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BY FACSIMILE

Michael Berman
U.S. Environmental Protection Agency
Office of Regional Counsel
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77 West Jackson Boulevard
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Dear Mike:

This letter is a follow up to the two conference calls with myself and/or Bill Walsh on behalf of the Fields Brook Potentially Responsible Parties Organization ("FBPRPO")[1] concerning federal and state applicable or relevant appropriate requirements ("ARARs") in the Sediment Operable Unit ("SOU") intermediate (60%) design documents ("60% Design Documents"). We have also coordinated with Joseph Heimbuch concerning the discussions of the EPA and FBPRPO technical representatives on these same issues. Based on these calls, I believe we have resolved and addressed all ARARs issues, at least pending review of the 60% Design Documents and other documents to be submitted soon.

First, in most cases, we are in agreement concerning these ARARs (see revised ARARs table attached hereto, which indicates the action that we will take in the 60% Design Documents

1. Jeffrey Hurdley, Ohio EPA, also participated on the first call.

concerning the ARARs). This table includes the additional ARARs discussed on the call that you had with Bill Walsh on July 7, 1995. The ARARs table in the 60% Design Documents will include these ARARs.

The FBPRPO recognizes that EPA and the State need to see the specific plans and details in the 60% Design Documents and other documents to be submitted to EPA in the near future (e.g., the Final Design Work Plan) before it can determine that the details of the remedial action meet ARARs. In some cases, we probably will not know the details of some portions of the remedy until contractor bids are solicited and a remedial action contractor selected (e.g., EPA will not be able to ascertain compliance with its off-site policy until a specific off-site thermal treatment unit or landfill is selected). Such sequencing of ARAR compliance is inherent in the remedial design process.

However, since there is a need for finality on the SOU design, no new ARARs can be added after the submission of the 60% Design Report.

Second, you and Bill Walsh discussed on July 7, 1995, whether the sediments were RCRA wastes and whether the Land Disposal Restriction ("LDR") regulations were ARARs. The FBPRPO have consistently and repeatedly provided the reasons that the LDR regulations are not ARARs at this Site.[2] However, as discussed on

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2. First, the Fields Brook Record of Decision ("ROD") is a pre-SARA ROD and, therefore, ARARs are not mandatory. The LDR regulations further permanence, but are not necessary to protect human health. Therefore, the ROD reflects the level of treatment EPA believes is consistent with the NCP and the LDRs cannot be used to require more treatment at this Site.

Second, the sediments are not RCRA wastes unless they fail the toxicity characteristic procedure ("TCLP") test. The four sediment samples from Fields Brook tested did not exceed the TCLP regulatory level. Similarly, the soil of samples from the SCM plant did not fail the TCLP test. Therefore, it is not a RCRA hazardous waste.

Third, the remedy does not involve placement, and therefore, the LDR regulations cannot be ARARs.

Fourth, even if the sediments were RCRA wastes, EPA has issued a national variance for the LDR as applied to soil

(continued...)

your call and more fully explained below, the real issues are: (1) what concentration of chemicals requires thermal treatment; and (2) what concentration of chemicals requires stabilization. It is agreed that construction debris will be disposed of without treatment. No contaminated sediments will be disposed of without treatment. If the details of the Final Work Plan satisfy EPA, then the issue of whether the LDR regulations apply is academic.

We are in agreement that the treatment requirements are specified in the Record of Decision ("ROD"). The ROD states that "contaminated sediments containing organic contaminants with higher mobility and the **highest** sediment ingestion risk" or "sediment with PCB *concentration greater than 50 mg/kg*" will be "thermally treated" and sediments with "relatively immobile or lower risk organic contaminants" would be solidified (ROD at 18-19).[3]

The documents to be submitted to EPA contain specific concentrations that implement this ROD language and volume estimates. We have used the confidence removal goal method of determining which sediment must be excavated.

Generally, any sediment from Fields Brook which is excavated and contains greater than 50 ppm of PCBs will be thermally treated in compliance with the ROD and disposed of in a landfill consistent with the post-thermal treatment concentrations

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2. (...continued)
precisely because EPA concluded that they were **not** necessary to protect human health and the environment and they were **not** cost-effective.

Fifth, EPA RCRA regulations designate hazardous waste cleanup areas as corrective action management units. This regulation would be an ARAR, if sediment were a hazardous waste. As a result, as a matter of law, the LDR regulations would not apply (<u>see</u> generally, the discussion of ARARs submitted with the Technical Memorandum 3 (dated December 20, 1994)).

The FBPRPO has thought that the question of the LDR regulations had been resolved years ago, at least for the sediments. The FBPRPO cannot agree that the LDR regulations are ARARs at this Site and any EPA decision based on its conclusory assertion that the LDR regulations are ARARs would be contrary to law and render such expenditures not cost recoverable.

3. A year ago, we also submitted a treatment position paper, but we received no reply from EPA so the issues were never resolved.

in the residual.[4] High ingestion risk sediment will be thermally treated in compliance with the treatability studies performed at the Site and disposed of consistent with the post-thermal treatment concentrations. Immobile low ingestion risk sediment will be solidified and landfilled in a RCRA landfill. The construction debris will be landfilled in a solid waste landfill.

