

SEDIMENT MANAGEMENT WORK GROUP

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October 26, 2005

David Anderson
Associate Director for Natural Resources
Executive Office to the President
Office of Management and Budget
725 17th Street, N.W.
Washington, DC 20503

Re: SMWG Comments on the Implementation of the Great Lakes Legacy Act

Dear Mr. Anderson:

The Sediment Management Work Group (“SMWG”) or (“Group”)¹ is pleased to provide information and comments to the Office of Management and Budget (“OMB”) on the implementation of the Great Lakes Legacy Act (“GLLA”) or (“Legacy Act”). The SMWG has been active nationally on various contaminated sediment issues since its founding in 1998. The SMWG has worked cooperatively with U.S. EPA, various other federal agencies, states and other stakeholders in support of the concept of a risk-based approach for evaluation and management of contaminated sediment. The SMWG recognizes that the Great Lakes are one of this nation’s greatest natural resources, deserving an appropriate level of attention to foster their recovery. Many of our Members have one or more facilities on or near the Great Lakes. In addition, the SMWG is interested in the progress of the recovery of the Great Lakes and the use of innovative remediation approaches and techniques, administrative processes and funding to address contaminated sediment. The methods and approaches utilized in addressing

¹ The Sediment Management Work Group is an ad hoc group of industry and government parties actively involved in the evaluation and management of contaminated sediments. (See Exhibit “A” for a list of its Members.) The Group is dedicated to the use of sound science and risk-based evaluation of contaminated sediment management options. The SMWG recognizes that the management of sites involving contaminated sediments frequently involves unique and complex scientific and technical issues, including assessment methodologies and evaluation of risk and risk reduction options. For more information, please refer to our webpage, www.smwg.org. As an active participant in the national discussions on sediment management issues, the SMWG welcomes the opportunity to offer observations and comments on the Legacy Act’s implementation as one of several important tools available to address contaminated sediment in the Great Lakes.

SEDIMENT MANAGEMENT WORK GROUP

David Anderson
October 26, 2005
Page 2

contaminated sediment in the Great Lakes can serve as a potential template for non-Great Lakes projects.

The Important Background Information on the GLLA

The genesis of the GLLA (Public Law 102-303, enacted on November 27, 2002) was a concerted, cooperative effort by multiple stakeholders including U.S. EPA and other federal agencies, state and local government, environmental groups and industry. These stakeholders coalesced to develop a mechanism to serve as a significant catalyst to accelerate the limited progress achieved at that time in addressing contaminated sediment in the Great Lakes. Industry was an active participant and strong proponent of the GLLA with the understanding and expectation that Legacy Act funding would be available for Areas of Concern (“AOCs”) in the Great Lakes, even where potentially responsible parties (PRPs) existed and were actively participating at a particular site. This was a central tenet of industry support for this multi-stakeholder initiative.

The Legacy Act is being administered by U.S. EPA’s Great Lakes National Program Office (“GLNPO”). We understand that GLNPO’s approach appropriately recognizes the eligibility of PRPs to serve in whole or in part as the non-federal sponsor in a Legacy Act project under appropriate circumstances on a site-specific basis. The SMWG supports GLNPO’s efforts in that regard. Sometime during the course of the review of the eligibility and funding sources of some of the early Legacy Act projects, however, questions arose externally on whether PRPs could serve in whole or in part as sources of funds covering the nonfederal share for Legacy Act projects.

The Legacy Act language itself expressly acknowledges that PRPs may serve this important role in Section 12(E)(iii)(I), which provides that the nonfederal share of the cost of the project “may include monies paid pursuant to, or the value of any in-kind service performed under an administrative order on consent or judicial consent decree...” Since administrative orders on consent and judicial consent decrees are the mechanisms of choice of cooperating PRPs, and parties just don’t generally sign such documents in the absence of some potential responsibilities under the environmental laws, it is obvious that the Congressional intent was to include PRPs as eligible to serve in the important role as a nonfederal sponsor.

