



**UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY
REGION 6
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DALLAS, TEXAS 75270**

September 8, 2023

BY E-MAIL

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Re: San Jacinto River Waste Pits Superfund Site; Administrative Settlement Agreement and Order
on Consent for Remedial Design, Docket No. 06-02-18 (Order)

Dear Chris and Steve:

The Environmental Protection Agency (EPA) has reviewed your companies' July 14, 2023, letter to EPA regarding the proposed independent third-party design review (IDR) for the San Jacinto River Waste Pits site (Site) Northern Impoundments Remedial Design (RD). The RD is being developed pursuant to the Order referenced above by Respondents McGinnes Industrial Maintenance Corporation and International Paper (together, Respondents). As specified in the Order, Respondents agreed to develop an RD consistent with the Site remedy selected by EPA in a Record of Decision (ROD) dated October 11, 2017.

Respondents submitted the last component of the North Impoundment Pre-final (90%) Remedial Design deliverable (the 90% design) on November 8, 2022. On December 8, 2022, EPA sent a letter to Respondents expressing its serious concerns with Respondents' 90% design deliverable and proposing that Respondents finance an independent, third-party, technical review (IDR) of the RD to address those concerns. As discussed in its December letter, EPA's hope was that the IDR would result in a technically sound evaluation of Site design issues and, although not binding, potentially provide the basis for agreement on RD technical issues between EPA, Respondents, local stakeholders and the community.

Nine months later, however, the IDR has not started, and the parties have not even agreed on a protocol on how to conduct it. A more detailed discussion of EPA's response to Respondents' July 14, 2023, letter regarding the proposed IDR is in the attached response. The attached response compares EPA's and

Respondents' objectives for the IDR as stated in their correspondence and drafts, and concludes that the parties' objectives for the IDR, and also their proposed methods to conduct the IDR, are materially different. The parties' June correspondence also demonstrates that the parties have a disagreement about conducting the IDR negotiations which could significantly delay completing the RD. See EPA's June 28, 2023, letter to Respondents. EPA's overall concern raised by the continuing IDR protocol issues is that they indicate how difficult, and potentially impossible, it will be to develop and conduct a mutually acceptable IDR. Even if additional time is dedicated to the remaining issues with the protocol, the IDR itself appears unlikely to achieve an agreed-upon technical foundation for resolving concerns and uncertainties with the RD as envisioned by the December 8 letter.

Since the December 8 letter, EPA also has continued to consider and develop additional technical information. This has led EPA to conclude that alternatives other than the IDR or an EPA-led technical review may be more efficient and effective for developing the RD than EPA believed shortly after receiving the 90% design. EPA cannot justify further delay of the RD to continue negotiations of the IDR protocol when, even if a protocol can be agreed upon, the conduct of the proposed third-party review appears unlikely to advance the remediation of the Site, and EPA now believes there are other viable alternatives to do so.

For the reasons stated in this letter and the attached detailed response, EPA withdraws its December 8, 2022, proposal to Respondents to conduct and finance an independent third-party technical review of the RD. The EPA will determine its next steps for the RD and inform Respondents accordingly.

Sincerely yours,

 Digitally signed by
JOHN MEYER
Date: 2023.09.08
15:45:05 -05'00'

John Meyer, Remedial Branch Manager
Superfund Emergency Management Division

cc: Brent Sasser, P.E.
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Attachment: EPA Response to Respondents' July 14, 2023, Correspondence Regarding the San Jacinto River Waste Pits Superfund Site

EPA RESPONSE TO RESPONDENTS' JULY 14, 2023 CORRESPONDENCE REGARDING THE SAN JACINTO RIVER WASTE PITS SUPERFUND SITE

Following a letter dated December 8, 2022, by the Environmental Protection Agency (EPA), EPA and Respondents McGinnes Industrial Maintenance Corporation and International Paper (Respondents) have been negotiating the protocol for a proposed Respondent-financed, third-party independent review of remedial design technical issues related to the San Jacinto River Waste Pits site (Site) Northern Impoundments. The parties have been unable to reach agreement on the third-party contractor scope of work and the framework for conducting the review. In a letter to EPA dated July 14, 2023, Respondents set forth their arguments concerning both the purpose of the proposed third-party design review and their view of the negotiations, including their interpretation of EPA's December 8, 2022, letter first proposing the review. As discussed in detail below, Respondents mischaracterize EPA's December 8 letter, and EPA has acted consistently with its initial proposal. A review of the correspondence and negotiation drafts demonstrates that the parties do not agree on the fundamental purpose and manner of conducting the third-party review, nor, based on Respondents' July 14 letter, does agreement in the future appear likely.

Background

The Site Record of Decision (ROD), signed on October 11, 2017, provides for the removal and off-site disposal of dioxin-contaminated waste material exceeding the cleanup level from the Site Northern Impoundments, located both in and adjacent to the San Jacinto River. The ROD received strong community and local shareholder support. In April 2018, EPA and Respondents entered into an administrative agreement and order on consent (Order) to develop the design for the Site, including the Northern Impoundments Remedial Design (RD). As specified in the Order, Respondents agreed to develop the RD consistent with the Site remedy selected by EPA in the ROD.

The RD has been delayed by multiple extensions totaling 725 days as requested by Respondents, and granted by EPA, to meet Respondents' Order deadlines. The RD Order originally included two extensive rounds of design investigation sampling, but Respondents requested, and EPA agreed to, a third round of design sampling to provide information Respondents had not previously gathered. Throughout the RD, Respondents identified and continued to develop issues with remedy implementation they termed "technical uncertainties." EPA and its partners attended multiple Technical Work Group (TWG) meetings to discuss these issues, offering clarifications on issues and some potential avenues that might help mitigate these "technical uncertainties."

Respondents submitted the two final components of the North Impoundment Pre-final (90%) Remedial Design deliverable (the 90% RD or 90% design) on June 27, 2022, which included the design for most of the Northern Impoundments, and on November 8, 2022, which was a design component addressing the Site's Northwest Corner. Section 3.6 of the Order's Statement of Work requires the 90% RD to include a "complete set of construction drawings and specifications" that are "suitable for procurement." The 90% RD submitted by Respondents is not an implementable design of the selected remedy and is not "suitable for procurement." Based on their initial review, the EPA review team raised other significant concerns with the 90% RD. On December 8, 2022, EPA sent a letter to Respondents expressing its serious concerns with Respondents' 90% RD deliverable and proposing an independent review to potentially address those concerns, as summarized below.

From December 8, 2022, to July 14, 2023, negotiations proceeded for the conduct of the EPA-proposed independent third-party design review (IDR) of the RD. Respondents submitted a January 26, 2023, draft scope of work for the IDR, which included “scope elements” for the review – essentially the charge to the third-party contractor identifying the technical and scientific issues which would be the subject of the contractor’s review. EPA responded on March 29 with its first draft of the scope elements, proposed contractor qualifications and conflict of interest provisions; this was followed by a second draft scope of work from Respondents on May 23 reproposing some of the scope elements previously rejected by EPA. EPA provided a second draft on June 5, which included not only draft scope elements and contractor qualifications, but a proposed process for the IDR and a draft Order amendment addressing the IDR. The parties exchanged correspondence in June, through which EPA repeatedly requested a detailed response to its June 5 draft, and through which Respondents repeatedly requested a meeting with EPA management (see EPA’s June 28, 2023, letter to Respondents), culminating in Respondents’ July 14, 2023 letter.

Summary of Response to Respondents’ July 14 Letter

The IDR proposed in EPA’s December 8, 2022, letter was a technical review pursuant to an innovative approach for CERCLA – a third-party independent design review financed by Respondents but structured to demonstrate independence and impartiality. The focus of EPA’s proposed third-party review was the remedial design for implementation of the 2017 ROD remedy. The IDR described in Respondents’ July 14, 2023, letter to EPA is an “holistic” review with the IDR contractor having “professional freedom” to weigh risks of remedial alternatives for the Site and evaluate the alternatives’ consistency with remedial selection criteria – essentially, a review focused on the bases for selecting the 2017 ROD remedy. This is similar to a feasibility study for CERCLA remedy selection, but without the EPA oversight required by statute for a feasibility study. This is not the review proposed in EPA’s December 8 letter – in fact a focused feasibility study was specifically ruled out in EPA’s letter. Respondents’ version of the IDR as described in their July 14 letter is not a Superfund site review consistent with EPA’s initial proposal, nor is it appropriate for EPA participation under EPA’s statutory and regulatory authority.

