



DEPARTMENT OF THE NAVY

NORTHERN DIVISION
NAVAL FACILITIES ENGINEERING COMMAND
10 INDUSTRIAL HIGHWAY
MAIL STOP, #82
LESTER, PA 19113-2090

V N00102.AR.000776
NSY PORTSMOUTH
5090.3a 08

IN REPLY REFER TO

5090
Code 1823/FE

28 DEC 1999

Ms. Meghan Cassidy
Environmental Protection Agency
Region I (Mail Code HBT)
1 Congress Street
Suite 1100
Boston, MA 02114-2023

Dear Ms. Cassidy:

SUBJECT: FEDERAL FACILITY AGREEMENT UNDER CERCLA SECTION 120 FOR
PORTSMOUTH NAVAL SHIPYARD, KITTERY, MAINE

In accordance with Section 35.1 of the Federal Facility Agreement (FFA) for Portsmouth Naval Shipyard, the Navy is transmitting copies of all comments received within the comment period to EPA within twenty-one (21) days of completion of the public comment period. Comments were received from Mr. Doug Bogen dated December 10, 1999, Ms. Carolyn Lepage dated December 11, 1999, and Maine Department of Environmental Protection dated December 13, 1999 on the subject agreement.

If additional information is required please contact Mr. Fred Evans at (610) 595-0567 x-159.

Sincerely,

Frederick J. Evans
Remedial Project Manager
By Direction of the
Commanding Officer

ENCL: (1) Mr. Doug Bogen's December 10, 1999 letter
(2) Ms. Carolyn Lepage's December 11, 1999 letter
(3) Maine DEP's December 13, 1999 letter

Copy to:
COMSUBGRU TWO (R. Jones)
PNS (Code 106.3R, M. Raymond)
PNS Code 100PAO

404 Pleasant St. Apt. 3
Portsmouth, NH 03801

December 10, 1999

Portsmouth Naval Shipyard
Code 106.3R Bldg 44
Attn: Marty Raymond
Portsmouth, NH 03804-5000

Re: Portsmouth Naval Shipyard Federal Facility Agreement

Dear Ms. Raymond,

I would like to submit the following comments regarding the Federal Facility Agreement between the Navy and the U.S. EPA for Portsmouth Naval Shipyard.

In my capacity as a member and community co-chair of the Restoration Advisory Board(RAB) for PNS, I am concerned that the FFA makes scant reference to the RAB in any of its provisions, particularly in the distribution and availability of documents or other data. I understand that the RAB doesn't have legal authority in the remediation efforts at PNS, and perhaps the RAB's rights to information and consultation are assumed under other statutes or guidance referred to in the FFA, but I and others would feel more comfortable if some of this was spelled out in the text of the agreement.

Shouldn't statements concerning submission of data, documents or revisions to documents include the RAB along with the EPA and the State? For example, in section 4.2 C. (p. 11) couldn't the text refer to the RAB being informed of Remedial Action alternatives prior to formal proposal for the purpose of promoting cooperation prior to selection of final Actions? Or in section 10, references to submissions of Primary and Secondary documents for review and comment could include submissions to the RAB along with EPA and the State.

In raising this concern, I do not mean to suggest that the Navy or other government agencies have in any way neglected to keep the RAB fully informed of developments or apprized of new documents and relevant comment periods to date; I merely suggest that it would be useful to make reference to our existing involvement and role in remediation activities within this agreement.

Thank you for your attention to this matter, and I look forward to your response as to the appropriateness of this request.

Sincerely,



Doug Bogen
Community Co-Chair, PNS RAB

Lepage Environmental Services, Inc.

