



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION I

J.F. KENNEDY FEDERAL BUILDING, BOSTON, MASSACHUSETTS 02203-2211

September 30, 1994

Captain W.A. Waters
U.S. Department of the Navy
Northern Division
Naval Facilities Engineering Command
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Terrence Grey P.E., Chief
State of Rhode Island and Providence Plantations
Department of Environmental Management
Division of Site Remediation
291 Promenade Street
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RE: Naval Education and Training Center, Newport, Rhode Island
EPA-New England Response to Navy's Statement of Dispute,
dated September 20, 1994

Dear Captain Waters and Mr. Grey:

Attached please find EPA's response to the Navy's Statement of Dispute, dated September 20, 1994, concerning EPA's assessment of stipulated penalties for non-compliance with the Federal Facility Agreement (FFA) for the Naval Education and Training Center (NETC) - Newport, Rhode Island.

According to Section 13.5 of the FFA, we as the members of the Dispute Resolution Committee, have twenty-one days from the submission of the dispute to the committee to unanimously resolve this dispute and issue a written decision signed by all parties. Pursuant to Captain Waters' September 23, 1994 letter, the period would begin to run after the Navy's response to the enclosed submission.

I suggest that we hold a conference call as soon as possible to begin the resolution process. I believe that we should limit the number of participants to no more than four representatives from each of our respective organizations. I suggest that the representatives consist of the Remedial Project Manager, the first line supervisor, the site counsel and the members of the DRC.

If we are not able to unanimously resolve the dispute within the twenty-one day period, then Section 13.5 of the FFA states that the Navy's written statement of dispute be forwarded to the Senior Executive Committee for resolution within fourteen days after the twenty-one day resolution period.



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We acknowledge that the Navy has many environmental responsibilities to maintain compliance at NETC. Regardless of the number of responsibilities and the scope of the restoration activities at NETC-Newport, this does not relieve the Navy from their obligations under the FFA for timely completion of the work for the Old Fire Fighting Training Area and McAllister Point landfill, which is the subject of EPA's assessment of stipulated penalties.

I look forward to hearing from you so that we may discuss the setting and format for resolving this dispute.

Sincerely,

Frank Cavattin

Director
Waste Management Division

cc: David Webster, EPA
Mary Sanderson, EPA
Andrew Miniuks, EPA
Bob DiBiccaro, EPA/ORC
Bill Frank, OFFE
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EPA'S RESPONSE TO NAVY'S STATEMENT OF DISPUTE CONCERNING
EPA'S ASSESSMENT OF STIPULATED PENALTIES
SEPTEMBER 30, 1994

I. Introduction

In a letter, dated May 4, 1994, the U.S. Environmental Protection Agency, Region I (EPA) assessed stipulated penalties against the Navy under the Federal Facility Agreement for the Naval Education and Training Center Newport (NETC), dated March 23, 1992, as amended (FFA). The penalties were assessed as a result of the Navy's failure to submit complete draft Phase II Remedial Investigation Reports (draft Phase II RI Reports) for the McAllister Point Landfill (MPLF) and the Old Fire Fighting Training Area (OFFTA), two areas of contamination to be remediated under the FFA, by the required FFA deadlines. The draft Phase II RI Reports submitted by the Navy were materially deficient because they failed to contain the required ecological risk assessments.

In a letter, dated May 5, 1994, the Navy invoked dispute resolution pursuant to FFA Section 22.2. Attachment A.

The parties were unable to resolve the dispute through informal dispute resolution and in a letter, dated September 27, 1994, the Navy, as the disputing party, submitted its written statement of dispute pursuant to FFA Section 13.3.

This submission is EPA's response to the Navy's Statement of Dispute.

At the outset, EPA notes that MPLF and OFFTA are contaminated areas located in sensitive ecological environments. Each is located on the Narragansett Bay, an important environmental area and economic resource to the State of Rhode Island. At this time, the collection of stationary shellfish from the shores adjacent to these sites is prohibited by the Rhode Island's Department of Health due to the presence of high levels of metals in the shellfish. It is, therefore, of critical importance that the Navy determine whether or not the contamination at MPLF and OFFTA is posing an unacceptable ecological risk to the near-shore environment which requires remediation.

