

RESPONSES OF THE PARTIES
TO THE PUBLIC COMMENTS
TO THE FEDERAL FACILITY AGREEMENT
FOR NAVAL AIR STATION MOFFETT FIELD, CALIFORNIA
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1. Several commenters suggested that the clean-up of Naval Air Station Moffett Field (NAS Moffett) be handled in a regional context, with state and federal officials working in-coordination with private industry to address the sites at NAS Moffett in coordination with those south of NAS Moffett.

The clean-up of NAS Moffett and the clean-up of the regional groundwater plume from the Middlefield-Ellis-Whisman (MEW) Superfund site are each being overseen by the Environmental Protection Agency (EPA), Region IX, and the California Department of Health Services (DHS) and the California Regional Water Quality Control Board (RWQCB), San Francisco Bay Region, representing the State of California. The regulatory agencies are carefully reviewing clean-up plans for both NAS Moffett and the regional groundwater plume from the MEW Superfund site in order to assure that the clean-up for each site is consistent with the other.

2. Several commenters suggested amending the Federal Facility Agreement (FFA) for NAS Moffett to provide for accelerated response actions, including the identification and control of sources of contamination at NAS Moffett. Some of these commenters suggested that the accelerated response actions would be a means to facilitate the clean-up of the regional groundwater plume at the MEW Superfund site.

The United States Department of the Navy, as part of its obligations under the FFA, has agreed to identify and control the sources of contamination at NAS Moffett. In response to public comments regarding identification and control of sources, the Navy has agreed to amend the FFA to include a schedule that provides for the implementation of source control actions as soon as practicable. See, Attachments 4 and 5 to the FFA. Soil analyses and the removal of abandoned and potentially leaking underground storage tanks are currently underway. Potential vertical conduits (abandoned wells) are being located and destroyed in compliance with applicable laws and regulations. The Navy has focused its current investigation efforts on the area of NAS Moffett nearest the regional groundwater plume from the MEW Superfund site. The Navy's investigations will lead to response actions facilitating the efforts of the potentially responsible parties (PRPs) at the MEW Superfund site to remediate the regional groundwater contamination. This systematic approach is necessary because a source control of any groundwater plume undertaken without sufficient information regarding the source, extent and chemical constituents of the contamination could risk spreading the contamination, resulting in a more complicated clean-up and in an increase in the time and expense of the remediation of the groundwater plume.

3. Several commenters noted that the clean-up of NAS Moffett should begin as soon as technically possible (and particularly before

1995). The commenters further suggested that the FFA should provide opportunities to accelerate the clean-up at NAS Moffett, rather than provide grounds for extending the schedule for remediation.

The Parties to the FFA agree that groundwater clean-up efforts at NAS Moffett should begin as soon as practicable. To that end, the Parties have amended the FFA to provide enforceable schedules for the performance of certain source control measures before 1995. In addition, the Navy has committed to undertake significant clean-up activities before 1995. For example, the FFA's schedules provide for the closing of abandoned wells located throughout NAS Moffett within the next two years. The FFA schedules also provide for the taking of interim control measures to prevent any further contamination of the groundwater from Navy sources. The source control measures should allow the PRPs at the MEW Superfund site to install an effective and environmentally sound regional groundwater extraction and treatment system. The schedules incorporated into the FFA provide maximum time limits for completion of the required tasks. The Parties may perform the tasks and submit or review the required documents within shorter time periods.

4. A commenter expressed concern over the definition of the regional groundwater plume from the MEW Superfund site, inquiring particularly as to whether that plume may affect the City of Sunnyvale.

The Navy's Site Investigations and those of the PRPs at the MEW Superfund site have defined the approximate boundaries of the regional groundwater plume from the MEW Superfund site. The Navy will continue to monitor that portion of the plume underlying NAS Moffett during Phase 2 of its Remedial Investigation (RI) and will continue to more precisely define and monitor the extent of the plume. The regional groundwater plume from the MEW Superfund site is migrating in a northerly direction, away from the City of Sunnyvale. As a result, it should have no impact on the City of Sunnyvale.

