



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5

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NIROP FRIDLEY  
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JUL 08 1996

REPLY TO THE ATTENTION OF:

Mr. Stephen Beverly  
Associate Counsel  
Counsel for the Southern Division  
Naval Facilities Engineering Command  
P.O. Box 190010  
2155 Eagle Drive  
North Charleston, SC 29419-9010

Re: Naval Industrial Reserve Ordnance Plant (NIROP), Fridley  
Facility Definition, Scope of Operable Unit #3 (OU3) RI Investigation

Dear Mr. Beverly:

This letter is in response to the May 9, 1996, letter from Mr. Scott A. Glass of the Department of the Navy ("Navy") to Mr. Tom Bloom of the U.S. Environmental Protection Agency (U.S. EPA) in connection with the above-referenced facility. This letter also references correspondence between Mr. David Cabiness of the Navy and Mr. David Douglas of the Minnesota Pollution Control Agency (MPCA), dated May 14, 1996, in which Mr. Cabiness states that the Navy will not include potential subsurface source areas under the United Defense LP (UDLP) portion of the NIROP facility as within the scope of the current remedial investigation.

It is the U.S. EPA's position that the portion of the property owned by UDLP, which is part of a single industrial plant divided in ownership, falls within the definition of "facility" under CERCLA and the National Contingency Plan (NCP). As part of the NIROP facility, the property should be addressed in the remedial investigation. Under the NCP and CERCLA, "facility" is defined as "...any site or area, where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located...." The NCP further defines "on-site" to mean "the areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action." In other words, under the NCP, the "site" is the facility, plus any area in close proximity to the facility necessary to implement the response action. While "facility" and "site" are often used interchangeably, "facility" is the operative word in connection with CERCLA liability and response authority; the distinction between "on-site" and "off-site" is important in terms of CERCLA's permit exemption and CERCLA's off-site waste disposal policy.

The Federal Facility Agreement (FFA) for NIROP Fridley does not define "facility" but does define "site" as "...[NIROP Fridley] and, for purposes of this Agreement only...any area outside or off of NIROP Fridley where a hazardous substance, pollutant, or contaminant has been deposited, stored, disposed of, or placed, or otherwise come to be located *as a result of migration of hazardous substances*...from the property currently identified as NIROP Fridley." [Emphasis added.] In Attachment A of Mr. Glass's May 9, 1996, correspondence, at Response to Comment 6, the Navy references the "as a result of migration of" language from the FFA definition of "site" as support for its claim that the Navy is not responsible for non-migration-related contamination beyond the property boundary with UDLP.

My disagreement with the Navy's interpretation is twofold: 1) to the extent that the Navy believes that the language "*as a result of migration of*" is restricting a clause of the sentence in which that language is contained, the language is restricting only the immediately preceding clause "or otherwise come to be located"; and 2) to the extent that the Navy believes that the "*as a result of migration of*" language is restricting all the precedent clauses of the sentence in which that language is contained--i.e., "deposited, stored, disposed, or placed, or otherwise come to be located"--the language conflicts with the CERCLA and the NCP definitions of "facility" and "release," and, pursuant to Section IV. of the FFA, the CERCLA and NCP definitions must control.

1. As a matter of usage, the absence of a comma in the FFA's definition of "site" between the phrase "or otherwise come to be located" and the phrase "as a result of migration of" indicates that the "migration" clause modifies only the "or otherwise come to be located" clause, not the "deposited, stored, disposed of, or placed" language. Logically, as well as grammatically, it makes no sense to say, for example, that contamination has been "stored...as a result of migration of...." Therefore, **by the very operation of the FFA's definition of "site,"** the Navy is responsible, not only for offsite contamination that is migration-related, but also for contamination resulting from hazardous substances that have been "deposited, stored, disposed of, or placed" offsite. Therefore, the offsite source areas at issue here are part of the NIROP Fridley facility, and the Navy is obligated to investigate and, if necessary, conduct further response actions in those areas. (Because the FFA does not define "facility," I am reading the FFA's definition of "site" to be the functional equivalent of what is normally meant by "facility.")

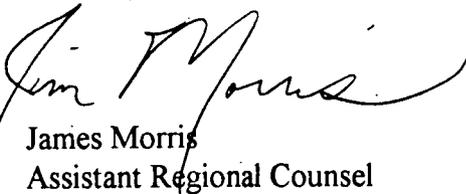
2. The FFA, in the first sentence of Section IV. Definitions, states, "[t]he definitions provided in CERCLA and the NCP shall control the meaning of the terms used in this Agreement to the extent that they conflict with [the] following...." Therefore, to the extent that the Navy interprets the FFA definition of "site" as limiting its responsibility to only *migration-related* offsite contamination (as stated both in its Response to Comment 6, cited above, and in Mr. Cabiness's May 14, 1996, letter to Mr. Douglas), then the FFA's definition of "site" conflicts with the definition of "facility" in CERCLA and the NCP, which do not contain the limiting "as a result of migration of" language. (Such an interpretation also conflicts with the CERCLA and NCP definition of "release"--one might argue that the FFA definition of "site" is attempting to limit the scope of what constitutes a "release" in order to limit the size of the "facility.") In any event, to

the extent that the Navy interprets the FFA definition of "site" to **exclude** areas that would be **included** in the CERCLA and the NCP definition of "facility," the FFA definition conflicts with the CERCLA and NCP definition, and, **by the terms of Section IV. of the FFA**, the CERCLA and NCP definition must control.

Because the U.S. EPA believes that, under the terms of the FFA, CERCLA, and the NCP, the subsurface source areas under the property owned by UDLP are part of the NIROP Fridley facility, those areas should be addressed in the OU3 remedial investigation. Enlarging the current scope of the RI in this manner is not only legally necessary by the terms of the FFA, CERCLA, and the NCP, it should also be more efficient and cost-effective for the Navy to address these areas **now**, under CERCLA, rather than at some future date in the corrective action context of the Resource Conservation and Recovery Act (RCRA) permit issued to the Navy and UDLP in March of this year.

Please call me at 312/886-6632 if you have any questions about the legal analysis or conclusions of this letter. Although the Navy has articulated its preliminary position on these issues to U.S. EPA and MPCA program staff, I hope that this letter will, at the very least, initiate a dialogue on the legal underpinnings of the Navy's position. If we are ultimately unable to reach agreement as to the requirements of the FFA, CERCLA, and the NCP, I would appreciate a written response explaining the Navy's legal position with respect to the provisions of the FFA, CERCLA, and the NCP at issue.

Sincerely,



James Morris  
Assistant Regional Counsel

cc: Tom Bloom, U.S. EPA  
Ken Tindall, U.S. EPA  
Bob Bowden, U.S. EPA  
Stephen Shakman, MPCA  
David Douglas, MPCA  
Scott A. Glass, Department of the Navy  
David Cabiness, Department of the Navy ✓  
Sidney L. Allison, Department of the Navy