IG-97-024

AUDIT REPORT

RAPID ACTION

COST SHARING FOR CLEANUP ACTIVITIES AT JPL

JET PROPULSION LABORATORY

June 6, 1997

National Aeronautics and Space Administration

OFFICE OF INSPECTOR GENERAL

National Aeronautics and
Space Administration

Headquarters
Washington, DC 20548-0001

Reply to Attn of: W

June 6, 1997

TO: J/Associate Administrator of Management Systems and Facilities

FROM: W/Acting Assistant Inspector General for Auditing

SUBJECT: Final Rapid Action Report
Cost Sharing for Cleanup Activities at the Jet Propulsion Laboratory
Assignment No. A-HA-97-014
Report No. IG-97-024

The NASA Office of Inspector General (OIG) is auditing environmental cleanup activities at three NASA centers included on the EPA's National Priorities List. This list represents the highest priority sites for clean up under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). During the survey phase of the audit, we identified three conditions at the Jet Propulsion Laboratory (JPL) that warrant management's immediate attention: (1) NASA has paid the full cost of contamination cleanup activities at the JPL, (2) NASA is not effectively pursuing cost sharing arrangements with other responsible parties, and (3) Caltech has a conflict of interest as the manager of NASA's cleanup activities at the JPL and as a potentially responsible party. Accordingly, we are issuing the enclosed rapid action report. The scope of our work for this report was limited to NASA's efforts for sharing cleanup costs with other responsible parties.

Of the total estimated $114 million to clean up JPL and the surrounding communities, NASA could reasonably expect to recover at least $57 million from other responsible parties. In addition, NASA is currently planning to further obligate itself by paying the full costs to clean up contamination detected in a neighboring community, the City of Altadena.

We recommend that NASA pursue cost sharing with all responsible parties, and resolve Caltech's conflict of interest relative to its management of JPL's cleanup activities.

We issued a draft rapid action report on April 10, 1997, and received management's written response on April 29th. Recommendations 2 and 6 are considered closed upon issuance of this final report. However, we believe the comments for recommendations 1, 3, 4, and 5 are nonresponsive. We consider these recommendations significant and will require OIG concurrence before their closure. We would like to reaffirm these recommendations and request the agency to reconsider its response. We would appreciate a response regarding such reconsideration within 30 days of the date of this letter.

If you have any questions or need additional information, please call Mr. Chester Sipsock, Director, Environmental Programs, at 216-433-8960; or Daniel Samoviski, Acting Director, Audit Division A, or me at 202-358-1232.

Robert J. Wesolowski

Enclosure

cc:
S/W. T. Huntress, Jr.
SPJ/K. L. Lindstrom

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COST SHARING FOR CLEANUP ACTIVITIES AT JPL

INTRODUCTION

The Jet Propulsion Laboratory (JPL) began as the Guggenheim Aeronautical Laboratory, owned by the California Institute of Technology, where Caltech began conducting rocket experiments in 1936. The Department of Army obtained ownership of the Laboratory from Caltech in 1945, when it became known as JPL. During this period, Caltech operated JPL and developed several missile systems and satellites for the Army. In 1958, the Department of Defense transferred JPL to NASA, and Caltech has operated the Laboratory as NASA's prime contractor since that time.

As early as 1980, trace levels of certain volatile organic compounds were detected in the groundwater wells of the City of Pasadena and the Lincoln Avenue Water Company, which serves the City of Altadena. To sustain public health and comply with state laws, both entities have shut down contaminated wells, been importing water to make up for lost capacity, and/or installed groundwater treatment plants to mitigate the contamination. Because of JPL's history and upgradient location, the Laboratory is believed to be a major source of the contamination (see Exhibit 2). As a result, both entities have pursued JPL to provide groundwater treatment plants and contribute to past costs incurred due to the contamination.

In October 1992, JPL was placed on the EPA's National Priority List. This list contains the most serious hazardous waste sites that require remedial response under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) Superfund legislation and the National Contingency Plan. Under this Superfund effort, NASA has completed preliminary site assessments, and is currently in the remedial investigation stage. After this stage, the actual remediation will commence, followed by a period of monitoring to ensure the effectiveness of the remediation.

OBJECTIVES, SCOPE, AND METHODOLOGY

OBJECTIVES

One of the audit objectives was to determine whether provisions are being made with other agencies and organizations for sharing environmental cleanup costs. The condition addressed in this report was identified while executing this objective. We will further address this objective in the expanded audit.

SCOPE AND METHODOLOGY

The audit scope was limited to a review of NASA's efforts to obtain cost sharing arrangements with other Potential Responsible Parties (PRPs) for cleanup activities associated with JPL. The OIG interviewed officials from NASA's Office of the General Counsel and Office of Management Systems and Facilities at Headquarters; the NASA Management Office (NMO) at JPL; the JPL Environmental Affairs Office; and the JPL Construction of Facilities Project Office. We also examined applicable laws and regulations, and agency and contractor records related to the audit objective, including:

- Superfund legislation (the CERCLA of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986).
- Federal regulations (the National Contingency Plan).
- The Devil's Gate Temporary Groundwater Treatment Plant, Participation and Settlement Agreement (effective 2/6/90) with the City of Pasadena.
- The Lincoln Avenue Water Company Interim Groundwater Treatment Plan, Participation and Settlement Agreement (Proposed).
- NASA prime contract NAS7-1260 with Caltech, effective September 20, 1993.

AUDIT FIELD WORK

Field work was conducted from September 1996 through February 1997, and was performed in accordance with generally accepted government auditing standards.

OBSERVATIONS AND RECOMMENDATIONS

OVERALL EVALUATION

NASA has been paying the full cost to clean up contamination on-site at JPL since 1991, and has been contributing significantly to the costs to treat contamination detected in neighboring communities since 1990. In addition, Caltech has a conflict of interest as the manager of NASA's cleanup activities at JPL and as a Potentially Responsible Party (PRP). Of the total estimated $114 million NASA will pay to clean up JPL and neighboring communities, the OIG believes NASA could reasonably expect to recover at least $57 million from PRPs. Superfund legislation and federal regulations provide for cost sharing among all responsible parties and prohibit conflicts of interest. By effectively pursuing cost sharing agreements with other parties responsible for the majority of the contamination, NASA could begin the process of cost recovery and make more effective use of its limited cleanup funds. However, NASA has not adequately pursued cost sharing arrangements, due to a possible reluctance to disrupt a long-standing relationship with Caltech, and the lack of policy guidance. As a result, NASA has yet to recover any costs, and may run the risk of further obligating itself to pay for the full costs of future cleanup activities.

NASA PAYS FULL COST OF CLEANUP

NASA has paid the full costs to clean up contamination on-site at JPL and has been contributing significantly to the costs to treat contamination detected in neighboring communities. To date, NASA has expended an estimated $17.5 million, and may pay a total estimated $114 million by the completion of this cleanup effort. These costs are spread over three areas--on-site cleanup costs at JPL, and offsite costs at locations involving the cities of Pasadena and Altadena.

In the case of Altadena, NASA currently is negotiating an agreement with the Lincoln Avenue Water Company (LAWC). Under this agreement, NASA would reimburse the LAWC up to $2.5 million through the year 2000. NASA would be making such an expenditure absent any agreements with other potentially liable parties relative to cost sharing and recovery. Further details of NASA's cleanup costs, including further details on the LAWC agreement, are shown in Appendix 1.

NEED FOR IMPROVED COST SHARING

NASA is not effectively pursuing cost sharing arrangements with PRPs responsible for the majority of JPL's contamination. To this end, NASA has not identified the maximum period it has to recover costs under the Superfund legislation's statutes of limitations. In addition, NASA has not attempted to reach cost sharing arrangements through negotiation versus litigation. NASA may not recover a potentially significant portion of its cleanup costs if it sustains its present course of action.

