



DEPARTMENT OF THE NAVY

NAVAL FACILITIES ENGINEERING COMMAND

200 STOVALL STREET

ALEXANDRIA, VA 22332-2300

IN REPLY REFER TO

N91192.AR.000090
NIROP FRIDLEY
5090.3a

March 8, 1991

Jerome Kujawa
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection
Agency, Region V
230 S. Dearborn St.
Chicago, IL 60604

Re: FFA for NIROP Fridley, MN

Dear Jerry:

On March 6, 1991, I received your letter dated March 4th enclosing EPA Region V's sixth draft Federal Facility Agreement (FFA) for the Naval Industrial Reserve Ordnance Plant (NIROP) Fridley, Minnesota. I have reviewed the draft FFA and am enclosing a short list of corrections which were previously identified and agreed upon, but which are not reflected in the draft FFA. Although we have made significant progress, there are still a few unresolved issues.

There is no meeting of the minds regarding the Deadlines section of the FFA. Neither the Deadlines section in the sixth draft FFA, nor the Deadlines section which you enclosed with your letter, are acceptable to the Navy. It is my understanding that EPA Region V had the Navy's most recent proposal regarding the Deadlines section for three weeks before distributing EPA Region V's most recent counterproposal. The Navy and the State's Project Managers met this week in Minnesota following the Technical Review Committee meeting. It is my understanding that they intend to attempt to continue the negotiations regarding the Deadlines section with EPA Region V on Monday, March 11th. Let me suggest that we renew our efforts to urge the resolution of this issue among the Project Managers (or alternatively, raise this issue to a headquarters level, if necessary).

In the sixth draft FFA, Executive Order 12580 is listed for the first time as Attachment F. I know that we discussed this briefly in Minnesota, at our last negotiation session on January 16-17th, but because this was not in EPA's fifth draft, which you distributed by letter dated February 21st, I did not have any opportunity to comment on this previously. In general, I do not have any objection to attaching Executive Order 12580 to the FFA, as the State requested, as a public information tool. However, I am concerned that the definition of "Agreement" (Section IV(A)) and the language of the Enforceability section (Section XXXVII)

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could be construed as allowing citizen suit enforcement of the Executive Order. Particularly because the Executive Order is not referenced anywhere in the body of the FFA as Attachment F, I suggest that it be dropped as an attachment. If it stays in as an attachment, we will have to add language to the FFA regarding my concern.

With regard to the Stipulated Penalties section (Section XXXI), Steve Shakman and I have agreed on the following changes to the language in EPA Region V's sixth draft FFA. In paragraph 31.1 (page 67) in the last sentence, in the third line from the bottom of the paragraph, insert "judicial" prior to "penalties". The rest of the sentence will remain the same.

With regard to State reimbursement, I am enclosing a draft provision which Steve Shakman and I have agreed upon. I assumed that it would become Section XLI of the FFA. Let me remind you that the Table of Contents (and the Effective Date section number) will need to be changed accordingly.

When you send out the next draft FFA, please include all of the attachments so that I can confirm that they reflect what was agreed to previously by the Project Managers.

The Navy appreciates the mandate of 42 U.S.C. 9620(e)(2) and shares the desire of EPA Region V to complete these negotiations prior to March 27th. Given the status of the negotiations, it is my opinion that it is extremely unlikely that we will meet that deadline. If there is any step that I can take in order to expedite matters, please let me know. I appreciate your cooperation in this matter and look forward to hearing from you.

Sincerely yours,



RAY GOLDSTEIN
Assistant Counsel (Environmental)

Enclosures

- cc: S. Shakman
R. Hanson
J. Shafer
K. Homick
N. Pryor
D. Olson
P. Kushner
G. Davidson (w/o enclosures)

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Comments - EPA's Sixth Draft FFA for NIROP Fridley

Table of Contents (page iii) - Delete "1-A18" and "1-B8" in the first and second attachment titles. The page numbers are unnecessary and I am not sure that they are still accurate.

Paragraph 5.1 (Statutory Compliance/RCRA-CERCLA Integration) (page 13) - In the second line, insert "/" between "Plant" and "Naval".

Paragraph 39.2 (Certification and Termination) (page 82) - In the tenth line, insert "pursuant to this Agreement" after "work".

