



U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

The Special Counsel

April 26, 2024

The Honorable Christine E. Wormuth
Secretary
U.S. Department of the Army
101 Army Pentagon
Washington, D.C. 20310-0101

Re: OSC File No. DI-24-000713
Referral for Investigation – 5 U.S.C. § 1213(c)

Dear Secretary Wormuth:

I am referring to you for investigation a whistleblower disclosure alleging employees of the U.S. Department of the Army (Army), U.S. Army Corps of Engineers (USACE), Mobile, Alabama, engaged in conduct that may constitute a violation of law, rule, or regulation and a substantial and specific danger to public health and safety. A report of your investigation into these allegations and any related matters is due to the Office of Special Counsel (OSC) on June 25, 2024.

██████████, a Project Manager in the Programs and Project Management, USACE Installation Restoration Program Support, Interagency and Environmental Branch consented to the release of his name. ██████████ alleged that USACE employees violated the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),¹ its implementing regulations, and Department of Defense (DoD) and Environmental Protection Agency (EPA) directives. ██████████ reported the alleged violations to agency officials, but they remain unresolved. The allegations to be investigated include:

¹ Codified at 42 U.S.C. §§ 9601–9675.

- In violation of CERCLA,² its regulations,³ DoD⁴ and EPA⁵ directives, USACE employees impermissibly restricted the areas to be investigated in a Remedial Investigation (RI) at Tyndall Air Force Base (Tyndall AFB) that is assessing the nature and extent of Per- and polyfluoroalkyl substance (PFAS) contamination, which include Perfluorooctanoic Acid (PFOA) and Perfluorooctane Sulfonate (PFOS)⁶;
- By impermissibly restricting the areas to be investigated in the PFAS RI at Tyndall AFB, employees, including USACE, Military Construction (MILCON) employees, MILCON contract employees, and Tyndall AFB employees working at Tyndall, may be unknowingly working in contaminated areas and thereby potentially exposed to PFAS; and
- Any related allegations of wrongdoing discovered during the investigation of the foregoing allegations.

Generally, CERCLA requires remediation of land highly contaminated by hazardous materials and permits the EPA to compel potentially responsible parties to perform adequate cleanup. At the EPA's request and pursuant to agreements it entered with USACE, USACE supports various aspects of the CERCLA process including RIs and Feasibility Studies (FS).⁷ CERCLA's implementing regulations require parties to conduct: a Site Inspection (SI), which provides preliminary contamination assessments and informs the RI; an RI, which collects the data needed to determine the full extent and scope of the contamination and assess the risks to human health and the environment; and an FS that develops and evaluates effective remedial alternatives so an appropriate remedy can be selected—the RI and FS should be conducted concurrently.⁸ ██████████ alleged that restricting the areas to be investigated in the RI for PFAS violates the primary requirements of a U.S. CERCLA RI, which is to define the full extent of the contamination.

██████████ explained that Tyndall AFB previously used Aqueous Film Forming Foam (AFFF)—a foam containing PFAS that Tyndall AFB firefighters used to extinguish petroleum-based fires. Tyndall AFB firefighters also stored and trained with AFFF. ██████████ asserted the Air Force stopped using AFFF due to PFAS toxicity. In 2018, Tetra Tech, Inc. (Tetra Tech)

² 42 U.S.C. § 9620 (applying CERCLA to the federal government including executive departments and agencies).

³ 42 C.F.R. § 300.430(d) (stating that RIs characterize the nature and extent of the threat the hazardous substance poses to human health or the environment by gathering data to develop and evaluate effective remedial alternatives).

⁴ See DoD Manual No. 4715.20, *Defense Environmental Restoration Program (DERP) Management* at § (4)(b)(5)(a).

⁵ EPA 540G-89004 OSWER Directive 9355.3-01 *Guidance for Conducting Remedial Investigations and Feasibility Studies under CERCLA*, Ch. 3 *Site Characterization*, Section 3.2.4 (Oct. 1988) (RIs determine the nature and extent of the contamination through iterative sampling and testing to identify where the contamination migrated both vertically and horizontally, assess its concentrations, and ascertain its physical boundaries).

