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Convening Report
on the Feasibility of a
Mediation Process to Determine
a Future Remedy for the McKin Superfund
Site
Gray, Maine

U.S. Environmental Protection Agency,
Region I

Submitted by

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Convening Report on the Feasibility of a Mediated Process to Determine a Future Remedy for the McKin Superfund Site, Gray, Maine

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Convening Report for a Mediated Process to Determine a Future Remedy for the McKin Superfund Site, Gray, Maine

INTRODUCTION

This report describes the findings and recommendations of Susan Podziba & Associates, the neutral convener, regarding the feasibility of initiating a mediated process to develop a future remedy for the McKin Superfund Site in Gray, Maine. The current remedy, a Groundwater Extraction and Treatment System (GETS), was temporarily turned off in October 1995, and the U.S. Environmental Protection Agency (EPA) and the Maine Department of Environmental Protection (DEP) (hereafter referred to together as "the Agencies") and the Potentially Responsible Parties (PRPs) have been in discussions since then regarding a technical impracticability (TI) waiver to permanently shut down the GETS. This convening report is divided into sections on background, feasibility, substantive issues, procedural issues, public involvement, PRP communications, participation, protocols and procedures, process design, schedule, financing arrangements, and conclusion.

BACKGROUND

In 1985, EPA issued a Record of Decision (ROD), which set forth a cleanup plan for the McKin Superfund Site. The ROD required the cleanup of contaminated soils on the site and the restoration of the groundwater to specified standards. In 1988, the Agencies entered into a Consent Decree under which a group of approximately 120 PRPs, consisting of large industrial businesses, small businesses, towns, school districts, hospitals, churches, and government agencies, agreed to fund and perform the work set out in the ROD. (Approximately 180 small parties accepted the option of settling their liability with a one-time cash payment for work at the site.) The DEP waived its right to sue for natural resource damages based on the belief that the aquifer would reach drinking water standards within five years.

The PRPs spent \$6.5 million to successfully clean the soils at the site. In 1990, as required under the ROD, the PRPs installed the GETS to cleanup the groundwater to specified standards. It was expected that this would take five years. After constructing and operating the GETS for four-and-a-half years, at a cost of \$5.2 million, in October 1995, the PRPs requested, and were granted permission by the Agencies, to temporarily turn off the system pending a determination of its effectiveness.

Since that time, the PRPs have been working on a Technical Impracticability (TI) Report to provide EPA and DEP with the information they need to determine whether it is possible to restore the groundwater to the standards required in the ROD within a reasonable cost structure, and if it is not, the alternatives that should be employed to ensure the protection of human health and the environment.

After three drafts of the TI Report, the PRPs and the Agencies still do not have a common view of the movement of the contaminants through the aquifer, and

therefore, of the potential effectiveness of an engineered remedy. All parties generally agree that the groundwater cannot be cleaned to the standards specified in the ROD in a cost-effective manner, but they disagree over the ability to achieve, the need for, and the impact of, some reduction of TCE contamination.

The Agencies and PRPs are currently at an impasse in their discussions over the issuance of the TI waiver. Though the Consent Decree contains a dispute resolution clause under which the PRPs and the Agencies can file lawsuits against each other, the Agencies and the PRPs are interested in initiating a mediation process to determine a future remedy for the McKin Site that would include representatives of the Agencies, the PRPs, the Town of Gray, the affected residents of East Gray, local environmentalists, and the affected water districts.

Susan Podziba & Associates, a subcontractor to RESOLVE, Inc. under its contract with EPA to provide neutral services, was asked by EPA to investigate the feasibility of a mediated process. Susan Podziba & Associates has interviewed approximately 45 representatives of the PRPs, local governments, local water districts, concerned citizens, local environmentalists, the affected neighborhood, the State of Maine, and the Agencies to determine:

- the principal categories of stakeholders that are affected and interested in the future remedy of the McKin site;
- the key issues from their perspectives;
- whether representatives of stakeholders are willing and able to participate in the mediation process recognizing the inherent time and resource demands; and
- who can best represent the views and perspectives of each group in the mediation.

