

MINNESOTA POLLUTION CONTROL AGENCY  
Ground Water and Solid Waste Division

N91192.AR.000076  
NIROP FRIDLEY  
5090.3a

Agenda Item Control Sheet

Agenda # 16

MEETING DATE: June 26, 1990

APPEARANCE REQUESTED - YES:  NO:  SCHEDULED TIME: 1:45 p.m.

PREPARED BY: Mark Lahtinen DATE MAILED: June 15, 1990  
Steve Shakman

TITLE: Request For Litigation Authority Against U.S. Department Of Defense, U.S. Air Force, U.S. Navy, FMC Corporation, Minnesota Air National Guard And National Guard Bureau To Recover Minnesota Pollution Control Agency Expenses Associated With The Duluth Air Force Base Located In Duluth, St. Louis County And The Naval Industrial Reserve Ordnance Plant Located In Fridley, Anoka County.

Fridley  
CITY

St. Louis, Anoka  
COUNTY

TYPE OF ACTION: Request for Litigation Authority

RECOMMENDED ACTION: Authorization

ISSUE STATEMENT: The Minnesota Pollution Control Agency (MPCA) Commissioner has requested reimbursement of MPCA expenses for oversight at the following U.S. Department of Defense (DOD) Sites: Naval Industrial Reserve Ordnance Plant (NIROP) and the Twin Cities Air Force Reserve Base (TCAFRB). To date, the MPCA expenses have not been reimbursed for these two Sites. Litigation authority against the DOD for failure to reimburse MPCA expenses for the Twin Cities Air Force Reserve Base was granted at the November 28, 1989, MPCA Board meeting. In addition, the former Duluth Air Force Base (DAFB) which is now a Minnesota Air National Guard (MANG) Base is also involved in the investigation and cleanup process under the Minnesota Environmental Response and Liability Act (MERLA). Although a response to the reimbursement request has not yet been received, because of DOD policy on reimbursements it is anticipated that the DOD, U.S. Air Force, MANG and National Guard Bureau will also refuse to make full reimbursement for DAFB. Responsible Parties are liable for reimbursement of all MPCA expenses associated with hazardous waste sites. The Responsible Parties for the NIROP and DAFB will not pay the MPCA for cleanup oversight expenses. Therefore, the MPCA staff recommends that the MPCA Board authorize the Commissioner, at his discretion, to request the Attorney General to commence legal action to recover MPCA expenses from the DOD, U.S. Navy, FMC Corporation, U.S. Air Force, MANG and National Guard Bureau for the NIROP and DAFB Sites.

ATTACHMENTS:

- MPCA Expense Reimbursement Letters
- Definitions

MINNESOTA POLLUTION CONTROL AGENCY  
Ground Water and Solid Waste Division  
Site Response Section

Request For Litigation Authority Against U.S. Department  
Of Defense, U.S. Air Force, U.S. Navy, FMC Corporation,  
Minnesota Air National Guard And National Guard Bureau To Recover  
Minnesota Pollution Control Agency Expenses Associated With  
The Duluth Air Force Base Located In Duluth, St. Louis County And  
The Naval Industrial Reserve Ordnance Plant Located In Fridley, Anoka County

June 26, 1990

ISSUE STATEMENT

The Minnesota Pollution Control Agency (MPCA) Commissioner has requested reimbursement of MPCA expenses for oversight at the following U.S. Department of Defense (DOD) Sites: Naval Industrial Reserve Ordnance Plant (NIROP) and the Twin Cities Air Force Reserve Base (TCAFRB). To date, the MPCA expenses have not been reimbursed for these two Sites. Litigation authority against the DOD for failure to reimburse MPCA expenses for the Twin Cities Air Force Reserve Base was granted at the November 28, 1989, MPCA Board meeting. In addition, the former Duluth Air Force Base (DAFB) which is now a Minnesota Air National Guard (MANG) Base is also involved in the investigation and cleanup process under the Minnesota Environmental Response and Liability Act (MERLA). Although a response to the reimbursement request has not yet been received, because of DOD policy on reimbursement it is anticipated that the DOD, U.S. Air Force, MANG and National Guard Bureau will also refuse to make full reimbursement for DAFB. Responsible Parties are liable for reimbursement of all MPCA expenses associated with hazardous waste sites. The Responsible Parties for the NIROP and DAFB will not pay the MPCA for cleanup oversight expenses. Therefore, the MPCA staff recommends that the MPCA Board authorize the Commissioner, at his discretion, to request the Attorney General to commence legal action to recover MPCA expenses from the DOD, U.S. Navy, FMC Corporation, U.S. Air Force, MANG and National Guard Bureau for the NIROP and DAFB Sites.

I. Background:

The Minnesota Environmental Response and Liability Act (MERLA) Minn. Stat. ch. 115B (1988) provides for reimbursement of Minnesota Pollution Control Agency (MPCA) expenses associated with the investigation and cleanup of the releases at hazardous waste sites.

The salient provisions of Minn. Stat. ch. 115B with respect to reimbursement of MPCA expenses are contained in Minn. Stat. §§ 115B.04, subd. 1(a) (1988) and 115B.17, subd. 6 (1988). Minn. Stat. § 115B.04, subd. 1 provides that:

Except as otherwise provided in subdivisions 2, to 12, and notwithstanding any other provision or rule of law, any person who is responsible for a release or threatened release of a hazardous substance from a facility is strictly liable, jointly and severally, for the following response costs and damages which result from the release or threatened release or to which the release or threatened release significantly contributes:

(a) All reasonable and necessary response costs incurred by the state, a political subdivision of the state or the United States; ...

In summary, Minn. Stat. § 115B.04, subd. 1(a) provides that the MPCA may request a person to reimburse expenses provided that: (1) there is a release or threatened release; (2) there is a facility; (3) the release or threatened release is from the facility; (4) the release or threatened release involves hazardous substances; and (5) the person(s) to whom the request for reimbursement is directed is a Responsible Party (RP).

