



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

Mr. Gerald F. Pease, Jr., Deputy Assistant Secretary
Environment, Safety and Occupational Health
U.S. Department of the Air Force
1665 Air Force Pentagon, Room 4C746
Washington, DC 20330-1665

Ms. Maureen Sullivan, Director, Environmental Management
Office of the Deputy Under Secretary for Installations and Environment, Acquisition,
Technology and Logistics
U.S. Department of Defense
3400 Defense Pentagon, Room 5C646
Washington, DC 20301-3400

Dear Mr. Pease and Ms. Sullivan:

This letter documents our key long-standing concerns regarding contamination and cleanup at Tyndall Air Force Base in Florida, a site that has been on the National Priority List since 1997. As you know, the Air Force, at Tyndall, remains unwilling to comply with the Comprehensive Environmental, Response, Compensation and Liability Act (CERCLA) mandatory duty under Section 120(e) to enter into an agreement to properly investigate and remediate actual and potential environmental and health hazards that can endanger the health and welfare of people who live and work there, as well as those in the surrounding community. That noncompliance has delayed necessary and proper cleanup and could result in wasted funds if activities now being unilaterally undertaken by the Air Force are not consistent with federal law. We consider this situation extremely serious, especially if inaccuracies about both the progress of cleanup and the potential risks to human health and the environment confuse and mislead the public.

EPA has submitted to the Air Force a CERCLA Federal Facility Agreement (FFA) that would cover activities at Tyndall. This agreement is based on an EPA/Department of Defense (DOD) accord in 2008 at Fort Eustis (VA), which DOD and EPA agreed would apply to all remaining DOD sites, including Tyndall. The "Fort Eustis model," similar to existing agreements developed at previous federal sites and comparable to the Agency's standard consent decree for private cleanups, provides a responsible structure for federal agency site management along with the proper EPA enforcement oversight and accountability to the public required by

law. Unlike more than 170 other federal facility cleanup sites on the National Priorities List, Tyndall has failed to sign such an agreement, mandated by the statute.

In addition, our concern is elevated at Tyndall by the Air Force's violation of EPA's 2007 Resource Conservation and Recovery Act (RCRA) imminent and substantial endangerment order, effective in 2008, for investigation and cleanup of site-wide contamination. The Agency's authority for that order, when challenged by DOD, was affirmed in 2008 by the Justice Department. Comparable violations for a private party at a non-federal site would expose that violator to million-dollar penalties. And while EPA cannot enforce this noncompliance with penalties against the Air Force, it creates a vulnerability to the Federal government as it is enforceable by citizens pursuant to Section 7002(a). Further, this RCRA liability should be of concern to the Air Force as a potential material weakness under the Federal Managers Financial Integrity Act (FMFIA).

EPA concerns with conditions at Tyndall Air Force base, which are detailed in the attachment, include:

1. Significant contamination at Tyndall, which presents serious public health and environmental risks.
2. The inadequacy of the Air Force's unilateral cleanup activities to protect public health and the environment.
3. The Air Force's compliance violations, including its failure to comply with a final, valid RCRA imminent and substantial endangerment order.
4. The insufficiency of a proposed state-based memorandum of agreement as a substitute for lawful and accountable cleanup oversight.
5. Questions of financial management integrity at Tyndall.
6. Inaccurate Air Force representations about Tyndall, which may mislead the public.

Tyndall's disregard for its legal obligation to sign a CERCLA agreement or to comply with its RCRA endangerment order means that those who work and live at the base, and others in the surrounding area, may not be receiving the protections they are entitled to by law. As you know, the EPA formally ended Tyndall FFA negotiations again on February 12, 2012, after attempting once more to address the Air Force's concerns about the FFA. While we have attempted to negotiate in good faith many times over the past decade, we ended those negotiations by concluding that the only FFA that the Air Force was willing to sign was one inconsistent with federal law.

