



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 10**

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May 23, 2008

Reply To: ECL-117

**MEMORANDUM**

**SUBJECT:** Final Decision On Disputes of February 19, 2008 and March 27, 2008 by Legacy Site Services LLC (LSS) Regarding U.S. EPA Region 10 Docket No. CERCLA 10-2005-0191

**FROM:**   
Daniel D. Opalski  
Director, Office of Environmental Cleanup

**TO:** File

By letter dated February 19, 2008, LSS disputed (1) EPA's decision to eliminate evaluation of a confined disposal facility (CDF) from the engineering evaluation/cost analysis (EE/CA) process and (2) EPA's decision to use screening level values (SLVs) as cleanup standards for the site. In the course of discussion and information exchange on these disputes, while not identifying it as a matter in dispute, LSS also has sought clarification/confirmation of the status of lindane as a chemical of interest (COI). By separate letter dated March 27, 2008, LSS also disputed certain costs in EPA's Bill No. 2700726S362. This memorandum sets forth my decisions in all of these matters based upon the administrative record, a description of which is attached.

**I. Evaluation of a CDF in the EE/CA**

LSS' position, in summary, is that it is appropriate to evaluate a CDF along with other disposal options in the EE/CA. LSS contends that the CDF option offers potentially significant benefits, notably environmental and financial advantages, and therefore warrants continued consideration. LSS further contends and commits that it can complete the analyses related to a CDF without needing to extend the EE/CA schedule. EPA's position is that the CDF introduces issues the complexity of which are beyond the appropriate scope of an EE/CA given the fundamental objective of moving expeditiously to early risk reduction through a removal action. EPA contends that at the Arkema site the issues related to a CDF are a recipe for further disputes and significant delays in completing the EE/CA and proceeding with a removal action at the site.

The rationale provided by EPA as the basis for screening out the CDF from further consideration has considerable merit. Experience within the Portland Harbor Superfund Site, albeit with a different performing party and a number of differing site characteristics, suggests significant challenges are likely for a further and, especially, timely evaluation of a CDF for the

Arkema site. Beyond the evaluation process, experience further suggests obstacles to selection of a CDF could be so substantial as to be insurmountable.

Nonetheless, as the performing party for a removal action that under any scenario currently being discussed between the parties is likely to be of significant scope, LSS has a reasonable expectation that it have the opportunity to evaluate and present to both the Agency and the public a (still) limited range of options through the EE/CA process. Therefore, conditioned upon LSS' commitment to adhere to the EE/CA schedule in its own July 2006 draft EE/CA work plan submittal – which follows the schedule expectations established in the Administrative Order on Consent -- and based upon LSS' credible representation that it understands the complexities of the analyses that will be necessary, I find that it is appropriate to allow LSS the opportunity to include a CDF evaluation in the EE/CA. I caution, however, that my decision to allow LSS to include a CDF evaluation in the EE/CA should not be construed as a diminution of the significance of the substantive issues presented by a CDF.

It is important to emphasize the schedule condition on this decision. The extended discussion, debate and dispute between the parties on various issues related to this project is well-documented. While it is true that the parties have resolved a large number of issues, the undeniable result nonetheless is a project that is already significantly behind schedule. In consideration of the continuing need to proceed as quickly as practicable with a removal action, should evaluation of the CDF begin to bog down, even despite good faith efforts by the parties, EPA may later determine due to such further delay in the schedule that the CDF analysis is, in fact, overly ambitious for the appropriate scope for an EE/CA in this case.

## II. Use of SLVs

LSS disagrees with what it asserts is EPA's effective adoption of the SLVs as cleanup levels. LSS has proposed a removal approach guided primarily by an evaluation of the efficiency of mass removal. LSS contends that the significance of using specific (especially lower) target concentrations is limited by the reality of the concentrations in dredge residuals and the protection afforded by a cap subsequent to dredging. EPA has taken the position that while the mass removal approach is a reasonable starting point, it makes sense to use the SLVs, along with other factors, to determine the extent of dredging, particularly in the vertical direction. EPA contends that upon selecting the area for the removal (the "hot spot"), it is appropriate to use the SLVs in conjunction with other factors to determine maximum practicable removal of source material. It is notable that between the parties there is agreement that the lateral extent of the removal area will be defined by approximately the 5 ppm DDx contour.

