



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION I

J.F. KENNEDY FEDERAL BUILDING, BOSTON, MASSACHUSETTS 02203-2211

4.5.8

60176

VIA FAX
CONFIRMATION COPY VIA FIRST CLASS MAIL

May 18, 1993

Richard Lehan, Esq.
Massachusetts Department of Environmental Protection
One Winter Street, 3rd Floor
Boston, Massachusetts 02108

Re: New Bedford Harbor Superfund Site
Applicability of 310 CMR 9.35 to Estuary/Harbor/Bay Operable
Unit

Dear Richard:

This letter is in response to your request that you be provided with a statement of the Region's position regarding the status of the above referenced regulation as an ARAR for the proposed remedial activities at New Bedford Harbor. The regulation provides in part,

....The project shall preserve any rights held by the Commonwealth in trust for the public to use tidelands...for lawful purposes; and shall preserve any public rights of access that are associated with such use.

310 CMR 9.35(1).

The regulation further provides that,

Any water-dependent use which includes fill or structures for private use of Commonwealth tidelands or Great Ponds shall provide compensation to the public for interfering with its broad rights to use such lands for any lawful purpose. Such compensation shall be commensurate with the extent of interference caused, and shall take the form of measures deemed appropriate by the Department to promote public use and enjoyment of the water...

310 CMR 9.35(4) (emphasis added).

Section 121(d)(2)(A) of CERCLA states,

With respect to any hazardous substance, pollutant, or contaminant that will remain onsite, if--
...(ii) any promulgated standard, requirement, criteria, or limitation under a state environmental or facility siting law that is more stringent than any federal standard... is legally applicable to the hazardous substance or pollutant or contaminant concerned or is relevant and appropriate under the circumstances of the release or threatened release of such hazardous substance pollutant or contaminant, the remedial action selected under section 9604 of this title...



shall require, at the completion of the remedial action, a level or standard of control for such hazardous substance or pollutant or contaminant which at least attains such legally applicable or relevant and appropriate standard, requirement, criteria, or limitation.

42 U.S.C. §9621(d)(2)(A).

As an initial matter you should note that terms used in the statute expressly connect ARARs to hazardous substances pollutants or contaminants. The regulations which you assert are ARARs for the proposed remedy fail to make this connection.

In construing and applying CERCLA, however, the Agency has identified certain laws as potential ARARs, which by themselves do not relate to hazardous substances, pollutants, or contaminants. These laws have been classified as "Resource Protection Statutes." In general, these laws are designed to preserve and protect natural and cultural resources such as endangered or threatened species, wild and scenic rivers, historic places, or sites of significant archeological value.

After reviewing the regulation and comparing it to other resource protection statutes, the Region has determined that the regulation is not an ARAR for the proposed remedy. Unlike regulations that have been deemed ARARs, the terms of the regulation do not limit or otherwise establish concentration amounts for hazardous, substances, pollutants, or contaminants. Nor does the regulation seek to impose standards or criteria for how a project may or may not impact or alter the physical environment or environmental resources. Instead the regulation seeks to impose a requirement that projects in Commonwealth tidelands preserve public access rights, and it imposes a compensation requirement for any interference with such rights. The regulation is designed to protect the public's right to use and enjoyment of the tidelands rather than to protect the tidelands themselves and their functional value.

Moreover, 310 CMR 9.35(4) by its terms applies only to situations where fill or structures for private use occur on Commonwealth tidelands. The purpose of the proposed remedy is to protect human health and the environment and does not contemplate the filling or construction of structures on tidelands for private use.

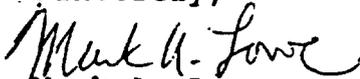
Finally, even if the regulation were an ARAR for the proposed remedy, or were otherwise applicable, the Region believes that the substantive requirements in the regulation are satisfied. Presently there are signs at the site warning the public against fishing and swimming. Because of the site contamination, public access to the tidelands is practically non-existent.

What the proposed remedy seeks to accomplish is the restoration of the eco-system by removing and isolating contaminants, and reducing the risks posed at the site to acceptable levels. By implementing the proposed remedy, the Region will be creating opportunities for public access to the site which currently do not exist. ~~Because~~ public access to the site is all but extinguished, implementation of the remedy will, in fact, enhance public access. Finally because the remedy does not involve the creation of structures for private use, the regulation is inapplicable.

For all of the reasons outlined above, the remedy put forward in the proposed plan, does not in the Region's view, trigger any further obligations pursuant to 310 CMR 9.35 (1) and (4). Thus, the Region is not obligated to take further steps to preserve access rights nor compensate for any infringement of access rights.

I hope that this letter serves to clarify the Region's position. If you have any questions, do not hesitate to call me at (617) 565-3455.

Sincerely,



Mark A. Lowe
Assistant Regional Counsel

cc Gayle Garman
Ellie Tonkin
Paul Craffey