While EPA considers its next steps, we are providing this letter and its attachment as a summary of our key concerns at this site for the record. We again urge the Air Force to meet its legally-mandated cleanup obligations by complying with the RCRA order and by signing the FFA provided by the Agency so that the activities at Tyndall are consistent with the law and are fully protective of human health and the environment.

You may contact me at 202 564-2510.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Kling', with a stylized flourish at the end.

David J. Kling, Director
Federal Facility Enforcement Office

Attachment

cc: Cynthia Giles
Gwendolyn Keyes Fleming
Lawrence Starfield
Steven Chester
A. Stanley Meiburg
Franklin Hill
Reggie Cheatham
V. Anne Heard
Florida Department of Environmental Protection

EPA Concerns at Tyndall (FL) Air Force Base

1. Significant contamination at Tyndall presents serious potential public health and environmental risks.

Tyndall Air Force Base was added to the National Priority List (NPL) in 1997 due to extensive contamination and high concentrations of probable human carcinogens and other contaminants, as detailed in EPA's 2007 RCRA 7003 order, from historical military and other activities at this 29,000 acre facility in Panama City, Florida. This is one of the nation's most significantly contaminated sites and of considerable concern because Tyndall remains an active military facility with remaining potential human exposures to these risks. Among the contamination is DDT, present at concentrations some 200 times greater than EPA's risk-based standards for people and the environment.

Other contaminants identified in soil, sediment, surface water and ground water at Tyndall include chlordane, trichloroethylene (TCE), tetrachloroethylene, vinyl chloride, jet fuels, polychlorinated biphenyls (PCBs), munitions and munitions constituents, lead, arsenic, chromium, barium, and fire-suppression chemicals. Of particular concern is petroleum and solvent contamination in soil and groundwater at refueling areas across the base. Groundwater is a source of drinking water at several locations at the facility, and the aquifers beneath the areas of contamination are potential potable water sources. Heavy metals, at concentrations exceeding EPA's risk-based screening levels and Safe Drinking Water Act standards, are present near the surface and in groundwater. Sample results also show that TCE, vinyl chloride, and benzene have migrated from shallow to deeper groundwater at Tyndall. This contamination is so extensive that ground excavations for any purpose, such as pipeline repair or building construction, would likely bring workers into contact with it.

Tyndall also has various operational and closed ranges across the site which contain used (fired) and unfired ammunition, as well as buried munitions. These munitions are leaching hazardous contaminants into the soil and these contaminants present a risk to groundwater quality. Human access is not limited in these areas and Tyndall does not have appropriate land use controls in place to prevent military personnel, their families, or others from coming into contact with these dangerous munitions.

The concentrations of contaminants in the soils, sediments, groundwater and surface water at multiple locations across Tyndall exceed state and federal standards for protection of human health and ecological resources. Because access to these areas is not restricted, military personnel, their families, and others are further endangered.

Given the levels of these contaminants, Tyndall should follow the same protective clean up protocols established and overseen by EPA pursuant to applicable federal law as other private and federal facilities. Actions under these protocols should be transparent to the public and designed to ensure protective cleanup.

2. The Air Force's unilateral cleanup activities are inadequate to protect public health and the environment.

We recognize that the Air Force has unilaterally engaged in some cleanup actions at Tyndall. However, these actions have proceeded without proper investigation and analysis as required by federal law. In the absence of such assessment, EPA cannot meet its obligation to determine the sufficiency of these actions to adequately protect the public. For instance, without careful evaluation and characterization of contaminated sites consistent with the requirements of CERCLA and the National Contingency Plan (NCP), the Air Force cannot properly investigate contaminated sites nor identify and select clean up alternatives that meet the legal requirements of these statutes. Without such rigorous, transparent analysis, neither EPA nor the public can determine whether cleanup actions protect public health or the environment consistent with federal law.

