

October 7, 2008



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL OCEAN SERVICE
Office of Response and Restoration
Silver Spring, Maryland 20910

Mr. Richard Seiler
State Lead Administrative Trustee
Texas Commission on Environmental Quality, MC 225
P.O. Box 13087
Austin, Texas 78711-3087

Dear Mr. Seiler:

The U.S. Department of the Interior (DOI) and the National Oceanic and Atmospheric Administration (NOAA) have reviewed the restoration actions outlined in the "Draft Restoration Plan/Environmental Assessment for the Greens Bayou Site, Harris County, Houston, Texas" (Draft RP/EA) for consistency with the Texas Coastal Management Program (TCMP) and have found that the restoration actions described therein are consistent to the maximum extent practicable with the applicable enforceable policies of the TCMP, and that they would otherwise be undertaken in a manner consistent with that approved coastal zone management program. This letter submits that determination to the State Trustee agencies¹ for review. NOAA and DOI understand that review of this determination is delegated to these State Trustee agencies by 31 T.A.C. 506.20(c).

Background

The Greens Bayou Site (the 'Site') consists of industrial facilities owned and operated by GB Biosciences Corporation and ISK Magnetics, Inc., surrounding industrial and undeveloped properties, the Harris County Flood Control District (HCFCD) ditch, and Greens Bayou. Historically the facility was owned and operated by Occidental Chemical Corporation. Haden Road roughly divides the Site into two parcels consisting of the operating facilities (approximately 134 acres) and a largely undeveloped tract of land (approximately 83 acres). Surface water from the Site is conducted in the HCFCD ditch, a lined culvert, where it flows through the facilities from north to south, then turns southwest near Haden Road and terminates at Greens Bayou. The HCFCD ditch was tidally influenced in the southern sections until a sediment retention dam was constructed at the mouth of the ditch in 2002. Greens Bayou flows east through an industrialized area before turning southwest prior to entering the Houston Ship Channel approximately 20 miles northeast of its confluence into Galveston Bay.

Historically, hazardous substances were improperly disposed of and released into the environment – both on Site and in surrounding areas. Studies have revealed the presence of DDT and other hazardous substances in groundwater, soil, and sediment in the HCFCD ditch, in the surrounding properties, and in Greens Bayou. A significant source of this contamination was the HCFCD ditch, which likely received untreated process water, storm water, and ground water containing hazardous substances from the facility. The HCFCD ditch receives and conducts water from the Site before entering into Greens Bayou. In an effort to mitigate further impacts

¹ The Texas Commission on Environmental Quality (TCEQ), the Texas Parks and Wildlife Department (TPWD), and the Texas General Land Office (GLO).



from contamination in the HCFCD ditch, a sediment retention dam was installed at the confluence of the ditch and Greens Bayou.

Paralleling TCEQ's remedial investigations for the Site, NOAA and DOI joined with the State Trustees in an effort to assess the natural resource injuries and service losses attributable to hazardous substances releases at the Site. The Trustees determined that two categories of injury resulted at the Greens Bayou Site, injury to bayou sediments and injury to terrestrial forested wetlands/grasslands. Approximately 6.9 acres of benthic habitat in Greens Bayou were impacted by hazardous substances historically released from the Site. This area and approximately 12.4 acres of additional benthic habitat will likely be impacted by the remedial actions at the Site. The creation of the Confined Dredge Disposal Facility to manage sediments dredged as part of the remedial activities will result in the destruction of approximately 33.6 acres of wooded wetlands and grassland habitats. The work undertaken by the agencies indicated that construction of 10.9 acres of vegetated intertidal wetlands and preservation of 100 acres of forested wetland in the upper Galveston Bay, Buffalo Bayou, or San Jacinto River watersheds would be needed to compensate for these injuries and losses. On the basis of this information, the Trustees negotiated a settlement of state and federal natural resource damage claims related to the Site in which the PRPs would implement marsh construction and forested wetland preservation projects.

The Draft RP/EA proposes the following projects for use to restore the ecological service losses attributed to the Site:

Preferred Restoration Alternatives: Marsh creation in the Baytown Nature Center through excavation of fill material overburden and filling of adjacent submerged areas to achieve intertidal elevations. Terrestrial uplands will be excavated to elevations similar to adjacent marshes. Material will be excavated from the artificial upland areas using a combination of backhoes and bulldozers. Some removed soil will be deposited in adjacent shallow open water areas to increase existing elevations to levels that will support emergent wetlands. This action is expected to provide approximately 10.9 acres of intertidal flats which will be planted using plugs of smooth cord grass.

The wetland construction efforts would be designed to increase tidal exchange, thereby increasing the benthic productivity of the project area and to create an additional 10.89 acres of sustainable, functionally equivalent brackish marsh habitat.