Third, the Superfund program office has concerns that there may be "new" ARARs that were needed to ensure that the remedy was protective of human health and the environment. As we indicated on the conference calls, the FBPRPO is not aware of any such ARARs. The FBPRPO has been willing to consider any potential ARARs or any other requirement specifically raised by USEPA or Ohio, but none has been brought to our attention. The 60% Design Documents will be prepared based on the attached list. We urge EPA to bring to our attention any requirement that appears to be a potential ARAR so that the issue may be investigated prior to submission of the 60% Design Documents. We believe that this approach resolves EPA's concerns.

Fourth, Ohio has withdrawn several drinking water standards as ARARs. The FBPRPO appreciates that decision. Fifth, we agreed that several of the other state ARARs (e.g., the five freedoms, the non-degradation policy, and the State nuisance law) may be moot if the details provided in the 60%, 90%, and 100% Design Documents satisfy the concerns of the State. Thus, it was agreed that these potential state ARARs would be listed in the attached list as "potential ARARs" with language indicating their indeterminant status, as described in the current status column of the attached list.

We propose that the following language be added to the text of the 60% Design Documents concerning these potential state ARARs:

> The FBPRPO are of the opinion that these requirements are not ARARs, they are not necessary, they are undefined and

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4. We note that there is no regulatory basis (other than the ROD) for requiring the thermal treatment of sediments or soil containing 50 ppm of PCB. The regulation allows landfilling, chemical treatment, or the performance equivalent to these alternatives. Current EPA guidance recommends containment of such material of concentration are 500 ppm or even higher and EPA guidance and Federal Register preambles have repeatedly acknowledged that thermal of low hazard soil (i.e., with a risk of less than 10^{-3}) is not cost-effective.

therefore unenforceable. The State is of the opinion that these are standard provisions in State permits and they are reasonable requirements. It cannot be determined at this time whether these provisions are State ARARs. The FBPRPO has asserted legal and factual rationales that these requirements are not be considered state ARARs. The State and EPA have asserted legal and factual rationales that these requirements should be considered state ARARs. Without withdrawing or compromising either position, the EPA, State, and FBPRPO will review the details in the 60% 90% and 100% Design Documents to determine if any of these requirements are necessary to support inclusion of additional environmental requirement or requirements.

Sixth, you have raised the issue of whether the off-site policy is an ARAR.[5] To the extent that a violation of an existing permit by a facility means that the use of that facility would not be protective of human health and environment, the off-site rule is a to be considered factor and the FBPRPO would not use that facility.

The FBPRPO will provide EPA the names and locations of all facilities to be used, once they are determined. These facilities cannot be used unless they are permitted. EPA may perform whatever review it wants on those facilities and provide the FBPRPO with its determination of whether use of the facility would not protect human health or the environment. At that time, we will resolve whether the FBPRPO should use the facility.

Seventh, you have expressed concern about whether Section 404 and other requirements designed to protect wetlands are ARARs. The FBPRPO agree that when the Fields Brook stream is diverted for excavation, measures should be taken to ensure protection of human health and the environment, particularly wetlands. Such a plan will be included in the appropriate design document, probably, however, not until we determine the exact locations of the excavation and receive bids from contractors. EPA, the State, and the Army Corps can then review this detailed plan and determine if it is adequate to protect human health and the environment.

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5. This policy has been challenged in court as, among other things, a violation of due process. The FBPRPO has taken no position at this time concerning the merits of that litigation. Obviously, if the policy is held invalid because of constitutional infirmities, it could not be an ARAR.

Eighth, you noted that the Great Lakes Water Quality Agreement of 1978 is listed as an ARAR in the ROD. Attached are contemporaneous memoranda from the State Department's Solicitors Office and EPA's General Counsel concluding that this Agreement is not enforceable. Therefore, it cannot impose a requirement on the FBPRPO. The FBPRPO, however, believes that it is, at most, a "to be considered" requirement. Thus, it is appropriate to consider the Agreement for the purpose proposed by EPA, i.e., to determine whether measures should be taken during the excavation of the sediment to ensure protection of human health and the environment.

Ninth, it was agreed that the FBPRPO will submit an air monitoring plan as part of the health and safety plan. This plan will be reviewed to determine if it meets EPA's concerns regarding the Clean Air Act. We agreed that nonattainment and significant deterioration requirements would apply to any treatment facility, but not to the excavation and handling of sediment. Since treatment will occur off-site, this is presently a moot point.

Tenth, the FBPRPO has agreed to meet with Ohio EPA to discuss each surface point source discharge and what, if any, treatment might be necessary. We are advised by Joe Heimbuch, that an initial meeting has already occurred.

Eleventh, you indicated that there was agreement that riprap would be placed along certain portions of the Brook. As we understand it from our technical team, there is agreement on this issue.

Twelfth, there is agreement that the requirements of the Occupational Health and Safety Administration will be followed in the health and safety plan.

Thirteenth, there is agreement that all construction will meet local building ordinances and requirements and all transportation will meet Federal and State hazardous waste transportation requirements.

