. Please note that amounts that the City and County have already paid to complete the RI/FS have been subtracted from our demand.

Please make your payment for \$5,947,917.65 by certified check made payable to "EPA Hazardous Substance Superfund," and reference CERCLA Site ID Number 06HZ. Send the certified check to:

U.S. Environmental Protection Agency
Superfund Payments
Cincinnati Finance Center
P.O. Box 979076
St. Louis, MO 63197-9000

Send a copy of the check to:

Section Chief, Enforcement Assessment Team (6SF-TE)
Superfund Division
U.S. Environmental Protection Agency
1445 Ross Avenue
Dallas, Texas 75202-2733

III. NEGOTIATIONS WITH EPA, NMED, THE U.S. DEPARTMENT OF JUSTICE AND OTHER PRPS

Please call or email EPA attorney James E. Costello at (214) 665-8045 or costello.james@epa.gov before 4:30 p.m. Central Standard Time on April 12, 2011, and let him know whether the National Guard Bureau will negotiate regarding the performance or payment for remedial action at the Site. The National Guard Bureau should provide Mr. Costello with a range of dates on which National Guard Bureau representatives can attend a settlement meeting at the EPA

Region 6 offices in Dallas. Negotiating parties will include the City and County, NMED, EPA, the U.S. Department of Justice, and the National Guard Bureau Bureau.

The EPA encourages communication between the National Guard Bureau, and the other PRPs at that Site—the State Armory Board, the City of Las Cruces and Dona Ana County. To assist you in your efforts, below please find a list of names and addresses of the representatives of the other PRPs at the Site. (This list subject to change based upon new information.) We recommend you contact as soon as possible the following individuals:

- Representing City of Las Cruces, and Doña Ana County:
Mr. Brad Marten
Ms. Jessica K. Ferrell
Marten Law
1191 Second Avenue, Suite 2200
Seattle, Washington 98101
(206) 292-2600
bmarten@martenlaw.com
jferrell@martenlaw.com
- Representing the New Mexico Armory Board:
Col. Alfred Perez
Staff Judge Advocate
New Mexico National Guard Joint Forces Headquarters
47 Bataan Boulevard
Santa Fe, New Mexico 87508-4695
(505) 474-1258
alfred.perez@us.army.mil

IV. ADMINISTRATIVE RECORD

Pursuant to CERCLA Section 113(k), 42 U.S.C. § 9613(k), EPA must establish an administrative record that contains documents that form the basis of EPA's decision regarding the selection of a response action for a site. The administrative record file is available to the public for inspection and comment. The primary location of the administrative record file is the Superfund Division file room at the EPA Region 6 office located at:

U.S. Environmental Protection Agency
1445 Ross Avenue
Dallas, TX 75202-2733

To make arrangements to see the administrative record file for the Site, at the Region 6 office, please contact the Remedial Project Manager for the Site:

Ms. Petra Sanchez (6SF-RL)
Superfund Division
U.S. Environmental Protection Agency
1445 Ross Avenue
Dallas, TX 75202-2733
Phone: (214) 665-6686
Fax: (214) 665-2222
Sanchez.petra@epa.gov

The administrative record file is also available for viewing and copying at:

Thomas Branigan Memorial Library
200 E. Picacho Avenue
Las Cruces, NM 88001
(505) 528-4005

New Mexico Environmental Department
Mr. Angelo Ortell
Superfund Oversight Division
1190 St. Francis Drive
Santa Fe, NM 87501
(505) 827-2866

V. RESERVATION OF RIGHTS

The EPA's rationale for making the determinations contained in this letter is based on the evidence in the EPA's files. However, please be aware these determinations are subject to the discovery of information that may come into the EPA's possession that would cause it to reverse its determinations. Furthermore, these determinations neither constitute, nor should they be construed as, a covenant not to sue or a waiver of prosecutorial discretion concerning this matter. In addition, nothing in this correspondence is intended to waive any rights the United States may have in law or in equity concerning the Griggs and Walnut Ground Water Plume Superfund Site against any parties associated with that Site.

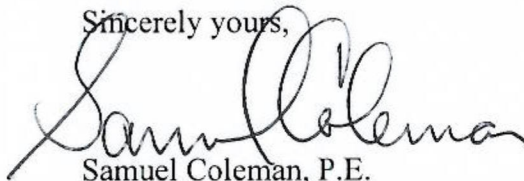
VI. EPA CONTACTS

Thank you for your attention to this matter. If you have any questions, please direct them

to EPA Attorney Mr. James E. Costello at (214) 665-8045 or Enforcement Officer Ms. Cynthia Brown at (214) 665-7480. Questions of a technical nature should be directed to Ms. Petra Sanchez, at (214) 665-6686.

My staff and I look forward to working with you during the coming months.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Samuel Coleman". The signature is fluid and cursive, with the first name "Samuel" and last name "Coleman" clearly distinguishable.

Samuel Coleman, P.E.
Director
Superfund Division

Enclosures (2): Griggs and Walnut Ground Water Plume Superfund Site Record of Decision (2007); Cost Summary

cc: Dana Bahar, NMED
Misty Braswell, NMED
Angelo Ortelli, NMED
Jessica Ferrell, Attorney for the City of Las Cruces and Doña Ana County
Brad Marten, Attorney for the City of Las Cruces and Doña Ana County
Nicole Veilleux, U.S. Department of Justice
Eileen McDonough, U.S. Department of Justice
Col. Alfred Perez, New Mexico Bureau of Military Affairs