



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 6

1201 ELM STREET, SUITE 500

DALLAS, TEXAS 75270

December 8, 2022

BY E-MAIL

Chris F. Kotara
Director, Global Environment Services & Remediation
International Paper Company
6400 Poplar Avenue
Memphis, Tennessee 38197

Steve Joyce, Senior Director
Environmental Legacy Management Group
McGinnes Industrial Maintenance Corporation
c/o Waste Management
5445 Triangle Parkway, Suite 170
Norcross, GA 30092

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

Dear Messrs. Kotara and Joyce:

On April 15, 2022, the Environmental Protection Agency (EPA), Region 6, responded to the March 24, 2022, letter submitted by International Paper Company and McGinnes Industrial Maintenance Corporation (Respondents) regarding implementation of the selected remedy for the San Jacinto River Waste Pits site (Site). The Respondents agreed to perform the design of the remedy selected in the October 11, 2017, Record of Decision (ROD) pursuant to the referenced Administrative Settlement Agreement and Order on Consent for Remedial Design (Settlement Agreement). In its April 15th letter, the EPA stated that Respondents must submit the North Impoundment Pre-final (90%) Remedial Design deliverable (the 90% Remedial Design or 90% design). The EPA also stated that information in the 90% design would assist the EPA in evaluating information that Respondents claim provides the basis for a remedy modification pursuant to 40 C.F.R. § 300.825.

Respondents submitted the remaining components of the 90% Remedial Design for the Site's Northern Impoundments on June 27 and November 8, 2022. The 90% design submitted by Respondents is not an implementable design of the selected remedy. It 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. The November 8th submittal for the Northwest Corner also includes an additional design for a remedial alternative not selected in the ROD, capping waste in place. The EPA will not review Respondents' capping alternative as it is not in compliance with the ROD or the Settlement Agreement.

The EPA, together with the Texas Commission on Environmental Quality (TCEQ), the EPA's contractors, the U.S. Army Corps of Engineers (USACE), and local stakeholders, has undertaken an initial review of the June 27th submittal, and a preliminary review of the November 8th submittal. This review 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 because:

- Respondents' submittals do not adequately explore or evaluate potential solutions to resolve technical difficulties. For example, EPA's contractor and the Texas Department of Transportation (TxDOT) have suggested options to reduce the footprint of the cofferdam wall to allow for TxDOT bridge construction, but the design does not support that alternative options to reduce the footprint were thoroughly evaluated by Respondents;
- For design options that Respondents claim to have evaluated, there is often a lack of explanation, documentation, or support of that evaluation, even when the selected design option creates additional implementability challenges or risks. Examples include but are not limited to the inflexible sequencing of the work; the non-excavation working season; the selection of dredging Best Management Practices (BMPs); Respondent's decision to not use barges to address proposed footprint concerns; Respondents' decision to do a hybrid of dredging and in the dry removal in the Northwest Corner; and Respondents' contention that the ability to remove waste over the 30 ng/kg TEQ cleanup level is limited by the ROD-selected risk assessment, potential for hydraulic heave, dredging limitations, and stormwater controls;
- Some parts of the design submittals are conceptual and not adequately developed for a 90% design (e.g. residuals management);
- Some factual statements in the design submittals are not adequately supported. For example, Respondents claim that the Northwest Corner remediation is limited because Respondents are concerned they cannot remove all of the 20,000 cubic yards of impacted material in a 6-month season using their suggested approach. This number is not quantitatively supported showing how the indicated volume was calculated, why it is unattainable, or why it varies significantly from excavation rates for similar types of projects based upon EPA's contractor experience and USACE studies and guidance; and
- The 90% design submittals consistently question the implementability of the Respondents' own selected design choices, such as the proposed height of the cofferdam wall, which Respondents evaluated, selected, and strongly advocated to EPA for approval, and the selected water treatment approach, which was designed based on Respondents' treatability study.

The EPA is also concerned that Respondents continue to evaluate and re-evaluate data, much of it available since 2019, to support their conclusions regarding the potential for hydraulic heave. The November 8th Northwest Corner submittal claims that there may be a greater hydraulic heave issue on other parts of the Site, apparently invalidating parts of the design submittal provided to EPA in June. Respondents state that they are currently conducting a second hydraulic heave analysis (using the same base set of data) that will change the entire design to an unknown extent.

Respondents may have raised potentially serious issues and uncertainties with remedy implementation in the 90% design submittals and your March 24th letter; however, while the EPA can identify problems, concerns, questions and potential solutions regarding the design deliverables submitted by Respondents, 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. This letter is not intended to provide the EPA's comments on the 90% Remedial Design pursuant to the Settlement Agreement, as the EPA does not believe that submitting its comments at this time for incorporation into another submittal will advance the design process. Instead, in order to move the project forward, the EPA proposes that an experienced contractor be selected to conduct an independent, systematic, technical review of the Remedial Design.