In addition, Minn. Stat. § 115B.17, subd. 6 provides that reasonable and necessary MPCA expenses including all response costs, and legal and administrative expenses may be recovered in a civil action brought by the Attorney General against the Responsible Parties. Further, recovered MPCA expenses shall be deposited in the Minnesota Environmental Response, Compensation and Compliance Fund (State Superfund).

Minn. Stat. § 115B.17, subd. 6 provides that:

Any reasonable and necessary expenses incurred by the agency or director pursuant to this section, including all response costs, and administrative and legal expenses, may be recovered in a civil action brought by the attorney general against any person who may be liable under section 115B.04 or any other law. The agency's certification of expenses shall be prima facie evidence that the expenses are reasonable and necessary. Any expenses incurred pursuant to section 115B.04 or any other law, including any award of attorneys fees, shall be deposited in the fund and credited to a special account for additional response action as provided in section 115B.20 subdivision 2, clause (b) or (d).

As provided for by Minn. Stat. §§ 115B.04, subd. 1(a) and 115B.17, subd. 6, the MPCA staff routinely requests that Responsible Parties reimburse MPCA expenses associated with the release or threatened release of hazardous substances from hazardous waste sites. The MPCA staff requests reimbursement in the form of an itemized statement of MPCA expenses for a stated period. The itemized expenses include: MPCA staff, legal services, travel, laboratory, and supply expenses which are associated with the hazardous waste site. To support the itemized statement, the MPCA staff maintains detailed records of staff time and other categories of expenses associated with specific hazardous waste sites.

Reimbursement of expenses is usually accomplished through Response Orders by Consent (CO) or through annual billing of MPCA expenses to parties identified in Requests for Response Action (RFRA). COs require reimbursement of all past expenses and annual reimbursement of ongoing expenses. However, CO negotiations do not always result in COs. In these cases, the Responsible Party can conduct response actions in accordance with an issued RFRA and the MPCA staff requests reimbursement of all past expenses in the RFRA and annual reimbursements thereafter.

In cases where there is neither a RFRA nor a CO, MPCA expenses may be recovered in a civil action brought by the Attorney General against the Responsible Parties under Minn. Stat. § 115B.17, subd. 6, as discussed previously.

Where Responsible Parties are agencies of the United States government, it is necessary to demonstrate not only that state law requires reimbursement but also that federal law affirmatively waives the immunity of the United States to such a suit. Absent waiver, the doctrine of sovereign immunity shields the United States from suit by a state or other person. In the cases of the U.S.

Air Force and U.S. Navy facilities addressed by this memorandum, and the Twin Cities Air Force Reserve Base which was the subject of a November 28, 1989, Board resolution, waiver of the government's immunity is found in several provisions of the Comprehensive Environmental response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601, et seq. and the resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901, et seq. Section 9620(a)(1) of CERCLA waives the immunity of government agencies under CERCLA, including expressly the section 9607 provisions authorizing states to recover their costs.<sup>1</sup> As to sites not listed on U.S. Environmental Protection Agency's (EPA) National Priority List<sup>2</sup>, section 9620(a)(4) of CERCLA waives the government's immunity to MERLA and other state laws. To the extent that these facilities are subject to underground storage tank requirements under Subtitle I of RCRA, the sovereign immunity of the federal government has been waived by 42 U.S.C. §§ 6961, 6991(b), and 6991f.

It is beyond the scope of this memorandum to delineate the precise extent of each waiver of immunity. However, in addition to the MERLA provisions cited above, the Attorney General might utilize the following federal and Minnesota laws in seeking recovery of costs from the federal government.

CERCLA: 42 U.S.C. §§ 9607, 9602(a)(1) and (a)(4)  
RCRA: 42 U.S.C. § 6991(h)(6) AND (h)(7)  
Water Pollution Control Act, Minn. Stat. §§ 115.061 and 115.071.

---

1. Copies of all the cited provisions of federal law are included in Attachments to this memorandum.

2. All of the Duluth base and all but one site at the Twin Cities base are not listed on the National Priorities List.

This combination of federal and state authority should bring the federal government into the practice of reimbursing MPCA Superfund expenses, as is regularly done by private and non-federal government entities in this state.<sup>3</sup> From July 1, 1983, the effective date of the MERLA, through June 30, 1989, more than 95 percent of expense reimbursements requested under RFRAs or COs have been paid by private and non-federal government RPs.

The following table shows that the Responsible Parties for the U.S. Department of Defense (DOD) hazardous waste sites (Sites) listed below have not reimbursed MPCA expenses despite requests for reimbursement.

<u>Site</u>	<u>Responsible Parties</u>	<u>Original Due Date</u>	<u>Not Reimbursed Amount</u>
Duluth Air Force Base	U.S. Air Force, DOD, National Guard Bureau Minnesota Air National Guard	---	\$46,868.28
Naval Industrial Reserve Ordnance Plant (NIROP)	U.S. Navy, DOD, FMC Corporation	April 28, 1987	\$59,894.48
*Twin Cities Air Force Reserve Base (TCAFRB)	U.S. Air Force Reserve (DOD)	December 28, 1989	\$77,211.47
		Total	<u>\$183,974.23</u>

\*Litigation authority authorized at the November 28, 1989, MPCA Board meeting.

3. It should be noted that the United States Army is fully reimbursing state expenses related to the Twin Cities Army Ammunition Plant Site in New Brighton/Arden Hills. This reimbursement is covered in a 1987 agreement between the Army, U.S. EPA and the MPCA.