Fourteenth, you informed Bill that the EPA Water Office is still reviewing the remedial plan. We have expressed our concern about this review and those concerns will not be repeated here. We reiterate Bill's offer to provide additional technical advice or assistance. Please call Joe Heimbuch if additional information would be helpful.

Fifteenth, we agreed that if plans changed and an on-site landfill would be built, the hazardous waste cell would meet Federal and State hazardous waste landfill requirements, the

portion containing PCBs in excess of 50 ppm would meet TSCA requirements and the cell containing solid wastes would meet Federal and State solid waste requirements.

Sixteenth, you indicated that EPA was "open" to suspending design work on the on-site landfill, but that the final official approval could not be provided until the FBPRPO submitted additional information documenting how we estimated the volumes of sediments to be removed, treated, solidified, and landfilled, this information was reviewed, and the appropriate EPA officials agreed. Joe Heimbuch indicates that this information is being prepared and will be submitted soon. The FBPRPO will proceed with the off-site landfilling and treatment approach for the 60% Design Documents. The FBPRPO is confident that this approach will be approved by EPA and, in any case, this approach is unlikely to result in a significant long-term delay in the schedule for implementing the remedy.

Conclusion

Once we have agreement on ARARs, Bechtel will proceed with the agreed upon ARARs list and develop the 60% Design Documents. I believe that we have made significant progress.

If you have any questions, please give me or Bill a call.

Yours truly

Stephen M. Truitt

cc: FBPRPO Negotiation Committee

Revised ARARs Chart

Proposed List Of Federal ARARs (EPA April 14, 1995 Comments at 13-14)	(February 1995) In 30% Design	Final 30% Work Plan (May 1994)	In ROD (Sept. 1986) (Table 9, pp 1-8)	Current Status	What Is Proposed To Be Done In the 60% Design Documents
40 C.F.R. § 264	Yes, p. 23	Yes, p. 23	Yes	**A** for nonlandfill requirements. **C** for RCRA landfill requirements.	**V** 16 subparts were listed in the 30% design. Fewer subparts will be listed in the 60% Design since many of these requirements only relate to on-site landfilling. This requirement will be listed as primarily an action-specific ARAR in the 60% Design. The siting requirements will not be listed in 60% Design.
Ambient Air Monitoring Reference and Equivalent Method (40 C.F.R. § 53)	No	No	Yes	**A**	**V**
National Primary and Secondary Ambient Air Quality Standards for Particulate Matter (40 C.F.R. § 50)	Yes, p. 30	Yes, p. 23	No	**A**	**V**
Executive Order 11988 (floodplains)	Yes, p. 24	Yes, p. 24	Yes	**A**	**V**
Movement of Excavated Materials/40 C.F.R. § 268. (40 C.F.R. 6, Appendix A.)	Yes, p. 23, but not including the land ban requirements.	Yes, p. 23, not including the land ban requirements.	Yes, generically, but not specifically indicating whether it required anything.	**D** for LDR regulations. **A** for those provisions that address the handling of hazardous waste where they are suitable to the conditions at the site. Some requirements (e.g., the storage time limit) either are not ARARs for a cleanup or must be waived.	**V** generally and **X** for the LDR.
Archaeological and Historic Preservation/16 U.S.C. Sec. 469; UAC, Title 63; Chapter 18; UAC R224	No	No	No	**D** There are no archeological sites within Field Brook, therefore, it is not an ARAR.	**X**

Proposed List Of Federal ARARs (EPA April 14, 1995 Comments at 13-14)	(February 1995) In 30% Design	Final 30% Work Plan (May 1994)	In ROD (Sept. 1986) (Table 9, pp 1-8)	Current Status	What Is Proposed To Be Done In the 60% Design Documents
Endangered Species Act/16 U.S.C. Sec. 1531-1543; 50 C.F.R. Parts 200 and 402; 33 C.F.R. Parts 320-330	No	No	Yes	D The discussion of the threatened and endangered species within Fields Brook, provided in the Integrated Risk Assessment indicates that it is unlikely that endangered or threatened species will be found within the project site.	X
Executive Order on Protection of Wetlands/Exec. Order 11990; 40 C.F.R. Sec. 6.302(A) and Appendix A; 40 C.F.R. Parts 230, 231	Yes, p. 24	Yes, p. 24	Yes	A	W The appropriate design document will include a plan describing the measures to be taken to protect human health and the environment during excavation of the sediment. The FBPRPO are not aware of anything that would be required by this requirement that would not also be required to protect human health and the environment.
Fish and Wildlife Coordination Act: (16 U.S.C. 661 et seq.); 40 C.F.R. 6.302) and Protection of Floodplains (40 C.F.R. 6, Appendix A): Any area affecting a stream of river which will have a diversion, channeling or other activity which modifies the stream or river and affects fish or wildlife must have action to protect fish or wildlife. Also, actions must be taken to avoid adverse effects, to minimize potential harm, and to restore and preserve natural and beneficial values for any actions within floodplains	No	No	Yes	A	W The appropriate design document will include a plan describing the measures to be taken to protect human health and the environment during excavation of the sediment. The FBPRPO are not aware of anything that would be required by this requirement that would not also be required to protect human health and the environment.