5. A commenter suggested that storm drains located on NAS Moffett be monitored during the clean-up in order to ensure that the treatment and discharge of effluent does not have an adverse impact on off-site water treatment plants or on the San Francisco Bay.

As part of the Management Plan required by the FFA, the Navy will conduct detailed studies of the vertical and horizontal conduits, which include the storm drains. The studies will determine the nature, source and extent of contaminants, if any, that might be migrating through the storm sewers. Based on the results of this study, the Navy will undertake appropriate response actions. At present, as part of its clean-up of NAS Moffett, the Navy does not intend to discharge any effluent, treated or otherwise, into storm drains. Any decision to discharge effluent,

treated or otherwise, would only be made as part of the Remedial Investigation/Feasibility Study (RI/FS) process and would receive public comment and regulatory review. The RI/FS process will ensure that any discharge into the storm drains would only be allowed if it were protective of human health and the environment. If effluent, treated or otherwise, were to be discharged into storm drains, such discharge would have to comply with all appropriate discharge limitations and monitoring requirements of the Federal Water Pollution Control Act (which would also be applicable or relevant and appropriate requirements (ARARs) under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)).

6. Two commenters noted that the regulatory agencies appeared to have traded away their enforcement authority over NAS Moffett in exchange for the Navy agreeing to enter into the FFA.

The Parties recognize that absent an FFA, disputes among the Parties could lead to lengthy administrative or judicial enforcement actions. The consultation and dispute resolution processes in the FFA are designed to quickly focus the Parties' attention on any dispute and to resolve any disputes expeditiously, without resorting to the time consuming administrative and judicial enforcement processes. See, Sections 9 (Consultation with EPA, DHS and RWQCB) and 10 (Resolution of Disputes) of the FFA. The consultation process establishes a framework for obtaining regulatory agency

concurrences on the Navy's technical documents. Moreover, the FFA places EPA in the role as the ultimate decision-maker in the dispute resolution process. The regulatory agencies view the consultation and dispute resolution scheme set forth in the FFA as an effective and enforceable means to ensure the Navy's compliance with CERCLA and with the terms and conditions of the FFA.

In exchange for the Navy's agreement to enter into the FFA, the regulatory agencies provided the Navy with a limited covenant not to sue. See, Section 25 (Covenant Not to Sue and Reservation of Rights) of the FFA. The covenant not to sue covers only currently known releases or threatened releases that are within the scope of the FFA and that are the subject of any RI/FS to be conducted pursuant to the terms of the FFA. Should the Navy violate a term or condition of the FFA, the regulatory agencies retain their rights to pursue administrative or judicial enforcement actions, concerning releases or threatened releases that are not part of an RI performed pursuant to the the terms of the FFA. An example of such a release would be a release or threatened release that becomes known after an RI/FS required by the FFA is completed. Also, the covenant not to sue pertains only to a release or threatened release of a hazardous substance that will be adequately addressed by a remedial action provided for in the FFA. The regulatory agencies will narrowly construe the application of the covenant not to sue in Section 25 of the FFA.

In addition, the FFA specifically provides that EPA, DHS or RWQCB may exercise any administrative, legal or equitable remedies available to each to require the Navy to take additional response actions, should previously unknown conditions or information demonstrate the need for such actions. Also, the regulatory agencies may require additional response actions if the actions called for by the FFA are no longer protective of human health or the environment. See, Section 25.1 of the FFA.

EPA may assess, and DHS or RWQCB, acting on behalf of the State of California, may recommend that EPA assess, a stipulated penalty against the Navy in the event that the Navy fails to submit a draft final primary document pursuant to the appropriate timetable or deadline, or fails to comply with a term or condition of the FFA relating to an operable unit or final remedial action. See, Section 26 (Stipulated Penalties) of the FFA. The Parties have amended Section 26 to clarify that the section applies to the enforceable deadlines for the Navy's submission of draft final primary documents. Under the terms of the FFA, EPA may assess a stipulated penalty in an amount not to exceed \$5,000 for the first week (or part thereof) and \$10,000 for each additional week (or part thereof) that the failure occurs. In addition to the enforcement powers of the regulatory agencies, any person may be able to seek to enforce certain provisions of the FFA pursuant to the citizen-suit provision of CERCLA, 42 U.S.C. § 9659.

