

Memorandum of Agreement

***Among the Department of the Army, the Environmental Protection Agency,
and the U.S. Army Corps of Engineers***

**To Strengthen Environmental Protection of the Ocean Environment and to
Promote Economic Progress in the Port of New York and New Jersey**

On July 24, 1996, the Department of Transportation, the Department of the Army, and the Environmental Protection Agency (EPA) joined together in a landmark agreement to advance our shared goals of protecting New Jersey's ocean environment, ensuring the competitiveness of the Port of New York and New Jersey, and strengthening economic and environmental progress in the region. This Memorandum of Agreement (MOA) outlines the steps our two agencies must take together in order to further advance the goals of the 1996 agreement.

Background

Under the innovative 1996 agreement, ocean disposal of Category 2 material ended, the controversial Mud Dump Site was closed forever, and the remediation of areas affected by historic dumping activities began through the designation of the unique Historic Area Remediation Site (HARS) under 40 C.F.R. Section 228.15(c)(6). This designation required that "[t]he site (HARS) [] be managed so as to reduce impacts within the PRA (Primary Remediation Area) to acceptable levels in accordance with 40 C.F.R. Section 228.11(c). Use of the site will be restricted to dredged material suitable for use as the Material for Remediation. This material shall be selected so as to ensure it will not cause significant undesirable effects including through bioaccumulation or unacceptable toxicity, in accordance with 40 C.F.R. 227.6." Consistent with the 1996 Agreement, the preamble to the final rule that designated the HARS, defined Remediation Material as "uncontaminated dredged material (i.e. dredged material that meets current Category I standards and will not cause significant undesirable effects including through bioaccumulation)." The 1996 Agreement also stated that "[t]he designation of the Historic Area Remediation Site will assure long-term use of category 1 dredged material". The HARS is unique to the New York Bight as its primary purpose is remediation of the ocean bottom.

The closing of the Mud Dump Site and the capping of the HARS will improve the health of the ocean environment. At the same time, the availability of the HARS for placement of Remediation Material and the accelerated development of upland sites for beneficial use of dredged material, are ensuring that needed Port maintenance and deepening projects have moved forward expeditiously, securing jobs that depend on the Port of New York and New Jersey and ensuring that the Port remains an engine of the regional and national economy in the new century.

In these efforts, the leadership of, and partnership with, our state partners have been critical in realizing the promise of the 1996 agreement. The State of New Jersey's leadership in developing alternatives to ocean placement of dredged material has been especially important to realizing the promise of the 1996 agreement. The State of New York has focused on identifying and controlling the sources of sediment contamination, and recently has begun to invest in efforts to promote upland beneficial use of dredged material.

As this progress continued, EPA fulfilled its commitment in the 1996 agreement and invested more than nine (9) months to review the need for changes to the agency's current ocean disposal regulations that apply nationally. After extensive consultation with all interested constituencies, which presented a range of views about the current regulations, EPA concluded that process and determined that broad-based support for revision of the regulations would not be forthcoming. Accordingly, no changes to the current national regulations have been proposed.

In addition, in fulfillment of a commitment in the New York - New Jersey Harbor Estuary Program (HEP) Comprehensive Conservation and Management Plan (approved by the Governors of New York and New Jersey and the EPA Administrator in 1996), EPA initiated a peer review of the testing evaluation framework utilized to determine suitability of dredged material for use as remediation material at the HARS: the EPA Region 2/CENAN Framework for Evaluating Bioaccumulation Test Results for Evaluation of Material for Proposed Placement at the HARS (the HARS TEF). The purpose of this review was to ensure that the approach taken by EPA and the U.S. Army Corps of Engineers (USACE) to evaluate dredged material proposed for placement at the HARS as Remediation Material reflects the most recent scientific developments and to ensure that this approach remains consistent with the remedial objectives of the HARS designation.

The completion of the peer review process and interagency review of the results has taken far longer than expected. In addition, the states of New York and New Jersey, interested members of the public, and other interested parties have asked to be consulted on EPA's response to the peer review before significant changes to the HARS TEF are proposed. Furthermore, EPA's Peer Review Policy provides that a peer review panel should review any comprehensive changes to the HARS TEF before they are fully implemented. Notably, "[t]he principle underlying the Peer Review Policy is that all major scientific and technical work products used in decision making will be peer reviewed," (Peer Review Handbook (EPA 100-B-98-001) (January 1998)). Revisions of the HARS TEF would appear to meet the criteria that the Policy identifies as supporting peer review.