The Air Force's treatment of lead contamination at Tyndall Elementary School illustrates these concerns. In August 2008, the Air Force observed lead shot and clay target debris contamination on the schoolyard playground. Without notifying the EPA or the parents of the children at the school, the Air Force allowed school children to use the playground for the remainder of the 2008-2009 school year. EPA did not receive Air Force notification of the contamination until the close of the school year, on June 2, 2009. Upon learning of the contamination, EPA immediately directed Tyndall to take appropriate action to address the contamination, notify parents, and offer blood lead testing of students so that parents could make informed decisions about protecting their children's health. On June 3, 2009, EPA also notified the U.S. Agency for Toxic Substances and Disease Registry (ATSDR) about the situation and requested that ATSDR assist in addressing the public health issues associated with the presence of the lead shot and target debris found on school grounds.

The Air Force did not notify parents and school staff nor provide blood lead testing services until June 24, 2009. In addition, the Air Force did not complete soil removal activities until September 2009. It turned out that the school was built in 1951 over a former World War II gunnery range. Had EPA been notified when lead shot was first discovered at the school, as would have been required under a CERCLA Federal Facility Agreement (FFA), the Agency would have required the Air Force to conduct a proper investigation and clean up and take immediate protective measures such as barring children from using contaminated areas. As it stands, the Air Force has still not conducted an investigation of the full nature and extent of contamination across the entire school property.

In the May 2012 Government Accountability Report (GAO) entitled *DoD Can Improve its Response to Environmental Exposures on Military Installations*, the GAO reported that DOD has inadequate policies in place to deal with past exposures such as those at Tyndall which may present public health risks. "DOD could be missing opportunities to identify and resolve concerns about some health threats."¹ In this case, toxicology studies indicate children are extremely vulnerable to adverse health effects

¹ U. S. Government Accountability Office. *DoD Can Improve its Response to Environmental Exposures on Military Installations*. May 2012. See p. 44.

of lead, a concern heightened by recent changes to the blood lead reference value prescribed by the Centers for Disease Control and Prevention (CDC).² In November 2009, the Air Force reported to EPA that the blood testing of Tyndall school children did not reveal cases of elevated blood lead. A recently published ATSDR Health Consultation notes, however, that two of the children tested did show blood lead levels which may indicate lead exposure, although it did not conclude that the playground exposures were the source.³ No information is available regarding the lead exposures of children who attended the school from the mid-1950s until 2009. The ATSDR Health Consultation recommends that the Air Force offer free annual blood lead testing in the future and strive to increase participation in the testing to at least 25% of the Tyndall elementary school population.⁴

This situation underscores the importance of operating within the legal framework of a CERCLA Federal Facility Agreement (FFA), as required under Section 120(e), and the existing RCRA order. The Air Force, like other responsible parties, is subject to applicable environmental cleanup requirements, including prompt notification to EPA and state regulatory agencies when hazardous substances are discovered or may be released. Regulatory requirements and transparency policy both call for documentation to support claims that contaminated areas are clean. A Federal Facility Agreement ensures that such a record is developed. In the case of Tyndall, there is no appropriate official record to sufficiently document the safety of contaminated areas because the Air Force has not signed an agreement.

3. The Air Force has not complied with CERCLA and remains in violation of its RCRA order.

At Tyndall Air Force Base, the Air Force has not complied with CERCLA section 120 (42 USC §9620 et seq.) which mandates that federal facilities comply with specific clean up requirements to the same extent as private parties, and enter into an interagency agreement with EPA to assure that their cleanup activities are conducted consistent with federal law and under EPA oversight. The deadline for entering into such an agreement, known as an FFA, was over a decade ago. The FFA must be signed by EPA and the federal entity responsible for cleanup, and may also be signed by the state.

