UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2
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CONFIDENTIAL

June 27, 2016

BY E-MAIL

Benjamin S. Lippard
Vinson & Elkins, LLP
2200 Pennsylvania Avenue, NW
Suite 500 West
Washington, DC 20037-1701

Re: Lower 8.3 Miles of the Lower Passaic River
Draft Statement of Work for the Operable Unit Two Remedial Design

Dear Mr. Lippard:

This letter responds to the questions raised in your May 24, 2016 letter on the draft Statement of Work for the Operable Unit Two (OU2) Remedial Design, on behalf of your client Occidental Chemical Corp. ("Oxychem"). While your letter referenced Maxus Energy Corp. and Tierra Solutions, Inc., EPA considers Oxychem to be the proposed performing party.

1. *SOW Section 1.4 - Performance Standards*

a) Will Region 2 allow the Remedial Design Performing Party(ies) ("Performing Party") to participate in the development of the Performance Standards?

The Region will consider opinions/suggestions provided by the Performing Party to EPA with respect to Performance Standards for the OU2 remedial action.

b) How will Region 2 account for and recover the costs it incurs for the development of the Performance Standards?

The development of Performance Standards are part of the OU2 remedial design for the Lower 8.3 Miles of the Lower Passaic River and are therefore costs recoverable by EPA. EPA expects to recover all costs it incurs related to the OU2 remedial design. In the event that the Agency enters into an administrative settlement agreement and order on consent concerning the OU2 remedial design, costs incurred by the Agency with respect to the remedial design would be recoverable under such a settlement agreement/order.

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2. SOW Section 3.2(b)(6) -Pre-Design Investigation Modeling Analysis

a) Does Region 2 have an expectation for which model(s) would be used during the Pre-Design Investigation?

b) If so, please specify which model(s).

c) If not, will the Performing Party have an opportunity to propose a model(s)?

The Performing Party will have an opportunity to propose a model or models for use during the Pre-Design Investigation. That said, the burden will be on the Performing Party to demonstrate that the proposed model(s) will accomplish the task for which it is being proposed within the approved remedial design schedule. If hydrodynamic, sediment transport, organic carbon and contaminant fate and transport models are contemplated for any task, Region 2 expects that the Performing Party will consider adopting the models that were used to support the ROD.

3. *SOW Section 3.3(e) - Remedial Design Work Plan Modelling*

a) Does Region 2 have an expectation for which model would be used during the Remedial Design?

b) If so, please specify which model(s).

c) If not, will the Performing Party have an opportunity to propose a model(s)?

Consistent with our response to item 2., above, the Performing Party will have an opportunity to propose a model or models for the Remedial Design, but will need to demonstrate that the proposed model(s) will accomplish the task for which it is being proposed within the approved remedial design schedule. And as stated above, Region 2 expects that the Performing Party will consider adopting the models that were used to support the Record of Decision for the Lower 8.3 miles of the Lower Passaic River (ROD).

4. *SOW Section 3.3(g) - Navigational Dredging/Work Plan for Congressional Deauthorization*

a) Does Region 2 consider the requested actions, and costs incurred, related to this effort consistent with CERCLA and the National Contingency Plan?

b) Why is Region 2 requiring the Performing Party to undertake this action as a Statement of Work Item?

c) How does Region 2 intend to address the reality that the Performing Party will have no control over the actions and timeframes necessary to accomplish this task?

d) Is Region 2 willing to agree that the Performing Party will not be at risk of

stipulated penalties if this work is not completed within the required time schedules?

e) Does EPA have an estimate or expectation of the time period necessary to accomplish the requested channel deauthorization?

Yes, EPA considers the requested actions and associated costs to be consistent with CERCLA and the NCP. As you may know, both the ROD itself, and the Responsiveness Summary, address the modification and deauthorization of some portions of the federal navigation channel in the Lower 8.3 Miles of the Lower Passaic River.

As set forth in the ROD, modification of the federally authorized navigational depth between RM 0.6 and RM 1.7, and deauthorization of the navigation channel above RM 1.7, is necessary in order for the remedy to comply with Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403), which is a location-specific applicable or relevant and appropriate requirement (ARAR). Thus, accomplishing this change is an important element of the remedial design phase and is consistent with CERCLA and the NCP. There is precedent for a performing party undertaking this action: the performing parties at the Lower Fox River and Green Bay Superfund Site worked with representatives of their Congressional delegation to have the Lower Fox River navigation channel modified and/or deauthorized. Similarly, the Port of Tacoma undertook modification of the federal navigation channel as part of completing work on aspects of the Commencement Bay/Nearshore Tideflats Superfund site. Since this action has an impact on the remedial design, it will have to be accomplished before the remedial design is finalized. The Region is open to assisting the Performing Party.

Stipulated penalties are addressed in the draft Settlement Agreement and Order on Consent. EPA, as you know, is prepared to consider comments provided by the Performing Party on that document.

5. *SOW Section 3.5- Sediment Processing Facility Site Selection*

a) From our discussions during our May 12th meeting, it is our understanding that Region 2 expects the Performing Party to develop a Site Selection Plan which, when implemented, will result in the development of a short-list of potential site locations which could be purchased/leased for siting the Sediment Processing Facility during the Remedial Action. Is our understanding correct?

b) How does Region 2 intend to address our concern that, given the current scarcity of suitable locations within the Lower 8 Mile Study Area, it is likely that each such short-listed site location will require unique design and engineering plans?

c) If our understanding in this regard is incorrect, please advise us of Region 2's thoughts regarding this requirement and in general terms the actions Region 2 envisions will be required to achieve compliance with this particular requirement.

Region 2 expects that the Site Selection and Evaluation Work Plan, when implemented, will result in the development of a list of potential site locations that could be purchased or leased for siting the sediment processing facility during the remedial action. The Region expects that the Site Selection and Evaluation Report will include an assessment of the suitability of the potential sites for use as a sediment processing facility, including, but not limited to geotechnical, baseline chemical conditions, habitat and cultural resources surveys, topographical survey and utility service assessment.

6. *SOW Section 5.5 - Certification of Deliverables*

a) How broadly will Region 2 apply this requirement?

b) What specific documents will Region 2 required this certification?

Certification will be required for the Final (100%) Remedial Design, as well as reports that support the Final (100%) Remedial Design. Those reports are the Pre-Design Investigation Evaluation Report, the Site Selection and Evaluation Report and the Treatability Study Evaluation Report.

7. *Remedial Design Performance Standards/Dispute Resolution*

a) Why are the Remedial Design Performance Standards not subject to dispute resolution?

The dispute resolution provisions in the draft Settlement Agreement and Administrative Order on Consent do not include Performance Standards. Region 2 has taken this approach regarding critical project elements previously (e.g., the modeling component of the 17 Mile RI/FS is excluded from the dispute resolution provisions in the administrative order) and believes a similar approach is appropriate for the RD Performance Standards. That said, we are open to discussing this further during negotiations.

Sincerely yours,

Juan Fajardo
Assistant Regional Counsel

Cc: Frank A. Parigi, Esq., Glenn Springs Holdings, Inc.
Laura J. Rowley, Esq., U.S. Department of Justice

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