Proposed List Of Federal ARARs (EPA April 14, 1995 Comments at 13-14)	(February 1995) In 30% Design	Final 30% Work Plan (May 1994)	In ROD (Sept. 1986) (Table 9, pp 1-8)	Current Status	What Is Proposed To Be Done In the 60% Design Documents
RCRA TSD: (40 C.F.R. 264.18(b)) - a TSD facility within a 100-year floodplain must be designed, constructed, operated and maintained to avoid washout.	Yes, p. 23	Yes, p. 23	Yes	C	W
RCRA TSD: (RCRA 3004(o)(7)): No landfills are allowed within vulnerable hydrogeology areas.	No	No	Yes	D There are no such hydrogeological conditions.	X
TSCA Landfill Requirements: (40 C.F.R. 761.60 and 761.75(b)):siting/design/ handling/monitoring requirements are specified (e.g., soil, hydrologic, flood protection, liner specs, etc.) (see TBC guidance addressing this regulation below). Also, FBPRPO should be aware that the Region 5 EPA TSCA office has noted that the process of receiving TSCA-office review of a TSCA-landfill design package with correction of deficiencies may take upwards of one year.	Yes, p. 24	Yes, p. 24	Yes	C	X

Proposed List Of Federal ARARs (EPA April 14, 1995 Comments at 13-14)	(February 1995) In 30% Design	Final 30% Work Plan (May 1994)	In ROD (Sept. 1986) (Table 9, pp 1-8)	Current Status	What Is Proposed To Be Done In the 60% Design Documents
TSCA 760.61(a)(5) requirements for disposal of dredged materials are an ARAR for any dredged TSCA materials to be addressed (e.g., potentially for the materials close to the Brook but on the properties).	No	No	No	A This provision applies to sediment containing greater than 50 ppm, but allows landfilling on the thermal treatment of any sediment containing above 50 ppm of PCBs. The provision also allows the use of more cost-effective remedial actions to cleanup the Brook sediment, if approved by EPA. Under this provision, the existing thermal treatment requirement could be changed to a more cost-effective remedy.	V
Interim Noncontinguous Site Policy (not in 4/14/95 Comments)	No	No	No	A Probably not needed.	V
NPDES Regulation	--	--	--	A	Y The FBPRPO will consult with state water officials concerning requirements for any point source discharge.
OSHA	--	--	--	A	MA
Local Construction Permits	--	--	--	A	E FBPRPO will comply with their requirements, but no permit is necessary.
Proposed List of State ARARs (April 14, 1995 at 13-15)					
"Five Freedoms" for surface Water/3745-1-04, A through E	No	No	No	U	Y

Proposed List Of Federal ARARs (EPA April 14, 1995 Comments at 13-14)	(February 1995) In 30% Design	Final 30% Work Plan (May 1994)	In ROD (Sept. 1986) (Table 9, pp 1-8)	Current Status	What Is Proposed To Be Done In the 60% Design Documents
Antidegradation Policy for Surface Water/3745-1-05 A, B, C	No	No	No	U N.B.: The final remedy removes a significant amount of chemicals at the site, and, therefore, can not degrade the surface water (see estimate recorded by Gradient and EPA State ARAR guidance).	Y
Water Quality Criteria/3745-1-07 C	No	No	Yes	A Although there will be no point source discharge after the remedy's implemented (therefore, there is no applicable requirement).	V
Ambient Air Quality Standards (for particulate matter)/3745-17-02 A,B,C	Yes, p. 6-56	No	Yes	A	V Particulates will be monitored at the location of the excavation for worker safety purposes.
Non-degradation Policy/3745-17-05	No	No	No	U The final remedy significantly removes the amount of chemicals at the site, and, therefore, cannot degrade the surface water (see estimate prepared by Gradient and EPA State ARAR guidance).	Y
Control of Visible Particulate Emissions from Stationary Sources/3745-17-07 A, B, C, D	Yes, p. 6-52	No	Yes	A	V
Restriction of Emission of Fugitive Dust/3745-17-08	Yes, p. 6-52	No	Yes	A.	V

Proposed List Of Federal ARARs (EPA April 14, 1995 Comments at 13-14)	(February 1995) In 30% Design	Final 30% Work Plan (May 1994)	In ROD (Sept. 1986) (Table 9, pp 1-8)	Current Status	What Is Proposed To Be Done In the 60% Design Documents
Control of Emissions of Volatile Organic Compounds from Stationary Sources/3745-21-09 A, B	No	No	Yes	A The FBPRPO agrees that monitoring at the point of excavation will be performed as part of the health and safety plan and this can be stated in the design. Additionally, Gradient has already performed a worst-case evaluation of the impact of VOC emissions. The technology-based limits are suitable for industrial sources, not a Superfund site.	X Monitoring of chemicals, including the appropriate VOCs, however, will be performed at the worksite.
Ambient Air Quality Standards, Lead/3745-71-02	No	No	Yes	D The lead concentrations in soil are within the range of background levels of lead. Therefore, the air concentrations generated during construction are unlikely to different from concentrations resulting from construction not involving a Superfund site. However, the FBPRPO agrees to monitor during excavation.	X
Maximum Contaminant Levels for Inorganic Chemicals/3745-81-11 A, B	No	No	No	R Fields Brook is not a drinking water source. State has withdrawn the requirement.	X

