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January 4, 2000

The Special Counsel

The President
The White House
Washington, D.C. 20500

Re: OSC File Nos. DI-99-0722 and DI-97-0912

Dear Mr. President:

In accordance with 5 U.S.C. § 1213(e)(3), I am transmitting a report from the Honorable Jerry MacArthur Hultin, Under Secretary of the Navy, sent to me pursuant to 5 U.S.C. §§ 1213(c) and (d). I transmitted the disclosure to the Honorable John H. Dalton, former Secretary of the Navy. The report contained no delegation of authority from Secretary Dalton concerning his obligation to review and sign the report pursuant to 5 U.S.C. § 1213(d).

The report sets forth the findings and conclusions of the Under Secretary's review of disclosures of information allegedly evidencing a violation of law, rule, or regulation, and a danger to public health and/or safety, at the Department of the Navy, Naval Air Station, Alameda, California (NAS, Alameda).

The whistleblowers, Mr. Marty Martinson and Mr. Brook Beesley, provided comments on the agency report to this office pursuant to 5 U.S.C. § 1213 (e)(1), which I am also transmitting.

We have carefully examined the original disclosures and reviewed the agency's response and the whistleblowers' comments. Pursuant to 5 U.S.C. § 1213(e)(2), I have determined that the findings in the agency report do not contain all of the information required by statute, and are not reasonable under Section 1213(e)(2)(A).

Mr. Martinson and Mr. Beesley alleged that as far back as 1983, the Navy had evidence that certain areas regularly used by firefighters for training and storage were contaminated with high levels of Polychlorinated Biphenyls (PCBs) and lead. They asserted that they and other firefighters worked regularly in the contaminated areas at NAS, Alameda, from approximately 1985 to 1994 without knowledge of the contaminants and without appropriate protective equipment.¹

¹ Mr. Beesley worked at NAS, Alameda from 1985 to 1994. Mr. Martinson worked at NAS, Alameda from 1989 to 1993.

Mr. Martinson and Mr. Beesley further alleged that in June 1988, the California Department of Health Services issued a Remedial Action Order (RAO) pursuant to State and Federal laws,² requiring the Navy to investigate and take remedial action. In 1990, pursuant to the RAO, the Navy, through Captain R. P. Boennighausen, the Commanding Officer (CO), NAS, Alameda, issued a Hazard Communication Information for areas including the firefighters' training grounds. This Hazard Communication was never presented to the firefighters, despite having been distributed to David Martineau, the Fire Division Chief. Firefighters were never told of the actual or potential contamination on the site. Before and after issuance of the Hazard Communication firefighters used Sites 14 and 15 for fire training activities. Mr. Martinson and Mr. Beesley contend that the Navy violated OSHA³ regulations and the RAO when it failed to notify firefighters of the hazards, failed to provide annual medical examinations, failed to adequately document medical records, and permitted firefighters to work in known contaminated areas without proper protective equipment.

Summary of Agency's Report

The Navy report states that, at the request of Under Secretary Hultin, the Naval Inspector General (NAVIG) conducted an inquiry into the allegations. The Under Secretary reported that he concurs with NAVIG's findings that:

- (a) the Navy violated 29 C.F.R. Section 1910.120(c)(8) by not providing all "information concerning the chemical, physical, and toxicological properties of each substance known or expected to be present on site..."
- (b) that the Navy violated the written assurance by Commanding Officer, Naval Air Station Alameda to the California Department of Health Services that notice would be provided to employees of the risks, when the then NAS, Alameda, Fire Chief failed to distribute a Hazard Communication to firefighters;
- (c) that Section 1910.1200 does not appear to apply in this case and, thus, the Navy did not violate it.

The report relies upon a 1997 study by the Navy Environmental Health Center (NEHC), which found that the total health risk for inhalation, ingestion and dermal contact of all potentially dangerous or carcinogenic materials within the affected sites was negligible. The report further relies upon the conclusions of prior investigations conducted by NAVIG and the Department of Defense Inspector General. The report

² The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (P.L. 96-510), as amended by the Superfund Amendments and Reauthorization Act of 1986 (P.L. 99-499) (CERCLA as amended by SARA).

³ 29 C.F.R. § 1910.120, 29 C.F.R. § 1910.1200.

represents that neither investigation substantiated any allegations regarding health dangers.

