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MEMORANDUM OF AGREEMENT BETWEEN THE COMMONWEALTH OF MASSACHUSETTS THROUGH THE MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION AND THE U.S. ENVIRONMENTAL PROTECTION AGENCY, NEW ENGLAND REGION

WHEREAS, the United States Environmental Protection Agency ("EPA") in September, 1983 listed the New Bedford Harbor Superfund Site located in the City of New Bedford, Massachusetts ("Site") on the National Priorities List ("NPL") pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601 *et seq*. ("CERCLA");

WHEREAS, by letter dated October 10, 1996, the Commonwealth of Massachusetts ("the Commonwealth" or "the State"), through the Department of Environment Protection ("DEP") requested, in accordance with section 300.515 (f) of the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. Part 300 ("NCP"), that EPA include navigational dredging as an Enhancement of the proposed remedy for the Site;

WHEREAS, pursuant to Subpart E of the NCP, in November 1996 EPA issued a Proposed Plan for remediation of the Upper and Lower Harbor of the Site ("OU1") including navigational dredging as a State Enhancement of the remedy;

WHEREAS, in September 1998, EPA issued a Record of Decision ("ROD") for OU1 that included DEP's requested Enhancement. In the ROD, EPA found that the Enhancement was not necessary to the selected Remedial Action but would not conflict or be inconsistent with the EPA selected remedy as long as the Commonwealth agreed to fund the costs associated with the Enhancement and that DEP agreed to assume the lead for supervising the Enhancement;

WHEREAS, the Commonwealth of Massachusetts, through DEP, concurred with the ROD and through that concurrence, the Commonwealth agreed to fund the costs associated with the Enhancement, which the Parties agree can include municipal (including any non-CERCLA match) funds for maintenance dredging and disposal, when and to the extent such funds became available and agreed to assume the lead for supervising the Enhancement, provided that the Parties understand and agree that the only currently available source of State funding for the Enhancement is the Commonwealth's Seaport Bond authorization, and;

WHEREAS, EPA and the Commonwealth, through DEP, recognize that the Enhancement shall consist of all or any part of the navigational dredging projects identified in the definition of "Enhancement" in this MOA, which will be implemented by the City of New Bedford (the "City") and/or the New Bedford Harbor Development Commission ("NBHDC") (hereinafter referred to collectively as the "City") and shall proceed as individual projects as funding becomes available;

WHEREAS, EPA recognizes that the City and DEP will enter into a separate MOA to define the roles and responsibilities of these parties for implementing and overseeing the Enhancement and that the City will procure one or more contractors to conduct and complete the

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Work and also retain an independent contractor to conduct daily oversight of the Work and to assist the City in the management and oversight of the Work;

WHEREAS, EPA further recognizes that while DEP will supervise the City and its contractor to ensure compliance with the performance, DEP will not be directly managing the Work being performed by the City's contractors nor will DEP be responsible for or otherwise involved in managing the funding, procurement, or contract management associated with the City's implementation of such Work;

WHEREAS, EPA and DEP agree that the Enhancement Work ("Work") as defined herein shall be conducted under the provisions of §121(e) of CERCLA, which does not require any Federal, State, or local permits for the Work conducted within the Site, and further agree that the Work must meet certain Performance Standards as defined herein;

WHEREAS, DEP recognizes that the U.S. Army Corps of Engineers ("USACE") has expertise in coordinating the regulatory review of dredging projects and will therefore coordinate the Enhancement Work with the USACE;

WHEREAS, DEP and EPA agree that the Enhancement Work shall end on or before the date EPA completes all Remedial Action dredging at the Site;

NOW, THEREFORE, in consideration of the foregoing and the mutual covenants set forth herein, it is agreed as follows:

EPA and the Commonwealth, through DEP, hereby enter into the following Memorandum of Agreement ("Agreement") for the New Bedford Harbor Superfund Site, New Bedford, Massachusetts.

I. INTRODUCTION

This Agreement is entered into by EPA and the Commonwealth of Massachusetts, acting by and through DEP (each a "Party", collectively the "Parties") pursuant to CERCLA and the NCP. EPA and DEP agree to comply with all provisions specified in this Agreement.

II. PURPOSE OF AGREEMENT

1. This Agreement defines the roles and responsibilities of the Parties for implementing the Enhancement portion of the OU1 ROD for the New Bedford Harbor Superfund Site.

2. This Agreement ensures that the Enhancement does not conflict with or become inconsistent with the remedy for the Site and allows for both the Enhancement and the Remedial Action to move forward separately yet simultaneously, taking advantage of opportunities to streamline operations without jeopardizing public health or the environment.