CERCLA Section 107 identifies the parties responsible for contamination caused by the disposal of hazardous substances (Appendix 2). Based on this legislation, JPL's history, and several studies and file searches, parties other than NASA are responsible for the majority of contamination at JPL and affecting the local communities. Specifically, NASA hired L.G.S. Turner and Associates, an independent firm to perform file searches of PRPs. The first of these searches was completed July 1996, and identified several PRPs. The parties identified as having the most significant responsibility were Caltech, as a past owner and the continual operator, and the Department of Army, as a past owner. Other parties identified included the U.S. Forest Service, the State of California, and the City of Pasadena. An expanded file search has been in process since November 1996 to further confirm the identity of these PRPs, as well as search for others. Although the expanded file search is not scheduled for completion until June 1997, other parties such as the cities of Altadena and La Cañada-Flintridge have already been identified.

Until the expanded file search is complete, NASA is not in a position to determine how cleanup costs are to be allocated among the PRPs. Nevertheless, the OIG believes NASA could reasonably recover at least half its cleanup costs, or $57 million. We base this assumption on the studies and file searches performed to date, which conclude that parties other than NASA are responsible for the majority of contamination.

NASA's Environmental Compliance Restoration Budget funds the JPL cleanup effort as well as other projects needed to achieve and maintain NASA's environmental compliance. Any cost sharing obtained from other responsible parties would lessen the strain on this budget, which in FY97 was $33 million. Limited budget resources would be made available to other cleanup projects instead of being used for the liability of other responsible parties.

Need To Define Statutes of Limitations

NASA needs to know how long it has under the Superfund legislation to recover cleanup costs from responsible parties. CERCLA Section 113 establishes three statutes of limitations defining the maximum period a facility owner can assert its rights to cost sharing through litigation (Appendix 2). However, NASA needs to determine which of the statutes applies to JPL and when the statutes expire. The NASA Management Office (NMO) at JPL, as the Superfund site manager, had asked the NASA Headquarters General Counsel since July 1996 to analyze the statutes in relation to the JPL cleanup. In a preliminary interpretation of the statutes provided to the NMO in September 1996, an independent consulting firm, contracted by NASA for regulatory analysis and technical support at JPL, concluded that the statutes may have already expired. Initially, Headquarters did not reply to the NMO's request and, as a result, the OIG discussed this issue with NASA's Office of General Counsel in February 1997. In providing a preliminary opinion to the OIG, the NASA Counsel stated that, based on an analysis on the current state of the law, NASA is in no immediate danger of expiring statutes. However, the NASA Counsel added that the issue would be further addressed after the completion of the expanded file search, scheduled in June 1997. Subsequent to the April 10, 1997 issuance of our draft rapid action report, the NASA General Counsel replied to the NMO's request, analyzing the statutes in its April 11, 1997 letter. This letter reaffirms NASA Counsel's preliminary opinion to the OIG (see Appendix 5).

CERCLA's statutes of limitations provisions are extremely complex, and current case law makes these statutes a cutting edge area of the Superfund legislation. As a result, the OIG believes that NASA should address this issue more proactively. It is important for NASA to identify which statutes apply and when they expire in order to ensure that NASA accomplishes cost sharing negotiations within the statutory time limits. If circumstances prevent the accomplishment of negotiations within this time, NASA can initiate a "tolling agreement" to suspend the statute period until resolution.

Need To Pursue Negotiations

The law encourages the negotiation of a settlement with PRPs rather than using the courts to resolve the matter. CERCLA encourages negotiation of a settlement in lieu of litigation, apparent in Section 113(f), CERCLA's contribution protection provisions (Appendix 2). Negotiation requires less time, effort, and funding than litigation, and is initiated by the facility owner notifying the party of its responsibility.

NASA's draft Policy Guidance 8850, entitled "Environmental Investigation and Remediation - Potentially Responsible Party Identification and Analysis" promotes negotiation as a first step. Section 1.1.3 of the draft states that "the preferable method of accomplishing such allocation [of investigation and cleanup costs] is through negotiation, although litigation is an option if negotiations fail." Also, the Department of Defense directs its efforts toward negotiating settlements with PRPs and uses methods of alternate dispute resolutions when standard negotiations fail (Appendix 3).

NASA, however, has not actively pursued negotiations with any of the parties identified as responsible for JPL's contamination problems. As the following examples illustrate:

(1) NASA notified the Department of Army of its liability in 1986. The Army initiated an interim cost sharing agreement in 1993 which would have alleviated NASA's out-of-pocket cleanup expenses. This interim agreement strongly recommended that NASA also view Caltech as partially responsible, and proposed cost sharing among the three parties. NASA did not follow through on this proposal and it was dropped (for further details, see Appendix 4).

(2) To date, NASA has not notified Caltech of its responsibility nor initiated negotiations with Caltech. In July 1996, the NMO drafted a letter which would have accomplished this, but NASA Headquarters did not issue it. NMO based this action on the results of the July 1996 file search performed by the independent firm for NASA, which concluded that Caltech is a responsible party.

(3) NASA also has not notified any of the other parties identified by the July 1996 file search as responsible for the contamination existing at JPL.

According to officials at NASA Headquarters, NASA is unwilling at this time to pursue PRPs associated with the JPL cleanup until NASA has collected and evaluated a considerable amount of evidence. These officials further stated that NASA's decision to pursue PRPs will consider the high costs to litigate versus the anticipated recovery. In our opinion, NASA's position is contrary to the contribution protection provisions of CERCLA, the practice followed by the DoD, and NASA's own draft policy guidance. We believe that NASA currently has enough evidence to pursue PRPs based on "strict liability" imposed by CERCLA Section 107(a). This strict liability

makes it unnecessary for the government or private party to prove that the past owner or operator of a facility was negligent or otherwise caused the release. It is merely necessary to establish that a hazardous substance was released at the facility.

VULNERABILITIES EXIST IN NASA'S MANAGEMENT PROCESS

Three factors contribute to NASA's practice of paying the full cost to clean up contamination on-site at JPL and has been contributing significantly to the costs to treat contamination detected in neighboring communities: (1) NASA does not have policy guidance requiring the allocation of cleanup costs among responsible parties; (2) NASA may be concerned with its longstanding relationship with Caltech and therefore reluctant to pursue Caltech for cleanup costs; and (3) NASA's use of Caltech as the manager of the cleanup activities places Caltech in a conflict of interest position.

1. NASA Does Not Have Policy Guidance

NASA has not had any policy guidance relative to when and how to allocate cleanup costs to other responsible parties. A General Accounting Office (GAO) study has addressed this problem NASA-wide. The GAO found that NASA was making limited efforts at cost sharing and recovery, and that the efforts needed to be consistent. GAO released a discussion draft, and the final draft will recommend that NASA issue a policy statement relative to cost sharing and recovery.

Anticipating a GAO recommendation, NASA issued draft guidance, NPG 8850, for comment in October 1996. The guidance would provide a process for notifying and negotiating with PRPs instead of focusing on litigation. Specifically, it prescribes that NASA perform an analysis to determine the identity of PRPs and the potential for cost sharing arrangements. If the pursuit of a PRP is advisable, NASA will notify the PRP, and initiate negotiations. This draft is still in the internal review and concurrence process, and is scheduled to enter the formal approval process in April 1997.

2. NASA's Ongoing Relationship with Caltech

We believe that NASA's inaction may be influenced by its ongoing efforts to preserve a longstanding relationship with Caltech, efforts that may be influenced by Caltech itself. In October 1996, Caltech's President issued a letter to the NASA Administrator informing NASA

of the "three top items that would improve the relationship between Caltech and NASA" (see Exhibit 1). One of these items was Caltech's "fear" that it would be considered liable for the cleanup costs at JPL. Caltech believes that the Government should take responsibility for any adverse environmental impacts caused by JPL's operations, as such operations have been under the direction of federal contracts.

