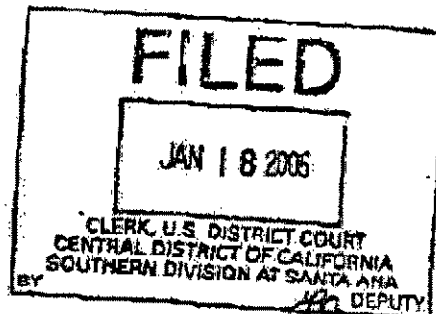


*Handwritten signature and "40 pages"*

- Priority
- Send
- Cisd
- Enter
- JS-5/JS-6
- JS-2/JS-3



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
SOUTHERN DIVISION

AIRPORT WORKING GROUP OF  
ORANGE COUNTY, INC., et al.,

Plaintiffs,

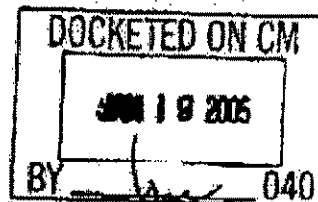
vs.

U.S. DEPARTMENT OF DEFENSE,  
et al.,

Defendants.

Case No. SA CV 02-1110-GLT (MLGx)

RESPONSE TO COURT'S QUESTIONS FOR  
CLARIFICATION RE CONTAMINATION



As part of the Court's continuing jurisdiction over compliance with the terms and conditions of the parties' settlement, the Court asked for clarification concerning compliance regarding contamination clean-up at the closed El Toro Marine Base. In August 2004, the Court asked clarifying questions, and the Department of Defense submitted its response. In October 2004 the Court asked additional questions. In response, the Court has received the attached November 24, 2004, letter from counsel for the Department of Defense; December 1, 2004, letter from counsel for the Airport Working Group; and December 7, 2004, letter from counsel for the Department of Defense.

The answers given clarify the Department of Defense's position on


*Handwritten circled number 38*

1 the contamination questions raised by the Court.<sup>1/</sup> It appears the  
2 Department of Defense's position is that proceeds from the sale of El  
3 Toro will be deposited along with money from other sources into the  
4 Department of Defense Base Closure Account; that Account will be the  
5 source to pay for the clean-up of contamination at El Toro and for  
6 other projects elsewhere; there is no guarantee money will be  
7 appropriated from that Account, or will still be available in that  
8 Account, for the El Toro clean-up; and there is no time-table for the  
9 El Toro clean-up.

10 The Court assumes timing and the availability of funds to pay for  
11 El Toro's clean-up is a matter of interest to the State of California,  
12 the County of Orange, the City of Irvine, and other persons and  
13 entities, and they will seek appropriate assurances, if necessary.

14 The Court retains its continuing jurisdiction over compliance with  
15 the terms and conditions of the parties' settlement.

16  
17 DATED: January 18, 2005.

18  
19  
20   
21 G. L. TAYLOR  
22 UNITED STATES DISTRICT JUDGE  
23  
24  
25  
26

27 <sup>1/</sup>A further hearing on these questions, as requested by the  
28 Airport Working Group, will not be necessary. If appropriate or  
necessary, the Group may pursue its settlement contract remedies.



U.S. Department of Justice  
Environment and Natural Resources Division  
Natural Resources Section

CRS

90-1-0-10691

501 "I" Street, Suite 9-700  
Sacramento, CA 95814-2322

Telephone (916) 930-2203  
Facsimile (916) 930-2210

November 24, 2004

Honorable Gary L. Taylor  
United States District Court  
Central District of California  
Southern Division  
Ronald Reagan Federal Building  
and U.S. Courthouse  
411 West Fourth Street, Room 1053  
Santa Ana, CA 92701-4516

Re: Airport Working Group of Orange County, Inc. v. Dept. of Defense  
Case No. SACV 02-1110-GLT (MLGx)

Dear Judge Taylor:

This responds to the Court's Civil Minute Order dated October 28, 2004. The Court requested that the defendants provide answers by November 30, 2004, to three questions, which the Court indicated were prompted by the defendants' September 10, 2004, letter. That earlier letter, in turn, provided responses to two questions regarding the settlement agreement which the Court approved last year.