## II. Discussion:

The status of the Sites with regard to reimbursement of MPCA expenses is as follows:

### Naval Industrial Reserve Ordnance Plant (NIROP)

A RFRA was issued on May 22, 1984, to the U.S. Navy and FMC Corporation (FMC). The MPCA Commissioner first requested reimbursement of MPCA expenses from the U.S. Navy in a February 27, 1987, reimbursement letter. MPCA expenses at that time totaled \$30,271.60 for the period January 1, 1983, to December 31, 1986. The U.S. Navy did not respond to that reimbursement request and the MPCA staff did not pursue the issue further at that time because of negotiations with DOD for the Twin Cities Army Ammunition Plant (TCAAP) Federal Facility Agreement (FFA).

A second reimbursement letter was sent to the U.S. Navy on March 31, 1989, for expenses totaling \$52,637.61 for the period January 1, 1983, to December 6, 1988. The U.S. Navy responded to that request by referring to a Defense-State Memorandum Of Agreement (DSMOA) that was being developed.

The DSMOA would limit reimbursement of the MPCA expenses to one percent of the U.S. Navy's post-SARA (Superfund Amendments and Reauthorization Act, October 17, 1986), costs including future Remedial Action expenses. Under this scenario, the MPCA would lose the pre-SARA expenses (\$26,759.40) and could also lose money dependent upon the ultimate cost of remedial action.

The MPCA Commissioner sent a third notice letter (for calendar year 1989 expenses) to the U.S. Navy on June 29, 1989. The U.S. Navy responded in an August 2, 1989, letter again referring to the DSMOA. On May 15, 1990, another reimbursement request was sent to the DOD for MPCA expenses, for the period January 1, 1983, through December 19, 1989, now totaling \$59,894.48. We have not yet received a reply.

The FMC Corporation is also a Responsible Party for NIROP named in the May 22, 1984, RFRA, and is also considered jointly and severally liable for the reimbursement of MPCA expenses for NIROP. A copy of each of the above reimbursement letters was also sent to FMC. FMC has responded to the NIROP reimbursement requests, and has taken the position that, to quote the most recent (May 23, 1990), response letter from FMC "... the responsibility is appropriately the Navy's and not the company's." FMC has, however, reimbursed the MPCA for expenses for the FMC site, which is adjacent to the NIROP site, as part of an October 28, 1986, CO between the MPCA and FMC.

Former Duluth Air Force Base

The U.S. Air Force contacted the MPCA staff in 1983 regarding an investigation that had been undertaken by its consultants at the Duluth Air Force Base (DAFB) under the Installation Restoration Program (IRP). The DAFB ceased as an active U.S. Air Force Base, and responsibility for DAFB was transferred to the National Guard Bureau and Minnesota Air National Guard (MANG) in 1986, with the environmental responsibility for the various sites at the base split between the U.S. Air Force and MANG.

A RFRA has not yet been issued to either the U.S. Air Force, MANG or National Guard Bureau for the DAFB. MPCA staff has been involved with both branches of the military regarding the investigations at their respective sites on the DAFB. The remedial investigations at the DAFB are close to completion for all known sites. A statement requesting reimbursement of expenses incurred by MPCA staff, for work conducted with regards to DAFB, was mailed to DOD on June 7, 1990. It is anticipated that DOD will act upon this request for reimbursement as it has regarding the equivalent statements for NIROP and TCAFRB.

Other Federal Facilities

The MPCA staff has received differing responses for two other DOD facilities: Twin Cities Army Ammunition Plant (TCAAP) and the Twin Cities Air Force Reserve Base. At TCAAP the MPCA, the U.S. Army, and the U.S. EPA entered into a three party Federal Facilities Agreement (FFA) which became effective on December 31, 1987. Under the FFA the U.S. Army has agreed to reimburse the MPCA for all past and future response expenses including overhead. The U.S. Army has been billed under the FFA and payment is anticipated, since the agreement to reimburse the state predated DOD policy on reimbursement (DSMOA) by nearly two years.

The TCAFRB, unlike TCAAP, has not been cooperative. From October 1988, through September 1989, MPCA staff was involved with staff from EPA in trying to negotiate a three party Interagency Agreement (IAG) with representatives of the U.S. Air Force Reserve. The three party IAG was essentially agreed to, except for the main issue of reimbursement of expenses for MPCA staff, which was deferred to the Office of the Deputy Assistant Secretary of Defense for the Environment (ODASD/E). ODASD/E indicated a willingness to reimburse Minnesota to the extent stated in the model DSMOA (Fed. Reg., Vol. 54, No. 144, pp. 31358, July 28, 1989), namely up to 1 percent of the investigation and cleanup costs at the Site for expenses incurred since October 17, 1986, when SARA was enacted.

The estimated total costs for all of the work funded under the Defense Environment Restoration Program (DERP) at the TCAFRB was estimated to be \$5 million at most. At the 1 percent reimbursement level, the proposed reimbursement level of \$50,000 would have presented the MPCA with a shortfall of about \$25,000 compared to the already incurred expenses (see table above). Substantial additional oversight expenses are anticipated which would not be reimbursed under the DOD's proposal. As a result, the possibility of achieving an agreement on reimbursement of expenses disappeared since all future expenses would not be reimbursed. Consequently, the MPCA Board issued a RFRA to the U.S.

Air Force on November 28, 1989. The RFRA included a requirement to reimburse the MPCA, for expenses incurred through September 1989, in the amount of \$77,211.47 by December 28, 1989. As of May 30, 1990, no response had been obtained from the DOD.

The RFRA issued to the U.S. Air Force November 28, 1989, also authorized the MPCA Commissioner to request the Attorney General to commence legal action to recover MPCA expenses for the TCAFRB site.

From the above discussion it is evident that DOD has chosen not to reimburse the State Superfund for expenses incurred by MPCA staff at the DOD facilities of DAFB, NIROP and TCAFRB. As the above table shows, the cumulative total for these facilities was \$183,974.23 by 1989.