Under the enforceable deadlines of the FFA, the Navy was required to submit these ecological risk assessments as part of the draft Phase II RI Reports no later than February 14, 1994 for OFFTA and March 30, 1994 for MPLF as part of the Phase. Eight years have elapsed since the Navy first obtained information indicating that contaminants from MPLF may be causing a risk to the environment and seven years since it first obtained information which

indicated a potential source of contaminants at the OFFTA. However, even as of the date of submission of this response to the Navy's Statement of Dispute, six months after they were due under the FFA, the Navy still has not produced these ecological risk assessments. Therefore, EPA submits that stipulated penalties for the Navy's failure to meet the deadlines in the FFA are indeed appropriate in this case.

II. The Draft Phase II RI Reports Did Not Meet the Requirements of the Phase II RI Workplan Because They Did Not Contain Ecological Risk Assessments.

The approved Phase II RI Workplan specifically required that ecological risk assessments for MPLF and OFFTA be included in the Phase II RI Report. The Navy submitted a draft Phase II RI Reports for MPLF on February 14, 1994 and for OFFTA on March 31, 1994. Neither of these documents contained an ecological risk assessment.

In its Statement of Dispute, at pages 2-5, the Navy asserts that the draft Phase II RI reports submitted met the technical requirements of the Phase II RI Workplan as pertaining to ecological risk assessments. A review of the requirements of the approved Phase II RI Workplan relating to the ecological risks assessments clearly demonstrates that the draft Phase II RI Reports did not meet these requirements because they did not contain qualitative and quantitative risk assessments.

A. The Phase II RI Workplan Required Qualitative and Quantitative Ecological Risk Assessments for MPLF and OFFTA.

The Navy's Phase II RI Workplan, is a primary document which was reviewed, commented on, and approved by EPA under the FFA. FFA Section 7.2(c)(iv). The Navy's approved Workplan makes it very clear that a qualitative and quantitative ecological risk assessment is a required component of the draft Phase II RI reports. The purpose of these risk assessments is to determine whether or not the site-related contaminants from MPLF and OFFTA in the near-shore and far-shore sediments pose an unacceptable risk to the environment.

Volume VI of the approved Workplan, dated March 1993, entitled "Risk Assessment Plan-Ecological Evaluation," states in Section 1.0, at page 1, that:

The overall objective of the planned Ecological Assessment is to provide a qualitative and quantitative assessment of the environmental risks and/or impacts associated with conditions at [MPLF and OFFTA]. These conditions include the presence of chemical contaminants in soil and groundwater and the potential that some of these chemicals are reaching adjacent streams, wetlands, or marine environments (Narragansett Bay). Thus the assessment will consider ecological components within freshwater, marine, wetland and terrestrial environments.

(emphasis added). Attachment B.

Section 1.0, at page 2, sets forth the specific objectives of the overall assessment which include:

- * Measure or estimate exposure point concentrations;
- * Characterization of the environmental risks associated with the exposure under current and future conditions;
- * Assessment of the uncertainties associated with the estimates; and
- * Discussion of the ecological significance of the findings.

Section 7.2 of Volume VI, at page 43, reiterate the requirement for a qualitative and quantitative ecological risk assessment:

A qualitative and quantitative assessment of risks to ecological receptors will be performed with regard to toxic effects. This analysis will use information generated from the Exposure and Ecological Effects Assessments and will rely upon the Toxicity Quotient approach as well as on direct observations of conditions in the field to provide an overall weight of evidence concerning the nature of risks.

(emphasis added). Attachment C.

The approved Phase II RI Workplan thus unequivocally required complete qualitative and quantitative ecological risk assessments for MPLF and OFFTA.