Paragraph 40.5 (Funding) (page 85) - In the fifth line from the bottom, replace "the" with "this", or, alternatively, delete "the".

Section XLI.

RECOVERY OF STATE RESPONSE COSTS

41.1 On or after October 1, 1991, MPCA will submit to the Navy an Accounting of all State response costs regarding the Site which were actually incurred prior to October 17, 1986, the date of the passage of the Superfund Amendments and Reauthorization Act of 1986. Such Accounting shall be accompanied by cost summaries and be supported by documentation which meets the following federal auditing requirements. The cost summaries will set forth employee-hours and other expenses by major type of support service. All costs submitted must be for work not inconsistent with either the National Contingency Plan (NCP) or the requirements described in OMB Circulars A-87 (Cost Principles for State and Local Governments), A-128 (Audits for State and Local Cooperative Agreements with State and Local Governments), and Standard Forms 424 and 270. The Navy has the right to audit any cost reports used by the State to develop these cost summaries.

41.2 The Accounting will not exceed \$26,759.40.

41.3 Within ninety (90) days of receipt of the Accounting, the Navy shall reimburse the State in the amount set forth in the Accounting.

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41.4 In the event the Navy disputes any of the costs set forth in the Accounting, or a dispute arises on any matter controlled by this Section including, but not limited to, allowability of expenses and limits on reimbursement, such a dispute shall be resolved through the bilateral dispute resolution process described in this Section. Such a dispute shall not be resolved through Section XV, Resolution of Disputes, of this Agreement. While it is the intent of the Navy and the MPCA that this Section shall govern the resolution of all disputes concerning State reimbursement, the Navy and MPCA agree to attempt informal dispute resolution whenever practicable.

(a) The Navy and MPCA Project Managers shall be the initial points of contact for coordination of dispute resolution under this Section.

(b) If the Navy and MPCA Project Managers are unable to resolve a dispute the matter shall be referred to the Commanding Officer, Northern Division, Naval Facilities Engineering Command, or his designated representative and the Director, Division of Groundwater and Solid Waste, MPCA, as soon as practicable, but in any event within fifteen (15) working days after the dispute is elevated by the Navy and MPCA Project Managers.

(c) If the Commanding Officer, Northern Division, Naval Facilities Engineering Command, and the Director, Division of Groundwater and Solid Waste, MPCA, are unable to resolve the dispute within fifteen (15) working days, the matter shall be elevated to the Office of the Assistant Secretary of the Navy (Installations and Environment) and the Commissioner of the MPCA.

(d) In the event the Office of the Assistant Secretary of the Navy (Installations and Environment) and the Commissioner of the MPCA are unable to resolve a dispute within sixty (60) days, the State retains any legal remedies it may have to recover these pre-October 17, 1986 expenses.

41.5 Any reimbursement provided under this Section shall be in settlement of any and all claims against the Navy for State response costs incurred prior to October 17, 1986 with regard to the Site, except as to disputed reimbursement claims not resolved under Paragraph 41.4.

41.6 With regard to any and all response costs incurred by the State after October 17, 1986, the MPCA agrees to negotiate in good faith for sixty (60) days, or longer if mutually agreed upon by the MPCA and the Department of Defense (DoD), a Department of Defense/State Memorandum of Agreement (DSMOA). In the event that the State is unable to reach agreement with DoD, the MPCA agrees

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to negotiate in good faith for sixty (60) days, or longer if mutually agreed upon by the MPCA and the Navy, to attempt to resolve any claims for reimbursement of State costs which were incurred after October 17, 1986. In the event that the MPCA is unable to reach an agreement with the Navy, the State reserves its rights to bring a cost recovery action against the Navy regarding State expenses incurred after October 17, 1986 with regard to the Site.

41.7 It is the expectation of the Navy that all obligations of the Navy arising under this Section will be fully funded. The Navy agrees to seek sufficient funding through the Department of Defense budgetary process to fulfill its obligations under this Section. Any requirement for the payment or obligation of funds by the Navy established by this Section shall be subject to the availability of appropriated funds, and no provision herein shall be interpreted to require obligation or payment of funds in violation of the Anti-Deficiency Act, 31 U.S.C. Section 1341.

41.8 Paragraph 40.6 of this Agreement shall not be applicable to this Section of the Agreement.