In response to the Court's October 28 Civil Minute Order, the Department of the Navy has provided the following information:

1. **Do areas of the El Toro Marine Base identified by the Navy as contaminated include evaluation for Perchlorate contamination?**

Yes. Since 1998, the Navy has been monitoring for perchlorate at the base as part of the regular groundwater monitoring program. The low detections of perchlorate within the boundaries of the former MCAS El Toro were found to be consistent with concentrations identified at monitoring well locations off-station. Subsequent stationwide sampling studies confirm the scattered presence of low perchlorate concentrations in groundwater beneath the public sale parcels as well as off-station property sampled by Orange County Water District.

Perchlorate has been detected in groundwater at Site 1, former Explosive Ordnance Disposal (EOD) Range, and Site 2, Magazine Road Landfill at levels that may require a response. Groundwater remediation decisions at these sites are being evaluated by the Navy and federal and state regulatory agencies. Site 1 is located in the far northeast corner of the station and remains under Navy ownership. Site 2 is located in a 900-acre area designated as a wildlife habitat that has already been transferred by the Navy to the Federal Aviation Administration. However, the perchlorate at those sites will not impact the public sale property.

**2. Has a standard been adopted for evaluating Perchlorate contamination? If so, what is that standard?**

Yes. Both the state and federal regulatory agencies have been evaluating perchlorate since the 1990s and have established public health guidelines for perchlorate in drinking water. A panel of world-renowned scientists has been convened by the National Academy of Sciences (NAS) to conduct a thorough and independent review of U.S. Environmental Protection Agency's (EPA) 2002 Draft Toxicological Review and Risk Characterization for Perchlorate. The NAS is expected to publish its report in late 2004 or early 2005. After all risk assessment studies are complete, it is anticipated that federal and state drinking water standards, or a maximum contaminant level (MCL), for perchlorate will be promulgated as enforceable regulations through public rulemaking proceedings. The California public health goal (PHG) of 6 micrograms per liter ( $\mu\text{g/L}$ ) has been established as guidance in the absence of a MCL. [Note: micrograms per liter ( $\mu\text{g/L}$ ) is also referred to parts per billion (ppb).]

For more information, the EPA's interim guidelines can be found at

[http://www.epa.gov/swc/ffr/documents/perchlorate\\_0a.htm](http://www.epa.gov/swc/ffr/documents/perchlorate_0a.htm)

The following California Department of Health Services (DHS) website provides information regarding perchlorate in California drinking water:

<http://www.dhs.ca.gov/ps/ddvcm/chemicals/perchl/perchlindex.htm>

**3. Is there a plan to remediate any Perchlorate contamination at El Toro Marine Base? If so, what is that plan?**

Yes. Even though no federal or state drinking water standards have been established, the Navy, in consultation from the regulatory agencies, has developed and is following a specific plan to address the localized perchlorate contaminated groundwater. The Navy's approach, specifically regarding Site 1, former Explosive Ordnance Disposal (EOD) Range, has been presented and discussed with the public and local community at the El Toro Restoration Advisory Board meetings of May 26 and September 29, 2004. In summer 2004, the Navy installed an additional 12 monitoring wells to further delineate any possible presence of perchlorate in groundwater at Sites 1 and 2 in preparation of groundwater aquifer and treatability tests. The Navy, regulatory agencies, and the community meet on a bi-monthly basis at the Irvine City Hall to discuss the El Toro environmental program.