3. This Agreement ensures that DEP provides adequate supervision of the Enhancement, including coordinating with the Regulatory Agencies in making determinations of compliance with the Performance Standards for the implementation of the Work. DEP supervision may involve the participation of or rely upon action by other Commonwealth agencies or departments.

III. SCOPE OF AGREEMENT

This Agreement governs only the Enhancement portion of the OU1 ROD for the New Bedford Harbor Superfund Site. EPA shall remain the lead agency and DEP the support agency for the Remedial Actions at the Site. Should any provisions of this Agreement conflict with any provisions of the ROD, the ROD provisions shall prevail.

IV. DEFINITIONS

As used in this Agreement, the following terms shall have the following meanings. In the absence of a definition in this Agreement, a term shall have the same meaning as in CERCLA or the NCP.

"Commonwealth of Massachusetts" or "the Commonwealth" or "the State" shall mean the Commonwealth of Massachusetts, including its departments, agencies and instrumentalities.

"DEP" shall mean the Massachusetts Department of Environmental Protection and any successor departments or agencies of the Commonwealth of Massachusetts.

"Enhancement" or "Enhancement Work" or "Work" shall mean all or any part of the navigational dredging projects depicted on Figure 5.8 of the New Bedford/Fairhaven Harbor Plan, August 2002, (Attachment A to this Memorandum of Agreement) and as further described on page 52 of that Plan (Attachment B to this Memorandum of Agreement) provided that the dredging projects are conducted entirely within the New Bedford Harbor Superfund Site. "Enhancement" or "Enhancement Work" or "Work" shall also include the disposal of the sediments dredged as depicted and described in Attachments A and B of this Memorandum of Agreement provided that the disposal facilities and any required mitigation measures and institutional controls are conducted entirely within the New Bedford Harbor Superfund Site and that operation and maintenance of the disposal facilities is performed in such a way that ensures that the facilities are protective of human health and the environment.

"EPA" shall mean the United States Environmental Protection Agency, New England Region, and any successor departments, agencies, or instrumentalities.

"New Bedford Harbor Superfund Site" shall mean the shallow northern reaches of the Acushnet River estuary south through the commercial harbor of New Bedford and into 17,000 adjacent areas of Buzzards Bay.

"Performance Standards" shall mean federal, state and local standards, requirements, criteria or limitation to which any navigational dredging project is required to conform to as determined by DEP, as lead agency, in coordination with the Regulatory Agencies.

"Regulatory Agencies" shall mean the Massachusetts Department of Environmental Protection, the Massachusetts Coastal Zone Management office, the U.S. Army Corps of Engineers, the National Fisheries Management Service, the U.S. Environmental Protection Agency, and other relevant state and federal regulatory programs.

"Remedial Action" shall have the same meaning as that set out in Section 101(24) of CERCLA.

"Response Actions" shall have the same meaning as that set out in Section 101(25) of CERCLA.

V. LEAD DESIGNATIONS, CERTIFICATIONS AND RESPONSIBILITIES

A. Lead Agency Designation

1. DEP will be the lead agency for the Commonwealth that supervises and reviews the conduct of the Enhancement Work at the Site pursuant to § 300.515(f)(1)(ii)(A) and (B) of the NCP.

2. EPA will continue to be the lead agency for overseeing implementation of the Remedial Action, including determining completion of Remedial Action dredging.

B. Lead Agency Certifications

1. Once available, the State funding for the Enhancement will include the necessary personnel, materials, and services to properly monitor the Work. The Commonwealth agrees to fund the costs associated with the Enhancement, provided that the Parties understand and agree the only currently available source of State funding for the Enhancement is the Commonwealth's Seaport Bond authorization.

2. DEP agrees that the Enhancement will not be funded from money currently residing in the Commonwealth of Massachusetts Operation and Maintenance Expendable Trust for the New Bedford Harbor Superfund Site that was specifically created to finance operation and maintenance of the remedy nor will DEP claim a credit against its state cost share of the Remedial Action under 40 C.F.R. §35.6285 for costs associated with the Enhancement or otherwise seek reimbursement of its costs from the Hazardous Substances Superfund established by 26 U.S.C. § 9507.

3. EPA and DEP agree that funds from the Commonwealth of Massachusetts Operation and Maintenance Expendable Trust for the New Bedford Harbor Superfund Site can be used to finance the operation and maintenance of the confined disposal facilities described in the ROD

that contain both sediment dredged as part of the ROD remedy and navigational dredged material.