Throughout the negotiations, Respondents have consistently advocated for an IDR materially different from the IDR proposal in EPA’s December 8 letter, including different views of both the proposed IDR scope and process. In its December 8 letter and subsequent EPA drafts of the IDR scope of work, EPA: 1) proposed an engineering review of technical issues identified in the 90% RD potentially affecting the implementability of the selected remedy, in order to develop alternative engineering approaches, options, methods, techniques and/or mitigation strategies to address those technical issues consistent with the ROD and best practices; 2) specifically ruled out using the review to re-open or re-evaluate the ROD remedy decision; 3) insisted on an independent review process; and 4) stated that to demonstrate the independence and impartiality of the process that there must be review procedures to ensure independence, including extensive conflict of interest requirements for the IDR contractor consistent with EPA third-party environmental audits. What Respondents proposed in meetings and in their January and May scope elements, as further described in their July 14 letter, is: 1) a design review broad enough to encompass review of the remedial selection criteria and different remedial alternatives, allowing the IDR to potentially re-evaluate the ROD; 2) using the IDR to emphasize the risks Respondents have claimed are created by their own design, risks which Respondents then attribute to the remedy; 3) a concept of “independence” consistent with using Respondents’ contractor that created the design to be the prime

contractor for the independent review of that design; and 4) less burdensome conflict of interest requirements, despite the EPA-proposed conflict of interest requirements being consistent with EPA third-party environmental audits.

In their July 14 letter, Respondents attempt to cast blame for the failure of the IDR negotiations on EPA. Respondents claim that EPA has not acted consistently with EPA's December 8 letter initially proposing the design review. As support for this proposition, Respondents focus on a list of ten issues in EPA's December 8 letter for inclusion in the IDR, arguing that there had been a "unilateral removal by EPA" of six of the ten issues from EPA's drafts of the IDR scope of work and draft scope elements.

Respondents' July 14 letter ignores the rest of the December 8 letter, which describes extensive concerns and IDR proposals beyond the six of ten issues cited by Respondents. Respondents' July 14 letter also ignores that: 1) Respondents did not adopt any of the ten issues as worded by EPA in Respondents' January 26 draft of the contractor scope elements, nor in Respondents' May 23 draft, but instead dropped one EPA issue, added other scope elements, and substantially reworded some issues to fundamentally change their meaning in order to reflect Respondents' apparent objectives for the IDR; 2) Respondents' scope elements, as reworded and supplemented, would have allowed the IDR to be used to re-evaluate the selected Site remedy, which EPA stated clearly in its December 8 letter is not acceptable; and 3) while Respondents' July 14 letter belatedly stresses the importance to Respondents of the verbatim wording of six EPA December issues, the July 14 letter mischaracterizes the meaning of the EPA December 8 issues as supporting Respondents' objectives for the IDR, which they do not.

Respondents' correspondence, including their July 14 letter, demonstrates not only differences with EPA on the IDR scope, but also on the IDR process and negotiations. Respondents never agreed to, or even responded to, EPA's draft Order amendment to conduct the IDR under the RD Order. Respondents claim in their July 14 letter that EPA completely excluded GHD from the IDR and participation in IDR meetings; however, EPA had clarified prior to the July 14 letter that, while it was inconsistent with the review's independence for GHD to act as the prime contractor for the review, GHD was not excluded from participation in IDR meetings as Respondents' contractor. Respondents disagree in their July 14 letter with extensive conflict of interest provisions proposed by EPA, despite the December 8 letter's emphasis on the independence of the review. Respondents also disagree with EPA's allegedly "unrealistic" IDR schedule, despite the fact that EPA's draft schedule is actually consistent with Respondents' suggested timeframe. Some of these issues might have been clarified if Respondents had provided, as repeatedly requested by EPA, a detailed response to EPA's June 5 draft.

EPA's March and June proposed scopes of work for the IDR contractor are consistent with EPA's December 8 letter, as described below, including EPA's list of ten specific issues; EPA simply used a streamlined approach to incorporate these issues and the other concerns in its December 8 letter. This streamlined approach both accomplished the EPA objectives for the review as stated in the December 8 letter and addressed EPA's concern that the IDR not be used to re-evaluate EPA's remedy decision, also as stated the December 8 letter.

Respondents conclude their July 14 letter by saying that EPA should adhere to the proposal in EPA's December 8 letter, but as discussed in this response, EPA has done so. Respondents' July 14 letter indicates that Respondents are no longer interested in the IDR, not because it's inconsistent with the IDR

EPA proposed last December, but rather because it is apparently not the IDR Respondents want to conduct.

The December 8 Letter

EPA sent its December 8, 2022 letter to Respondents one month after EPA's receipt of the last component of the 90% RD, which, as stated in the December 8 letter, is "not an implementable design of the selected remedy" and also "lists significant technical uncertainties with remedy design and implementation that Respondents claim could render the selected remedial alternative in the ROD technically impracticable and not implementable." EPA, working with the Texas Commission on Environmental Quality (TCEQ), EPA's contractors, the U.S. Army Corps of Engineers (USACE), and local stakeholders, conducted a preliminary review of Respondents' June 27 and November 8 90% RD submittals and identified several concerns with the submittals, including the failure to adequately explore or evaluate solutions to identified technical problems; the lack of adequate documentation and support for design options and factual statements in the design; and the fact that the 90% RD repeatedly casts doubt on whether Respondents' selected design options are implementable. As stated in the December 8 letter, this preliminary review by EPA's review team "indicates that Respondents have failed to document that the selected remedy is not implementable or that the listed technical uncertainties do not have acceptable engineering solutions, and that there are significant concerns about the sufficiency of the submittals."

EPA's December 8 proposal for a third-party independent review was in response to a "virtual impasse" over the 90% RD, "with Respondents convinced that they have adequately documented that there are significant, and potentially insoluble, technical uncertainties preventing implementation of the selected remedy, and with the EPA review team concerned that this conclusion is not warranted based on currently available information." As stated in the December 8 letter, EPA believed that it needed additional information to resolve this impasse, because "...while the EPA can identify problems, concerns, questions and potential solutions regarding the design deliverables submitted by Respondents, EPA does not have the information necessary to make a determination regarding Respondents' claims that the selected remedy is not implementable or about the technical uncertainties identified by Respondents in the 90% design."

While EPA proposed that Respondents finance the third-party technical review, the December 8 letter emphasized that the proposed review must be "designed to demonstrate independence and impartiality." EPA was concerned that the "process for conducting the review proposed by the EPA must ensure that the review is as independent as possible," providing "all parties – the EPA, Respondents, TCEQ, other governmental stakeholders, and the community – with assurance that the information, analysis, opinions, and conclusions provided are technically sound, reliable and impartial in its evaluation of the design for ROD remedy implementation." It was EPA's hope "that all parties will find the review to be technically sound and based on best engineering practices."

In making its proposal in the December 8 letter, EPA was clear that it "is not proposing, and will not agree to, use of the proposed technical review process to re-evaluate the remedy selection process or to conduct a focused feasibility study to consider other remedial alternatives that are not the selected remedial alternative."

The December 8 letter also specified what the proposal, the proposed IDR process and potential IDR conclusions were *not*. The review's conclusions would not be binding. Neither the IDR proposal nor the review's findings would limit EPA's authority to take all appropriate action to protect human health and the environment or to respond to actual or threatened hazardous substances releases from the Site, nor would the proposal or findings "prevent[] the EPA from seeking legal or equitable relief to enforce the terms of the Settlement Agreement ... or from taking other legal or equitable action as it deems appropriate and necessary." Finally the proposed IDR was "not a settlement or negotiation process, but instead a third-party evaluation of technical, engineering issues regarding the Remedial Design which will be part of the public record for the Site."

EPA proposed the IDR "to move the project forward." EPA expressed its hope that "[w]ith the opportunity for fresh eyes to evaluate the project, all parties, including not just the EPA and Respondents, but also the TCEQ, local stakeholders and the community, may be able to find common ground in advancing remediation of the Site's Northern Impoundments."

Respondents' January 26 Draft of the IDR Scope Elements and Respondents' July 14 "Key Elements"

In its December 8 letter, EPA described the issues and concerns it wanted the IDR to address, including, but not limited to, a list of ten specific issues to be included in the proposed IDR. The list of ten issues combined EPA's broad-brush concerns with the RD based on technical uncertainties presented by Respondents in the 90% RD; EPA's concern that the EPA review teams' comments be addressed; and some specific technical issues described without much detail (such as the potential for hydraulic heave). The list of issues was not intended to be, and was not represented as, a verbatim charge for the IDR contractor. The letter concluded by stating that, if Respondents were agreeable to the letter's proposal, both parties should confer on the final schedule and process for the proposed IDR in accordance with the letter's framework.

After meeting with EPA, Respondents provided a draft scope of work for the proposed IDR on January 26, 2023, which included draft scope elements. In their July 14 letter, Respondents identify some of EPA's December 8 list of ten issues as "key elements" for Respondents' agreement to the IDR. However, this confuses EPA's December list of issues for inclusion in the IDR with the scope elements, which for this IDR comprise the charge to the IDR contractor and were first developed by Respondents in January 2023. Subsequent drafts by both parties included different proposed scope elements.

