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Sent by electronic mail to dsou461@ecy.wa.gov

August 28, 2012

David South
Senior Engineer, Toxics Cleanup Program
Washington Department of Ecology
3190 – 160th Ave SE
Bellevue, WA 98008-5452

Dear Mr. South:

Weyerhaeuser NR Company comments on the Department of Ecology's Five-Year Periodic Review for "Weyerhaeuser Everett East Site" (Facility Site ID #11) are provided.

Background

Weyerhaeuser has successfully fulfilled all obligations imposed by Consent Decree No. 97-2027738. In July 1997, the Department of Ecology confirmed the satisfactory completion of all remedial actions set forth in this consent decree.¹ In April 2005, Ecology acknowledged that, with a single exception, the compliance groundwater monitoring wells in Parcels 1 and 4 had demonstrated attainment of cleanup standards.² That exception was resolved with a final monitoring event in 2011 Q1 which showed achievement of a cleanup level at one well consistent with the approved groundwater monitoring plan.³ Weyerhaeuser requested in April 2011 that Ecology acknowledge completion of all Consent Decree requirements.

Weyerhaeuser sold the Everett East Site to the Port of Everett in 1997. Aside from implementation of the groundwater monitoring program, Weyerhaeuser has had no authority/responsibility for any activity on the Site, involvement in real property transactions, etc., since the date of sale.

Comments

1. Consent Decree paragraph XXVI. *Duration of Decree* states:

¹ Letter from Mike Palko, WDOE, July 11, 1997, to Arlan Ruf, Weyerhaeuser

² Letter from Mark Edens, WDOE, April 29, 2005, to Jennifer Bariska, Weyerhaeuser.

³ "Groundwater Sampling Results – December 2010 & March 2011 Weyerhaeuser Everett East Site," PES Environmental, Inc., June 6, 2011, forwarded to David South, WDOE, in Ken Johnson letter of June 10, 2011

This decree shall remain in effect and the remedial program described in the Decree shall be maintained and continued until Weyerhaeuser has received written notification from Ecology that the requirements of the Decree have been satisfactorily completed.

Are there remaining "remedial program" requirements needing to be "satisfactorily completed" to support an Ecology determination the Consent Decree can be terminated? In short, can the obligations intended by the Consent Decree be separated from the restrictive covenant such that the Decree is deemed "completed"?⁴

2. Mention is made on pages 2 and 16 of the Port of Everett's plans (now on-going) to place fill across the Site to achieve a 100-year floodplain property elevation. Placing this additional clean sand/soil cap would seem to have relevance to the assessment on several of the Periodic Review criteria in WAC 173-340-420, and worthy of more commentary.
3. References to "National Recommended Water Quality Criteria" on pages 5, 7, 10-12, 17. These criteria may be EPA's best view on aquatic life and human health-based water quality criteria, but they are not water quality criteria adopted under the Federal Clean Water Act.⁵ Indeed, the preamble to EPA's 2003 version of Recommended Criteria has this to say

*EPA's recommended human health water quality criteria do not substitute for the CWA or regulations, nor are they regulations themselves. Thus EPA's recommended criteria do not impose legally binding requirements. States and authorized Tribes have the discretion to adopt, where appropriate, other scientifically defensible water quality standards that differ from these recommendations.*⁶

The state of Washington's water quality standards are adopted at WAC 173-201A *Water Quality Standards for Surface Waters*. Washington adopted the EPA National Toxics Rule into WAC 173-201A in 1992.⁷ This water quality standards regulation presents all of the water column aquatic life and human health criteria applicable in Washington state. Washington's adopted water quality criteria do not include the pentachlorophenol, PCB, c-PAH aquatic life and human health criteria values presented in the Periodic Review (Table 3 and elsewhere).

While Washington will likely give consideration to these National Recommended Criteria when revisions to WAC 173-201A are contemplated in 2013 and beyond, they have not

⁴ It is highly likely that contaminants above Consent Decree soil cleanup levels will remain on site and therefore the restrictive covenant will forever impose development/activity limitations on the Site. The presence of this institutional control will require Ecology to address WAC 173-340-420 *Periodic Review* into the future. The stand-alone set of requirements imposed through the restrictive covenant would seem to be unaffected by the presence/absence of the Consent Decree.

⁵ Adopted federal water quality standards are promulgated in 40 CFR 131.

⁶ 68 FR 75505-75515 (December 31, 2003)

⁷ The National Toxics Rule is adopted at WAC 173-201A-240(5) and 40 CFR 131.36

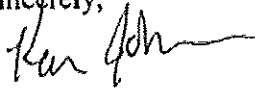
been “adopted” and therefore would not seem to be “Legally applicable requirements.” As such, some explanation on the regulatory justification for considering the National Recommended Criteria in this process would be helpful (beyond simply asserting they are “federal laws”). Please provide that regulatory rationale.