P. O. Box 1195 • Auburn, Maine 04211-1195 • 207-777-1049 • Fax: 207-777-1370

December 11, 1999

Johanna Lyons
Seacoast Anti-Pollution League
P. O. Box 1136
Portsmouth, New Hampshire 03802

Subject: Review of the September 1999 *Federal Facility Agreement* and the July 1999 *Site Management Plan*

Dear Ms. Lyons:

Following a brief review, we are transmitting comments on the September 1999 *Federal Facility Agreement* and the July 1999 *Site Management Plan* to the Seacoast Anti-Pollution League (SAPL). The *Federal Facility Agreement* (FFA) is a legally binding agreement between the Navy and the U.S. Environmental Protection Agency (EPA) that, among other things, spells out the procedural framework and schedule for Superfund activities at Portsmouth Naval Shipyard. The *Site Management Plan*, which is a part of the FFA, provides more site-specific details regarding investigation and cleanup activities at the Shipyard. Our comments on the two documents are as follows:

Federal Facility Agreement

1. Restoration Advisory Board. During our review, we were struck by the fact that the Restoration Advisory Board (RAB) was only mentioned in two places in the FFA - Subsections 9.6C and 33.6. The RAB was formed to promote community awareness and understanding of the CERCLA investigation and cleanup at the Shipyard. It consists of representatives of the community, the Shipyard, and state and federal agencies, and provides a forum for the discussion and exchange of information and for community questions and concerns to be heard and addressed by the Navy and the regulatory agencies. At a minimum, the RAB should be defined in Section II (Definitions), and should be mentioned in the definitions of "community relations" and "Public Stakeholders".

In order to accomplish its mission the RAB reviews and comments on documents and information provided by the Navy. The FFA specifies the structure and schedule for the exchange of comments and responses on various documents among the Navy, EPA, and the State, but, with the exception of the Site Screening Process Work Plan, does not mention the RAB being involved in the comment/response process. Yet the Site Management Plan (see page 5-1 and the schedules in Appendix C) states that draft and draft final documents are subject to review by the EPA,

MEDEP, and the RAB. Therefore, the FFA should mention the role of the RAB in reviewing and commenting on primary and secondary the documents as well.

2. "Area". The use of the term "area" in several definitions in Section II is a bit confusing. For example, "facility" and "Portsmouth Naval Shipyard" are defined as all property owned by the United States and operated by the Navy in Kittery, Maine, known as the Portsmouth Naval Shipyard, and including all areas identified on the map attached as Appendix A to the FFA. It is not clear what "areas" means in this context. Is it the entire plan view shown on the map? Does it mean the specific SWMUs (Solid Waste Management Units) and sites listed on the map? But the list of "Areas of Concern" (AOCs) in Appendix B includes a number of places that are not labeled or listed on the map in Appendix A. Furthermore, the definition of "Site" states that it includes PNS and any other areas where a hazardous substance, pollutant, or contaminant from PNS has been deposited, stored, disposed of, or placed, or has migrated or otherwise come to be located. Does the use of "areas" in this context mean locations not depicted on the map in Appendix A? These definitions require clarification.

3. Terms Listed But Not Defined. There are several terms that are listed in Section II, but the reader is referred to another document for definition of the term. These terms include "off-site", "release", "remedy" or "remedial action", and "removal" or "removal action". To avoid potential misunderstandings and to save the reader from having to go to other references, the specific definitions of these terms should be provided in the FFA.

4. Operable Unit. The definition of "operable unit" in Section II states it means a discrete action that comprises an incremental step toward remediating the Site and addresses one or more AOCs. Up until we read this definition, we had been accustomed to using "operable unit" in more of a geographical or locational, rather than an action-oriented sense. Our past usage is similar to the use of the term in Subsection 5.4, which states "All Response Actions at the Site shall occur in discrete locations called Site Screening Areas, Areas of Concern, or Operable Units ...". Therefore, we feel the definition in Section II requires additional clarification.

5. Notification of Property Transfer. Subsections 3.2 and 26.1 state that the Navy shall notify the EPA and the State of the sale or lease of property affected by the FFA at least 60 days prior to any such transfer. It would be appropriate for the Navy to also inform the RAB of such a transfer so that the public has an opportunity to be informed as well.

