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**NORTHROP GRUMMAN**  
*Integrated Systems*

Northrop Grumman Corporation  
**Airborne Early Warning and  
Electronic Warfare Systems**  
South Oyster Bay Road  
Bethpage, NY 11714-3581

ESH&M-03-034  
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**VIA E-MAIL, FACSIMILE AND REGULAR MAIL**

Mr. James Colter  
Northern Division  
NAV FAC ENG COM  
10 Industrial Highway  
Lester, PA 19113-2090

RE: January 2003 Record of Decision (ROD) for Operable Unit 2 (OU2) –  
Groundwater, Naval Weapons Industrial Reserve Plant (NWIRP)  
Bethpage, New York

Dear Mr. Colter:

Northrop Grumman Corporation (NGC) has reviewed the document entitled, "January 2003 Record of Decision (ROD) for Operable Unit 2 (OU2) – Groundwater; Naval Weapons Industrial Reserve Plant (NWIRP), Bethpage, New York" (hereinafter referred to the Navy ROD), and offers the following comments.

**General Comment**

NGC believes that the Navy ROD improperly seeks to institutionalize the current status quo for the remedial activities being undertaken by the Navy and NGC. NGC is willing to maintain this status quo only until it can be modified, and we have been actively seeking to modify the present suite of activities to be more consistent with the historical allocation of responsibilities between the Navy and other Government-Owned, Contractor-Operated (GOCO) facility operators. We believe this is essential to provide for a more equitable treatment of NGC, ensure a more appropriate allocation of costs over the long term and preserve our competitiveness in the marketplace. With the exception of the Navy-imposed "institutional control" for onsite groundwater (which consists of a deed restriction prohibiting the extraction of groundwater from within the boundaries of the Naval Weapons Industrial Reserve Plant (NWIRP) – Bethpage facility), the Navy ROD should be revised to acknowledge its joint and several responsibility for all the requirements and remedial measures mandated in the March 2001 ROD for Operable Unit 2 (OU-2) Groundwater issued by the New York State Department of Environmental Conservation (NYSDEC) for the NWIRP – Bethpage and Northrop Grumman – Bethpage sites (hereinafter referred to as the NYSDEC ROD).



To that end, NGC offers legal comments below, followed by specific technical comments on various sections of the ROD.

### Legal Comments

#### **The Navy is Subject to New York State Law**

Congress has waived "sovereign immunity" and thus the Navy (as well as NGC), is subject to the New York State Environmental Conservation Law (ECL) and the regulations promulgated thereunder which govern the remedial activities proscribed by the NYSDEC ROD for OU-2.

"[S]tate laws concerning removal and remedial action, including state laws regarding enforcement (emphasis supplied) shall apply to removal and remedial action at facilities owned or operated by a Department agency, agency, or instrumentality of the United States . . . when such facilities are not included on the National Priority List." CERCLA § 120(a)(4), U.S.C. § 9620(a)(4).

The NWIRP, the NGC facilities and the environmental conditions which are the subject of both the NYSDEC and the Navy RODs are not listed on the NPL, and thus, clearly fall within the ambit of CERCLA's waiver of sovereign immunity. Section 120(a)(1) does not provide that governmental entities such as the Navy are exempt from liability. Rather, it provides that the federal government, in this case the Navy, is liable in the same manner and to the same extent as any non-governmental entity. CERCLA § 120(a)(4) unambiguously provides that the waiver broadly applies to state laws pertaining to enforcement, and is not limited to state law clean up standards or ARARS.

In the instant case, Article 27, Title 13 of the ECL and the regulations promulgated thereunder at 6 NYCRR Part 375 establishes New York's enforcement mechanism for implementing the remediation of OU-2, as well as New York's clean up goals, objectives and methodologies. Importantly, New York's regulations, which establish the basis for the NYSDEC's ROD, track its federal counterpart and incorporate by reference the National Contingency Plan. See 6 NYCRR § 375-1.10. Consequently, the Navy is subject to the ECL § 27-1313 and the regulations promulgated at 6 NYCRR § 375-1.3(u) which establish the Navy's strict, joint, and several liability for the entire OU-2 remedy as prescribed by the NYSDEC ROD. This does not allow the *de facto* allocation of responsibility as proposed in the Navy ROD.

