



United States Department of the Interior

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VIA Electronic Mail

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Re: United States Department of the Interior Comments on Revised Draft Feasibility
Study Report for the Rolling Knolls Landfill Superfund Site in Chatham, New Jersey

Dear Ms. Flanagan and Mr. Fajardo:

This letter follows up on the meeting held on August 15, 2018, between EPA Region II ("EPA") and the Department of the Interior ("DOI") and the United States Fish and Wildlife Service ("FWS"), to discuss the draft feasibility study ("FS") being developed by several companies¹ (the "PRP Group") under an administrative order on consent with EPA for the Rolling Knolls Landfill Superfund Site ("Site") in Chatham, New Jersey. During the course of the meeting, it was clear that there continued to be some outstanding issues that needed to be clarified, and DOI/FWS offered to provide additional information in order to facilitate the resolution of these issues. To that end, and to assist EPA in efficiently finalizing the feasibility study and moving forward with remedy selection for the Site, DOI has prepared the enclosed track-change version of the latest draft FS that specifically illustrates the changes FWS believes are needed to effectively evaluate remedial alternatives consistent with the Wilderness Act and other location-specific ARARs administered by FWS. (Attachment 1)

As I believe we indicated by e-mail, as we reviewed the FS, we had some questions about the current structure and some of the overall decisions made. The attached track-changes document includes suggestions for a reorganization we think makes the document clearer, and highlights our questions. While our primary concern is the FS as it relates to land managed by DOI, we have included these comments for your consideration as you seek to strengthen the final document.²

¹ Chevron Environmental Management Company, Kewanee Industries, Alcatel-Lucent USA, Inc., and Novartis Pharmaceuticals Corporation.

² For example, we believe that the FS could better explain how landfill closure requirements pursuant to the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, et seq., or state law are met in the alternatives being considered and how hot spot cleanup will result in adequately reduced risk at the site, given the alternate cleanup levels, multipliers, and exposure assumptions used. This is particularly significant for the area of the Site within the Refuge, since the exposure scenarios contemplated were developed only with trespassers in mind and are on the low end of

As we explained at the meeting and in our prior comments on the draft Development and Screening of Remedial Alternatives Technical Memorandum, in April 2017, the draft Feasibility Study, in February 2018 and June 2018, and multiple phone and in-person conversations, any remedial action that the EPA selects for the portion of the Site on the Great Swamp National Wildlife Refuge (“GSNWR”) wilderness area must comply with the applicable location-specific requirements of the Wilderness Act, the National Wildlife Refuge System Act, as amended, and other related federal laws. The FS must also be corrected to reflect the statutory and regulatory-mandated current and future use of the GSNWR wilderness area portion of the Site, which is passive recreation.³ We appreciate EPA’s acknowledgement of this future use requirement at our recent meeting.

We are sensitive to the fact that EPA and the PRP Group have been working on the RI/FS for this Site since 2005 and would like to conclude the process, however, FWS believes that the draft FS prepared by the PRP Group for the Site does not currently provide alternatives that comply with the Wilderness Act, despite statements in the draft document to the contrary and despite FWS’ work with EPA and the PRP Group for some years now to explain those requirements. EPA has expressed the view that compliance with the Wilderness Act is limited to the need to ensure that the use of such things as heavy equipment during implementation of the selected remedy will comply with restrictions imposed by the Refuge Manager. As explained below, this is simply not correct.

FWS believes that the FS must consider alternatives that remove or cap the waste within the Wilderness Area in order to comply with the location-specific requirements of the Wilderness Act. We further believe that such alternatives are more practical and less costly than the FS currently suggests, because of the availability of on-site capping material, which should be considered in the assessment of alternatives.⁴ As the attached track-change version illustrates, alternatives that incorporate these measures can be readily developed in the final FS based largely on information already available in the draft document.

The Wilderness Act

As you know, much of this Site is surrounded by an area of the GSNWR that has been designated by Congress as “wilderness,” to be administered by the FWS in accordance with the Wilderness Act (16 U.S.C. §§1131–1136).⁵ The purpose of the National Wilderness Preservation System established by the Wilderness Act is to ensure that areas identified by Congress as “wilderness areas” are “designated for *preservation and protection in their natural condition.*” 16 U.S.C. §

likely exposure for recreational users. Is there an additive value to these assumptions that may result in underestimating risk?

³ 50 CFR 35.2(b) states, “Except as otherwise provided by law, wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use and shall be administered in such a manner as will leave them unimpaired for future use and enjoyment as wilderness.” See also 16 U.S.C. § 1131(a).