B. The Navy Did Not Submit Quantitative and Qualitative Ecological Risk Assessments for MPLF and OFFTA.

It is significant that nowhere in its Statement of Dispute does the Navy state that it submitted a quantitative and qualitative ecological risk assessment as required by the Phase II RI/FS Workplan. Instead, the Navy argues that it met what it refers to as the "technical requirements" of the Workplan because it submitted some information related to ecological risk assessments in the draft Phase II RI reports. For example, the Navy makes the following statements:

Significant work in the area of ecological assessments had already been accomplished and provided in the draft submissions.

Statement of Dispute, at page 2.

Results of the Phase II remedial investigations . . . provided a preliminary characterization of the marine environment on the basis for a more detailed assessment."

Statement of Dispute, at page 4.

The Navy, therefore, appears to argue that, because it has done what it believes to be "significant work" relating to ecological risk assessments and has provided a "preliminary characterization" of the marine environment, it has met its obligation to provide quantitative and qualitative ecological risk assessments as required by the Phase II RI Workplan.

EPA submits that this is clearly insufficient. Even if the draft Phase II RI Reports do contain data and documents which met some of the "technical requirements" of the Workplan relating to ecological risk assessments, they clearly do not contain risk assessments which measure exposure point concentrations; characterize the environmental risks associated with the exposure under current and future conditions; assess the uncertainties associated with the estimates; and discuss the ecological significance of the findings. In short, the draft Phase II RI Reports did not contain the required qualitative and quantitative ecological risk assessments and are therefore unable to determine whether or not sediment remediation is needed.

In fact, the Navy could not produce these risk assessments in the draft Phase II RI Reports because the data to make the assessments was not collected by the Navy and is not included within the draft Phase II RI reports. In fact, the Navy has recently indicated that such data will not be collected until October, 1994 and a draft ecological risk report based on this data will not be submitted to EPA until December 29, 1994.
Attachment D.

III. Stipulated Penalties Are Warranted Because the Navy Failed to Comply with the Enforceable Requirements of the FFA.

Deadlines for draft primary documents are enforceable requirements of the FFA. These deadlines are a fundamental part of the FFA because they provide the basis for ensuring that the Navy conducts the cleanup of NETC in a timely manner. FFA Section XIV sets forth the deadlines for the submission of the documents and Section XXII provides for assessment of stipulated penalties as the enforcement mechanism.

As discussed below, because the Navy failed to submit complete draft Phase II RI reports for MPLF and OFFTA, and instead submitted materially deficient documents, it failed to comply with the enforceable deadlines for these documents and stipulated penalties are warranted.

- A. Under the FFA, the Navy Was Required to Submit a Complete Draft Phase II RI Report for MPLF by February 14, 1994 and for OFFTA by March 31, 1994 Which Included Ecological Risk Assessments.

Under FFA Section 14.1, the Navy is obligated to provide draft primary documents, including the draft Phase II RI Workplan and the draft Phase II RI Report, by the dates specified in Section 14.12. Section 14.12 specifies that the Navy shall submit the draft Phase II RI Reports by September 1, 1993. The Navy, EPA and the State of Rhode Island subsequently agreed to amend the FFA schedule to revise this deadline to November 7, 1993. This deadline was further extended by fourteen weeks (to February 14, 1994) for MPLF and by twenty-two weeks (to March 31, 1994) for OFFTA as a result of EPA approval of extension requests submitted by the Navy pursuant to FFA Section XV. Attachments E and F.

FFA Section XIV does not state the content of the draft primary documents which the Navy is required to submit by the deadline. Clearly, if no document is submitted by the deadline, the Navy has not complied with Section XIV. Similarly, if the Navy submits an incomplete document which contains a material deficiency prior to the deadline, it also has not complied with Section XIV.

In the case of the Phase II RI Reports at issue here, there is no question as to the required contents since there was an approved Phase II RI Workplan which set forth the specific requirements for the ecological risk assessments. See Section II.A. above.