FEASIBILITY

Based on the interviews, Susan Podziba & Associates believes that a mediated process to determine a future remedy for the McKin Superfund Site has a reasonably good chance of resulting in consensus. To be sure, there are strong differences of opinion on key aspects of data analysis concerning the contaminated aquifer in East Gray. However, there appear to be opportunities for agreements on the development of a comprehensive remedy for the McKin site that will satisfy the interests of all the stakeholders. There is a high degree of interest in participating from all the identified stakeholder groups.

An additional positive aspect of using a mediated process is the opportunity to clarify, for all the stakeholders, the existing information regarding the site contaminants, specifically TCE, as well as information regarding the analysis of the discharges and pathways of TCE into the groundwater. In many instances, the information available to some stakeholders has been sparse and/or confusing.

No matter how propitious the prospect for consensus, there is always uncertainty in prejudging outcomes of mediation processes, particularly when potentially opposite points of view must be reconciled. The desire, on the part of a number of stakeholders, for a compressed schedule may provide an additional constraint. Thus, the challenge for all the participants will be to demonstrate the commitment to, and necessary flexible attitude for, working together as a problem-solving team at the earliest possible point in the process. The parties have indicated that they are willing to put forth the effort necessary to achieve the objectives.

On balance, Susan Podziba & Associates believes that a mediation process is likely to improve the quality and efficiency of the development of a future remedy for the McKin Superfund Site.

SUBSTANTIVE ISSUES

Key Issues Identified By Stakeholder Group

The Agencies. The key concern of the EPA and DEP is to cleanup the site, if possible, and if it is not possible to remediate the site, then their interest is in exploring mitigation and/or containment options to improve the conditions of the groundwater, even if it cannot meet the standards specified in the ROD, and to develop a series of reliable institutional controls to protect human health and the environment as impacted by the site. To date, they have not been convinced of the lack of effectiveness of the GETS nor of the analysis provided by the PRPs concerning the movement of TCE in the groundwater. The Agencies consider the information provided in the TI Report to be biased against any technological remedies and to offer insufficient institutional controls given the expected 200-year timeframe for natural attenuation.

PRPs. The PRPs key concern is that they not be required to implement a costly remedy that does not have a significant impact on human health and the environment. They are convinced that the current GETS and similar engineered remedies to attempt to remove significant quantities of TCE from the groundwater are either technically impossible or impracticable relative to cost. The PRPs are willing "to do the right thing at this site," but do not want to "throw good money after bad." They are frustrated over dollars spent on studies and legal fees and want to spend their limited resources on activities that will have a real impact on the lives of the affected parties, specifically the people of the Town of Gray.

Local Environmentalists. The local environmental group is most concerned about TCE moving from the contaminated aquifer into the Royal River. They are concerned about a lack of data on the impact of TCE on the river and identified the need for a characterization of the river during high and low flow periods. The local environmentalists are mindful of the resources spent by the PRPs with seemingly little impact, but still want to ensure the protection of the river.

Town of Gray. The key concern of the Town of Gray is to ensure a safe water supply for all its residents now and into the future. The affected residences of East Gray were

connected to the town water system after TCE and TCA were identified in their private wells. The Town wants to ensure that any residences with wells potentially at risk because of the movement of the TCE plume will be tied into the public water system. The Town of Gray is frustrated by the resources expended for the seemingly ineffective GETS. They feel that money would have been better spent securing a future water source to protect the water supply of its residents and to find an additional water source to support future development. The Town is also concerned about contamination of the Royal River.

Water Districts. The Gray and Yarmouth Water Districts want to ensure the safety of their existing and future water supplies for their customers. As a result of the establishment of the East Gray Water System, the Gray Water District is at capacity. To ensure that it will continue to be able to provide water to support future development in Gray, the water district needs to identify additional water sources and develop additional pumping and storage facilities. The Yarmouth Water District, which provides water for the Towns of Yarmouth and North Yarmouth¹ is currently expanding and is studying an aquifer near the Royal River. If it selects this site, the pumping system will need to be built to ensure no feeding of the aquifer from the Royal River. This is likely to increase the costs of the construction and operation of the pumping station. The Yarmouth Water District is also concerned about the loss of water rights as a result of contamination from the McKin site. Finally, the water districts are concerned about possible negative public perceptions of their water supplies.