The proposed independent review would 1) evaluate the implementability challenges of the selected remedy and the technical uncertainties identified by the Respondents in their 90% design submittals; 2) suggest changes or adjustments to the proposed design to resolve the issues and risks identified by Respondents, if possible, using best engineering practices; 3) evaluate Respondents' design approaches overall; and 4) specify any additional information or evaluation necessary for these determinations. The EPA 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 proposed review is consistent with the Settlement Agreement's Statement of Work, Section 3.1(g)(2), which provides for the use of "[i]ndependent engineers and/or contractors with construction experience, as needed to provide an independent review of proposed construction methods and processes, and evaluation and optimization of the design of the remedy selected in the ROD." However, as described further below, the proposed process would be separate from the Technical Working Group (TWG) process, although the ultimate findings of the review could be analyzed in a dedicated TWG meeting. Specific issues for the proposed independent design review would include:

- 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;
- Independent assessment of the validity of draft 90% Remedial Design comments provided by the EPA review team;
- Independent hydraulic heave analysis for the entire Site and proposal of any suggested approaches to mitigate risk;
- 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;
- Independent evaluation of dredging and proposed water treatment/residual/stormwater management issues, including previous water treatability studies;
- Independent evaluation of the validity of current 90% Remedial Design assumptions and approaches selected by Respondents that may create implementability challenges or risks;
- Independent evaluation of potential impacts to nearby structures and channel scour patterns post Site remediation;
- Expert opinion on whether best engineering practices would require additional information, sampling, analysis and evaluation for completion of the Remedial Design; and
- 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.

The process for conducting the review proposed by the EPA must ensure that the review is as independent as possible. The third-party, independent expert review of the Remedial Design is critical to provide 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.

The EPA is proposing that Respondents finance the independent, expert review of the remedy implementation issues identified above pursuant to the Settlement Agreement in accordance with the process outlined in this letter. The 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.

Respondents have greater flexibility in contracting; however, as part of the independent review process, both the EPA and Respondents would agree on the contractor selected from a list of acceptable proposed candidates. Both the EPA and Respondents also would need to agree on the contractor's statement of work. The selected contractor must be a qualified engineering and design expert with experience on similar projects. In addition, the selected contractor must not be a current or former contractors for any Site work, and must not have significant, ongoing contractual work with Respondents. The contract terms would limit direction and input by the parties and their contractors to the provision of documents by both parties at the start of the process and an initial discussion with both parties separately. If the third-party contractor has questions during the course of its review, it must pose the questions to both parties simultaneously and not have ex parte communications. All draft or final work products would be provided to both parties simultaneously, and no party would have editorial control, ability to modify, or any prior opportunity to review any work product. The contract would stipulate that all findings and conclusions of the engineering design review must be independent.

Although the EPA hopes that all parties will find the review to be technically sound and based on best engineering practices, no party would be bound by the findings and/or conclusions of the third-party contractor, and the parties would retain the right to disagree with and contest some or all of the review's findings and conclusions. In addition, the EPA must be clear that nothing in this proposal, or any eventual factual findings or conclusions of the proposed review, limits the authority of the EPA to take, order or direct all appropriate action to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of hazardous substances on or from the Site, or prevents the EPA from seeking legal or equitable relief to enforce the terms of the Settlement Agreement, including but not limited to the imposition of stipulated penalties, or from taking other legal or equitable action as it deems appropriate and necessary. The EPA is proposing this review process for the Site in the exercise of its discretion based on site-specific circumstances, and the proposal and/or use of this process at this Site does not create any right or obligation to consider or use this process at any other site. The proposed review process is 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.

The EPA is proposing the third-party independent review because it believes that the Remedial Design is at a virtual impasse, 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. With 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.

If this proposal is agreeable, we will confer on the final process and schedule for conduct of the technical review and the process to select an appropriate contractor with the required expertise, including any additional conflict of interest or qualification requirements identified by the EPA. After agreement on the third-party contractor, all parties would need to agree on the terms and conditions of the expert's retention agreement, which must be consistent with the framework outlined above and include provisions to demonstrate independence and impartiality. The final contract may allow for sub-contracting if necessary to obtain required specialized expertise in mutually agreed-upon fields, although all sub-contractors would need to be subject to the same requirements for independence as the primary contractor.

The EPA is convinced that the required time to conduct a third-party technical review is necessary to move the design process forward, and that a failure to conduct the review will almost certainly result in additional delays for the project. If Respondents refuse this proposal, the EPA intends to proceed to implement its own engineering design review with an EPA contractor or other party selected by EPA pursuant to EPA's existing contract mechanisms without additional input from Respondents. The EPA believes that the resulting information still would be valuable to assist EPA's oversight of the Remedial Design absent the agreed-upon independent third-party contracting review proposed in this letter. It is the EPA's intent to address the findings of the review, whether financed by Respondents pursuant to this letter or conducted by EPA, in its comments on the 90% Remedial Design deliverable.

I request that you provide a response to this proposal by Friday, January 6, 2023.

Sincerely yours,

Lisa Price
Deputy Director
Superfund Emergency Management Division