Respondents' January 26 draft listed thirteen "scope elements" for the proposed IDR contractor to review, but Respondents did not adopt the wording of EPA's December 8 issues for Respondents' January 26 and May 23 draft scope elements, and Respondents failed to include all ten EPA December 8 listed issues in both their drafts. In particular, Respondents did not include a draft scope element related to an independent review of the "validity of draft 90% Remedial Design comments provided by the EPA review team," as originally proposed by EPA in its list of ten issues in December 2022. This is a critical issue for EPA, because EPA received significant comments and input on the 90% RD from its review team. The disparity between the EPA review team comments and Respondents' 90% RD was one of the driving forces behind EPA's proposal for the IDR, yet this critical issue was unilaterally removed by Respondents in their draft scope elements. Although the review team comments had not been consolidated by EPA at

that time into one EPA comment document, EPA subsequently incorporated some of the substance of EPA's review team comments into its own draft scope elements focused on specific technical issues. In their July 14 letter, however, Respondents objected to EPA's inclusion of "specific alternative methods or strategies" suggested by EPA's review team as "inappropriate."

With the exception of hydraulic heave, Respondents also significantly reframed and re-worded the remaining issues from EPA's December 8 letter in Respondents' January 26 proposed scope elements. While a connection with nine of the EPA issues is still identifiable through repetition of some key EPA words and phrases, the meaning and focus of some issues were changed significantly by Respondents. Respondents later incorrectly claimed that EPA's December 8 letter supported Respondents' objectives based on the superficial similarity in some wording between EPA's issues and Respondents' scope elements. However, Respondents' January 26 scope elements are not only different from EPA's December issues, but they also do not address key EPA concerns and are affirmatively problematic for EPA.

In the July 14 letter, Respondents quote six of the listed issues in EPA's December 8 letter verbatim claiming that they support Respondents' IDR objectives, but there is an overall disconnect between Respondents' July 14 interpretations of EPA's December issues and the actual contents of the December 8 letter. Respondents present a convoluted argument that EPA is being inconsistent with six of the ten issues in EPA's December 8 letter, with these six "key" December 8 issues (which Respondents confusingly call "elements" although they are not scope elements) representing three "critical" topics for Respondents' participation in the IDR. Respondents' July 14 verbatim embrace of six of EPA's December 8 issues is also confusing because, as discussed above, Respondents never included the December 8 issues as worded or framed by EPA in Respondents' draft scope elements. Respondents appear to claim in their July 14 letter that EPA – unlike Respondents – could not modify the December 8 listed issues when EPA drafted its IDR scope elements. Most importantly, in their July 14 letter, Respondents attribute meanings to these six issues inconsistent with what the issues actually state and inconsistent with the rest of the December 8 letter. The July 14 letter accomplishes this in part by taking one word ("risks") and one phrase ("overall big picture look at the project") out of context to graft meanings on them that were not present in EPA's December 8 letter.

While Respondents modified their January proposed scope elements in their May 23 draft, significant concerns for EPA remained. It is clear from the January 26 Respondent scope elements, and the parties' May and June correspondence culminating in Respondents' July 14 letter, that there was no fundamental agreement between the parties regarding the scope or conduct of the IDR.

The EPA-Proposed IDR Was Not a Remedy Re-Evaluation Process

In EPA's December 8 letter, EPA expressly states that the proposed design review by a third-party contractor could not be used "to re-evaluate the remedy selection process or to conduct a focused feasibility study to consider other remedial alternatives that are not the selected remedial alternative." It was not, and is not, acceptable to EPA for Respondents to use a third-party contractor financed by Respondents for an "independent" technical review to re-evaluate EPA's final remedial decision as documented in the ROD. EPA has been given the authority pursuant to the Comprehensive Environmental

Response, Compensation and Liability Act, as amended (CERCLA), 42 U.S.C. § 9604, to select remedial actions for Superfund sites consistent with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 CFR Part 300. Remedy selection must be conducted as part of an evaluation process detailed in the NCP, 40 CFR § 300.430(e) and (f), as well as EPA policy and guidance, and specifically after evaluation of nine criteria specified in the NCP. 40 CFR 300.430(e)(9)(iii). Evaluation and comparison of remedial alternatives is conducted as part of a CERCLA feasibility study and, if potentially responsible private parties conduct a feasibility study, it must be subject to EPA oversight under an administrative order, pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604. In its December 8 letter, EPA explicitly rules out Respondents conducting a focused feasibility study, instead proposing an independent, technical design review because “Respondents have failed to document that the selected remedy is not implementable or that the listed technical uncertainties do not have acceptable engineering solutions,” as stated in EPA’s December 8 letter.

Respondents’ January 26 draft scope elements are of particular concern to EPA because they would allow, and even encourage, the IDR contractor to re-evaluate the selected remedial alternative for the Site and potentially develop new remedial alternatives outside the scope of the ROD. Respondents’ apparent intent to use the IDR to re-evaluate the selected remedy – contrary to the statute, the NCP, and EPA policy and guidance, as well as EPA’s December 8 letter – is documented by Respondents’ draft scope elements. In particular, Respondents included scope elements in their January 26 and May 23 drafts directly calling for a review of remedial alternatives in light of the remedial objectives. Respondents also advocated in their 90% RD/Northwest Corner Component for a remedial alternative not selected by EPA, capping.

The following is one of the ten issues as presented by the EPA on December 8:

- Overall big picture look at the project, including best engineering practices, or additional solutions/approaches to design the removal remedy selected in the ROD, if possible, including estimated costs, and an evaluation of the constructability of the selected remedy. (EPA’s December 8, 2022 Letter to Respondents).

Respondents’ January 26 draft presented the following scope element:

Overall big picture evaluation of the project, including evaluation of alternative approaches to the excavation and dredging target depths that may limit implementation risk, yet still address the ecological receptor risk identified in the Remedial Investigation/Feasibility Study (RI/FS) that is driving the remedial action (RA) for the Northern Impoundment. This evaluation should address the appropriateness or lack thereof in removing all the volume of impacted material identified in the 90% RD to achieve ecological risk reduction, along with any industry norms applicable to addressing ecological risk at other Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) sites in the U.S. This evaluation should consider additional solutions/approaches to design of the remedy selected in the ROD. (Respondents’ January 26, 2023 Draft of the IDR Scope of Work).

EPA’s issue regarding a “big picture” review is limited by its own terms to “the removal remedy selected in the ROD,” and this limitation is further reinforced by the December 8 letter’s separate, express statement that it is unacceptable to EPA for the proposed IDR to be used to re-evaluate the ROD remedy.

As stated by Respondents in this scope element, they propose that the IDR contractor conduct a “big picture” consideration of the “appropriateness or lack thereof” of EPA’s selected removal remedy to achieve Site risk reduction. The last sentence of the scope element is also ambiguous as to whether it is seeking evaluation of additional solutions/approaches for the design, or solutions/approaches in addition to proceeding with designing the ROD remedy.

Respondents have mischaracterized EPA’s use of the term “big picture” as an invitation for IDR consideration of remedial alternatives other than the selected remedial alternative. A comparison of EPA’s issue with Respondents’ scope element shows that EPA’s “big picture look at the project” was to look for alternative engineering solutions and approaches beyond those presented in the 90% RD, but consistent with the ROD (“Overall big picture look at the project, including best engineering practices, or additional solutions/approaches to design the removal remedy selected in the ROD”), while Respondents’ proposed “big picture look at the project” is to re-evaluate whether there are other remedial alternatives addressing risks at the Site other than the ROD selected alternative (“Overall big picture evaluation of the project, including evaluation of alternative approaches to the excavation and dredging target depths that may limit implementation risk, yet still address the ecological receptor risk identified in the Remedial Investigation/Feasibility Study”). While EPA’s issue and Respondents’ scope element start with the same seven words, they have vastly different implications and indicate the fundamental disconnect between what the parties hoped to accomplish with the IDR.

Respondents’ July 14 letter repeatedly says that Respondents have structured the potential IDR so that it can be performed without re-evaluating the EPA-selected remedy, but Respondents repeatedly use language in the scope elements (including the language above) and in the July 14 letter that indicates the opposite. In their July 14 letter, Respondents discuss why EPA not incorporating this particular issue as originally worded is problematic for Respondents:

During the reviewing firm’s evaluation, it would be beneficial to look at the “primary objectives of preventing human exposure to contaminants, and preventing or minimizing further migration of contaminants” as stated in the Record of Decision (ROD). By not allowing the reviewing firm to take a larger look at these objectives, there is a missed opportunity in which the firm could provide approaches and solutions that may resolve some of the current challenges and be provided with the professional freedom to make technical suggestions (from Respondents’ July 14, 2023 Letter to EPA).

Respondents’ July 14 reasoning bears little relation to the issue as presented by EPA on December 8. Respondents claim EPA’s December 8 issue allows for a “larger look” of the “primary objectives of preventing human exposure to contaminants, and preventing or minimizing further migration of contaminants” – which is a Remedial Action Objective (RAO) of the ROD. The RAOs in the ROD are broad risk-based objectives including preventing releases of dioxin and furans from the Site above the cleanup levels, and preventing human exposure to dioxin and furans from the Site, as well as exposure to benthic invertebrates, birds, and mammals. EPA has already considered those RAOs and other factors (see Rationale for Selected Remedy in the ROD), specifically evaluating the nine criteria for remedy selection in accordance with the NCP, 40 CFR § 300.430(e) and (f), and selected a removal remedy.

