



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 1
5 POST OFFICE SQUARE, SUITE 100
BOSTON, MA 02109-3912

February 11, 2010

OFFICE OF THE
REGIONAL ADMINISTRATOR

Mr. Gary Moran
Deputy Commissioner
Department of Environmental Protection
One Winter Street
Boston, MA 02108

Re: New Bedford Harbor State Enhancement of Remedy Request

Dear Mr. Moran:

Thank you for your January 25, 2010 letter requesting that an expansion of the State Enhancement of Remedy (SER) be included in a forthcoming Explanation of Significant Differences (ESD) the Region is planning to issue for the New Bedford Harbor Superfund Site. EPA continues to support the SER and compliments MassDEP and the New Bedford Harbor Development Commission on its management of the project to date.

Your request to include the SER expansion in EPA's upcoming ESD raises several issues, both of a general nature and specific to each of the four proposals set out in the January 25 letter. Below, the general issues are discussed first, then the specific issues raised by the four proposals. Before EPA can respond to MassDEP's request, the following information must be provided:

General Issues

Inclusion in the ESD: The Region does not believe that the SER expansion request should be incorporated into its forthcoming ESD for an upper harbor CAD cell. As described in more detail below, EPA will require significantly more information and broader vetting of MassDEP's request, and we do not want to delay the CAD cell ESD to allow this to happen. We are also concerned about mixing two very different issues into one document for public comment.

Resource agencies and public vetting: The Region believes this proposal must be subject to a robust vetting process with the public as well as the resource agencies that would normally be involved in the permit review process for the activities requested in your letter. As discussed below, these proposals will have significant resource and business relocation impacts that need to be fully investigated and evaluated by all stakeholders. Even if this proposal were to be approved by EPA thus allowing the CERCLA 121(e) permit exemption provision to apply, the project must still meet all substantive requirements and evaluations that would normally be conducted for this proposal as part of the regulatory review and permitting process.

Business relocations: As you know, section 300.515(f)(1) of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 CFR Part 300 requires that the state finance 100% of the SER. MassDEP will need to provide an in-depth study of business relocation needs, especially those that are water dependent. Specifically, a detailed cost analysis must be performed including both temporary and permanent relocation costs and associated timeframes, and an accounting of how the State will cover all of these costs and how the State anticipates addressing any potential future claims against the State and potentially the United States by these relocated businesses.

Specific Issues

With regard to the four specific proposals presented in the January 25 letter, EPA raises the following concerns: this is not meant to be an exhaustive list but rather an indication of the need for additional information EPA would need to review prior to making a decision on your request.

1. Construction of up to three shoreline CDFs (confined disposal facilities) for disposal of clean CAD (confined aquatic disposal) cell material

As discussed with your staff, our main concerns are a) impacts to natural resources, especially at South Terminal, b) water-dependent business relocations, c) resource agency acceptance and d) community acceptance. For example:

How much habitat, and what different types of habitat would be eliminated by the proposed CDFs, especially at South Terminal? What specific mitigation measures are planned? Have the appropriate resource agencies been contacted?

A previously identified alternative for South Terminal that would eliminate the need for a bulkhead extension and consequent loss of 800 linear feet of natural coastal habitat using bundled pilings (aka "dolphins"), together with the existing marine bulkhead to secure docked ships, appears to be a viable alternative without the adverse impacts of the proposal put forth – why wasn't this alternative chosen? In addition, what other alternatives that avoid or reduce solid fill in sub- and intertidal habitat have been evaluated?

What would the impact of the proposed North Terminal navigational CDF be on the new \$5 million-plus marine terminal that EPA constructed to relocate Tisbury Towing as part of the Superfund harbor cleanup?

How much flood storage volume above would be lost due to the CDFs and what floodplain compensation measures are envisioned? We have similar concerns for any impacted wetlands.

What are the size and cost of the CDFs?

What do other relevant resource agencies and community stakeholders think about the proposal?

Has a detailed evaluation of impacts on existing combined sewer overflows and storm drains been performed and alternative plans been devised?

2. On-site capping using clean CAD cell material

EPA cannot approve such a broad request without knowledge of the specific aspects (e.g., spatial area to be capped, type of benthic habitat to be lost by capping, grain size and chemistry of cap material, type of cap placement, performance standards for cap placement, depth of cap placement, monitoring protocols, etc.) of any particular capping project.

3. Disposal of contaminated sediment into CDFs

The question of the type of material to be placed into a navigational CDF cannot be addressed until the underlying issue of whether such CDFs can be included in the SER is resolved, as discussed in issue #1 above.

If the footprints of the CDFs are located over contaminated sediment that is slated for dredging as part of the Superfund remedy, the CDFs would trigger 100% state responsibility for long-term operation and maintenance costs as part of the Superfund remedy. Has the state budgeted for this cost? In addition, if contaminated sediment is contained in the CDFs and "clean sand" is also temporarily stored in the CDF for future reuse, has the cost of a liner been included to prevent mixing of these materials?

4. Repair of piers impacted by navigational dredging

Since repair of piers is not expected to beneficially impact the harbor PCB cleanup, EPA will NOT approve such repairs as being included in the SER. The Steamship Authority example in your letter was an emergency situation that EPA agreed to include in the SER as an exception. In fact, we made it clear in our February 6, 2007 approval letter to MassDEP for the Steamship pier that "for future phases of SER dredging, other pier modifications that may be required must go through the normal regulatory review and permitting process for such activity."

We look forward to further dialogue and information-gathering regarding this request. Please do not hesitate to contact David Dickerson of my staff at (617) 918-1329 should you have any questions in this regard.

Sincerely,



H. Curtis Spalding
Regional Administrator

cc: Kristin Decas, New Bedford Harbor Development Commission
Paul Craffey, MassDEP