



Commonwealth of Massachusetts
Executive Office of Environmental Affairs

Department of Environmental Protection

William F. Weld
Governor

Daniel S. Greenbaum
Commissioner



SDMS DocID 63906

New Bedford
17.07
63906

August 11, 1993

Mark A. Lowe
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region I
J.F. Kennedy Federal Building
Boston, Massachusetts 02203-2211

Re: New Bedford Harbor - Estuary/Harbor/Bay Operable Unit
Department position on State Waterways and Hazardous
Waste ARARs

Dear Mr. Lowe:

This letter has a dual purpose: (1) to respond on behalf of the Department to your letter to me dated May 18, 1993, which set forth EPA's view that the Department's Waterways regulation at 310 CMR 9.35 is not an ARAR for the proposed remedy; and (2) to clarify the Department's position on the State Hazardous Waste permeability standard applicable to the proposed Confined Disposal Facilities ("CDFs").

I. Waterways ARAR

The Department disagrees with EPA's evaluation of the ARAR status of the above referenced Waterways regulation. For the reasons below, the Department reaffirms its position (previously communicated to you) that 310 CMR 9.35 is a legally applicable ARAR within the meaning of s.121(d)(2)(A) of CERCLA and the National Contingency Plan ("NCP"). As your letter acknowledges, EPA has identified certain laws as ARARs which by themselves do not relate to hazardous substances, pollutants or contaminants, but are designed to preserve and protect natural and cultural resources such as wild and scenic rivers, historical places or sites of significant archeological value. This is consistent with the definition of "applicable requirements" under the NCP which also includes "standards of control and other substantive requirements, criteria, or limitations" promulgated under state environmental laws that specifically address a "remedial action, location or other circumstances found at a CERCLA site" and are more stringent than otherwise applicable federal requirements. See 40 CFR s.300.5.

310 CMR 9.35(1) regulates projects to "preserve any rights held by the Commonwealth in trust to use tidelands...for lawful purposes", and to "preserve any public rights of access that are associated with such use." In assessing the significance of any interference with public rights in the tidelands, the Department is directed to "take into account that the provision of public benefits by certain water-dependent uses may give rise to some unavoidable interference with certain water-related public rights." More specifically, 310 CMR 9.35(4) provides that any water-dependent use project which includes fill or structures for "private use" of the tidelands shall provide compensation to the public for interfering with its broad rights to use such tidelands, commensurate with the extent of the interference caused.

These provisions of the above referenced Waterways regulation constitute an applicable requirement, as defined in the NCP, which specifically addresses the proposed (remedial) action of permanently filling, and constructing CDFs, in Commonwealth tidelands - a location found at this CERCLA site which is subject to the jurisdiction of M.G.L.c. 91 and the regulations promulgated thereunder at 310 CMR 9.00. The requirements under 310 CMR 9.35 arise out of - and are inseparable from - the Department's stewardship obligation under M.G.L.c. 91 to protect and maintain the environmental quality of the tidelands and to regulate activity in the tidelands consistent with that purpose. While the public use compensation requirement under 310 CMR 9.35(4) is directed at preserving public rights in the tidelands, its underlying environmental protection purpose seeks to, at the same time, regulate the proper level and character of the public's use of the tidelands to ensure the tideland's protection from degradation and alteration, and their continued availability as a natural resource area to be used and enjoyed by the public for the purposes identified in 310 CMR 9.35 (e.g., fishing and fowling) which must be sustained by a certain level of environmental quality.

Moreover, the Department's view of the ARAR status of 310 CMR 9.35 is consistent with the relevant criteria for "location-specific" ARARs contained in EPA's own ARAR guidance manual - particularly as it applies to an analogous federal ARAR, the "Wild and Scenic Rivers Act" ("WSRA"). See CERCLA Compliance with Other Laws Manual (the "Manual"), 1.2.3.2, p.p. 1-25, 1-26; Exhibit 1-2, p. 1-28; 4.4.1 - 4.4.3, p.p. 4-17 - 4-20; Exhibit 4-3, p. 4-19. The WSRA requires a determination of whether the proposed project (which includes an activity such as dredging) could affect the "free-flowing characteristics or scenic, recreational, or fish and wildlife values" of a designated river. Ibid, 4.4.2 and footnote 8, p. 4-18. The Manual indicates that if, in the CERCLA context, the proposed action will not result in conditions consistent with the character of the river, the project must be mitigated or modified, and that the development and implementation of such mitigation is to take place at the ROD and RD/RA project phase. Ibid, Exhibit 4-3, p. 4-19. Similarly, 310 CMR 9.35(4) imposes a

qualitative standard for assessing, on a project-specific basis, the extent of any adverse impact on like public use values protected in the tidelands and the level of mitigation required to compensate for such interference.