Next Steps

This MOA identifies six steps that EPA and USACE will take (pursuant to sections 102(a) and 103, of the MPRSA, 33 USC 1412(a) and 1413) to ensure that the evaluation of dredged material proposed for placement at the HARS as Remediation Material reflects current scientific developments. This MOA sets forth the process and schedule by which we will complete public consultation and the scientific peer review process.

First, EPA and USACE agree to work together to expeditiously complete the process of

reviewing the science and guidelines that EPA and USACE use in the evaluation of dredged material proposed for placement as Remediation Material at the HARS. Specifically, the agencies commit to the shared objective of completing the scientific peer review of the HARS TEF, and to responding to input from the peer review processes and from the public, according to the following schedule and principles:

- EPA Region 2 (EPA-R2), with the support and participation of USACE North Atlantic Division (NAD), will immediately re-convene and reconfigure the Criteria Workgroup (under the HEP Dredged Material Management Forum) to review and provide advice concerning the science and policy criteria used to evaluate dredged material proposed for placement at the HARS as Remediation Material. EPA-R2 will rename the Criteria Workgroup the Remediation Material Workgroup (RMW). EPA-R2 will name a new chair or co-chairs, in consultation with the RMW and appropriate officials.
- By October 25, 2000, EPA-R2 will release its response to the science issues raised by the peer reviewers that reviewed the current HARS TEF. Upon release, this response shall be made available to the public and to the RMW.
- By November 15, 2000, the USACE New York District (NYD), in coordination with EPA-R2, will provide to the public all monitoring data concerning conditions at the HARS subsequent to the signing of the 1996 agreement.
- By January 15, 2001, in consultation with the RMW, EPA-R2 and USACE-NAD jointly will complete a comprehensive proposal as to how the agency plans to revise or maintain the HARS TEF. In accordance with EPA's peer review policies, this comprehensive proposal will be a candidate for peer review before a new independent peer review panel. EPA and USACE will charge this panel with providing its comments by July 15, 2001. The dates in this section may change and will be dependent upon progress made through the agencies' consultation with the re-convened RMW.
- By January 30, 2001, USACE-NYD, with EPA-R2 as a co-chair, will convene the Scientific Review Panel (SRP) described in the 1997 HARS Site Monitoring and Management Plan (SMMP). The SRP will consist predominantly of professionals from the fields of engineering, toxicology, oceanography, and will include representatives of governmental resource agencies, to review the HARS SMMP and relevant monitoring data. Membership and participation will be controlled by the terms of the SMMP.
- EPA-R2 and USACE jointly will respond to the peer reviewers and finalize proposed changes to the HARS TEF, if any, within ninety (90) days following the July 15 receipt of comments from the peer review panel, or by October 15, 2001. If the nature of the comments from the peer review panel makes this date impracticable, the agencies will respond at the earliest practicable date consistent with sound science.
- Once EPA-R2 and USACE jointly finalizes proposed changes to the HARS TEF, if any, EPA-R2 and USACE jointly will provide a sixty (60) day opportunity, until December 15, 2001, for public comment on any proposed revisions.

- EPA-R2 and USACE jointly will respond to comments received in the comment period, make any appropriate changes, and finalize any revisions to HARS TEF within sixty (60) days, or by February 15, 2002. If the nature of the comments from the peer review panel or the public makes this date impracticable, the agencies will respond at the earliest practicable date consistent with sound science.
- If any projected time deadline set forth in this MOA is not met, EPA-R2 and USACE-NAD will provide a written explanation of the reasons for delay to the RMW and the public, and will consult with the RMW concerning the appropriateness of additional interim measures to ensure that the capping of the HARS proceeds and that evaluation of material proposed for placement at the HARS is scientifically sound.