By proceeding with activity at this site absent the required FFA, the Air Force has taken the position that it can unilaterally decide if and when to conduct remedial investigations and feasibility studies, how to properly characterize the contaminated areas, when and how to provide information and other documents and data to EPA, and what cleanup work is appropriate and protective. In taking this position, the Air Force

² The Advisory Committee on Childhood Lead Poisoning Prevention (ACCLPP), in its January 2012 report to the Centers for Disease Control and Prevention (CDC), has found there is no safe blood lead level in children. As recommended by the ACCLPP, the CDC will replace the current "level of concern" of 10 µg/dL (micrograms per deciliter) with a more conservative blood lead "reference value" of 5 µg/dL, to be updated once every four years.

³ U.S. Agency for Toxic Substances and Disease Registry (ATSDR). Health Consultation for Tyndall Elementary School, Tyndall Air Force Base. June 13, 2012. See Conclusions, pp. 2-3.

⁴ Ibid. see Recommendations, p. 27.

is neglecting EPA's considerable experience in the scientific investigation of contaminated sites. The Air Force is also failing to meet its legal obligation to provide the public, especially those on base and in the surrounding community, with site and cleanup information which accurately portrays the disposition and progress of the site cleanup itself. These Air Force actions effectively remove a large share of the characterization work and decision-making from the public transparency and participation which occurs at other FFA-governed cleanup sites.

EPA is particularly concerned because the Air Force, at Tyndall, has argued that it should not conduct remedial investigations at areas where there is only potential for a toxic release. The Air Force has taken the position that to conduct an investigation, there must be proof of an actual release. To date, the Air Force has not provided adequate documentation that many disputed areas are free of contamination. According to the Air Force, only if EPA can *first* prove there is a release would the Air Force agree to perform such an investigation. Most importantly, the Air Force is incorrect in its assertion that releases must be proven prior to an investigation. In addition, without an agreement in place which is the statutory vehicle for EPA to secure documentation, the Agency can neither evaluate the potential for, much less "prove" the existence of, releases, as called for by the Air Force.

This Air Force position is contrary to CERCLA and the National Contingency Plan, and is quite different from the standard applied at other Superfund sites, where areas with potential releases are typically investigated when there is reason to believe an area may be contaminated due to prior activities occurring at the site. Depending on the circumstances, this investigation need not be particularly extensive, but it must provide a sufficient basis to determine that a site is not contaminated and can be excluded from further review. Ultimately, the Air Force position inhibits the proper investigation of areas where there is a threat of release, and is not protective of public health and the environment.

In response to our continued concerns about contamination at Tyndall, EPA, in November 2007, issued a RCRA 7003 imminent and substantial endangerment order which became effective in May 2008. The order requires the Air Force to determine the nature and extent of the contamination and provides that activity at Tyndall, as at any other public or private site under a comparable order, proceed under a defined process and with proper EPA oversight to properly clean up contamination at Tyndall under publicly available, EPA-approved plans. The Air Force has *not* complied with this RCRA order, claiming instead that it has achieved "substantive compliance" with the terms of the order.

Unfortunately, this claim is not supported by documentation available to EPA or the public. EPA has repeatedly notified the Air Force, in writing, that the Air Force continues to be in noncompliance with the RCRA 7003 order at Tyndall. No responsible party or regulated entity, including the Air Force, can unilaterally claim "substantive compliance" with CERCLA or RCRA. Further, EPA cannot make a compliance or acceptability determination when proper Air Force study, documentation, and reporting is lacking. While EPA is limited in its ability to impose penalties on the Air Force to promote compliance with the RCRA order, noncompliance represents a vulnerability to

the Federal government as the order is enforceable by citizens and states pursuant to Section 7002(a).

Environmental laws, such as CERCLA and RCRA, are in place to protect human health and the environment, and EPA, as mandated by Congress, is responsible for ensuring that regulated entities comply with these laws, so risks to the public and the environment are eliminated or minimized. Under CERCLA, federal facilities like Tyndall must comply “in the same manner and to the same extent” as private entities. As such, the Air Force is subject to the same laws that other regulated entities must follow to protect human health and the environment.