The IDR proposed by EPA was to evaluate how to implement the selected remedy, not how to achieve the RAOs – the latter has already been decided by EPA. Neither EPA’s December 8 listed issues, nor the December 8 letter, reference the RAOs at all because review of the basis for the ROD, including the RAOs, is not relevant to the IDR proposed by EPA.

While the RAOs are not included in EPA’s December 8 issue cited by Respondents, Respondents added their own, different scope element in their January 26 and May 23 drafts which did specifically address the RAOs. This RAO-focused scope element would have accomplished what Respondents state is “critical” to them in their July 14 letter – providing for an overall reassessment of how to comply with the RAOs in the ROD – and specifically the following:

Evaluation of the ability to effectively comply with the Remedial Action Objectives (RAOs) listed in the ROD during construction, including the requirement for no releases from the Northern Impoundment to the San Jacinto River. This would include addressing what risks exist in relation to these RAOs and reasonable methods for mitigating them. (Respondents’ January 26 and May 23, 2023 Drafts of the IDR Scope of Work).

EPA rejected this scope element in its March 29 draft. Respondents appear in their July 14 letter to tie the underlying concept of this RAO-focused scope element back to EPA’s December 8 issue regarding the overall look at the project; Respondents state that EPA’s “big picture look” issue is “key” and “critical” to them in their July 14 letter because Respondents wrongly claim it provides scope to revisit the primary risk objectives of the ROD. While identified in their July 14 letter as “key” and “critical,” Respondents second draft of the scope elements on May 23 did not include their January 26 scope element using the words “big picture look,” which was discussed above. However, Respondents’ May 23 draft still contains the above-quoted scope element directly providing for re-evaluation of the remedy in light of the RAOs.

Even though the July 14 letter states that Respondents’ proposed version of the IDR “can be” performed without re-evaluating EPA’s remedy selection, the July 14 letter is also clear that Respondents believe the IDR contractor should have the “professional freedom” to revisit the RAOs and how to achieve them, which would constitute re-evaluating EPA’s remedy selection. It is not acceptable to EPA, nor was it acceptable to EPA in the December 8 letter, for the proposed IDR contractor to have the “professional freedom” to second-guess EPA’s statutory and NCP remedy determinations and re-evaluate how the remedial alternatives comply with the RAOs.

Respondents’ intent to use the IDR to re-evaluate the remedy is evidenced by their inclusion in the 90% RD of a remedial alternative not selected in the ROD, capping waste in place, which as noted in the December 8 letter “is not in compliance with the ROD or the Settlement Agreement.” Respondents’ 90% RD/Northwest Corner Component included the design of the non-ROD remedy accompanied by Respondents’ own remedy evaluation discussion, using some of the terminology from a CERCLA remedial alternatives analysis; in this discussion, Respondents compared the capping remedial alternative with the EPA-selected remedy. Respondents specifically compare the ROD remedy and capping in relation to how they meet the RAOs, as well as short-term and long-term protectiveness of human health and the environment (see p. 12 of the 90% RD/Northwest Corner Component, Section 5.12.2.3).

Respondents argued in the 90% RD that a capping approach for part of the Northwest Corner would satisfy the RAOs and other criteria. Respondents’ proposal states that capping should be included as part

of the remedy for the Northwest Corner despite it not being the ROD-selected remedy (see pp. 15-16 of the 90% RD/Northwest Corner Component, Section 5.12.2.4 Evaluation Summary). Respondents then provided a detailed capping design in their 90% RD.

In their draft scope elements for the IDR, Respondents favor a broad IDR scope allowing IDR consideration of remedial evaluation and selection issues. The IDR could potentially cloud the record with information supporting capping, the remedy favored by Respondents, or other alternatives; Respondents already have attempted to create a record for capping by adding the capping design in the 90% RD. While the proposed IDR is not binding, it would be an RD-related process for the Site in which the EPA is a participant, but without traditional EPA oversight. The IDR proposed by EPA in December 2022 was an independent technical design review, while the review proposed by Respondents – explicitly ruled out by EPA’s December 8 letter – is more analogous to a CERCLA feasibility study which must be conducted pursuant to an administrative order with EPA oversight pursuant to the statute, regulations and the EPA’s policies and guidance for feasibility studies. Because of the professed independence of the review, while EPA could object after the fact to findings or conclusions regarding remedial alternatives not selected in the ROD, the IDR’s conclusions might still be presented as potential substitutions for Agency judgments or decision-making and create a record potentially undermining future Agency decisions. At no point has it been acceptable to EPA to use the IDR to re-evaluate the remedial alternatives presented in the ROD, and EPA would be acting inconsistent with its statutory authority if it were to agree to do so.

Respondents’ Scope Elements and Their July 14 Letter Make “Risk” a Focus of Their Proposed IDR Process, Misinterpreting EPA’s Use of the Word “Risks,” While EPA Proposed an IDR Focused on Potential Technical Solutions

Respondents’ July 14 letter cites three uses of the word “risks” in EPA’s December 8 listed issues to support an IDR focus on evaluating “risks and associated consequences [of] undertaking the project as designed” by Respondents. As discussed further below, EPA does not agree that it used the word “risks” in that context. Respondents’ assumption underlying this focus on risk appears to be that if Respondents’ 90% RD has excessive risk, then so must the remedy. As stated in its December 8 letter, however, EPA is concerned that there potentially could be acceptable engineering solutions to the risks and technical uncertainties listed in the 90% RD - solutions not addressed by the 90% RD - because “Respondents’ submittals do not adequately explore or evaluate potential solutions to resolve technical difficulties.” For that reason, EPA’s December 8 letter focuses instead on developing, if possible, alternative engineering or design approaches, methods, techniques and/or mitigation strategies consistent with the ROD and best practices to address the technical issues identified in the 90% RD. Two of EPA’s December 8 listed issues specifically called for IDR evaluation of “additional solutions/approaches to design the removal remedy selected in the ROD, if possible” (see EPA December 8 issue quoted above) as well as an evaluation of “engineering best practices or other solutions/approaches to mitigate the risks and/or address the uncertainties that are identified in the 90% design” (see EPA December 8 issue quoted below).

Respondents’ July 14 letter argues that evaluation of risk should be central to the proposed IDR, but it is not completely clear to EPA what risks Respondents want the IDR to evaluate, or how Respondents’ July 14 claim that EPA is “removing risk from the evaluation” relates to EPA’s December 8 list of issues. To the extent Respondents want the IDR to evaluate risks as a way to re-evaluate the remedy, that is not

acceptable to EPA; relative short-term risks and protectiveness have already been evaluated as part of EPA's remedy selection process and decided in the ROD. An evaluation of risk is a critical component of the NCP-required assessment of short-term and long-term protectiveness in EPA's remedy selection process. Short-term protectiveness in the NCP specifically includes the type of "risks" Respondents apparently are contemplating – "[s]hort-term risks that might be posed to the community during implementation of an alternative;" "[p]otential impacts on workers during remedial action and the effectiveness and reliability of the protective measures;" and "[p]otential environmental impacts of the remedial action and the effectiveness and reliability of protective measures." 40 CFR 300.430(e)(9)(iii) (E). As noted above, Respondents attempted to argue in the 90% RD/Northwest Corner Component that a capping alternative is consistent with RAOs and with short-term and long-term protectiveness. However, EPA has already made the determination that the "best balance of tradeoffs" among the NCP criteria pursuant to the statute and the NCP, see 300.430(e)(9)(iii) (f)(4), should result in the selection of a removal remedy. It is not appropriate for a private party contractor to reassess that decision as part of an independent design review, and EPA's December 8 proposal excluded the use of the IDR for that purpose.

EPA's December 8 listed issues used the word "risks" in three issues as another term for the technical problems identified in the 90% RD, referring to "risks and technical uncertainties," "risks... that are identified in the 90% design," and "challenges or risks," with an additional reference in another issue to "hydraulic heave risk." Respondents' July 14 letter incorrectly claims that using the word "risks" equates to an EPA proposal that the IDR focus on the "potential consequences, severity, and likelihood of the risks" posed by Respondents' proposed design. Respondents' characterization of an evaluation of "risks" seems to be more of an invitation to the IDR contractor to label the design and/or the remedy as in some way risky. That is not consistent with the technical evaluation proposed in the December 8 letter.

Respondents' July 14 letter completely mischaracterizes EPA's concern in the following December 8 issue including the word "risks":

- Independent evaluation of the validity of current 90% Remedial Design assumptions and approaches selected by Respondents that may create implementability challenges or risks (EPA's December 8, 2022 Letter to Respondents).

In this issue, EPA is not asking for IDR evaluation of the risks posed by the 90% RD, but instead EPA is asking for the IDR contractor to evaluate whether Respondents' own design choices create implementability issues unnecessarily. EPA's December issue is consistent with other concerns stated in EPA's December 8 letter that the "90% design submittals consistently question the implementability of the Respondents' own selected design choices" and the 90% RD lacks explanation for design options "even when the selected design option creates additional implementability challenges or risk." It does not support, as claimed in Respondents' July 14 letter, focusing the IDR on a general evaluation of risk.