According to Superfund legislation, Caltech is responsible as (1) the continual operator of JPL and the arranger for the disposal of hazardous substances under the performance of its contracts, and (2) the original owner and operator of JPL from 1936 to 1945, a period during which contamination could have occurred. In our opinion, NASA should carefully weigh these facts before making the decision on whether to release Caltech of any liability. Releasing Caltech would be inconsistent with Superfund legislation and agency draft policy guidance, which support the allocation of costs among responsible parties. Also, NASA could be setting a precedent for other NASA contractors to seek release of their liability for any future cleanup costs.

3. A Conflict of Interest Exists With Caltech

A conflict of interest that exists with Caltech may have impacted the costs NASA has paid. Caltech is a potentially responsible party for the contamination at JPL, yet Caltech manages all on-site cleanup efforts as NASA's prime contractor at JPL. In addition, Caltech negotiates with the City of Pasadena and the Lincoln Avenue Water Company for the groundwater treatment efforts paid for by NASA.

The EPA generally uses responsible parties to clean up Superfund sites. However, the responsible parties perform the work pursuant to court or administrative orders, or in accordance with express agreements with the EPA. Because the EPA requires these responsible parties to clean up the site and share in the costs, the responsible parties have incentives to keep the cleanup progressing and the associated costs low.

However, Caltech does not have these incentives. Caltech is an unnotified PRP at JPL, and NASA does not have an express agreement with Caltech to share the responsibility and costs associated with the cleanup of JPL. Instead, NASA reimburses Caltech for all costs incurred in the performance of on-site cleanup management, including overhead on the indirect costs. In addition,

Caltech receives an annual performance award fee of up to $18 million for the performance of its prime contract. According to the contract, this fee will be renegotiated when total business activity increases over a predetermined amount. Caltech's business activity includes the on-site cleanup of JPL.

The National Contingency Plan (NCP) is a plan required by CERCLA and amended by the EPA, to provide structure and procedures for environmental response actions. The NCP warns that the use of a contractor, who is also a PRP, may not be in the best interest of the Government (see Appendix 2). In addition, NASA's prime contract with Caltech requires the contractor to be free from organizational conflicts of interest. Caltech's conflict of interest position could significantly impact the performance of the cleanup effort and the allocation of liability among responsible parties.

An example of how this conflict may have adversely impacted NASA was discovered in 1996 by L.G.S. Turner & Associates. During the period of 1946 and 1991, Caltech disposed of hazardous substances in the City of Pasadena's Arroyo Seco dry creek bed (see Exhibit 2) with the City's approval. NASA's prime contract with Caltech requires the contractor to have full disclosure of its affairs to NASA. Yet, L.G.S. Turner & Associates found that NASA was not copied on or made aware of the documentation between Caltech and the City of Pasadena regarding this activity.

The disposal of hazardous substances in the Arroyo Seco may have contributed to the groundwater contamination affecting the local communities. As PRPs, Caltech (the disposer) and the City of Pasadena (the approval authority) are liable for a portion of the costs associated with the groundwater treatment activities. Yet, NASA relied on Caltech to negotiate the agreement with the City of Pasadena while Caltech clearly had a conflict of interest. As a result, both Caltech and the City may have unjustly benefitted from Caltech's position, as NASA paid the full costs of this agreement.

CONCLUSION

Cost sharing agreements between liable parties are essential in effectively allocating site cleanup costs. The longer NASA delays the finalization of such arrangements, the agency faces greater risk that it may pay more than its fair share of the total cleanup cost, not to mention that limited environmental resources are being tied up indefinitely. With respect to the JPL cleanup, there is a question as

to the proper application of the statutes of limitation contained in Superfund law, and a need for NASA to more aggressively negotiate settlements with PRPs as they are identified. In addition to a lack of internal guidance in this area, the JPL situation is complicated by the extremely delicate relationship between Caltech and NASA, and the conflict of interest which currently exists with Caltech. These concerns must be addressed expediently to minimize NASA's future liability and to ensure effective cost sharing and recovery.

RECOMMENDATION 1

NASA should not release Caltech of the liability for its portion of costs to clean up both JPL and the neighboring communities.

MANAGEMENT RESPONSE

NASA has no authority to release Caltech, or any other party, from whatever liability they may have under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42.U.S.C. 9601 et seq. NASA may only settle a claim which it has asserted against a potentially responsible party (PRP) for cleanup costs. However, it still must be determined whether evidentiary or legal considerations warrant pursuing such a claim against a particular PRP, as further discussed with regard to Recommendation 3 below.

EVALUATION OF MANAGEMENT RESPONSE

NASA's management response is nonresponsive to the OIG recommendation. In making this recommendation, the OIG looked upon the issue in a broader sense. We believe that under the strict liability of CERCLA, Caltech is a potentially liable party for the contamination at JPL. As a result, NASA should be pursuing Caltech rather than indemnifying or neglecting to pursue it. To our knowledge, NASA has yet to formally respond to Caltech's October 17, 1996, letter essentially requesting indemnity. Until NASA formally responds that it will not relieve Caltech of any or all liability, contractually or otherwise, the OIG cannot consider management's response as adequate.

The OIG disagrees with management's statement that NASA may only "settle a claim" which it has asserted against a PRP for cleanup costs. NASA can pursue Caltech and other PRPs through negotiation agreements and other alternate methods. The OIG asserted this view in the draft report and further addressed it in our "Evaluation of Management Response" associated with Recommendation 3.

RECOMMENDATION 2

NASA should identify which statutes apply and when they expire as soon as possible to ensure that NASA (1) accomplishes its cost recovery within the statutory time limits, and (2) facilitates the work of the NMO.

MANAGEMENT RESPONSE

Enclosed is the General Counsel's legal opinion dated April 11, 1997, provided to the NMO regarding Statutes of Limitation. (See Appendix 5)

EVALUATION OF MANAGEMENT RESPONSE

NASA's proposed actions are responsive to the recommendation. The OIG recognizes the complexity of the statutes as well as the state of flux with current case law. The OIG made this recommendation because the NASA General Counsel had not formally addressed the statutes' issue at the time the OIG issued the draft report. The OIG believed that it was necessary for adequate legal involvement to take place on NASA's behalf.

RECOMMENDATION 3

NASA should pursue negotiations with all known potentially responsible parties, based on the minimal evidence needed under the strict liability imposed by CERCLA. If negotiations fail, NASA should attempt the use of tolling agreements or alternate dispute resolution methods before turning to litigation.

MANAGEMENT RESPONSE

We disagree with the wording of the recommendation "NASA should pursue all known PRP's based on the minimal evidence needed under strict liability imposed by CERCLA." It may not be in NASA's interest to pursue all PRP's at a site, which may include private parties, when considering issues such as legal constraints, ability to collect, completeness of records, and other factors. Due to the complexity of this issue, NASA established a process to identify and pursue PRP's under draft NASA Policy Guidance (NPG) 8850. Concurrences have been obtained from all of the appropriate NASA officials, including the Inspector General. We expect to issue the NPG within the next several weeks. The NPG establishes factors to be considered when conducting a cost sharing or cost-recovery evaluation. We suggest that the recommendation should state that NASA follow the process established by NPG 8850 and pursue negotiations with the appropriate PRP's based on the results of this evaluation.

