

Date: June 30, 2020

To: Lydia Emer, Administrator, Land Quality Division

From: Kevin Parrett, Manager, NW Region Cleanup Program

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Subject: Request for Orphan Site Designation – Portland Harbor Superfund Site –
DEQ Oversight of Site-wide Remedial Actions – ECSI # 2068

The purpose of this memorandum is to request official designation of a portion of the Portland Harbor Superfund Site (PHSS) as an Orphan Site, under Oregon Revised Statute (ORS) 465.381. This designation will enable DEQ to use the Orphan Site Account to fund a portion of the State's remedial action costs at the PHSS. ORS 465.381(6)(a) allows DEQ to use the Orphan Site Account for DEQ expenses at sites where the responsible party is "unknown or is unwilling or unable to undertake all required removal or remedial action." As described in this memorandum, DEQ has determined that the party or parties potentially liable for contamination at the PHSS are currently unwilling to fund DEQ oversight of Site-wide remedial actions (Site-wide Oversight).

Site Summary

The U.S. Environmental Protection Agency (EPA) placed the PHSS on the National Priority List (NPL) on December 1, 2000. The PHSS consists of an approximate 10 mile section of the Lower Willamette River and all upland source areas. The primary contaminants of concern at the PHSS include PCBs, PAHs, pesticides and dioxins/furans. More than 50 additional contaminants at the PHSS pose unacceptable risks to human health and the environment. The highest concentrations of these contaminants in river sediment are generally located in discrete, near-shore areas that are associated with historical releases from upland or overwater industrial activities. Soil and groundwater are also highly contaminated at numerous upland facilities.

A Memorandum of Understanding (MOU) was entered into by EPA, DEQ, Oregon Department of Fish & Wildlife, National Oceanic and Atmospheric Administration, U.S. Department of the Interior and six tribal governments in 2001. The MOU designated DEQ as lead agency and EPA as support agency for the upland portion of the PHSS (i.e., source control) and designated EPA as lead agency and DEQ as support agency for the in-water portion of the PHSS. The MOU also established a Technical Coordination Team (TCT), consisting of signatories to the MOU. The TCT representatives coordinate and provide technical comments on site matters, coordinate and disseminate information relating to the PHSS, and discover and resolve problems.

EPA issued the Record of Decision (ROD) in January 2017 that designated the cleanup remedy for the in-water portion of the PHSS. The ROD consists of active remediation through dredging, capping and enhanced natural recovery for 394 acres of sediment and passive remediation

through monitored natural recover for the remaining 1,774 acres of sediment within the PHSS. The ROD also calls for active remediation of 23,305 linear feet of river bank. The cost to implement the remedy was estimated by EPA at \$1.05 billion. In December 2019, EPA issued an Explanation of Significant Differences (ESD) which modified this remedy and reduced the estimated cost of implementation by \$34 million to \$1.016 billion.

Funding of DEQ Oversight

The Lower Willamette Group (LWG), consisting of ten Potentially Responsible Parties (PRPs), entered into an Administrative Order on Consent (AOC) with EPA in September 2001 to conduct a Remedial Investigation and Feasibility Study (RI/FS). This order required the LWG to fund DEQ oversight of the RI/FS as the in-water support agency from the time of the NPL listing until the ROD was issued, with minor exceptions. More than 35,000 DEQ labor hours were billed to (and most were paid by) the LWG for work performed over the 15 years before the LWG disbanded, in January 2017, when EPA issued the ROD, at which point the LWG ceased paying DEQ oversight costs.

EPA has entered into AOCs for 12 project areas within the PHSS, with performing parties to prepare remedial designs for implementing the ROD in these areas of the PHSS, and one AOC to manage data and institutional controls. EPA recently issued unilateral orders for two project areas to respondents to prepare remedial designs. Additional AOCs or unilateral orders will need to be issued by EPA to parties for two or more additional areas of the PHSS. The AOCs require the performing parties to fund DEQ oversight of the design work as the in-water support agency. The unilateral orders do not currently *require* DEQ funding. Substantial DEQ labor hours will be billed to these parties over the five or more years DEQ anticipates it will take to complete this work. This oversight is estimated to average at least 20 hours/month per AOC which equates to a total harbor-wide oversight effort of 340 hours/month.

Following completion of remedial design work, EPA will enter into consent decrees with performing parties to construct the remedy. Negotiation of final consent decrees will likely involve resolution of EPA, DEQ, and other parties' claims to unreimbursed oversight costs and other remedial action costs, as settling parties will likely want finality through the consent decree for PHSS-related liability.

DEQ in-water oversight includes work performed under the individual AOCs and unilateral orders, such as reviewing and commenting on technical reports and participating in meetings with EPA, the TCT and the performing parties. DEQ also performs oversight of Site-wide remedial actions that include coordinating and meeting with EPA and the TCT. DEQ and EPA regularly conduct internal coordination meetings with staff, managers and senior leadership. These meetings help ensure that the ROD is implemented in an effective, efficient and timely manner and that State regulatory standards are met. DEQ also coordinates with the Governor's office and other State agencies to ensure that State interests are considered during remedy implementation. DEQ participates in community meetings and responds to media inquiries. Site-wide activities also include reviewing and commenting on draft EPA documents that are not specific to individual AOCs, such as EPA's recent ESD that changed the cleanup levels for one of the primary contaminants of concern and EPA's recent guidance documents for remedial design and river bank characterizations.