With respect to the firefighter's request to have written statements reflecting their exposure for their medical records, the report indicates that in January 1998, the Navy initiated efforts to provide such letters. The report states that NAVIG is "still inquiring into this aspect of the matter..." to ensure that the statement has been placed into the medical records of all personnel for whom it was appropriate.

Acknowledging that the Navy failed to inform the firefighters of the information that was available concerning the chemicals known to exist at these sites, the report states that the Under Secretary is "considering appropriate remedial actions to preclude any similar oversights from occurring onboard U.S. Navy installations and vessels in the future.

Deficiencies in Report

The report neither meets the Section 1213(d) requirements, nor satisfies the reasonableness requirement of Section 1213(e)(2). OSC's efforts to obtain corrections of these deficiencies prior to issuance of the final agency report were unsuccessful. The following deficiencies are noted:

- The report was signed by the Under Secretary of the Navy. It is not signed by the agency head as required by 5 U.S.C. § 1213(d), nor does it contain a delegation of authority.
- The report does not contain the information required by Section 1213(d)(2) (a description of the conduct of the investigation). The report merely states that at the request of the Under Secretary, NAVIG "conducted an inquiry into the matter."
- The report does not contain the information required by Section 1213(d)(5) (a description of any action taken or planned as a result of the investigation). Although the agency substantiated at least one of the allegations, the report merely states, "I am considering appropriate remedial actions to preclude any similar oversights from occurring onboard U.S. Navy installations and vessels in the future."
- Mr. Martinson and Mr. Beesley alleged a violation of 29 C.F.R. § 1910.120. The report substantiated a violation of 29 C.F.R. § 1910.120(c)(8) only. This subsection pertains to the employer's obligation to notify employees prior to the commencement of their work activities concerning the chemical, physical and toxicological properties of each substance known or expected to be present on site. 29 C.F.R. § 1910.120 contains numerous other provisions that appear to impose obligations on employers to provide information, supply personal protective equipment, identify risks, establish a

site control program, and engage in medical surveillance of employees and monitoring programs. The report substantiates a violation of the one subsection identified. There is no discussion or explanation of the agency's apparent conclusion either that no other subsection was violated or that the other subsections were inapplicable to it.

- Mr. Martinson and Mr. Beesley alleged that the Navy violated a Remedial Action Order (RAO) issued by the State of California. The report substantiated their allegations that the Navy violated the written assurance by the Commanding Officer, NAS, Alameda, to the California Department of Health Services (presumably the RAO), that notice would be provided to employees of the risks. The inquiry determined that although Captain R. P. Boennighausen, the Commanding Officer of NAS, Alameda, drafted a Hazard Communication for Installation Restoration Site, and although David Martineau, the then Fire Chief of NAS, Alameda, received it, the firefighters were never made aware of the potential contamination in the areas in which they were working. The report indicates that the former Fire Chief is presently the Deputy Fire Chief, Commander, Navy Region Southwest.
- The report does not propose disciplinary action against the former Fire Chief. Rear Admiral M. B. Drew, Director, Hotline Investigations Division, Office of the Navy Inspector General (NAVIG), reported orally to this office that the Navy does not contemplate taking action against the former Fire Chief, primarily because he reported being unable to recall whether or not he distributed the Hazard Communication. Nonetheless, for purposes of the investigation, NAVIG concluded that he did *not* distribute the notice. Despite this conclusion, the report does not discuss the decision not to proceed with disciplinary action against the former Fire Chief or any other officials.
- Mr. Martinson and Mr. Beesley alleged that the Navy failed to supply adequate written statements of exposure for firefighters' health records. The report acknowledges that the Navy agreed to provide written statements, but states that "NAVIG is still inquiring into this aspect of the matter to ensure Dr. Abbe placed the statement into the medical records of all personnel for whom it was appropriate." This statement is not sufficient to meet the requirements of Section 1213(d)(5).
- The OSC transmittal to the Secretary included allegations that the Navy failed to provide annual medical examinations for exposed firefighters, and permitted firefighters to work in known contaminated areas without proper protective equipment. These allegations were not addressed in the report.
- The OSC transmittal contained an allegation of a violation of 29 C.F.R. § 1910.1200. In response to this allegation, the Report states, "I also concur with NAVIG that Section 1910.1200 does not appear to apply in this case and, thus, do not believe the

Navy violated it." No further discussion on this issue is contained in the report. This fails to meet all of the statutory requirements of Section 1213(d).

