



OFFICE OF INSPECTOR GENERAL

Catalyst for Improving the Environment

Ombudsman Report

Ombudsman Review of Bunker Hill and Coeur d'Alene Basin Superfund Actions

Report No. 2004-P-00009

March 24, 2004



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Abbreviations

CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
EPA	Environmental Protection Agency
MOA	Memorandum of Agreement
NCP	National Contingency Plan
NPL	National Priorities List
OIG	Office of Inspector General
OU	Operable Unit
ROD	Record of Decision

Cover photo: Aerial photo of former Bunker Hill smelter facility in northern Idaho
(Photo from EPA Region 10's Bunker Hill web page).



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

OFFICE OF
INSPECTOR GENERAL

March 24, 2004

MEMORANDUM

SUBJECT: Ombudsman Review of Bunker Hill and Coeur d'Alene Basin
Superfund Actions
Report Number 2004-P-00009

FROM: Paul D. McKechnie / s /
Acting Ombudsman
Office of Congressional and Public Liaison

TO: L. John Iani
Regional Administrator, Region 10

Attached is our final report on our review of complaints regarding the Bunker Hill and Coeur d'Alene Basin conducted by the Office of Inspector General (OIG). We undertook this work as a result of issues brought to the attention of the former Environmental Protection Agency (EPA) Ombudsman and, subsequently, the OIG Acting Ombudsman, by citizens in Idaho and Washington State. There is local and Congressional interest in the citizens' issues.

This report contains findings and recommendations that describe needed improvements the OIG has identified and the corrective actions the OIG recommends. This report represents the opinion of the OIG and the findings contained in this report do not necessarily represent the final EPA position. Final determinations on matters in this report will be made by EPA managers in accordance with established audit resolution procedures.

On February 18, 2004, the OIG issued a draft report to EPA's Region 10 for review and comment. On March 3, 2004, we met with the Agency to answer questions and discuss the draft and the Agency's expected comments. We received the Agency's response to the draft report on March 15, 2004. The Agency's comments in their response to the draft focused on the accuracy of the report and provided suggestions for clarifications. In general, the Agency agreed with our report and its findings and recommendations. We provide a summary and general evaluation of Agency comments and our response at the end of each section of this report. We include the full text of EPA's comments in Appendix A.

The findings in this report are only applicable for OIG Ombudsman purposes. Additionally, these findings are not binding in any enforcement proceeding brought by EPA or the Department of Justice under the Comprehensive Environmental Response, Compensation, and Liability Act to recover costs incurred not inconsistent with the National Contingency Plan.

We have no objection to the further release of this report to the public.

Action Required

In accordance with EPA Manual 2750, you are required to provide this office with a written response within 90 days of the final report date. The response should address all recommendations. For corrective actions planned but not completed by the response date, please describe the actions that are ongoing and provide a timetable for completion. Reference to specific milestones for these actions will assist in deciding whether to close this report in our assignment tracking system.

If you or your staff have any questions regarding this report, please contact me at (617) 918-1471 or Fran Tafer, the Assignment Manager, at (202) 566-2888.

Executive Summary

The Environmental Protection Agency (EPA) Office of Inspector General (OIG) conducted a review of issues that citizens brought to our attention regarding the Bunker Hill Superfund site and the surrounding Coeur d'Alene Basin area, located primarily in northern Idaho. Many of the issues raised involved scientific concerns that are being considered by a National Academy of Sciences study approved and funded by Congress and contracted for by EPA, and we presented the citizens' scientific concerns to the Academy. We then grouped the remaining citizens' concerns into four main issues for our review. Following are those issues and what we found regarding each.

1. Site Listing: Did EPA follow laws and regulations in listing the site? Also, why were the areas outside the "Box" (those areas included in Operable Unit 3, also known as the Basin) not included in the original cleanup work?

We found that EPA followed laws and regulations in listing the site. We concluded that EPA made a logical decision to first do cleanup work in the Bunker Hill Box and then later to study areas outside the Box and pursue further cleanup work on specific targeted areas in the Coeur d'Alene Basin. EPA is permitted, and chose, to address the most critical areas first, and we consider that a logical decision. In the interest of being open to the public, we recommend that EPA post this report and any relevant, related information on its web site.

2. Basin Commission: Did the Comprehensive Environmental Response, Compensation, and Liability Act authorize the Coeur d'Alene Basin Commission to plan, prioritize, and perform response/remedial actions, as specified in the September 2002 Record of Decision?

The Act does not address the creation of an independent body, like the Basin Commission, to plan, prioritize, and perform response/remedial actions. However, the National Contingency Plan – the Federal Government's blueprint for responding to hazardous substance releases – encourages the involvement of organizations to coordinate responsible party actions; foster site response; and provide technical advice to the public, Federal and State governments, and industry. We concluded that the Basin Commission, as a coordinating body, is allowed under the National Contingency Plan definition. We recommend that EPA Region 10 both clarify its relationship, under CERCLA, to the Basin Commission and encourage the Commission to clarify its exact status to its members and other stakeholders.

3. Lake Management Plan: Did the Coeur d'Alene Lake Management Plan adequately address cleanup under the Clean Water Act? Will the actions listed in the Plan support an EPA decision to conduct a partial deletion of the Lake from the National Priorities List? How will the Plan be implemented without mandatory dedicated funding (also referred to as the “unfunded mandate” issue)?

We concluded that the Coeur d'Alene Lake Management Plan could better address cleanup under the Clean Water Act. The management actions recommended in the Plan lack detail. Also, the actions proposed in the Plan do not fully support an EPA decision to conduct a partial deletion of the Lake from the NPL. Further, due to the lack of dedicated funding for Plan implementation, EPA, the State of Idaho, and the Coeur d'Alene Tribe should come to some form of consensus about the dedication of funds to pay for the implementation of the Plan. In our recommendations, we encourage better implementation of the Plan, that an attempt be made to resolve disagreement on who will pay for remedial actions, and that some form of consensus be reached on the dedication of funds.