4. DEP agrees to maintain its lead agency status through the completion of the Enhancement.

C. Lead Agency Responsibilities

1. As recognized in this MOA, the navigational dredging projects that comprise the Enhancement Work will be implemented by the City, under the supervision of DEP. The City will procure the project contractor(s) and retain an independent contractor to conduct daily oversight of the Work and to assist the City in the management and oversight of the Work. Accordingly, the City will be responsible for preparing a Statement of Work ("SOW") and a draft Workplan for each project, subject to DEP's review and approval. Upon its approval of such documents, DEP will, in turn, submit them to EPA to make the "consistency determinations" specified below.

2. For each project to be implemented as part of the Enhancement, DEP shall submit to EPA New Bedford Harbor Superfund Site Project Managers ("EPA Project Managers") a Statement of Work (SOW), prepared by the City and approved by DEP, that is sufficient for EPA to make a determination that the Work proposed in the SOW is conducted entirely onsite for the purposes of §121(e) of CERCLA and does not conflict with nor is inconsistent with the remedy ("the SOW consistency determination"). EPA shall issue the SOW consistency determination within thirty (30) days of receipt of the SOW.

3. DEP shall also provide a copy of the SOW to the Regulatory Agencies for review and comment.

4. After receiving EPA's SOW consistency determination, DEP, in coordination with the City, USACE and the Regulatory Agencies, shall meet ("coordination meeting(s)") to determine the Performance Standards that apply to the Work for each project and shall incorporate those Performance Standards into a draft Workplan, prepared by the City and approved by DEP, for each project of the Enhancement. DEP shall provide EPA Project Managers with a copy of each draft Workplan at least sixty (60) days before beginning the Work. Within thirty (30) days of receipt of the draft Workplan, EPA Project Managers shall issue a Workplan consistency determination to ensure that the Workplan does not conflict with nor is inconsistent with the remedy ("Workplan consistency determination"). If both parties agree, certain tasks in the Workplan may be initiated upon approval by EPA prior to issuance of the consistency determination.

5. DEP shall consult with USACE to ensure that coordination meetings with all Regulatory Agencies occur as needed during each project.

6. Upon request, DEP shall provide to the EPA Project Managers copies of submittals for the Work and provide for an opportunity for review and comment by the EPA Project Managers. DEP, within fifteen (15) working days of receipt of EPA Project Managers'

comments, shall provide in writing to EPA (or orally if the Parties agree) a rationale whenever EPA's comments are not incorporated in the document.

7. DEP in coordination with the Regulatory Agencies shall ensure that the Work is performed in a manner that is consistent with the final Workplan, EPA's consistency determinations and that the Work complies with the Performance Standards. EPA acknowledges, however, that the City, in implementing the Enhancement, is not acting as an agent of DEP, or the Commonwealth, and that the City and its contractors are responsible for compliance with the approved Workplan and the Performance Standards.

8. DEP shall ensure that all public participation requirements identified in the Performance Standards as well as other appropriate community involvement and public outreach efforts occur.

9. DEP shall ensure that all records that form the basis for the selection of each project of the Enhancement, the funding sources for each project of the Enhancement Work and any other documents that are consistent with the terms of this Agreement are maintained.

10. DEP, in entering into its MOA with the City, shall incorporate a provision requiring the City to provide access to the Work areas for employees and other authorized representatives of EPA for the purposes of complying with this Agreement.

VI. SUPPORT AGENCY DESIGNATION, CERTIFICATIONS AND RESPONSIBILITIES

A. Support Agency Designation

Except as noted in this document, EPA is the support agency for the Enhancement at the Site.

B. Support Agency Certifications

EPA shall make best efforts to review the SOW and draft Workplan to make the consistency determinations in Section V. C. above in a timely manner but no longer than thirty (30) days after receiving the documents.

C. Support Agency Responsibilities

EPA may attend meetings or provide comments on submittals pursuant to Section V.C. above. If EPA Project Managers request copies of submittals, EPA comments shall be submitted to DEP within fifteen (15) working days of receipt of the submittal unless another time period is agreed to by the Parties. EPA Project Managers' comments submitted to DEP do not constitute EPA concurrence on any or all points contained in the document and EPA's concurrence is not a prerequisite to State approval of any or all documents submitted to the State for the Work.

