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Subj: Scope of Operable Unit #3 (OU3) RI Investigation at the Naval Industrial Reserve Ordnance Plant (NIROP) Fridley, Minnesota

Dear Mr. Morris:

This responds to your letter of July 8, 1996, in which you set forth EPA's position regarding the appropriate scope of the RI for OU3 at NIROP Fridley. I will also address in this response certain related matters set forth in Mr. Gary Eddy's letter to Tom Bloom of June 27, 1996.

First of all, I want to thank you for providing EPA's legal position on this issue. Unfortunately, we cannot agree with your contention that CERCLA, the NCP, and the NIROP Fridley FFA (FFA) dictate that the Navy assume responsibility for the investigation and clean-up of those discrete (i.e., non-migration related) subsurface source areas, if any, located beneath UDLP's portion of the main manufacturing building. I say this because no amount of linguistic or grammatical analysis of the language contained in the FFA can change those specific provisions of CERCLA which dictate: (i) the applicability of CERCLA's requirements to federal facilities; (ii) what constitutes a "federal facility" for purposes of Hazardous Waste Compliance Docket and NPL listing; (iii) the proper scope of Interagency Agreements (IAGs) for such facilities or, (iv) the scope of the delegation of the President's lead-agency authority under CERCLA to the Department of Defense (DoD). I will separately address each of these fundamental considerations.¹

As you know, the application of CERCLA to federal facilities is governed solely by Section 120 of that statute. (42 U.S.C. §9620). EPA has previously interpreted the purposes underlying Section 120's passage as follows:

¹ As used hereinafter the terms "NIROP" or "NIROP Fridley" shall mean the same as they do in the FFA (i.e., only the Navy owned portions of this plant). The terms "UDLP's plant" or "UDLP's portion of the main manufacturing building" should be deemed to include all associated realty owned by UDLP within the fence lines of this particular plant.

[EPA] believes that although section 120(a)(2) evidences Congress' intent that the Federal agencies comply with the same baseline of requirements applicable to private sites, the section does not require that all policies and requirements applicable to private and Federal facility sites be identical. Indeed, Congress specifically set out a series of requirements which apply to Federal facilities in a manner different from, or in addition to, those applicable to private sites, e.g., the preparation of a separate Federal Agency Hazardous Waste Compliance Docket (section 120(c)); ...and the entire process for signing Interagency Agreements at Federal facility sites (section 120(e)(2)-(4)). See 54 Fed. Reg. 10520, 10522 (March 13, 1989).

CERCLA Section 120(c) specifically requires EPA to establish and update a *Federal Agency Hazardous Waste Compliance Docket* (Docket) and to publish in the Federal Register a list of the "*Federal facilities*" included in the Docket.² Not surprisingly, NIROP Fridley's Docket listing makes no mention of UDLP's portion of the main manufacturing building since EPA regulations have always prohibited the inclusion of privately-owned facilities in the Docket.³ See, 53 Fed. Reg. 4280, 4281 (Feb. 12, 1988). See also e.g., 56 Fed. Reg. 64898, 64899 (Dec. 12, 1991); 53 Fed. Reg. 46364, 46365 (Nov. 16, 1988). For the purposes of Docket listing, EPA's definition of "*federal facility*" is a "*property-based*" definition which encompasses "*all contiguous land that is owned by a department... of the United States.*" See 53 Fed. Reg. at 4280; cf., EPA, Office of External Affairs, Federal Facilities Compliance Strategy (Nov. 1988), §III(A) at III-1. Under this definition, UDLP's portion of the main manufacturing building can hardly be said to be part of the Navy's "*federal facility.*" Moreover, in connection with this particular definition EPA has previously acknowledged that:

[EPA's] use of this definition...stems from the designations that are employed by the Federal agencies themselves when carrying out their programs. Most Federal agencies have specific land holdings under their jurisdiction that are confined within property boundaries, such as national parks and Department of Defense installations. See 53 Fed. Reg. at 4280.

² While Section 120(b) requires that the Docket include information on contamination from a listed federal facility that affects contiguous or adjacent property owned by any other person, at issue here is not contamination migrating from Navy property, but rather, the investigation of discrete subsurface contaminant source areas beneath UDLP's property.

³ One exception, inapplicable to the issue at hand, involves the inclusion of privately-owned, government-operated (POGO) facilities on the Docket. See 57 Fed. Reg. 31758, 31759 (July 17, 1992). EPA has never asserted that the portion of the main manufacturing building owned by UDLP constitutes a POGO.

Section 120(d) of CERCLA requires EPA to evaluate each federal facility placed in the Docket and to include those particular facilities which meet certain hazard ranking criteria on the NPL. Thus, in order for a "federal facility" to be scored for placement on the NPL, that facility must first have been placed on the Docket. In 1989, NIROP Fridley was proposed and listed on the "Federal Facilities Sites" portion of the NPL. See 54 Fed. Reg. 29820, 29824 (July 14, 1989); and, 54 Fed. Reg. 48184, 48186 (Nov. 21, 1989). Since, as previously noted, EPA's own Docket regulations precluded the listing of private property on the Docket, neither in the proposed or final listing for the NIROP did EPA give notice to either the Navy or UDLP that it considered UDLP's property with its own discrete contaminate source areas to be part of the NPL listing for NIROP Fridley. Having previously excluded such property from inclusion on the NPL, we must question how EPA can now legitimately assert that any such areas beneath UDLP's portion of the main manufacturing building fall within the intended parameters of our current NPL-based agreement.