Specifically, the Navy is not entitled to "accept" certain obligations and delegate others. In an attempt to escape liability, the Navy relies on *United States Department of Energy v. Ohio* in the responsiveness summary of the Navy ROD. That case pertains to RCRA

and CWA only, and the ambiguous language of those statutes<sup>1</sup> is dissimilar to the express language contained in CERCLA § 120(a)(4). Thus, under the unambiguous provisions of CERCLA, state laws concerning removal and remedial action, including laws regarding enforcement, do apply at Federal facilities not on the NPL. Moreover, in light of CERCLA's broad remedial goals, the interpretation that the Navy seeks to apply in these circumstances would lead to irreconcilable and inconsistent results and remedies. To avoid such inconsistent results and remedies, as in this instance, Congress expressly gave state law precedence.

### **The Navy's Position is Contrary to Navy Policy**

Moreover, to suggest that CERCLA Section 120 is "ambiguous" or otherwise fails to enable the State of New York to compel complete Department of Defense (DOD) action at Bethpage is a dramatic departure from Navy's own Environmental and Natural Resources Program Manual (OPNAVINST 5090.1B) ("Navy Policy Manual").

Chapter 15 of the Navy Policy Manual pertains to the very Installation Restoration Program at issue here and "non-government owned sites that have been contaminated by the disposal of Navy-generated waste and other [hazardous substances] for which the Navy is a potentially responsible party." (Emphasis added.) Of note, Section 15-2.6 (State laws) reaffirms that, "under CERCLA Section 120(a)(4), State laws concerning removal, remedial action, and enforcement apply to Federal facilities not listed on the National Priorities List (NPL)." Indeed, "Navy policy is to comply with all State laws

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<sup>1</sup> The citizen suit provision of the CWA reads:

Any citizen may commence a civil action on his own behalf-- (1) against any person (including the United States ...) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation....

The district courts shall have jurisdiction ... to enforce an effluent standard or limitation, or such order ... as the case may be, and to apply any appropriate civil penalties under [33 U.S.C. § 1319(d)].

CWA § 505(a), 33 U.S.C. § 1365(a).

The RCRA provision reads:

(a) In general . . . [a]ny person may commence a civil action on his own behalf—

(1)(A) against any person (including . . . the United States . . .) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter . . . or (B) against any person, including the United States . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment . . . . The district court shall have jurisdiction . . . to enforce the permit, standard, regulation, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person . . . and to apply any appropriate civil penalties under [42 U.S.C. §§ 6928(a) and (g)].

RCRA § 7002, 42 U.S.C. § 6972.

which are consistent with CERCLA, SARA and the NCP.” Section 15-5.29. In addition, “Navy actions to fulfill its CERCLA responsibilities shall be consistent with its contractual requirements with the GOCO contractor.” Section 15-5.28 (emphasis added). Section 15-5.17 of the Navy Policy Manual confirms that “[a]lthough neither a ROD nor an IAG [interagency agreement] is required under CERCLA at non-NPL sites[e.g., Bethpage], State remediation laws may contain requirements for decision documentation. Where such requirements apply, the cognizant NAVFACENGCOM activity shall write a decision document for submittal to the installation that satisfies State law.” Navy Policy Manual Section 15-5.17 (emphasis added).

### **The Navy’s Position is a Material Deviation from the Prior Course of Dealing**

NGC has also found that the NWIRP-specific ROD conflicts with not only New York State law and published Navy policy, but also pre-existing facility contracts and the prior course of dealing.

In the face of a comprehensive March 2001 NYSDEC ROD for groundwater, the Navy purports to “accept” almost two years later only certain aspects of the Bethpage groundwater remedy mandated by the NYSDEC ROD and relegate other substantive aspects of the NYSDEC ROD to its contractor (NGC) over NGC’s objection. According to the Navy, the purpose of its considerably narrower and competing Navy ROD is purportedly to authorize DOD funding for those limited tasks that “Navy feels” are “acceptable” for it in regard to implementation of the OU-2 remedy.

Promptly after the issuance of the NYSDEC ROD in March 2001, NGC attempted without success to enter into an “Environmental Matters Agreement” with the Navy to allocate voluntarily responsibility under OU-2. Where the Government has failed to fund 100% cleanup, the Navy and other DOD departments have occasionally entered into such agreements with contractors at a number of contaminated industrial reserve plants. The Navy terminated those discussions with NGC over one year ago and now seeks to impose its own allocation formula under the veil of a “Navy ROD.”

The Navy ROD is plainly calculated to impose what Navy admits is an incomplete solution for OU-2 over the objections of both NYSDEC and NGC. Navy concedes that, when it could not delegate responsibility for OU-2 to NGC in the face of contractual guarantees to the contrary, Navy first approached NYSDEC to enter into a Federal Facilities Site Remediation Agreement to bind DOD to only certain aspects of OU-2: “That is why the Navy approached NYSDEC to enter into a Federal Facilities Site Remediation Agreement (FFSRA) with the Department of the Navy that binds the Navy to accept responsibility for certain portions of groundwater remedy.” Navy Comments at A-11.

