



DEPARTMENT OF THE ARMY
HEADQUARTERS, U. S. ARMY AIR DEFENSE ARTILLERY CENTER AND FORT BLISS
1733 PLEASANTON ROAD
FORT BLISS, TEXAS 79916-6816

ENTERED

March 15, 2002

REPLY TO
ATTENTION OF:

Directorate of Environment

Mr. James P. Bearzi, Chief
Hazardous Waste Branch
NMED
Harold Runnels Building
1190 St Francis Drive, P.O. Box 26110
Santa Fe, NM 87502-6110



Dear Mr. Bearzi:

This is in response to your letter dated 20 February 2002, which was received on 04 March 2002.

Let me begin by stressing that environmental regulatory compliance and stewardship of natural resources are of great importance to the United States Army Air Defense Artillery Center & Fort Bliss. The United States Army has a strong institutional policy to comply with all applicable environmental requirements, and Fort Bliss has developed and implemented safeguards to prevent non-compliance and protect the environment and public health and safety. The Commanders of this installation, and the management and staff of the Fort Bliss Directorate of Environment, have demonstrated a commitment to environmental stewardship that has resulted in an exemplary record of environmental regulatory compliance, including numerous Department of Defense, Department of the Army, state and local awards.

We are troubled by your agency's response to the No Further Action ("NFA") Petition submitted 14 September 2000, requesting Class 3 permit modifications for six sites listed as Solid Waste Management Units ("SWMUs") on the installation's RCRA permit. The information and data submitted in support of the request for permit modification clearly establish that the Doña Ana and Meyer Range Camp wastewater treatment oxidation ponds and the other four sites included in the NFA Petition each meet all of the applicable RCRA regulatory criteria for closure, and present no potential hazard to the environment or public health and safety. This was confirmed by Mr. Kieling's statement in his letter of 14 January 2002 that "all six sites qualify for a NFA determination." Moreover, each of the last three years, following NMED inspections at installation facilities in New Mexico, your agency has issued letters of compliance stating complete satisfaction with the regulatory compliance status of those facilities. Accordingly, there exists no basis for denial of the requested permit modification.

As we have indicated in previous communications with representatives of your agency, we remain convinced that the New Mexico Ground Water Protection regulations are not applicable to the Doña Ana and Meyer Range Camp wastewater treatment oxidation ponds, and that the federal government has not waived sovereign immunity with respect to state ground water protection regulations.

Extensive analysis of the potential ground water impacts of the Doña Ana and Meyer Range Camp sewage ponds was conducted in preparation for submission of the NFA Petition. This analysis, which was submitted in support of the Petition, establishes that the Doña Ana and Meyer Range Camp ponds are not discharging water contaminants that may affect ground water. The main reasons for this are the 70-100 inch annual evapotranspiration rate, an annual rainfall average of less than eight inches, and a

FB

lack of a completed hydrological connection between the ponds and any ground water which may exist beneath the ponds.

Additionally, we believe that the data exclude the possibility that, under the circumstances existing at the Doña Ana and Meyer Range Camp ponds, the contaminant identified by agency representatives as being of concern (Nitrogen, in the form of Nitrate (NO₃), as a constituent of domestic sewage) could travel the 400 or more feet, through totally dry, non-saturated soils, to the subsurface water level, passing through multiple intervening layers of low permeability clay, in concentrations sufficient to affect ground water. For these reasons, we believe that there exists no discharge of a water contaminant from the ponds which may affect ground water. Moreover, the installation is not "intending to make a new water contaminant discharge or to alter the character or location of an existing water contaminant discharge." Accordingly, the Notice of Intent to Discharge provision of the New Mexico Ground Water Protection regulations (20 NMAC 6.2.1201) is not applicable to the Doña Ana and Meyer Range Camp wastewater treatment oxidation ponds.

We have explained in past communications with your agency and its General Counsel that Congress has not waived sovereign immunity from state ground water protection regulation. The waiver of sovereign immunity from state regulation under the Clean Water Act is limited to "requirements...respecting the control and abatement of water pollution." Ground waters are not protected waters under the Clean Water Act. Accordingly, the waiver of sovereign immunity under the CWA does not extend to ground water regulation by the states. Similarly, the waiver of sovereign immunity under RCRA is limited to "requirements...respecting control and abatement of solid waste or hazardous waste disposal and management." The requirements of the New Mexico Ground Water Protection Regulations are not "respecting control and abatement of solid waste or hazardous waste disposal and management." Accordingly, the waiver of sovereign immunity under RCRA has no effect on federal agency immunity from ground water regulation by the State of New Mexico.

For these reasons, we believe your agency should grant this installation's request for permit modification. Based on the record before you, and your agency's previous acknowledgement that the six sites included in the request for permit modification qualify for a NFA determination, denial of that request would be arbitrary, capricious, an abuse of agency discretion, not supported by substantial evidence in the record, and otherwise not in accordance with law.

Thank you for your time and consideration. Should you have any questions or need further clarification please do not hesitate to contact me at 915-568-3782.

Sincerely,


Keith Landreth
Director
Directorate of Environment

cc: Marcy Leavitt (GWQB)
Peter Maggiore (NMED)