**Additional Information.**

**Management and Regulatory Oversight of MCAS El Toro's Environmental Program**

- Since October 1990, the Navy's environmental program at El Toro has been managed under a legally binding Federal Facility Agreement (FFA) among the Navy, EPA, California Department of Toxic Substances Control (DTSC), and

the California Water Quality Control Board (RWQCB), Santa Ana Region. The FFA governs the cleanup at El Toro (including sites 1 and 2) by establishing a procedural framework and schedule for developing, implementing, and monitoring the Navy's environmental response actions, which must comply with federal and applicable state laws.

- The FFA states that no change in the ownership (or closure) of El Toro shall in any way alter the responsibility of the Navy under the agreement. Also, the Marine Corps shall not transfer any real property from federal ownership until all necessary environmental actions have been met (in compliance with section 120(h) of CERCLA, 42 U.S.C. Section 9620(h)). This means that until the Navy can convey the property under the 120(h) provision of CERCLA, the Navy will continue its investigations and necessary remedial actions at El Toro. DoD policy of July 25, 1997, details the DoD responsibility for additional environmental cleanup after transfer of real property. DoD is committed to selecting remedies that provide for the full protection of human health and the environment, even after the transfer of property.

### **Perchlorate and Public Sale Property**

- The Navy, EPA, DTSC, and RWQCB reviewed all available environmental data, including perchlorate, and determined with the July 2004 Finding of Suitability to Transfer (FOST) that the property to be transferred in the public sale parcels is suitable for residential and other proposed uses. The regulatory agencies concurred with the July 2004 Final FOST without exception.
- The perchlorate detected in groundwater within the public sale parcels are within the range that regulatory agencies have found acceptable (i.e. no action required) at other sites around the state and nation.
- On MCAS El Toro property that is NOT a part of the public sale, perchlorate has been detected and some environmental action may be required. The Navy and regulators are currently evaluating what type of response may be necessary at those sites. However, the perchlorate at those sites will not impact the public sale property.
- A fact sheet regarding perchlorate and its presence on the former air station property can be found on the Bidder Support auction web site

<http://www.heritagefields.com> under Frequently Asked Questions (FAQ) or directly downloaded from:

[http://www.heritagefields.com/faq/pdf/HF\\_Perchlorate\\_Fact\\_Sheet.pdf](http://www.heritagefields.com/faq/pdf/HF_Perchlorate_Fact_Sheet.pdf)

The defendants respectfully submit that this information responds in full to the Court's questions and should put any further concerns to rest.

While defendants have not objected to responding to the Court's questions, the process of continuing inquiries into a case that has been dismissed with prejudice does strike the defendants as rather unusual. As the Court is aware, the plaintiffs agreed to dismiss the complaint with prejudice, subject only to the requirement that the Navy complete an air quality study prescribed by the settlement.

agreement, and the Court approved the settlement, along with dismissal of all claims with prejudice. The settlement agreement expressly limited any possible remedy to possible concerns that the plaintiffs might raise relating to the manner in which the Navy completes that air quality study. The plaintiffs have not raised any such concerns or objections. In light of the additional information that the Navy has provided regarding the ongoing cleanup and monitoring of the former MCAS El Toro site, including the treatment of perchlorate, the defendants request that the Court now regard this litigation as concluded, consistent with the binding terms and conditions of the Court-approved settlement agreement.

Very truly yours,

*Charles R. Shockey*

Charles R. Shockey  
Attorney for Defendants  
(916) 930-2203

cc: Barbara Lichman, Esq.  
Attorney for Plaintiffs

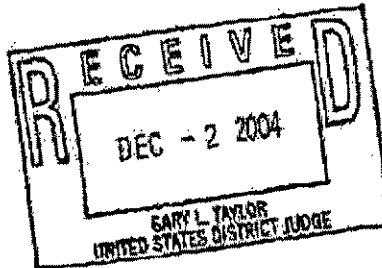


**CHEVALIER, ALLEN & LICHMAN LLP**  
*Attorneys at Law*  
Commercial Litigation • Aviation Law & Litigation • Environmental Law & Litigation