Thus, in the absence of an Environmental Matters Agreement, the Navy ROD evidently became its third option to delegate OU-2's obligations and impose a Navy-sponsored allocation formula, regardless of controlling state and federal law, and its own contractual obligations to its contractor.

The history of the NGC facility compels a contrary conclusion. For example, since the 1930s, production at the adjoining and highly integrated Navy- and NGC-owned parcels has related almost exclusively (98%) to DOD requirements, DOD production and DOD product specifications. Thus, the environmental degradation attributable to 98% DOD production is not susceptible to the arbitrary allocation formula imposed by Navy in its ROD.

Moreover, the Navy assumes erroneously that the activities and operations on the Navy parcels and NGC parcels were unrelated and independent, which is more accurately the case with the activities at the Occidental Petroleum/RUCO site under EPA jurisdiction. To the contrary, the activities at Bethpage that led to historical releases to groundwater were in direct support of DOD programs and in compliance with DOD specifications and oversight. Further, the Navy ROD ignores the applicable Bethpage facility use and production contracts that plainly allocate responsibility for damages arising from DOD-related production activities to the Navy, regardless of whether part or all the DOD work occurred on a specific Navy/NGC parcel or within a specific Navy/NGC building. Over the six decades of DOD production at Bethpage, the ownership of various parcels and production buildings has changed back and forth between DOD and NGC or its predecessor. Accordingly, the Navy's approach to limit its responsibility in the manner set forth in its narrow and self-serving ROD is both arbitrary and capricious.

It is noteworthy that all costs pertaining to OU-1 (soils) and the interim OU-2 groundwater measures undertaken at NWIRP and on the adjoining NGC parcels, including all downgradient off-site locations, have been assumed directly or indirectly by Navy, as required by applicable contracts, federal regulations and New York State Law. This interim allocation for OU-2 is far more consistent with applicable law and DOD practices at hundreds of other former industrial reserve plants and military installations. The Navy ROD departs from its practices over the last 10 years at Bethpage and Calverton and is remarkably silent on Navy's obligations under its own Bethpage contracts to assume the cost of cleanup of OU-2. Navy simply states that in the event its former GOCO contractor fails to perform certain key tasks necessary to implement the NYSDEC ROD, NYSDEC may exercise its option to revisit the Navy ROD every 5 years.

At Bethpage, the Navy represents to NYSDEC that a competing ROD that selects certain more favorable portions of a pre-existing state ROD (and unilaterally allocates substantive obligations to other parties) is "required" in order to obtain DOD funding. Navy's own policy manual instructs otherwise. The Navy's own practices at Bethpage, Calverton and other GOCO facilities also instruct otherwise.

In light of the foregoing, it is clear the Navy ROD is legally defective and has no purpose other than to limit NYSDEC's enforcement options, override controlling state law and mitigate controlling facility contracts in order to achieve an outcome favored by the Navy.

### **Technical Comments**

1. The description of the "commingled plume" should be revised to include that portion of the plume that is off-site, downgradient of the NWIRP and Northrop Grumman sites. See Page DS-2 (1<sup>st</sup> paragraph).
2. The ON-SITE GROUNDWATER remedy should be revised to include the NYSDEC ROD-required ONCT System Hydraulic Effectiveness Evaluation, including any follow-up activities required by the NYSDEC. See Pages DS-3 (1<sup>st</sup> full paragraph); 3 (1<sup>st</sup> paragraph); 17 (Section C, 1<sup>st</sup> paragraph); 18; and 31 (top of page).
3. The description of the GM-38 Area remedy should be revised to include the following components. See Pages DS-3 (Groundwater Remedial Program Section); 3 (Groundwater Remedial Program Section); 18 (Section E); 31 (Groundwater Remedial Program Section); and 32 (Groundwater Remedial Program Section).
  - a. Remedial design of GM-38 remedy.
  - b. Construction of GM-38 remedy.
  - c. Monitoring of GM-38 remedy (consistent with Page 18, Section E of Navy ROD).
4. The Groundwater Remedial Program Section should be revised to include the recognition of responsibility for implementing any investigation, RD/RA, OMM, or other activity required by the NYSDEC. See Pages DS-3 (Groundwater Remedial Program Section); 3 (Groundwater Remedial Program Section); 31 (Groundwater Remedial Program Section); and 33 (Groundwater Remedial Program Section).
5. The phrase "by the commingled plume from the NWIRP and Northrop Grumman sites" should be added to the end of the last bullet on Pages DS-4; 32 (top of page – last bullet); and 34 (Item No.9).
6. Monitoring of Outpost Wells should be added to the 3<sup>rd</sup> bullet on Pages DS-4; 4; and 33 (Item No. 6). Furthermore, the goal of the vertical profile boring program stated under the Public Water Supply Protection Program heading should be