The Trustees also propose a fee simple acquisition of 100 acres of forested wetlands in the Spring Creek Greenway threatened by development for sand and gravel mining, timber harvesting, and residential housing construction. The property will be acquired from a willing seller with clear title, with title to be held by the government of Montgomery County. A conservation easement for the same property will be held by Legacy Land Trust, and conservation easement fees will be provided for baseline biological monitoring, annual monitoring, and legal enforcement of the easement provisions. Third party rights of enforcement will also be retained by the Texas State Trustees and USFWS.

The goals of the preferred project are (1) to remove the potential for mining, timber, or residential development of the property currently threatening the ecological integrity of the site, and (2) to ensure the continued provision of ecological services from the preserved property comparable to those lost due to injury to natural resources associated with the planning and implementation of the CDF.

A copy of the Draft RP/EA is enclosed with this letter and is on file with each of the State Trustee agencies involved in its development.

Summary of CZA Analysis

The principle policies of the TCMP that are potentially relevant to the marsh creation and forested wetland preservation actions described in the Draft RP/EA are those at 31 T.A.C. 501.14 (e) – relating to the prevention, response, and remediation of oil spills, (h) – relating to development in areas designated as critical, (i) – relating to construction of waterfront facilities and other structures on submerged lands, (j) – relating to dredging and the use of dredged material disposal and placement, (m) – relating to the development within the coastal barrier resource system, (o) – relating to the alteration of coastal historic areas, and at 501.15 – relating to policy for major actions. The basis for our determination of consistency with these enforceable policies is reflected in the following summaries.

(1) Prevention, Response, and Remediation of Oil Spills – Subsection 501.14(e) – This section requires that a restoration plan provide for participation by the public and be designed to promote the restoration of injured resources with all deliberate speed. While the identified restoration actions are not proposed in response to an oil spill, but rather to restore resource losses due to releases of hazardous substances at a state Superfund site, we elected to note our adherence to this policy, in the event the general policy is intended to apply to all damage assessment and restoration plans.

The Draft RP/EA is consistent with this section's policy as it is being released for public review and comment. The Draft RP/EA provides the public with information about the nature and extent of the natural resource injuries and losses attributed to Site releases, including the methods and analyses used to define and quantify those losses, and on the restoration alternatives considered and on the restoration actions which the Trustees have identified as preferred for use to restore, replace or provide for natural resources or services equivalent to those lost. The opportunity for public review and comment on the restoration actions proposed therein is an integral component of the restoration planning process for this Site accomplished through release of this document. The availability of the document for a 30-day period of public review will be announced in October 2008, the date of its release, by notice published in the Texas Register. Public comments on the proposed restoration plan will be considered by the Trustees before the restoration is finalized.

The restoration actions proposed in the Draft RP/EA address the resource service losses of an ecological nature which the Trustees have attributed to Site releases, including based on the remedial actions undertaken. They are consistent with the restoration policy outlined in this subsection as each of these restoration actions would create ecological services of a type and quality comparable to those lost.

(2) Development in Critical Areas – Subsection 501.14(h) – Critical areas under the TCMP include coastal wetlands, seagrasses, tidal sand and mud flats, oyster reefs and hard substrate reefs. The policies embodied in 501.14(h) govern dredging, the construction of structures, and the discharge of dredge or fill material into critical areas. Projects in critical areas are to avoid and minimize, to the greatest extent practicable, adverse effects on these areas. DOI and NOAA believe that the restoration actions proposed in the Draft RP/EA are consistent with the policies outlined in this subsection. The proposed restoration project will not be sited in or will not displace any such habitat areas. Rather, the project will restore marsh habitat to an area of the upper Galveston Bay watershed where it once flourished but was gradually lost due to subsidence, development, erosion and saltwater intrusion caused by anthropogenic activities in the area. Marsh creation would occur on submerged sediments in areas which today are predominately open waters. Implementation of the project is unlikely to give rise to any risk to adjacent or nearby wetlands, and the potential for any temporary effects during construction will be managed and minimized through the established consultations, reviews, permitting and/or certification processes which will apply to project implementation. The action proposed will increase the amount, function and value of critical areas in the Texas coastal zone.

(3) Construction of Waterfront Facilities and Other Structures – Subsection 501.14(i) - The policies in this section are applicable to development actions on submerged lands within the TCMP boundary. Among other things, these policies seek to avoid adverse effects on critical areas from boat traffic, to avoid unnecessary interference with public navigation, recreation or with key uses by wildlife, to avoid interfering with natural processes which supply sediments to shoreline areas, and to avoid impounding or draining wetlands. The outlined policies favor the use of natural or ‘clean’ materials in construction, sediment berms and planting of vegetation for erosion control, and actions which are water dependent, serve a public purpose or contribute to the enhancement of coastal water quality, critical areas, submerged lands or shore areas.