In the meantime, L.G.S. Turner & Associates is completing a more detailed investigation of PRP's at JPL. NASA will consider the process established by NPG 8850, along with the results of the

pending PRP report before reaching a decision regarding PRP's at JPL. We will advise you of that decision and provide you with documentation. We believe that it is premature to commit NASA to an alternate approach at this time. Claims against PRP's are serious and sensitive matters as they imply the threat of court action with attendant expenditure of time and resources.

EVALUATION OF MANAGEMENT RESPONSE

NASA's management response is nonresponsive to the OIG recommendation. The OIG based the recommendation on the draft NPG which suggests pursuing negotiations rather than litigation. Our recommendation further suggests the use of Alternate Dispute Resolution (ADR) if negotiations fail. Not only are ADR procedures used by the DoD, but NASA has used forms of ADR for contractual matters and supports its continuing use. The OIG has recommended that litigation be considered only after such other efforts are unsuccessful.

While it is important to look at the high costs of litigation and the extensive evidence needed to pursue a claim against a PRP, the OIG believes that NASA should first initiate negotiations based on lesser evidence required by, for instance, the strict liability provision of CERCLA. However, the closing statement in management's response suggests NASA's continued preference for the use of litigation as a criteria in its decision to pursue PRPs. The OIG agrees with the statement that "claims against PRPs are serious and sensitive matters as they imply the threat of court action with attendant expenditure of time and resources". However, negotiation does not threaten litigation. Instead, it brings parties to the table to foster cooperation in avoidance of litigation. The OIG understands that NASA might not be successful in its pursuit of PRPs through negotiations, but believes that it is a no-lose situation to try.

The OIG believes that if NASA follows the evaluation guidelines of the draft NPG 8850 in determining which PRPs to pursue negotiations with, then management's actions will be considered responsive to the recommendation. However, until such time as the OIG is informed of NASA's decisions and provided documentation on this issue, the OIG cannot consider management's response as adequate.

RECOMMENDATION 4

NASA should obtain cost sharing arrangements with other responsible parties before reimbursing the Lincoln Avenue Water Company Agreement for past and future cleanup costs.

MANAGEMENT RESPONSE

The Lincoln Avenue Water Company (LAWC) provides water for the Altadena area, and has for several years claimed that its water is contaminated, due to pollutants deriving from JPL. NASA does not necessarily accept LAWC's negotiation position, but cannot ignore it either, due to the requirements of the environmental laws to protect the public health and welfare.

The current negotiations with the LAWC are a result of threatened litigation by LAWC. JPL had entered into a "Standstill Agreement" with LAWC on July 29, 1994, whereby LAWC was paid $50,000 and they agreed not to pursue claims against Caltech. The Standstill Agreement has since expired and LAWC is seeking permanent settlement.

Based on LAWC insistence on a permanent settlement at this time, litigation is likely, should negotiations be suspended until the PRP issues are resolved. PRP negotiations are usually very time consuming and there is no guarantee of success. NASA may need to make a decision on the LAWC agreement soon which best serves NASA's interests, when considering the public health and welfare, cost of litigation, and potentially increased future costs due to delays.

EVALUATION OF MANAGEMENT RESPONSE

NASA's management response is nonresponsive to the OIG recommendation. The OIG disagrees with the arguments posed in this response as reasons to avoid cost sharing arrangements with other PRPs. The LAWC has threatened litigation as far back as March 1990, when it learned that NASA provided groundwater treatment facilities to the City of Pasadena. As a result, the OIG does not believe NASA's sense of urgency to settle the issue with LAWC differs with that of seven years ago. In addition, NASA's interests in protecting the public's health and welfare in this situation will be limited to that of reimbursing LAWC for the costs of their response actions since the 1980s. Because the LAWC is requesting straight reimbursement of past and future costs, the OIG does not understand management's reference to increased future costs due to delays. In final, the OIG believes that NASA could use any claim asserted by the LAWC as a vehicle to pursue other PRPs for their appropriate share of the claim. This, in turn, may induce all parties to settle cost-sharing arrangements with NASA to avoid litigation.

RECOMMENDATION 5

NASA should resolve Caltech's conflict of interest by recontracting the JPL cleanup effort to a non-PRP contractor in accordance with the National Contingency Plan.

MANAGEMENT RESPONSE

As noted in your report, the Environmental Protection Agency (EPA) generally uses responsible parties to clean up Superfund sites where the work is performed, pursuant to a court or administrative order or in accordance with expressed agreements with the EPA. The remedial activities at JPL are under a Federal Facilities Agreement and are closely monitored by EPA and the state. We are also familiar with the National Contingency Plan Section 300.435(d) regarding contractor conflict of interest for Fund-financed remedial design/remedial action (RD/RA) and O&M activities. NASA is not using Superfund resources and the project has not yet progressed to the RD/RA and O&M phases.

We appreciate your concern regarding the conflict of interest issue and have taken steps to minimize the potential for conflict of interest. We supported establishment of a remedial project manager civil service position in the NMO to provide Government oversight, funded an independent review of the ongoing remedial investigation, and will continue to review available options as to the appropriate contractual arrangements for the remedial activities.

EVALUATION OF MANAGEMENT RESPONSE

NASA's management response is nonresponsive to the OIG recommendation. As stated in the report, Caltech's position is in violation of the prime contract requirement to be free from organizational conflicts of interest. As a result, the OIG recommended that NASA resolve this issue by recontracting the cleanup effort to a non-PRP. Until this corrective action occurs, the OIG cannot consider management's response as adequate. The OIG is interested to know which appropriate contractual arrangements NASA is considering, and how that decision is progressing.

The OIG recognizes that the remedial activities at JPL are under a Federal Facilities Agreement and are closely monitored by EPA and the state. However, Caltech is not a party to this agreement and therefore not under an expressed agreement with the EPA. The OIG believes the establishment of a civil service remedial project manager at NMO does not adequately minimize the seriousness of this conflict of interest issue. In addition, the independent review stated as a corrective action had also identified a potential conflict of interest with Caltech.

RECOMMENDATION 6	Once NASA issues Policy Guidance 8850, NASA should ensure that the centers are implementing the guidance for cost sharing on all ongoing and future Environmental Compliance and Restoration Projects.
MANAGEMENT RESPONSE	As the functional manager for the environmental program, the Environmental Management Division conducts an annual integrated program assessment in accordance with NASA Management Instruction 1240.3B on Functional Management. This process includes compliance with internal NASA guidance, which will include the pending NPG 8850.
EVALUATION OF MANAGEMENT RESPONSE	NASA's proposed actions are responsive to the OIG recommendation.

Exhibit 1 - Caltech Letter to NASA Administrator

CALIFORNIA INSTITUTE OF TECHNOLOGY

Pasadena, California 91125

Thomas E. Everhart
President

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October 17, 1996

The Honorable Daniel S. Goldin
Administrator
National Aeronautics and Space Administration
300 E Street, SW
Washington, DC 20546-0005

Dear Dan:

I'm sure you remember the excellent meeting between yourself and the JPL Committee of the Caltech Board of Trustees on June 24th in Washington at the Willard Hotel. At that meeting, there was a frank exchange of views, and in the end, you asked me to list the three top items that would improve the relationship between Caltech and NASA. After due consideration, and consultation with colleagues, this letter is my response.

First, I hope we can return to our historic mode where JPL is viewed as a NASA center, a partner in the robotic exploration of space, and not treated as an adversary that requires excessive oversight. Technical people in NASA do seem to regard us as a partner; some business people in NASA seem to regard us as an adversary.