In assessing the proper scope of any FFA, one must also look to two other CERCLA provisions. Section 120(e)(1) provides that not later than six months after the inclusion of any federal facility on the NPL, the federal department or agency which "owns or operates" that facility shall, in consultation with EPA and the appropriate state agency(ies), commence a remedial investigation and feasibility study for the facility. Section 120(e)(2) sets forth the follow-on requirement that such agencies and EPA enter into Interagency Agreements (IAGs) for the completion of all necessary remedial action at those facilities. As a matter of policy, EPA and DoD have, by-in-large, utilized FFA's to satisfy this specific statutory requirement. Consistent with this policy, the FFA for NIROP Fridley was entered into prior to the IAG execution deadline prescribed under 120(e)(2). Unfortunately, it now appears that EPA and MPCA simply do not want to acknowledge the fact that the Navy neither "owns or operates" that portion of the plant beneath which the suspected discrete source areas are located. Since that is the case, however, once again, we must question how it can legitimately be argued that the NIROP FFA is properly applicable to the investigation and cleanup of these areas. If, in fact, EPA believed and it was agreed by all parties during FFA negotiations that UDLP's portion of the plant would be investigated as part of the Navy's "facility wide" IRP efforts, then one would have expected to see such an understanding reflected in the FFA. Instead, the FFA clearly distinguishes between that portion of the plant owned by the Navy and that then owned by FMC Corporation. See Section IV(K) and Attachment C-2 (Site Plan / Map) of the FFA.

With regards to the scope of the Navy's lead-agency authority under CERCLA, Executive Order 12580 makes clear that the delegation to DoD of the President's authority under CERCLA applies only to "releases or threatened releases where either the release is on or the sole source of the release is from any facility or vessel under the jurisdiction, custody or control" of the Navy. See Section 2(d), Id. Similarly, the Navy's environmental response authority under the Defense Environmental Restoration Program (DERP), extends only to those sites or facilities "owned by, leased to, or otherwise possessed by the United States and under the jurisdiction of [DoD]." See 10 U.S.C. §2701(c)(1)(A). UDLP's portion of the main manufacturing building is clearly not property owned by, leased to, or otherwise possessed by DoD, nor can it fairly be said that such property is under the jurisdiction, custody or control of the Navy as is the case with similar all-Navy-owned

GOCO plants. Moreover, the undertaking of investigative activities in connection with any discrete sources beneath UDLP's property cannot fairly be said to fall within the "sole source of release" limitation placed on the Navy's delegated authority.⁴

While we certainly agree that the NIROP FFA cannot properly be construed to authorize actions inconsistent with CERCLA or NCP requirements, neither can it be construed to authorize us to undertake response actions under the guise of CERCLA authority not otherwise specifically granted to us via the President's delegation. It is our view that if we were to adopt EPA's position that UDLP's source areas should be addressed under the scope of our RI efforts at the NIROP we would effectively be agreeing to do just that. Moreover, under your specific interpretation of the term "site" in the FFA the Navy would quite literally be obligated to investigate, as part of those efforts, all non-migration related contamination "deposited, stored, disposed of, or placed" off Navy property regardless of where it may now be located (i.e., even if on non-adjacent properties). Such a position is clearly not supportable under either CERCLA or the NCP. Similarly, one cannot take the statutory and regulatory definitions of "facility" and "on-site," out of their intended contexts so as to justify a position not fairly contemplated by the FFA signatories.

Finally, in both your's and Mr. Eddy's letters, reference was made to the Navy possibly having to assume responsibility for addressing the disputed source areas in the RCRA corrective action context. In response, I would simply note that we reasonably expect, given where they are located, that should MPCA choose to proceed under its HW program authorities that it will first look to UDLP to undertake any necessary investigative / corrective action activities for these particular sites. I say this reasonably assuming that if two private companies, rather than the Navy and UDLP were involved here as co-permittees, that MPCA would most likely take that approach as between the two of them. As regards the Navy being a "responsible party" in connection with contamination on UDLP's property, as EPA and MPCA well know, the Navy has already and will foreseeably continue to expend considerable resources remediating contaminated groundwater migrating from beneath this particular plant. We believe these efforts have and will continue to stem those reasonably discernible impacts to the Mississippi River and UDLP's property from the Navy's past industrial operations at the NIROP. At this time, we see no reasonable basis for either EPA or MPCA to be looking to the Navy to undertake any further remedial activities in connection with possible or known contamination on UDLP's property under the guise of potential CERCLA / MERLA third party liability.

I trust this adequately explains the Navy's position with regard to the specific matters raised in your letter. I have coordinated this response with counsel from both our headquarters and NAVSEA. We are certainly amenable to future dialogue on these

⁴ It must also be noted that EPA's own lead-agency authority under CERCLA is subject to the President's delegation of authority to DoD. See Section 2(g). Id.

matters, particularly on how the Navy and UDLP could best coordinate their separate efforts to effect a timely, cost effective and complete remedial investigation of subsurface source areas beneath the entire main manufacturing building. Should you have any questions regarding this response please feel free to call me at (803) 820-5708. I appreciate your cooperation in this matter and look forward to further discussions with you on this and other matters involving the NIROP.

Sincerely,


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cc:

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