I find LSS' characterization of EPA effectively designating the SLVs as cleanup levels to be inaccurate. While there is no question that EPA intends for the SLVs to be a significant consideration in terms of designing the vertical extent of dredging, it is also clear that other factors, including the feasible extent of conventional dredging techniques, would be significant considerations. Furthermore, the parties agree on LSS' basic contentions regarding the likely realities of residuals in any dredging project. So far as I can tell, EPA has not set an expectation that the concentration of the dredge residuals themselves would need to reach the SLVs, which would be more consistent with the label of "cleanup level". I also note that while the SLVs in use at the site are at the lower end of the cleanup values submitted for the record, there is precedence for considering numbers in this range.

The documentation and oral information provided by both parties supports the notion that mass and concentration are both important considerations in designing the removal approach. While EPA has agreed that the mass-driven approach proposed by LSS has merit, a mass-driven approach tends to “reward” the circumstance where there is significant mass to begin with (i.e. “only” 10% of a very large amount could still be a very large amount). At the same time, it is possible that post-removal concentrations of interest could still be present but in a distribution that allows for appropriate consideration of risk management approaches other than further dredging. The mass and concentration that will be left behind needs to be considered from the perspective of (1) the continued risk the material poses in a direct and current sense and (2) the long-term management that would be necessary to minimize future risks from either the uncovering of materials left in place or the upward migration of material through cover material.

Therefore, I find that the EE/CA shall proceed with analyses that consider the implications of dredging to a range of concentrations vertically, with that range to include at least the SLVs and the approximate 5 ppm concentration suggested by LSS’ mass-based analysis. The EE/CA alternatives analysis shall consider constraints such as the feasible limits of conventional dredging techniques, as well as other appropriate factors, in evaluating various extents of dredging.

### III. Lindane

LSS contends that the available data are sufficient to indicate that lindane should not be of continued concern. LSS is troubled by the apparent use of a different set of criteria for identifying lindane as a COI. EPA contends that the available data are sufficient to make lindane a COI, in part because there is a potential “masking” effect because of much higher concentrations of other sufficiently similar compounds being present. EPA acknowledges that there is no clear link of the chemical to operations at the Arkema site, but continues to be interested in lindane because of recontamination potential regardless of the lindane’s initial source.

The parties have indicated that the further data collection at the site (e.g. as part of further characterization or post-removal confirmation) will continue to include analyses for a suite of pesticides that will include lindane. It also seems true that where other pesticides are at high concentrations that are of interest, these compounds will tend to drive actions such that the lindane itself will not likely be as critical of a consideration *at that time*. It would seem, then, that whether to designate lindane as a COI is not particularly crucial decision unless lindane becomes a more likely driver in assessing residual risk and/or the need for additional action. Therefore, while it is not necessary to identify lindane as a COI *at this time*, the EE/CA process, and in particular the collection and reporting of data, should continue to include lindane, with appropriate consideration of detection limits so as to improve our ability to interpret the lindane-related data set.

#### IV. EPA Costs

In summary, LSS is disputing certain of EPA's contractor costs as inconsistent with the National Contingency Plan (NCP), not recoverable under the work takeover provisions of the administrative order, outside the scope of the administrative order, and disproportionate with oversight costs of the Harbor-wide Remedial Investigation/Feasibility Study (RI/FS). LSS takes issue in various ways with the timing of the work that led to EPA's costs. LSS also contends that it is being unfairly burdened with costs associated at least in part with what the record indicates are problems between EPA and its contractor. EPA's position is that its contractor's billed costs, minus those subsequently identified as an accounting error, fit within the definition of "Future Response Costs" under the order.