Second, there is an issue, historical in nature, that must be addressed expeditiously. As you may know, JPL has been placed on the Superfund National Priorities List by the Environmental Protection Agency. Our fear is that Caltech could be viewed by the Government as a party responsible for funding the activities to remediate any significant environmental problems identified by the regulators because Caltech has had the longest relationship with JPL. Such an outcome would be fundamentally unfair and inconsistent with the long-standing contractual relationship between Caltech and the United States government. JPL has been a federal government facility since the early 1940's, and throughout this period, all activities at JPL have been subject to federal direction, policies and regulation. Thus, Caltech believes that the Government should take responsibility for any adverse environmental impacts that have resulted from JPL operations in the absence of any evidence that Caltech acted in willful disregard of applicable

Exhibit 1 (Continued)

directives, policies or regulations. John Curry and Ed Stone have discussed this in some detail with your deputy, Jack Dailey. Any help you could provide to resolve this issue would be very helpful.

Finally, JPL needs to build new core capabilities in order to carry out its mission of robotic space exploration in a better, faster and smaller era. As we discussed, with the major shift in the character of missions assigned to JPL, there is a need to establish a funding mechanism to assure development of technology needed in the longer term. In addition, we need a shared vision of the value of appropriate reimbursable work. A significant portion of JPL's technology work has been funded by other agencies during the last decade or longer, and this has benefited NASA. [I am hopeful that reimbursable work will be implemented more effectively when we improve our institutional relationship (the first issue I mentioned.)]

I believe that attention to these three issues will improve the institutional relationship between NASA and the California Institute of Technology. I would be pleased to elaborate on any of these issues at your convenience. We appreciate the steps NASA has taken recently to improve our relationship, such as the NASA/JPL Interface study team recently appointed by Wes Huntress.

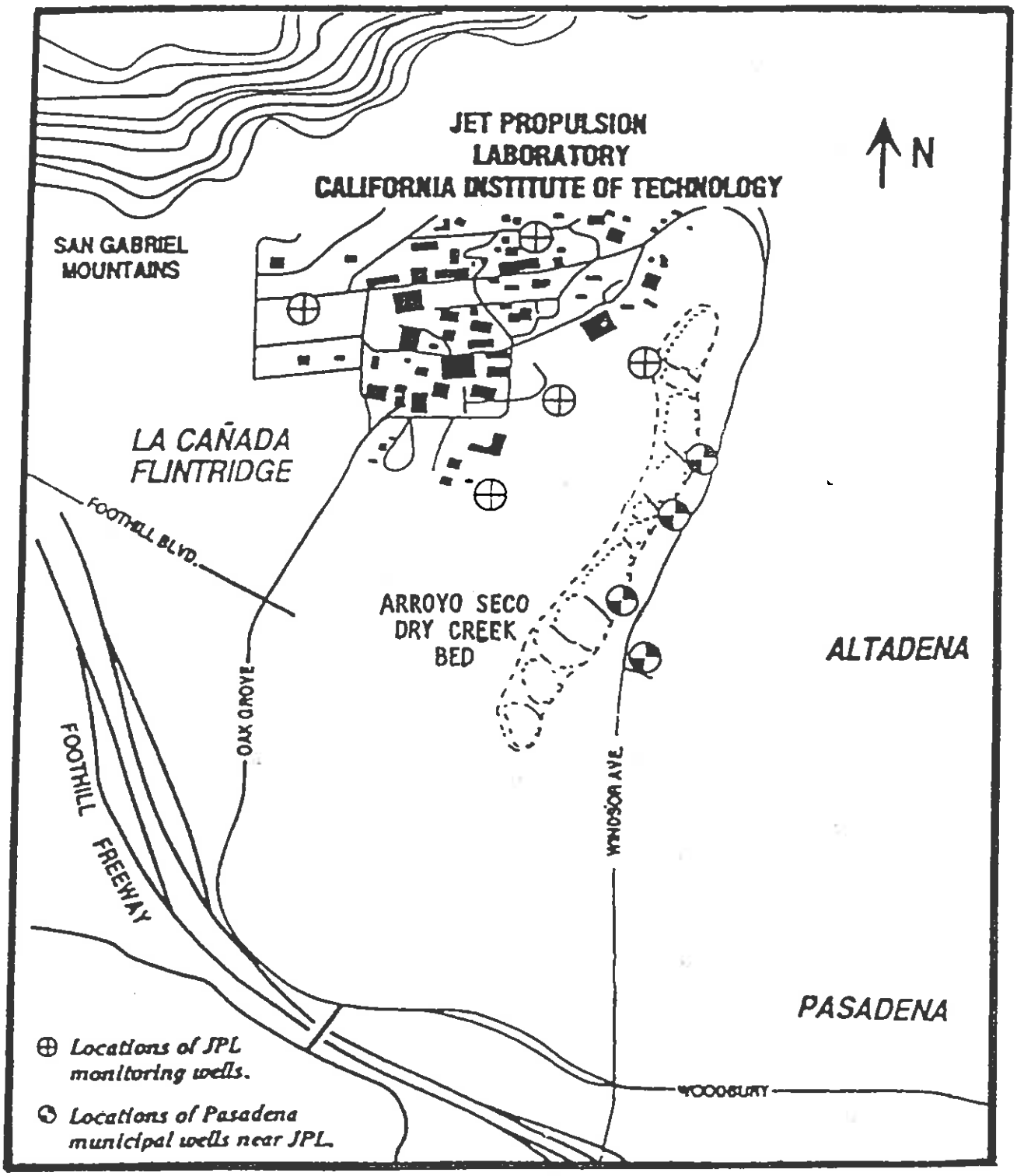
Sincerely yours,

Tom Everhart

Thomas E. Everhart

c: Edward C. Stone

Exhibit 2 - Map of JPL and Neighboring Communities



Appendix 1

BREAKOUT OF NASA'S CLEANUP COSTS

JPL ON-SITE CLEANUP

A March 1992 estimate prepared for NASA by Jacobs Engineering Group, Inc., estimated that NASA could pay as much as $104.5 million to clean up on-site contamination at JPL under CERCLA (Figure 1). Of this $104.5 million, NASA has paid approximately $12.5 million. The effort is currently in the investigation phase, with cleanup scheduled to begin approximately in the year 2000. The March 1992 estimate forecasted completion of the cleanup in the year 2023.

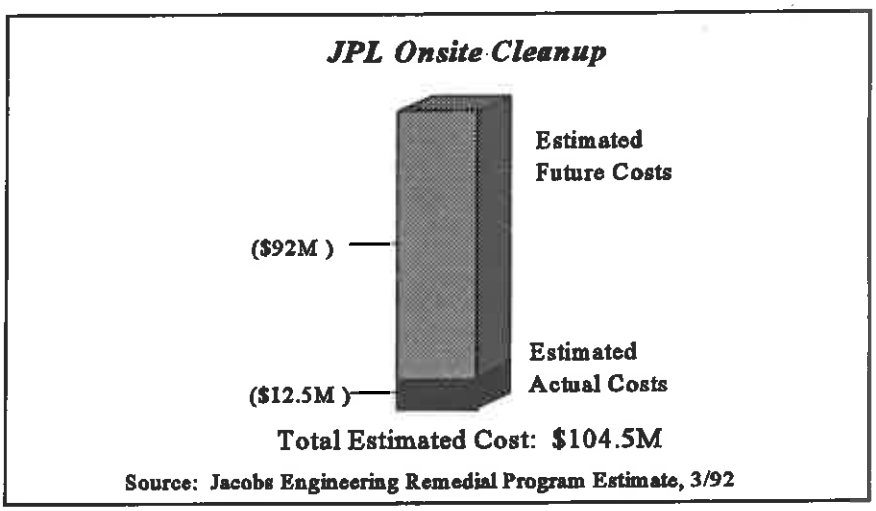


Figure 1

PASADENA GROUNDWATER TREATMENT

In addition, the OIG estimates that NASA could pay as much as $6.85 million to provide the City of Pasadena with a temporary groundwater treatment plant (Figure 2). Under the "Devil's Gate Temporary Groundwater Treatment Plant, Participation and Settlement Agreement", NASA has provided approximately $5 million to the City of Pasadena since 1990. This $5 million paid for the installation, operation, and maintenance of the plant, including the reimbursement

of past costs incurred due to the contamination. NASA will continue to pay as much as $450,000 per year for the future operations of the plant until about the year 2000, when the Agency expects to begin cleanup actions on-site at JPL. At that time, according to the NMO, NASA and the appropriate regulatory agencies will contemplate a permanent solution to the City's contamination problem.