The Navy appears to argue that as long as it submits any document by the required deadline, even an incomplete document which contains material deficiencies, it has met its obligation under Section XIV. EPA submits that merely placing the proper document name on a materially deficient document and submitting it prior to a deadline does not fulfill the Navy's obligation to submit the required document.

The Navy's reading of the FFA would render the deadline provisions for draft primary documents meaningless because the Navy could submit materially incomplete documents with impunity and without concern for the stipulated penalty enforcement provisions of FFA Section XXII. Such a reading would make a mockery of the deadline provisions of the FFA.

B. The Navy Did Not Submit Complete Phase II RI Reports for MPLF and OFFTA by the Required FFA Deadlines.

In its January 11, 1994 request to extend the deadlines for submission of draft MPLF and OFFTA Phase II RI Reports, the Navy stated that the additional time was required in order for the Navy to prepare "separate, comprehensive and quality documents for both Sites 01 (McAllister Point landfill) and 09 (Old Fire Fighting Training Area) which should ultimately save time in achieving approved documents." (emphasis added) Attachment F. Implicit in these requests was that the Navy would provide documents which were materially complete and which met the requirements of the approved Phase II RI Workplan.

Instead, the Navy submitted incomplete draft Phase II RI Reports for MPLF and OFFTA which were materially deficient because they did not contain the required ecological risk assessments. As discussed in Section II.A. above, the approved Workplan clearly provides that the Phase II RI Reports for these sites must include an ecological risk assessment. Because the draft Phase II RI Reports did not contain the required ecological risk assessments, they were materially deficient and the Navy failed to meet the FFA deadlines for submission these documents.

C. Stipulated Penalties May Be Assessed for Navy's Failure to Submit Complete Phase II RI Reports by the Required Deadlines.

FFA Section 22.1 provides that

In the event that the Navy fails to submit a Primary Document set forth in this agreement to EPA and the State pursuant to the appropriate Schedules, Timetable or Deadlines in accordance with the requirements of this Agreement, . . . EPA may assess a stipulated penalty against the Navy.

As discussed in Section III.A. above, FFA Section XIV sets forth the deadlines for submission of draft primary documents, including the Phase II RI reports for MPLF and OFFTA. These deadlines are not met if the Navy fails to submit a materially complete document, as in this case where the Navy submitted documents which did not contain the required ecological risk assessments. Therefore, under Section 22.1 EPA may assess stipulated penalties.

The Navy argues, however, that stipulated penalties may not be assessed on an incomplete draft primary document, and that completeness issues must be addressed through the review and comment process. Navy's Statement of Dispute at 6-7.

EPA acknowledges that, under FFA Section 7.6(b), completeness issues can be raised by EPA during the review and comment period on the draft primary documents. However, the deadlines of Section XIV relate to the submission of draft documents and it is the Navy's responsibility as lead agency to produce complete draft documents which are not materially deficient and which meet the requirements of the approved workplans. When a completeness issue relates to material deficiencies in the draft primary document, it is appropriate for EPA to assess stipulated penalties under Section 22.1 for the Navy's failure to submit the required draft document by the FFA deadline.

The Navy further argues that, since Dispute Resolution for stipulated penalty assessments is available to the Navy under Section 22.2 and since Dispute Resolution is available on primary documents only after the documents are issued by the Navy as draft final documents, "it must reasonably follow that the FFA contemplates that stipulated penalties will not be assessed on a primary document until after the Navy issues it in draft final." Navy's Statement of Dispute at page 6.

EPA strongly disagrees. The Navy misconstrues the FFA Dispute Resolution provisions relating to draft final documents and to the assessment of stipulated penalties. The purpose of the Dispute Resolution provisions relating to draft final primary documents is to allow the parties to resolve EPA and the State comments on the draft primary documents in the review and comment stage without resorting to dispute resolution on myriad individual issues. If EPA and the State comments are not addressed to their satisfaction, they may invoke Dispute Resolution on the draft final document. This right to invoke Dispute Resolution is specifically given to the EPA and State in Section 7.2(a), and not to the Navy since it is issuing the document.