4. Mention of “unrestricted land use” on pages 5, 6, 7, 14 – The Consent Decree makes no reference to nor did it establish soil cleanup levels based on “unrestricted land use.” The Consent Decree recognizes the site as an industrial property, zoned M-2 Heavy Manufacturing. The Consent Decree presents the soil cleanup “Protection Basis” as “MTCA Method C Industrial.” The Restrictive Covenant references soil cleanup levels established under WAC 173-340-745 *Soil Cleanup Levels for Industrial Properties*. The Periodic Review Table 6 appropriately compares residual contaminant soil concentration levels with *Industrial Soil Direct Contact Cleanup Levels*. The Restrictive Covenant prohibits residential development and the withdrawal of groundwater for potable uses.

The point here is that the Everett East site is an industrial property. Ecology should be cautious to avoid positioning this Periodic Review to suggest that soil cleanup levels aligned with “unrestricted land use” are relevant. The narrative discussion and Site drawing references to “unrestricted land use” should be stripped out of this Periodic Review report.

5. Finally, we note the Restrictive Covenant Section 3 prohibition on “activit(ies)” which may interfere with contained hazardous substances. This demand is contrasted with Section 4 which acknowledges that hazardous substances encountered in site “development” will require containment or proper management/disposal. Ecology will presumably reconcile how the disturbance of hazardous substances can both be prohibited and also allowed if certain conditions are met. However these terms might be delineated, does the agency believe Weyerhaeuser has some continuing obligation to reimburse Ecology oversight of either “activity” or “development” proposals that occur in the future?

Sincerely,



Ken Johnson

cc Erik Gerking – Port of Everett



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DEPARTMENT OF ECOLOGY

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October 19, 2012

Mr. Ken Johnson
Weyerhaeuser
P.O. Box 9777
Federal Way, WA 98477-9777

Re: Weyerhaeuser Everett East Periodic Review Comments

Dear Mr. Johnson:

This letter responds to Weyerhaeuser's August 28, 2012, comments on the *Periodic Review, Weyerhaeuser Everett East Site* dated July 9, 2012. A summary of Weyerhaeuser's comments and the Department of Ecology's (Ecology) responses are numbered below in the same order as in your letter. I have used the abbreviation **WY** for Weyerhaeuser's comments and **ECY** for Ecology's responses.

1. **WY:** Are there remaining "remedial program" requirements needing to be "satisfactorily completed" to support an Ecology determination the Consent Decree can be terminated? In short, can the obligations intended by the Consent Decree be separated from the restrictive covenant such that the Decree is deemed completed?

ECY: Periodic Reviews are required as long as restrictive covenants remain on the deed. WAC 173-340-420(7). The Periodic Reviews are remedial actions. See WAC 173-340-420(1) (purpose of periodic review is "to assure that human health and the environment are being protected"), RCW 70.105D.020(26) (defining "remedial action" as "any action or expenditure: to identify, eliminate, or minimize any threat or potential threat posed by hazardous substances to human health or the environment"). Conducting Periodic Reviews is also an Ecology oversight activity with respect to the *Weyerhaeuser Everett East Site*. See WAC 173-340-420(2)(a) and Consent Decree 97 2 02773 8, §XXIV, Periodic Review. §XXI of the Consent Decree provides that Weyerhaeuser agrees to pay costs incurred by Ecology pursuant to the Decree for, among other things, remedial actions and Decree oversight and administration. The Consent Decree obligations cannot be separated from the restrictive covenant.

Additional detail on this comment is provided in Ecology's July 5, 2012, email response to similar comments on the draft Periodic Review made by Weyerhaeuser in a letter dated June 13, 2012. See **ECY_1**, **ECY_2**, and **ECY_3**.



2. **WY:** The Port of Everett's plan to place additional fill across the Site would seem to have relevance to the assessment on several of the Periodic Review criteria in WAC 173-340-420 and worthy of more commentary.

ECY: Weyerhaeuser made this same comment in their comments of January 30, 2012. Ecology responded on March 19, 2012, and indicated a sentence would be added to the document indicating the greater thickness of clean fill above the surface on which Weyerhaeuser operations were conducted. This was done and was in the draft provided on May 11, 2012, for Weyerhaeuser review. Weyerhaeuser did not comment on this issue in their June 13 comments on the May 11 draft, so Ecology believed the added language sufficiently addressed Weyerhaeuser's concern. (See p. 3 of the Periodic Review, first bullet)

In any case, the Periodic Review primary purpose is to address current conditions. Ecology believes the indication that clean fill would provide a greater thickness of fill above the surface on which Weyerhaeuser operations were conducted sufficiently notifies future site users of the condition of the site.

3. **WY:** Please provide the regulatory rationale for considering the National Recommended Water Quality Criteria "legally applicable requirements".