While Respondents in July claimed that this EPA issue was centered on risk, in January Respondents clearly understood EPA's actual purpose for this particular issue. Only one of Respondents' January 26 draft scope elements uses language similar to EPA's "assumptions and approaches" language, and that element provided for an evaluation of whether Respondents' design assumptions or approaches are "contrary to engineering standards or industry norms" – without mention of the critical word "risks" at all:

Evaluation of the current 90% RD basis of design including technical assumptions used in establishing the basis of design and the technical merit of proposed remedial approaches. This evaluation should identify if any of the basis of design assumptions or approaches are contrary to engineering standards or industry norms, and if so, recommend alternative approaches that might be more appropriately considered. (Respondents' January 26, 2023, Draft IDR Scope of Work).

Whereas EPA wanted the IDR to include an evaluation of whether Respondents' design choices created additional implementability issues, Respondents wanted the IDR to include an evaluation supporting that their individual design choices – at least in isolation – could be construed as consistent with “engineering standards or industry norms,” even though in the aggregate they do not present an implementable remedy. In effect, Respondents apparently want their design approaches and assumptions reviewed without consideration of how, or if, they are ultimately successful as design components for implementing the ROD remedy. Regardless, the issue in question was not focused on an evaluation of risk.

In their July 14 letter, Respondents also claim that the following two EPA December 8 issues support an IDR focus on evaluation of risk:

- Independent assessment of the risks and technical uncertainties posed by implementation of the selected remedy, as described in the 90% design;
- Independent assessment of whether there are any engineering best practices or other solutions/approaches to mitigate the risks and/or address the uncertainties that are identified in the 90% design (EPA's December 8, 2022, Letter to Respondents).

Respondents again mischaracterize what these issues address: EPA wanted the IDR to include an independent review of specific technical uncertainties listed in Section 5.11.1 of the 90% RD (Technical Uncertainties) and assess whether there are solutions or design approaches to address or mitigate each uncertainty. As discussed above, “risks” is used in these EPA issues as a way of broadly identifying – together with “technical uncertainties” – implementation problems in the 90% RD. It does not represent, as Respondents indicate in their July 14 letter, a desire to focus the IDR on the “potential consequences, severity, and likelihood of the risks” of implementing either the 90% RD, if it were an implementable design, or the ROD.

In their July 14 letter, Respondents identify, as one of their “key” issues, the EPA issue quoted above proposing that the IDR look for “any engineering best practices or other solutions/approaches to mitigate the risks and/or address the uncertainties that are identified in the 90% design.” This “key” issue was not presented by Respondents as a separate scope element in Respondents' January 26 draft, but was instead rolled into the end of the following scope element:

Assessment of the risks and technical uncertainties, as described in the 90% RD, posed by implementation of the selected remedy, as outlined in the ROD. This evaluation should address the potential consequence, severity, and likelihood of the risks involved in implementation of this remedy as designed and identify any practical mitigation measures that could be put in place to minimize these risks. (Respondents' January 26 Draft IDR Scope of Work).

The focus of Respondents' scope element is on “[a]ssessment of the risks” through evaluation of “the potential consequence, severity, and likelihood of the risks,” with an implication that at best there might

be “mitigation measures...to minimize these risks” – as opposed to actual solutions or design approaches that could address technical issues. Respondents’ emphasis on risk – and lack of emphasis on potential solutions – is also evident in the wording of Respondents’ other January scope elements, which contain multiple references to “risk” and “risks,” but either include relatively perfunctory requests for potential mitigation measures, or else make no mention at all of potential solutions/mitigation measures (for instance, scope elements regarding water treatment and infrastructure).

In their January 26 draft, Respondents use risk repeatedly to frame their scope elements in a way that potentially “influences [the IDR contractor’s] review and focus areas,” as Respondents in their July 14 letter accuse EPA of attempting. Respondents repeat “risk,” “risks,” and associated concepts in their proposed scope elements in association with the design and the selected remedy, including the following excerpts from Respondents’ January 26 draft:

“the potential consequence, severity, and likelihood of the risks involved in implementation of this remedy as designed”;

“associated risks with excavation behind a cofferdam to complete removal in accordance with the ROD”;

“associated risks with dredging behind a cofferdam...to complete removal in accordance with the ROD”;

“what risks exist in relation to these RAOs”;

“whether additional data collection is warranted to better understand the risks involved in the implementation of the remedy”;

“the appropriateness, practicality, challenges, and risks of the current approach to water management and water treatment”;

“the practicality, challenges, and risks associated with implementation of the remedial action project.” (Respondents’ January 26 Draft IDR Scope of Work).

Respondents in their scope elements also editorialize other issues, for instance by inaccurately claiming that the ROD provides for “no releases” to the San Jacinto River. In addition to its other concerns, EPA believes Respondents’ presentation of the scope elements overstates Respondents focus on the risk of the project in a manner that could influence the IDR contractor’s perception of the project and final conclusions.

In their July 14 letter, Respondents also indicate that EPA’s focus on implementable solutions for the RD, as opposed to Respondents’ focus on risk, could be equivalent to EPA focusing the IDR on “technically feasible or possible” solutions that are not necessarily solutions consistent with best practices. In drafting its scope elements for the IDR to emphasize potential solutions and mitigation methods for implementation problems, EPA thought it implicit that any solutions and methods for IDR recommendation should be and would be consistent with industry norms and engineering standards, and not, as Respondents’ July 14 letter states, a “cause for concern” or “have substantial repercussions if failure were to occur.” However, if Respondents had expressed this specific concern at some time before including it in their July 14 letter, EPA certainly would have added language to its proposed scope elements to clarify that any solutions and mitigation methods identified by the IDR contractor should be not only be technically possible, but also consistent with best practices.

EPA's March 29 Revised Draft Scope Elements of the IDR

In preparing its response to Respondents' January 26 draft, EPA's primary considerations were how to frame the scope elements in a way which would serve the purpose of the IDR, which was to conduct an independent third-party technical review of the RD in order to advance remediation of the Site; to make the review effective and time-efficient; and to formulate the scope elements so as to prevent re-evaluation of the remedy selection process or consideration of new remedial approaches, while still providing the technical information EPA needs for its decision-making. In its March 29, 2023, draft of the IDR scope elements and qualifications/conflict-of-interest requirements, EPA, after careful consideration, narrowed the thirteen scope elements proposed by Respondents on January 26 to seven EPA-proposed scope elements. EPA has been consistent and clear as to the primary reasons for its presentation of the revised scope elements: EPA is not willing for the IDR to reconsider the selected remedy; and after consultation with Agency experts with extensive experience of third-party reviews and optimizations, EPA believes that focusing the IDR on scope elements examining specific technical problems would be more likely to result in a successful design review. See EPA Letter to Respondents dated March 29, 2023, and EPA's Draft IDR Scope of Work dated June 5, 2023.

One of the most important reasons for focusing the IDR scope elements was that EPA believes the IDR would be more effective with a more focused scope on evaluating, and if possible finding solutions consistent with the ROD for, specifically identified technical issues raised by the 90% RD. These issues include hydraulic heave, water management and water treatment, potential conflicts regarding the TxDOT right of way/the I-10 bridge replacement project, impacts on the adjacent infrastructure, the design of the cofferdam wall, and review of potentially limiting materials handling procedures. This would be more likely to result in a successful review than asking the IDR contractor to re-evaluate the design in its entirety to identify and address broad and unspecified implementability concerns.

This conclusion is supported by Agency experience of engineering optimization and peer review at other sites. It would provide for more efficient use of the proposed IDR schedule by focusing on issues already identified by over five years of Northern Impoundment RD and multiple TWG discussions with Respondents. EPA's March 29 draft incorporated not only knowledge from the RD process but also input from EPA's review team, with the purpose of evaluating identified roadblocks to implementing the selected remedy and determining potential ways to remove or mitigate those roadblocks consistent with the selected remedy. The streamlined approach also acknowledged the significant public interest in a more efficient, more timely process which would directly address information EPA needs for its decision-making in order to advance Site remediation.

EPA also included language in its March 29 draft to prevent use of the IDR as a substitute for the CERCLA remedy selection process (specifically adding, "The Independent Design Review, including but not limited to the Contractor's findings and all draft and final reports, shall not re-evaluate EPA's remedy selection process for this Site, or consider or propose other remedial alternatives that are not the 2017 selected remedial alternative for the Northern Impoundments as determined by the EPA"). However, focusing the scope elements on specific technical issues also helped address the Agency's concern that the IDR contractor or Respondents might use IDR evaluation of broad implementability concerns as a basis for improperly evaluating Agency actions, decisions or policy, in particular by identifying alternate

remedial alternatives as a way to address the broad implementability concerns.