Gary M. Allen, Ph.D.  
John Chevalier, Jr.  
Bernie C. Hart  
Barbara E. Lichman, Ph.D.  
Jacqueline E. Sarnack, J.L.M.\*  
Frederick C. Woodruff

December 1, 2004

Honorable Gary L. Taylor, Judge  
United States District Court  
Central District of California  
Southern Division  
Ronald Reagan Federal Building  
and U. S. Courthouse  
411 West Fourth Street, Room 1053  
Santa Ana, California 92701-4516



\*Retired  
\*Admitted in New York  
\*Of Counsel

606 Tower Center Plaza, Suite 700  
Costa Mesa, California 92626  
Telephone (714) 384-6520  
Facsimile (714) 384-6521  
E-mail cal@calalaw.com

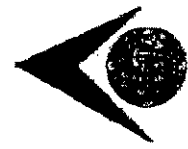
Re: *Airport Working Group of Orange County, Inc., et al. v. United States Department of Defense, et al., U.S.D.C. Case No. SACV 02-1110-GLT(MLG) - Minute Orders Re: Contamination at El Toro Marine Corps Air Station*

Dear Judge Taylor:

Airport Working Group of Orange County, Inc. (AWG) submits to the Court the following comments concerning the Department of Defense's (DOD) September 10, 2004 responses to the Court's August 26, 2004 Minute Order and DOD's November 24, 2004 responses to the Court's October 28, 2004 Minute Order, and requests that the Court schedule a Status Conference to address DOD's responses and AWG's concerns, as set forth below. Despite several discussions and a letter to DOD outlining the need for a Status Conference, DOD has thus far declined to join in this request.

I. DOD SEPTEMBER 10, 2004 RESPONSE TO THE COURT'S AUGUST 26, 2004 MINUTE ORDER.

DOD's response to the Court's Minute Order does not accurately state the purposes for which proceeds from the sale of the El Toro property may be used under the Defense Base Closure and Realignment Act of 1990 ("DBCR") (Public Law 101-510, 10 U.S.C. § 2687 note). The Court's first question, "[w]ill El Toro Air Station sales proceeds be used to clean up hazardous substances at the El Toro Air Station site?" is very specific as to the source of the funding and the use to which the funds will be put. DOD responded with an unequivocal "yes" to that question. That is not, however, an accurate answer.



Honorable Gary L. Taylor, Judge  
United States District Court  
Central District of California  
Southern Division  
Page 2

It is true that: (1) DBCRA establishes the "Department of Defense Base Closure Account of 1990" ("Account"); (2) Section 2906(a)(2) provides for deposit into the Account of, among other funds, "(D) proceeds received after September 30, 1995 from the lease, transfer, or disposal of any property at a military installation closed or realigned under Title II of the Defense Authorization Amendments and Base Closure and Realignment Act (Public Law 100-526; 10 U.S.C. 2687 note)"<sup>1</sup>; and (3) Section 2906(b)(1) requires that the funds in the Account to be used only for the "limited" purposes "described in section 2905". That is, however, far from the whole story.

What DOD's response does not reveal is that Section 2905 allows for a variety of uses for the money deposited in the account other than environmental remediation and mitigation, including, but not limited to, "economic adjustment assistance" [§ 2905(a)(1)(B)(i)]; "community planning assistance" [§ 2905(a)(1)(B)(ii)]; and, even more broadly, for "planning and design, minor construction, or operation and maintenance" [§ 2905(a)(1)(A)], subject to the complete discretion of the Secretary of Defense. ["In closing or realigning any military installation under this part, the Secretary may . . .", § 2905(a)(1) [emphasis added], referring to the expenditure of funds.]

