




United States Department of the Interior

OFFICE OF THE SOLICITOR

MEMORANDUM

TO: Kris Doebbler
Remedial Project Manager, PG&E Topock CERCLA Site

FROM: Melissa Derwart 
Attorney-Advisor, Office of the Solicitor

RE: CERCLA Permit Exemption

DATE: November 16, 2007

Per your request, the following memorandum is provided to describe the scope and effect of the permit exemption codified in Section 121(e)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"). The Administrative Consent Agreement ("Consent Agreement"), executed July 11, 2005, between the United States Department of the Interior, the Bureau of Land Management, the U.S. Fish and Wildlife Service, the Bureau of Reclamation (collectively, the "Federal Agencies"), and Pacific Gas & Electric Company ("PG&E") expressly provides that any response action conducted at the PG&E Topock CERCLA Site (the "Site"), including studies, shall be subject to the permit exemption in CERCLA Section 121(e).¹ This memorandum provides further guidance on the language and purpose of the permit exemption and its applicability to the Site.

CERCLA Permit Exemption - Section 121(e)(1)

CERCLA Section 121(e)(1) provides that: "No Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely on-site, where such remedial action is selected and carried out in compliance with this section."² This

¹ See Consent Agreement, Section XI (Other Applicable Laws).

² 42 U.S.C. §9621(e)(1).

provision, applies to all administrative requirements, whether or not they are actually styled as “permits.” In other words, Section 121(e)’s permit exemption relieves a party from the permitting process, or any other administrative or procedural requirements (e.g. requirements for preparing and submitting permit applications). Any substantive elements that would be required by the permit, however, must still be attained.³

The permit exemption was developed by the U.S. Environmental Protection Agency (“EPA”) in promulgating the National Contingency Plan (“NCP”), and subsequently codified by Congress in amendments to CERCLA, to ensure that CERCLA response actions “proceed in an expeditious manner, free from potentially lengthy delays associated with the permit process.”⁴ The rationale for the permit exemption, as articulated by EPA, is that procedural and administrative requirements typically required by a permit process should not be required during a CERCLA response action because “CERCLA and the NCP already provide a procedural blueprint” for a CERCLA response.⁵ Therefore, exempting CERCLA response actions from external permitting processes would preclude delay, cost increases, and duplication, making the response process far more efficient.

When determining the applicability of the permit exemption, there are two threshold elements. First, there must be a “qualifying action,” which is defined as any CERCLA response action “...conducted by a lead agency or by a potentially responsible person or other person under an order or consent decree...”⁶ Second, the permit exemption applies only to the portion of the removal or remedial action which is conducted entirely “on-site.” The NCP defines “on-site” as “the areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action.”⁷ EPA guidance and the NCP preamble further explains that “areal” refers to surface areas, the air above the site, the soil, and any groundwater plume that are to be remediated.⁸

³ See *In the Matter of U.S. Department of Energy Hanford Nuclear Reservation*, Determination Regarding CERCLA and RCRA Jurisdictional Relationship, EPA ALJ Opinion, February 9, 2000.

⁴ EPA Guidance Document, *RCRA, Superfund & EPCRA Hotline Training Module; Introduction to Applicable or Relevant and Appropriate Requirements*, EPA540-R-98-020, June 1998.

⁵ *Id.*

⁶ EPA Guidance Document, *Permits and Permit “Equivalency” Processes for CERCLA On-Site Response Actions*, OSWER Directive 9355.7-03, February 19, 1992.

⁷ *Id.*; 40 CFR § 300.400(e)(1).

⁸ See EPA Guidance, *Permits and Permit “Equivalency”*; See also, 55 FR 8689, March 8, 1990.

Applicability to the Topock Site

The Consent Agreement provides for PG&E to perform both a Remedial Investigation and a Feasibility Study in a manner consistent with CERCLA and the NCP, and subject to the oversight of the Federal Agencies. Therefore, all activities conducted by PG&E pursuant to the Consent Agreement at the Site are qualifying actions to which the permit exemption applies.

In addition, the Consent Agreement defines the Site as “all areas where hazardous substances released at or from the Compressor Station have come to be located, including areas where hazardous substances are discovered in the course of performing the Work.”⁹ Hence, any response action performed within the boundaries of the Site, or areas in very close proximity to the Site that are necessary for implementation of the response action, are subject to the permit exemption. Response actions include, but are not limited to, groundwater pump and treat measures, in situ treatment, the collection and analysis of samples, and any other soil or groundwater investigation or cleanup.

I hope that this memorandum clarifies the scope and effect of the CERCLA permit exemption and its applicability to the Topock CERCLA Site. Please do not hesitate to contact me if you need any more information.

⁹ Consent Agreement, Section VII (Definitions). “Work” is defined in the Consent Agreement as “all response actions and corrective actions associated with releases of hazardous substances at the Site performed by PG&E, including all activities to be performed by PG&E as described in Article IX (Work to Be Performed) and all activities conducted by PG&E pursuant to the CACA.