



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 10

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OFFICE OF  
ENVIRONMENTAL  
CLEANUP

**OCT 26 2011**

Nina DeConcini  
Northwest Region Administrator  
Oregon Department of Environmental Quality  
2020 SW Fourth Avenue, Suite 400  
Portland, Oregon 97201-4987

Re: Deferral Criteria for final NPL listing of the Astoria Marine Construction Company

Dear Ms. DeConcini:

In March of this year, the U.S. Environmental Protection Agency Region 10 proposed the Astoria Marine Construction Company site for inclusion on the Superfund National Priorities List. This action was supported by then-Governor Kulongoski in a letter dated September 21, 2010. In his letter of April 28, 2011, providing comments on the proposed listing, the Chair of the Clatsop County Board of Commissioners requested that the EPA delay making a final decision on listing the site to the NPL. While the Board of Commissioners supported cleanup of the site, the Board also expressed concern regarding the potential impacts to AMCC's viability and the services and jobs provided by the company. The Board expressed an interest in exploring other possible options for securing the cleanup of the site. In response, the EPA agreed to delay making a final listing decision until March 2012.

In a meeting between the EPA and the Oregon Department of Environmental Quality on August 10, 2011, the DEQ requested that the EPA provide criteria that EPA would evaluate to determine whether to defer the final listing of the AMCC site on the NPL while the DEQ oversees investigation and cleanup.

In determining whether to defer this site to the DEQ, certain conditions, as outlined in the EPA's guidance on *Deferral of NPL Listing Determinations while States Oversee Response Actions* (dated May 3, 1995) must be met. A copy of this guidance is enclosed for DEQ's reference. Informed by our experience where we have deferred other sites, this letter provides additional detail and clarification on a few of the key elements that will be considered by the EPA in determining whether a deferral is appropriate.

As stated in the May 1995 guidance, the purpose of deferral is to address sites more quickly than the EPA would otherwise address them. In order to achieve this purpose, the DEQ will need to ensure a reliable source of funding to accomplish the remedial investigation and feasibility study. The EPA understands that AMCC is currently seeking coverage determinations from its insurance carriers. AMCC will need to obtain a duty to defend determination, or an equivalent and reliable assurance of funding, to provide certainty that funding will be available to complete the RI/FS. Given the importance of a reliable funding source, AMCC should obtain a duty to defend determination or equivalent funding mechanism by December 1, 2011.

**1. Assurance that a Comprehensive Environmental Response, Compensation, and Liability Act equivalent Remedial Investigation and Feasibility will be conducted at the AMCC site.**

The RI/FS should define the severity and areal extent of contamination both on the site as well as the sediments adjacent to the site. The boundaries of the AMCC site will be determined by the extent of contamination with consideration of contaminant migration from the uplands to groundwater and to open waters. The RI/FS scope of work therefore should not be restricted to the area that was investigated under EPA's site investigation.

A CERCLA-equivalent RI/FS also will determine applicable or relevant and appropriate requirements; assess associated human health risks, including risks associated with subsistence consumption of seafood and ecological risks, especially in sensitive habitats and critical habitats of species protected by the Endangered Species Act; and evaluate remedial alternatives. Evaluation of remedial alternatives includes consideration of various remedial technologies that when implemented:

- are protective of human health and the environment;
- meet ARARs to the maximum extent practicable under DEQ's state authorities;
- treat/remove sources to the extent practicable, or otherwise contain sources; and
- are reliable over the long term,

A work plan, sampling and analysis plan, quality assurance/quality control plan and health and safety plan also will need to be prepared.

**2. Assurances that the remedy selected for implementation at the AMCC site will be a CERCLA-protective cleanup and will be substantially similar to a CERCLA response.**

The DEQ will need to demonstrate selection of a CERCLA-protective cleanup of the site that is substantially similar to a CERCLA response. To clarify the standard "substantially similar to a CERCLA response," the EPA expects that:

- DEQ will select a response action will be protective of human health and the environment, as generally defined by a  $10^{-4}$  to a  $10^{-6}$  risk range for carcinogens, a hazard index of 1 or less for non-carcinogens and an ecological risk above relevant screening level ecological risk values.
- DEQ will ensure that the remedy selected at the site will comply with all Federal ARARs and more stringent State ARAR requirements to the maximum extent practicable under DEQ's state authorities, controls or eliminates sources and is effective, cost-effective and reliable.
- DEQ will ensure that groundwater is restored to its highest beneficial use, to the extent practicable.

Although the guidance generally provides for an annual review by the EPA, the agencies may need to establish a protocol for more frequent communication and EPA involvement to address specific issues concerning CERCLA protectiveness. The EPA considers a CERCLA-protective cleanup to be one that meets federal and more stringent state ARARs. However, the EPA recognizes that if the site is deferred, it would be addressed under state authorities, which may give rise to questions concerning CERCLA protectiveness and differences between state and federal authorities. Such considerations would be particularly pertinent in a situation such as this where we may lack solid

assurances regarding the availability of funding for the remedial action and therefore, the distinct possibility that the site would be referred back to the EPA. For these reasons, if the EPA determines that the RI/FS is insufficient or the cleanup is not CERCLA-protective, EPA may exercise its authority to terminate the deferral agreement and list the site on the NPL.

