

Message

From: Weaver, Elizabeth M. [elizabeth.weaver@nortonrosefulbright.com]
Sent: 8/30/2017 8:24:54 PM
To: Pirzadeh, Michelle [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=2ae309e0a52a42cd847709b39bc2239a-Pirzadeh, Michelle]
CC: Cora, Lori [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=c8850941bf1540c796559dce75c2f5ee-Cora, Lori]; Kelly, Albert [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=08576e43795149e5a3f9669726dd044c-Kelly, Albe]; Gustavson, Karl [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=242318f48f264976aeeb0008f0a44210-Gustavson, Karl]; Sheldrake, Sean [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d16e2780a4094bba82daaa5283a71572-Sheldrake, Sean]; Ebright, Stephanie [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=6fe08cfbe17940aabd4d999a19eada04-Ebright, Stephanie T.]; Bilbrey, Sheryl [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=45612dba9a7f4a718d12e27feec7590f-Bilbrey, Sh]; 'davis.zhen@epa.gov' [davis.zhen@epa.gov]; Ingemansen, Dean [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=80449989b40b42ec8202ed034c75b237-Ingemansen, Dean]; Opalski, Dan [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=8b5ed6410d934bf699a008a252791a55-Opalski, Dan]; 'Loren R. Dunn (LDunn@bdlaw.com)' [LDunn@bdlaw.com]; 'Peter Saba (psaba@schm.com)' [psaba@schm.com]; 'greg.christianson (greg.christianson@morganlewis.com)' [greg.christianson@morganlewis.com]; 'richard.george (richard.george@pgn.com)' [richard.george@pgn.com]; 'Karen TRAEGER (karen.traeger@external.total.com)' [karen.traeger@external.total.com]; 'J.W. Ring (JWRing@ringbenderlaw.com)' [JWRing@ringbenderlaw.com]; 'Christine L. Hein (CHein@ringbenderlaw.com)' [CHein@ringbenderlaw.com]
Subject: RE: Pre-RD Group Proposal and Status
Attachments: Cost estimate Pre-RD Proposal 2017-08-30.pdf

To Michelle,

The Pre-RD Group's budget estimate for the scope of work proposed by the Pre-RD Group is attached. Please contact us if you have any questions. Thank you.

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NORTON ROSE FULBRIGHT

From: Weaver, Elizabeth M.
Sent: Tuesday, August 29, 2017 5:03 PM
To: 'pirzadeh.michelle@epa.gov'
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Subject: Pre-RD Group Proposal and Status

FOR SETTLEMENT PURPOSES ONLY – SUBJECT TO Rule 408, FRE

Michelle,

Thank you for meeting with the Pre-RD Group yesterday. The Pre-RD Group's proposal is a robust plan that meets the ROD's stated need for more information. Our proposal will provide data and analysis to update the RI data that is 10-15 years old, to better understand current conditions, to refine the remedy, to re-baseline the site, and progress the allocation process. The proposal has been designed to complete this work within two years. As we discussed, the additional technical scope and AOC issues that remain not only have substantial cost impacts, but even more importantly have significant schedule implications that threaten our ability to achieve the two-year goal.

At the meeting, we presented a summary of the negotiations thus far and the remaining issues in dispute. You indicated that we would be receiving EPA's response to the documents we sent last week – the AOC e-mailed last Wednesday August 23 and the SOW and Work Plan e-mailed last Friday August 25. We need to receive your response on the remaining open issues not later than COB Wednesday in light of the upcoming holiday and in order to achieve agreement in principle by the middle of next week. We would then need to finalize the AOC and SOW documents as well as the Work Plan by mid-September. Meeting this schedule to conclude the negotiations and documentation is critical to starting the field work this Fall and achieving the two-year schedule.

During our meeting yesterday you made statements to which we feel compelled to respond, as they indicate that EPA and the Pre-RD Group have significantly different views of key issues that are critical to the final stage of negotiations.