VII. TERMINATION OF THE AGREEMENT

1. This Agreement will terminate on or before ten (10) years from the date of the last signature to this MOA or on the date of completion of the Remedial Action dredging, whichever is earlier. At the termination of this MOA, if both Parties agree, the MOA may be extended for an agreed upon period of time but not beyond the date of completion of the Remedial Action dredging.

2. EPA may stop the Work and terminate this Agreement if:

(a) The Parties mutually agree;

(b) EPA determines that conditions for DEP to be the Lead Agency are not achieved or maintained during the performance of the Agreement;

(c) EPA determines that the Enhancement interferes or is inconsistent with the Remedial Action at the Site;

(d) EPA determines that conditions at the Site pose or may pose an imminent and substantial endangerment to public health or the environment; or

(e) EPA takes an enforcement action against any entity performing the Work.

3. Nothing in this Agreement obligates DEP or the Commonwealth to initiate or complete the Enhancement, and the Commonwealth, through DEP, may, in its sole discretion, terminate the Enhancement Work for any reason, including insufficient funding; if the Enhancement is implemented by an entity other than DEP, the Commonwealth or their authorized representatives, the permit exclusion provision in § 121(e) of CERCLA no longer applies and all necessary permits must be secured by the entity implementing the Work. Should the Enhancement Work terminate pursuant to this paragraph, the Commonwealth, through DEP, shall provide EPA with thirty (30) days advance written notice of and the reasons for the Commonwealth's proposed action and shall afford EPA an opportunity to respond, in writing or orally, to the Commonwealth's proposed action. Prior to the termination of the Enhancement Work, EPA shall identify any activities as necessary to ensure that the terminated Work does not conflict with nor is inconsistent with the remedy.

4. Except in the event that EPA determines that conditions at the Site pose or may pose an imminent and substantial endangerment to public health or the environment, prior to any EPA decision to terminate this Agreement and/or stop the Work, EPA will provide DEP with 30 days advance written notice of EPA's proposed action. In the event of conditions that pose or may pose an imminent and substantial endangerment to the public health or the environment, EPA will provide notice to DEP as soon as is practicable after the Work has stopped and/or the Agreement is terminated but no longer than five (5) days thereafter. All notices required by this paragraph shall include the reasons for EPA's decision to stop the Work and/or terminate the Agreement and will provide DEP with an opportunity to respond in writing or orally to EPA's

action. DEP will be provided an opportunity to rectify the cause of any of the above notice(s) within 30 days after EPA's notice is issued. Except when EPA has terminated this Agreement and/or stopped the Work because EPA has determined that conditions at the Site pose or may pose and imminent and substantial endangerment to public health or the environment, DEP may dispute the decision by using the Dispute Resolution provisions in the New Bedford Harbor State Superfund Contract to resolve the dispute, except that neither party shall seek judicial resolution of the dispute.

VIII. POINTS OF CONTACT

State Project Manager
Paul Craffey
MADEP
Bureau of Waste Site Cleanup
One Winter Street
Boston, MA 02108

EPA Project Managers
Dave Dickerson
Jim Brown
U.S. EPA (HBO), Office of Site Remediation & Restoration
One Congress Street, Suite 1100
Boston, MA 02114

Within fifteen (15) days of any changes in the points of contact, such change will be communicated to the other Party in writing.

IX. OTHER PROVISIONS

1. EPA shall not be responsible for any harm to any person caused by the acts or omissions of any Commonwealth employees, or other representatives or agents of the Commonwealth during the course of the Work or during the course of any Commonwealth inspection of the Work. The Commonwealth shall not be responsible for any harm to any person caused by the acts or omissions of any EPA employees or other representatives or agents of EPA during the course of the Work or during the course of any EPA inspection of the Work.

2. This Agreement is intended to benefit only the Commonwealth of Massachusetts and EPA. It extends no benefit or right to any third party not a signatory to this Agreement.

3. EPA (including its employees, agents, contractors and other representatives) is not authorized to represent the Commonwealth or act on behalf of the Commonwealth in any matter relating to the subject matter of this Agreement. The Commonwealth (including its employees, agents, contractors and other representatives) is not authorized to represent EPA or act on behalf of EPA in any matter relating to the subject matter of this Agreement.

4. This Agreement does not constitute a waiver of EPA's right to bring an administrative or judicial action against any person(s) under Sections 104, 106, or 107 of CERCLA, or any other statutory provision or common law. This Agreement does not constitute a waiver of the Commonwealth's right to bring an action against any person(s) for liability under M.G.L. c. 21E, the Massachusetts Contingency Plan ("MCP"), or any other applicable statute or common law.