When the DEQ believes that the remedy has been completed, the State shall certify to the Region and the affected community that the remedy meets the standards of a CERCLA-protective cleanup. As part of this certification, the State shall submit to the Region remedial action completion documentation similar to EPA's "Remedial Action Report" (OSWER Directive 9355.0-39FS).

**3. Assurance that an appropriate enforcement mechanism will be in place during the investigation and potential cleanup of the AMCC site.**

The EPA will need firm assurance that the necessary investigation and feasibility study will be completed without requiring federal Superfund program enforcement or funding. From discussions between the DEQ and the EPA to date, it is our understanding that DEQ is not committing from its own resources the funding to conduct the investigation and any necessary cleanup at the site. If this continues to be the case, a deferral agreement will require a signed, enforceable agreement between the DEQ and the responsible party(s) to conduct the RI/FS. Specifically, EPA would expect to be assured that the enforceable agreement(s) provides for the following:

- a. All necessary investigation work to characterize the full nature and extent of contamination will be completed in a timely manner.
- b. Work not funded by responsible parties will also be completed in a timely manner (or concurrent with work funded by responsible parties).
- c. The RI and FS work will result in timely preparation of proposed plans(s) and record(s) of decision.
- d. Final cleanup decision-making will rest with the DEQ.

Beyond the enforceable agreement, the DEQ will need to present a plan that clearly demonstrates how DEQ intends to complete the RI/FS should one or more of the parties become recalcitrant, fail to perform or withdraw from the agreement. The plan should detail the steps and a schedule for the implementation of enforcement actions, the identification of other available funding sources including state programs and a description of how funding would be requested from such sources, and an explanation of how and when the site would be referred back to the EPA for placement on the NPL in the event the RI/FS, proposed plan or record of decision cannot be completed under the deferral.

Should a decision be made that a remedial and/or removal action is necessary; the EPA will need firm assurance that the DEQ and the responsible party have a signed, enforceable agreement to conduct the cleanup and future operation and maintenance of the site.

Note that the EPA may pursue recovery under its own authorities of the costs it has incurred related to the site.

#### **4. Preservation of the rights of the Federal Natural Resource Trustees**

At NPL sites, under the Superfund law, the EPA is required to coordinate assessments, investigations and planning with the Federal Natural Resource Trustees. If a site is listed on the NPL, the statute of limitations for the Trustees to file Natural Resource Damage Assessment claims runs for three years from the completion of remedial actions. However, under deferral the statute of limitations would be much sooner and it is unclear how the deferral agreement would affect the rights of the Trustees to recover natural resource damages. The EPA's interest is to protect the rights of its federal partners, and we have significant concerns that the deferral action may limit the Trustees' ability to be fully engaged in the cleanup investigations, planning and recovery natural resource damages, if appropriate. Therefore, if requested by the Trustees, AMCC must enter into an agreement tolling the applicable statute of limitations to enable full participation by the Trustees. This tolling agreement should be executed concurrent with a final deferral action. The EPA expects that the DEQ will facilitate the signing of this agreement and assure that the Trustee's role throughout the cleanup process will not be impaired. Any final deferral will be contingent upon a signed tolling agreement, if one is requested by the Trustees.

#### **5. Assurance of support for Tribal involvement**

The EPA has both a federal trust responsibility to Tribes and a government-to-government relationship with Tribes. This assures the Tribes that they will be consulted and have their viewpoints considered in any EPA activity that would affect them. To preserve tribal rights for involvement, the EPA would need assurances from DEQ that they would agree to develop a Memoranda of Understanding with any affected tribe that would describe their government-to-government relationship in the planning, investigation and cleanup process. Such an agreement may also require funding to the affected tribes, where appropriate, to ensure their full participation in the cleanup process.

#### **6. Assurance of support of community involvement**

We know the DEQ shares our interest in ensuring meaningful community engagement in the site cleanup process. To help ensure informed community involvement at this site, we would expect the DEQ to develop a community involvement plan. Also, funding will need to be provided for community technical assistance (similar to EPA's Technical Assistance Grants). If the site is deferred, DEQ should have funding strategies in place to address this need.

I hope that this letter clarifies the EPA's needs in evaluating the potential deferral of NPL listing to DEQ response authorities. The EPA is committed to provide additional information about our deferral process, as needed. As we discussed, the EPA would need written assurance of the above elements no later than December 31, 2011, to defer a final listing of AMCC to the NPL. We would then expect to have in place no later than January 31, 2012, a written deferral agreement signed by the DEQ and the EPA incorporating these assurances, the other elements of the deferral guidance and a schedule for completion of the remedial investigation/feasibility study.

If you have any questions or comments, please feel free to contact me at 206-553-1855.

Sincerely,



Daniel D. Opalski  
Director

Enclosure

cc: Senator Betsy Johnson  
Senator Jeff Merkley  
Senator Ron Wyden  
Representative Deborah Boone  
Chuck Harman, DEQ, NW Region  
Keith Johnson, DEQ, NW Region  
Duane Cole, Clatsop County Board of Commissioners  
Don Fastabend, AMCC  
Tim Fastabend, AMCC