Regarding the first basis of the dispute, LSS contends that the EPA contractor's performance and/or EPA's management of the contractor resulted in costs inconsistent with the NCP. Both parties recognize that EPA has, in fact, replaced its contractor for the site. However, I do not agree to attribute to the NCP an assumption that EPA would never encounter issues with contractor performance in the conduct of its many responsibilities under the NCP. Supporting a claim that a cost is "inconsistent" with the NCP carries a very high burden. This is not to suggest that EPA can or should take lightly its fiduciary responsibility to secure the most effective use of its contract funding, whether or not it expects to bill the costs to another party. But through many years of experience with a large number of contractors, EPA has found that a wide variation in performance is frankly to be expected given the nature of the work and the contracting environment. What is more relevant to consider, therefore, is whether EPA took steps to address a situation of potentially problematic contractor performance when it arose. In fact, in this case the EPA contractor's progress reports document how the contractor responded to direction from EPA wherein EPA has obviously expressed dissatisfaction with the contractor's performance. In response to direction from EPA, the contractor took steps including changing the mix of personnel assigned to work, providing more detailed tracking of time spent on specific tasks, and providing more detail in progress reports. Ultimately, as noted above, EPA removed the contractor from the site when there was not sufficient improvement in performance. Therefore, the record indicates EPA was attentive to contract management issues and took definitive steps in response to the contractor's performance. LSS can argue that it would have taken other steps or taken them more quickly, but the record does not support a contention that EPA ignored problematic performance or allowed it to continue unaddressed. Even in that case, it is not clear that such contractor costs would rise to the level of being inconsistent with the NCP. In sum, I find insufficient basis to conclude that costs were incurred inconsistent with the NCP based upon contractor performance or EPA's contract management.

LSS contends, as well, that EPA's own management of the project in terms of inconsistent or frequently changing direction to the contractor (as suggested by the contractor's progress reports) was so inefficient as to make the contractor's resulting costs inconsistent with the NCP. Without commenting upon LSS' own perceptions of EPA's project management, I view with caution the account of EPA's contractor, who because of the issues previously discussed could have had a vested interest in effectively ascribing its own performance shortfalls to others' behaviors. In any event, while everyone involved with the project would prefer for the issues in play (primarily the matter of principal threat material definition) to have been addressed more quickly, the reality is that they had and have been vexing issues that consumed a lot of time and effort as people sought alternative strategies and approaches. Certainly a fair amount of the

contractor's costs are, regardless of effectiveness of EPA's project management, related to the need to review and respond to new alternatives suggested by LSS itself. Given the number of parties involved and the contentiousness between LSS and EPA, I would not disagree that there were likely opportunities for the work to be more efficient or better coordinated, but not to the extent that the costs in question are inherently inconsistent with the NCP.

As to the second basis of LSS' dispute, EPA has conceded its incorrect reference to the work takeover provision of the administrator order. The point is moot, however, because the costs are in any case eligible for recovery pursuant to the Future Response Costs definition, which in turn encompasses the activities and work products that EPA could perform or produce as described in Paragraph 22.

LSS argues that EPA costs were outside the scope of, or otherwise inconsistent with, the Administrative Order. The discussion of this contention is perhaps best structured similar to the "Cost Reduction" slide in LSS' presentation of April 17, 2008. In that slide, LSS identifies (1) costs incurred before LSS was notified that EPA had decided to disapprove and modify the work plan, (2) costs incurred while EPA's decision was in dispute, and (3) costs incurred after the deadline for a "substantially complete work plan" created by the decision on the earlier dispute, as well as the accompanying indirect costs.