5. Any emergency response activities conducted pursuant to the NCP shall not be restricted by the terms of this Agreement.

6. Each Party reserve all rights provided them by CERCLA, the NCP, M.G.L. c. 21E, the MCP, and other State and Federal laws.

7. This Agreement shall not limit the authority of EPA New England Region or DEP to undertake response or enforcement actions pursuant to any environmental statute or regulation. Furthermore, this Agreement shall not limit the authority of any other federal or state agency or office to take response or enforcement actions pursuant to other federal or state statutes or regulations.

X. MODIFICATION

This Agreement may be modified or amended by mutual agreement of the Parties.

FOR THE COMMONWEALTH, BY AND THROUGH THE MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION

Jan 10, 2005
Date

Richard Chalpin
Acting Assistant Commissioner
Bureau of Waste Site Cleanup
Department of Environmental Protection

FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY-EPA NEW ENGLAND

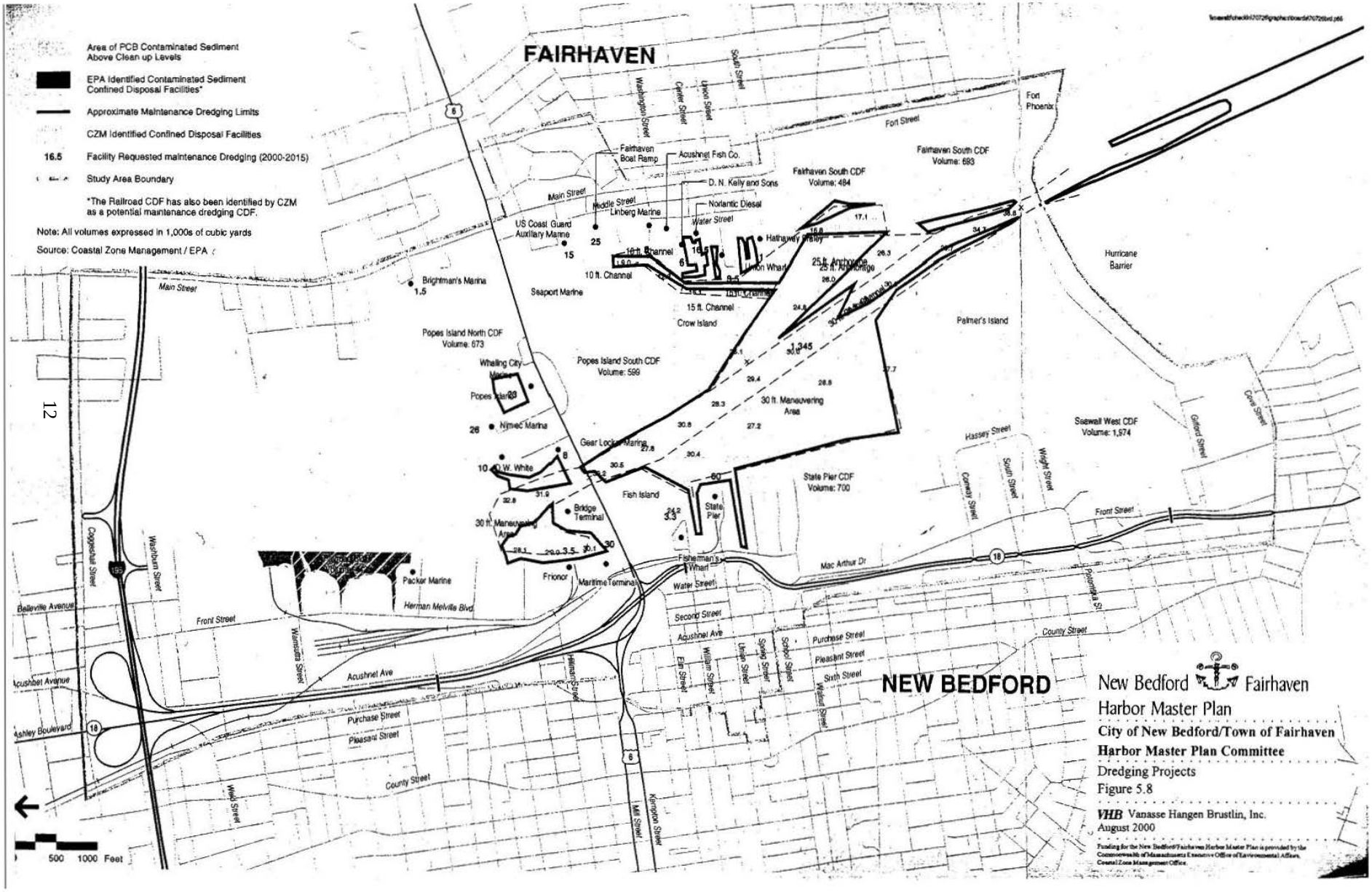
Jan 10, 2005
Date

Susan Studlien
Director, Office of Site Remediation and Restoration
U.S. EPA - New England Region