Residents of East Gray. The residents of East Gray are satisfied that they have secure and safe drinking water, however, they want to be sure that newcomers to the area know not to dig and use wells on their property. They want good information regarding the available technical remedies and institutional controls and have concerns about the Royal River. Some expressed concern about a stigma to the area and a desire for closure with regard to the site.

Key Issues Identified Across Stakeholder Groups

Information on the Effects of TCE. Among some of the stakeholders, there is a fair amount of confusion regarding the effects of TCE. One point of confusion is, for example, whether or not EPA considers it a carcinogen.

The TI Report. The Agencies and the PRPs have been entangled in writing and revising the TI Report since October 1995, when the Agencies allowed the PRPs to temporarily turn off the GETS. After three drafts and responses to hundreds of comments, the Agencies and the PRPs have been unable to agree on some significant substantive issues in the report. An attempt by the PRPs to hire an additional technical consulting team to verify the findings of the first, led to new theoretical constructs and

¹ The Towns of Yarmouth and North Yarmouth do not consider themselves to be key stakeholders regarding a future remedy at the McKin Superfund Site. However, both town managers have asked to be put on mailing lists to be kept abreast of the mediation process.

conclusions, which led to additional questions and requests for information on the part of the Agencies, which led to more frustration for the PRPs and so on and so forth. It has been described by some as “an infinite do loop.” The central disagreement in the report concerns the conceptual model, which describes the movement of TCE in the affected groundwater aquifer, specifically through fractured bedrock and the overburden. Many of the stakeholders are not aware of the specifics of this disagreement nor of its implications. Some have indicated that the question of this conceptual model may not need to be resolved to determine a future remedy for the site.

In addition, the Agencies and PRPs disagree over cost analyses and estimates of the effectiveness of particular options, both engineered and institutional controls. Thus far, the Agencies have determined that the document does not lay the groundwork to support its conclusions and therefore, have not granted the TI waiver.

It is expected that the upcoming draft of the TI Report will list out the “universe of options” along with an estimated range of cost and effectiveness for each. Such a report, especially if it can be condensed into a series of charts, will provide a sound basis for beginning the discussion of options during the mediation.

Recalcitrant PRPs and the potential for a dissolution of the trust. Some of the PRPs have not paid their recent assessments because of frustration over the lack of a clear direction on a resolution for the site. Some PRPs are concerned about the potential for the dissolution of the McKin Trust if numerous PRPs become recalcitrant. The Trustees may resign because they do not want to spend Trust money suing recalcitrant PRPs.

Perceived ability of the Agencies’ staff to recommend difficult decisions and provide leadership. There is concern about the authority and/or willingness of the Agencies’ staff to recommend what may be an unpopular political decision. Some perceive the Agencies’ staff as unwilling to recommend a decision in favor of natural attenuation even if it is impracticable to employ a technical remedy to remove significant levels of TCE from the groundwater. Some are concerned that the Agencies are asking the public to make decisions rather than providing leadership to the public regarding a future remedy for the site.

Significant Environmental Impact. There is general agreement among the stakeholders that the groundwater cannot be cleaned up to the standards specified in the ROD in a cost-effective manner. Some of the PRPs read the ROD to indicate that if they cannot reach the levels stipulated in the ROD, they are then freed of their commitment to clean the aquifer. Other stakeholders believe that even if it is impossible to clean the groundwater to the stipulated standards, the PRPs should employ methods to reduce the contamination levels in the groundwater. The central questions of this issue are, what is a significant environmental impact relative to reduced levels of TCE in the groundwater, and what costs are reasonable to reach significant levels of environmental improvement?

Additional Information. There are some questions that will not be answered to levels of certainty regardless of how much data is collected. However, some stakeholders

have identified a need for additional data, specifically with respect to a characterization of the Royal River during a period of low flow.

Boiling Springs. In the Boiling Springs area, there is a concentrated discharge of TCE. Many interviewees suggested that this may be an area where a cost effective technical remedy may have a significant environmental impact.