It appears that litigation is needed to obtain DOD, U.S. Air Force, U.S. Navy, FMC, MANG and National Guard Bureau reimbursement of the MPCA expenses for NIROP and DAFB. Accordingly, the MPCA staff recommends that the MPCA Board authorize the MPCA Commissioner, at his discretion, to request the Attorney General to commence legal action to recover MPCA expenses from the Responsible Parties for the identified federal and state facility Sites.

### III. Conclusions:

The Responsible Parties have failed to reimburse MPCA expenses for the Sites as required by Minn. Stat. §§ 115B.04, subd. 1(a) and 115B.17, subd. 6. and other laws. Therefore, the MPCA staff recommends that the MPCA Board authorize the MPCA Commissioner, at his discretion, to request the Attorney General to commence legal action to recover MPCA expenses from the Responsible Parties for the Sites.

### IV. Recommendation:

The MPCA staff recommends that the MPCA Board adopt the Suggested Staff Resolution.

SUGGESTED STAFF RESOLUTION

WHEREAS, in accordance with the requirements of Minn. Stat. §§ 115B.17, subd. 1 and 115B.18, subd. 3 (1988), the Minnesota Pollution Control Agency has issued a Request for Response Action for the release or threatened release of hazardous substances to U.S. Department of the Navy and FMC Corporation with respect to the Naval Industrial Reserve Ordnance Plant;

WHEREAS, in accordance with the requirements of Minn. Stat. § 115B.04, subd. 1(a) the Minnesota Pollution Control Agency staff has requested reimbursement of reasonable and necessary Minnesota Pollution Control Agency expenses for the Naval Industrial Reserve Ordnance Plant;

WHEREAS, the U.S. Department of the Navy, FMC Corporation and the U.S. Department of Defense have failed to reimburse the Minnesota Pollution Control Agency expenses for the Naval Industrial Reserve Ordnance Plant pursuant to the Minnesota Pollution Control Agency staff requests for reimbursement;

WHEREAS, in accordance with the requirements of Minn. Stat. § 115B.04, subd. 1(a) the Minnesota Pollution Control Agency staff will be requesting reimbursement of reasonable and necessary Minnesota Pollution Control Agency expenses for the Duluth Air Force Base;

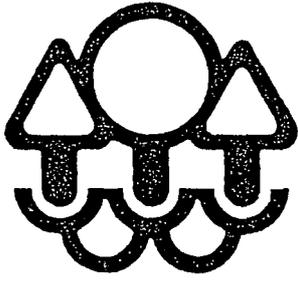
WHEREAS, it is anticipated the U.S. Air Force, U.S. Department of Defense, Minnesota Air National Guard and the National Guard Bureau, as responsible parties for the former Duluth Air Force Base, will fail to reimburse the Minnesota Pollution Control Agency staff requests for reimbursement;

WHEREAS, in accordance with Minn. Stat. §§ 115B.17, subd. 6, and 115.071, subd. 3 reasonable and necessary Minnesota Pollution Control Agency expenses may be recovered in a civil action brought by the Attorney General against any Responsible Party;

NOW THEREFORE, BE IT RESOLVED, that the Minnesota Pollution Control Agency hereby authorizes the Commissioner, at his discretion, to request the Attorney General to commence legal action against the U.S. Department of the Navy, FMC Corporation, U.S. Air Force, the National Guard Bureau, the Minnesota Air National Guard and the U.S. Department of Defense to recover all Minnesota Pollution Control Agency expenses including all response costs and administrative legal expenses with respect to the Naval Industrial Reserve Ordnance Plant and the Duluth Air Force Base.

ATTACHMENT 1

Reimbursement Letters



# Minnesota Pollution Control Agency

CERTIFIED MAIL

FEB 27 1987

Mr. E.J. Cordes, Jr.  
Commander, CEC, U.S. Navy  
Head Facilities Management Department  
Department of the Navy  
Northern Division  
Naval Facilities Engineering Command  
Philadelphia, Pennsylvania 19112-5094

Mr. William Warren  
Legal Counsel  
FMC Corporation  
Northern Ordnance Division  
4800 East River Road  
Fridley, Minnesota 55421

Dear Gentlemen:

Re: Reimbursement of Minnesota Pollution Control Agency  
Expenses

Part V.B.1. of the Request for Response Action (RFRA) issued by the Minnesota Pollution Control Agency (MPCA) Board to the U.S. Navy (Navy) and FMC Corporation (FMC) on May 22, 1984 requires that the Navy and FMC shall reimburse the MPCA for all reasonable and necessary expenses it incurs as a result of MPCA activities to investigate and cleanup releases associated with the Naval Industrial Reserve Ordnance Plant (NIROP) Site. This letter constitutes an itemized statement of MPCA expenses incurred during the period of January 1, 1983 to December 31, 1986.

ITEMIZED STATEMENT OF MPCA EXPENSES FOR THE PERIOD  
January 1, 1983 to December 31, 1986

<u>ITEM</u>	<u>MPCA EXPENSES</u>
MPCA Staff	\$20,878.24
Legal Service Expenses	\$ 16.80
Travel	\$ 407.41
Laboratory	\$ 8,966.49
Other	\$ 2.66
Total MPCA	\$30,271.60

Phone: \_\_\_\_\_

Mr. E. J. Cordes, Jr.  
Mr. William Warren  
Page 2

FEB 27 1987

The payment should be forwarded to John Retzer, Accounting Director, in the required amount payable to the Minnesota Pollution Control Agency, 520 Lafayette Road, St. Paul, Minnesota 55155 (please also carbon copy Mark Lahtinen, MPCA Project Manager to your reimbursement letter). You are hereby notified that if the Responsible Parties fail to submit the above required payment within 60 days of receipt of this letter, the MPCA staff may pursue authority to seek reimbursement through legal action.

If you have any questions regarding this matter, please contact Mark Lahtinen of my staff at (612) 297-1806. Thank you for your cooperation.