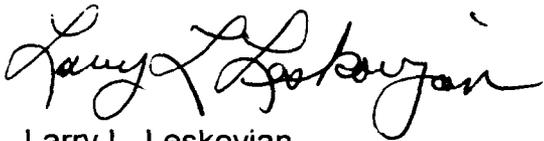
revised to indicate that the goal was to collect depth-specific lithologic and groundwater samples to establish a vertical profile of the geology and groundwater quality at each investigation location in support of groundwater modeling efforts, not to delineate the extent of the plume.

7. Change the phrase "NWIRP ROD" to "OU-1 NWIRP ROD", on Page 7 (1<sup>st</sup> full paragraph).
8. Insert the phrase "at the NWIRP site" after the phrase "SCGs" on Page 10 (last paragraph).
9. Change the phrase "IRAs" to "IRMs", on Page 13 (1<sup>st</sup> full paragraph).
10. Delete the phrase "known to presently exist or that have historically existed at the site" from the 2<sup>nd</sup> paragraph under Section 4.3 on Page 13. NGC is not aware of any human exposures that exist, either historically or currently.
11. Add the NYSDEC ROD-required Non-Detect Performance Standard for affected public supply wells to the list of goals on Page 15 (2<sup>nd</sup> paragraph).
12. The 3<sup>rd</sup> sentence in the last paragraph on Page 15 should be revised to say "Since completion of the ONCT system in 1998, NGC has operated the system continuously and has been conducting quarterly sampling of on-site wells since 1995 and both on-site and off-site wells since 1998."
13. Delete the 2<sup>nd</sup> sentence in the 1<sup>st</sup> paragraph on Page 18. The public supply wells that are presently equipped with wellhead treatment systems are operated and maintained by the water districts. Therefore, the preparation and implementation of the associated operation and maintenance plan would be the responsibility of the respective water district, not Northrop Grumman.
14. The text for Page 18, Section E and Page 19, Section G do not match the titles given for these sections. These sections should be revised, as follows: Section E should include the components of the GM-38 Area remedy discussed herein as Specific Comment No. 3; Section G should include preparation of the Water Supply Contingency Plan, including trigger values, installation of VPBs and outpost wells, and outpost monitoring.
15. The 4<sup>th</sup> paragraph on page 24 should be deleted and replaced with the wording provided by the NYSDEC on Page 4 (2<sup>nd</sup> bullet) of the NYSDEC ROD.
16. Add language to address implementation of any NYSDEC-required follow-up (including Pre-Design investigation, RD/RA, OMM, etc.) to the GM-75D2 investigation.

17. Figure 3 should be revised to better illustrate the extent of the VOC plume. The plume extent is not apparent in the figure supplied.
18. The statement made on Page 17, Item C, 1<sup>st</sup> paragraph, second sentence is incorrect, as the OMM Plan does not include a specific task to verify the NWIRP contamination does not pass beyond the ONCT system. As referred to in Specific Comment No. 2, herein, the ROD requires that a hydraulic effectiveness evaluation of the ONCT system be performed to verify that the system achieves the goals of the system, which are defined as preventing the off-site migration of NGC and NWIRP site-related VOC-impacted groundwater that is located within the boundaries of the sites (*i.e.*, on-site contaminant mass containment). Further, this ROD requirement is not limited to the NWIRP site contaminants.

NGC appreciates the opportunity to provide comments on this document. We trust that it will be modified to reflect our concerns and objections, and we look forward to engaging in meaningful and productive discussions with the Navy regarding the allocation of responsibilities for implementing the NYSDEC ROD in accordance with historical practice and contract requirements. Please contact me if you have any questions regarding these comments.

Very truly yours,



Larry L. Leskovjan  
Manager  
Environmental, Safety, Health & Medical

cc: Steven Scharf, NYSDEC  
Richard Grieves, Esq., NGC  
Michael Tone, Esq.  
Robert Howard, Esq.  
Rosalie Rusinko, Esq., NYSDEC  
John DeBois, NGC  
John Cofman, NGC