This intent is documented in the legislative history of the Legacy Act. For example, House Report 107-587 is filled with references to private entities, corporate involvement and private sector funding. Likewise, Senate Report 107-312 also utilizes similar language and references eligibility of cash or the value of in-kind services contributed by parties subject to an administrative order on consent or judicial consent decree. The Senate Report appropriately draws the distinction between voluntary PRP actions and involuntary actions, such as where a unilateral order or court order is involved.

SEDIMENT MANAGEMENT WORK GROUP

David Anderson
October 26, 2005
Page 3

Public Policy Considerations

The legislative intent of the GLLA in making PRPs eligible to serve in whole or in part as the nonfederal sponsor in GLLA projects is consistent with the sound public policy encouraging an accelerated pace for cleanup of Great Lakes contaminated sediment. In fact, when the legislation passed, Chairman Young [U.S. Representative Don Young (Alaska)] made it a point to stress that "This is not a situation that can be addressed by pointing fingers and suing people under the Superfund Law or other liability statutes." and further that "The solution provided by the Great Lakes Legacy Act is to address sediment contamination through cooperative efforts and public-private partnerships." Likewise, Chairman Duncan [U.S. Representative John J. Duncan (Tennessee)] noted that "The Great Lakes Legacy Act will help overcome the obstacles to cleanup by encouraging voluntary, consensus-based cleanup actions that will be carried out by EPA in partnership with nonfederal sponsors." Chairman Duncan further noted "I commend Dr. Ehlers [U.S. Representative Vernon J. Ehlers (Michigan)] and his colleagues for working with stakeholders from the Great Lakes to advance this consensus approach to Great Lakes remediation." (November 12, 2002 Congressional press release) Congress recognized that PRP funding could serve to stimulate, accelerate and enhance remediation of Great Lakes contaminated sediment. In fact, in these troubled times with extreme budget shortfalls plaguing most state and local governments, utilizing PRP funding for some or all of the nonfederal share may offer the best hope of supplying the local match necessary to fund Legacy Act projects.

Recent Renewed Consensus of Stakeholders in Support of this Issue

On May 18, 2004, President Bush recognized the priority of a healthy Great Lakes when issuing an Executive Order calling for the development of a "Strategy to Restore and Protect the Great Lakes." As a result of this Executive Order, a multi-stakeholder process was created focusing on a number of areas critical to the long-term recovery of the Great Lakes known as the Great Lakes Regional Collaborative Process. In addition to issues on PBTs, non-point sources and sustainability (among others), one of the specific areas of focus was the "Areas of Concern/Sediments" issue. Over the months that followed, numerous meetings and discussions amongst a diverse array of stakeholders which formed the AOC/Sediments Subgroup occurred which focused on identifying critical priorities and recommendations to accelerate progress in addressing contaminated sediment in the AOCs in the Great Lakes.

Detailed discussions occurred during the AOC/Sediments Subgroup meetings on the topic of the appropriate role of PRPs in serving as nonfederal sponsors for Legacy Act projects. This diverse group of stakeholders reached a strong consensus that the original intent of the Legacy Act to permit potentially responsible parties to participate as the source of some or all of the nonfederal sponsor's share "should be clarified and reiterated." (p. 7)² Those stakeholders

² The discussion of the PRP eligibility question can be found on page 3 of the recommendations section of the AOC/Sediments Chapter and page 7 of the Supplemental Information section.

SEDIMENT MANAGEMENT WORK GROUP

David Anderson
October 26, 2005
Page 4

included environmental groups such as the Sierra Club, State environmental officials (including the Directors of the respective environmental protection agencies of Michigan and Ohio), the Great Lakes Commission, representatives from GLNPO, a former head of U.S. EPA Region 5's Superfund program, representatives from the Army Corps and other federal agencies, as well as local governments and nongovernmental organizations, and industry, to name just a few. The final report of the AOC/Sediments subgroup was issued just recently, on October 14, 2005 and is attached as Exhibit "A."

