



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION II

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Responses to questions raised at Hudson River PCBs Steering Committee meeting of October 16, 1991

The six questions raised by the Steering Committee are as follows:

1. Why participate in the extensive Community Interaction Program that EPA has designed for the Reassessment if in fact public input will not have an impact and DEC will dredge no matter what EPA's ultimate decision is?
2. In a question of ultimate jurisdiction, if EPA's decision on a federal level is a remedial alternative other than dredging, does DEC have the authority to proceed arbitrarily with the Project Sponsor Group's dredge project?
3. Since DEC is actively participating in the reassessment process, will DEC abide by the EPA decision if it is other than a dredging decision?
4. Are federal permits (EPA, Army Corps) being processed for the Project Sponsor Group's effort before the reassessment decision under Superfund can be made (i.e., TSCA, wetlands, etc.)?

5. Are DEC's costs reimbursable if these contract funds for Site 10 are being spent prior to EPA's making a decision as part of the Reassessment? Are the funds reimbursable at all?

6. Is there anything EPA can do to stop DEC from proceeding with its activities pertaining to the development of Site 10 until the completion of the Reassessment?

Response to questions 1 through 3: EPA believes that it is important for interested members of the public to participate in the Community Interaction Program ("CIP"). The CIP is a mechanism which enhances the public's opportunity to present to EPA, and others who are participating in the Reassessment Remedial Investigation/Feasibility Study ("RRI/FS") process, their concerns, questions, recommendations and issues regarding EPA's review of the Hudson River PCBs Site (the "Site"), and to be kept informed regarding the RRI/FS. The participation by the public in the CIP helps insure that EPA is aware of the concerns of the public as EPA proceeds through the RRI/FS process and eventually makes a remedial decision.

In conducting a detailed analysis of remedial alternatives during Phase 3 of the RRI/FS (the Feasibility Study) and in subsequently making a decision regarding the appropriate remedy (if any) for the PCB-contaminated river sediments, EPA must, in accordance

with the National Contingency Plan ("NCP"), consider various criteria. One of those criteria is "community acceptance", that is, the community's support for, reservations about, or opposition to the various remedial alternatives. EPA will not ignore the public's views, as by law and agency commitment, it is interested and concerned about them.

As we have stated throughout the RRI/FS process, EPA has in no way "pre-judged" what its final decision will be. We are conducting the RRI/FS in an objective manner, and will make a decision which we believe is the most appropriate in light of the legal requirements established by the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") and its implementing regulations.

EPA cannot comment on what final position DEC would take if, following the completion of the RRI/FS, EPA reaches a decision other than one calling for dredging. However, DEC has stated, in a January 21, 1992 letter from Commissioner Thomas C. Jorling to members of the Hudson River PCB Oversight Committee:

No final commitment will be made to undertake the dredging and encapsulation project or any appropriate alternative until the U.S. EPA has completed its reassessment of its 1984 Record of Decision. In addition, the work of that reassessment will be incorporated into the Department's record of proceeding for the permit application processes and will be valuable in any decision on the applications at the State level It should be noted that we do not consider our decision regarding dredging contaminated sediments from the Hudson River irrevocable We would certainly reconsider our position on dredging provided another remedy can be sufficiently demonstrated to be

capable of achieving equivalent protection of human health and the environment.

The Steering Committee's second question, set forth above, raises complicated issues of law. The State's authority to proceed with a dredging project in the face of a hypothetical EPA decision in favor of an alternative other than dredging might depend on various factors, such as the exact nature of the EPA remedy selection decision, the legal vehicle or method by which the State would seek to have the project carried out, and the timing of that effort.

There have been a few judicial cases which indicate that the CERCLA statutory scheme places certain constraints on a state's ability to pursue a remedy which differs from the one previously selected for the given site by EPA, particularly where the state remedy would conflict or interfere with the EPA-selected remedy. Nevertheless, we cannot categorically say that were EPA to select a remedial alternative here other than dredging that DEC would forever be barred from proceeding with the Project Sponsor Group's ("PSG") proposed dredging project.