6. Purpose of the FFA. The general and specific purposes of the FFA are identified in Section IV. We were unable to find anything in this section about communicating with or involving the public, or addressing public concerns. In addition, Subsection 4.2D states that Response Actions at the Site will be coordinated with the mission and support activities of PNS. However, it is not clear to us exactly what the mission and nature and extent of support activities are. It is also not clear how activities covered under the FFA will be affected should the mission and support

activities change, as land uses change at PNS (such as leasing buildings to non-Navy entities), or if the Shipyard closes. These shortcomings need to be addressed.

7. Document List. The last document listed in Subsection 6.13 is dated October 1998. Are there more recent documents that should be added or is the list considered complete as of the date the FFA was signed?

8. Radionuclides Screening. According to Subsection 6.14, the EPA has concluded that further site screening for radionuclides is unnecessary. It is not clear how that statement relates to monitoring should there be future releases or new evidence of past releases. The EPA's conclusion should not be interpreted as including the radioactive hazard monitoring necessary to protect site workers' health and safety during site investigations and remediation activities at the Shipyard. This radioactive hazard monitoring will provide additional information for assessing the health and safety of future site users as well.

9. State Authorization Under RCRA. The information in Subsection 8.1 is a bit confusing. The Navy and the EPA intend that the FFA will integrate the Navy's CERCLA obligations with existing RCRA corrective action obligations. The State of Maine is not a party to the FFA, but is authorized under RCRA to implement its hazardous waste program, including corrective actions. Does this mean that the State can pursue RCRA corrective action at a SWMU separate from the CERCLA actions governed by the FFA?

10. Local Laws and Permits. The second sentence in Subsection 8.3 should include local laws.

11. "Risk Plus Other Factors" Priority Screening. Subsection 11.3 summarizes the factors considered in prioritizing site activities presented in the Site Management Plan. The prioritization process included consultation with Public Stakeholders. Subsection 12.4 states that the "risk plus other factors" outlined in Subsection 11.3 will be reexamined whenever the Navy amends the SMP, and that Public Stakeholders will be consulted before milestone or project end dates are changed. What is the process by which Public Stakeholders will be consulted?

12. Permits. Subsections 17.1 and 17.2 appear to be in conflict. The first states that the Navy shall be responsible for obtaining all permits necessary for performing the work under the FFA. But the second states that Response Actions selected and carried out under CERCLA are exempt from the procedural requirements to obtain any permits. Additional clarification is needed.

13. Removal Actions. The Site Management Plan (see page 3-4) states that both time-critical and non-time critical removal actions require that a public comment period be held so that the public has the chance to comment on the removal action. However, we are unable to find any accommodation for public input in Section XVIII of the FFA. Additional information is needed.

14. Imminent Health Hazard. Subsection 18.5 states that, if an imminent health hazard or other danger to the public health or welfare or the environment is discovered, the Navy will take appropriate action and notify appropriate agencies, potentially affected persons and officials. We assume that appropriate agencies include the Maine DEP. It would also be appropriate to notify the RAB.

15. Natural Resource Trustees. During our brief review of the FFA, we noted that the natural resource trustees are only mentioned in Subsection 24.5 (we may have missed other references elsewhere). Who or what are the federal and State natural resource trustees? What is their role in CERCLA activities at the Shipyard? Should they be included as Public Stakeholders?

16. Community Relations. Subsection 33.1 states that revisions or amendments to the Community Relations Plan will be submitted to the EPA and the State for review and comment. The RAB should also be provided with the opportunity to review and comment. It is not clear what the Administrative Record is, based on the information in Subsection 33.5. It is also not clear how it relates to the information repository described in Subsection 33.4.