Personalities. There is a belief on the part of many of the interviewees and stakeholder groups that personalities may be reducing opportunities for a possible resolution at this site.

Potential for Litigation under the Dispute Resolution Clause. None of the stakeholders want to incur the costs associated with litigation. Virtually all the parties believe that a negotiated resolution is possible. However, the PRPs will not willingly implement a costly remedy that they believe will not have a significant impact on human health and the environment, and the Agencies will only agree to a remedy that they have determined to be environmentally and legally defensible.

PROCEDURAL ISSUES RELATED TO THE MEDIATION PROCESS

There are three procedural issues that should be considered.

Schedule. There is a strong desire on the part of a number of stakeholders to move forward at a reasonably fast pace to complete the plan for a future remedy within a reasonable timeframe.

Technical Assistance Grant (TAG). EPA will provide TAG money to support the Gray Water District and environmentalists during the mediation process. These resources should be secured prior to the start of the mediation process to ensure that these parties have access to good technical advisors, which will allow them to evaluate options and participate in the process with good information.

PRP September Assessments.² A great deal of concern was expressed regarding the September assessment for the PRPs. It was hoped that this would be the final assessment, and there is concern that many more PRPs will become recalcitrant in their payments. Some PRPs believe it may be possible to delay the assessment pending the outcome of the mediation. In this situation, the PRPs with larger volumetric assessments may provide the funds necessary to cover expenses during the mediation process.

PUBLIC INVOLVEMENT

² PRPs are periodically assessed to pay for the costs associated with the cleanup of the McKin Superfund Site. Assessments are based on the volumetric amount of contaminants each PRP sent to the site.

Susan Podziba & Associates recommends the implementation of the following steps to inform the public of the mediation process to develop a future remedy for the McKin Superfund Site and to provide opportunities for public involvement.

Residents of Gray

Letters. The Town of Gray, either through its town manager or its town council, should communicate with its residents about the mediation process, primarily through a series of letters mailed directly to residences. Susan Podziba & Associates recommends that a minimum of three letters be sent to Gray residents. The first letter should inform the community that the Town will be participating in a mediated process to determine the future remedy for the McKin Superfund Site. It should identify the town's interests with regard to the future remedy and include information about who to contact for additional information, a list of the process participants, and the site summary developed by EPA, DEP, and the PRPs.

Susan Podziba & Associates recommends that a second letter be sent to Town residents when the process participants have completed a draft proposal for the future remedy for the McKin site. It should include a summary of the key aspects of the proposal and identify a way for people to access additional information. A third letter should be sent out when agreement has been reached on the future remedy. It should outline the key elements of the agreement.³ The second and third letters may be joint letters from all members of the team working to develop the future remedy.

Gray News. This local paper, which is delivered free to every home and business in the Town of Gray, has been identified as a good way to inform the community of developments during the mediation process.

Cable TV. The Town may use its community access channel to hold call-in cable TV shows about the future remedy of the site. The show would include a presentation of information and allow people to call in with questions. This element of communication with the town should be considered, based on the level of Gray resident subscriptions to cable television.

Public Meetings. Susan Podziba & Associates recommends that a public meeting be held shortly after the draft proposal is sent to the residents of Gray. This meeting should be designed as informational, that is, to answer questions about the proposal, as well as to get comments on the proposal. Expectations about how public input will be used should be made clear to the attendees.

EPA/DEP

Letters. EPA and DEP have lists of people who have written to the Agencies at various times during the life of the McKin Site. Although some of these individuals may no

³ If the process participants fail to reach an agreement, the letter should indicate the issues that could not be decided, and the next steps to be taken by the Agencies and the PRPs.

longer have an interest in the McKin Site, Susan Podziba & Associates recommends that the Agencies' community relations departments send letters to them to provide updates on its status relative to the mediation process. The Agencies may choose to update these individuals with additional letters in a manner similar to the Town.

PRP COMMUNICATIONS

Some PRPs indicated that they do not feel well-informed of the McKin cleanup activities. To address this concern, Susan Podziba & Associates recommends the implementation of the following steps to ensure communication with the PRPs.