Proposed List Of Federal ARARs (EPA April 14, 1995 Comments at 13-14)	(February 1995) In 30% Design	Final 30% Work Plan (May 1996)	In ROD (Sept. 1986) (Table 9, pp 1-8)	Current Status	What Is Proposed To Be Done In the 60% Design Documents
Maximum Contaminant Levels for Organic Chemicals/3745-81-12 A, B, C	No	No	No	R State has withdrawn the requirement.	X
Maximum Contaminant Levels for Turbidity/3745-81-13 A, B	No	No	No	R State has withdrawn the requirement.	X
Prohibits Violation of Air Pollution Control Rules/3704.05 A-1	No	No	No	D Violation of an action-specific ARAR would be a violation of the administrative order or consent decree which requires implementation of the remedy. State has withdrawn the requirement.	X
Explosive Gas Monitoring Plan/3734.041	No	No	Yes	A This is an action-specific ARAR. However, if no explosive gases are measured during construction, it may be moot.	Y Woodward-Clyde and Bechtel will check to determine if explosive gases are present. If they are present, monitoring will be required. If they are not present, no monitoring will be required.
Prohibition of Nuisances/3767.13	No	No	No	U This provision provides no specificity concerning what is required.	Y
Prohibition of Nuisances/3767.14	No	No	No	U See above.	Y
Location Criteria for Solid Wastes Disposal Permit/3745-27-07 A, B	No	No	No	C See response to hazardous waste landfill ARAR.	X
Construction Specifications for Sanitary Landfills/3745-27-08 C, D H	No	No	No	C	X
Sanitary Landfill Operational Requirements/3745-27-09	No	No	No	C	X

Proposed List Of Federal ARARs (EPA April 14, 1995 Comments at 13-14)	(February 1995) In 30% Design	Final 30% Work Plan (May 1994)	In ROD (Sept. 1986) (Table 9, pp 1-8)	Current Status	What Is Proposed To Be Done In the 60% Design Documents
Final Closure of Sanitary Landfill Facilities/3745-27-11 A, B, G	No	No	No	C	X
Location Standards for Hazardous Wastes Treatment/Storage/ Disposal Facilities/3745-54-18 A, B, C	No	No	Yes	C	X
Permits to Operate and Variances/3745-35	No	No	No	D No permit required. It is unknown what specifically is being required.	X
Permit Information Required for All Hazardous Waste Facilities/3745-50-44 A, B	Yes, p. 6-57	No	Yes	C	X
General Analysis of Hazardous Wastes/3745-54-13 A	Yes, p. 6-58	No	Yes	A	U
RCRA design guidelines for capping	No	No	No	C Irrelevant. RCRA cap is not an ARAR for contaminated soil or sediment. No on-site landfill is contemplated. If one is built, this requirement would be an ARAR.	X
RCRA permit requirements for incineration	No	No	No	C If incineration is off-site, the waste must meet off-site policy (as described in the cover letter). If incineration is on-site, procedural requirements are not ARARs.	X for on-site and Y for off-site thermal treatment.
RCRA permit writer's guidance for TSD facilities	No	No	No	D This is a guidance, not a regulation. It will be used as a guidance	Z

Proposed List Of Federal ARARs (EPA April 14, 1995 Comments at 13-14)	(February 1995) In 30% Design	Final 30% Work Plan (May 1994)	In ROD (Sept. 1986) (Table 9, pp 1-8)	Current Status	What Is Proposed To Be Done In the 60% Design Documents
Requirements for HW Landfill Design, Construction and Closure (EPA 625/4-89/022)	No	No	No	C Action-specific ARAR for the on-site landfill, if the sediment is hazardous waste.	Z
TGD: Final Covers on Hazardous Waste Landfills and Surface Impoundments (EPA 530-SW-89-047 (7/89))	No	No	No	C Action-specific ARAR for hazardous waste landfill on-site.	Z
TSCA's "Guidance Document for a 40 C.F.R. 761.75 Landfill Application" (see enclosure 1, received from the Region 5 TSCA office). Note: the 761.75 regulation is an ARAR for how a TSCA landfill should be constructed. Also, the Region 5 EPA TSCA office has noted that the process of receiving TSCA-office review of a TSCA-landfill design package with correction of deficiencies may take upwards of one year	Yes, p. 24	Yes, p. 24	Yes	C Guidance is not an action-specific ARAR.	Z If the requirement makes no sense for the conditions at the site, it will not be used to design the remedy.

CURRENT STATUS CODES

A Agreed, this requirement is an action-specific ARAR.
B Agreed, this requirement is a location specific ARAR.
C This requirement is not an ARAR because there is no on-site landfill currently planned as part of the remedy. This requirement would be an action-specific (and, for some requirements, a location-specific ARAR), if an on-site landfill were constructed.
D This requirement is not an ARAR.

NA No action required.