Sincerely,

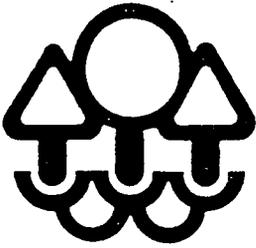
Thomas J. Kalitowski  
Executive Director

TJK/ds

cc: Mr. A. Rhoads, Navy  
Mr. Dave Smith, Navy  
Mr. Richard Cornelius, General Counsel

MIC 2/16  
DMN 2/20/87

Red Line  
BAS 2/24/87



# Minnesota Pollution Control Agency

520 Lafayette Road, Saint Paul, Minnesota 55155

Telephone (612) 296-6300



CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

March 31, 1989

Mr. Michael J. Lukas  
Environmental Engineer  
Department of the Navy  
Northern Division  
Naval Facilities Engineering Command  
Building 72L  
Philadelphia, Pennsylvania 19112-5094

Mr. William Warren  
FMC Corporation  
Northern Ordnance Division  
4800 East River Road  
Fridley, Minnesota 55421

Gentlemen:

Re: Reimbursement of Minnesota Pollution Control Agency  
Expenses

Part V.B. of the Request for Response Action (RFRA) issued by the Minnesota Pollution Control Agency (MPCA) Board to the United States Department of the Navy (Navy) and FMC Corporation (FMC) on May 22, 1984, requests that the Navy or FMC reimburse the MPCA for all reasonable and necessary expenses it incurs as a result of MPCA activities to investigate and cleanup releases associated with the Naval Industrial Reserve Ordnance Plant (NIROP) Site. This letter constitutes an itemized statement of MPCA expenses incurred during the period of January 1, 1983, to December 6, 1988.

ITEMIZED STATEMENT OF MPCA EXPENSES FOR THE PERIOD  
January 1, 1983, through December 6, 1988

ITEM	MPCA EXPENSES
MPCA Staff	\$ 42,870.15
Legal Service Expenses	\$ 16.80
Travel	\$ 412.41
Laboratory	\$ 9,289.59
Other	<u>\$ 48.66</u>
Total MPCA	\$ 52,637.61

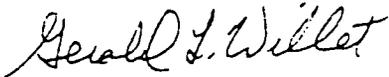
The payment should be forwarded to John Retzer, Accounting Director, in the required amount payable to the Minnesota Pollution Control Agency, 520 Lafayette Road, St. Paul, Minnesota 55155 (please also carbon copy to Mark Lahtinen, MPCA

Mr. Michael J. Lukas  
Mr. William Warren  
Page 2

Project Manager). You are hereby notified that if the Responsible Parties fail to submit the above required payment within 60 days of receipt of this letter, the MPCA staff may pursue authority to seek reimbursement through legal action.

If you have any questions regarding this matter, please contact Mr. Lahtinen of my staff at 612/296-7775. Thank you for your cooperation.

Sincerely,



Gerald L. Willet  
Commissioner

GLW:ds

cc: Joan Tanaka, U.S. Environmental Protection Agency



DEPARTMENT OF THE NAVY

NORTHERN DIVISION

NAVAL FACILITIES ENGINEERING COMMAND  
PHILADELPHIA, PENNSYLVANIA 19112-5094

IN REPLY REFER TO

6280

Ser 4020/142

MAY 22 1989

MAY 24 89

Mr. Mark Lahtinen  
Project Manager  
Minnesota Pollution Control Agency  
520 Lafayette Road  
St. Paul, MN 55155

NA, Ground Water  
Div.

Re: REIMBURSEMENT OF MINNESOTA POLLUTION CONTROL AGENCY EXPENSES

Gentlemen:

We are in receipt of your letter of March 31, 1989 requesting reimbursement for expenses incurred at the Naval Industrial Reserve Ordnance Plant (NIROP) in Fridley, Minnesota. At this time the Navy does not have a way to reimburse states for oversight costs. However, reimbursement for State expenses at Department of Defense (DOD) installations for activities funded under the Environmental Restoration appropriation is being developed by a DOD/State Workgroup. Called a Defense-State Memorandum of Agreement (DSMOA), it would allow DOD to reimburse the State of Minnesota for expenses incurred up to a specified percentage of the total costs of remediation at NIROP Fridley. Minnesota was part of the State Workgroup that developed the DSMOA and is now seeking broad concurrence from the full membership. Once a DSMOA is executed for DOD installations in the State of Minnesota, reimbursement can be made. Mr. Bob Dullinger was an MPCA representative on that workgroup.

In light of the above, we request MPCA defer seeking reimbursement until a DSMOA can be executed between DOD and the State of Minnesota. If you have any questions regarding this matter, please contact Mr. Michael Lukas of my staff at (215) 897-6432.

Sincerely,

C. J. MAYER

Head, Environmental Restoration Branch  
By direction of the Commanding Officer



# Minnesota Pollution Control Agency

520 Lafayette Road, Saint Paul, Minnesota 55155

Telephone (612) 296-6300



CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

June 29, 1989

Mr. C. J. Mayer  
Head, Environmental Restoration Branch  
Department of the Navy, Northern Division  
Philadelphia, Pennsylvania 19112-5094

Mr. William Warren  
FMC Corporation  
Northern Ordnance Division  
4800 East River Road  
Fridley, Minnesota 55421

Gentlemen:

RE: Reimbursement of Minnesota Pollution Control Agency Expenses

This letter is in response to your May 22, 1989, letter to Mark Lahtinen of my staff regarding the Minnesota Pollution Control Agency (MPCA) request for reimbursement of expenses. Part V.B of the Request for Response Action (RFRA) issued by the MPCA Board to the United States Department of the Navy (Navy) and FMC Corporation (FMC) on May 22, 1984, requests that the Navy or FMC reimburse the MPCA for all reasonable and necessary expenses it incurs as a result of MPCA activities to investigate and clean up releases associated with the Naval Industrial Reserve Ordnance Plant (NIROP) Site. In letters dated January 26, 1986, February 27, 1987, and March 31, 1989, MPCA staff or the MPCA Commissioner has requested payment of MPCA expenses for oversight of the NIROP site investigation and cleanup. At this point in time neither the Navy or FMC has reimbursed the MPCA for the requested expenses.

