



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
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March 2, 2001

James Shafer, Remedial Project Manager  
U.S. Department of the Navy  
Naval Facilities Engineering Command  
Northern Division  
10 Industrial Highway  
Code 1823, Mail Stop 82  
Lester, PA 19113-2090

Re: Providence Gas request for use of Derecktor Shipyard.

Dear Mr. Shafer:

I am writing in response to our telephone conversation of February 15, 2001 where you informed EPA of the Navy's intent to issue an easement to Providence Gas to install a peak shaving facility at the Derecktor Shipyard Superfund site. As described in more detail below, EPA has identified a number of issues regarding compliance with statutory requirements under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) pertaining to the Navy's granting of the proposed easement.

When EPA first learned of this proposal in April 2000, EPA stated that any activities that occur on Derecktor Shipyard must not impede or impair the investigation or cleanup of hazardous substances. As you know, the current Federal Facilities Agreement indicates that final remedy selection for this site is planned for the end of 2004. At the April 11, 2000 meeting, I recommended that the onshore portion of Derecktor Shipyard be closed out under the Superfund with a No Further Action Record of Decision that documents that all removal actions have adequately addressed the site risks.

As noted in my comments on the *Draft Project Close-out Report for Various Removal Actions at the Derecktor Shipyard* (see EPA letters dated October 23, 2000 and January 3, 2001), EPA is awaiting information from the Navy regarding the completeness of the investigations and removal actions at Derecktor Shipyard before it can determine whether all necessary actions have been taken to address on-shore site risks. Additionally, the Rhode Island Department of Environmental Management ("RIDEM") may have concerns about the completeness of the investigation and associated removal actions. As such, EPA must consider Derecktor Shipyard to be a contaminated parcel until agreement is reached and the final remedy selection for the site is embodied in a Record of Decision.

Section 120(h) of CERCLA establishes requirements for federal agencies for the transfer of contaminated property subject to CERCLA. The Navy questioned whether requirements under

Section 120(h) of CERCLA, 42 U.S.C. § 9620(h) pertain to the granting of easements on the Derecktor Shipyard Site.

EPA Region I has consulted with counsel for the Rhode Island Department of Environmental Management (RIDEM), EPA Headquarters, and counsel from other EPA Regions regarding this matter. Most notably, Thelma Estrada, Counsel in Region IX, the author of a January 30, 1995 draft memo regarding the granting of easements at a BRAC facility in California was consulted. From these discussions several points were identified that need to be considered to evaluate whether Section 120(h) is applicable to an easement transfer at a federal facility: applicable state law (particularly in this case Rhode Island hazardous waste and property law standards) and the Site-specific circumstances regarding the easement being granted (including status of cleanup activities at the Site and the potential for the activities permitted under the easement to interfere with remedial activities).

With respect to state law, EPA consulted with Mr. John Langlois, RIDEM counsel, who informed EPA that the proposed easement was a property transfer within a contaminated property that needs to comply both with Rhode Island and federal hazardous waste standards. Since the remedial action has not been completed under the Federal Facilities Agreement for the Derecktor Shipyard Operable Unit, the transfer must be approved by both EPA and RIDEM in order to ensure that the remedial action at the Site will not be compromised. Section 120(h) of CERCLA establishes the standards for making such a finding.

Subsection 120(h)(1) of CERCLA requires notice to be given when the United States "...enters into *any contract for the sale or other transfer* of real property which is owned by the United States and on which any hazardous substance was stored one year or more, known to have been released, or disposed of [emphasis added]...." This requirement under Section 120(h) is further described in regulations promulgated under the statute, 40 C.F.R. Part 373. Since the transfer of a permanent easement on Navy property to Providence Gas is a transfer of an interest in real property, the notice requirements of Subsection 120(h) clearly apply.