R State has agreed to remove this requirement from the list of State ARARs.
V This requirement will be listed as an action-specific ARAR on the 60% Design Documents.
W This requirement will be listed as a location on the 60% Design Documents.
Z The requirement will not be listed as an ARAR in the 60% Design Document.
Y The requirement will continue to be listed as a "potential ARAR." The FBPRPO are of the opinion that these requirements are not ARARs, they are not necessary and they are undefined and therefore unenforceable. The State is of the opinion that these are standard provisions in State permits and they are reasonable requirements. It cannot be determined at this time whether this provision is a state ARAR. The

FBPRPO have asserted legal and factual rationales that these requirements are not be considered state ARARs. The State and EPA have asserted legal and factual rationales that these requirements should be considered state ARARs. Without withdrawing or compromising either position, the EPA, State, and FBPRPO will review the details in the 60% 90% and 100% Design Documents to determine if any of these requirements are necessary to support inclusion of an additional environmental requirement or requirements.

z The requirement will be listed as a to be considered requirement.

DEPARTMENT OF STATE

Washington, D.C. 20520

August 2, 1978

MEMORANDUM TO: OMB - Mr. Tozzi

FROM: John Crook
Assistant Legal Adviser
for European Affairs

SUBJECT: 1978 Great Lakes Water
Quality Agreement

As you know, the Office of Management and Budget has posed a number of questions to this Department and to EPA concerning the legal status of the negotiated text of the 1978 Great Lakes Water Quality Agreement. EPA has responded separately to these questions in a series of memoranda sent to OMB on July 28. In general, we endorse EPA's analyses. However, on one major point -- the legal status of the General and Specific Objectives -- our views differ from EPA's.

This memorandum has accordingly been prepared to set forth what we believe to be the proper interpretation of these provisions.

It is important to recall that the system of water quality objectives embodied in the 1978 text is not a new approach. The 1972 Great Lakes Water Quality Agreement, with which we have had over six years of experience domestically and with the Canadians, also established a set of water quality Objectives, which are identical in concept to the General and Specific Objectives of the 1978 Agreement. It was the intent of the negotiators of the 1972 Agreement, confirmed by six years of subsequent practice by the two Governments, that those Objectives not be legally binding, precise standards of conduct. Instead, those Objectives -- as their name suggests -- are hortatory targets or objectives which the Governments

would wish ideally to meet. The Objectives established under the 1972 Agreement have not in all cases been met. This has not led to any charge by either Government that the other Government has breached the Agreement, since both sides clearly understood and intended the nature of the Objectives as targets or goals.

The 1978 Agreement reiterates some of the General and Specific Objectives of the 1972 Agreement; revises others; and adds new Objectives. This process of refinement naturally reflects the evolution of our scientific understanding and national policies concerning water quality. The Objectives, however, are no different in legal character from those under the 1972 Agreement. A more detailed legal analysis of this point and related issues is attached.

The Department of State shares EPA's view that the text of the Agreement should be cleared for signature without changes or further delay. Should questions regarding the Agreement remain following your review of the materials we and EPA have provided, we anticipate having the opportunity to discuss the matter with OMB at an appropriate policy level.

If we may provide any further information or clarification, do not hesitate to call on us.

Attachment:
Legal Memorandum.

ORF-5 TAB A

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

25 JUL 1978

MEMORANDUM

OFFICE OF GENERAL COUNSEL

SUBJECT: United States and Canada: Great Lakes Water Quality Agreement

FROM: Joan Z. Bernstein
General Counsel A-130

TO: Thomas C. Jorling
Assistant Administrator for
Water and Hazardous Materials (WH-556)

Facts

The United States and Canada currently have a joint program for improvement of water quality in the Great Lakes. 1/ This program was implemented pursuant to the Great Lakes Water Quality Agreement of 1972, which was signed by President Nixon and Prime Minister Trudeau on April 15, 1972. In April, 1977, five years later, a comprehensive review of the provisions and implementation of the Agreement was undertaken, as required by Article IV. As a result of this review a new agreement has been proposed to supersede the 1972 Agreement. It is anticipated that the new agreement will be signed by Vice President Mondale on behalf of the United States.

Although the proposal is similar in many respects to the 1972 Agreement, its requirements are stricter and several new provisions are included. Article II of the proposed agreement provides that "the Parties agree to make a maximum effort to develop programs, practices and technology necessary. . ." to achieve the stated purposes. General and Specific Objectives have been established based on data collected and analysed by the International Joint Commission (IJC). The General Objectives in Article III state the long range goals of the parties. The Specific Objectives, in Annex 1, represent the minimum levels of water quality desired in the boundary waters of the Great Lakes System.

1/ The cooperative program with Canada began over a decade ago when the International Joint Commission was directed to study the pollution problem in the Great Lakes. That study led to the Great Lakes Water Quality Agreement of 1972 (1972 Agreement). The 1972 Agreement was intended to meet the obligations of each country under the Boundary Waters Treaty of 1909 not to pollute the Great Lakes to the injury of health or property in the other country. Under the Treaty, failure to meet pollution control obligations could lead to claims for damages and restoration.