⁴ EPA has suggested that consideration of on-site capping material can be addressed at the design phase. However, if alternatives are eliminated from further consideration because of the costs and community impact associated with trucking in capping material, those alternatives never get to the design phase, and may be eliminated based on incomplete or incorrect information.

⁵ Pub. L. 90-532, 82 Stat. 883 (1968).

1131(a). Federal law requires that these wilderness areas be administered “for the use and enjoyment of the American people in such manner as will leave them *unimpaired for future use and enjoyment as wilderness*, and so as to provide for the *protection of these areas, the preservation of their wilderness character*, and for the gathering and dissemination of information regarding their use and enjoyment as wilderness.” *Id.*

For wilderness areas on FWS-managed lands, FWS “*shall* be responsible for preserving the wilderness character of the area and *shall* so administer such area for such other purposes for which it may have been established as also to preserve its wilderness character.” 16 U.S.C. § 1133(b).⁶ *See also* 55 C.F.R. § 35.2(a). FWS has delegated these management responsibilities to refuge managers.⁷ While EPA has expressed concern regarding what it considers the nebulous quality of “wilderness” and “unimpaired” lands, as well as the requirements for such management, FWS, with its statutory authority for compliance with this law and decades of experience and expertise, and in cooperation with other federal agencies so authorized, has developed standards for understanding what non-impairment and “wilderness character” mean and how to protect and preserve these qualities. I have included here an attachment that excerpts from a number of FWS management documents several examples of management requirements and considerations for management of wilderness areas. (Attachment 2). For example, the FWS Refuge Management Manual, Part 610 (Wilderness Stewardship), identifies a number of specific tangible and intangible aspects of wilderness that are to “be a primary criterion for judging the appropriateness of proposed refuge management activities and refuge uses” and specifies the principles by which such areas are to be managed. *See* attachment 2 at 4-5. One of the “key principles” identified is to “[s]ecure “an enduring resource of wilderness” by maintaining and, where appropriate, restoring, a wilderness area’s biological integrity, diversity, environmental health, and wilderness character.” 610 FW 1.13, *see* Attachment 2 at 5. In addition, 610 FW 2.4 states that man-made structures or installations should be removed unless they meet certain requirements. *See* attachment 2 at 7.

In addition, refuge managers are well trained and have significant expertise in land management requirements and environmental conservation. The refuge manager is responsible for managing the wilderness area within the refuge consistent with the Wilderness Act, the wilderness area’s Congressional designation, the National Wildlife System Administration Act and all other federal laws applicable to management of this particular location. As the documents excerpted indicate, each wilderness area is “unique” and must be managed to address the specific

⁶ FWS is required to manage the wilderness area of the GSNWR in accordance with other applicable federal laws as well. In particular, FWS is required to manage this refuge area in accordance with the National Wildlife Refuge System Administration Act, as amended, 16 U.S.C. §§ 668dd – 668ee. This federal law requires FWS to manage and conserve the lands and waters within the National Wildlife Refuge System, and where appropriate, to restore “the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans.” 16 U.S.C. § 668dd(a)(2).

⁷ For example, the FWS Refuge Management Manual, Part 610 (Wilderness Stewardship) states in section 1.14 “For a refuge use proposed for designated wilderness areas, the refuge manager must first determine whether the use is compatible with the purposes of the refuge as well as the purposes of the Wilderness Act (603 FW 2). If the use is compatible, the refuge manager must analyze whether we can allow the use under the terms of the area-specific wilderness legislation and the Wilderness Act.” *See* Attachment 2.

circumstances of its particular location⁸, but that does not mean, contrary to EPA's assertion, that management of a wilderness area is left to the manager's personal "opinion." Rather, the refuge manager, in the exercise of his or her delegated statutory authority, relies on his or her professional judgment within the limits of well-established DOI policies, to achieve the legal requirements of the Wilderness Act taking into account the unique setting of a particular wilderness area. While FWS policy documents are not ARARs, the Wilderness Act is an applicable requirement that must be achieved. Responsibility for interpreting and implementing that act falls to FWS for FWS-managed lands, and FWS has the expertise to understand how to do that. Indeed, the National Wildlife Refuge System Administration Act requires the manager to make an determination that any activity proposed within his or her refuge, including any wilderness area, be "compatible" with the purposes for which the refuge was established and other controlling land management requirements. 16 U.S.C. § 668dd.