EPA submits that it is a different matter when the Navy fails to provide a draft primary document by the required deadline or has only submitted a document which contains material deficiencies by the deadline. FFA Section 22.1 allows EPA to assess stipulated penalties in such instances and Section 22.2 allows the Navy to invoke Dispute Resolution. In the Dispute Resolution under Section 22.2, the Navy can contest in its Statement of Dispute, whether or not the documents were materially incomplete.

In arguing that EPA cannot assess stipulated penalties for draft primary documents which are materially deficient, the Navy misunderstands one of the fundamental tenets of the enforceable requirements of the FFA--namely that the Navy is required to submit draft primary documents by required FFA deadlines and that, if it does not, it is subject to stipulated penalties. The submission of a document with material deficiencies simply to meet a deadline, does not meet the requirement that the draft primary document be submitted by the deadline. The assessment of stipulated penalties in such instances enables EPA in its oversight role to ensure that the cleanup takes place expeditiously in accordance with FFA deadlines. As discussed above in Section III.A., the Navy's reading of the FFA would render the FFA deadline provisions meaningless in instances where materially deficient draft primary documents are submitted.

Here, EPA assessed stipulated penalties because the Navy failed to submit materially complete documents by a required FFA deadlines. The Navy has exercised its right to invoke Dispute Resolution under Section 22.2. The issue to be decided is whether or not the documents were materially incomplete. If they were, the Navy did not meet the required deadlines and stipulated penalties may be assessed.

IV. The Navy Has Not Demonstrated a Commitment to Produce Ecological Risk Assessments for MPLF and OFFTA in a Timely Manner.

The Navy asserts that it "has been proactive in addressing ecological risk issues since 1984 when the initial confirmation was initiated." Navy's Statement of Dispute, at page 8.

EPA disagrees. A review of the Navy's actions since 1984 shows that the Navy has consistently failed to produce acceptable analytic procedures and sampling data in a timely manner. For example, as noted by the Navy, the findings of the sampling of MPLF off-shore clams and sediments which was completed in January, 1988, were not accepted by EPA "due to undocumented sampling and analysis methods for this work." Id.

Further, the Navy indicates that it obligated funds to perform off-shore sampling of biota and sediments at MPLF in the Spring/Summer of 1990, but that the work "was postponed by mutual agreement of the Navy and EPA due to concerns over unapproved biota and sediment analytic procedures." Id. In fact, the postponement was required because of inadequacies in the Navy's proposed sampling and analysis workplan which were set forth in the EPA's comments on the workplan. Attachment G.

A year passed before the Navy submitted on July 1, 1991, a modified workplan to address EPA's concerns. This modified workplan also had serious deficiencies as noted by EPA in a letter, dated August 27, 1991:

Although EPA is offering comment with regard to this initial round of proposed off-shore biota and sediment sampling at NETC, these activities do not sufficiently fulfill EPA-Region I ecological risk assessment requirement. Additional work will be necessary to completely characterize the environmental risk at NETC by identifying potential exposures to all surrounding ecological receptors and evaluating the potential effects associated with such exposures. Data collection requirements for ecological assessment will be discussed during our September 5 scoping meeting.

Attachment H.

EPA's concerns about the modified workplan were discussed in the September 5, 1991 meeting of the Navy, EPA and the State, (referred to by the Navy in its Statement of Dispute at page 8-9).

Rather than correcting inadequacies promptly, however, the Navy let another year pass before, at the August 6, 1992 Technical Review Committee meeting, it presented an outline of a revised workplan. Navy's Statement of Dispute, Enclosure 5.

The Navy then took another year, until July 19, 1993, before it produced the actual proposed workplan for EPA review. The Navy, at this juncture was in a great hurry to conduct the sampling which it scheduled for August, 1993. The Navy unilaterally scheduled a meeting for July 28, 1993 to discuss the Navy's approach which included composite sampling. Contrary to the Navy assertion (Statement of Dispute, page 9) that EPA concurred in the use of composite sampling at the meeting, EPA raised serious concerns about the approach. Attachment I (July 28, 1993 meeting notes of Andrew Miniuks, EPA Remedial Project Manager).