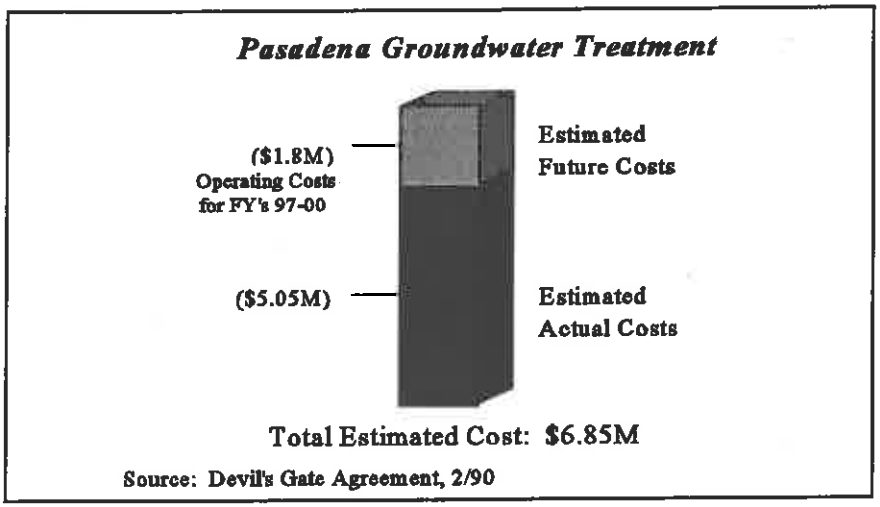


Figure 2

ALTADENA GROUNDWATER TREATMENT

Lastly, the OIG estimates that NASA could pay as much as $2.5 million to reimburse the Lincoln Avenue Water Company (LAWC), which serves the City of Altadena, for two temporary groundwater treatment plants (Figure 3). Currently under negotiations is the "Lincoln Avenue Water Company Interim Groundwater Treatment Plan, Participation and Settlement Agreement." Under the proposed Agreement, NASA will reimburse the LAWC for plant installation, operation, and maintenance, as well as past shutdown expenses. A November 1996 estimate provided to JPL by Don Owen & Associates, an independent firm, showed that the LAWC costs from FY84 through FY97 will total approximately $2 million, including interest. In addition, NASA may pay an estimated $170,000 for annual operation until about the year 2000, when the Agency expects to begin cleanup actions on-site at JPL. According to the NMO, NASA and the appropriate regulatory agencies will contemplate a permanent solution to the City's contamination problem at that time.

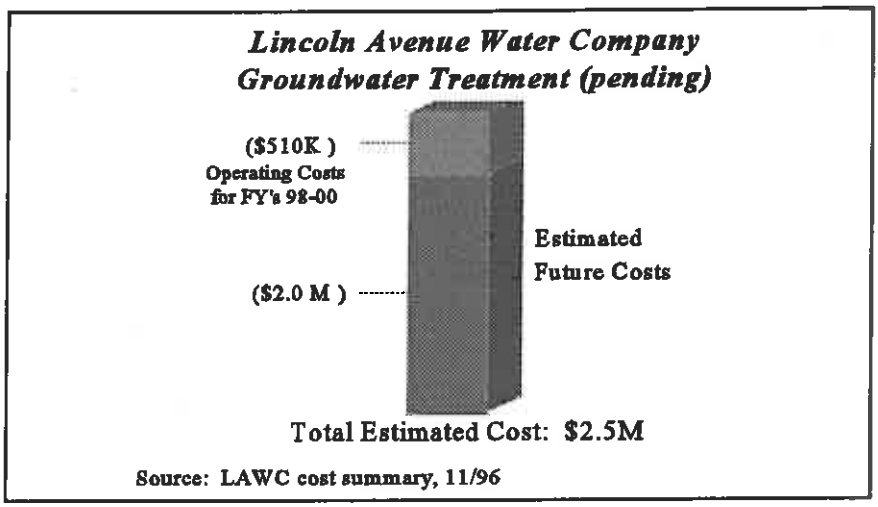

Lincoln Avenue Water Company
Groundwater Treatment (pending)
($510K)
Operating Costs
for FY's 98-00
($2.0 M)
Estimated
Future Costs
Total Estimated Cost: $2.5M
Source: LAWC cost summary, 11/96

Figure 3

Appendix 2

SUPERFUND LEGISLATION AND FEDERAL REGULATIONS

CERCLA ASSIGNS LIABILITY

Through CERCLA Section 107(a), Congress designated four broad categories of Potentially Responsible Parties (PRPs) that, regardless of fault, are liable for superfund cleanups if they contributed any amount of a hazardous substance to the site. The four classes of PRPs are:

-- Current owners or operators of a site;

-- past owners or operators of a site at the time hazardous substances were disposed of at the site;

-- any person who by contract, agreement, or otherwise, arranged for the disposal, transport, or treatment of hazardous substances found at the site (generators); and

-- any person that accepted hazardous substances for disposal and selected the site now slated for cleanup.

CERCLA DEFINES STATUTES OF LIMITATION

CERCLA Section 113, "Litigation, Jurisdiction, and Venue" sets forth several statutes of limitations which prescribe the period in which actions for cost sharing may be brought. The following are three statutes which may be applicable in JPL's case:

-- Actions for natural resources damages [Section 113 (g)(1)], which runs three years;

-- Recovery [Section 113(g)(2)], which runs either three or six years; and

-- Contribution [Section 113(g)(3)], which runs three years.

The determination on which of these three statutes applies and when they expire depends mainly on three factors: (1) which action starts

the clock (i.e., discovery of contamination, start of cleanup activity, or court judgment); (2) how the action is classified (i.e., remedial vs. removal action); and (3) how the owner's involvement is classified (i.e., innocent vs. partially responsible).

CERCLA ENCOURAGES SETTLEMENT

One of the Congressional intents behind CERCLA's contribution protection provisions in Section 113(f) is to encourage negotiation of settlements in lieu of litigation. This is evident in the legislative history as described in House Report No. 99-253(I). This history states that "the section should encourage private party settlements and cleanups. Parties who settle for all or part of the cleanup or its costs, or who pay judgments as a result of litigation, can attempt to recover some portion of their expenses and obligations in contribution litigation from parties who were not sued in the enforcement action or who were not parties to the settlement. Private parties may be more willing to assume the financial responsibility for some or all of the cleanup if they are assured that they can seek contribution from others."

NCP DISCOURAGES CONFLICT OF INTEREST

The National Contingency Plan (NCP) Section 300.435(d) discourages contractor conflict of interest. Specifically, the NCP requires Lead Agencies to:

-- Require potential contractors to certify their status as PRPs (including the status of their subcontractors, parent companies, and affiliates);

-- Determine whether potential contractors have "conflicts of interest that could significantly impact the performance of the contract or the liability of potential prime contractors or subcontractors";

-- Award the contract to the next eligible contractor if the potential prime contractor or subcontractor has a conflict of interest that cannot be avoided or otherwise resolved, and using that contractor would not be in the best interests of the Government.