Your May 22, 1989, letter, in response to the March 31, 1989, MPCA request for reimbursement, indicates that the Navy currently does not have a way to reimburse states for their expenses. We are advised by the Minnesota Attorney General's Office that 10 U.S.C. § 27.01(d) provides the mechanism for Navy reimbursement of MPCA costs. We also believe the RFRA is applicable to the Navy under 42 U.S.C. § 9620(a)(4).

In your May 22, 1989, letter, you indicate that a Defense-State Memorandum of Agreement (DSMOA) is being developed which could result in reimbursement of MPCA expenses based on a percentage of remedial action costs. While we recognize that the DSMOA is being developed, it could also be sometime until the DSMOA is executed. Therefore we are again requesting that the Navy and/or FMC, as responsible parties for the NIROP Site, reimburse the MPCA for its oversight expenses as settlement of past RFRA costs. When a DSMOA is executed, the RFRA settlement payment could be subtracted from the amount or percentage agreed upon in the DSMOA.

Mr. C. J. Mayer  
Mr. William Warren  
Page 2  
June 29, 1989

Please remit the payment in the amount requested in my March 31, 1989, request for reimbursement letter within 30 days of receipt of this letter. If the Navy and FMC, as Responsible Parties, fail to submit the required payment, MPCA staff is prepared to pursue authority to seek reimbursement through legal action.

If you have any questions regarding this matter, please contact Mr. Mark Lahtinen of my staff at (612)296-7775.

Sincerely,



Gerald L. Willet  
Commissioner

GLW:ajr

cc: Pete Sanders, U.S. Environmental Protection Agency, Region V  
Steve Vukelich, U.S. Navy, Philadelphia



DEPARTMENT OF THE NAVY

NORTHERN DIVISION

NAVAL FACILITIES ENGINEERING COMMAND  
PHILADELPHIA, PENNSYLVANIA 19112-5094

IN REPLY REFER TO

6280  
Ser 4300/142

JUL 21 1989

JUL 17 1989

Mr. Mark Lahtinen  
Project Manager  
Minnesota Pollution Control Agency  
520 Lafayette Road  
St. Paul, MN 55155

CEPCA, Ground Water  
& Solid Waste Div.

Re: REIMBURSEMENT OF MINNESOTA POLLUTION CONTROL AGENCY EXPENSES

Gentlemen:

Your letter of June 29, 1989 requesting reimbursement for oversight of remedial activities at Naval Industrial Reserve Ordnance Plant (NIROP), Fridley, Minnesota has been referred to Naval Facilities Engineering Command Headquarters for resolution.

A handwritten signature in cursive script, appearing to read "C. J. Mayer", is written above the typed name.

C. J. MAYER  
Head, Environmental Restoration Branch  
By direction of the Commanding Officer

Copy to:  
NAVFACENGCOM (Codes 18, 09C)  
CNO (OP-451)



DEPARTMENT OF THE NAVY

NORTHERN DIVISION

NAVAL FACILITIES ENGINEERING COMMAND  
PHILADELPHIA, PENNSYLVANIA 19112-5094

IN REPLY REFER TO

6280

Ser 4359/1421

AUG 07 89

PCA, Ground Water  
Solid Waste Div.

AUG 2 1989

Mr. Mark Lahtinen  
Project Manager  
Minnesota Pollution Control Agency  
520 Lafayette Road  
St. Paul, MN 55155

Re: REIMBURSEMENT OF MINNESOTA POLLUTION CONTROL AGENCY EXPENSES

Gentlemen:

This letter is in response to your June 29, 1989 letter requesting reimbursement for expenses incurred relating to the site investigation and for clean-up of the Naval Industrial Reserve Ordnance Plant (NIROP) Minneapolis. Since you request payment be handled outside the framework of the Defense-State Memorandum of Agreement (DSMOA), we recommend a three-party Federal Facility Agreement (FFA), also known as a CERCLA IAG.

We will be working on a draft copy of an FFA that incorporates the model language, a "Reimbursement of State Support Services" clause, as well as a complete proposal for non-model provisions. We will forward that to you by September 29, 1989 and then schedule a meeting to discuss the FFA issues.

On July 28, DOD published in the Federal Register the model DSMOA and notified the states that applications may be submitted for these agreements. We still feel this is the best and most expeditious method for you to receive reimbursement.

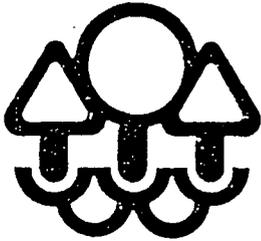
If you have any questions, please contact our Remedial Project Manager, Steve Vukelich at (215) 897-6432.

Sincerely,

C.J. MAYER

Head, Environmental Restoration Branch  
By direction of the Commanding Officer

Copy to:  
NAVFACENGCOM (Code O9C, 18)  
NAVPRO Minneapolis  
EPA Region V



# Minnesota Pollution Control Agency

520 Lafayette Road, Saint Paul, Minnesota 55155

Telephone (612) 296-6300



CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

May 15, 1990

William H. Parker, III, P.E.  
Deputy Assistant Secretary of Defense (Environment)  
206 North Washington Street  
Suite 100  
Alexandria, Virginia 22314

Mr. William Warren  
FMC Corporation  
Northern Ordnance Division  
4800 East River Road  
Fridley, Minnesota 55421

Dear Messrs. Parker and Warren:

RE: Reimbursement of Minnesota Pollution Control Agency  
Expenses - January 1, 1983, through December 19, 1989

Part V.B. of the Request for Response Action (RFRA) issued by the Minnesota Pollution Control Agency (MPCA) Board to the United States Department of the Navy (Navy) and FMC Corporation (FMC) on May 22, 1984, requests that the Navy or FMC reimburse the MPCA for all reasonable and necessary expenses it incurs as a result of MPCA activities to investigate and clean up releases associated with the Naval Industrial Reserve Ordnance Plant (NIROP) Site. This letter constitutes an itemized statement of MPCA expenses incurred during the period of January 1, 1983, through December 19, 1989, and requests payment of these expenses.