FWS is not suggesting that it has authority to select the remedy at an NPL site. It does, however, have an obligation to ensure that all activities undertaken on FWS-managed land, including CERCLA response actions, comply with all land management laws and regulations. Just as EPA is statutorily charged with final remedy selection for an NPL site, so FWS is charged with ensuring that all actions taken on FWS-managed land comply with the Wilderness Act and other land management laws. This is precisely why EPA and federal land management agencies have developed policies and principles for cooperation, to ensure that all agencies can comply with their respective obligations.⁹ As the agency responsible for administering the Wilderness Act at the Great Swamp National Wildlife Refuge, FWS is empowered to advise EPA Region II when alternatives developed in the feasibility study do not achieve this ARAR. While FWS has an obligation to explain the basis for its determination to EPA, its determination should be given deference by EPA given FWS's expertise in the administration of the wilderness area at the refuge in accordance with the Wilderness Act.

EPA Recognition of Wilderness Act Requirements

Both in guidance and in practice, EPA has recognized that CERCLA remedial actions must comply with location-specific applicable or relevant and appropriate requirements ("ARARs"), including the Wilderness Act. Multiple EPA guidance documents discuss adherence with the provisions of the Wilderness Act; to name just two, as we previously have noted, EPA's compliance with other laws manual directs EPA to consult with DOI with respect to compliance with the Wilderness Act, and EPA guidance specific to conducting an RI/FS for CERCLA Municipal Landfill Sites expressly recognizes the Wilderness Act requirement that wilderness areas must be left "unimpaired."¹⁰ Thus, EPA's guidance goes beyond requiring consultation with the refuge

⁸ See Keeping It Wild: An Interagency Strategy to Monitor Trends in Wilderness Character Across the National Wildlife Preservation System (July 2008), attachment 2 at 9-10, noting "This uniqueness means that change in wilderness character can only be understood in the context of a particular area and that it cannot be compared from one wilderness to another. Also, there can be no national numerical standard regarding wilderness character other than agency policy to preserve wilderness character relative to the time the area was designated as wilderness."

⁹ This is also why DOI has a policy requiring DOI concurrence with any EPA-selected remedy before a land manager may permit actions to be taken on DOI-managed land. We have also attached this policy statement, attachment 3.

¹⁰ EPA OSWER Directive 9355.3-11 (February 1991), *Conducting Remedial Investigations/Feasibility Studies for CERCLA Municipal Landfill Sites*, Section 5.2 (Compliance with ARARs) (stating in Table 5-2 that the location-

manager regarding non-intrusive remedy implementation, but specifically recognizes the need to address the fundamental purposes of the statute.

In addition, EPA, DOI, and USDA developed a Statement of Principles for Collaborative Decision Making at Mixed Ownership Sites in 2007¹¹ that acknowledged the important role that federal land management agencies ("FLMAs") play in establishing the "general purposes for which certain Federal lands are to be administered" and recognizes that "land and resource management plans are developed and implemented and accordance with statutory and regulatory requirements . . ."

Also notable is the Record of Decision that EPA and DOI jointly issued for OU3 of the Asbestos Dump Superfund Site within the same GSNWR wilderness area. At that Site, EPA acknowledged the requirements of the Wilderness Act, and in particular the non-impairment standard, in remedy selection. That ROD, in the Compliance with ARARs section, noted: "a remedial alternative that leaves site conditions largely unchanged is considered inconsistent with location-specific ARARs or TBCs that address management of general public use of National Wildlife Refuge Systems under Executive Order 12996, management of wilderness areas under the Wilderness Act and specifically management of the GSNWR Wilderness Area under the Great Swamp NWR Wilderness Area Act." ROD, pg. 30. The selected remedy for OU3 was the same waste consolidation and capping approach that FWS recommends for Rolling Knolls Landfill, and the OU3 area is now unimpaired for future use and enjoyment, as required by Wilderness Act.

FWS is not requesting anything extraordinary for the Rolling Knolls site. Rather, our comments simply show how the remedy selection process needs to progress in a manner that is consistent with applicable statutes and regulations, EPA's own guidance, and EPA past practice.

A final FS prepared consistent with FWS's suggested revisions, as well our prior comments and correspondence, will allow EPA to select a remedy that complies with location-specific ARARs administered by FWS. We would like to schedule a conference call at your earliest convenience to discuss these recommended revisions and answer any questions you may have regarding compliance with the location-specific ARARs associated with the wilderness area at the Site.

Sincerely,



Lois Godfrey Wye
Assistant Solicitor

cc (via email): Betsy Donovan, EPA Region II, Remedial Project Manager
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specific requirement under the Wilderness Act is that the "[a]rea must be administered in such a manner as will leave it unimpaired as wilderness and to preserve its wilderness character").

¹¹ EPA OSWER Directive 9200.06-1

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Enclosures