4. Community Involvement and Economic Aspect: Did EPA properly follow laws and regulations in handling community involvement during the Superfund process at Bunker Hill/Coeur d'Alene? Did EPA take steps to alleviate the economic downturn in Shoshone County?

We concluded that the quantity of past community involvement has met standards. We found many instances where EPA took positive steps to involve the community. We found EPA followed laws and EPA regulations and guidance on community involvement, and we noted considerable input by the community for the remedial design work for the overall Coeur d'Alene Basin. Also, we found evidence that EPA took steps to help alleviate the economic downturn in Shoshone County, which includes the Bunker Hill Box and much of the Coeur d'Alene Basin.

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Introduction

Purpose

The Environmental Protection Agency (EPA) Office of Inspector General (OIG) conducted a review of issues that individual citizens and citizens' groups brought to our attention regarding the Bunker Hill and Coeur d'Alene Basin site in northern Idaho. The goal of the OIG Ombudsman is to independently review and report on public concerns regarding EPA activities, including Superfund issues.

Based on the issues raised, our objectives were to determine:

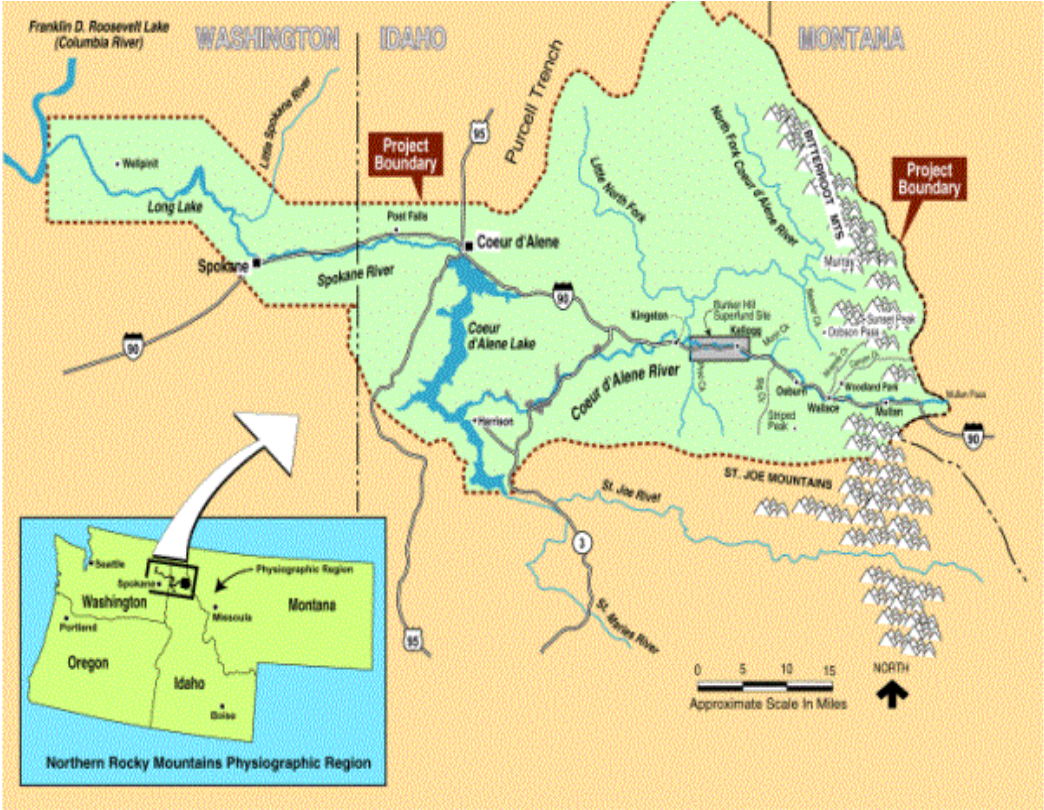
1. Did EPA follow laws and regulations in listing the site? Also, why were the areas outside the "Box" (those areas included in Operable Unit 3, also known as the Basin) not included in the original cleanup work?
2. Did the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) authorize the Coeur d'Alene Basin Commission to plan, prioritize, and perform response/remedial actions, as specified in the September 2002 Record of Decision?
3. Did the Coeur d'Alene Lake Management Plan adequately address cleanup under the Clean Water Act? Will the actions listed in the Plan support an EPA decision to conduct a partial deletion of the Lake from the National Priorities List (NPL)? How will the Plan be implemented without mandatory dedicated funding (also referred to as the "unfunded mandate" issue)?
4. Did EPA properly follow laws and regulations in handling community involvement during the Superfund process at Bunker Hill/Coeur d'Alene? Did EPA take steps to alleviate the economic downturn in Shoshone County?

Background

Mining within the Coeur d'Alene Basin began more than 100 years ago. It generated tailings (low grades of mining ore remaining after minerals are extracted), waste rock, concentrates, and smelter emissions. These wastes contain hazardous substances, including arsenic, cadmium, lead, and zinc. In addition, the water that drains from many abandoned adits (almost horizontal entrances to mines), as well as seeps, contain elevated levels of these metals.

Until 1968, most tailings were discharged directly into the South Fork of the Coeur d'Alene River or its tributaries. Since 1968, tailings have been impounded or placed back in the mines, and current mining practices contribute relatively little to the Coeur d'Alene River system compared to existing contamination resulting from pre-1968 practices. An estimated 62 million tons of tailings had been discharged to streams prior to 1968, containing an estimated 880,000 tons of lead and more than 720,000 tons of zinc. Water concentrations of metals such as arsenic, cadmium, lead, and zinc have increased.