Subsection 120(h)(3) of CERCLA is titled "Content of certain deeds" and requires that 1) notice be provided; 2) there is a description of the remedial action taken, if any; and 3) a covenant is given that all necessary remedial action has been taken before the date of transfer and that any remedial action found to be necessary after the date of such transfer will be conducted by the United States. Subsection 120(h)(3)(C) establishes a deferral mechanism, whereby a property where all remedial action has not been taken (as is the case at Derecktor Shipyard) may be transferred based upon a determination by EPA and the Governor that the property is suitable for transfer. The Navy's stated position is that subsection 120(h)(3) does not apply to easements. However, under Rhode Island property law any conveyance of lands, tenements, or hereditament for a term greater than one year must be in writing and recorded in the local land records, RI ST S 34-11-1. To record an easement it either must be recorded against an existing deed for the property or a new deed must be created to document the location and restrictions on the easement. Since a deed must be used to record the easement, in the opinion of EPA, in

consultation with RIDEM counsel, the provisions of Subsection 120(h)(3) of CERCLA must be met.

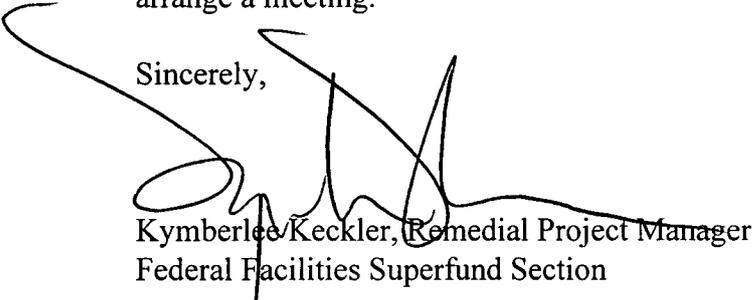
With respect to consideration of the site-specific factors regarding the proposed easement, the Navy has stated that it is basing its opinion on an EPA Region IX memo written in 1995 by Thelma Estrada, that at a particular California base, the transfer of some utility easements did not require a covenant under section 120(h)(3) of CERCLA. Based on EPA Region I's review of the memo and discussions with the memo's author, it is apparent that the California memo's findings are based on significantly different site-specific factors than the proposed Navy easement at Derecktor Shipyard in Rhode Island. In particular, Ms. Estrada recollected that at the time of the release of the memo she had noted on the final version of the document that the content of the memo pertained to the California subject site only, was based on her analysis of the unique facts of the site, and did not reflect EPA policy. Moreover, the easements at the California facility were not within an operable unit undergoing remedial action. As discussed above, EPA and the State are currently reviewing ongoing Navy efforts to complete remediation on the on-shore portion of Derecktor Shipyard. The memo's author also stated that she based her opinion on a review of California property law, which is clearly not relevant to Rhode Island property law standards.

The EPA Region IX memo states that at the California base the access provisions of Section 120(h) were unnecessary because the United States, as the land owner, would continue to have access. The proposed permanent easement at Derecktor Shipyard is different in that Providence Gas will be installing a natural gas peak shaving facility to which the Navy would not automatically have access unless access provisions were included as part of the terms of the easement. At the California facility the United States already had access to the pre-existing utility corridor. This facility, along with the natural gas line connections that need to be installed through the Site, could limit or prevent the Navy's access to areas of the Operable Unit requiring additional investigation. Therefore, the access provisions of the Section 120(h) covenant are necessary to ensure that the operations of the gas peaking facility do not interfere with ongoing remedial actions at the Site.

On February 20, 2001, EPA met with RIDEM and representatives from Providence Gas and its consultants. The Navy was invited, but chose not attend. In order to allow the Providence Gas project to move forward in a timely manner, EPA recommended that the Navy lease the area needed to Providence Gas until such time as all remedial action has been addressed. Since a lease agreement is not a permanent transfer of a federal property interest, it does not need to be implemented under the provisions of Section 120(h)(3)(C) of CERCLA. As discussed in the beginning of this letter, EPA has previously suggested splitting the Derecktor Shipyard into two operable units, onshore and offshore. Depending on the results of ongoing Navy cleanup actions, it may be possible to issue a No Action Record of Decision for the onshore section, if created, which would then allow the easement to be conveyed to Providence Gas without triggering the deferral requirements of Section 120(h)(3)(C).

I look forward to working with you and the RIDEM toward the cleanup of Derecktor Shipyard. Please do not hesitate to contact me at (617) 918-1385 should you have any questions or wish to arrange a meeting.

Sincerely,



Kimberlee Keckler, Remedial Project Manager  
Federal Facilities Superfund Section

cc: John Langlois, RIDEM, Providence, RI  
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