7. Several commenters recommended that the Parties amend the FFA to more clearly define remediation goals and the ARARs for the clean-up at NAS Moffett. Some commenters also sought amendments to the FFA making clean-up goals and ARARs more enforceable.

The Navy agrees to conduct all investigations, remedial actions and removal actions at the site in a manner consistent with the National Oil and Hazardous Substances Pollution Contingency Plan (also known as the National Contingency Plan or the NCP), 55 Fed. Reg. 8665 (March 8, 1990). The NCP requires the Navy, as part of the RI/FS process, to identify remedial action objectives, preliminary remediation goals, remediation goals, as well as ARARs. Consistent with the requirements of the NCP, the Navy will establish remedial action objectives specifying contaminants and media of concern, potential exposure pathways and remediation goals. See, NCP, 55 Fed. Reg. at 8713. The Navy will develop preliminary remediation goals based on readily available information, such as chemical-specific ARARs or other reliable information. The Navy then will modify the preliminary remediation goals, as necessary, during the RI/FS. The Navy will establish final remediation goals, specifying the acceptable exposure levels that are protective of human health and the environment, by considering ARARs and other factors.

The Navy will determine the ARARs based upon an analysis of the requirements that are applicable or relevant and appropriate to the specific circumstances and actions contemplated at NAS Moffett. The NCP requires attainment of ARARs during the implementation of a remedial action, at the completion of a remedial action and to the extent practicable, considering the exigencies of the situation, during removal actions. See, NCP, 55 Fed. Reg. at 8741. Section 9.6 of the FFA establishes the process for the identification of ARARs for any remedial action taken at NAS Moffett. This process requires the Parties to cooperate in the ARAR identification stage and acknowledges that ARAR identification is an iterative process and that the Navy must re-examine potential ARARs throughout the RI/FS, until a Record of Decision (ROD) is signed.

Pursuant to the terms of the FFA, the Navy agrees to perform all remedial actions consistent with CERCLA and the NCP. The Parties have the ability to enforce this obligation. In addition to the regulatory agencies' enforcement powers, any person may seek to enforce certain provisions of the FFA pursuant to the citizen-suit provision of CERCLA. In addition, Section 121(e)(2) of CERCLA establishes a mechanism for a State to enforce any ARAR. Further, Section 121(f)(3) of CERCLA provides an opportunity for the State to concur in or dissent from any remedial action selected by the Navy that waives compliance with an ARAR pursuant to Section 121(d)(4) of CERCLA.

In light of the lengthy and complex process for establishing clean-up goals and ARARs, it is not possible to identify with greater specificity the clean-up objectives and ARARs in the FFA.

8. Several commenters noted that the Technical Review Committee (TRC) had never met and asked that it be activated immediately.

The TRC for NAS Moffett held its first meeting on February 12, 1990. Meetings will be conducted once every 90 days, or as appropriate. The Navy planned to convene the TRC before the end of calendar year 1989. However, the October 1989 earthquake and subsequent complications delayed matters until the beginning of 1990.

The TRC is chaired by the Commanding Officer, NAS Moffett, and is comprised of designated representatives from the following member agencies and organizations: the Department of the Navy, National Aeronautics and Space Administration (NASA), Ames Research Center, EPA, Region IX, DHS, RWQCB, Bay Area Air Quality Management District, Santa Clara County Board of Supervisors, Mountain View Chamber of Commerce, Sunnyvale Chamber of Commerce, League of Women Voters, Silicon Valley Toxics Coalition, and the MEW Area Study Group.

9. A commenter stated that he had requested copies of the technical data related to the RI and clean-up activities at NAS Moffett but that he had never been provided a copy of those documents.