EPA's determination that 310 CMR 9.35(4) is not an ARAR for the proposed remedy appears based, in large part, on its interpretation that the Department's regulation does not apply to the placement of fill or structures in Commonwealth tidelands where such activities are for a public purpose. As you were previously informed by the Department, EPA's interpretation of 310 CMR 9.35(4) is contrary to the Department's own interpretation and application of the scope of its regulation. The Department interprets the phrase a "water-dependent use project which includes fill or structures for private use of Commonwealth tidelands" in the first sentence in 310 CMR 9.35(4) as applying to any such project whose effect interferes with the general public's pre-existing rights in the tidelands - i.e., its effect is "private" in the sense that it is preclusive, and results in a narrowing of the otherwise broad water-related public rights adhering in the tidelands.

Furthermore, the Department has applied 310 CMR 9.35(4), consistent with the above interpretation, in several cases where the water-dependent use project was being carried out by a public entity to further a public purpose (e.g., certain Central Artery/Third Harbor Tunnel project components). While the public benefits to be derived from such "public purpose" projects are clearly relevant to the Department's determination of whether such benefits are commensurate with the interference caused by the placement of fill or structures in a particular location, such projects are not categorically exempt from making the necessary showing under 310 CMR 9.35(4). The Department's interpretation and application of its own regulation is entitled to deference when, as in the instant case, it is consistent with the purpose and effect of the statute and regulations as a whole and consistently applied. EPA failed to acknowledge these facts in its letter, and thereby avoided an evaluation of the ARAR status of 310 CMR 9.35(4) based on an express consideration of the Department's own interpretation and application of its regulation.

The Department has evaluated, based upon the application of 310 CMR 9.35, whether any public use compensation measures would be required as a component of the proposed remedy beyond the measures already included in the remedy. Based on the Department's current understanding of the relevant measures contained in the remedy, described below, the Department believes that the overall public benefits to be derived from the implementation of the remedial action at this site constitute sufficient compensation for the unavoidable interference with water-related public rights caused by the placement of fill and structures in the tidelands. The Department's understanding of the public use compensation measures

contained in the proposed remedy is as follows:

- (1) the implementation of the remedy itself, which will significantly reduce the level of water and sediment contamination in (at present) severely degraded tidelands, and thereby improve the degree of the public's safe contact with the tidelands;
- (2) the construction of CDF No.7 in a manner that will facilitate the City's further development of the area as commercial port facilities;
- (3) the area set aside for the siting of CDF No.7 allows for the City's potential use as a (short-term) disposal area for its dredged spoils, should the Department later determine that such area is appropriate for the described use;
- (4) dredging activities which will improve navigation in certain areas of the Harbor; and
- (5) the replacement of an existing soccer field at the conclusion of the remedy which will be used as a staging area for the incinerator and wastewater treatment plant.

The Department emphasizes that its acknowledgement that the remedy, as presently proposed, satisfies the compensation requirement under 310 CMR 9.35(4) in no way affects EPA's obligation to demonstrate, consistent with s.121(d)(2)(A) of CERCLA, that the remedy attains this legally applicable state requirement. In a Superfund context, the Department is concerned with the precedential effect of a failure by EPA to identify 310 CMR 9.35 as a legally applicable ARAR for this Site. The Department's confirmation of its position is also intended to preserve a consistent interpretation and application of its Waterways regulatory program.

For these reasons, the Department respectfully requests EPA to reconsider its position on the ARAR status of 310 CMR 9.35 for the proposed remedy. The Department, in turn, reserves its right to maintain its position on the ARAR status of 310 CMR 9.35 as outlined above.

II. Hazardous Waste ARAR

This letter is also intended to clarify the State's position on the lining of the CDFs. It was not the Department's intention to identify its Hazardous Waste Regulations, 310 CMR 30.00, in their entirety as relevant and appropriate ARARS for the Site. Instead, the State has identified the permeability standard of 1×10^{-7} cm/sec contained in 310 CMR 19.110 of the Department's Solid Waste Regulations as the relevant and appropriate ARAR for the lining of the CDFs. Based on the CDF

leachate information provided by EPA, the Department agrees with EPA that the above referenced permeability standard is relevant and appropriate for the CDFs.

If you have any questions or comments concerning the Department's position in these matters, please feel free to contact me at (617) 292-5568, or Paul Craffey, BWSC, at (617) 292-5591. Thank you for your consideration.

Sincerely,



Richard Lehan
Deputy General Counsel

cc: Helen Waldorf, Deputy Division Director, BWSC, DEP
Paul Craffey, BWSC, DEP
Peg Brady, Deputy Division Director, WW, DEP
Samuel Bennett, OGC, DEP
Andrea Langhauser, WW, DEP
John Carrigan, HW, DEP
Gayle Garman, EPA