Appendix 3

DEPARTMENT OF DEFENSE PROCEDURES

The following detail is extracted from the U.S. Army Corps of Engineers Program Manual entitled "Defense Environmental Restoration Program for Formerly Used Defense Sites", Chapter 4 - "Potentially Responsible Party (PRP) Process". The U.S. Army Corps of Engineers (the Corps) has been delegated by the Department of The Army to resolve all CERCLA liability issues for the Department of Defense's Formerly Used Defense Sites.

NEGOTIATION IN LIEU OF LITIGATION

The Corps directs its efforts toward negotiating settlements in lieu of litigation. The Corps' Program Manual states that "Litigation of PRP issues is expected to be expensive and time consuming. Therefore, PRP negotiation efforts should be directed toward resolution of CERCLA liability-related issues without litigation. To this end, use of alternative dispute resolution procedures, such as non-binding arbitration, mediation, facilitation, monitorial, and dispute panels, should be emphasized where normal negotiation techniques prove unsuccessful in resolving disputed issues."

Appendix 4

SUMMARY OF NASA'S COST RECOVERY EFFORTS

DEPARTMENT OF ARMY

In 1986, NASA notified the Department of Army of its liability. In 1991, the U.S. Army Corps of Engineers (the Corps) acknowledged the Army's partial responsibility at JPL as a Formerly Used Defense Site. In 1993, the Corps strongly recommended that NASA also view Caltech as partially responsible, and initiated an interim cost sharing agreement among the three parties. If executed, this interim agreement would have provided interim cost sharing among the three parties to alleviate NASA's out-of-pocket cleanup expenses. NASA never executed this agreement, choosing instead to wait until the Corps conducted its file search to identify other responsible parties at JPL and to determine the extent of their liabilities.

According to the Corps Environmental Branch Program Manager, the file search was completed in 1995. Although the resulting evaluation is privileged internal documentation, the Corps provided all source documents to NASA for use in conducting a similar file search, which was completed July 1996. The Program Manager stated that the Corps continues to be very interested in resolving the Army's liability at JPL and has been waiting for NASA to renew negotiations.

Appendix 5 - Management Comments

National Aeronautics and
Space Administration
Headquarters
Washington, DC 20546-0001

APR 29 1997

Reply to Attn of: JE

TO: W/Acting Assistant Inspector General for Auditing

FROM: J/Associate Administrator for
Management Systems and Facilities

SUBJECT: Draft Rapid Action Audit Report, Cost Sharing for Cleanup Activities at the Jet Propulsion Laboratory, Assignment No. A-HA-97-014

We have reviewed the Draft Rapid Action Audit Report, Cost Sharing for Cleanup Activities at the Jet Propulsion Laboratory (JPL), dated April 10, 1997. We have the following comments/responses to the recommendations:

RECOMMENDATION 1: NASA should not release Caltech of the liability for its portion of costs to clean up both JPL and the neighboring communities.

RESPONSE: NASA has no authority to release Caltech, or any other party, from whatever liability they may have under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. 9601 et seq. NASA may only settle a claim which it has asserted against a potentially responsible party (PRP) for cleanup costs. However, it still must be determined whether evidentiary or legal considerations warrant pursuing such a claim against a particular PRP, as further discussed with regard to Recommendation 3 below.

RECOMMENDATION 2: NASA should identify which statutes apply and when they expire as soon as possible, to ensure that NASA: (1) accomplishes its cost recovery within the statutory time limits, and (2) facilitates the work of the NASA Management Office (NMO).

RESPONSE: Enclosed is the General Counsel's legal opinion dated April 11, 1997, provided to the NMO regarding Statutes of Limitation.

RECOMMENDATION 3: NASA should pursue negotiations with all known potentially responsible parties, based on the minimal evidence needed under the strict liability imposed by CERCLA. If negotiations fail, NASA should attempt the use of tolling

agreements or alternate dispute resolution methods before turning to litigation.

RESPONSE: We disagree with the wording of the recommendation "NASA should pursue all known PRP's based on the minimal evidence needed under strict liability imposed by CERCLA." It may not be in NASA's interest to pursue all PRP's at a site, which may include private parties, when considering issues such as legal constraints, ability to collect, completeness of records, and other factors. Due to the complexity of this issue, NASA established a process to identify and pursue PRP's under draft NASA Policy Guidance (NPG) 8850. Concurrences have been obtained from all of the appropriate NASA officials, including the Inspector General. We expect to issue the NPG within the next several weeks. The NPG establishes factors to be considered when conducting a cost sharing or cost-recovery evaluation. We suggest that the recommendation should state that NASA follow the process established by NPG 8850 and pursue negotiations with the appropriate PRP's, based on the results of this evaluation.

In the meantime, L.G.S. Turner & Associates is completing a more detailed investigation of PRP's at JPL. NASA will consider the process established by NPG 8850, along with the results of the pending PRP report before reaching a decision regarding PRP's at JPL. We will advise you of that decision and provide you with documentation. We believe that it is premature to commit NASA to an alternate approach at this time. Claims against PRP's are serious and sensitive matters as they imply the threat of court action with attendant expenditure of time and resources.

RECOMMENDATION 4: NASA should obtain cost sharing arrangements with other responsible parties before reimbursing Lincoln Avenue Water Company Agreement for past and future cleanup costs.

RESPONSE: The Lincoln Avenue Water Company (LAWC) provides water for the Altadena area, and has for several years claimed that its water is contaminated, due to pollutants deriving from JPL. NASA does not necessarily accept LAWC's negotiation position, but cannot ignore it either, due to the requirements of the environmental laws to protect the public health and welfare.

The current negotiations with the LAWC are a result of threatened litigation by LAWC. JPL had entered into a "Standstill Agreement" with LAWC on July 29, 1994, whereby LAWC was paid $50,000 and they agreed not to pursue claims against Caltech. The Standstill Agreement has since expired and LAWC is seeking a permanent settlement.

Based on LAWC insistence on a permanent settlement at this time, litigation is likely, should negotiations be suspended until the PRP issues are resolved. PRP negotiations are usually very time consuming and there is no guarantee of success. NASA may need to make a decision on the LAWC agreement soon which best serves

NASA's interests, when considering the public health and welfare, cost of litigation, and potentially increased future costs due to delays.

RECOMMENDATION 5: NASA should resolve Caltech's conflict of interest by recontracting the JPL cleanup effort to a non-PRP contractor, in accordance with the National Contingency Plan.

RESPONSE: As noted in your report, the Environmental Protection Agency (EPA) generally uses responsible parties to clean up Superfund sites where the work is performed, pursuant to a court or administrative order or in accordance with expressed agreements with the EPA. The remedial activities at JPL are under a Federal Facilities Agreement and are closely monitored by EPA and the state. We are also familiar with the National Contingency Plan Section 300.435(d) regarding contractor conflict of interest for Fund-financed remedial design/remedial action (RD/RA) and O&M activities. NASA is not using Superfund resources and the project has not yet progressed to the RD/RA and O&M phases.

We appreciate your concern regarding the conflict of interest issue and have taken steps to minimize the potential for conflict of interest. We supported establishment of a remedial project manager civil service position in the NMO to provide Government oversight, funded an independent review of the ongoing remedial investigation, and will continue to review available options as to the appropriate contractual arrangements for the remedial activities.

RECOMMENDATION 6: Once NASA issues Policy Guidance 8850, NASA should ensure that the Centers are implementing the guidance for cost sharing on all ongoing and future Environmental Compliance and Restoration Projects.

RESPONSE: As the functional manager for the environmental program, the Environmental Management Division conducts an annual integrated program assessment in accordance with NASA Management Instruction 1240.3B on Functional Management. This process includes compliance with internal NASA guidance, which will include the pending NPG 8850.

We appreciate the opportunity to review the draft report.