Due to the enormous volume of documents pertaining to the RI/FS at NAS Moffett (most of which have large engineering maps and fold-out pages), the Navy is unable to provide free photocopies of this material to all requesters. However, in compliance with the public participation requirements of Section 117 of CERCLA, these documents are available for review by the public at the Mountain View Public Library. In addition, interested persons may make an appointment to review this material at the offices of the Public Works Environmental Division at NAS Moffett. Finally, a request for these records can be made pursuant to the Freedom of Information Act or the California Public Records Act.

10. With respect to the regional groundwater plume from the MEW Superfund site, several commenters wanted to modify the FFA to include provisions that would require the following: (1) coordination of the Navy's RI with remedial activities undertaken by the PRPs at the MEW Superfund site, (2) joint remedial design/remedial action by the Navy and the PRPs at the MEW Superfund site to address merged plumes, (3) cost allocation and dispute resolution between the Navy and the PRPs at the MEW Superfund site, (4) access by the PRPs for the MEW Superfund site to Moffett, (5)

determination of ARARs, remediation technology and remediation goals that are consistent with EPA's ROD for the MEW Superfund-site, and (6) coordination of termination rights and obligations. One commenter offered to enter into the FFA as a Party, or to enter into a separate agreement with the Navy, the regulatory agencies and the other PRPs for the MEW Superfund site, in order to facilitate the coordination of the overall clean-up efforts.

The Parties to an FFA are the federal department or agency (in this case, the Navy), EPA, and the State (in this case, DHS and RWQCB representing the State of California). Therefore, an FFA cannot address all potential issues relating to non-Parties. The Navy has been and is willing to negotiate an agreement with the parties responsible for the groundwater contamination flowing from the MEW Superfund site. Such an agreement would resolve the issues raised by the commenter.

To the extent that the Navy will be addressing specific sources within the regional groundwater plume flowing from the MEW Superfund site, the FFA's consultation provisions give EPA and the State the opportunity to identify ARARs and appropriate remediation goals as well as the ability to comment on proposed remediation technology. Moreover, as the clean-up of both sites is being overseen by EPA and the State, the regulatory agencies will be able to ensure that ARAR determinations and remediation goals strategies and technologies will not conflict with one another.

11. A commenter suggested that the deadline for closing abandoned wells at NAS Moffett be accelerated from the proposed August 1991 date to August 1990.

Deadlines for initiation and completion of field work have been added to Attachment 3 of the FFA to ensure timely closure of abandoned wells. The estimated dates in Attachment 3 to the FFA have been changed to reflect more accurately the time that is necessary to evaluate and close the wells. Most of the unknowns (for example, the location, depth or condition of the well) have been factored into the estimated dates so completion of the work should not go beyond these new dates. In June 1990, the Navy started field work to close the abandoned wells at NAS Moffett. Based on current schedules, the three known wells should be sealed by October 1990, and all associated reports submitted by August 1991. Investigation to locate the presence of suspected wells will begin in October 1990.

12. One commenter inquired as to who was responsible for coordinating the NAS Moffett clean-up effort with the Bay Area Air Quality Management District (BAAQMD).

The BAAQMD is a member of the Technical Review Committee for NAS Moffett. As such, the BAAQMD receives copies of major reports generated in the course of the RI/FS. In addition, under the FFA,

the State will solicit the BAAQMD's applicable or relevant and appropriate requirements for the Navy's clean-up efforts at NAS Moffett.

13. Some commenters suggested that the FFA include a provision in which the Navy agrees to undertake appropriate interim clean-up measures during the development of the Feasibility Study and the Proposed Plan.

In response to these comments, the Navy has agreed to amend the FFA to include a schedule for undertaking certain removal actions. Schedules for these removal actions have been incorporated into the FFA as Attachments 4 and 5.

14. Some commenters stressed that the FFA should require the Navy to clean up NAS Moffett consistent with what would be required of a private party. Specifically, these commenters sought assurances in the FFA that the Navy will proceed with the remedial actions at NAS Moffett according to time schedules and substantive requirements that are consistent with those required of private parties.

The Navy must proceed with all response actions at NAS Moffett in a manner consistent with the requirements placed on private parties. Section 120(a)(1) of CERCLA provides that each federal

department or agency shall be subject to, and comply with, CERCLA in the same manner and to the same extent, both procedurally and substantively, as any non-governmental entity. The Navy agrees to perform all response actions at NAS Moffett consistent with CERCLA and the NCP. Therefore, the standards placed on the Navy are the same as would be required of any private party performing a CERCLA response action.