These practices have contaminated substantial portions of the Basin with concentrations of metals that are potentially hazardous to humans, animals, and plants. To deal with these threats, EPA has taken several actions. In 1983, EPA placed the Bunker Hill Mining and Metallurgical Complex on the Superfund NPL. The site includes mining-contaminated areas in the Coeur d'Alene River corridor, adjacent flood plains, down stream water bodies, tributaries, and fill areas, as well as the 21-square-mile Bunker Hill "Box" (the Box) located in the area surrounding the historic smelting operations (see center of map). The Box and the primary mining source areas are located in Shoshone County, Idaho. However, much of the contaminated lower basin and lake areas are located in Kootenai County, Idaho. Contamination also extends into Spokane County, Washington.



Map: Bunker Hill Box and Coeur d'Alene River Basin
(Coeur d'Alene Basin Study Area Map from EPA Region 10 web site)

The 21-square mile box encompasses EPA’s initial area of concern regarding cleanup, and includes the mines and smelter. The Coeur d’Alene “Basin” includes the Box plus the surrounding area in northern Idaho and parts of Washington State. Specific areas within the Basin in addition to the Box area have been determined to be contaminated and targeted for cleanup. The Basin is within EPA Region 10.

EPA conducted a number of removal actions to address immediate threats to public health. EPA identified three operable units (OUs) for cleanup within the Bunker Hill/Coeur d’Alene Basin site, and various Records of Decision (RODs) have been signed to initiate cleanup actions within the OUs. Specifically:

- OU1:** EPA signed a ROD in 1991 to initiate cleanup in the populated areas of the Bunker Hill Box.
- OU2:** EPA signed another ROD in 1992 to address the non-populated areas of the Box.
- OU3:** In September 2002, EPA signed an interim ROD that specified selected interim remedial actions over the next 30 years for mining-related contamination in the broader Coeur d’Alene Basin. This interim ROD identified anticipated costs totaling \$360 million.

Scope and Methodology

Due to citizen complaints and concerns, the former National Ombudsman (then residing in EPA’s Office of Solid Waste and Emergency Response) opened a case on the Coeur d’Alene Basin and Bunker Hill Box based on two letters from Idaho Congressional representatives in 1999 and 2000. When the OIG acquired the Ombudsman function in April 2002, we continued this case.

At the invitation of the Idaho Congressional delegation, the Acting Ombudsman and OIG staff made a July 2002 trip to Spokane, WA; Coeur d’Alene, ID; and the Silver Valley area of Idaho, including Smeltonville, Wallace, and Kellogg. During this trip, the Ombudsman and staff met with 18 citizen groups, tribes, State and local governments, and citizens in a 3-day period to listen and try to understand the concerns in the community.

Upon our return, we categorized the concerns and complaints into various areas for overall review. Four of those areas were designated as our primary objectives and are the focus of this report. Due to the breadth and volume of concerns and questions raised, our objectives and this report sought to provide answers and information on the categorical areas we deemed most relevant. We did not

attempt to individually address each specific citizen or citizen's group question, concern, or complaint. Citizen concerns regarding whether EPA or Idaho would lead the cleanup were dropped from our review because the September 2002 ROD designated EPA as the lead organization. We also dropped an issue regarding the site boundary because the site boundary decision was vacated by the courts. Also, a large number of the concerns involved scientific areas that are being considered by a National Academy of Sciences study approved and funded by Congress and under a contract with EPA; therefore, we did not conduct a separate review of those concerns.

We conducted our review from July 2002 through August 2003. We researched the files we obtained from the former Ombudsman. As mentioned above, we traveled to the site for an overview, and we discussed issues and concerns with citizens and citizens' groups. We interviewed key officials in Region 10 who worked on one of the three Operable Units of the Superfund site.

We performed our Ombudsman review and analysis in accordance with *Government Auditing Standards*, issued by the Comptroller General of the United States. However, we did not review compliance with laws and regulations, except for those laws and regulations affecting a specific issue. Also, we did not review internal management controls concerning the CERCLA program. Our review was limited to responding to citizen, citizen group, and other concerns and issues, as described in our objectives. We did not seek to reproduce or re-analyze any testing, sampling, or analysis that EPA had conducted in reference to this site.

Results of Review

1. Site Listing

Question: Did EPA follow laws and regulations in listing the site? Also, why were the areas outside the "Box" (those areas included in Operable Unit 3, also known as the Basin) not included in the original cleanup work?

We concluded that EPA made a logical decision to first do cleanup work in the Bunker Hill Box and then later study areas outside the Box and pursue further cleanup work on specific targeted areas in the Coeur d'Alene Basin. While the first ROD to address concerns within the Box was issued in 1991, and the ROD to address Basin concerns outside the Box was not issued until 2002, EPA is permitted, and chose, to address the most critical areas first. We considered EPA's decision to perform work on the more critical areas within the Box first to be logical.

Laws and Regulations Followed

It is common for EPA to address large and complicated sites by breaking the work into smaller units called operable units. Usually, EPA prioritizes the most critically needed cleanup work in such units to prioritize the cleanup. EPA signed RODs in 1991 and 1992 for cleanup actions in Operable Units (OUs) 1 and 2, respectively. Both units covered areas within the 21-square-mile Bunker Hill Box, which included the Bunker Hill Mine and smelter. In 2002, EPA signed a ROD to perform additional cleanup in the Coeur d'Alene Basin (OU 3), which includes specific areas targeted for cleanup within a larger area surrounding the Box.

