

Portland Harbor Draft AOC – Key Remaining Issues 10-5-17

1. Paragraph 3.1 (Statement of Purpose) – In its new redline, EPA proposed to delete most of the stated objectives that appeared in the prior draft of this paragraph and add a more general statement that the work is intended to “inform certain analysis.” On Monday’s call with EPA, the group expressed concern with this proposed change, noting that we believe that the list that appeared in our prior draft accurately described the objectives that we have discussed with EPA over the past few months. The group also expressed its concern that the phrase “to the extent statistically significant data is available” is too limiting.

EPA explained that it is concerned that the full list of objectives as described in the prior draft could be construed as a pre-determination by EPA that the data will be sufficient to meet all those objectives. EPA noted that its use of the phrase “to inform certain analysis” in its insert was intended to reflect the fact that EPA cannot make a determination on the sufficiency of the data without first reviewing it. However, we are concerned that your proposed changes may make it more difficult to use the data to facilitate a speedy and cost effective implementation of a remedy.

Proposed Resolution: As discussed on Monday, we propose that we re-insert the list of objectives that appeared in the group’s prior draft but address EPA’s concerns by revising the text to clarify that EPA is not making any pre-determination regarding the data (e.g., revise the objectives to indicate that the work is intended “to inform” the various analyses or “assist with”). If EPA is amenable to this approach, we can quickly propose specific edits after tomorrow’s call.

2. Section XIV (Dispute Resolution) – In the interest of reaching a resolution, the group is willing to accept many of EPA’s proposed edits to this section, but we wish to discuss two of the changes that EPA made to the last draft:
 - a) Official Making Regional Determination – In the group’s prior draft, we accepted EPA’s proposal that formal disputes would be decided at the regional level unless appealed to the Administrator or his/her designee, but we proposed that the Regional determination would be made by the Regional Administrator. In its redline, EPA proposed that the Director of the Region’s Office of Environmental Cleanup render that determination. We continue to believe that any such determinations on any formal disputes under the AOC at the Regional level should be made by the Regional Administrator.

Proposed Resolution: To achieve resolution on this issue, we would propose that the Regional determination be made by “the Regional Administrator or the Regional Administrator’s Designee.” This would be similar to the resolution achieved regarding the decision maker at the appeal level, preserves the Regional

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Administrator's authority to manage the region, and not prejudice that management approach prior to the appointment of a new Regional Administrator.

- b) Timing of Expert Panel Report – In its redline, EPA agreed to provide an opportunity for the group to submit a report from an expert panel in a formal dispute resolution process, but it proposed certain revisions to this section. Most of those revisions are acceptable. However, in our prior redline, we proposed that the expert panel report be submitted concurrently with the report by the CSTAG Chair, after both the request for formal dispute resolution and the response were submitted. In EPA's redline, EPA proposed that the expert panel report be submitted with the group's initial request for dispute resolution, prior to EPA's response. We believe that this change to the proposed schedule would be counterproductive and undercut the effectiveness of that expert panel. For example, if the Expert Panel is required to produce its report before EPA prepares its response, the Expert Panel would not have the benefit of EPA's views before rendering its opinion. The group believes that any Expert Panel report will be more useful to achieving a fair and informed determination if the Expert Panel can consider and address EPA's position before rendering an opinion.

Proposed Resolution: The Pre-RD Group will submit any expert panel report, concurrently with the submission of the CSTAG Chair's evaluation, 30 days after the Response to the Request for Resolution.

3. Section XXVII (Completion) – In its redline, EPA proposed various changes to this section including new language under which EPA would determine after the PDI Evaluation Report is submitted whether all work under the AOC has been fully performed. If so, EPA would provide written notice to the group. EPA's proposed revisions, however, do not include any schedule for EPA's determination or issuance of the notice under this section.

Proposed Resolution: The group is willing to accept EPA's changes to this section as long as a time period is established that would allow the group to dispute the non-issuance of a notice of completion if EPA declines to act. We believe that the most efficient approach is to insert language allowing the group to initiate dispute resolution under Section 14 if EPA does not issue a notice of completion within 30 days after submission of the PDI Evaluation Report to coincide. We believe this timing makes sense since EPA's comments on the PDI Evaluation Report are also due 30 days after it is submitted. In setting the same date for EPA's comments on the PDI Evaluation Report and the group's ability to initiate dispute resolution on work completion, we can avoid any unnecessary delay or duplication of effort by addressing both issues in a single dispute resolution process.