The FFA, as amended in response to public comments, requires the Navy to investigate the release or threatened release of hazardous substances at NAS Moffett and to perform any appropriate response action in a time frame that is consistent with any that would be required of a private party clean-up. The schedules attached to the FFA reflect the reality that the Navy is addressing a large, complex contamination situation at NAS Moffett. The clean-up of the entire base is governed by the FFA. The base actually consists of nineteen disparate areas of contamination, making "base-wide" remediation a formidable task. In response to the public comments, the Parties have amended the FFA to include expedited schedules for the performance of the RI/FS activities and specified certain removal actions to be undertaken at NAS Moffett. In addition, the Parties have incorporated enforceable deadlines into the Attachments.

15. A commenter proposed that the Parties amend the FFA to clarify that: (1) the FFA does not, in and of itself, limit the rights of

the PRPs at the MEW Superfund site to seek judicial review under a consent decree with respect to any issue arising under such decree relating to actions taken by EPA or the Navy pursuant to the FFA; and (2) the FFA does not alter the rights of non-Parties to the FFA to bring an action against the Navy to seek reimbursement for response costs incurred with respect to releases originating at NAS Moffett.

The Navy, EPA and the State of California are parties to the FFA. None of the Parties to the FFA has the legal ability to restrict or expand the jurisdiction of a court with regard to the legal rights, if any, of non-Parties to the FFA.

16. One commenter suggested that the Parties amend the FFA to establish a fixed and enforceable deadline for completion of the final RI/FS, consistent with Section 120(e)(1) of CERCLA, which requires the Administrator of EPA and the State to publish a timetable and deadlines for expeditious completion of such investigation and study.

The duty to publish the timetable and deadlines, pursuant to Section 120(e)(1) of CERCLA, exists independent of the FFA. Therefore, EPA and the State will publish the enforceable schedule for completion of each RI/FS for NAS Moffett. In response to the public comments, the Parties have amended the FFA to establish fixed

and enforceable deadlines for submittal of draft final primary documents. Such documents will become final during the time periods allowed in the consultation section of the FFA.

17. A commenter questioned whether the FFA's estimated schedule for implementation of remedial action complied with Section 120(e)(2) of CERCLA which requires the Navy to commence substantial continuous physical on-site remedial action within fifteen months after completion of the RI/FS.

Section 120(e)(2) of CERCLA requires the Navy to commence substantial continuous physical on-site remedial action within fifteen months after completion of the RI/FS for NAS Moffett. Attachment 3 to the proposed FFA listed estimated dates by which the Navy was to begin remedial construction. These dates were target dates. The enforceable deadlines for initiation of remedial action were to be established pursuant to Section 7.3 of the proposed FFA. That section required the Navy to submit a proposed schedule for the implementation of the selected remedial actions at the site at the time the Navy submits the draft ROD to the regulatory agencies for review. The final schedule for implementation of the remedial actions, therefore, might have differed from the estimated dates specified in Attachment 3 to the proposed FFA.

To avoid any potential conflict between the estimated dates and the enforceable deadlines for the initiation of remedial action, and to remove any ambiguity concerning Section 120(e)(2) of CERCLA, the Parties have amended the FFA by: (1) deleting the estimated dates for the initiation of remedial construction; and (2) requiring the Navy to submit the proposed schedule for implementation of remedial action at the time it submits the draft Proposed Plan to the regulatory agencies. By providing for the submittal at the time of the draft Proposed Plan rather than the draft ROD, the amended FFA allows the schedule to be offered for public review and comment along with the Proposed Plan for remedial actions at NAS Moffett.

18. One commenter expressed concern that the FFA contained no fixed and enforceable schedule for the completion of the remedial actions at NAS Moffett. The commenter cited Section 120(e)(4) of CERCLA as requiring such a schedule.