Operable Units 1 and 2. To determine whether EPA followed laws and regulations in listing the site, we reviewed the hazardous ranking system scoring documents and other pertinent EPA documents. We also reviewed EPA's decisions on determining what were the site boundaries for the Bunker Hill cleanup. The Bunker Hill site was listed on the NPL on September 8, 1983. The original August 13, 1982, hazardous ranking system package for the Bunker Hill facility said that, "Site boundaries extend from Smeltonville down the Coeur d'Alene River to Coeur d'Alene Lake" – within and outside the Box and within the Basin.

During our review, EPA Region 10 personnel told us the most significant human health concerns were within the Box, so they decided to start their

work there. EPA Region 10 added in a 1985 letter that their preliminary study area, the Box, corresponded to the area of a 1983 health study. However, EPA further said that as it continued its investigations, the area of concern might expand or contract, depending on what was found.

Operable Unit 3. Later, EPA decided to further address contamination outside the Box and within the Basin. A December 26, 1984, EPA letter discussed that EPA may expand the study area if EPA finds extensive groundwater contamination coming from beyond the study boundaries. Approximately a year after EPA's NPL site listing, EPA stated in a 1984 letter that releases exist outside the Box. In 1998, EPA initiated a remedial investigation and feasibility study for areas outside the Box but within the Coeur d'Alene Basin. On September 12, 2002, EPA signed an interim ROD that specified selected interim remedial actions over the next 30 years for the broader Coeur d'Alene Basin. This interim ROD presents an incremental cleanup strategy for protecting human health and the environment in the Upper and Lower Basins of the Coeur d'Alene River and the Spokane River Basin west of the Idaho border.

According to EPA, scientific and sampling studies justified the need for further remedial cleanup work outside the Box. Citizen concerns and doubts about the decision to clean up the Basin prompted a request by the Idaho Congressional delegation for a re-examination of these studies. The National Academy of Sciences is currently conducting a study of EPA's Basin assessment and cleanup decisions.

Recommendation

- 1-1 In the interest of being open to the public and getting wide dissemination of useful information, we recommend that EPA Region 10 post a copy of this report and the finalized National Academy of Sciences study on the EPA Superfund Coeur d'Alene Basin web site to ensure availability to citizens.

Agency Comments and OIG Response

The Agency's comments on section 1 of the report (and the Executive Summary, Background, and Scope and Methodology) focused on the accuracy of the report and provided suggestions for clarifications. In response to Agency suggestions, we made revisions to the report where appropriate. For example, we replaced a site map in the draft report with a Region 10-suggested map that is more inclusive in relation to the States involved and the area covered. We should note here that specific page numbers and references in the Agency's response (located at Appendix A) to the OIG draft report may or may not relate to page numbers and

references in the final report. EPA indicated that it will respond to the specific recommendation after the final report is published.

2. Basin Commission

Question: Did CERCLA authorize the Coeur d'Alene Basin Commission to plan, prioritize, and perform response/remedial actions, as specified in the September 2002 ROD?

CERCLA does not address the creation of an independent body, like the Basin Commission, to plan, prioritize, and perform response/remedial actions. However, the National Contingency Plan (NCP) – the Federal Government’s blueprint for responding to hazardous substance releases – encourages the involvement of organizations to coordinate responsible party actions; foster site response; and provide technical advice to the public, Federal and State governments, and industry. We believe the Basin Commission, as a coordinating body, is allowed under the NCP definition in order to foster site response.

Basin Commission as a Coordinating Body

In 2001, the State of Idaho passed the Basin Environmental Improvement Act, codified at Title 39, Health and Safety, Chapter 81. The Act sets forth the responsibilities, authorities, and limitations of the Basin Environmental Improvement Project Commission (Basin Commission). The purpose of the Commission was to fulfill the Basin work plan, which consisted of EPA’s RODs and other measures related to heavy metal contamination. The board of commissioners is made up of seven representatives from various Federal, State, tribal, and local governments, as shown in the accompanying box. Powers have been given to the Commission by State statute to carry out the work plan, including hiring personnel and contracting for work.

Board of Commissioners

1. United States Government
2. State of Idaho
3. State of Washington
4. Shoshone County
5. Kootenai County
6. Benewah County
7. Coeur d'Alene Tribe

The seven governmental agencies represented on the Commission, along with the Spokane Tribe of Indians, U.S. Department of Interior, and U. S. Forest Service, signed a Memorandum of Agreement (MOA) on August 13, 2002. Based on the MOA, the Commission will coordinate work with other entities that have jurisdiction and interest in the Basin. EPA believes that the MOA outlines the terms of Federal participation. Further, EPA Region 10 believes that the MOA’s terms are supported by the NCP and, thus, EPA reserves the rights and responsibilities pursuant to Federal law.

The agreement recognizes the importance of public participation in the Commission, and the parties to the agreement agree to use the Commission as a

vehicle to coordinate public comment and involvement. Each agency reserves its individual rights and responsibilities that exist by law. In addition, the agreement recognizes that it is the responsibility of the United States to “exercise governmental authority” under CERCLA.

The Commission is unique to the ROD implementation process, providing recommendations for the work plan to EPA even though EPA normally develops the work plans. The Commission, through the annual and 5-year work plans, identifies the projects, priorities, and funding needs. EPA, at its discretion, can enter into cooperative agreements with the implementing agencies recommended by the Commission for those projects that are funded. The NCP encourages organizations to assist in the coordination of "responsible party actions, foster site response, and provide technical advice to the public, federal and state governments, and industry," although EPA has the final authority to ensure remedial actions under its RODs are carried out.

CERCLA/NCP Authorizations

Though CERCLA does not, the NCP does define a lead and support agency as an agency that provides an On Scene Coordinator or the Remedial Project Manager, and notes that EPA or “a state (or political subdivision of a state)” can be a lead or support agency. The 2002 ROD identifies the lead agency as EPA. The support agencies identified are the Idaho Department of Environmental Quality, State of Washington Department of Ecology, and the Coeur d'Alene Tribe.