Site Management Plan

17. Figure 1-2. This figure is very busy, but contains a lot of necessary and useful information. However, the numbers on contour intervals should be large enough to be read easily. The symbol for a depression is included in the legend, but we were not able to identify a depression on the map. If there is a depression on the map, the symbol needs to be enhanced; if not, the symbol should be deleted from the legend. We note that the Facility Map in Appendix A of the FFA includes Site 34 (Building 62, Oil Gasification Plant), but that Site 34 is not included on Figure 1-2. The site information should be the same on both maps.

18. Page 1-8, Section 1.2.2 Offshore Studies. The last sentence in the second paragraph should be revised to reflect that the date for the draft final version of the *Estuarine Ecological Risk Assessment* is 1997, not 1995. The reference listed in Section 7 should be revised as well.

19. Page 2-1, Section 2.0 SITE DESCRIPTIONS. The information presented in the second and third paragraphs is confusing. The second paragraph states that Sites 30, 31, 32, and 34 have been identified as AOCs. But the third paragraph states these sites are Site Screening Areas that require screening to determine if they should become AOCs. The text must be clarified.

20. Page 2-4, Section 2.2.2 Site #6 - Defense Reutilization and Marketing Office (DRMO) Storage Yard. The site description should mention the discovery during the summer of 1999 of the contaminated soil erosion problem at the DRMO shoreline and the Navy's resulting actions to date.

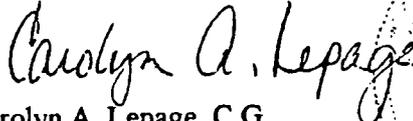
Page 5 of 5, J. Lyons
December 11, 1999
Review of Federal Facility Agreement

21. Appendix A. Only the first page of the Executive Summary is included in Appendix A. The remaining pages must be provided.

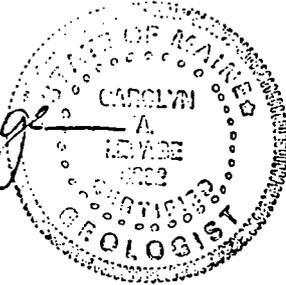
22. Appendix B. While we did not review the Relative Risk Evaluation Worksheets, we note that the location of the Shipyard should be Maine, not New Hampshire.

If you have any questions regarding the comments above, please give me a call at 207-777-1049.

Sincerely,



Carolyn A. Lepage, C.G.
President



Enc.

cc: Iver McLeod, Department of Environmental Protection
Meghan Cassidy, Environmental Protection Agency
Alan Robinson, Portsmouth Naval Shipyard
✓ Marty Raymond, Portsmouth Naval Shipyard



STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

ANGUS S. KING, JR.
GOVERNOR

MARTHA KIRKPATRICK
COMMISSIONER

December 13, 1999

Mr. Fred Evans
Department of the Navy
Northern Division
Naval Facilities Engineering Command
10 Industrial Highway, Mailstop 82
Lester, PA 19113-2090

re: Federal Facility Agreement October 1999 and Site Management Plan July 1999

Dear Fred:

The Maine Department of Environmental Protection has reviewed the documents referenced above. Although the MEDEP has opted to not enter into the Federal Facility Agreement with the Navy and the USEPA we have several comments.

Federal Facility Agreement

1. The MEDEP notes that our decision to not enter into this agreement is based on the following language:

a) XI. Deadlines and Contents of Site Management Plan, p. 45

“Out Year Milestones and Project End Dates shall not be enforceable until they become Near Term Milestones for the current FY in accordance with the terms of Subsection 12.4 below...”

The MEDEP believes Out Year Milestones and Project End Dates, as stated in the Site Management Plan, should be enforceable prior to their becoming Near Term Milestones.

b) 11.7, p. 47

“The Parties recognize that possible bases for extension of the Deadlines [established pursuant to Sections XI and XII], as determined by mutual consent of the Parties, include... (ii) reprioritization of activities under this Agreement caused by changing priorities or new site conditions elsewhere in the Navy; and (iii) reprioritization of activities under this Agreement caused by budget adjustments (e.g., recisions, inflation adjustments, and reduced congressional appropriations).”