Moreover, on August 12, 1993, EPA provided detailed written comments on the Navy's workplan. Enclosure 8 to Navy's Statement of Dispute. In these comments, EPA specifically informed the Navy that sediment toxicity testing must be conducted at the same time and location as the sampling (general comment 1) and that the samples should not be composited (general comment 6). Despite EPA's comments, the Navy nevertheless went forward with the fieldwork without conducting the toxicity testing and by compositing the samples.

At an April 1, 1994 meeting with EPA and the State, the Navy discussed the results of the August, 1993 fieldwork which indicated that there was relatively high contamination in the near-shore sediments and less in the far-shore sediments, and that it was being accumulated within mussels and clams. Attachment J (Section 5.0 Summary and Conclusions from Appendix O of the draft Phase II RI report). These results are virtually identical to the results of the 1986 Confirmation Study. However, because the Navy did not conduct toxicity testing and composited the sediment samples, the information was insufficient for the Navy to perform the required ecological risk assessments. Thus, after eight years of effort at MPLF to characterize the nature and extent of site-related contaminants and the associated ecological risks, the Navy is still unable to do so.

On May 31, 1994, after EPA had assessed stipulated penalties, the Navy submitted a document entitled "McAllister Point Landfill and Old Fire Fighting Training Area Ecological Risk Assessment Report," dated May 1994. This report consisted of reformatted portions of the draft Phase II RI report and some additional documentation which was not included within the original draft Phase II RI reports. Despite its title, however, this document still did not contain the required ecological risk assessments, and indeed it could not contain them because of the inadequacy of the data collected in the August, 1993 fieldwork.

The Navy appeared to recognize the limitations of the data collected for the ecological risk assessments by stating in its letter of April 29, 1994 (Attachment K):

The Navy is proceeding with a more focused ecological risk assessment for the sediments off-shore of McAllister Point Landfill due to the recent findings. . . . Based on discussions during the April 1, 1994 meeting, the Navy anticipates this next phase to propose specialized testing such as toxicity testing, bioassays, and bioaccumulation modeling for a more comprehensive ecological risk assessment. Submission of the draft work plan is estimated to be June 15, 1994.

This report, entitled "Draft Work/Quality Assurance Project Plan for the Narragansett Bay Ecorisk and Monitoring for Navy Sites - Offshore Ecological Risk Assessment for the Lower East Passage Study Area," was submitted to EPA on July 12, 1994. Incredibly, this workplan described a region-wide study of the Narragansett Bay, rather than a determination of whether or not site-related contaminants within the near-shore and far-shore sediments adjacent to MPLF and the OFFTA pose an unacceptable risk to the environment.

On July 15, 1994, at a meeting at NETC to discuss this workplan, the Navy agreed to produce an addendum to the July 12, 1994 workplan which would describe the work necessary to determine the impact of MPLF and OFFTA contaminants on the near-shore and far-shore sediments, and the associated risk to the marine environment.

The addendum, which the Navy submitted to EPA on August 2, 1994, falls short of what is required. The addendum was essentially an outline that included the field elements that were discussed at the July 15, 1994 meeting, rather than a comprehensive plan for an ecological risk assessment. EPA's comments on this addendum noted numerous details which are critical to obtaining approval were not included within the addendum. The Navy has not yet responded to EPA's comments.

Finally, EPA notes that the Navy in its Statement of Dispute (at page 9) has attempted to confuse the requirement for conducting site-specific ecological risk assessments at MPLF and OFFTA with the Navy's voluntary efforts to conduct research into marine sampling and risk assessment techniques. The Navy's research group has been coordinating with EPA's Narragansett Research Laboratory to develop sampling techniques which may ultimately be appropriate for use at Naval facilities. This extended research effort, while commendable, is simply not required for the Navy to be able to conduct the ecological risk assessments at MPLF and OFFTA.