The Basin Commission was created by the Idaho legislature through a State statute. While the Commission was given powers and responsibilities, the Commission itself “cannot represent the State of Idaho” in negotiations “with representatives of the State of Washington, Coeur d’Alene Tribe, and the United States of America.” However, those negotiations can be done by the Director of the Idaho Department of Environmental Quality, the Attorney General of Idaho, the Governor, or their representatives regarding agreements, compacts, and participation in the commission.

Recommendation

We recommend that Region 10:

2-1 Encourage the Basin Commission to clarify its exact status, especially including a consensus among all Basin Commission members, so that its future actions and decisions, and especially its interactions with EPA under CERCLA, will be based on a settled definition of the Basin Commission’s powers and abilities.

2-2 Clarify to the Basin Commission, inclusive of its board of directors and

those who signed the MOA, the region's relationship with the Commission under CERCLA and other applicable laws and regulations.

Agency Comments and OIG Response

EPA's comments regarding section 2 of the report focused on the accuracy and completeness of the report and provided suggestions for clarifications. In response to EPA suggestions, we made revisions in the report where appropriate. For example, we included the full list of MOA signatories whereas we had not in the draft report. EPA indicated that it will respond to the specific recommendations after the final report is published.

3. Lake Management Plan

Question: Did the Coeur d'Alene Lake Management Plan adequately address cleanup under the Clean Water Act? Will the actions listed in the Plan support an EPA decision to conduct a partial deletion of the Lake from the NPL? How will the Plan be implemented without mandatory dedicated funding (also referred to as the “unfunded mandate” issue)?

We concluded that the Coeur d'Alene Lake Management Plan could better address cleanup under the Clean Water Act. The management actions recommended in the Plan lack detail. Also, the actions proposed in the Plan do not fully support an EPA decision to conduct a partial deletion of the Lake from the NPL. Further, due to the lack of dedicated funding for Plan implementation, EPA, the State of Idaho, and the Coeur d'Alene Tribe should come to some form of consensus about the dedication of funds to pay for the implementation of the Plan. In our recommendations, we encourage better implementation of the Plan, that an attempt be made to resolve disagreement on who will pay for remedial actions, and that some form of consensus be reached on the dedication of funds.

Clean Water Act

EPA noted in a March 25, 2003, letter to the Idaho Department of Environmental Quality and the Coeur d'Alene Tribe that the Lake Management Plan should include accountability checkpoints, a mechanism for coordination, and a timetable for implementation. However, these actions have not been taken.

The Clean Water Act provides appropriate guidance for the development of an adequate management plan. The Lake Management Plan could better address cleanup if it contained some of the provisions that are listed in section 319, Part (b), including:

- A schedule containing annual milestones for implementation of the plan.
- An adequate list and description of best management practices.
- A certification from the State Attorney General for Idaho that the laws of the State provide adequate authority to implement the plan.
- Adequate practices and measures to reduce the level of pollution in the Lake that result from nonpoint sources.

Partial Deletion of the Lake from the National Priorities List

Actions proposed in the Plan and its subsequent Addendum do not fully support an EPA decision to conduct a partial deletion of the Lake from the NPL.

EPA determined in the ROD for OU 3 that any actions to remove contamination from the Lake's bed would have caused more dispersion of contamination within the water column, thereby increasing the potential for harm to human and ecological receptors. In addition, the costs of active remediation of the Lake were prohibitive. The ROD deferred action on the Lake to the future implementation of the Lake Management Plan to reduce the probability of additional metals movement from the sediments at the lake bottom into the lake water. EPA agreed to consider a "No Further Remedial Action Required" recommendation for the Coeur d'Alene Lake, and to consider a partial deletion of the Lake from the NPL, provided that the Plan would adequately manage the contamination in the Lake.

The Plan was developed in 1995, and a draft Addendum to the Plan was released for public comment in 2003. However, we do not consider the actions proposed in the Plan and its draft Addendum to fully support an EPA decision to conduct a partial deletion of the Lake from the NPL. The recommended actions made in the Plan included the encouragement of best management practices among the differing responsible parties, such as farmers, land developers, and forest harvesters. It also recommended actions for monitoring lake water quality to track the mass balance of nutrients and metals within the Lake; the health assessment of fish, waterfowl, and other wildlife; the identification of additional nutrient loading sources (such as from sewage and sink/shower water systems from boats and private homes); and the beginning of stream bank stabilization projects. However, the best management practices were not fully identified; the identification and rectification of additional nutrient loading sources and unstable stream banks were not mandatory; and the Plan relied primarily on education for the accomplishment of its goals.

Further, although the Basin Commission's 2003 Work Plan implemented part of the Management Plan by including an Education and Information Program and a 3-year Lake Monitoring Plan, the Program only provided for voluntary changes in actions that affect the Lake's water quality, and its impact will not be known for several years. In addition, the Lake Monitoring Plan will have no direct impact on the Lake's water quality because it is a measure designed to record the results in the Lake of remedial actions conducted in the streams and tributaries that feed the Lake, and not a more proactive measure.

Unfunded Mandate

The Coeur d'Alene Tribe believes that an "unfunded mandate" was created when EPA decided to address Coeur d'Alene Lake contamination through a Lake

Management Plan without identifying any funding to implement it. Between January and March 2003, the Tribe, Idaho, and EPA exchanged ideas in a group of letters. During this exchange, the Tribe requested funds be identified for implementation of specific projects, a long-term lake water monitoring plan, and payment of staff to run the projects before the Plan is approved.

In addition, the EPA informed the State of Idaho that remediation activities need to begin in the upper basin before EPA will agree to consider a partial deletion of the Lake from the NPL, but the State is unclear whether EPA wants it to pay for those remedial actions. Due to the current lack of dedicated funding for Plan implementation, EPA, the State of Idaho, and the Coeur d'Alene Tribe should come to some form of consensus about the dedication of funds to pay for implementation of the Plan. However, the State of Idaho does not agree that hiring of staff, or the identification of funds for specific projects, needs to be accomplished before the Plan is approved.