ECY: The Periodic Review notes, at page 6, that "Two of the Periodic Review criteria are to consider new scientific information for individual hazardous substances or mixtures present at the site and to consider new applicable state and federal laws for hazardous substances present at the site." Consequently, the Period Review, in Table 3, compares the groundwater cleanup levels provided under the Consent Decree for pentachlorophenol (PCP), polychlorinated biphenyls (PCB), and carcinogenic polyaromatic hydrocarbons (CPAH) for protection of the Snohomish River to current cleanup levels.

The current cleanup levels in Table 3 were derived first by reference to WAC 173-340-720, concerning groundwater cleanup levels. That rule generally provides that groundwater cleanup levels shall be at least as stringent "as concentrations established in accordance with the methods specified in WAC 173-340-730 for protecting surface water beneficial uses, unless it can be demonstrated that hazardous substances are not likely to reach surface water." E.g., WAC 173-340-720(5)(b)(ii).

WAC 173-340-730(3), in turn, provides that Standard Method B cleanup levels for hazardous substances in surface waters shall be at least as stringent as the water quality criteria adopted under WAC 173-201A, the national toxic rule at 40 C.F.R. 131, and

Water quality criteria based on the protection of aquatic organisms (acute and chronic criteria) and human health **published under section 304 of the Clean Water Act** unless it can be demonstrated that such criteria are not relevant and appropriate for a specific surface water body or hazardous substance. (Bold added)

WAC 173-340-730(3)(b)(i)(B). The PCP, PCB, CPAH aquatic life and human health criteria values published by EPA as National Recommended Water Quality Criteria for the Protection of Human Health are precisely the type of criteria referred to in WAC 173-340-730(3)(b)(i)(B) of the MTCA rules, because they were published by the EPA under Clean Water Act Section 304(a), 33 U.S.C. § 1314. See e.g., 68 Fed. Reg. 75507-01. Therefore, unless it can be demonstrated that these National Recommended Water Quality Criteria are not relevant and appropriate for the Snohomish River, then they represent the current cleanup levels for these hazardous substances.

4. **WY:** Ecology should be cautious to avoid positioning this Periodic Review to suggest that soil cleanup levels aligned with "unrestricted land use" are relevant at this industrial property. The narrative discussion and Site drawing references to "unrestricted land use" should be stripped out of this Periodic Review.

ECY: The distribution of contamination at the site will be of interest to future site developers and users. The site has been replatted into several parcels. Prospective buyers of these parcels will want to know the concentrations and distribution of contaminants with respect to current cleanup levels as well as the cleanup levels set in the Consent Decree. This allows them to judge the degree of hazard remaining on the parcel they are interested in.

In addition, development may result in soil being sent off-site. Having an idea of the relationship of contaminant concentrations to unrestricted land use concentrations could be important in assessing disposal options.

Finally, Ecology will be contacted in the future regarding site conditions. Knowing the relationship of contaminant concentrations to cleanup levels for various exposure pathways, even if they are not the cleanup levels set in the consent decree, will be of assistance to Ecology in adequately responding to inquiries.

Ecology's concern regarding efficient response to questions from future site users is not abstract. The Tulalip Water Pipeline is being constructed across the Weyerhaeuser Everett East property, and Ecology has been contacted several times for consultation and advice.

Additional detail on this comment is provided in Ecology's July 5, 2012, email response to similar comments on the draft Periodic Review made by Weyerhaeuser in a letter dated Jun 13, 2012. See ECY_8.

Mr. Ken Johnson
October 19, 2012
Page 4

5. **WY:** Weyerhaeuser notes the Restrictive Covenant Section 3 prohibition on "activities which may interfere with contained hazardous substances. This demand is contrasted with Section 4 which acknowledges that hazardous substances encountered in site "development" will require containment or proper management/disposal. Ecology will presumably reconcile how disturbance of hazardous substances can both be prohibited and also allowed if certain conditions are met. However, these terms might be delineated, does the agency believe Weyerhaeuser has some continuing obligation to reimburse Ecology oversight of either "activity" or "development" proposals that occur in the future.

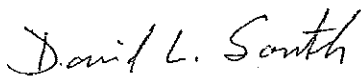
ECY: Consent Decree 97 2 02773 8, Ecology v. Weyerhaeuser Company, provides in §XXII, Remedial and Investigative Costs, that Weyerhaeuser agrees to pay costs incurred by Ecology pursuant to this Decree. These costs shall include work performed by Ecology for oversight and administration. Per the Consent Decree, Weyerhaeuser has a continuing obligation to reimburse Ecology oversight of any "activity" or "development" proposal that results in the need for Ecology oversight so long as restrictive covenants are in effect at the site.