Moreover, even if the funds are used for environmental restoration, Section 2906(b)(1) does not require that they be dedicated to the base from the sale of which the funds were derived, or to any base or military facility in particular, but allows the Secretary to use the funds at "military installations" in general. Thus, while the Account may be the sole source of funds for environmental restoration [§ 2906(b)(1)]; and, while all the funds from the sale of El Toro will be

---

<sup>1</sup> Section 2906(a)(2)(C) provides an exception. "except as provided in subsection (d), proceeds received from the lease, transfer, or disposal of any property at a military installation closed or realigned under this part the date of approval of closure or realignment of which is before January 1, 2005;" Subsection (d)(1) provides that "If any real property or facility acquired, constructed, or improved (in whole or in part) with commissary store funds or nonappropriated funds is transferred or disposed of in connection with the closure or realignment of a military installation under this part the date of approval of closure or realignment of which is before January 1, 2005, a portion of the proceeds of the transfer or other disposal of property on that installation shall be deposited in the reserve account established under Section 204(b)(7)(C) of the Defense Authorization Amendments and Base Closure and Realignment Act (10 U.S.C. 2687 note)." Thus, if any part of the MCAS El Toro property was acquired, constructed or improved with nonappropriated funds [not addressed by DOD], a portion of the proceeds of the sale of the MCAS El Toro property must be deposited into the reserve account, not the Department of Defense Base Closure Account.



Honorable Gary L. Taylor, Judge  
United States District Court  
Central District of California  
Southern Division  
Page 3

deposited in it, the obverse need not be true, i.e., nothing in the DBCRA requires that El Toro be the recipient of funds in the Account. Thus, a literal reading of the governing law shows that the funds may or may not be used for remediation; may or may not be used at El Toro; if used at El Toro, may or may not be used in direct proportion to the amount contributed by the sale of El Toro; and may or may not be used for remediation at El Toro or elsewhere, depending on the sole discretion of the Secretary of Defense.

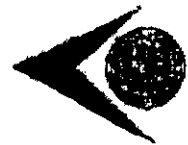
The citations in DOD's response establish only that: (a) the Account is the sole source of monies for environmental remediation; (b) the money in the Account comes from many sources including, but not limited to, base transfers; (c) the money in the Account may be used for any or all closed military installations, not dedicated to a single base in proportion to the amount the sale of that base contributes to the Account; (d) the Secretary of Defense may use the money in the Account for many purposes, including, but not limited to, remediation; and (e) the DBCRA does not dictate the proportion of the funds that must be spent for remediation, so that it is theoretically possible that the Account could be drawn down for purposes other than remediation, or for remediation at other military installations, to a level lower than that necessary to complete environmental remediation at El Toro.

II. DOD'S NOVEMBER 24, 2004 RESPONSES TO THE COURT'S OCTOBER 28, 2004 ADDITIONAL QUESTIONS CONCERNING CONTAMINATION.

DOD does not fully respond to the Court's two-part inquiry, "Is there a plan to remediate any Perchlorate contamination at the El Toro Marine Base? If so, what is the plan?" DOD states only that "Yes" there is a plan, but does not tell the Court what the plan is. Moreover, DOD's response addresses monitoring only, but does not address remediation.

III. AWG'S REQUEST FOR A STATUS CONFERENCE.

In light of DOD's incomplete and somewhat misleading responses to the Court's questions and the parties' differing positions with regard to environmental remediation of the El Toro property, and to avoid burdening the Court with continuing correspondence from both parties, AWG requests that the Court schedule a Status Conference, at the Court's earliest convenience, to



Honorable Gary L. Taylor, Judge  
United States District Court  
Central District of California  
Southern Division  
Page 4

allow the parties to present, and the Court to consider, their respective positions concerning the Court's questions and any further questions the Court may have.