Recommendations

We recommend that EPA Region 10:

- 3-1 Encourage the State of Idaho and the Coeur d'Alene Tribe to implement within the Coeur d'Alene Lake Management Plan some of the recommendations in its March 25, 2003, letter, including adding accountability checkpoints, a coordination mechanism, and an implementation timetable.
- 3-2 Clarify with the State of Idaho, and other stakeholders, who will pay for upstream remedial actions and Lake management activities.
- 3-3 Work with the State of Idaho and the Coeur d'Alene Tribe to reach some form of consensus about the dedication (or assignment) of funds or funding sources to pay for the implementation of the Lake Management Plan.

Agency Comments and OIG Response

We made minor corrections and wording changes the Agency suggested to clarify Lake Management Plan issues, CERCLA and Clean Water Act laws and guidance, EPA's actions and plans, and our recommendations. The Agency believed it would be helpful to include EPA's view on two issues: details on Lake Management Plan funding and EPA's belief that there is no "mandate" for a Lake Management Plan under CERCLA. We have not added EPA's discussion on these two issues into section 3, mainly due to their length; however, the reader may view Region 10's comments in Appendix A.

Additionally, though Region 10 asked us to provide more information about why the Lake Management Plan and its draft addendum do not fully support an EPA decision to conduct a partial deletion of the Lake from the NPL, we have not added more information. We also do not provide specific recommendations about what actions would be supportive of such a decision. On both these issues, we believe it is up to the Agency to develop a method to determine which of its recommended actions presented in the Plan must be fulfilled and how and when implementation of these actions will enable the partial deletion approach.

Finally, the Agency made extensive comments to our “Unfunded Mandate” subsection, regarding EPA’s view on funding for upstream cleanup actions and the Lake Management Plan, and EPA’s interactions with Idaho. Region 10 asked that we explain whether our recommendation 3-2 refers to upstream remedial actions or lake management activities; it refers to both. We did not make any other changes to that subsection because we believe (a) clarifying the recommendation addresses the issues raised; and (b) EPA’s response to our draft report further demonstrates the stakeholders’ differences and confusion about funding for cleanup actions, both upstream and for the Lake Management Plan (see Appendix A).

EPA indicated that it will respond to the specific recommendations after the final report is published.

4. Community Involvement and Economic Aspects

Question: Did EPA properly follow laws and regulations in handling community involvement during the Superfund process at Bunker Hill/Coeur d'Alene? Did EPA take steps to alleviate the economic downturn in Shoshone County?

We concluded that the quantity of past community involvement met standards. Although citizen groups with whom we spoke expressed concern that EPA did not seriously consider their comments about proposed actions in the ROD, we found many instances where EPA took positive steps to involve the community. We noted considerable input by the community for the remedial design work for OU 3. Also, we found evidence that EPA took steps to help alleviate the economic downturn in Shoshone County.

Community Involvement

One of the goals of the Superfund program is to promote public involvement that is informed, reasonable, thoughtful, solution-oriented, and collaborative. We reviewed community involvement at the Bunker Hill/Coeur d'Alene Superfund site and determined that:

- EPA developed Community Involvement Plans, as required.
- EPA conducted over 200 public meetings.
- EPA issued fact sheets and advertised significant events in the remedial investigation and feasibility study and ROD processes.
- EPA maintained six information repositories, including an Administrative Record at North Idaho College in Coeur d'Alene.
- EPA site files contain numerous volumes of public participation and public comments.
- The Citizens Coordinating Council is currently in place to allow citizen input to the Basin Commission for remedial design/remedial action phase work. Also, there is currently considerable community involvement through the Technical Leadership Group and its Project Focus Teams. Local governments have representatives on the Technical Leadership Group. Interested citizens are invited to participate in the Project Focus Teams.
- The Lake Management Plan states that Technical Advisory Groups are a vehicle for public participation.

We found that EPA received more than 3,300 comments on the proposed Basin Cleanup Plan from approximately 1,300 different individuals. EPA extended the comment period twice, for a total of 120 extra days, in response to public requests. Part 3 of the ROD contains many of the public's comments and EPA's response to those comments.

In addition to comments noted to EPA in the ROD, two of the citizen groups we talked to expressed concern that EPA did not seriously consider their comments about the proposed actions in the ROD. However, as previously outlined, we found many instances where EPA took positive steps to involve the community. We found that EPA followed laws and its own regulations and guidance on community involvement. Based on our review of Region 10 documentation, we concluded that community involvement has met requirements and, furthermore, gone beyond requirements. The inclusion of the community in efforts such as the Citizens Coordinating Council is evidence of this involvement. Community involvement, however, does not mean unanimous agreement.

Economic Aspects

Various steps taken by EPA should help alleviate the economic downturn in Shoshone County. EPA has encouraged local hiring for cleanup work, issued grants in the area, and been flexible and creative in helping the County. According to EPA documents, up to \$42 million was spent locally on labor, materials, rentals, taxes, and utilities. EPA authorized and funded hazardous materials training to over 100 local workers. During peak construction years on the Box cleanup, more than 200 local people were employed. EPA also committed \$200,000 in grants to help the viability of the local economy.

EPA also provided documentation on flexible and creative ways it has tried to help the local community. The first Superfund Prospective Purchaser Agreement and Covenant-Not-to-Sue in the United States was used to facilitate the building of the Silver Mountain Gondola at the Bunker Hill Box. EPA has released Superfund Liens on both commercial and residential properties formerly owned by Bunker Limited Partnership (and related entities such as Bunker Hill Mining Co. and MCI) to remove potential "clouds" and allow property transfers. EPA has also given special attention to improving the appearances of the remediated areas by use of fertilization, seeding, and nature trails. Other projects included allowing more useable land for future development, helping local businesses, and supporting flood control and street projects.