Second, in order to ensure that EPA-R2 and USACE-NAD continue to incorporate the most up-to-date science in determining what material is appropriate for placement at the HARS, and to ensure that the quality of material approved for placement at the HARS meets the remedial purposes of the HARS designation, one element of the HARS TEF will immediately be changed. Specifically, one matrix value in the HARS-specific effects levels for PCBs will be revised. The PCB matrix value for the worm will be revised from 400 ppb to an interim value of 113 ppb, effective immediately for pending and future permit and authorization requests. The two agencies agree that, while the peer review process is not yet complete, the science reviewed to date warrants implementation of this interim change. This interim change shall be effective immediately upon signing of this MOA and be subject to future review by the re-convened RMW. As with other values currently in use, the application of this new HARS-Specific Value shall be subject to notice and comment in the context of individual permit and authorization decisions, and may be subject to further revision (upward or downward) as the peer review and public consultation processes proceed.

This change reflects current scientific developments and ensures that the agencies' approach remains consistent with the remedial objectives of the HARS designation. Notably, this change will result in improvements in the quality of HARS Remediation Material with respect to numerous parameters other than PCBs, because elevated PCB levels frequently are associated with elevated levels of other chemicals of concern.

This interim measure will be implemented prospectively, and will not affect permits or authorizations that already have been issued. In addition, based upon available data identified with Port deepening projects, none of the major channel deepening projects should be affected. Based on a review of past HARS projects, the agencies recognize and anticipate that dredged material from approximately one-third of the maintenance projects (non-Federal and Federal) that might otherwise have been authorized for placement at the HARS may now be unsuitable for use as Remediation Material in light of this interim measure.

Third, EPA and USACE agree that Regional Administrator (EPA-R2) and North Atlantic

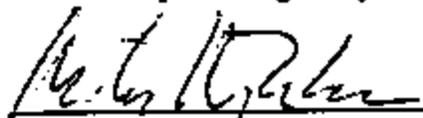
Division Commander (USACE-NAD) will form a senior oversight panel to ensure that the commitments in this MOA are honored, that schedules are met, and that any disputes between the agencies in the implementation of this MOA are expeditiously elevated and resolved.

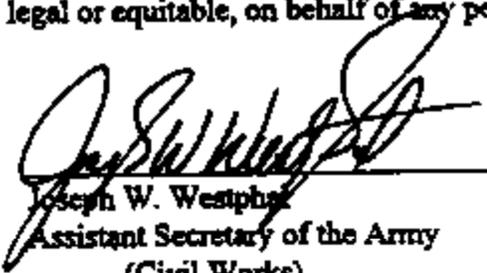
Fourth, EPA and USACE agree to continue to work closely in partnership with the states of New Jersey and New York, and with affected shipping, labor, environmental, and community organizations, to advance the goals of the 1996 agreement in achieving both the economic and environmental goals of the Region.

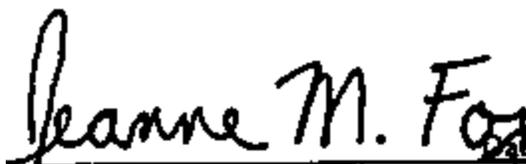
Fifth, EPA and USACE pledge their continuing support to efforts in both states to develop economically viable disposal options for material that is not suitable for the HARS. The development of such options will not eliminate the need to fully remediate the HARS using dredged material that is suitable under the terms of the HARS designation.

Sixth, EPA and USACE recognize that the interim change established here, as well as any further changes responsive to the scientific peer review or the public, will create additional funding needs for public agencies and the private sector in transition to revised standards and will raise new regulatory and programmatic questions as options for alternative uses of dredged material are developed. These agencies also commit to continuing outreach to communities concerning their approach. EPA and USACE agree to work together to ensure that these needs continue to be addressed in a manner that meets both the environmental and economic objectives of the 1996 agreement.

This MOA is intended exclusively for the internal management of the Executive Branch, and does not establish or create any enforceable rights, legal or equitable, on behalf of any person or entity not a signatory to this agreement.


Date: 9/26/00
W. Michael McCabe
Deputy Administrator
U.S. Environmental Protection Agency


Date: 9/26/00
Joseph W. Westphal
Assistant Secretary of the Army
(Civil Works)


Date: 9/27/00
Jeanne M. Fox
Regional Administrator
U.S. Environmental Protection Agency


Date: 9/26/00
Brigadier General M. Stephen Rhoades
Commander, North Atlantic Division
U.S. Army Corps of Engineers