If Tyndall were a private site, EPA would immediately seek court intervention to compel legal compliance with the Agency’s RCRA order. In addition, EPA would have authority to impose civil penalties at a rate of up to \$6,500 - \$7,500 per day. EPA has authority, affirmed by the Justice Department in December 2008, to issue imminent and substantial endangerment orders like the RCRA order at Tyndall. Although federal agencies are required to comply with such orders, EPA is limited in its ability to enforce these orders by collecting penalties when a federal entity is the responsible party.⁵

In a July 2010 report, the Government Accountability Office (GAO) concluded that the Air Force at Tyndall shows a pattern of noncompliance with federal laws concerning cleanup. Noting that the law imposes comparable environmental compliance requirements on federal and private entities, GAO recommended that Congress provide to EPA clearer regulatory and enforcement authority to ensure the federal agencies are equally accountable as private entities under the law, as required by CERCLA⁶.

Since 1988, approximately 116 DOD facilities placed on the National Priorities List under CERCLA have signed FFAs based on models negotiated and agreed to by DOD and EPA, including the most recent one based on the Fort Eustis agreement. Twenty-seven of these DOD facilities are Air Force installations. FFAs were signed for two Air Force installations – Air Force Plant 44 in Arizona and at Joint Base Andrews in Maryland – as recently as 2011. Tyndall is one of only two DOD installations in the nation that have failed to sign FFAs as required by CERCLA Section 120.

4. The State of Florida’s recent proposal does not substitute for the enforceable framework required by federal law.

EPA appreciates the Florida Department of Environmental Protection’s interest in establishing an oversight agreement with the Air Force to oversee environmental

⁵ U.S. Department of Justice. “Issuance of Imminent and Substantial Endangerment Orders at Department of Defense Facilities.” Office of Legal Counsel. December 1, 2008.

⁶ U.S. Government Accountability Office. *SUPERFUND. Interagency Agreements and Improved Project Management Needed to Achieve Cleanup Progress at Key Defense Installations*. July 2010. See p. 39. Also, U.S. Government Accountability Office. *SUPERFUND: Greater EPA Enforcement and Reporting Are Needed to Enhance Cleanup at DoD Sites*. March 2009. See p. 24, Attachment 18.

cleanup work at Tyndall.⁷ EPA shares the state's frustration over the lack of progress in cleaning up Tyndall.

However, a State/Air Force Memorandum of Agreement (MOA), while consistent with a common desire to expedite cleanup, will not satisfy all Air Force obligations required under CERCLA to properly evaluate and characterize contamination at the facility, select cleanup remedies jointly with EPA and make Tyndall, like all other federal and private Superfund sites, accountable for its performance. In addition, the MOA would have no effect on the Air Force's obligation to fully comply with the RCRA order by recommending, for selection by EPA, corrective measures to address contamination that poses an unacceptable risk to human health and the environment.

5. Questions of responsible financial management integrity at Tyndall.

The Air Force is obligating and spending millions of dollars for cleanup at Tyndall that have not been approved under a legally required FFA process and which, as a result, are potentially inadequate to meet the standards of the law. In August 2010, an Air Force press release stated that "an estimated \$42.7 million has been spent to clean up Tyndall Air Force Base's contaminated sites." The expenditures were made outside the mandated framework of an FFA and without compliance with the RCRA order. EPA understands that in September 2011, the Air Force awarded a task order for approximately \$40 million in additional funds to perform additional environmental work at Tyndall over the next nine years. Unless the Air Force signs an FFA and conducts this work pursuant to its terms, this work will also be conducted outside of proper regulatory and public oversight.