In addition, EPA reduced its recovery in the Gulf Resources, Inc., bankruptcy to ensure that a group of Gulf retirees would receive affordable medical coverage. This benefitted the Gulf retirees whose medical coverage had been adversely impacted by Gulf's mishandling of assets and then the bankruptcy. Gulf had owned the Bunker Hill mine.

We do not consider any recommendations regarding EPA's community involvement and its role regarding the economy in the Coeur d'Alene Basin area to be necessary.

Agency Comments and OIG Response

The Agency suggested some clarifying changes, which we made to the final report. We dropped an introductory paragraph under the Economic Aspects subsection and added information on the Technical Leadership Group.

EPA Response to Draft Report



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, WA 98101

Reply To
Attn Of: RA-140

Mr. Paul D. McKechnie
Acting Ombudsman
Office of Congressional and Public Liaison
EPA Office of Inspector General
One Congress Street, Suite 1100
Boston, MA 02114-2023

RE: Draft Ombudsman Report Ombudsman Review of Bunker Hill and Coeur d'Alene Basin

Dear Mr. McKechnie:

Enclosed please find the EPA Region 10 comments on the Draft Ombudsman Report issued by your office on February 18, 2004. These comments focus on the factual accuracy of the report and provide suggestions for corrections and clarifications. We understand that the final report will provide an assessment of our comments.

Thank you for the opportunity to comment on the draft report and also for your work in responding to the concerns raised by the public regarding the Bunker Hill/Coeur d'Alene Basin Cleanup. Once you issue a final report, EPA Region 10 will respond to your final recommendations.

If you have any questions about our comments, please contact Sheila Eckman, the Bunker Hill/Coeur d'Alene Basin Team Leader, at (206)553-0455.

Sincerely,

/s/ L. John Iani 3/15/04

L. John Iani
Regional Administrator

Enclosure

cc: Frances Tafer, OIG
Jamie Huber, OIG

EPA Region 10
Comments on Draft Ombudsman Review of Bunker Hill and Coeur d'Alene Basin
Superfund Actions

3/15/04

The following comments are provided on the Draft "Ombudsman Review of Bunker Hill and Coeur d'Alene Basin Superfund Actions" The comments address factual accuracy and provide suggestions for clarification of background information and recommendations.

Executive Summary

Please see comments in the "Results of Review" section.

INTRODUCTION

Background

Page 2, paragraph 3: "The Box and much of the Basin is located in Shoshone County, Idaho". The Box and the primary mining source areas are located in Shoshone County. However, much of the contaminated lower basin and lake areas are located in Kootenai County, Idaho. Contamination also extends into Spokane County, Washington.

The map provided does not represent the entire area subject to Operable Unit 3. We suggest you use Figure 1.0-1 from the ROD (Basin Study Area) and will forward this map to you in electronic format.

Scope and Methodology

Page 4, paragraph 1: "Concerns regarding EPA versus Idaho cleanup were dropped..." The concern here is unclear - was the issue whether EPA versus the State of Idaho would lead and/or fund the cleanup?

Please consider the following change: "The findings contained in this report are only applicable for OIG Ombudsman purposes. Additionally, the findings contained in this report are not binding in any enforcement proceeding brought by EPA or the Department of Justice under ~~Section 107~~ of the Comprehensive Environmental Response, Compensation, and Liability Act to recover costs incurred not inconsistent with the National Contingency Plan" This would also cover actions under Section 106 or another statutory provision.

RESULTS OF REVIEW

1. Site Listing

Objectives: The draft report reads "Also, why were the areas outside the "Box" (those areas included in the Basin listing) not included in the original cleanup work?" The statement in parentheses is not clear - areas outside the Box were included in the Bunker Hill site listing. We

suggest this be clarified to read “(those areas included in Operable Unit 3, also known as the Basin)”.

Page 5, paragraph 1: “Based on our analysis, we concluded that EPA followed laws and regulations in the original site listing on OUs 1 and 2.” The site listing did not identify Operable Units and was not limited to OUs1 and 2 (the Box).

Page 5, paragraph 2: “Both units covered areas within the 21-square-mile Bunker Hill Box, which included the mines and smelter”. The largest area mine, the Bunker Hill, is located in the Box. However, there are many other mine and mill sites which represent sources of contamination, which are outside of the Box. Suggested clarification: “...which included the Bunker Hill Mine and smelter.”

2. Basin Commission

Page 7, paragraph 2: “Powers have been given to the Commission to carry out the work plan, including hiring personnel and contracting for work”. It should be clarified that these powers are granted by State, not Federal, legislation. The Memorandum of Agreement outlines the terms of Federal participation. EPA Region 10 believes that the terms of this MOA are supported by the NCP and reserve our rights and responsibilities pursuant to federal law.

Page 7, paragraph 3: It might be helpful to indicate that the MOA was also signed by representatives of the US Department of Interior, the US Forest Service, and the Spokane Tribe of Indians as “coordinating entities”.

Page 8, paragraph 2: Delete the last 2 sentences. Change of lead agency is not a change to the selected remedy in the ROD and thus does not require a formal ESD or ROD amendment. In practice, however, EPA would involve stakeholders in this decision.

Page 8, paragraph 3: It would be helpful to include the basis for the statements regarding who can represent the State of Idaho in negotiations.

Recommendation: Please clarify whether the intent is for Region 10 to encourage the Basin Commission board to provide clarification of its status, or for Region 10 to clarify EPA’s role with regard to the Basin Commission, or both.