Letters. Susan Podziba & Associates recommends that the PRP representatives communicate with the entire group of PRPs through a set of letters similar to those that the Town of Gray will use to communicate with its residents. The letters should include the information described above. As noted above, the second and third letters may be prepared jointly with the other stakeholders.

Informational Meeting. Similar to the town of Gray Public Meeting, Susan Podziba & Associates recommends that the PRPs invite the entire group of PRPs to an informational meeting to discuss the draft proposal and to get feedback on it.

PARTICIPATION

Susan Podziba & Associates identified seven categories of stakeholder interests for the mediation process to develop a future remedy for the McKin Superfund Site. Thus, a primary goal in selecting membership has been to ensure that the final committee represents a fair balance both among and within each of these interest groups.

In some instances, where noted, the individual identified is a contact person for identifying an individual to represent that stakeholder or is the proposed representative subject to agreement by others in that stakeholder group. In addition, with the exception of the Agencies, stakeholders preferred to represent themselves directly during the mediation and to be supported by their counsel rather than have their counsel speak for them.

Based on the interviews, the suggestions of numerous people, a stated willingness to fully participate and operate by consensus, and in consideration of the issues described above, Susan Podziba & Associates believes the following individuals would represent an appropriate mix of interest and backgrounds for the mediated process. The members of the proposed "McKin Future Remedy Team" (Team) are listed here as members of the groups with whom they are primarily affiliated.

EPA

- Beth Tomasello, Regional Counsel
- Terry Connelly, Site Manager

- support from superiors⁴

State of Maine

- Rebecca Hewett, DEP
with support from superiors⁴
- Dennis Harnish, Office of the Attorney General

PRPs

- Kevin Gildart, Bath Iron Works, PRP Trustee⁵
supported by Ron Hausmann, Esq., Coke Cherney, Esq., and John Sevee,
technical expert
- Jim Kohler, Lockheed Sanders, PRP Trustee⁵
supported by Ron Hausmann, Esq., Coke Cherney, Esq., and John Sevee,
technical expert
- Roger LeJeunesse, Winthrop School Department
supported by Jim Katzifikas, Esq.
- Father John Keagen, Chevrus High School
- State of Maine.⁶ The contact person is Elizabeth Butler, Office of the Governor.

Town of Gray

- Town Councilor.⁷ The contact person is Audrey Burns, Council Chair.

⁴ The question of the authority of the staff and their ability to potentially recommend a politically unpopular decision will have to be addressed at the outset of the mediation so that all the stakeholders perceive the process as a legitimate attempt to resolve the question of a future remedy. The Agencies' staff will need to determine the mechanisms for briefing and engaging their superiors, including the possibility of guest appearances by superiors at certain junctures in the process.

⁵ The PRP Trustee representatives have been selected subject to agreement by the other Trustees.

⁶ The Governors' Office will select an appropriate person, most likely from one of the state agencies that is a PRP.

⁷ The Gray Town Council representative will be selected by the Town Council. This is slightly complicated by the fact that there is a June election and the current Chair

East Gray Residents

- Karen Sanborn, resident
- Mike Wilson, Wilsondale Farms

Water Districts

- James Foster, Gray Water District supported by Jack Erler, Esq.
- Robert MacKinnon, Yarmouth Water District

Environmental

- John MacKinnon, Friends of the Royal River
- Kathy Lamar (formerly Kathy Hinds)⁸, Military Toxics Project

Susan Podziba & Associates believes that the participation recommended above would constitute an excellent Team for the development of a future remedy for the McKin Superfund Site.

PROTOCOLS AND PROCEDURES

Susan Podziba & Associates recommends that the McKin Future Remedy Team operate on a consensus basis. In consensus processes, agreements reached by the group must be adopted unanimously. This helps to ensure that recommendations adopted by the group are truly representative of all interests and that opportunities for future action are not undermined by different groups producing majority and minority reports.

At its initial meeting, the Team should develop procedural groundrules that will govern its discussions and negotiations. It is recommended that the mediator selected by the parties⁹ provide the Team with draft groundrules prior to that meeting to serve

of the Council will be leaving office. The person selected will be responsible for official communications with residents of Gray.