## ITEMIZED STATEMENT OF MPCA EXPENSES FOR THE PERIOD January 1, 1983, through December 19, 1989

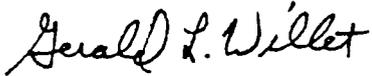
<u>ITEM</u>	<u>MPCA EXPENSES</u>
MPCA Staff	\$50,042.24
Legal Service Expenses	82.80
Travel	431.19
Laboratory	9,289.59
Other	<u>48.66</u>
Total MPCA	\$59,894.48

The payment should be forwarded to John Retzer, Accounting Director, in the required amount payable to the Minnesota Pollution Control Agency, 520 Lafayette Road, St. Paul, Minnesota 55155 (please also carbon copy Mark Lahtinen, MPCA Project Manager). You are hereby notified that if the Responsible Parties fail to submit the above required payment within sixty (60) days of receipt of this letter, the MPCA staff in conjunction with staff of the Attorney General's Office will determine appropriate action against the Responsible Parties.

Messrs. Parker and Warren  
Page 2

If you have any questions regarding this matter, please contact Mark Lahtinen of my staff at 612/296-7775. Thank you for your cooperation.

Sincerely,



Gerald L. Willet  
Commissioner

GLW:kn

cc: James Shafer, NAVFACENGCOM, Philadelphia  
CDR, Jim Chattin, NIROP

FMC Corporation  
Naval Systems Division  
4800 East River Road  
Box 59043  
Minneapolis, Minnesota 55459-0043  
612 571 9201 Telex 170 371

**FMC**

May 23, 1990

RECEIVED

MAY 25 90

Minnesota Pollution Control Agency  
520 Lafayette Road  
St. Paul, Minnesota 55155

MPCA, Ground Water  
& Solid Waste Div.

Attention: Mr. Mark Lahtinen

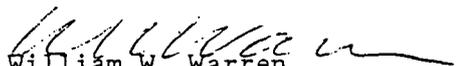
Re: May 15, 1990 letter from MPCA  
Seeking Reimbursement for Expenses  
Pursuant to May 22, 1984 RFRA

Dear Mr. Lahtinen:

This is in response to the subject letter from Commissioner Gerald L. Willet. As you know, the May 22, 1984 RFRA relates to property owned by the United States Navy. The Navy assumed responsibility from the beginning to investigate the property and respond to the RFRA. It has been FMC's position that the responsibility is appropriately the Navy's and not the company's. Therefore, in our opinion, the Navy is the appropriate entity to respond to the subject letter, and we expect they will do so in due course.

Very truly yours,

FMC CORPORATION  
Naval Systems Division

  
William W. Warren  
Counsel

8668H/pg

cc: William H. Parker, III, P.E.  
Deputy Assistant Secretary of Defense (Environment)  
James Shafer, NAVFACENGCOM  
Commander James Chattin, NAVPRO



# Minnesota Pollution Control Agency

520 Lafayette Road, Saint Paul, Minnesota 55155

Telephone (612) 296-6300



P 819 458 064

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

RECEIPT FOR CERTIFIED MAIL  
NO INSURANCE COVERAGE PROVIDED  
NOT FOR INTERNATIONAL MAIL  
(See Reverse)

June 7, 1990

Mr. William H. Parker, III, P.E.  
Deputy Assistant Secretary of Defense (Environment)  
206 North Washington Street  
Suite 100  
Alexandria, Virginia 22314

Sent to	Mr. William H. Parker
Street and No.	206 N. Washington St, #100
P.O., State and ZIP Code	Alexandria, Virginia
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt showing to return and Date Delivered	

Dear Mr. Parker:

RE: Reimbursement Of Minnesota Pollution Control Agency  
Cumulative Expenses Through December 1989

Minnesota Statutes.115B (1988) is the Minnesota Environmental Response and Liability Act (MERLA) under which all state Superfund cleanups are carried forward. Minn. Stat. § 115B.17, subd. 6 of MERLA authorizes the Minnesota Pollution Control Agency (MPCA) to request that any responsible party reimburse the MPCA for all reasonable and necessary expenses it incurs as a result of MPCA activities to investigate and clean up releases associated with any particular site. This letter constitutes an itemized statement of MPCA expenses incurred during the period of April 15, 1986, to December 19, 1990, for all response costs, and administrative and legal expenses incurred by MPCA staff at the Former Duluth Air Force Base. This letter also serves as a request for payment of these expenses.

### ITEMIZED STATEMENT OF MPCA EXPENSES FOR THE PERIOD APRIL 15, 1986, THROUGH DECEMBER 19, 1990

ITEM	MPCA EXPENSES
MPCA Staff	\$ 39,394.10
Legal Services Expenses	\$ 936.00
Travel	\$ 990.63
Laboratory	\$ 4,801.40
Other	\$ 746.15
Total MPCA	\$ 46,868.28

The payment should be forwarded to John Retzer, Accounting Director, in the required amount payable to the Minnesota Pollution Control Agency, 520 Lafayette



ATTACHMENT 2

Definitions

DEFINITIONS

1. "RELEASE", is defined in Minn. Stat. § 115B.02, subd. 15 as follows:

"Release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment which occurred at a point in time or which continues to occur.