Beginning with the last category, LSS essentially equates falling behind schedule with being outside the scope of the Administrative Order. Consistent with my comments in other sections of this memorandum, it is an extremely unfortunate and disappointing fact that the schedule for this project is far behind what should have been doable. But this hardly means that all the efforts expended in the unanticipated additional time have by definition been outside the scope of the Administrative Order. More to the point with this matter, while the identified costs admittedly were incurred beyond the date specified in my earlier decision for substantial completion of the work plan, they were nonetheless still incurred in continuing efforts to redraft the EE/CA work plan, the completion of which clearly is a critical initial component of the work to be done within the scope of the Administrative Order. No suggestion has been made that the additional time for performance was due to EPA preparing an EE/CA work plan that was different in scope from what was anticipated in the Administrative Order. Furthermore, despite falling behind, EPA did not ignore my direction to provide opportunities for input by and interaction with LSS as modification of the EE/CA work plan proceeded.

For the second category, LSS seems to contend that its obligation to pay costs incurred by EPA during the period of dispute was tolled indefinitely. I believe this is an incorrect interpretation of Paragraph 50 of the Administrative Order. It is true that EPA assumed some risk by continuing to incur costs related to disputed matters during the period of the dispute. And although it did not occur, had EPA attempted *during the dispute* to demand payment of costs related to disputed matters, LSS would have had the basis for withholding payment (or more accurately putting the appropriate sum in escrow) pending the resolution of the dispute. Had LSS prevailed in the dispute, LSS would then have had a basis for arguing that EPA's costs for performing the work in dispute were not LSS' responsibility. However, when the dispute was decided in favor of EPA's decision, costs that EPA had continued to incur on work that was the subject of dispute effectively were found to be Future Response Costs as defined in the Administrative Order. This determination also effectively ended the tolling of LSS' obligation to pay the costs pursuant to the billing and payment procedures in the Administrative Order.

The first category of costs raises some interesting issues. First, there is a matter of LSS' misinterpretation of the EPA contractor's progress reports. I have examined contractor costs for each task. Through August 17, 2006, costs incurred for work plan revisions are associated with the EPA contractor's revisions, in response to EPA direction, of its own work plan. This work entailed estimating the level of effort that would be required to redraft the EE/CA work plan and provide EPA with a modification of the contractor's own work plan, which, when approved, would establish the task under which the contractor would conduct the work of redrafting the EE/CA work plan. The work of scoping out and preparing for this potential different approach (i.e. comprehensive modification rather than continued review and comment) to completing the EE/CA work plan reasonably falls within EPA's oversight discretion; therefore, I find the costs through August 17 are clearly within the scope of the order.

But LSS contends that costs incurred by EPA to begin redrafting the EE/CA work plan prior to EPA's written notice to LSS of its decision to disapprove and modify LSS' most recent draft of the work plan are outside the scope of the Administrative Order. Arguably still in question, then, are costs between August 17, 2006 and September 21, 2006 -- the date of EPA's formal written notice to LSS of its disapproval and decision to proceed to modify the EE/CA work plan -- to the extent that costs during this period included costs for redrafting the EE/CA work plan. Despite EPA's characterization otherwise of the work performed by the EPA contractor during this time period, the EPA contractor's narrative summaries covering this time period, as well as the contractor cost break down for the months of August and September, support the assertion that EPA incurred costs for its contractor to begin redrafting/revision of the EE/CA work plan during this time period. Therefore, there are relevant costs to consider. However, while LSS is correct that EPA is required to provide its approvals/disapprovals in writing, there is nothing in the Administrative Order that says that EPA cannot proceed with modifications prior to providing such notice.

While this plain reading of the Administrative Order could be sufficient basis for denying LSS' dispute with respect to the "pre-notice" costs, it seems appropriate to first consider a broader view of the intent of the Administrative Order. Specifically, the Administrative Order is constructed so there will be one party whose primary responsibility is to perform the work and one party whose primary role is to oversee the work. Granted, EPA has broad discretion to conduct its oversight role in a way that can come very close to direct work performance, specifically in its authority to modify submittals, and also has the authority to actually take over work, but the Administrative Order is underlain by an acknowledgement that LSS has not just the responsibility but the opportunity to perform before EPA steps in substantially.