Funding for DEQ in-water oversight is provided by performing parties through their individual orders. Funding for DEQ upland source control oversight is provided by performing parties for their individual upland sites. General source control activities, not associated with individual sites, are funded by EPA through DEQ/EPA Support Agency Cooperative Agreement (SACA) grants. More than 20,000 DEQ labor hours were billed to these SACA grants since the NPL listing in December 2000. EPA also has provided SACA grants for several special projects focused on sediment investigations upriver of the PHSS. The most recent of these special projects is an investigation of dioxins/furans contamination which includes 600 labor hours for DEQ. This project will begin in July 2020 and be led by DEQ.

Unrecovered Oversight Costs

DEQ incurred \$1.3 million in unrecovered Site-wide costs prior to the NPL listing in December 2000. These costs were associated with or attributable to the NPL listing. Between the NPL listing and issuance of the ROD in January 2017, the LWG funded the vast majority of DEQ Site-wide oversight activities. During this time period, DEQ recovered \$6.03 million in Site-wide oversight costs while approximately \$45,000 remains unrecovered. Upon issuance of the ROD, the LWG was no longer obligated to fund DEQ Site-wide activities and no new funding sources have been established. DEQ has incurred nearly \$1 million in unrecovered Site-wide costs since issuance of the ROD. Of this amount, \$367,448 was incurred in the current biennium.

DEQ is currently expending approximately 100 hours/month for Site-wide oversight activities that are not readily billable to the performing parties working under individual AOCs or other funding agreements. These monthly expenditures are expected to decrease slightly as the PHSS settles into routine remedial design work; however, these costs will continue through approximately 2025 when DEQ negotiates settlement agreements with liable parties prior to EPA issuing consent decrees.

PRPs have been periodically notified of their liability for DEQ unrecovered oversight costs plus interest. DEQ sent letters to PRPs in 2019, 2018, 2008 and 2006. The 2008 letter included a detailed summary of unrecovered costs associated with or attributable to DEQ remedial activities prior to the NPL listing. Parties who responded to these letters typically denied liability. Examples of the 2019 and 2008 letters and the mailing lists are also posted on DEQ's ECSI website.

DEQ has attempted to apportion the Site-wide oversight costs to parties performing remedial design work under AOCs. In early 2018, parties working under the three AOCs in effect at that time were informed of DEQ's plans to begin invoicing each of them 1/3 of DEQ Site-wide oversight costs. The parties disputed DEQ's authority to recover these oversight costs and rejected the apportionment concept. DEQ temporarily halted pursuit of Site-wide oversight costs from those performing parties.

ORS 465.330 requires that DEQ recover remedial action costs, including oversight costs, from responsible parties. If responsible parties refuse to pay the remedial action costs, DEQ can bring a lawsuit to require payment. However, there are significant challenges in pursuing litigation at the present time. The primary challenge is that efforts to obtain cost recovery through litigation are likely to significantly undermine voluntary and settlement-based approaches to resolving liability and completing cleanup for the PHSS. If DEQ were to bring a cost recovery action

against one or more responsible parties, those parties would likely file contribution actions against all of the other PRPs in the harbor. This, in turn, would likely result in a situation where all of the liability issues currently being addressed in the allocation process would begin being litigated in court. A decision to litigate these issues would be likely to undermine or at least significantly complicate further voluntary action in the allocation process and in the PHSS cleanup. Secondly, this litigation would be complicated and expensive and take a long time to resolve. The likely result would be that DEQ would incur more unrecovered costs over the short to medium term while also undermining voluntary progress toward liability allocation and cleanup, without potentially realizing cost recovery any more quickly than what would have been possible under the ongoing voluntary processes.

Recommendation for Orphan Site Account funding of DEQ Site-wide Oversight

DEQ’s continued oversight of Site-wide remedial actions is necessary to fulfil our responsibility as the support agency for the in-water portion of the PHSS and lead agency for the upland portion of the PHSS, as described in the 2001 MOU with EPA and the TCT members.

DEQ recommends using the Orphan Site Account to fund the approximately 100 hours per month for Site-wide oversight through the end of the current biennium and potentially to reimburse HSRAF for \$367,448 in unrecovered costs incurred since the beginning of the current biennium, July 2019. DEQ also recommends using the Orphan Site Account to fund future Site-wide oversight, beyond the current biennium, if adequate funding is available.

With the approval of this Orphan designation, DEQ’s Business Office will begin using the Orphan Site Account to pay for Account-eligible activities. This approval will also enable the transfer of any appropriate prior expenses from HSRAF to DEQ’s Orphan Site Account. The Orphan Site Account will in turn be reimbursed with funds recovered from liable parties during consent decree negotiations.

Please sign below to approve this request for designation of a portion of the PHSS as an Orphan Site, and to authorize use of the Orphan Site Account to fund DEQ oversight of Site-wide remedial actions.

Lydia Emer, Administrator
Land Quality Division

Date