MEMORANDUM OF LAW

DATE: October 13, 1993

TO: James A. Wageman, Senior Civil Engineer
Clean Water Program

FROM: City Attorney

SUBJECT: Hazardous Waste Site at Naval Training Center as Regards North Metro Interceptor Project (Supplemental to Memorandum of Law Dated June 8, 1993)

This replies to your memorandum of September 30, 1993 concerning a letter received September 8, 1993 from the Commanding General of the Marine Corps Recruit Depot on behalf of the Department of Defense ("DOD"). The General raised the issue regarding a contaminated Comprehensive Environmental Response Compensation, and Liability Act ("CERCLA") site at the Naval Training Center, as that site relates to the proposed alignment of a new North Metro Interceptor tunnel. Apparently, the DOD retains a high degree of concern about the proposed alignment, largely due to CERCLA provisions which impose liability for response costs on parties responsible for contamination, including federal departments such as DOD. Also cited were provisions of the 1993 DOD Appropriations Act. As we view it, two distinct issues are raised in the General's letter:

1. One provision of CERCLA 42 USC Section 9620(h)(3)(B) precludes the DOD from transferring real property upon which hazardous substances are known to have been released unless the DOD provides a warranty that all necessary action to protect public health has been taken prior to the transfer. Since the DOD cannot presently provide this warranty (the site is not on the National Priorities List and cleanup is not scheduled to occur until several years from now), the threshold issue is whether the grant of an easement is even legally possible under the circumstances.

This issue has already been addressed by this office in a Memorandum of Law dated June 8, 1993 (copy attached). In summary, we concluded that the cited section would not be applicable if the proposed easement encompasses only property that has not been subjected to a release of hazardous substances.

This is important because soil tests performed in the proposed easement have not disclosed hazardous substances or contaminants, so far as we have been informed. Also, and perhaps more importantly, we do not consider the grant of an easement to be a "transfer" of property at all, and hence the cited CERCLA section is inapposite.

We should also address the recent acts of Congress cited in the attachment to the General's letter. These are: H.R. 5504; Section 330, 138 Congressional Record H10210-09; and 138 Congressional Record S14256-01. These laws were incorporated generally as part of the 1993 Appropriations Act applicable to DOD. Although the provisions are law independent of CERCLA, they nonetheless raise the same issue already addressed concerning 42 USC Section 9620(h)(3)(B).

The Appropriations Act contained conditional language to address the subject of transfer of federal properties resulting of impending base closures. In effect, the conditions contained in the Appropriations Act are not much different from the requirement of 42 USC Section 9620(h)(3)(B). That is, DOD would be required to indemnify transferees (including state or local governments) for environmental response costs. But here again, even though the Naval Training Center is slated for closure, the grant of a sewer easement is not a "transfer" in the sense covered by the mandatory indemnity language of the Appropriations Act. The appropriation bill set forth in 138 Congressional Record H10210-09 would apply only if the City acquired "ownership or control" of the subject site. When the bill passed through the Senate, the language employed was not expressed in terms of ownership or control; the term "transferred" was used instead. (138 Congressional Record at S14259 9-21-92.) The Appropriations Act appeared as Public Law 102-396, which also uses only the word "transferred." Since this is the same issue already addressed in regard to 42 USC Section 9620(h)(3)(B), our perspective is no different: The cleanup or indemnity requirements are not applicable to grants of easement, for such are not "transfers."

2. The second issue, reached after resolution of the first, concerns possible allocation of the risk for bearing response costs between the City and DOD. The enclosure to the General's September 8 letter reveals that several federal laws (the bills and the Appropriations Act discussed above) "contain provisions which could make DOD responsible for any costs caused to the City due to contamination encountered on DOD property during the construction of the interceptor, if an easement is issued for this project." This indicates that in addition to the easement issue, there is the further issue concerning the possibility of indemnity to the DOD. Any

potential DOD liability for damages to the City is not conducive to favorable consideration for the easement by DOD. The question, then, is whether some form of indemnity agreement may be entered whereby the City and DOD could fairly allocate risks of damage or cleanup costs which might be associated with the interceptor project and landfill site.

In reply to this question, we believe that such an indemnity agreement is a legally viable mechanism which could be used to assure the DOD that if it were to grant the easement, it would be free from exposure to potential liability to the City for damage or cleanup costs that are related to any landfill contamination encountered during the interceptor project. Our reasoning follows:

Section 107 of CERCLA contains a provision which directly addresses the subject of indemnification and hold harmless agreements relating to CERCLA liability. 42 U.S.C. Section 9607(e)(1) provides:

> No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section. Emphasis added.

The second sentence of subsection (e) indicates that indemnity agreements may be lawfully entered and enforced, so long as the actual or potential CERCLA liability which is the subject of indemnity is transferred to a party to that agreement. CERCLA is structured on the statutory designation of "responsible parties" or "potentially responsible parties," who are generally categorized as present owners/operators of vessels or facilities where hazardous substances have been released; as past owners/operators responsible for generating or storing hazardous waste; as suppliers or generators of hazardous waste; or as transporters of hazardous waste. Agreements may be entered between actually or potentially responsible parties which provide for indemnity or contribution for CERCLA liability. See Caldwell v. Gurley Refining Co., 755 F.2d 645, 651-52 (8th Cir. 1985) -

lessor of dump site had right of indemnity from waste dumping lessee by virtue of lease; Chemical Waste Management Inc. v. Armstrong World Industries, Inc., 669 F. Supp. 1285, 1294-1295 (E.D.Pa. 1987) - indemnity agreements between owners/operators and generators are legal and enforceable if their terms are express: "If owners or operators and generators wish to redistribute the risks distributed by Congress, they must do so clearly and unequivocally." Id. at 1295.

Moreover, we do not believe the Appropriations Act would prohibit an indemnity agreement which provides for City responsibility for certain response costs. The duty for DOD to completely indemnify arises upon a "transfer," and no transfer is at issue here.

Thus, we believe that CERCLA itself provides an option for an express indemnity agreement between the City and DOD. However, we must caution that any agreement by the City to assume liability for response costs should be entered only after full consideration of alternatives and after careful evaluation of risks for potential expense. For this reason, we have not yet attempted to draft the indemnity agreement requested in Item 2 of the attachment to the General's September 8 letter. We believe that completion of dialogue on the foregoing issues would be a reasonable course to take before actual terms are considered. Anyhow, specific terms cannot be reasonably proposed until all information concerning the site has been fully reflected upon, and we have not yet had the opportunity to do this. However, our conclusion in concept is that an indemnity agreement certainly could be entered, provided the City is agreeable to the risks and potential expense. In most general terms, we would advise that the City should not assume any more risk of liability for contamination response costs other than those which could be associated with the volumetric easement itself, or those which may be directly caused by the interceptor project.

If the Clean Water Program decides to assume liability for response costs necessitated by its project, and if the DOD accepts this analysis, we would then move forward with specific terms of agreement.

JOHN W. WITT, City Attorney
By
Frederick M. Ortlieb
Deputy City Attorney

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Attachment
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