⁸ Ms. Lamar is a former resident of East Gray and was instrumental in bringing federal and state attention to the McKin Site. She has remained active with regard to the McKin site and currently works on a range of environmental issues.

⁹ The parties are in the process of interviewing and considering potential mediators.

as a basis for discussion and decision-making. The proposed groundrules would cover such matters as the following:

- purpose of the Team;
- obligations of and protections for the Team members;
- obligations that derive for members as a result of consensus agreements;
- structure of the Team including its ability to add members, use alternates, have advisors, use workgroups to develop proposals, caucuses, and attendance requirements;
- decision-making rule (definition of consensus);
- how to deal with media contacts;
- the role of public participation;
- procedures to ensure the protection of confidential information;
- the recognition that meetings are open to the public;
- the manner in which a record of the sessions will be kept;
- schedule of meetings and planned completion date; and
- roles and responsibilities of the mediator.

PROCESS DESIGN¹⁰

Susan Podziba & Associates suggests that the Team has a better chance of successfully developing a consensual future remedy for the McKin Superfund Site by beginning with the “universe of options” for technical remedies and institutional controls than by seeking agreement on the technical questions concerning the movement of TCE through the affected aquifer. After the development of the universe of options and associated cost and effectiveness estimates,¹¹ the Team will need to determine criteria for “substantial impact to the environment and/or human health” as well as

¹⁰ It is the understanding of Susan Podziba & Associates that EPA considers this process to be exempt from Federal Advisory Committee Act (FACA) requirements.

¹¹ To develop the “universe of options,” the Team might begin with the universe of options described in the most current draft of the TI report. The Team should add any additional options it wants to consider to its list of options (not necessarily to the TI report). It should then review cost and effectiveness estimates and if necessary, revise them to create acceptable ranges for each. This work should continue until all members of the Team agree that they have a legitimate “universe of options” to work from.

“reasonable costs.” With this set of mutually acceptable data, the Team can then begin developing the package of options that will constitute the future remedy for the site.

The first sessions should include a discussion of groundrules; an informational session on the context of the McKin Superfund Site within the overall Superfund Program in Region I, specifically what is typical and what is unique about the site; an informational session on TCE to clarify confusion over the effects of TCE on human health and the environment; an informational session on the existing data and identification of the areas of agreement and disagreement on the conceptual model; identification of an agenda of issues; discussion of the universe of options; and identification of additional informational needs.¹²

SCHEDULE

Susan Podziba & Associates proposes that, as an initial matter, the McKin Future Remedy Team schedule six meetings. These meetings would be used to define issues; discuss data and data analysis; develop a mutually agreeable “universe of options” complete with cost ranges and effectiveness expectations; negotiate a future remedy; and craft appropriate language reflecting consensus. Due to the pending September PRP assessment and its related concerns, Susan Podziba & Associates recommends that the first meeting be held as soon as possible, but ideally, after the Technical Assistance Grant is in place.

Susan Podziba & Associates proposes that all meetings be held in Stimson Hall (next to Town Hall) in Gray, Maine. If many members of the Town come to the meetings and Stimson Hall is too small, the meetings can be moved to Pannell Recreation Center, also in Gray. To reserve this meeting space, contact Paul Bird, Gray Town Manager.

FINANCING ARRANGEMENTS FOR THE PROCESS

EPA has assumed all costs associated with this convening and expects that the Agencies and the PRPs will share all costs associated with the mediation process.

CONCLUSION

Susan Podziba & Associates believes the McKin Future Remedy Team to be a highly motivated group with a reasonably good chance of successfully reaching a consensual agreement on a future remedy for the McKin Site through the mediation process described above.

¹² Some of the informational needs will simply require summarizing and distributing existing information. In other cases, there may be a need to generate additional data and information. Because of the desire on the part of many stakeholders to move the process forward at a reasonable pace, the group should identify what it expects to learn from additional data, and may decide to develop contingent agreements subject to the findings of future data.

Appendix

Individuals Contacted Concerning the Feasibility of a Mediation Process to Develop a Future Remedy for the Mckin Superfund Site

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