Sauget Sites Area II / Sauget SP / Legal

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April 3, 1990

Mr. James L. Morgan
Assistant Attorney General
Environmental Control Division
Attorney General
State of Illinois
Springfield, Illinois 62706

Re: Sauget Sites Area II--Comments to Interim Consent Order and De Minimis Partial Consent Decree

Dear Mr. Morgan:

This is in response to your request for comments to the draft Interim Consent Order for the performance of the RI/FS for Site Q and to the De Minimis Partial Consent Decree which you submitted to Frank Pellegrini for review. Our comments are general in nature and do not fully address every item with which we are in disagreement, meaning that our failure to object to a specific provision should not preclude us from later objecting to such provision once formal negotiations are commenced. It is my understanding that you are seeking our input to provide IEPA with an indication of the terms we wish to include in the final Consent Order for the performance of the RI/FS for Site Q.

To comment on the general framework of the Interim Consent Order, it does not seem structured to address the relationship of the parties to Site Q. All of the known and willing PRPs for Site Q at the time of the effective date of the Order should be made parties, with Eagle Marine Industries assuming the lead. It is important to afford Eagle Marine the latitude to maintain the lead, but permitting it to relinquish this role, if desired, should it enter into a De Minimis Consent Decree. The Order appears to be tailored to a situation wherein the "Defendant" is the only PRP, i.e., V.B. requires "Defendant" to remediate any release or threatened release at or from the Site. That provision is not appropriate where, as here, there are several PRPs. While it may be advisable to have Eagle Marine as the lead, to serve as a representative for the PRPs as a collective group, Eagle Marine is not willing to assume any liability for

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the group. The references to "Defendant" in the Order will have to be adapted to reflect this relationship.

Addressing specific provisions, most noticeable is the absence of certain basic protective provisions. It is important to include a procedure for the identification of additional PRPs by both IEPA and other PRPs, requiring IEPA input and further providing that response costs may be recovered from non-cooperative and non-participating PRPs. It is also necessary to include a provision that this Consent Order is inadmissible as evidence in any court proceeding. In some sections IEPA has imposed time restrictions for responding and providing information, whereas in others it has not. For example, in Paragraph X(A), Certification and Termination, it is necessary to put a time limit, such as 30 days, within which Plaintiff must notify Defendants of what needs to be done to complete the required work. We would also insist on a provision requiring that IEPA make available, upon request, all information and documentation regarding the Site subsequent to the commencement of the RI/FS. We would also like to designate an individual to serve as Defendants' Executive, for purposes of receiving all reports and comments and general representation of Defendants in addition to the Project Coordinator. Also, in Paragraph XVII(E), we should be given the option to have an Alternate Project Coordinator present in the event the designated Project Coordinator is unavailable for whatever reason. Under Paragraph IX, we would like to see a provision for conferral prior to the requirement by Plaintiff of additional work. A provision is necessary stating that penalties do not run during the dispute resolution phase. Under Paragraph XVIII(E), Dispute Resolution, Defendants should be given a notice of when a 30 day period begins to run. Also, the 90 day period for the State is excessive and seems rather arbitrary. Finally, in Subpart (B)(F) of that paragraph, we simply cannot agree to the accrual of penalties during the challenge to stipulated penalties.

Other provisions are too restrictive and need to be amended to impose good faith efforts by IEPA. Otherwise, the whims of personnel involved can dictate whether the RI/FS is given a fair opportunity to be carried out. For example, Paragraph V(E)(6) permits IEPA to reject the RI/FS for any reason and requires Defendants to incorporate all of IEPA's modifications, even those

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that may be unreasonable. Similarly, Paragraph VI(C) requires incorporation of all of IEPA's modifications. In a complex RI/FS such as this, a requirement of good faith and reasonableness needs to be imposed to prevent impasse on minor items. Under Paragraph VII, Remedies Selection, we would like to see included a provision to the effect that, in selecting a remedy, factors such as cost effectiveness must be considered.

Some provisions merely need refinement. For example, Paragraph IX(C) is duplicative of the guidelines contained in USEPA Document QAMS-005-80 and seems unnecessary. Similarly, Paragraph X(B), beginning with "if the Plaintiff . . . " is in large part a repetition of Paragraph X(A). Moreover, in Paragraph IX(C)(3), we would insist that IEPA absorb the cost for requiring laboratories to analyze additional samples. Also, Paragraph VIII(A), Access, allows only 30 days for Defendants to obtain access to the Site; more time may be required given the nature of the Site. With respect to that provision, we would also add a provision requiring IEPA to use reasonable authority to assist Defendants in obtaining access to the Site. Under Paragraph IX(B), we would add a requirement that Plaintiff provide reasonable notice prior to inspecting the premises. The confidentiality provisions of Paragraph VIII(C) should be incorporated by reference here. In Paragraph XIV, Force Majeure, we would add a specification of what may constitute a force majeure, i.e., fire, flood, compliance with a governmental directive or order, etc. Also, Defendants should be required to report circumstances which Defendants have "reason to believe has caused or may cause a violation of the Order." To amend Paragraph XIV(C), the parties should be given the opportunity to extend performance themselves, rather than requiring the court to make that determination. The $50,000.00 security agreement deposit and maintenance of $50,000.00 limit of Paragraph XV is excessive and unnecessary. We propose to delete that entire section which requires a security deposit. Paragraph XVII(A) gives the On-Scene Coordinator too much authority to require extra work to be performed. Some degree of input from Defendants should be permitted.

As I prefaced, these comments are general in nature and do not address all of the problem areas. I hope this gives you an indication of our position regarding the specific terms of a

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Consent Order. We are certainly willing to negotiate on all items and are prepared to do that once formal negotiations are commenced.

You also requested comments regarding the draft De Minimis Consent Decree which you submitted to Frank Pellegrini. Having reviewed the De Minimis Decree, it does not appear to serve as a suitable model for any De Minimis Decree to which we would eventually agree. While your draft does have certain standard provisions, such as a covenant not to sue, and denial of liability, the fact situation upon which it is based is not similar to the situation at Site Q, and we feel it necessary to tailor the De Minimis Decree to our specific circumstances. Therefore, we are reserving more extensive comments regarding the possible De Minimis Consent Decree for a later time. If you are able to locate a De Minimis Consent Decree which more parallels our fact situation, please forward it to this office, and we will provide comments. In the meantime, if you have any questions, please do not hesitate to call.

Sincerely yours,

Julie A. Emmerich

JAE/db

cc: Richard D. Burke
Robert Schreiber
Richard L. Waters
Milton Greenfield, Jr.