This consensus report confirms and acknowledges that PRPs seeking to participate in the Legacy Act program "are neither excluded from eligibility to serve as nonfederal sponsors nor absolved from their liability for remediation of contaminated sediments under federal and state remediation programs." (p. 3) This is an important reiteration because neither of the far ends of the spectrum would be appropriate; that is, PRPs should not be categorically eliminated as the nonfederal sponsor nor should they be guaranteed the benefit of funding from the federal sponsorship share at sites where they are involved. Instead, the Congressional intent of allowing the merits of each specific project to be considered on a site-specific basis is the appropriate approach supported by the AOC/Sediments Subgroup. In fact, the pertinent recommendation reflected in the AOC/Sediments Chapter on this subject states as follows:

The eligibility of PRPs to provide some or all of the nonfederal share of a Legacy Act package should be evaluated on its merits on a site-specific basis, in the context of the concept of "added value." Examples of circumstances where PRP participation in Legacy Act project funding would provide "added value" include, but are not limited to, sites where an "orphan share" exists or where the remedy will be enhanced (such as where the scope -- quality or quantity -- of the remediation is improved, innovative methods are employed or the remediation will be accelerated).
(p. 3)

The bottom line is that with scarce resources available and extreme pressure on state and local budgets, elimination of PRP eligibility to serve in whole or in part as the nonfederal sponsor would cut off one of the best resources available to obtain the nonfederal share statutorily necessary for Legacy Act funding. To do so would miss a golden opportunity to achieve the important objective of the Legacy Act -- to accelerate the remediation of contaminated sediment in the Great Lakes.

SEDIMENT MANAGEMENT WORK GROUP

David Anderson
October 26, 2005
Page 5

Note that this eligibility does not mean that the actual percentages between the federal share and the PRP share necessarily need to be 65%-35%. There is nothing in the statute requiring a set percentage, nor limiting the discretion of the implementing Agency to determine the appropriate percentage on the merits, under the facts and circumstances of the Project. For example, at a site where the federal share is being provided as an incentive for the PRP to incorporate an innovative method into the remedy in a project the PRP otherwise intended to implement, the percentage for the PRP nonfederal share might end up in the 80-90% range, thereby conserving Legacy Act funds for other projects. In fact, it is often the PRP who proposes this type of added value. The key clarification, which should be reflected in the anticipated Guidance on the eligibility and administration of the Legacy Act program, should confirm that the selection of eligible projects and apportionment of sponsorship funding should be made on a project-by-project basis.

Part of the site-specific evaluation approach referenced in the consensus AOC/Sediments Chapter is the concept that the substantive evaluation of the merits should focus on situations either where there is an orphan share at a site (a situation where some or all of the responsibility for the contaminated sediments could not be covered due to the unavailability of one or more responsible parties due to dissolution, bankruptcy or other factors) or where the PRP involvement will provide "added value." In fact, as noted above, the AOC/Sediments Chapter provides examples of "added value" as including, but not limited to sites where an "orphan share exists or where a remedy will be enhanced (such as where the scope – quality or quantity – of the remediation is improved, innovative methods are employed or the remediation will be accelerated." This makes sound public policy.

One additional fact scenario worth discussing relates to the situation where a particular Area of Concern is involved with a federal or state remediation program such as CERCLA, RCRA or a state analog. At first blush one might conclude that under those circumstances, PRP eligibility to serve as the nonfederal sponsor in a Legacy Act project might not be appropriate. However, on a site-specific basis, subject to the "added value" standard proposed by the AOC/Sediments Subgroup, there are a variety of circumstances where the use of Legacy Act funding would be appropriate. There are many AOCs in the Great Lakes where progress has simply not occurred. This is precisely why the Legacy Act was passed. This lack of progress often is not the fault of the regulator or the regulated community. There are a number of circumstances where the use of Legacy Act funding would be appropriate and consistent with the spirit of the Act. As noted above, the Senate Report expressly noted the distinction between voluntary PRP involvement and precluded enforcement settings such as where a PRP is subject to a court order or a unilateral administrative order. The main point to be underscored is that other than when in an "enforcement mode," the eligibility of a PRP to serve as the nonfederal sponsor at a site which is the subject of a federal or state remediation program should neither be guaranteed nor precluded. The eligibility should be objectively evaluated on its merits based upon the added value approach referenced above.

