DATE: September 2, 1994

SUBJECT: Retrocession of Federal Legislative Jurisdiction Over the Cornhusker Army Ammunition Plant - Environmental Issues

REQUESTED BY: The Honorable E. Benjamin Nelson
Governor, State of Nebraska

WRITTEN BY: Don Stenberg, Attorney General
Lauren L. Hill, Assistant Attorney General

The Governor’s office has initiated negotiations with the United States Army regarding retrocession to the State of exclusive legislative jurisdiction over the Cornhusker Army Ammunition Plant ["CAAP"]. See 10 U.S.C. § 2683 (1983). The CAAP is comprised of 11,936.08 fee acres and is located near Grand Island, Nebraska. In a prior opinion, we advised you of the procedures required for effecting retrocession. See Op. Att’y Gen. No. 94-013 (March 9, 1994). You have now asked us to determine whether express language is necessary to clarify that the State, by accepting legislative jurisdiction, is in no way agreeing to accept environmental liability incurred by the federal government due to its use of the CAAP property.

Federal Government Use of the Property

The history of state and federal jurisdiction over the CAAP was set forth in our prior opinion. See Op. Att’y Gen. No. 94-013. Presently, the federal government is vested with exclusive legislative jurisdiction over the property. The following facts...
The Honorable E. Benjamin Nelson  
Page -2-  
September 2, 1994  

regarding the CAAP property were established pursuant to an agreement entered into by the U.S. Environmental Protection Agency, the United States Army, and the Nebraska Department of Environmental Quality:

- The CAAP is a United States Army Armament, Munitions, and Chemical Command facility which was constructed in 1942 for the production of conventional munitions. Alternating between periods of activity and inactivity, it has been in standby status since October, 1973;

- Principal activities conducted at the CAAP included the loading, assembling, and packing of conventional munitions, and the production of ammonium nitrate fertilizer;

- During periods of munitions production, wastewater contaminated with explosives was deposited into fifty-six earthen surface impoundments;

- Extensive groundwater contamination exists beneath the CAAP and in a plume extending downgradient from the CAAP approximately 3-1/2 miles beyond the eastern boundary of the facility;

- Contaminants which have been identified in the ground water include the following explosive compounds: Cyclotrimethylene Trinitramine (RDX), 2-4-6 Trinitrotoluene (2-4-6 TNT), 2-4 Dinitrotoluene (2-4 DNT), 2-6 Dinitrotoluene (2-6 DNT), 1-3-5 Trinitrobenzene (1-3-5 TNB), and Trichloroethylene (TCE);

- Approximately 9-1/2 billion gallons of ground water have been contaminated by explosive compounds originating from the site;


Potential Liability


The federal government asserts that there is "no connection between a change in legislative jurisdiction and any previous environmental liability at [the] CAAP." Letter to Governor Nelson from the Department of the Army, January 24, 1994. The federal government relies on the aforementioned Federal Facilities Agreement when contending that "currently there is a negotiated agreement between the State of Nebraska and the [f]ederal [g]overnment covering environmental restoration efforts on [the] CAAP." Id. We have thoroughly reviewed the Federal Facilities Agreement. We note three concerns with relying solely upon this Agreement to resolve future liability disputes with the federal government. First, the Agreement in no way addresses the retrocession issue. Next, the Agreement addresses only the extent of the federal government's environmental liability for damages caused by groundwater contamination. Finally, the findings of fact and determinations made by the parties within the Agreement are limited by the following disclaimer: "None of these findings are admissions by CAAP or the Army for any purpose, including the extent of CAAP compliance with applicable Federal or State environmental laws, nor are they in any way legally binding on any party." Federal Facilities Agreement at pps. 11 & 16.

A potential for increased liability exists with heightened state involvement in the CAAP property. Based upon this fact and upon the disclaimers contained within the only agreement executed between the state and federal governments with regard to the CAAP, we recommend that, if you choose to effect retrocession of legislative jurisdiction over this property, then express language be contained within both your Executive Order and the United States government's formal offer which specifies that the State of Nebraska in no way accepts responsibility for liability incurred by the federal government due to its operation of the CAAP.
The Honorable E. Benjamin Nelson
Page -4-
September 2, 1994

property.

We note that the January 24, 1994, letter authored by the Chief of the Corps of Engineers' Real Estate Division, does not likely constitute a binding offer of retrocession by the "appropriate federal authority" as required by Neb. Rev. Stat. § 84-168 (Supp. 1993). Therefore, we recommend that any document constituting a formal offer of retrocession by the federal government specify that it is the U.S. Army’s intent to continue to be responsible for any and all environmental actions that need to be undertaken at the CAAP property. If for no other reason, inclusion of such an express provision would clarify the State’s intent in entering into this transaction.

Respectfully submitted,

DON STENBERG
Attorney General

[Signature]

Lauren L. Hill
Assistant Attorney General

24-14-14.op

Approved by:

[Signature]

Attorney General