While the MEDEP recognizes the Navy’s claimed dependence on congressional appropriations the Department takes note that if the State sues any agency of the federal

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government under section 107 of CERCLA the judgment is paid from the Judgment Fund which is fully funded. Moreover, Maine is concerned primarily solely with those sites within the State of Maine. Therefore, we cannot accept Navy priorities shifting to sites outside the State of Maine due to reduced congressional appropriations or other budget adjustments. Moreover, the State believes that the Navy and the Federal Government in general should provide leadership in addressing their environmental responsibilities. Neither the State nor its municipalities are excused from compliance at Superfund Sites due to the failure of elected officials to raise the necessary funds. The federal government too should fully fund its cleanups.

2. II. Definitions, p. 4

Please clarify further how an Interim Remedial Action differs from a Removal Action.

3. III. Parties Bound, p. 9, 10

a) "EPA and the Navy have agreed to allow the State a participatory role..."

It is not up to EPA and the Navy to "allow" the State a participatory role. The State's role is mandated by the NCP and CERCLA.

b) "...this Agreement does not establish in the State any rights as a third-party beneficiary."

The State does not necessarily agree that it is not a third-party beneficiary of the FFA (with independent enforcement rights).

c) "...the State has rights and responsibilities under CERCLA that are separate and distinct from this Agreement."

The State's rights separate from this Agreement arise not just under CERCLA but also RCRA and State law.

4. VI. Findings of Fact, Section 6.14, p. 18

"EPA...considers that further site screening for radionuclides is unnecessary."

Does this include screening for worker safety during remedial activities?

5. VIII Statutory Compliance, p. 20, Sections 8.1 and 8.2

The State does not necessarily agree that the FFA will satisfy the Navy's obligations under RCRA especially if the Navy delays deadlines. The State reserves the right to require further corrective action under RCRA as well as under state law.

6. Site Screening Areas/Site Screening Process, p. 22

Please clarify that the Site Screening process will be consistent with the PA/SI/HRS process used at all other sites. Will a scoring or ranking be conducted, and if so, what is the score which brings the site into the RI/FS process?

7. IX. Site Screening Areas/Site Screening Process, 9.6C, p. 23, para 3

Please confirm that Navy is required to provide the schedule to the State at the outset of the 14 day comment period. The FFA does not explicitly state that it is unacceptable to submit work plans to the State after the start of the comment/review period.

This same comment applies throughout the document: Sections 9.7D, 9.7E, 9.10C, 9.11B, 9.11F, 9.12A, 10.2, 10.3, 10.7D, 12.5.

8. IX. Site Screening Areas/Site Screening Process, 9.7, p. 24

Please provide further information regarding the decision to add sites to the RI/FS process. It is difficult to tell from this section if the criteria is a release of hazardous substances, pollutants or contaminants or based on risk.

9. IX. Site Screening Areas/Site Screening Process, Interim Remedial Actions, p. 26

Please distinguish an Interim Remedial Action from a Removal Action.

10. IX. Records of Decision and Plans for Remedial Action, p. 28

Responsible parties at non military Superfund sites are required to address comments, not respond to them. Please provide the rationale for this discrepancy.

11. IX. Records of Decision and Plans for Remedial Action, p. 30

Please describe the consequences should EPA concur with the ROD but DEP does not.

12. 9.19 Construction Completion/Site Completion/EPA Certification, p.34

The Preliminary Closeout Report (PCOR) should include a detailed map that depicts the locations and boundaries of all waste remaining at the site.

13. 9.20 Construction Completion/Site Completion/EPA Certification, p.35

According to the FFA, the FCOR shall include a discussion of institutional controls. Please clarify that this discussion is for review and educational purposes only – the actual institutional control instruments will be separate documents subject to agency review and approval.