To the extent that the restoration action proposed in the Draft RP/EA involves development actions on submerged lands, each is within the scope of favored actions. Only natural or clean materials (sediments, vegetation, rock) are contemplated for use in this marsh construction project. The creation of estuarine marsh will involve the placement of clean sediment material on submerged areas. The material utilized for this purpose will be obtained by excavation of adjacent terrestrial uplands of fill material overburden. While these activities will take place on submerged lands, each will enhance and contribute positively to water quality and ecosystem function, while also increasing the quantity and value of critical areas within the TCMP. The restoration action would not adversely affect public navigation and would benefit other adjacent or near-by wetland areas, area wildlife, public recreation, or other natural ecological processes in this system. Therefore, DOI and NOAA believe that the restoration action proposed is consistent with this subsection of the TCMP.

(4) Dredging and Dredged Material Disposal and Placement – Subsection 501.14(j) - The policies outlined in this subsection are intended, to the extent practicable, to avoid and minimize adverse effects of these activities to coastal waters, submerged lands, and coastal shore areas. Further, 501.14(j) (4) is explicit in favoring beneficial uses of dredge material. Any material dredged in order to implement this project will only be used beneficially, i.e. to create estuarine marsh. Any potential adverse effects will be avoided, or managed and minimized during project

implementation. The proposed restoration project is subject to and will be carried out in accordance with all applicable State and federal laws, including those pertaining to dredging and/or the disposal and placement of any dredge material. Operational compliance with the policies outlined in 501.14(j) will be achieved through the established consultation, review, permitting and/or certification processes which will apply to project implementation as well as through Trustee oversight during implementation. Therefore, DOI and NOAA believe that the restoration action is consistent with this subsection of the TCMP.

(5) Development Within the Coastal Barrier Resource System – Subsection 501.14(m) – This section applies to the development of new infrastructure or the major repair of existing infrastructure within or supporting development within the Coastal Barrier Resource System Units and Otherwise Protected Areas under the U.S. Coastal Barrier Resources Act (COBRA) 16 U.S.C. 3503 (a). The restoration project proposed in the Draft RP/EA does not include new infrastructure or the major repair of existing infrastructure that will support development. Thus, NOAA and DOI believe this TCMP section is inapplicable.

(6) Alteration of Coastal Historic Areas – Subsection 501.14(o) – NOAA and DOI know of no areas designated as Coastal Historic Areas by the State in the vicinity of the proposed restoration site. Accordingly, NOAA and DOI believe the proposed restoration action will not affect any areas designated by the State as Coastal Historic Areas.

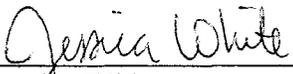
(7) Policy for Major Actions – Under the TCMP, a “major action” is “an individual or agency or subdivision action relating to an activity for which a federal environmental impact statement (EIS) under the National Environmental Policy Act is required.” [31 T.A.C. 501.15(a)]. Under the major actions policy, agencies and subdivisions with jurisdiction over the activity must meet and coordinate their actions and, to the greatest extent possible, consider the cumulative and secondary adverse effects, as described in the federal environment impact assessment process, of each major action relating to the activity [31 T.A.C. 501.15(b)]. An agency subject to the major actions policy may not take an action that is inconsistent with the TCMP goals and policies and must avoid and otherwise minimize the cumulative adverse effects to coastal natural resource areas of each major action [31 T.A.C. 501.15(c)]. Consistent with federal NEPA requirements, an environmental assessment of restoration alternatives was incorporated in the Draft RP/EA. Based on that assessment, NOAA and DOI have preliminarily concluded that the actions proposed in the Draft RP/EA will not have any significant impacts on the quality of the human environment, including to coastal natural resources. Unless significant impacts are revealed through the public comments on the proposed restoration actions, however, DOI and NOAA will finalize their assessment and finding of no significant impact. Based on the current assessment, however, NOAA and DOI do not believe the major actions policy outlined in this subsection of the TCMP will apply to the restoration actions outlined in the Draft RP/EA.

Conclusion

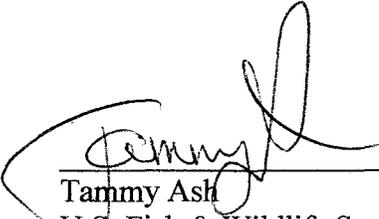
This letter comprises and outlines the basis for NOAA and DOI’s determination that the restoration actions described in the Draft RP/EA are consistent to the maximum extent practicable with the applicable enforceable policies of the TCMP, and would otherwise be undertaken in a manner consistent with that approved coastal zone management program. An

expeditious review of this determination by the State Trustee agencies is requested. If you have any questions or need any additional information, please feel free to contact Jessica White at 214-665-2217.

Sincerely,



Jessica White
National Oceanic and
Atmospheric Administration



Tammy Ash
U.S. Fish & Wildlife Service
Department of the Interior

cc: Ms. Diane Garcia, Council Secretary – Coastal Coordination Council
Keith Tischler, Texas General Land Office
Don Pitts, Texas Parks and Wildlife Department