Whistleblowers' Comments

Mr. Martinson and Mr. Beesley provided comments on the report, asserting that, in addition to the statutory deficiencies outlined above, the report lacks credibility for several reasons. Mr. Martinson points out that officials at the Alameda Naval Air Station resisted responding to firefighters' concerns and denied or failed to respond to requests made under the Freedom of Information Act until after the firefighters sought intervention from their congressional representatives. Even after congressional intervention, Mr. Martinson asserts, the Fire Chief, Captain Dodge, delayed addressing the firefighters' concerns until after the base closed, thus making the firefighters' efforts to obtain historical information more difficult.

Mr. Beesley commented that shortly after the firefighters' union issued a press release concerning the contamination, he was demoted without justification. Only after filing a complaint before the Merit Systems Protection Board, was he restored to his supervisory position. Both Mr. Martinson and Mr. Beesley assert that prior Navy investigations, initiated by Mr. Martinson's complaints to the Inspector General, resulted in a "whitewash" of the allegations, and failed to address their allegations that the Navy had knowledge of the contamination but failed to put the firefighters on notice. Contrary to the Navy report, Mr. Martinson responded, the allegations were not twice previously investigated. The report states that both NAVIG and the Department of Defense Inspector General (DODIG) investigated the complaints and did not substantiate any allegations regarding health dangers. According to Mr. Martinson, the DODIG did not investigate his complaint or reach any determination on the merits of the allegations, but referred the matter to NAVIG.

Mr. Martinson and Mr. Beesley assert that the findings of the NEHC study are unreliable and contradict the previous Navy site studies. According to Mr. Martinson, NEHC staff members have publicly acknowledged that previous risk assessments conducted by NEHC have been for hypothetical populations. Mr. Martinson has concerns that the NEHC staff members have experience using only computer scenarios for potential future populations, not extrapolating prior recorded data. Mr. Martinson also responds that NEHC staff members refused to answer firefighters' questions during the assessment.

Mr. Martinson's comments include references to prior studies and reports concerning the contamination at the site. His principal concern is that the prior studies reflect elevated levels of PCBs and lead, exceeding the total threshold limit concentration toxicity criteria for hazardous waste. In a 1994 study, Mr. Martinson relates, the Navy determined that the presence of contaminated soil constituted a potential threat to public

health or welfare or the environment. These findings, he and Mr. Beesley maintain, are inconsistent with the report's conclusion that "no personnel were exposed to harmful or potentially harmful concentrations of carcinogens."

Finally, Mr. Martinson and Mr. Beesley take issue with how the Navy has chosen to handle providing firefighters with written statements for their medical records. The report indicates that the Navy is still inquiring into the matter of whether or not the official charged with providing medical statements actually placed the statement into the medical records of all personnel for whom it was appropriate. According to the report, each letter states that the individual concerned operated in PCB-contaminated areas but that his PCB exposure levels were within a completely safe range and no health problems were anticipated. They take exception to the wording of the statement. The statement refers to "possible" past exposure and that "there may have been some potential for exposure." They assert that Navy studies, including the NEHC health risk assessment, acknowledge the *fact* of exposure, not merely the possibility or potential for exposure.

Mr. Martinson and Mr. Beesley remain concerned about *which* medical records received the statement. Rather than place the statement in the files of retired or former firefighters, they argue, the Navy should provide a statement to each former employee for his *current* medical record. Mr. Martinson asserts that he is the only firefighter to have received a copy of such a statement. He claims to have been advised by Navy officials that only those firefighters who requested medical statements would receive them, contrary to the representations in the report. Mr. Martinson also points out that he had no exposure-related treatment by Navy medical personnel, and was not questioned about his work in the contaminated areas by an Industrial Hygienist involved in the preparation of the medical statement. Together, they question how the Navy could opine on the health of the firefighters when the firefighters were not medically examined or monitored after they became aware of the exposure.

Special Counsel's Determination

I have determined, pursuant to section 1213(e)(2), that the agency's report does not contain the information required under section 1213(d), and is not reasonable under Section 1213(e)(2)(A). As required by section 1213(e)(3), I have sent a copy of the report and the whistleblowers' comments to the Chairman of the Senate Armed Services Committee, and the Chairman of the House Committee on Armed Services. We have also filed a copy of the report in our public file and closed the matter.

Respectfully,



Elaine Kaplan

Enclosures