"Release" does not include:

(a) Emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, watercraft, or pipeline pumping station engine;

(b) Release of source, byproduct, or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954, under 42 United States Code § 2014, if the release is subject to requirements with respect to financial protection established by the federal Nuclear Regulatory Commission under 42 United States Code § 2210;

(c) Release of a source, byproduct or special nuclear material from any processing site designated pursuant to the Uranium Mill Tailings Radiation Control Act of 1978, under 42 United States Code § 7912(a)(1) or 7942(a); or

(d) Any release resulting from the application of fertilizer or agricultural or silvicultural chemicals, or disposal of emptied pesticide containers or residues from a pesticide as defined in § 18A.21, subd. 25.

2. "FACILITY", is defined in Minn. Stat. § 115B.02, subd. 5 as follows:

"Facility" means:

(a) Any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft;

(b) Any watercraft of any description, or other artificial contrivance used or capable of being used as a means of transportation on water; or

(c) Any site or area where a hazardous substance, or a pollutant or contaminant, has been deposited, stored, disposed of, or placed, or otherwise come to be located.

"Facility" does not include any consumer product in consumer use.

3. "POLLUTANT OR CONTAMINANT", is defined in Minn. Stat. § 115B.02,

Subd. 13 as follows:

"Pollutant or contaminant" means any element, substance, compound, mixture, or agent, other than a hazardous substance, which after release from a facility and upon exposure of, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in the organisms or their offspring.

"Pollutant or contaminant" does not include natural gas, natural gas liquids, liquefied natural gas, synthetic gas usable for fuel, or mixtures of such synthetic gas and natural gas.

4. "HAZARDOUS SUBSTANCE" is defined in Minn. Stat. § 115B.02,

Subd. 8 as follows:

"Hazardous substance" means:

(a) Any commercial chemical designated pursuant to the Federal Water Pollution Control Act, under 33 United States Code § 1321(b)(2)(A);

(b) Any hazardous air pollutant listed pursuant to the Clean Air Act, under 42 United States Code § 7412; and

(c) Any hazardous waste.

"Hazardous substance" does not include natural gas, natural gas liquids, liquefied natural gas, synthetic gas usable for fuel or mixtures of such synthetic gas and natural gas, nor does it include petroleum, including crude oil or any fraction thereof which is not otherwise a hazardous waste.

5. "HAZARDOUS WASTE" is defined in Minn. Stat. § 115B.02, Subd. 9 as follows:

"Hazardous waste" means:

(a) Any hazardous waste as defined in § 116.06, Subd. 13, and any substance identified as a hazardous waste pursuant to rules adopted by the agency under § 116.07; and

(b) Any hazardous waste as defined in the Resource Conservation and Recovery Act, under 42 United States Code § 6903, which is listed or has the characteristics identified under 42 United States Code § 6921, not including any hazardous waste the regulation of which has been suspended by act of Congress.

6. "RESPONSIBLE PERSON" is defined in Minn. Stat. § 115B.03 as follows:

Subd. 1. General Rule. For the purposes of §§ 115B.01, to 115B.20, and except as provided in subds. 2 and 3, a person is responsible for a release or threatened release of a hazardous substance, or a pollutant or contaminant, from a facility if the person:

(a) Owned or operated the facility: (1) when the hazardous substance, or pollutant or contaminant, was placed or came to be located in or on the facility; (2) when the hazardous substance, or pollutant or contaminant, was located in or on the facility but before the release; or (3) during the time of the release or threatened release;

(b) Owned or possessed the hazardous substance, or pollutant or contaminant, and arranged, by contract, agreement or otherwise, for the disposal, treatment or transport for disposal or treatment of the hazardous substance, or pollutant or contaminant; or

(c) Knew or reasonably should have known that waste he accepted for transport to a disposal or treatment facility contained a hazardous substance, or pollutant or contaminant, and either selected the facility to which it was transported or disposed of it in a manner contrary to law.

Subd. 2. Employees and Employers. When a person who is responsible for a release or threatened release as provided in subdivision 1 is an employee who is acting in the scope of his employment:

(a) The employee is subject to liability under § 115B.04 or 115B.05 only if his conduct with respect to the hazardous substance was negligent under circumstances in which he knew that the substance was hazardous and that his conduct, if negligent, could result in serious harm.

(b) His employer shall be considered a person responsible for the release or threatened release and is subject to liability under § 115B.04 or 115B.05 regardless of the degree of care exercised by the employee.

Subd. 3. Owner of Real Property. An owner of real property is not a person responsible for the release or threatened release of a hazardous substance from a facility in or on the property unless that person:

(a) was engaged in the business of generating, transporting, storing, treating, or disposing of a hazardous substance at the facility or disposing of waste at the facility, or knowingly permitted others to engage in such a business at the facility;

(b) knowingly permitted any person to make regular use of the facility for disposal of waste;

(c) knowingly permitted any person to use the facility for disposal of a hazardous substance;

(d) knew or reasonably should have known that a hazardous substance was located in or on the facility at the time right, title, or interest in the property was first acquired by the person and engaged in conduct by which he associated himself with the release; or

(e) took action which significantly contributed to the release after he knew or reasonably should have known that a hazardous substance was located in or on the facility.

For the purpose of clause (d), a written warranty, representation, or undertaking, which is set forth in an instrument conveying any right, title or interest in the real property and which is executed by the person conveying the right, title or interest, or which is set forth in any memorandum of any such instrument executed for the purpose of recording, is admissible as evidence of whether the person acquiring any right, title, or interest in the real property knew or reasonably should have known that a hazardous substance was located in or on the facility.

Any liability which accrues to an owner of real property under §§ 115B.01 to 115B.15 does not accrue to any other person who is not an owner of the real property merely because the other person holds some right, title, or interest in the real property.

An owner of real property on which a public utility easement is located is not a responsible person with respect to any release caused by any act or omission of the public utility which holds the easement in carrying out the specific use for which the easement was granted.