⁶ 87 Fed. Reg. 54,415 (Sept. 6, 2022) (the EPA's rule proposing to designate Perfluorooctanoic Acid (PFOA) and Perfluorooctane Sulfonate (PFOS) as hazardous substances under CERCLA, which became final on April 19, 2024).

⁷ See <https://www.usace.army.mil/Missions/Environmental/Superfund/>

⁸ See 42 C.F.R. § 300.430(d).

conducted an SI for PFAS released at Tyndall AFB, and in February 2022, USACE contracted with Tetra Tech to conduct a U.S. EPA CERCLA, RI of PFAS at Tyndall AFB to delineate fully the contamination both horizontally and vertically. ██████ explained that in conducting the RI, Tetra Tech iteratively expands the RI area by taking samples on the surface (horizontally) and by drilling deeper (vertically) until actionable contamination levels⁹ are no longer found. Documents show that the 2018 SI—again, a preliminary step in the CERCLA process—documented fifteen locations on Tyndall AFB where AFFF was released. ██████ explained that the SI confirmed contamination at these locations exceeded the actionable levels. ██████ stated that the SI results were not intended to define the extent of contamination at these release sites or otherwise restrict the boundaries of the contamination at Tyndall AFB.¹⁰

However, documents ██████ provided show that USACE, MILCON directed Tetra Tech not to collect soil or groundwater samples outside of the PFAS site boundaries established in the SI. The documents show that this was because “Samples collected outside of the PFAS site boundaries could cause major cost modifications to the ongoing MILCON effort. [But] [t]hese sampling limitations were not identified in the SOW [statement of work]; therefore, Tetra Tech requested documented guidance from the USACE to clearly define the revised SOW.”¹¹ Consequently, USACE and Tetra Tech modified the contract to reflect the restricted RI areas. The modification was awarded March 18, 2023, and Tetra Tech began the RI work in February 2024.

██████ stated that based on his experience project managing PFAS RIs at eight Air Force installations across Florida and Tennessee, an RI could track the PFAS contamination for thousands of feet or more from the initial release location before potentially identifying the boundary where conditions no longer present a risk to human health and the environment. ██████ further stated that most of these installations also have MILCON activities in progress but none of the PFAS RI areas to be investigated on those installations have been restricted as they have at Tyndall AFB. ██████ asserted that by restricting the areas to be investigated in the PFAS RI, any employee, including the contract employees of MILCON, i.e., construction workers, USACE employees, and Tyndall AFB employees, working in the areas that are outside of the restricted RI areas may be unknowingly working in contaminated areas and thereby potentially exposed to PFAS. ██████ further asserted that because the contamination status of the areas outside of the restricted RI areas is unknown, the requirements of the Occupational Safety and

⁹ On July 1, 2022, the DoD stated that “PFAS shall be addressed in the same manner as other contaminants of concern within the DERP [the Defense Environmental Restoration Program].” DoD Memo. *Investigating Per- and Polyfluoroalkyl Substances within the Department of Defense Cleanup Program* (July 1, 2022). DoD also adopted the EPA’s regional screening levels (RSLs) for these chemicals and stated that RSLs should be used to determine if further investigation in the RI is warranted. *Id.*

¹⁰ Preliminary modeled SI data rendered on a map of Tyndall AFB indicates the areas where PFOS contamination is potentially above actionable levels is widespread.

¹¹ Tetra Tech’s September 2022, *Contractor’s Progress Status and Management Report*, p. 3.

The Honorable Christine E. Wormuth

April 26, 2024

Page 4 of 4

Health Administration's (OSHA) regulations¹² regarding hazardous waste operations apply.¹³ [REDACTED] contended that restricting the RI area to be investigated will restrict the area to be remediated, and as such, will not address the full scope of the contamination or the public health and environmental threat.