With respect to the §3 prohibition on "activities" which may interfere with contained hazardous substances and §4 provision for wastes encountered in development, this simply means that if wastes encountered during development are not properly managed, temporarily stored, and disposed of or recontained at the same or greater level or before, then the containment would have been interfered with.

Additional detail on this comment is provided in Ecology's July 5, 2012, email response to similar comments on the draft Periodic Review made by Weyerhaeuser in a letter dated June 13, 2012. See ECY_2, ECY_5, and ECY_6.

Should you have any questions, please call me at (425) 649-7200.

Sincerely,



David L. South
Senior Engineer
Toxics Cleanup Program

ecc: Erik Gerking, Port of Everett
Jayman Woody, Motor Trucks, Inc.

RECEIVED

SEP 07 2012

DEPT OF ECOLOGY
TOP - NWRO

September 2, 2012

David L. South
Dept. of Ecology
3190 160th Ave SE
Bellevue, WA 98008

Re: Weyerhaeuser Everett East Site

Dear Mr. South:

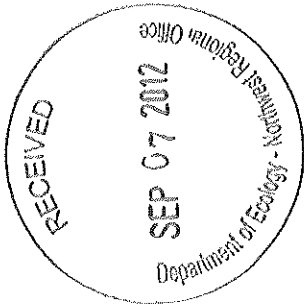
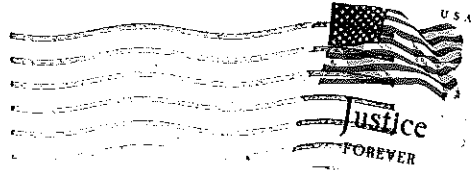
I have reviewed your publication #12-09-173 regarding the Weyerhaeuser Everett East Site. I agree with and support the plan to clean up this site. I believe it is important to clean up this site and others for public health reasons for humans, animals and marine life.

I am a resident in Everett and have attended several meetings about this project.

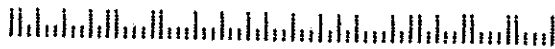
Sincerely,
Jennie Lindberg

Jennie Lindberg
307 Federal Ave
Everett WA 98201
206 818 7650

PO Box 12418
Everett, WA 98201



David L. Southrop
3190 160th Ave SE
Bellevue, WA 98008





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October 11, 2012

Ms. Jennie Lindberg
3007 Federal Avenue
Everett, WA 98201

Re: Weyerhaeuser Everett East Site

Dear Ms. Lindberg:

Thank you for your comment regarding the Weyerhaeuser Everett East Site. We will continue to clean up sites to protect human health and the environment.

Sincerely,

David L. South

David L. South
Senior Engineer
Toxics Cleanup Program

South, David (ECY)

From: South, David (ECY)
Sent: Monday, October 08, 2012 1:52 PM
To: 'Dean Smith'
Subject: RE: Everett clean up sites

Thank you for your comment. We are working toward getting all sites cleaned up.

David L. South
Senior Engineer
Toxics Cleanup Program, NWRO
3190 160th Avenue SE
Bellevue, WA 98008-5452
425-649-7200

-----Original Message-----

From: Dean Smith [<mailto:deansmith4@mac.com>]
Sent: Tuesday, September 11, 2012 8:16 AM
To: South, David (ECY)
Subject: Everett clean up sites

David,

I strongly support the Dept. of Ecology actions to clean up all of the contaminated sites along the Snohomish River around Everett, WA. These areas need to be brought back into safe public use.

Dean Smith
3007 Federal Ave.
Everett, WA, 98201

Sent from my iPad

South, David (ECY)

From: South, David (ECY)
Sent: Wednesday, August 22, 2012 2:17 PM
To: 'Tim Garton'
Subject: RE: The future of the Weyerhaeuser Everett East Site

Thank you for your comment, Mr. Garton. Traffic routing is a local government matter. The Washington State Department of Ecology has no jurisdiction regarding traffic routing.

You may wish to contact the City of Everett and the Port of Everett with your traffic concerns.

David L. South
Senior Engineer
Toxics Cleanup Program, NWRO
3190 160th Avenue SE
Bellevue, WA 98008-5452
425-649-7200

From: Tim Garton [<mailto:thgarton@gmail.com>]
Sent: Tuesday, August 21, 2012 6:37 PM
To: South, David (ECY)
Subject: The future of the Weyerhaeuser Everett East Site

Hi David.

I'm looking at the department of Ecology report on the plans for the subject site. I see that the plan for this site is to construct an industrial park on the site. I live in the Belmonte Heights town home complex at the current exit from that area. I would like to see southbound traffic out of that site routed along the railroad tracks so that it does not use East Marine View drive and enters Marine view drive across the street from the south bound entrance to I5. This would route a lot of heavy truck traffic out of the residential neighborhood and make it a much more pleasant area to live in. We already have a great deal of train noise to deal with and increasing the level of truck traffic will make it intolerable. Please give this some consideration.

Tim Garton