In this case, LSS has had the opportunity to perform, having produced not one but two drafts of the EE/CA work plan. Although EPA's formal written notice of its disapproval of the second draft did not occur until September 21, 2006, LSS was aware through various communications, including in writing, that EPA had substantial concerns with significant elements of the latest draft. For its part, EPA clearly saw itself moving into a new role, as evidenced by direction to its contractor to modify its own work plan to provide a new task under which it would perform new work (i.e. comprehensive revision of the EE/CA work plan). This activity by EPA can be considered consistent with the scope of the Administrative Order in that it was intended to support getting to the necessary point of an acceptable EE/CA work plan. All of EPA's costs were necessarily incurred once EPA determined that LSS' second draft was

inadequate and that EPA would itself need to take on the work of completing an acceptable EE/CA work plan. Perhaps a problem would arise if EPA's proceeding to modify "without notice" resulted in truly duplicative costs where LSS was simultaneously expending costs in preparing yet another draft of its own. LSS has not presented information that this was the circumstance, however. Therefore, while such a sequence of events theoretically could have led to questionable costs, based upon the available record LSS does not appear to have incurred any costs it would not otherwise have incurred due to either the timing of EPA's initiation of modifying the work plan or the timing of specific notice of its decision to disapprove and modify the work plan. As such, I find all of EPA's costs disputed costs to be within the scope of the Administrative Order.

Finally, regarding LSS' assertion of disproportionate costs, while the comparisons referenced between the Arkema project and the Harbor-wide RI/FS (e.g. study area size and number of contaminants) have some merit, EPA also correctly cites the difference between a "lead" and "oversight" role as a factor that can and often does have a significant impact upon the level of costs incurred. Staying with the source of LSS' own comparison, LSS refers to EPA's RI/FS oversight bills; from cost figures repeatedly shared by the Lower Willamette Group (LWG) in media coverage – and with which LSS is undoubtedly intimately familiar – it appears extremely likely that the LWG was incurring costs for direct work performance that were much higher than EPA's oversight costs for the same period – even if the costs of sample collection and analysis are separated out. The LWG's direct "performance" costs would be more analogous to EPA's costs for revising the draft EE/CA work plan. Suffice it to say that LSS' basis for expecting cost proportionality does not compel a conclusion that the costs in question are inconsistent with the NCP.

In summary, then, I find that LSS is responsible for paying all of EPA's disputed costs under the Administrative Order.

Attachment



**Administrative Record, Disputes of February 19, 2008 and March 27, 2008**  
**By Legacy Site Services LLC**  
**Regarding U.S. EPA Region 10 Docket No. CERCLA 10-2005-0191**  
**Arkema Early Action**

**Work Plan Dispute, February 19, 2008**

1. Disputed Directed Changes to May 2007 Arkema Draft EE/CA Work Plan U.S. EPA Region 10 Docket No. CERCLA 10-2005-0191, dated February 19, 2008, from Doug Loutzenhiser (LSS) to Lori Cora & Sean Sheldrake, with attachments.
2. Transmittal of EPA's Response to Arkema's Dispute Statement, Portland Harbor Superfund Site Administrative Order on Consent; Docket Number CARCLA-10-2005-0191, dated March 25, 2008, from Deb Yamamoto thru Sean Sheldrake and Lori Cora to Daniel D. Opalski, with attachments.
3. Revised Draft Work Plan Engineering Evaluation / Cost Analysis, Arkema Removal Action, Portland, OR, dated July 14 2006, From Integral Consulting Inc. to EPA, Doc. #1235759.
4. EPA Draft Arkema Early Action EE/CA Work Plan, dated May 11, 2007, from Parametrix to Sean Sheldrake.
5. LSS presentations, Arkema EE/CA and Cost Dispute Meeting, dated April 17, 2008, from Integral Consulting to LSS.
6. EPA presentations, Arkema EE/CA and Cost Dispute Meeting, April 17, 2008, from Sean Sheldrake, Lori Cora, Deb Yamamoto to Daniel D. Opalski
7. EPA letter disapproving LSS draft work plan including comments on Arkema's July 14 2006 revised draft EE/CA Workplan, dated September 21, 2006 from Sean Sheldrake to Todd Slater (LSS), EPA Doc. #1244329.
8. Formal Dispute Decision, Arkema Inc Administrative Order on Consent for Removal Action, Docket No. 10-2005-0191; resolving Arkema's Dispute of EPA's Decision to Disapprove Arkema's July 2006 Engineering Evaluation/Cost Analysis (EE/CA) Work Plan and Modify the Work Plan, and Unresolved Directed Changes, dated November 29, 2006, From Daniel D. Opalski, EPA to Doug Loutzenhiser, LSS.

