

State of Maine

Department of
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Memorandum

To: Portsmouth Naval Shipyard Restoration Advisory Board
From: Iver McLeod 
cc: Dennis Harnish, Assistant Attorney General
Mark Hyland, MEDEP
Denise Messier, MEDEP
Date: Wednesday, January 21, 1998
Subject: Maine's Position with Regard to the Proposed Federal Facilities Agreement (FFA)

The State of Maine has always had an active involvement with the Portsmouth Naval Shipyard (PNS). In the 1980's, this involvement included regular inspections of PNS for compliance with Maine's hazardous waste, solid waste and oil laws. The environmental staff at PNS, as well as at Northern Division, have placed a high priority on compliance with Maine's environmental laws and have substantially improved the Shipyard's compliance with these laws.

The State also has had a long history of involvement in the cleanup of hazardous substances and petroleum product discharges at PNS. In the early 1990's, the State was involved in an advisory role with respect to a HSWA permit issued to PNS by EPA pursuant to EPA's authority under RCRA (Resource Conservation and Recovery Act). On May 31, 1994, PNS was listed on the National Priorities List and thereafter EPA transferred PNS from its RCRA program to its CERCLA program. CERCLA requires the Navy and EPA to negotiate an interagency agreement (also known as a Federal Facilities Agreement or FFA) for the cleanup of the Shipyard. CERCLA also requires EPA to consider the State's comments with regard to the remedial actions taken at PNS and to invite the State to participate in the FFA.

In November of 1995, EPA issued a formal special notice to the Navy with regards to PNS and initiated negotiations with the Navy and the State concerning a FFA to cover the cleanup of PNS.

As a basis for these negotiations, EPA proffered a draft FFA similar in form to FFAs entered by EPA, the State of Maine and the Navy with regard to the cleanup of the Brunswick Naval Air Station and among EPA, the Air Force and the State of Maine with regard to the cleanup of the Loring Air Force Base. This draft FFA included a schedule of compliance for each operable unit at PNS running through implementation of the remedy and post-closure monitoring. Just as in the FFAs at Brunswick NAS and Loring AFB,

these schedules were to be enforceable, not just by the State of Maine, but also by any citizen of the State.

In the spring of 1996, the Navy informed EPA and the State that it would not proceed with negotiations based upon EPA's draft FFA notwithstanding that the Navy had entered a very similar agreement with regard to Brunswick NAS. The Navy said that this was because Congress had cut back on appropriations for cleaning up federal facilities and the Navy feared that it would not receive full funding for the PNS cleanup. The Navy's position created an impasse among the parties beginning in June of 1996. Because the matter could not be resolved at the regional level and because the Navy was taking the same position with regard to other federal facilities under its jurisdiction, negotiations transpired between the Navy and EPA at the headquarters level. The upshot of these negotiations was that EPA retreated from its initial position of insistence on an agreement similar to the Brunswick NAS FFA and agreed to a draft FFA under which there would be no enforceable deadlines beyond the present calendar year. The deadlines would only become enforceable after PNS and Northern Division received money in its budget for that calendar year to pay for the items covered by those deadlines.

No other state in the nation has been willing to enter such an agreement. This State is not willing to enter such an agreement. We believe that to do so would be to accept a greatly reduced pace for the PNS cleanup because if we entered this FFA there would be no enforceable deadlines to drive the Navy's budgeting process. Instead, the well-intentioned staff at PNS and Northern Division would be authorized to spend on cleanup only such money as trickled down from the Navy's budgeting process. By staying outside the FFA, the State retains its ability, pursuant to its legal authorities, to induce Navy headquarters to budget an adequate amount of funding to clean up PNS in a prompt but thorough manner.

Even though, for the reasons described above, the State is not going to continue to negotiate with regard to the draft FFA, this does not mean that the State is withdrawing from the cleanup of PNS. We remain as committed to that cleanup as ever. Indeed, we see our role as a watchdog to insure that the cleanup process does not flag due to budgetary constraints. The State has legal authorities under which it could impose a cleanup schedule for PNS. By not entering into the FFA, we preserve our right to use these authorities. It is expected, on the basis of past experience with regard to PNS, that should the State use its legal authorities in this manner, our right to do so would be vigorously contested by the Navy in court. So long as adequate cleanup progress is maintained at PNS, it would not be in the interest of any of the parties to engage in such protracted litigation. However, should the DEP become dissatisfied with the pace of the cleanup at PNS, we will consider our legal options. We look to the RAB, as representative of the citizens most directly affected by the PNS cleanup, to give us guidance on this issue.

DEP has recently advised EPA and the Navy that it would be willing, pursuant to a recent EPA policy initiative, to become the lead agency with regard to all or a portion of the PNS cleanup. We believe that the State could do the job of overseeing the PNS cleanup more cheaply and with more flexibility than EPA, thus insuring a quicker, more thorough cleanup at a lower cost. Perhaps this is a matter which can be discussed at a future RAB meeting.

Dennis Harnish, Assistant Attorney General, has indicated that he would be pleased to answer the RAB's questions with regard to any matters raised by this memorandum either over the telephone or at a future RAB meeting. His telephone number is (207) 626-8580.