Sincerely,

CHEVALIER, ALLEN & LICHMAN, LLP

Barbara E. Lichman, Ph.D.

cc: Charles R. Shockey  
Greg Hurley

12/07/04 10:28 FAX 918 930 2210

US D.C.J. / ERM / GENLIT

001/003



U.S. Department of Justice  
Environment and Natural Resources Division  
Natural Resources Section

CRS  
90-1-0-10691

501 "P" Street, Suite 9700  
Sacramento, CA 95814-2322

Telephone (916) 930-2205  
Facsimile (916) 930-2210

December 7, 2004

Honorable Gary L. Taylor  
United States District Court  
Central District of California  
Southern Division  
Ronald Reagan Federal Building  
and U.S. Courthouse  
411 West Fourth Street, Room 1053  
Santa Ana, CA 92701-4516

Re: Airport Working Group of Orange County, Inc. v. Dept. of Defense,  
Case No. SACV 02-1110-GLT (MLGx)

Dear Judge Taylor:

This responds to the letter to the Court dated December 1, 2004, from the plaintiffs' counsel, Ms. Barbara Lichman. In that letter, the plaintiffs have requested that the Court hold a status conference to discuss the plaintiffs' concerns regarding the defendants' written responses to the Court's Civil Minutes Orders dated August 26 and October 28, 2004.

The defendants must respectfully but forcefully oppose this attempt by the plaintiffs to reopen this litigation. As an initial matter, the plaintiffs are mistaken in asserting that the defendants' responses to the Court are either incomplete or misleading. As summarized below and as detailed in the letters from counsel to the Court dated September 10 and November 24, 2004, the defendants have provided fully satisfactory responses. More fundamentally, however, the plaintiffs have presented no justifiable grounds for the Court to set aside the binding terms of the settlement agreement and the Court's order approving that agreement, which dismissed this litigation with prejudice. The plaintiffs cannot be allowed to ignore that agreement and decree under the guise of requesting a status conference to press new and additional claims that they did not raise in this litigation.

With regard to the question of the Navy's commitment to the ongoing funding of environmental cleanup activities at the former Marine Corps Air Station El Toro (El Toro), the plaintiffs simply raise hypothetical questions about the manner in which they believe the defendants might decide to exercise the statutory authority that Congress has provided to the Department of Defense (DoD) under the Defense Authorization Amendments and Base Closure and Realignment Act. In doing so, the plaintiffs overlook the DoD's and Department of the Navy's consistent commitment to comply with all applicable federal and state environmental statutes relating to the cleanup operations at El Toro.

12/07/04 13:28 FAX 916 930 2203

US D.O.J. / ENRD / GENL JT

003/003

With regard to the perchlorate issues, the defendants' response to the Court provided more-than-sufficient information and references to more detailed sources of information that address the ongoing and planned treatment of perchlorate at El Toro. This is an issue that, the defendants note, that the plaintiffs never pursued through this litigation and which the plaintiffs appear to be using to attempt to circumvent the settlement agreement and dismissal order.

The defendants have responded in a direct and meaningful manner to the Court's inquiries. If the plaintiffs are allowed to use the recent correspondence to breach the settlement agreement and abrogate the dismissal order, then the defendants will be deprived of the binding provisions of the negotiated bargain. At a minimum, if the plaintiffs wish to invalidate the settlement agreement or no longer view it as binding, then they must immediately return to the federal taxpayers the entire amount of the attorneys' fees and costs, plus interest, which the defendants negotiated and paid in good faith as consideration for the dismissal of this case.

The defendants request that the Court decline to grant the plaintiffs' effort to arrange a status conference to resuscitate this litigation. The settlement agreement provides the exclusive grounds for any further judicial inquiry, which must be preceded by the mandatory dispute resolution process -- a process that the plaintiffs have neither invoked nor exhausted. Unless and until that should occur, this case is closed and should remain dismissed from the Court's docket.

Very truly yours,

*Charles R. Shodley*  
Charles R. Shodley  
Attorney for Defendants  
(916) 930-2203

cc: Barbara E. Lichman, Esq.  
Attorney for Plaintiffs