9. Questions related to Formal Dispute Under PH AOC, Docket No. CERCLA-10-2005-0191, email dated April 7, 2008 from Daniel D. Opalski, EPA to Deb Yamamoto, EPA and Doug Loutzenhiser, LSS.
10. LSS Response, with attachments, to Additional EPA Information Requests, April 21, 2008 Dispute Resolution Teleconference U.S. EPA Region 10 Docket No. CERCLA 10-2005-0191, from Doug Loutzenhiser, LSS to Daniel D. Opalski, EPA.
11. Memorandum re: Arkema Workplan Dispute, Answers to Dispute Official's Questions (email of April 7, 2008), dated April 16, 2008, from Sean Sheldrake to Daniel D. Opalski.
12. EPA lindane response, with attachments, to Dispute Official's question on lindane (email of April 7, 2008), dated April 16, 2008 from Sean Sheldrake thru Lori Cora and Deb Yamamoto to Daniel D. Opalski.
13. EPA Lindane Documents, email dated May 2, 2008 from Sean Sheldrake To Daniel D. Opalski.
14. Request by Daniel D. Opalski for Arkema PTM Feb 07 meeting information, email dated May 2, 2008 from Sean Sheldrake to Daniel D. Opalski.
15. Administrative Order on Consent for Removal Action, U.S. EPA Region 10 CERCLA Docket No. 10-2005-0191
16. LSS CD ROM, Document ID# 1235906

#### **Cost Dispute, March 27, 2008**

1. LSS dispute statement with attachments, Site 10BX, Portland Harbor–Arkema Dispute Regarding Bill No. 2700726S362 Docket No. CERCLA-10-2005-0191, dated March 27, 2008, from Doug Loutzenhiser (LSS), to Lori Cora & Sean Sheldrake, EPA.
2. EPA response letter with attachments, dated February 6, 2008, from Sean Sheldrake, to Todd Slater (LSS).
3. Transmittal of EPA's Response to Arkema's Dispute Statement Regarding Response and Oversight Costs, Portland Harbor Superfund Site Administrative Order on Consent; Docket Number CERCLA-10-2005-0191, dated April 8, 2008, from Deb Yamamoto Thru Sean Sheldrake & Lori Cora to Daniel D. Opalski.

4. LSS presentations, Arkema EE/CA and Cost Dispute Meeting, April 17, 2008, from Integral Consulting to LSS
5. EPA presentations, Arkema EE/CA and Cost Dispute Meeting, April 17, 2008, from Sean Sheldrake, Lori Cora, Deb Yamamoto to Daniel D. Opalski
6. Additional EPA contract information, Arkema - Task Order #3B Work Plan Information Task 7, email dated April 28, 2008, from Elizabeth Pendleton to Daniel D. Opalski
7. 003B Portland Harbor/Arkema Task Order Cost Spreadsheet, email dated April 29, 2008, from Elizabeth Pendleton to Daniel D. Opalski.
8. Additional cost dispute information, e-mail dated April 22, 2008 from Deb Yamamoto to Dan Opalski
9. Administrative Order on Consent for Removal Action, U.S. EPA Region 10 CERCLA Docket No. 10-2005-0191