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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:	)	
	)	
Sauget Area 2 Superfund Site	)	
Sauget, Cahokia, and East	)	
St. Louis, Illinois	)	
	)	Docket No. V-W-02-C-716
RESPONDENTS:	)	
	)	
A-1 Oil Corporation et al.	)	
	)	
Proceeding Under Section 106(a) of the	)	
Comprehensive Environmental Response,	)	
Compensation, and Liability Act of 1980,	)	
As amended (42 U.S.C. § 9606(a))	)	

RESPONSE OF RESPONDENT ROGERS CARTAGE COMPANY

On or about October 15, 2002, Rogers Cartage Company ("Rogers Cartage") was served with an Administrative Order for Remedial Design and Interim Remedial Action in the matter of the Sauget Area 2 Superfund Site, Sauget, Cahokia and East St. Louis, Illinois (the "UAO"). Pursuant to paragraph 99 of the UAO, Rogers Cartage must submit to the U.S. EPA a written notice stating its unequivocal intention to comply with all terms of the UAO. With this response, Rogers Cartage is invoking its rights pursuant to 42 U.S.C. § 9601(b) and paragraph 101 of the UAO, and is asserting a "sufficient cause" defense to the UAO. In support of its sufficient cause defense, Rogers Cartage states as follows:

Sufficient Cause Defense

1. Rogers Cartage has sufficient cause not to respond to the UAO as it is overbroad and confusing. An overly broad, infeasible or unduly burdensome order issued pursuant to CERCLA § 106 provides sufficient cause for noncompliance. *Employers Insurance of Wausau v. Browner*, 848 F. Supp. 1369, 1377 n.13 (N.D. Ill. 1994) (explaining that infeasibility,

overbreadth and unduly burdensome orders provide sufficient cause for noncompliance as set forth in 42 U.S.C. § 9606). *See also, Employers Insurance of Wausau v. Browner,* 52 F.3d 656, 663-64 (7th Cir. 1995) (en banc). The Area 2 UAO ostensibly demands that 77 separate and different respondents construct a wall, install groundwater monitoring wells, conduct groundwater monitoring, and treat extracted groundwater from Site R. Even if Rogers Cartage were able and decided to comply with the UAO, it is unclear how its response would be coordinated with the multitude of other respondents without the installation of 77 different walls.

Furthermore, the UAO asks Rogers Cartage, one of many respondents in the case who are either not liable or are responsible for de minimis shares, to fund all of a more than 26 million dollar cleanup. Such a request, while potentially not unduly burdensome as to a large generator like Solutia, is clearly unduly burdensome with respect to a small, innocent party like Rogers Cartage.

2. Rogers Cartage has sufficient cause to refuse to comply with the UAO because the UAO would be impossible to comply with. Impossibility is sufficient cause for noncompliance with a § 106 order. *Employers Insurance of Wausau*, 52 F.3d at 664; *Employers Insurance of Wausau*, 848 F. Supp. at 1377 n.13. In this case, it would be impossible for Rogers Cartage to comply with the UAO because Solutia has indicated that it intends to comply with the order, and has begun, or plans to begin building a wall and performing the other tasks laid out in the UAO. If Solutia performs and funds the UAO, there will be no possible way for Rogers Cartage to comply with the terms of the order.

3. Rogers Cartage lacks sufficient capital to fund such a large cleanup operation. Lack of funds is sufficient cause for noncompliance with a CERCLA § 106 order. *Employers*

Insurance of Wausau, 52 F.3d at 663 (explaining in *dicta* that an inability to pay for a cleanup mandated by a section 106 order provides sufficient cause for failing to respond).

4. Rogers Cartage should not be considered a responsible party at the Area 2 site. A party has sufficient cause not to comply with a UAO if they do not fall within one of the four categories of responsible parties set forth in 42 U.S.C. § 9607. 42 U.S.C. § 106(b). As Rogers Cartage does not fall within any of these four categories, it has sufficient cause to refuse to comply with the UAO.

5. The UAO as issued to Rogers Cartage is arbitrary, capricious and incorrect. When the EPA issues a UAO arbitrarily or capriciously, a respondent has sufficient cause not to comply therewith. *Solid State Circuits v. United States Environmental Protection Agency*, 812 F.2d 383, 391 (8th Cir. 1987). In this case, Rogers Cartage did not generate wastes which were disposed of, released into and/or transported to Area 2 groundwater. Accordingly, the UAO was issued arbitrarily and capriciously to Rogers Cartage. Rogers Cartage has sufficient cause not to comply therewith.

6. Finally, Rogers Cartage requests an administrative hearing, so that it may be heard on its sufficient cause defenses set forth above.

7. The UAO was improperly issued in this case, as the Area 2 UAO does not present an imminent and substantial danger to the public health. Section 106 of CERCLA specifies that an administrative order such as this UAO may only be issued when a release presents an imminent and substantial danger to the environment. In this case, no such imminent and substantial danger is present. State and Federal authorities have been addressing contamination in the area for years, and impacted business and residents have long been protected against harm. Furthermore, responsible parties, such as Solutia have previously negotiated and agreed to

perform the Area 2 UAO remedy. In light of these facts, no imminent and substantial danger exists, and the EPA lacked authority to issue the UAO under § 106. Rogers Cartage has sufficient cause not to respond to the UAO.

Settlement Negotiations With Solutia Are Ongoing

Purely in recognition of the litigation costs that will be necessary to fight the EPA in responding to the UAO, and with an eye to minimizing such costs, Rogers Cartage has entered into negotiations with Solutia to settle its outstanding liability to the EPA pursuant to the UAO. In exchange for Rogers Cartage's payment of funds to Solutia to offset the cleanup operations, Solutia would be willing to assume any responsibility Rogers Cartage has to the EPA pursuant to the UAO. Solutia and Rogers Cartage have not yet reached agreeable terms for such a settlement.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document was served via facsimile, overnight delivery and U.S. Mail, postage pre-paid, this 13th day of February, 2003 upon the following individuals:

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