David Anderson
October 26, 2005
Page 6

Hypothetical Examples of the Added Value By PRP Involvement as a Nonfederal Sponsor for Legacy Act Funding

A few examples where PRP participation can add value as the non-federal sponsor include:

- The PRPs are working under a state remediation program voluntarily and are willing to incorporate an innovative component to a remedy which could enhance the long-term protectiveness of the remedy. The innovative component itself will be more costly than its traditional counterpart and value will be added not only because of the enhancement of adding the innovative feature, but its long-term prove out will provide more opportunity for confidence in utilizing the innovative feature at future projects, assuming it is successful.
- The PRP is willing to implement a sediment remedy within a designated area of the waterbody. The precise definition of the source of impacted sediments in other adjacent areas of the waterbody would be difficult. Some impact to sediments from the known PRP source may be present in these adjacent areas, but the contaminated sediment also could be impacted due to other sources. By providing most or all of the cost to remediate the known PRP-impacted area as the nonfederal share, this would leverage the ability of the Legacy Act to expand the remedy outside the known-PRP area up to the 65% match. This is obviously beneficial to the waterbody and the environment and would eliminate the uncertainty to the known PRP about potential future liability for the adjacent areas addressed by the federal share.
- A PRP is cooperating during the assessment stage and will likely do so at the remediation stage at a particular site but the PRP is not the sole source of the impacted sediment. Other sources are now considered “orphan shares.” Often times, the orphan share burden is a roadblock to the remaining PRPs’ ability to undertake a broader remedy. Appropriate and proportionate use of Legacy Act funding could eliminate the roadblock caused by this difficult issue and accelerate the cleanup.
- A cleanup could be enhanced with different or additional remedial components or methods.
- The scope of a remedy could be expanded by utilizing a more aggressive cleanup standard or by expanding the geographic extent of the remedy.

SEDIMENT MANAGEMENT WORK GROUP

David Anderson
October 26, 2005
Page 7

- A remedy could be implemented beyond the scope of one or more particular regulatory requirements (*e.g.*, although the cleanup objective can be achieved by the baseline remediation approach, a speedier recovery of the system will occur if additional focused remediation steps are undertaken).
- A legitimate technical dispute over the precise remedial components which are protective of human health and the environment may exist at a site. Legacy Act funds could be used to break the technical stalemate by bridging the gap between the cost of agreed upon components and the ones subject to debate.
- A site in a large industrial basin where PRPs exist theoretically but where no enforcement action has been implemented for a variety of reasons may be jump started by the use of remedial funds from the Legacy Act in conjunction with PRPs who had not previously been active.

Conclusion

The SMWG strongly supports the multi-stakeholder consensus reflected in the Great Lakes Regional Collaboration Draft Action Plan that the “U.S. EPA should develop Guidance to clarify and reiterate the Legacy Act’s original intent to permit PRPs to participate as nonfederal sponsors for projects under the Act. This Guidance should confirm that PRPs are neither excluded from eligibility to serve as the nonfederal sponsor nor absolved from their liability for remediation of contaminated sediments under federal and state remediation programs. The eligibility of PRPs to provide some or all of the nonfederal share of a Legacy Act package should be evaluated on its merits on a site-specific basis, in the context of the concept of “added value.” Examples of circumstances where PRP participation in Legacy Act project funding would provide “added value” include, but are not limited to, sites where an “orphan share” exists or where the remedy will be enhanced (such as where the scope -- quality or quantity -- of the remediation is improved, innovative methods are employed or the remediation will be accelerated).” (p. 3)

Proposed Meeting

The SMWG would like the opportunity to meet with you and your staff, as well as any others whom you believe might be interested in discussion of this important issue, as soon as possible. We are prepared to meet as soon as schedules will permit and would prefer to do so within the next seven to fourteen days. We look forward to meeting with you in the near future to discuss this important issue.

SEDIMENT MANAGEMENT WORK GROUP

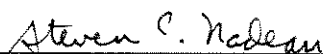
David Anderson
October 26, 2005
Page 8

Please feel free to contact us if you have any questions regarding our comments or if additional information or materials would be helpful to your consideration of this issue.

Respectfully submitted,

THE SEDIMENT MANAGEMENT WORK GROUP

By:



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