3. Lake Management Plan

Page 9, paragraph 2: The EPA letter to IDEQ and the Coeur d’Alene Tribe is dated March 25, 2003, not May 2003.

Page 9, paragraph 2: Please clarify whether and how section 319 of CWA provides guidance on how plan should work.

Page 10, paragraph 1: "...an Addendum to the Plan was completed in 2003". A draft Addendum to the Plan was issued for public comment in 2003, but a final Addendum has not been issued. IDEQ and the Coeur d'Alene Tribe are evaluating public comments and determining the next steps.

You conclude that the Lake Management Plan (LMP) and its addendum do not fully support an EPA decision to conduct a partial deletion of the Lake from the NPL. It would be helpful to provide more information about this conclusion. Could you provide specific recommendations about what actions would be supportive of such a decision? If the plan is revised with your recommendations to include provisions meeting the requirements of the Clean Water Act, would it be supportive of a decision to conduct a partial deletion of the Lake?

It may be helpful to include EPA's view of Lake Management Plan funding. EPA has provided Superfund funding to the State of Idaho and the Coeur d'Alene Tribe for development of the plan addendum. EPA has not selected a remedy for the Lake and has not designated the Lake Management Plan as a CERCLA remedy. If EPA moves forward with a "No Further CERCLA Action" ROD, it would not designate the Lake Management Plan as a CERCLA remedy, therefore implementation of the plan would not be a CERCLA remedial action and would not be eligible for CERCLA funding. EPA could provide assistance to the State and the Tribe to identify other potential funding sources for portions of the plan, but would expect those entities to be responsible for plan implementation and funding. Should the EPA select the Lake Management Plan as a remedial action under CERCLA, it is very unlikely that EPA could provide CERCLA funding for these tasks, given their focus on institutional controls and nutrient management and because any Fund expenditures would have to be consistent with the state match obligations of CERCLA Section 104(c). In addition, should the Lake Management Plan become a CERCLA remedy, EPA would have to determine that it was protective of human health and environment and it met ARARs (or ARARs were waived) prior to partial deletion from the NPL. It is not likely this would happen in the short-term, even if lake management activities were implemented.

It should be noted that an evaluation of Lake conditions will be part of the CERCLA-required five year review process, regardless of any potential deletion from the NPL (see 2002 ROD, Section 12.3).

Unfunded Mandate

Page 10, paragraph 4: It would be helpful to include EPA's view of this issue. There is no "mandate" for a Lake Management Plan under CERCLA - EPA has not designated a Lake Management Plan as the CERCLA remedy for the lake. The State of Idaho and local communities have expressed interest in managing the lake outside of the CERCLA process. Any costs incurred in implementing the Lake Management Plan are made to mitigate the presence of hazardous substances in the Lake, and are made as a result of responsible stewardship and not as result of a requirement to pay for a Federally mandated program.

Page 11, paragraph 2: "...EPA informed the State of Idaho that remediation activities need to begin in the upper basin before EPA will agree to conduct a partial deletion of the Lake from the NPL, but the State is unclear whether EPA wants it to pay for those remedial actions." It is hard to believe that the State of Idaho is unclear about the requirements for funding remedial actions. EPA and the State have been implementing work at Bunker Hill for almost 20 years, consistent with CERCLA funding requirements. Under CERCLA, it is clear that, for a fund-lead remedy, EPA is responsible for 90% of remedial action costs, and the State is responsible for 10% of remedial action costs as well as 100% of Operations and Maintenance. This is documented on a site-specific basis through Superfund State Contracts (SSC). IDEQ has entered into an SSC with EPA for the OU3 remedy but has declined to enter into an SSC for the OU2 November 2001 ROD amendment (Central Treatment Plant). Therefore, EPA is unable to use available CERCLA funding to begin remedial action at the Central Treatment Plant without this agreement in place. EPA has begun remedial actions in OU3.

Recommendation 3-2: "Clarify with the State of Idaho who will pay for remedial actions before EPA..." It is unclear whether this recommendation refers to remedial actions in the Lake or upstream. If it refers to upstream, we suggest the following: "...who will pay for **upstream** remedial actions..." If this statement refers to actions in the Lake, we suggest the following revision: "Clarify with the State of Idaho who will pay for **lake management activities** before EPA considers a partial deletion of the Lake from the Lake Management Plan." A clarification of this issue is provided in a previous comment. EPA has not chosen a remedy for the lake. Therefore, there are no "remedial actions" to be funded under CERCLA. Should EPA proceed with the approach of a "No Further CERCLA Action ROD" as supported by the State of Idaho, the lake management activities will not be eligible for CERCLA funding.

4. Community Involvement and Economic Aspects

Economic Aspects

Page 13, paragraph 1: Based on our discussions regarding recent economic data, we agreed that this paragraph would be deleted.

Community Involvement

It should also be noted that there currently is considerable community involvement through the Technical Leadership Group and its Project Focus Teams. Local governments have representatives on the Technical Leadership Group. Interested citizens are invited to participate in Project Focus Teams.

Distribution

Regional Administrator, Region 10
Region 10 Audit Followup Coordinator
Region 10 Superfund Regional Public Liaison
Team Leader, Bunker Hill/Coeur d'Alene Basin Cleanup, Office of Environmental Cleanup,
Region 10
Assistant Administrator for Solid Waste and Emergency Response (5101T)
Assistant Administrator for Enforcement and Compliance Assurance (2201A)
Comptroller (2731A)
Agency Followup Official (the CFO) (2710A)
Deputy Chief Financial Officer (2710A)
Agency Followup Coordinator (2724A)
Audit Liaison, Office of Solid Waste and Emergency Response (5103T)
Associate Administrator for Congressional and Intergovernmental Relations (1301A)
Associate Administrator, Office of Public Affairs (1101A)
Inspector General (2410)