Pursuant to my authority under 5 U.S.C. § 1213(c), I have concluded that there is a substantial likelihood that the information provided to OSC discloses a violation of law, rule, or regulation, and a substantial and specific danger to public health and safety. Please note that specific allegations and references to specific violations of law, rule or regulation are not intended to be exclusive. If, in the course of your investigation, you discover additional violations, please include your findings on these additional matters in the report to OSC. As previously noted, your agency must conduct an investigation of these matters and produce a report, which must be reviewed and signed by you. Per statutory requirements, I will review the report for sufficiency and reasonableness before sending copies of the agency report along with the whistleblower's comments and any comments or recommendations I may have, to the President and congressional oversight committees and making these documents publicly available.

Additional important requirements and guidance on the agency report are included in the attached Appendix, which can be accessed at <https://osc.gov/Services/Pages/DU-Resources.aspx>. If your investigators have questions regarding the statutory process or the report required under 5 U.S.C. § 1213, please contact Catherine A. McMullen, Chief, Disclosure Unit, at (202) 804-7088 or cmcmullen@osc.gov for assistance. I am also available for any questions you may have.

Sincerely,



Hampton Dellinger
Special Counsel

Enclosure

cc: The Honorable Frank Kendall, Secretary, U.S. Department of the Air Force
Lieutenant General Donna W. Martin, Army Inspector General
Lieutenant General Stephen L. Davis, Air Force Inspector General

¹² 29 C.F.R. § 1910.120.

¹³ OSHA states that where there is a reasonable possibility that employees may be exposed to hazardous substances, employers must comply with the requirements of 29 C.F.R. § 1910.120. In addition, all USACE Commands must comply with 29 C.F.R. § 1910.120. See USACE Engineering Regulation No. 385-1-92 *Safety and Occupational Health Requirements for Environmental Clean Up Projects*.

APPENDIX

AGENCY REPORTS UNDER 5 U.S.C. § 1213

GUIDANCE ON 1213 REPORT

- OSC requires that your investigators interview the whistleblower at the beginning of the agency investigation when the whistleblower consents to the disclosure of his or her name.
- OSC will consider extension requests in 60-day increments when an agency evidences that it is conducting a good faith investigation that will require more time to complete.
- Identify agency employees by position title in the report and attach a key identifying the employees by both name and position. The key identifying employees will be used by OSC in its review and evaluation of the report. OSC will place the report without the employee identification key in its public file.
- Do not include in the report personally identifiable information, such as social security numbers, home addresses and telephone numbers, personal e-mails, dates and places of birth, and personal financial information.
- Include information about actual or projected financial savings as a result of the investigation as well as any policy changes related to the financial savings.
- Reports previously provided to OSC may be reviewed through OSC's public file, which is available here: <https://osc.gov/Pages/Resources-PublicFiles.aspx>. Please refer to our file number in any correspondence on this matter.

RETALIATION AGAINST WHISTLEBLOWERS

In some cases, whistleblowers who have made disclosures to OSC that are referred for investigation pursuant to 5 U.S.C. § 1213 also allege retaliation for whistleblowing once the agency is on notice of their allegations. The Special Counsel strongly recommends the agency take all appropriate measures to protect individuals from retaliation and other prohibited personnel practices.

EXCEPTIONS TO PUBLIC FILE REQUIREMENT

OSC will place a copy of the agency report in its public file unless it is classified or prohibited from release by law or by Executive Order requiring that information be kept secret in the interest of national defense or the conduct of foreign affairs. 5 U.S.C. § 1219(a).

EVIDENCE OF CRIMINAL CONDUCT

If the agency discovers evidence of a criminal violation during the course of its investigation and refers the evidence to the Attorney General, the agency must notify the Office of Personnel Management and the Office of Management and Budget. 5 U.S.C. § 1213(f). In such cases, the agency must still submit its report to OSC, but OSC must not share the report with the whistleblower or make it publicly available. See 5 U.S.C. §§ 1213(f), 1219(a)(1).