The resulting scope elements in EPA's March 29 draft were not only focused on specific technical issues, and potential solutions for those issues, but also accomplished two additional objectives: they included scope element topics identified by Respondents on January 26 but not included in EPA's December 8 list of issues, such as evaluation of the cofferdam design and potential conflicts between the southern portion of the cofferdam and the I-10 bridge replacement; and they further elaborated upon EPA's specific technical questions and concerns for each issue based on comments EPA received from the EPA review team, instead of making those comments a separate scope issue (addressing, in a way consistent with EPA's streamlined approach, EPA's December 8 proposal for evaluation of the validity of EPA review team comments, which was completely rejected by Respondents).

EPA's March 29 and June 5 Draft Scope Elements Incorporate EPA's IDR Issues Using a Streamlined Approach

The overarching issues and technical concerns discussed in the December 8 letter, including the list of ten issues, are incorporated into the EPA's March 29 and June 5 drafts of the IDR Scope of Work. For the reasons discussed previously by EPA, EPA's December 8 issues are captured in EPA's scope elements, not as a verbatim list of the ten December 8 issues for the IDR to address, but as part of a directed, streamlined charge to the IDR contractor in order to address those issues effectively.

EPA's March 29 and June 5 drafts did delete scope elements proposed by Respondents on January 26 and May 23 inconsistent with EPA's December letter. EPA did not, as stated in Respondents' July 14 letter, delete "key elements that were originally proposed by EPA" because 1) EPA's December 8 issues are not the same as the "key elements" described in Respondents' July 14 letter, in particular Respondents' "key elements" of evaluation of risk and a broad contractor review potentially encompassing EPA's remedy selection process; and 2) the ten issues as actually listed by EPA are in fact addressed in EPA's scope elements, but in a streamlined fashion not favored by Respondents.

In their May 23 response and July 14 letter, Respondents do not agree with EPA on the advantages of a streamlined approach. One of their concerns is that by narrowing the IDR to specific technical issues the EPA was limiting "the ability for the contractor to review, assess, validate, and/or mitigate any of the proposed assumptions and approaches in the current 90% RD, regarding challenges or risks" as stated in Respondents' July 14 letter. However, this ignores that EPA added a new scope element in its June 5 second draft to address Respondents' concern that each EPA scope element was limited to review of a specific technical issue. EPA's new June 5 scope element provided for review by the IDR contractor of "the proposed technical approaches in the 90% RD for implementation of the ROD, and identification and evaluation of any modified or alternate remedial technical approaches" that might address the technical uncertainties presented by Respondents as limiting ROD implementation – even if the modified technical approach had not been specifically identified by EPA and Respondents. This additional scope element is consistent with the December 8 issues and addresses Respondents' stated concerns about allowing the IDR contractor to identify technical approaches not included in EPA's streamlined scope. But again, EPA's focus is identifying any modified or new technical approaches that could provide solutions to move the RD forward.

In their July 14 letter, Respondents state that they are also concerned because the “streamlined scope of review is not what was originally proposed by EPA in the December 8th letter and significantly alters the direction and intent of the IDR.” A streamlined scope is not inconsistent with the December 8 letter or EPA’s intent for the IDR. The EPA originally proposed the IDR because, as stated in the December 8 letter, it believed that “the EPA does not have the information necessary to make a determination regarding Respondents’ claims that the selected remedy is not implementable or about the technical uncertainties identified by Respondents in the 90% design.” The December 8 letter also outlined the EPA’s concerns with the 90% RD, including lack of support for evaluations and factual statements and the lack of information regarding potential solutions for technical difficulties. The IDR was proposed by EPA to provide that information and documentation lacking in the 90% RD. Through evaluation of the specific technical issues pursuant to EPA’s proposed scope elements, the IDR might have provided a thorough engineering design review giving EPA, as decision-maker, specific information to support its decisions about the Site remediation.

Finally, in their July 14 letter, Respondents express concern that a streamlined review is inconsistent with “a complete and holistic evaluation of the 90% RD”; technical issues “will be evaluated in isolation, and not holistically evaluated for all variables and inputs that feed into or out of it”; and a streamlined review “separates and in some cases erroneously oversimplifies many of the complex dynamics of the project, leading to scope elements being evaluated in isolation and without the proper consideration of the project in its entirety.”

It is not clear to EPA what Respondents mean in these circumstances by an “holistic” review. The IDR proposed by EPA was an engineering design review. It was proposed as a technical review of an engineering design project, the RD, and the 90% RD identifies specific design concerns Respondents claim may prevent implementation (see Section 5.11.1 of the 90% RD). A technical review should systematically evaluate identified concerns, propose any alternate or additional methods to solve and/or mitigate them consistent with the scope, and then document the review’s findings. EPA’s draft IDR Scopes of Work accomplished these objectives.

EPA is concerned that Respondents’ proposed description of an “holistic” IDR might lend itself to either the IDR contractor looking beyond the RD to re-evaluate EPA’s remedy selection decision, or else giving an essential thumbs up/thumbs down on the implementability of the remedy or the validity of the design without adequate justification of the basis for that opinion. Respondents objected to EPA language in the proposed Scope of Work requiring the IDR contractor to fully document the basis for its findings, claiming the language was “outside the industry norms” (Respondents’ May 23, 2023 responses regarding the draft IDR Scope of Work). The language rejected by Respondents is from EPA’s Peer Review Handbook (4th ed.); specifically, as stated in EPA’s March 29 draft, the IDR report should include “[a] description of the procedures used to arrive at the IDR findings; a list of sources relied upon; and clear and substantiated identification of the methods and considerations upon which the IDR findings were based.” A streamlined scope focusing on specific issues lends itself to the systematic identification of the bases, sources, and considerations for each IDR conclusion. It is consistent with EPA’s December 8 letter making clear that that what EPA proposed was “a third-party evaluation of technical, engineering issues regarding the Remedial Design which will be part of the public record for the Site.”

EPA's Scope Elements Allow for IDR Evaluation of Actual Substance of "Key" EPA Issues

While all of the December 8 listed issues were not presented by EPA as separate scope elements in its draft Scopes of Work, the EPA's proposed scope elements would have ensured that an IDR contractor addressed all of those issues in the context of evaluating the technical problem considered in each scope element. The constituents of several broad December 8 issues now identified by Respondents as "key," but as originally stated by EPA – evaluating technical uncertainties presented in the 90% RD, identifying solutions and alternate approaches to address or mitigate those technical uncertainties, identifying whether Respondents' design approaches and assumptions create implementability issues, and developing additional information and evaluation of data – were still a critical part of the IDR scope proposed by EPA. For instance, evaluating technical uncertainties generally is not a separate EPA scope element, but evaluating hydraulic heave, identified in the 90% RD as a significant technical uncertainty, is extensively addressed in EPA's proposed scope elements. As another example, EPA adapted one of Respondents' draft scope elements for the following EPA proposed scope element:

Evaluation of the potential impacts to nearby infrastructure that may result from implementation of the response action as designed in the 90% RD, or from its final end-state. This evaluation should include an assessment of potential impacts to the current and planned TxDOT I-10 bridge, the navigation channel, subsurface pipelines, and any other nearby structures, and recommendations to address any potential impacts (EPA's March 29 and June 5, 2023, Draft IDR Scopes of Work).

This proposed scope element encompasses the evaluation of a technical uncertainty identified in the 90% RD (potential impacts to nearby infrastructure), including the evaluation of impacts from the way Respondents designed the remedy in the 90% RD; development by the IDR contractor of an assessment of potential impacts to specific infrastructure; and recommendations for ways to address those impacts. Similarly, each of the other EPA scope elements encompasses the important elements of the "key" issues cited by Respondents.

The only one of Respondents' July 14 "key" issues that concerns a specific technical issue or uncertainty is the evaluation of excavation depths, and Respondents express concern in their July 14 letter that EPA did not include excavation depths in a separate IDR scope element. Excavation depths were listed as a technical uncertainty in the 90% Remedial Design, and EPA included the issue in its December 8 letter (specifically, "Independent evaluation of excavation depth limits proposed in the 90% design and any technical or construction concerns limiting excavation, as well as any options to mitigate them").

Respondents' January 26 draft included two scope elements related to excavation depths, one of which was evaluating the "lateral and vertical extent" of material exceeding the cleanup level, which was not specifically addressed in EPA's December issues. In its March 29 scope elements, EPA considered IDR evaluation of the lateral and vertical extent of the waste unnecessary because Respondents concluded in the 90% RD that "[a]s the result of three pre-design investigations, there is an extensive dataset to give confidence in the horizontal and vertical delineation of the impacted area in the Northern Impoundment." (p. 29 of Respondents' 90% RD/Northwest Corner Component).

While not a separate scope element, EPA did include in its proposed scope elements evaluation of "technical or construction concerns limiting excavation," as stated in the EPA's December 8 letter. Two of the primary issues regarding excavation depths cited by Respondents are their relation to hydraulic

heave and the design of the cofferdam wall; both EPA's March and June scope elements for hydraulic heave and the cofferdam wall design address their effect on excavation depths. EPA's hydraulic heave scope element addresses the issue of heave potentially limiting excavation of waste at lower depths exceeding the cleanup level, requiring "identification of practical approaches to mitigate any hydraulic heave risk that could occur during the removal of waste material over 30 ng/mg TEQ_{DF,M}." EPA's scope element related to the cofferdam design includes evaluation of its ability to "[a]llow potential over-excavation of up to an additional 2 feet below the depth of the waste material exceeding 30 ng/kg TEQ_{DF,M}."