Section 120(e)(4) of CERCLA requires "interagency agreements" entered into pursuant to Section 120(e)(2) of CERCLA, to include, among other provisions, a schedule for the completion of each remedial action reviewed in that interagency agreement. The interagency agreement to which Section 120(e)(2) of CERCLA refers, however, is the agreement required by CERCLA after completion of each RI/FS for the site. The Parties are entering into the FFA for NAS Moffett before completion of each RI/FS. Therefore, CERCLA does

not require that the elements specified in Section 120(e)(4) of CERCLA for interagency agreements, which are entered into post-RI/FS, to be included in the FFA at this time. As stated above, upon completion of the RI/FS, and according to Attachment 3 to the FFA, the Navy will publish a Proposed Plan that will include a schedule for remedial actions to be implemented at the site. Once final, the schedule for completion of the remedial action at NAS Moffett will be incorporated in and made an enforceable part of the FFA.

19. Two commenters stated that the FFA's document review and dispute resolution provisions were too lengthy.

The schedules attached to the FFA reflect the reality that the Navy is addressing a large, complex contamination situation at NAS Moffett. The Parties agreed to document review periods based on actual past experiences which required review of complex engineering reports and technical documents. The Parties will consult as quickly as possible. Further, the initiation of the dispute resolution process does not automatically stop all remedial activity at NAS Moffett. See, Section 10 (Resolution of Disputes) of the FFA. The dispute resolution process is designed to avoid even more lengthy administrative or judicial proceedings that might be necessary in the absence of an FFA.

20. A commenter stated that the definition of NAS Moffett should be more clearly delineated. The commenter questioned whether, for example, NAS Moffett includes any facilities presently or formerly operated by NASA.

NAS Moffett is defined as the current boundaries of the Naval Air Station Moffett Field, California. NAS Moffett does not include any facilities presently or formerly operated by NASA.

21. A commenter noted that Section 8.2 of the FFA dealing with additional work provides that no further corrective action will be required. The commenter suggested that this language was overbroad and should be deleted.

Under Section 8.1 of the FFA, the Navy agrees to integrate the corrective action requirements of the Resource Conservation and Recovery Act (RCRA) with the CERCLA remedial actions taken at NAS Moffett. As a result of this integration, the Parties intend that the CERCLA remedial actions will satisfy the RCRA corrective action requirements for a RCRA permit (and for interim status facilities). In addition, Section 8.2 of the FFA provides that the Parties agree that RCRA is an ARAR for the CERCLA remedial actions taken at NAS Moffett. Therefore, the Navy will comply with all applicable and relevant and appropriate RCRA requirements during implementation and upon completion of the CERCLA remedial actions at NAS Moffett.

22. Two commenters suggested that the Parties should amend Section 9.10.4 of the FFA to provide for a procedure by which the regulatory agencies may order additional work without requiring the amendment of a report or the Navy's consent. These commenters expressed concern that modification of a previously finalized report would be inappropriate for addressing new work required, for example, by the discovery of a new source. These commenters also requested clarification that EPA has the right to require further investigations.

Section 120 of CERCLA requires that federal departments or agencies that own or operate facilities that are on the National Priorities List enter into interagency agreements with EPA for the clean-up of those facilities. The FFA will provide an efficient mechanism to address the issues of newly discovered sources of contamination and the need for further investigations. The Parties have concluded that the procedures provided in the FFA adequately address the regulators' ability to require the Navy to perform additional investigation and response activities. By setting forth a specific list of primary and secondary documents, the FFA provides a comprehensive framework for the documents supporting the CERCLA remedial actions at NAS Moffett. The RI/FS reports, for example, are intended to cover all releases of hazardous substances to be addressed under CERCLA.

Should the Navy discover an additional source of contamination, the RI/FS could be modified to investigate and analyze potential remedial actions for that source. Section 9.10.2 of the FFA provides for a modification under such a circumstance. Further, in the event the Parties do not reach consensus on the need for a modification, any Party may raise the issue through the dispute resolution process provided in Section 10 of the FFA. The Administrator of EPA could ultimately resolve any dispute so elevated in accordance with the prerequisites for such a modification as provided for in Section 9.10.3 of the FFA.