In order to meet these Objectives, Article V of the proposed agreement requires that any regulations promulgated by either country "shall be consistent with the achievement of the General and Specific Objectives." The proposal establishes programs in Article VI which contain specific requirements to be met by the parties. Each program specified in Article VI is described in greater detail in Annexes 3 through 12. In addition to these specific programs, Article VI provides that "[w]here present treatment is inadequate to meet the General and Specific Objectives, additional treatment shall be required." In Article XI, the parties commit themselves to seek any legislation necessary to implement the programs.

Article XI of the proposed agreement is identical to Article X in the 1972 Agreement and provides that the program and other costs of implementing its provisions "shall be subject to the appropriation of funds in accordance with the constitutional procedures of the Parties." The Article further states that the parties "commit themselves to seek" the appropriations necessary to implement the agreement.

As in the 1972 Agreement, the proposal gives the IJC responsibility to implement the agreement. The Great Lakes Water Quality Board and the Great Lakes Science Advisory Board, established by the IJC under the 1972 Agreement, are continued under the proposal.

The 1972 Agreement will continue in effect until it is either superseded by the proposed agreement or terminated by affirmative action of one of the parties. The term of the proposed agreement is for "five years and thereafter until terminated upon twelve months notice given in writing by one of the Parties to the other."

Issues

1. What is the legal effect of the Great Lakes Water Quality Agreement? 2/

2. As a result of this Agreement, can EPA require municipalities or industries to comply with deadlines or effluent limitations more stringent than required by statute or deny variances or extensions allowed by statute?

3. Does Article XI bind the United States to seek appropriations or additional legislation to meet the objectives of the Agreement?

2/ References to the "Great Lakes Water Quality Agreement" or "Agreement" refer to the proposed Great Lakes Water Quality Agreement of 1978.

In international law, an executive agreement is considered as binding as a treaty; its terms bind the parties to act in good faith. This is the rule of pacta sunt servanda. This rule applies regardless of the title given to the instrument. Any party defaulting is subject to international sanctions. As a general rule, enforcement of executive agreements is initiated through diplomatic channels.

While the Agreement binds the parties internationally to act in good faith, it does not constitute independent legal authority apart from domestic statutues. Unlike a treaty, an executive agreement does not override existing federal law. United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953), aff'd on other grounds, 348 U.S. 296 (1955). 3/ Any Act of Congress enacted after any international agreement is signed, including a treaty, takes precedence over the agreement. Chae Chan Ping v. United States, 130 U.S. 581 (1889). Consequently, this Agreement may only be implemented in the United States in a manner consistent with federal statutory authority in existence both before and after it enters into force.

In effect, the United States commits itself to good faith fulfillment of its obligations only to Canada. Therefore, only Canada has standing to question any actions or lack of action on the part of the United States. No U.S. citizen has standing to enforce an executive agreement, since no domestic party is within the zone of interests protected by the Agreement, Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970). In addition, no domestic suit for an award of monetary damages may be entertained by the Court of Claims for claims arising under a treaty, (28 U.S.C. §1502). This Act has been interpreted to in dude executive agreements within the meaning of "treaty". Hughes Aircraft Co. v. United States, 209 Ct. Cl. 446, 534 F.2d 889 (1976). It has also been construed to bar jurisdiction of U.S. District Court. George E. Warren Corp. v. United States, 94 F.2d 597, (2d Cir.), cert. denied, 304 U.S. 572 (1938).

Finally, although the Agreement does not override federal law and is not legally binding within U.S. boundaries, it does represent a commitment of the United States to fulfill its terms. Consequently, the Agreement must be considered in formulating federal policies and in making responsible decisions within the federal government.

3/ In the absence of a controlling federal statute, executive agreements take precedence over conflicting State and local law. United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937).

2. EPA Cannot Impose on Municipalities and Industries Effluent Limitations or Schedules of Compliance More Stringent than Authorized by Federal Law Nor Deny Variances or Extensions Otherwise Authorized By Federal Law.

Internationally, the parties commit themselves to a variety of programs and measures enumerated in Article VI and Annexes 3 through 12. Article VI states that:

> 1. The Parties shall continue to develop and implement programs and other measures to fulfill the purpose of the Agreement and to meet the General and Specific Objectives. Where present treatment is inadequate to meet the General and Specific Objectives, additional treatment shall be required. The program and measures shall include the following: (emphasis added).

Thus all programs set out in Article VI are prefaced with mandatory language which commits the parties to implement each program in the Article. 4/ If the United States or Canada fails to implement one of the programs, a technical violation of the Agreement would occur. Each of the programs contain commitments. Some mandate establishment of requirements, such as the phosphorus control programs in Annex 3, or deadlines for program completion and operation, such as the municipal water treatment program.

The Agreement establishes the General Objectives in Article III and the Specific Objectives in Annex 1 subject to the terms of Article IV. The parties are theoretically not bound to meet these objectives, since they are defined as "goals", e.g. in Article I(q):

> "Specific Objectives" means the concentration or quantity of a substance or level of effect that the Parties agree, after investigation, to recognize as a maximum or minimum desired limit for a defined body of water or portion thereof, taking into account the beneficial uses or level of environmental quality which Parties desire to secure and protect; (emphasis added).