However, EPA is not willing for the IDR contractor to re-evaluate EPA technical decisions regarding excavation depths in relation to compliance with the cleanup level, or to allow Respondents to use IDR review of excavation depths as a way to challenge EPA's RD cleanup compliance decisions. The method to determine compliance with the cleanup level directly affects the depths required to excavate waste, but Respondents do not agree with EPA's decisions regarding the method of determining compliance. The EPA Remedial Project Manager has consistently stated that EPA has not approved a site-wide SWAC (surface weighted average concentration) approach, favored by Respondents, to measure compliance with cleanup levels at this Site, and that the final decision on how compliance with the cleanup level will be determined is a decision for EPA. As EPA discussed with Respondents in a Teams call regarding the IDR on July 6, 2023, cross-sections presented in the 90% RD show excavation depths based on meeting a site-wide average to demonstrate compliance with the cleanup level – a method ruled out by EPA in TWG meetings. Respondents also listed "the acceptance of Respondents' excavation methodology" based on their "risk-based approach" as a "major uncertainty in the success of the RD" (see Section 5.11.1.2 of the 90% RD (Excavation Limits – Acceptance of the Design Excavation Surface). Respondents then proposed in their January 26 draft that this particular excavation depths issue should be evaluated by the IDR contractor, stating that "[t]he review should include evaluation of potential alternative approaches to the excavation depths which satisfy the exposure risks identified in the ROD." Inclusion of this scope element regarding excavation depths, as proposed by Respondents, would substitute the judgement of the IDR contractor for decisions already made and to be made by the Agency, and for that reason was not accepted by EPA.

Detailed Implementation Solutions Are Appropriate for IDR Consideration

EPA has used Respondents' term "technical uncertainties" when discussing engineering problems with the design, but at least some of the problems characterized by Respondents as "technical uncertainties" are in fact engineering or construction issues, which however complex, are capable of resolution. To address these "technical uncertainties," EPA proposed IDR evaluation of engineering design and construction approaches not included in the 90% RD and consideration of what Respondents term "contractor means and methods," but Respondents claim EPA's proposals are inappropriate for review by the IDR.

As stated in their July 14 letter, "[m]any of the suggested alternatives to be evaluated in the [EPA's] IDR Scope of Work are contractor means and methods... and not something specified in an engineering design report nor covered in a peer review of a design report." However, Respondents identified as "Technical Uncertainties" in the 90% RD problems arguably caused by Respondents' own choice of, or failure to choose, what they term "contractor means and methods."

Respondents use an overly conceptual approach to the 90% RD which is not consistent with a remedy design that should be 90% complete, leaving significant issues for final resolution by a future remedial contractor. Respondents' 90% RD fails to sufficiently define options for implementing the design; Respondents either leave the design options unresolved for future remedial contractors because they are "contractor means and methods," or Respondents adopt design factors that are themselves identified as technical uncertainties, without sufficiently evaluating alternatives. This could limit future remedial contractors to either resolving open technical uncertainties or implementing a flawed approach, discouraging potential remedial contractors' interest in implementing the project. In effect, Respondents' 90% RD both identifies unresolved future issues regarding "contractor means and methods" as technical uncertainties, and simultaneously refuses to address the technical uncertainties as part of the design because Respondents claim that they are "contractor means and methods."

These problems potentially could be resolved by consideration of "means and methods" either not considered by Respondents or rejected without adequate explanation. For example, Respondents discussed as a technical uncertainty limited access to the Site and competing needs for use of the TxDOT right of way (see Section 5.1.11.1 of the 90% RD, Use of TxDOT ROW to Access the Site). There are potential solutions to these access issues through, for instance, the greater use of barges and sophisticated piping to perform operations and remove waste from the Site, rather than Respondents' almost total reliance on using trucks on the access road. EPA therefore included in its March 29 scope elements a "[r]eview of the material handling procedures in the 90% RD and an evaluation of alternate methods or practices for movement of material, material staging, storage, treatment and transportation that could be used to address limitations in the site area and road access." This proposed scope element was rejected by Respondents in their May 23 draft. If Respondents claim that a problem is a technical uncertainty creating implementability issues, they should not dismiss EPA's attempts to resolve those issues – a detailed resolution would still be a resolution.

Respondents specifically identify in their July 14 letter EPA's "inappropriate" consideration of "contractor means and methods" related to "water management evaluation of alternative clarifying methods, reagents/clarifiers, mixtures of reagents, and methods of applying agents." Again, water treatment is specifically listed as a technical uncertainty under Section 5.11.2.1 of the 90% RD and has been a critical limiting factor in implementation of the remedy, being used by Respondents to justify the move away from the 30% RD dredging approach. In reviewing the details of Respondents' evaluation of water treatment in the 90% RD, it is not clear to EPA's review team that specific methods which could address some water treatment and management issues were considered by Respondents, particularly regarding pre-treatment methods that could be used to make the water treatment system more effective. EPA's proposed IDR scope element therefore asks the IDR contractor to evaluate the use of specific water treatment methods as part of its review, as well as potential issues with the wastewater treatment system that could be mitigated by changes to the way materials are excavated and handled during the removal. As a practical matter, if technical engineering issues can be resolved by utilizing different contractor means and methods, it makes no sense for the IDR not to consider them.

While arguing for a broader review, Respondents also appear to argue that IDR evaluation of certain issues – specifically the 90% RD's choice of design approaches and potential engineering alternatives - is limited to what is already in the 90% RD. Respondent's July 14 letter disagrees with some of EPA's

revised scope elements because they “are suggestive of specific alternative methods or strategies to be reviewed, even though they are not discussed in the 90% RD.” Similarly, the scope elements developed by Respondents are often focused either on the validity of individual design choices in the Respondents’ 90% RD (from Respondents’ January 26 draft, the IDR should evaluate “the technical merit of [Respondents’] proposed remedial approaches”), or seeking to verify problems Respondents have already identified in the 90% RD and confirm the risks of implementation of Respondents’ 90% RD design choices (for example, from Respondents’ January 26 draft, “evaluation of appropriateness, practicality, challenges and risks of the current [90% RD] approach to water management and water treatment”).

Respondents’ assumption appears to be that if their 90% RD is not implementable, it proves that neither is the ROD remedy. EPA does not agree. Even if Respondents’ contractor made a series of assumptions and choices arguably consistent with engineering standards or industry norms during the course of the RD, at least in isolation, that does not mean that other technically sound engineering approaches – or even alternate “contractor means and methods” – might not exist that could be more successful at resolving technical challenges and presenting an implementable design of the remedy. As discussed in EPA’s December 8 letter, EPA’s review team does not agree that Respondents have documented that the remedy is not implementable, in part because Respondents failed to adequately explore or evaluate solutions to identified technical problems in the 90% RD. EPA’s scope elements focus on identifying those alternate solutions and approaches (even if “contractor means and methods”) as long as they are consistent with the ROD remedy and best practices, but regardless of whether they are in the current 90% RD. While some specific approaches or methods suggested by EPA certainly were not part of Respondents’ design, EPA’s concern is that perhaps they should have been.

Finally, some of what Respondents dismiss as “inappropriate” “alternative methods or strategies” and “contractor means and methods” represent EPA review team input. One of EPA’s December 8 listed issues – unilaterally rejected by Respondents in their scope elements – is the need to address the EPA review team comments. There was no point to EPA or the community in conducting the IDR if alternate methods recommended by the EPA review team were not considered by the IDR contractor. This would leave open the possibility of a multi-month remediation delay for the IDR concluding with IDR findings lacking consideration of critical EPA review team issues, and therefore based on incomplete information. If EPA-recommended alternative approaches, such as different water treatment methods, were not considered in the 90% RD or evaluated by the IDR, Respondents would still need additional time after IDR conclusion for response to EPA’s 90% RD comments with EPA review team input. This would have created additional, unnecessary delays in the RD process.

Issues Raised Regarding Process for Conducting the Proposed IDR

Attached to its June 5 letter, EPA provided a comprehensive draft of the procedures for the proposed IDR (as opposed to the scope elements and the qualification and conflict-of-interest requirements, which were in EPA’s March 29 draft) and a draft amendment to the Order Statement of Work providing for conduct of the review under the Order. In its June 5 letter, EPA requested detailed comments in two weeks from Respondents on approximately four pages of draft procedures and draft amendment, and later repeated its requests on June 21 and June 28. Respondents’ June 16 and June 23 did not provide the detailed responsive comments requested. In their July 14 letter, Respondents again did not provide either detailed

comments on, or revisions of, the drafts provided by EPA on June 5, which at that point they had had for over five weeks, nor did they express willingness to accept some or all of the provisions proposed by EPA. Respondents did generally discuss a few concerns regarding EPA's draft process in their July letter, concerning the necessary time to select and retain the IDR contractor and the involvement of GHD, Respondents' design contractor, in the IDR. Respondents also stated that EPA should require less extensive conflict of interest requirements for the selected IDR contractor.