Of course, an additional constraint on the State's ability to unilaterally proceed with a remedy involving dredging of the contaminated sediments and encapsulation of those materials in the PSG's proposed disposal site, Site 10, relates to the issue of permits. Various federal permits or other similar federal

authorizations would be required before such a remedy could be conducted by the State. They include an authorization by EPA under the Toxic Substances Control Act for the use of Site 10 for the disposal of PCBs, a permit from the U.S. Army Corps of Engineers ("USACE") under Section 404 of the Clean Water Act for the discharge of dredged material into waters of the U.S., and a permit from USACE under Section 10 of the Rivers and Harbors Act of 1899. DEC has not submitted applications for any of these permits.

We have been informed that the State will apply for these federal permits no earlier than when the Project Sponsor Group's application for a state permit under 6 NYCRR Part 373 (dealing with hazardous waste treatment, storage and disposal facilities) is determined to be complete. However, the PSG has not yet submitted a Part 373 application to DEC in order to obtain a determination that the application is complete. Normally, EPA would utilize, among other things, the information contained in the State's §373 permit (or, where applicable, the federal RCRA permit) in assessing whether issuance of a TSCA authorization for a given disposal facility is appropriate. Thus, here, EPA would likely not issue the necessary TSCA authorization prior to the State's issuance of the §373 permit. (For more on the permit issue, see our response to the Steering Committee's question #4, below.)

In sum, at the Hudson River PCBs Site, EPA's RRI/FS process is ongoing and we have not determined whether our 1984 No Action decision should be modified, and if so, how. Indeed, we have not yet begun Phase 3 of the RRI/FS, which will include a detailed evaluation of the various remedial alternatives. Thus, we cannot predict whether EPA and DEC will reach agreement regarding the appropriate remedy at the Site, nor can we predict what DEC would seek to do in the event of disagreement. We are hopeful that EPA and DEC will ultimately reach a consensus.

Response to question 4: EPA is the agency which issues authorizations under TSCA, while it is USACE which has the authority to issue §404 and §10 permits. USACE consults with EPA and certain other federal agencies prior to issuing a §404 or §10 permit. Under the Clean Water Act, EPA also has certain other authorities which can affect USACE's consideration of §404 permit applications.

As stated above, no federal permits or authorizations relating to the PSG's proposed dredging and encapsulation project are presently being processed. When the applications are submitted to the federal government, the appropriate federal agencies would need to assure themselves that the various prerequisites to the issuance of the permits/authorizations have been met before the permits/authorizations could be issued.

Darryl Decker (Chairman of the Government Liaison Group) inquired, in his November 26, 1991 letter to the EPA Regional Administrator, as to whether EPA would grant a TSCA authorization for the disposal of PCBs if DEC proceeded with a dredging project despite a no-dredge ROD. Applications for TSCA authorizations are reviewed by EPA on their own merits. It would be inappropriate for us to speculate regarding how we would respond to a TSCA application that we have not yet received.

Response to question 5: EPA will not speculate on the issue of whether DEC could recover from GE the costs of DEC's Site 10 development activities. As to whether DEC could be reimbursed by EPA for those costs, it should be noted that in general, a state's costs may only be paid for by EPA under CERCLA if EPA authorized the State to conduct those activities and agreed, in an assistance agreement entered into before the costs were incurred, to provide funding for those activities. EPA has not authorized or agreed to fund DEC's Site 10 development activities. EPA's regulations do allow for a case-specific "deviation" to be granted from the aforesaid general rule in certain circumstances. Such deviations must be approved by EPA Headquarters.

Response to question 6: To EPA's knowledge, the activities that the PSG has engaged in to date with respect to Site 10 include hydrogeological and geological studies, archaeological studies,

and seismic investigations. The PSG is also apparently having its contractor, Malcolm Pirnie, assist in the preparation of a §373 application by, e.g., preparing conceptual design drawings of the proposed disposal facility. EPA is not empowered to prevent the PSG from conducting such preliminary investigative and planning activities, nor do we believe that it would be appropriate, as a matter of policy, for EPA to attempt to stop the PSG from conducting them. However, regardless of the performance of such activities by the PSG, EPA has not prejudged what its decision will be regarding the appropriate remedy (if any) for the contaminated river sediments.