Benita A. Cooper

Enclosure

Appendix 5 - Management Comments (Continued)

cc:
JM/J. Werner
G/E. Frankle
S/W. Huntress
JPL/SPJ/K. Lindstrom
LeRC/28-1/C. Sipsock

Appendix 5 - Management Comments (Continued)

National Aeronautics and
Space Administration
Headquarters
Washington, DC 20546-0001

Reply to Attn of: G

APR 11 1997

TO: S/Associate Administrator for Space Science

NASA Management Office-JPL
Attn: 180-801/Manager

FROM: G/General Counsel

SUBJECT: Memoranda from Manager, NASA Management Office (NMO) at JPL, Regarding Environmental Liability of Potentially Responsible Parties at JPL

This is in response to the July 1, 1996 memorandum from the NMO to Headquarters Codes J, G, and S, and the January 24, 1997 memorandum from the NMO to Codes G and S.

The first memorandum recommends that NASA notify the California Institute of Technology (Caltech) that we consider it to be a Potentially Responsible Party (PRP) for contamination at JPL, with the view to opening negotiations on sharing the cost of the cleanup being undertaken at JPL pursuant to the Federal Facilities Agreement (FFA) between NASA, the Environmental Protection Agency (EPA) and the State of California.

The second memorandum makes two requests of this office: that this office provide a written legal opinion regarding the possible applicability of the statute of limitations contained in Section 113 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 et seq., to the recommended Caltech notification; and that this office "formally (through DOJ) designate the U.S. Army as a PRP."

As you know NASA Headquarters is nearing completion of NPG 8850, Environmental Investigation and Remediation - Potentially Responsible Party Identification and Analysis, which will implement NASA policy for identifying PRP's who may be responsible for contamination of NASA property, and for formally notifying them in order to commence negotiations on cost sharing or cost recovery arrangements.

ENCLOSURE

Both Code S and the NMO have submitted their comments, and it is the understanding of this office that the NMO is currently engaged in further analysis of evidence as to the responsibility for the contamination at JPL to supplement the CERCLA File Search submitted by the NMO with the July 1, 1996 memorandum.

Complicating the situation, however, is the recent case filed against Caltech, styled Vallier v. Jet Propulsion Laboratory, California Institute of Technology. This case involves three women who attended a parochial school near JPL in the 1970's and who developed Hodgkins disease. One of the women died, and her mother and estate along with the other two women are suing Caltech, alleging that the toxic materials disposed of at the site during earlier decades caused the illnesses.

The United States may eventually be brought into the case, either by the suing parties, or by Caltech. This office is coordinating this matter with the Department of Justice and the U.S. Army. As the litigation is still in its preliminary stages, we have not yet settled upon the best course of action for the Government to pursue.

Therefore, there are both strategic and tactical issues to be resolved before we can decide whether or when to formally notify Caltech and the U.S. Army of our claims for cost sharing the cleanup at JPL. The legal and policy considerations involved in these issues are under analysis and will soon be presented to the Office of the Administrator.

Moving to the statute of limitations question, many laws, including CERCLA, contain time limitations in which certain court actions must be brought. The statute of limitations periods most relevant to the JPL situation are contained in CERCLA Sections 113(g)(2) and 113(g)(3).

Section 113(g)(2) provides that a court action to recover costs under Section 107 must be brought within 3 years after completion of an environmental removal action and 6 years from the commencement of construction of an environmental remedial action, although if construction is begun within 3 years of completion of the removal action the costs of the removal action may also be recovered in the remedial action time period.

In addition, Section 113(g)(3) provides a 3-year time period for bringing certain court actions for "contribution." Contribution actions are authorized by Section 113(f) to

allow a PRP who is paying more on a CERCLA cleanup than warranted by its relative responsibility for the contamination to recover the excess from other PRP's. The time period provided in Section 113(g)(3), however, does not cover all the situations in which contribution actions may be brought under Section 113(f).

The relevant questions in a CERCLA statute of limitations analysis are: 1) Under which statutory provision is the court action being brought and is the person bringing the action entitled to utilize that provision? 2) What is the time period for bringing an action under that provision? 3) What is the triggering event which starts the running of the time period? and 4) If there is no explicit time period or triggering event in the law, will a court impose one pursuant to its judicial powers?

The case law pertaining to the CERCLA statute of limitations provisions is complex, and is currently in a state of flux. Different courts have provided different answers to each of these four question.

NMO refers to an expiration of the statute of limitations in 1998. While the origin of that date is not clear, it may have arisen from the application of the 6-year period referred to in CERCLA Section 113(g)(2) to the 1992 date of the FFA. This is an incorrect application of the 6-year period. The 6-year period begins with the initiation of remedial construction, not the signing of the FFA. Further, legal interpretations differ as to who may utilize Section 107 for bringing a recovery action. Therefore, this provision may not even be available to NASA in relation to the cleanup at JPL.

It is clear, however, that a contribution action under Section 113(f) would be available to NASA, should it decide that the evidence would support such an action. However, none of the three triggering events for the running of the 3-year limitations period for a contribution action listed in Section 113(g)(3) have yet occurred. These events are: the date of a court judgment, the date of a Section 122(g) settlement, or the date of a Section 122(h) settlement. At JPL, NASA is expending funds to remediate the site pursuant to the FFA and Section 120 of CERCLA, not pursuant to a court judgment or the Section 122 settlement authorities.

The closest precedent to the JPL situation so far adjudicated is U.S. v. Scott's Liquid Gold, 934 F. Supp. 362 (D. Colo. August 19, 1996), which concerns a U.S. Army claim for contribution against an offsite PRP at the Rocky

Mountain Arsenal in Colorado. The EPA's Record of Decision (ROD), and the Army's cooperative agreement with the EPA and the local water district, were entered into about 7 years prior to the filing of the contribution claim by the Army. The construction of the remedial action in question was commenced over six years prior to the filing of the claim.

The court held that, since Congress specified the three triggering events for the 3-year limitations period for contribution actions, other contribution actions, not involving those triggering events, were not subject to the 3-year period. Thus, the Army claim in that case was not barred. The court also refused to import other limitations periods from Federal or state law, as this would be inconsistent with applying the law as enacted by Congress.

NASA's situation at JPL is even stronger than that of the Army's in the Liquid Gold case, as the EPA will probably not issue a final ROD concerning the NASA cleanup at JPL for at least 2 years. Despite that, we should not unduly delay a PRP decision because we cannot predict whether other courts will follow the Liquid Gold court in not importing limitations periods from other laws.

In addition, no matter what the limitations period turns out to be, mere notification of a PRP of its status does not stop the running of the limitations period. For this to occur, there must be an actual filing in court, or a tolling agreement between the parties, in the face of a threatened court action.

Finally, issues of limitation apply in this case only to a NASA claim against Caltech or other non-Federal PRP. Since Federal agencies cannot sue each other, statutes of limitations lose their meaning when claims among Federal agencies are involved. However, claims against other agencies should also be made in a timely manner, in order to allow them to integrate the cost sharing of the work into their appropriations cycles.

In summary, it is my opinion that NASA does not face any imminent issue concerning the statute of limitations as applied to a potential contribution claim against Caltech for the JPL cleanup. While lengthy delay should be avoided in making the ultimate decision in this case, haste should also be avoided. PRP designations are serious and sensitive matters, and in this case, the Vallier case makes the subject even more sensitive. There will be time for appropriate action when the factual and legal situation becomes clearer.

I hope this information responds to the issues raised in the two NMO memoranda. Code G will continue its close coordination of these matters with Codes S, JE, and the NMO, as we have in the past. Should you have any questions or concerns, please feel free to contact Aaron Hostyk of my staff at (202) 358-2082.

Edward A. Frankle

Appendix 6

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