In view of the above record, EPA submits that the Navy has not demonstrated a "proactive role" in or a commitment to ecological risk assessments at MPLF and OFFTA in a timely manner, but instead has moved only haltingly since 1986, making little progress toward producing the required ecological risk assessment for these sites.

V. The Purpose of Stipulated Penalties Is Furthered by Assessing Them in this Instance.

The Navy states that "the purpose of the FFA is to facilitate the cleanup" of NETC and that stipulated penalties "are intended to achieve that same goal." Navy's Statement of Dispute, at page 10.

EPA submits that purpose of the FFA more accurately stated is to ensure that the Navy fulfills its responsibilities as lead agency to conduct the NETC cleanup in an expeditious manner in accordance with the requirements of the FFA. Stipulated penalties provide the mechanism for EPA in its oversight role to ensure that the Navy meets its responsibilities.

One of the responsibilities the Navy must meet under the FFA is to produce primary documents in accordance with deadlines established in the FFA. When, as here, the Navy fails to do so, it is subject to stipulated penalties under FFA Section 22.1.

The Navy assert that stipulated penalties should only be used to "deter actions and failures that inhibit the cleanup process or otherwise endanger human health or the environment." Navy's Statement of Dispute, at 10. EPA disagrees. FFA Section 22.1 places no such limitations on the assessment of stipulated penalties.

Moreover, even if the Navy's assertion is accepted, EPA submits that the Navy's failure to provide draft Phase II RI Reports containing ecological risk assessments for MPLF and OFFTA is inhibiting the cleanup process because the Navy's failure to complete the ecological risk assessments does not allow the determination of the extent of the MPLF and OFFTA impacts on the sediments.

Further, the MPLF source control Record of Decision (ROD), signed by the Navy on September 27, 1993 provided for the construction of a landfill cap. The ROD specifically requires the Navy to determine "[t]he nature, extent and location of near-shore sediments which may have been affected by site-related contamination and whether they will be addressed by a separate remedial action or excavated and consolidated under the cap."

Under the requirements of Section 120(e)(2) of the Comprehensive Environmental, Compensation, and Liability Act, the commencement of construction of the landfill cap must take place no later than December 27, 1994. However, due to the Navy's failure to complete the ecological risk assessment for MPLF in a timely manner, it will not be able to meet the requirement of the ROD prior to the commencement of construction and, therefore, has eliminated one of its disposal options for the sediments, if remediation of the sediments is necessary.

Further, EPA takes issue with the Navy's assertion that "[q]ualitative field verification performed by the Navy shows the presence of key species and no evidence of a stressed environment." Navy's Statement of Dispute, at 10.

EPA submits that, contrary to this statement, the information collected by the Navy is insufficient to conclude that the environment has not been impacted. As discussed in Section IV above, the results of the Navy's August, 1993 fieldwork indicate that the contaminants from MPLF and OFFTA are migrating into the marine environment. Further, the qualitative field verification referred to by the Navy is incomplete because it was not conducted on the near-shore sediments of these sites.

In view of all the information in the record, it is surprising that the Navy would try to minimize the potential harm to the environment.

Moreover, only by producing an ecological risk assessment can the harm to the environment be determined. Thus, the Navy's failure to do so in accordance with the FFA deadlines warrants the assessment of stipulated penalties.

Finally, the Navy argues that stipulated penalties should not be assessed in this instance because the Navy's employees have been "dedicated and cooperative in performing the cleanup at the base." *Id.* While EPA does not dispute this, EPA submits that it is irrelevant to the appropriateness of stipulated penalties in this matter. What is relevant is that the Navy has failed to produce meet an enforceable deadline of the FFA in connection with MPLF and OFFTA.

VI. Conclusion

For the reasons stated above, the Navy has failed to meet enforceable FFA deadlines by failing to submit complete draft Phase II RI reports for MPLF and OFFTA, and EPA's assessment of stipulated penalties is warranted and appropriate.