EPA's fiduciary role at Tyndall, exercised through implementation of the FFA and the RCRA order, requires the Air Force to request funding from Congress for cleanup activities and that these activities be adequate and protective. By conducting cleanups outside of the congressionally-mandated process and inconsistent with the RCRA order, the Air Force could be spending millions of dollars on inadequate work. Further, potentially millions of additional dollars may be needed later to rectify these unilateral determinations and ensure adequate and safe environmental remediation. The Air Force can ensure a proper return on investment of expended dollars by signing the Tyndall FFA or complying with the RCRA order without additional delay.

Finally, in the absence of an FFA or RCRA compliance, the Air Force at Tyndall continues to provide the EPA with various materials describing its unilateral actions. The Agency, when faced with such information, is then expected by the Air Force to make critical oversight judgments without the proper authority to secure additional information which may be necessary to fully inform those judgments and ensure that cleanup money is properly spent. The net effect is that the EPA and the public may be unable to hold Tyndall, as it does other federal facilities, legally accountable for cleanup which is timely and protective, as required by law. The 2010 Government Accountability Office report, discussed above, concluded that federal agency "informal interactions, while well intentioned" but without the standard enforceable arrangements

⁷ Letter, Herschel T. Vinyard Jr. Secretary, Florida Department of Environmental Protection, to Gwendolyn Keyes Fleming, Region 4 Administrator, U.S Environmental Protection Agency. May 7, 2012.

required under the FFA, “contributed to disagreements between the agencies, further delayed cleanup, and resulted in a lack of transparency and accountability to Congress and the public.”⁸

6. Inaccurate Air Force representations about Tyndall may mislead the public.

The Air Force has issued inaccurate press releases or conducted other public outreach activities regarding Tyndall which have mischaracterized EPA’s role at the site and may otherwise be misleading to the public. For instance, in an Air Force press release dated August 30, 2010, the Air Force stated, “25 (sites at Tyndall) have been restored and received “no further action” determination from the Environmental Protection Agency and/or the Florida Department of Environmental Protection.” However, prior to this release, EPA informed the Air Force in writing that the sites in question require additional characterization and may need land use controls to ensure protectiveness over time. The Air Force’s press release does not reflect this condition.

In a press release issued by the 325th Fighter Wing Public Affairs Office at Tyndall on October 29, 2009, the Air Force states: “Tyndall AFB, the EPA and Florida Department of Environmental Protection, the Agency for Toxic Substances and Disease Registry, URS, Tyndall Elementary School Staff, and the Bay County School Superintendent’s office all worked together as a team.” While EPA has certainly been involved at this site, this statement does not properly reflect that involvement or EPA’s statutory role as a neutral oversight agency. The Air Force proceeded outside the statutory process required by CERCLA and the RCRA order.

In an August 30, 2010 press release, the Air Force stated that “when lead shot contamination at the [Tyndall Elementary School] was identified, Air Force officials removed contaminated soil in the school yard and replaced it with clean fill within 4 months of identifying a risk.” In contrast, EPA’s records show that the soil removal activities were completed in September 2009 – approximately 12 months after Tyndall representatives observed the contamination during the 2008 site survey.

Since the last Tyndall Community Involvement Plan shared with EPA did not clearly state that the Air Force had not met its CERCLA FFA obligations and remained out of compliance with the RCRA 7003 order, the public could mistakenly believe that environmental cleanup is proceeding under the oversight frameworks required by these federal laws. Cynthia Giles, EPA’s Assistant Administrator for Enforcement and Compliance Assurance, wrote on September 13, 2010, to urge the Air Force to immediately issue clarifications to more accurately portray the technical and legal facts at Tyndall.⁹ EPA is unaware of any such public clarification.

⁸ U.S. Government Accountability Office. *SUPERFUND: Interagency Agreements and Improved Management Needed to Achieve Cleanup Progress at Key Defense Installations*. July 2010. See p. 37.

⁹ Letter, Cynthia Giles, Assistant Administrator for Enforcement and Compliance, U.S. Environmental Protection Agency, to Terry A. Yonkers, Assistant Secretary, U.S. Air Force. September 13, 2010.