14. X. Consultation, 10.2, p. 36

Responsible parties at non military Superfund sites are required to address comments, not respond to them. Please provide the rationale for this discrepancy.

15. XIV. Project Managers, 14.7, p. 57

The State only requires 4, not 5, copies of each Primary and Secondary Document.

16. XIV. Project Managers, 14.9, p. 57

The address for the State should be as follows:

Maine Department of Environmental Protection
Bureau of Remediation and Waste Management
17 State House Station
Augusta, ME 04333-0017
ATTN: Federal Facilities Unit

17. XVIII. Removal and Emergency Actions, 18.4, p. 64

Depending on the emergency, notice of DEP may be required by state law.

18. XX. Dispute Resolution, Section 20.11, p. 69

“Resolution of a dispute in accordance with this Section of the Agreement constitutes a final resolution of any dispute arising under this Agreement.”

Please clarify this statement.

19. XXII. Force Majeure, 22.1, p. 71

DEP does not consider breakage of pipes or equipment sufficient reason to invoke Force Majeure.

20. XXVII. Funding, 27.3, p. 75

“Any requirement for the payment of obligation of funds, including stipulated penalties, by the Navy established by the terms of this Agreement shall be subject to the availability of appropriated funds, and provisions governing the payment of penalties (10 U.S.C. 2703 (e)).”

In October of this year, President Clinton signed the Defense Appropriations Act, enacting Section 8149. Section 8149 states,

"SEC. 8149. None of the funds appropriated in this Act may be used for the payment of a fine or penalty that is imposed against the Department of Defense or a military department arising from an environmental violation at a military installation or facility unless the payment of the fine or penalty has been specifically authorized by law. For purposes of this section, expenditure of funds to carry out a supplemental environmental project that is required to be carried out as part of such a penalty shall be considered to be a payment of the penalty."

Please discuss how this section of the Defense Appropriations Act may affect payment of fines or penalties at the Portsmouth Naval Shipyard.

Site Management Plan

21. 1.0 Introduction, p. 1-1

"The use of a SMP allows for annual adjustment in scheduled activities for reasons such as Federal budgetary constraints..."

As stated previously, the MEDEP objects to delays in schedules based on changes in Federal budget.

22. Appendix A, Executive Summary: The Relative Risk Site Evaluation Concept

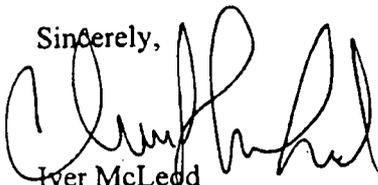
This section is incomplete. Please include the entire Executive Summary.

23. Appendix C, Summary and Detailed Schedules

The schedules are not correct in some places. For instance, the schedule for OU2 indicates regulators were to receive a Response to Comments Letter for the Pilot/Treatability Study Work Plan on 8/6/99. In addition, regulators were to receive the Final Pilot/Treatability Study Work Plan on 10/5/99. Likewise, the schedule for OU3 needs to be updated (test pit work and Draft Feasibility Study comment dates). When will these schedules be corrected/updated?

Please feel free to contact me at (207) 287-8010 if you have any questions.

Sincerely,



Iver McLeod

Project Manager

Bureau of Remediation and Waste Management

pc:

Denise Messier, MEDEP
Larry Dearborn, MEDEP
Katie Zeeman, MEDEP
Dennis Harnish, State of Maine
Meghan Cassidy, USEPA
Marty Raymond, PNS
Linda Klink, TiNUS
Debbie Cohen, TiNUS
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Ken Munney, USFWS
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Phil McCarthy, RAB
Jack McKenna, RAB
Onil Roy, RAB
Roger Wells, RAB
Mary Menconi, RAB
Seacoast Anti-Pollution League, TAG Group
Carolyn Lepage, TAG Advisor
Claire McBane, NH F&W
File