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FR 96



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January 5, 1996

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Post-it* Fax Note	7671	Date	2/2/96	# of pages	4
To	Syed	From	Marshall Schuman		
Co./Dept.	Fort Bliss	Co.	NMED		
Phone #		Phone #	827-2996		
Fax #	(915) 568-1333	Fax #			

Dear Mr. Wilcox:

This letter confirms our telephone conversation and replies to your letter dated September 26, 1995 regarding the authority of the New Mexico Environment Department (NMED) to require a discharge plan for sewage lagoons located at Fort Bliss. As I stated to you by telephone, we believe that NMED has authority to require federal facilities to comply with all state requirements to control and abate water pollution, including the requirement to submit a discharge plan to NMED as needed to protect state groundwaters from pollution.

In your letter, you assert that NMED has no authority to require Fort Bliss to prepare a groundwater discharge plan application because the plan does not fall within the meaning of the federal Clean Water Act (CWA). Specifically, you allege that there is no likelihood that the sewage lagoons would discharge to "navigable waters" or otherwise to "waters of the United States" under the CWA. The issue of whether the sewage lagoons discharge to "navigable waters" or are otherwise hydrologically connected to surface waters is not relevant to the authority of NMED to require a discharge plan. Indeed, if there was a discharge to a "water of the United States" there may be a violation of Section 301 of the CWA or NPDES permit requirements. McClennan Ecological, See page situation (MESS) v. Weinberger, 47 F.3d 325 (9th Cir. 1995); Sierra Club v. Colorado Refining Co., 838 F. Supp. 1428 (D.Co. 1993). However, NMED is neither requesting that Fort Bliss obtain an NPDES permit nor asserting that groundwater which may be discharged from the sewage lagoons in question are or may be hydrologically connected to surface waters.

NMED's authority to require a federal facility to comply with state regulations to prevent the abatement of groundwater pollution stems from federal and state law. Executive Order 12088, attached, makes clear that federal facilities are required to comply with

requirements necessary for the prevention, control and abatement of environmental pollution. Section 1-101 of E.O. 12088 states that:

The head of each Executive Agency is responsible for ensuring that all necessary actions are taken for the prevention, control, and abatement of environmental pollution with respect to Federal Facilities and activities under the control of the agency.

The CWA contains broad provisions requiring compliance by federal facilities with "all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity." 33 U.S.C. §1323(a). The Safe Drinking Water Act contains a similar provision. 42 U.S.C. §3005-6(a). The fact that the sewage lagoons may not be hydrologically connected to surface waters does not necessarily mean that they fall outside the CWA. See e.g. Leslie Salt Co. v. United States, 765 F.2d 126 (9th Cir. 1990) (water in an isolated, seasonally dry man-made pit with no hydrological connection to surface waters qualified an "other water" in the definition of "water of the United States" under the CWA). Further, there are several specific references in the CWA to the broad goal of the Act to protect groundwater. See e.g. 33 U.S.C. §1254(a)(5).

For these reasons, we believe that Fort Bliss is required to comply with state requirements under Section 3-104 of WQCC regulations to obtain a discharge plan as needed to protect groundwater from pollution. Under state law, federal facilities are not exempted from requirements to obtain discharge plans or permits. NMSA 1978, Section 74-6-2.H. (Repl. Pamp. 1993) and Section 1-101.II. of WQCC regulations.

Please submit an application for a discharge plan and all information set forth in our September 6, 1995 letter as soon as possible, and no later than thirty (30) days. If we fail to timely receive this information, we will need to take appropriate legal action. If you have any questions, do not hesitate to contact me at (505) 827-0127

Sincerely,



SUSAN M. McMICHAEAL
Assistant General Counsel

Enclosure(s)

cc: Dale Doremus
Marchell Schuman