However, since the program commitments in Article VI are mandatory in nature and include achievement of the "goals" of the General and Specific Objectives, the General and Specific Objectives could be mandatory also. From the international perspective, the United States could be bound to meet the criteria contained in the Specific Objectives.

4/ The same mandatory language was used in the 1972 Agreement, and no attempts were made to require absolute compliance. Therefore, although the literal language is "hard" it can be argued that the custom and useage of the language is more moderate. That is, "shall" can be interpreted as "should."

The criteria in the Special Objectives are not binding on the Parties under domestic law. The IJC recognizes this fact and has stated that the specific water quality objectives have "no effect in the domestic law of either country; they are not standards for enforcement purposes." (Notice of Public Hearing from IJC dated April 20, 1978). Accordingly, EPA's effluent limitations established pursuant to the Clean Water Act are the only standards that are legally enforceable within the boundaries of the United States.

The Agreement provides that programs for control of municipal sources of water pollution shall be in operation no later than December 31, 1982. (Article VI, para. 1(a)). It also calls for programs pertaining to industrial water pollution to be completed and in operation by December 31, 1983. (Article VI, para. 1(b)). These deadlines have been questioned as being stricter than those set out for compliance by individual dischargers in §301 of the Clean Water Act, 33 U.S.C. §1311. The Agreement only requires that the programs be completed and in operation, not that the facilities be constructed or operational by the deadlines. Thus, EPA cannot cite the Agreement as authority to require municipalities and industries in the Great Lakes area to comply with more stringent effluent limitations or treatment programs sooner than required by statute. Nor can outside domestic interests compel EPA to provide funds for earlier compliance than required by federal law and regulations.

While not legally binding on the parties domestically, the Agreement does affect the manner in which each country must approach water pollution control in the Great Lakes area. For example, the Clean Water Act contains several provisions which allow for a modification or waiver of compliance with effluent limitations, (Clean Water Act, §301(c), (g), 33 U.S.C. §1311(e), (g)). EPA regulations provide that variances may be granted allowing application of less stringent effluent limitations for individual types of industry (40 C.F.R. Subchapter N). In addition, there is authority to extend deadlines in certain instances, postponing compliance with water quality standards (Clean Water Act, §301(i)(2), 33 U.S.C. §1311(i)(2)). The principle that an executive agreement does not override prior or subsequent federal statutes allows EPA to grant variances, deadline extensions, and other modifications allowed by law. However, when considering an application for such a modification, consideration must be given to the "good faith" requirements of the Agreement. Accordingly, the Agreement may have a bearing on any determination to relax compliance with established standards.

Because the Agreement states that the programs and other measures shall be undertaken, the parties are pledging to each other to implement them in their respective countries. In order to be assured that the United States can fulfill its obligations to Canada; the Executive Branch should determine whether the requisite legislation currently exists in the United States to implement each program mandated by the Agreement. Where there is no legal authority to perform an obligation under the Agreement, the

Executive Branch must be willing to seek additional legislation or amendments to existing authorities e.g., the Clean Water Act. Article XI of the Agreement specifically states that the parties commit themselves to seek:

> b. The enactment of any additional legislation that may be necessary in order to implement the programs and other measures provided for in Article VI;. . .

Finally, in order to fulfill its obligation to act in good faith to Canada, the United States must not only be able to implement the mandatory programs as a matter of law but must intend to do so as a matter of fact. That is, not only must all the necessary legislation be in effect or sought but the Executive Branch must act pursuant to that legislative authority in its policies and guidance to implement the Article VI programs.

3. EPA, and the Executive Branch are Bound to Seek Appropriations and Legislation Pursuant to Article XI of the Agreement.

Article XI of the Agreement provides in part:

> 2. The Parties commit themselves to seek:
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> (a) The appropriation of the funds required to implement this Agreement, including the funds needed to develop and implement the programs and other measures provided for in Article VI, and the funds required by the International Joint Commission to carry out its responsibilities effectively;

This commitment, as does each commitment in the Agreement, binds the United States to act in good faith in fulfilling this obligation to Canada.

While no specific amount is designated in the Agreement, the sum sought by the Executive Branch must include one-half of the amount designated by the IJC as required to carry out its responsibilities. 5/ Article VIII, para. 4 states:

> 4. The Commission shall submit an annual budget of anticipated expenses to be incurred in carrying out its responsibilities under this Agreement to the Parties for approval. Each Party shall seek funds to pay one-half of the annual budget so approved, but neither Party shall be under obligation to pay a larger amount than the other toward this budget.

5/ Funding of the IJC and its regional office in Windsor, Ontario is handled through the annual State Department appropriations process.

Funds required to implement the programs enumerated in Article VI are appropriated on the basis of federal statutory authorization. Since the Agreement is subject to federal law with respect to domestic questions, the Executive Branch may only seek appropriations within statutory authorizations. Because the Executive Branch may only seek appropriations for funds which have been authorized by Congress, additional legislation authorizing funds may be required. For example, the Clean Water Act §207, 33 U.S.C. §1287 authorizes appropriations only through the fiscal year ending September 30, 1982. Accordingly, EPA may have to seek compatible authorization legislation and appropriations pursuant to the commitment made in Article XI, para. 2(b).