First, you indicated that EPA believes that the cost of implementing the Group's proposed plan is about \$4.5 million -- not \$15 million or more as we have indicated. We have agreed to provide our cost estimate for your review and ask that you will in turn provide the basis for EPA's estimate to our Group. (We will send our cost estimate under separate cover to you not later than tomorrow morning.) As we indicated at the meeting, we have asked our consultants to thoroughly scrub these numbers and provide a realistic and detailed best case estimate, assuming no major disputes or difficulties arise. As you can see, our best case estimate far exceeds EPA's estimate of \$4.5-5 million.

Second, EPA representatives have suggested the request by EPA for all COCs is a minor cost item, as is the ongoing request for more samples. We estimate the cost of analyzing for all site COCs would be an additional \$1-2 million based on our current sample count, and the cost of adding 84 additional samples would be approximately \$500,000. Both of these additional scope items have the potential for causing schedule impacts that would put the two-year goal at risk. Further, as you know, we do not believe these additional scope items would result in a materially different or improved work product.

That brings up the question of whether additional samples being sought by EPA are required in order to produce a product that is statistically robust enough to support conclusions that can be used in analyzing future trends, including the rate of natural recovery. You indicated that EPA technical staff had told you that the "power" of our sampling plan would yield a 60% power, whereas EPA is proposing more samples to yield a higher power. We mentioned that during the technical discussions we had demonstrated that our work will yield 75 to 80%, whereas EPA is at 90%, based on PCB statistics. Attached is a slide from a presentation our Group made to EPA on August 17 that shows the difference between the statistical power of the two plans. Because our sampling plan, which was increased during the course of the negotiations, is sufficient and robust for all contemplated uses of the data, we have not proposed to further increase the number of samples.

Finally, you suggested that our goals and plan seem to be more aimed at refinement of sediment management areas, rather than re-baselining the site or understanding current conditions. This is a fundamental misunderstanding of our offer. Both aspects of our plan are critical and inter-related. The results of the baseline evaluation and data analysis are just as critical to furthering the allocation as is the work to refine the footprints of active remediation.

We heard again at the meeting the suggestion that EPA intends to pursue others or somehow seek additional samples and analyses from others. We asked for some understanding of what options EPA is pursuing or may pursue in this regard and no details were provided. If this is a serious suggestion, then we will need to know how that work would inter-relate with our own, since your involvement of another team could have cost and schedule implications for our project. As we said at the meeting, we are not aware of any party willing to step forward to do pre-RD or baselining work at this time other than our group.

You indicated at the meeting that the technical issues remaining in dispute are not as significant as the legal issues we presented. We are very concerned that EPA apparently is planning to reject the use of expert or peer review of technical disputes, and hinted that it may not accept our request to remove the work “takeover” provision in the AOC and other similar provisions. By way of explanation, the requested changes are designed to protect us from a repeat of some very unfortunate experiences of the LWG during the RI/FS. Significant work was taken away and finished by EPA and technical disputes were lengthy and unsatisfactory. In light of previous experience, the PRPs at the Portland site are less willing to leave such matters unresolved before concluding an AOC. We believe that the process as revised in our latest draft of the AOC involving input from an impartial panel of experts in place and selected by the CSTAG chairman while retaining final decisional authority with EPA through the Administrator’s designee provides a fair and expedited dispute resolution process that will promote achievement of the work on the agreed schedule. In contrast, a takeover of the work by EPA is not consistent with a limited, short-term project and would likely result in the failure to achieve the two-year goal.

Finally, among all the issues we have raised, it is critical that we confirm that if we do the work we propose, EPA, at all levels, will consider and act upon the new data, including our evaluation and analysis of what the data means for the site going forward. As we have told EPA staff, the science should speak for itself. Data collected using sound, EPA-approved methods should be respected and used to complete an effective and protective remedial action in Portland Harbor. We should be prepared to follow the data and its implications.

As you know, EPA originally sought to change the “evaluation” aspect of our work to a “data dump.” That will not be a satisfactory outcome here, for the reasons we have previously expressed to Region 10 staff. We need a firm agreement on our right to provide an analysis/report at the end of the project, and whether EPA will agree to consider and act on the findings, if appropriate.

Please treat this email and its attachments as confidential settlement negotiations. Please contact us if you have any questions or wish to discuss.

SENT ON BEHALF OF THE MEMBERS OF THE PRE-RD GROUP

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