Extensive Conflict of Interest Provisions Are Necessary for an Independent Review, and EPA Provided an "Achievable Timeline" for IDR Contractor Selection by Respondents' Own Calculation

In EPA's December 8 proposal, it was critical to EPA that the IDR process "ensure that the review is as independent as possible," providing "all parties – the EPA, Respondents, TCEQ, other governmental stakeholders, and the community – with assurance that the information, analysis, opinions, and conclusions provided are technically sound, reliable and impartial in its evaluation of the design for ROD remedy implementation." Because the IDR contractor would be paid by Respondents, EPA's March and June draft IDR scopes included detailed conflict of interest provisions for proposed IDR contractors to demonstrate independence and impartiality. Although required by EPA's December 8 letter, Respondents complained in their July 14 letter that EPA "added substantial conflict of interest (COI) and financial requirements for candidate contractors" which were "burdensome" and a "significant cause for concern by the Respondents."

EPA's December 8 letter specifically suggests that "[t]he proposed selection and contracting process would be designed to demonstrate independence and impartiality similar to the processes approved by the EPA for independent third-party environmental compliance evaluations or audits financed by private-party defendants pursuant to the EPA's regulatory programs." The conflict-of-interest provisions and contracting timeframes proposed by EPA on March 29 and June 5 accordingly are similar to some provisions used in EPA settlements providing for independent third-party environmental compliance audits, where the independence and impartiality of the third-party contractor is also a concern. When made aware on June 29 of Respondents' concern about EPA's proposed conflict-of-interest requirements and timeframes for identifying candidate contractors, EPA forwarded to Respondents' counsel a copy of a judicial consent decree including the performance of environmental audits in U.S. and State of Texas v. E.I. DuPont de Nemours and Co. and Performance Metals, NA, Inc., Civil Action No. 1:21-cv-00516-MJT (E.D. Tex. Beaumont Div.), entered on January 28, 2022.

Under the proposed IDR process in EPA's June 5 draft, Respondents would provide names and qualifications of five potential contractors within 30 days after the Order's Statement of Work was amended to provide for the IDR. This is consistent with the DuPont consent decree and recognizes that Respondents have been aware of the conflict-of-interest provisions and qualifications sought by the EPA since March 29, allowing for the possibility of some advance research, discussions and vetting of potential contractors. However, this is just the first step in the process. Under the EPA proposal, Respondents then would select the IDR contractor within another 30 days after EPA provided notice of any disapproved contractors. Following the selection date of the contractor by Respondents, the Respondents would, after a further fifteen days under EPA's proposal, provide EPA with a detailed IDR

schedule pursuant to a completed contract with the selected contractor. Assuming two to four weeks for EPA to check the proposed contractors' qualifications, the final contractor selection would have occurred three to three-and-a-half months after finalizing the amendment.

While not providing a definite timeframe, Respondents stated in their July 14 letter that the process for selecting a contractor would take three to four months from "Preparation and submittal of the RFQ [Request for Qualifications]" to "Selected Contractor Contracting." That is not 30 days under the schedule proposed by the EPA; as discussed above, EPA's 30-day timeframe was an initial proposed deadline for identifying candidate contractors, but the entire EPA-proposed process through "Selected Contractor Contracting" was approximately three to three-and-a-half months – exactly what Respondents say is "reasonable." This might have been clarified if, as requested, Respondents had provided EPA with a markup of the specific deadlines and process language.

Respondents' July 14 letter also finds fault with EPA's IDR path forward because "EPA has removed and modified much of the sequenced process around contractor selection and procurement" in the process proposed by Respondents, with "no mention of a RFQ and RFP [Request for Proposal] in the process." Prior to its March 29 and June 5 drafts, EPA explained to Respondents that EPA's involvement in the IDR contractor selection is generally limited to EPA disapproval of candidate contractors not meeting the qualifications/conflict-of-interest requirements to EPA's satisfaction; Respondents subsequently could contract with any candidate not disapproved. The process provided in EPA's drafts of the IDR Scope of Work is consistent with the contractor selection process in all EPA's model CERCLA administrative orders and consent decrees.

Appearance of IDR Independence Compromised if Respondents' Contractor Preparing the 90% RD Acts as the Prime Contractor for the IDR, But EPA Did Not Oppose GHD Attending Joint EPA/Respondent Meetings with the Proposed IDR Contractor

At a February 7, 2023, meeting with EPA, Respondents proposed that they use GHD, their current contractor which prepared the 90% RD for the Site, as Respondents' contractor in charge of advertising, selecting, hiring, contracting and paying for a subcontractor to conduct the IDR. As stated in an EPA letter dated February 16, 2023, EPA objected that Respondents' proposed use of GHD as the primary contractor subcontracting the third-party review of GHD's own work is inconsistent with the technical review being or appearing "independent," jeopardizing its credibility. Regardless of any controls on GHD's involvement, there would be a fundamental appearance problem because it's GHD's design. In its February 16 letter, the EPA stated that, if the IDR was to proceed, that GHD should not have any further involvement in the IDR contracting process and should not have ex parte communications with the future IDR contractor. Respondents then agreed that GHD would not be in charge of contracting the IDR.

In its June 5 draft of the IDR Scope of Work, the EPA suggested revisions regarding joint meetings with the IDR contractor, deleting GHD as a specific participant and instead referencing only the parties and the IDR contractor as attendees. The intent was for both EPA and Respondents to have their own representatives and contractors, as necessary, at the meetings with the IDR contractor, and that Respondents' contractor for that purpose could be GHD. As worded by Respondents in their drafts (citing as the only attendees at IDR meetings "EPA, Respondents, GHD and the Contractor"), it was possible that the language could be construed so that Respondents, but not EPA, were allowed to have their contractor in attendance, and also gave the incorrect impression that GHD was a separate party to the IDR.

In a July 6, 2023, Microsoft Teams call, Respondents expressed their concern with the deletion of specific mention of GHD's attendance at joint meetings, stating that GHD should be included in the IDR meetings because the discussions are very technical, and Respondents need GHD's expertise. EPA responded during the call that EPA never requested that GHD not be the Respondents' consultant during the IDR, but that the EPA did not want GHD to be in charge of contracting the IDR. The EPA representatives on the call clarified EPA's intent that contractors for both parties, including GHD for Respondents, could be present at meetings of all parties with the IDR contractor. Despite this clarification, Respondents' July 14 letter inaccurately stated "GHD has been completely removed from participating in any part of the IDR process," without acknowledging the July 6 discussion or EPA's clarification.

In addition to participation in meetings with the IDR contractor, Respondents' contractor would also have had substantial input in the IDR process through the parties' written submissions following initial IDR meetings and also the parties' written comments and clarification questions on the draft of the final IDR report. Respondents' July 14 claim that their contractor would have "no input in the IDR conclusions, determinations or recommendations" is a misrepresentation of EPA's statements and drafts.

EPA's Evaluation of Additional Information

In its December 8 letter proposing the IDR, EPA stated that it did "not believe that submitting its comments [on the 90% RD] at this time for incorporation into another submittal will advance the design process" and that the IDR process or, alternatively, EPA potentially conducting its own engineering design review, would be the most productive path "to move the design process forward." Since the date of the December 8 letter, however, EPA has continued to coordinate and receive comments and input on the 90% RD from its contractors, TCEQ, local stakeholders, experts at EPA, and the USACE. This continued evaluation has provided EPA not only more information about the IDR process, as discussed above, but also more information about the RD. Information EPA has evaluated since its December 8 letter includes the performance of the water treatment system on the Site's Southern Impoundment and also the design of a sediment removal remedy in a highly challenging marine environment in another EPA region. While more information remains necessary to fully develop an implementable design, EPA's evaluation of additional information since December 8 has led EPA to conclude that a third-party or EPA-led technical review is not the only way to develop necessary information for the RD.

Conclusion

EPA initially proposed the idea of the IDR as a possible path forward from the "virtual impasse" presented by, on the one hand, Respondents' 90% RD stating that at its foundation are technical uncertainties potentially preventing implementation of the selected remedy, and, on the other, the EPA review team concluding that the record currently does not support a finding that the remedy cannot be implemented. EPA has explored the IDR proposal with Respondents, but both the substance and the manner of the proposed IDR discussions demonstrate that the IDR is not the preferred path forward, and certainly not a likely source of "common ground in advancing remediation of the Site's Northern Impoundments" as envisioned by EPA in December 2022.

While Respondents' July 14 letter characterizes the remaining issues on the protocol as minor, the history of the IDR demonstrates that the parties have a fundamental disagreement. As stated above, the review

EPA proposed on December 8 is apparently not the review Respondents are willing to accept, and the IDR outlined by Respondents in their July 14 letter is not acceptable to EPA. This has led EPA to the conclusion that continued pursuit of the IDR would create a significant delay in completing the RD process without advancing the remediation of the Site.