ATTACHMENT A

New Bedford – Fairhaven
Harbor Master Plan

Figure 5.8


Area of PCB Contaminated Sediment Above Clean up Levels
EPA Identified Contaminated Sediment Confined Disposal Facilities*
Approximate Maintenance Dredging Limits
CZM Identified Confined Disposal Facilities
16.5 Facility Requested maintenance Dredging (2000-2015)
Study Area Boundary
*The Railroad CDF has also been identified by CZM as a potential maintenance dredging CDF.
Note: All volumes expressed in 1,000s of cubic yards
Source: Coastal Zone Management / EPA
FAIRHAVEN
NEW BEDFORD
Fairhaven Boat Ramp
Acushnet Fish Co.
D. N. Kelly and Sons
Norlantic Diesel
Linberg Marine
US Coast Guard Auxiliary Marine
Brightman's Marina
Seaport Marine
Hathaway Bailey
Union Wharf
Fairhaven South CDF Volume: 484
Fairhaven South CDF Volume: 693
Fort Phoenix
Hurricane Barrier
Palmer's Island
Crow Island
Popes Island North CDF Volume: 673
Popes Island South CDF Volume: 599
Whaling City Marine
Nimec Marina
Gear Locker Marine
W. White
Bridge Terminal
Fish Island
State Pier
State Pier CDF Volume: 700
Seawall West CDF Volume: 1,974
Packer Marine
Frionor
Maritime Terminal
Fisherman's Wharf
Main Street
Middle Street
Water Street
Fort Street
South Street
Washington Street
Center Street
Union Street
Hassey Street
Cornay Street
Wright Street
Gifford Street
Cove Street
Front Street
Mac Arthur Dr
Second Street
Acushnet Ave
Purchase Street
Pleasant Street
Sixth Street
County Street
Herman Melville Blvd
Belleville Avenue
Acushnet Avenue
Ashley Boulevard
Coggeshall Street
Weldon Street
Hamilton Street
Elm Street
William Street
Union Street
Sycamore Street
School Street
Walnut Street
Potomska St
Mill Street
Kempton Street
500 1000 Feet
New Bedford Fairhaven
Harbor Master Plan
City of New Bedford/Town of Fairhaven
Harbor Master Plan Committee
Dredging Projects
Figure 5.8
VHB Vanasse Hangen Brustlin, Inc.
August 2000
Funding for the New Bedford/Fairhaven Harbor Master Plan is provided by the Commonwealth of Massachusetts Executive Office of Environmental Affairs, Coastal Zone Management Office.

ATTACHMENT B

New Bedford – Fairhaven
Harbor Master Plan

Page 52 Maintenance/Improvement Dredging – Quantities

- *Cleanup Dredging* involving removal of contaminated harbor sediments is being advanced under the auspices of the Environmental Protection Agency and is now moving into the implementation stage.

Maintenance/Improvement Dredging – Quantities

The dredge volume associated with dredging the federal channels to authorized depths and implementing previously identified state and private projects has been estimated by CZM as up to 2,000,000 cubic yards, most if not all of which is comprised of polluted aquatic sediments. The following dredging needs in cubic yards have been identified and are supported by the Plan:

Location	Cubic yards
Fisherman's Wharf	3,333
Maritime Terminal Wharf	30,000
Frionor	3,500
Fish Terminal	10,000
Gear Locker Marina	8,000 (plus 8,000 improvement dredging)
Union Wharf	3,524
Norlantic Diesel	16,500
Hathaway Braley Wharf	1,000
State Pier to Federal Channel	60,000
Central Waterfront Public Piers	35,000 (maintenance and improvement dredging)
Fairhaven Boat Ramp	25,000
Federal Channel	1,345,000
Packer Marine	1,000 (plus 1,500 improvement dredging)
Linberg Marine Berth	5,000 (plus 2,000 improvement dredging)
D. N. Kelley	61,000
U.S. Coast Guard	15,407
Acushnet Fish Company Pier	11,000
Niemiec Marine	26,000
Whaling City Marine	23,000
D. W. White Construction	10,000