UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA, Plaintiff, vs. NL INDUSTRIES, et al., Defendants, and CITY OF GRANITE CITY, ILLINOIS Intervenor/Defendants,	)	Civil Action No. 91 CV 00578-JLF

CITY OF GRANITE CITY'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

COMES NOW Intervenor/Defendant, City of Granite City, Illinois ("the City") and moves that this Court enter a temporary restraining order and a preliminary injunction, pursuant to FRCP 65, prohibiting the United States, the U.S. EPA, and their officers, agents, servants, and employees, and all other persons in active concert with them, from proceeding with the residential soil remedial action plan for NL Industries/Taracorp Superfund site ("NL Site") as proposed in the Record of Decision for that Site until this Court has determined the merits of Intervenor/Defendant's First Amended Counterclaim and the issues in Phase I of this Court's First Case Management Order. In support thereof, the City states as follows:

1. On July 31, 1991, the United States filed its Complaint in this action against NL Industries and several alleged generators, seeking 1) to recover its response costs pursuant to Section 107 of CERCLA, 42 U.S.C. 9607 and 2) injunctive relief to

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compel the defendants to comply with an administrative order issued pursuant to Section 106 of CERCLA, 42 U.S.C. 9606. The United States in its Complaint alleged that the order was based on a Record of Decision ("ROD") issued on March 30, 1990. (Complaint at Par. 43).

The pertinent aspects of the procedural history of this case are contained in the Procedural Posture and Statement of Facts of the Memorandum attached hereto.

2. The remediation plan set forth by the U.S. EPA in its ROD provides for the removal of the residential soil of yards where the lead in a single soil sample exceeded 500 parts per million ("ppm"), a decision which potentially impacts in excess of 1,000 residences and will disrupt life in Granite City for many years to come. The U.S. EPA set this level even after a Remedial Investigation/Feasibility Study by a contractor for NL Industries determined that a lead-in-soil cleanup level exceeding 1,000 ppm would be fully protective of human health and the environment in Granite City. (AR No. 144). The City and Defendants have repeatedly shown that the agency's stated bases for this decision do not support the chosen level. Instead of reviewing its decision in good faith, the agency has for more than 6 years continued to attempt to justify its original decision, changing the supporting basis each time a justification is proven not to support the decision.

3. Because the U.S. EPA has refused to act at the outset in accordance with the law in reaching its decision, and refused to

act in good faith to reconsider its original determination, and is now undergoing significant excavation activities in Granite City, the City has no choice but to file this motion. Furthermore, because CERCLA exceeds the authority granted to Congress under the Commerce Clause as applied to the NL Site, the U.S. EPA is acting pursuant to an unconstitutional statute.

4. The City was once before forced to file a Motion for a Temporary Restraining Order and Preliminary Injunction when, in August, 1994, the U.S. EPA suddenly began remediating residential properties in Granite City, without notification to the City. This action was in direct contradiction to prior assurances by the U.S. EPA, during the May 19, 1993 status conference before this Court, that no residential soil removal would occur before the Madison County Exposure Study, discussed below, was finalized and the comment period reopened.

5. The City's 1994 preliminary injunction action was withdrawn after the U.S. EPA agreed to limit the number of homes it would remediate to only a few specified homes above 1,000 ppm, participate in a convention of experts, allow the City (through Dr. Robert Bornschein) to undertake a recontamination study, and honor its earlier commitment to reopen the Administrative Record.

6. As part of the reopening of the record, the U.S. EPA agreed to consider the results of the Madison County Exposure Study, a health study performed in Granite City by the U.S. EPA's sister agency - the Agency for Toxic Substances and Disease Registry ("ATSDR"). (Memorandum, Exhibit C). This study was

conducted specifically to determine whether the U.S. EPA's planned cleanup would effectively improve the health of the citizens in Granite City.. The Madison County Exposure Study revealed that the proposed cleanup would not improve the health of the citizens. It showed that lead in soil has a small impact on blood lead levels in Granite City, and that lead paint is a much larger contributor. The study therefore showed that soil lead remediation alone would not reduce exposure to lead in Granite City. (See Memorandum at 18-20; Exhibit C at 26).

7. The U.S. EPA reopened the comment period in October, 1994 and closed it in January, 1995. The City and the Defendants submitted extensive comments to the agency concerning the Madison County Exposure Study and the bases set forth by the U.S. EPA for its 1990 decision. (Supp. AR No. 336). In October, 1995, the U.S. EPA issued a Decision Document/Explanation of Significant Differences ("DD/ESD"). This document "reaffirmed" the 500 ppm lead-in soil cleanup level. (Supp. AR No. 377).

8. The basis set forth in the DD/ESD for the "reaffirmation" of the 500 ppm cleanup level is that running the latest version of the U.S. EPA's Integrated Exposure Uptake/Biokinetics ("IEUBK") model backwards, using default values (instead of available site-specific data), supports a cleanup level of 500 ppm. (Memorandum, Exhibit G). Among other defects, delaying disclosure of this rationale until release of the DD/ESD, eight months after the close of public comment, violates the U.S. EPA's obligation to set forth its decision and the information upon which it is based in a manner

that provides for meaningful public comment. (See Memorandum at 32-34).

9. Running the IEUBK model backwards with default parameters will achieve the same result, 500 ppm, regardless of what site is being studied. By ignoring available site-specific information and relying on the default parameters for this model, the U.S. EPA is, in effect, establishing 500 ppm as the universal lead-in-soil cleanup level. The U.S. EPA has thus dictated a rule that 500 ppm is the appropriate level. The IEUBK model has not been subject to rulemaking procedures and cannot, used in this manner, provide an adequate basis for establishing a lead in soil cleanup level at any given site. Moreover, the validity of the model and the accuracy of the default values used are questionable. (See Memorandum at 34-36).

10. In the Fall of 1994 and at the request of the City, Dr. Robert Bornschein of the University of Cincinnati, began a study of homes in Granite City that had been remediated by the U.S. EPA to determine whether the remediation had achieved its goal of reducing residents' exposure to lead. The U.S. EPA was informed of this study at the time the settlement was reached in 1994, and was advised it would be provided upon completition. In April, 1996, Dr. Bornschein's report of his study, "The Effectiveness of Soil Removal of Lead Exposure in Granite City," was issued. (Memorandum, Exhibit D). The report concludes that the abatement of residential soil in Granite City does not effectively reduce housedust lead levels and therefore is likely to have a minimal

effect on lead exposure. The study also noted that interior housedust lead levels increased substantially at most of the dwellings evaluated and that the soil itself became recontaminated after the completion of abatement activities. It is thus clear from Dr. Bornschein's study that any effective cleanup in Granite City must address all sources of lead, including the Taracorp pile and lead paint. The U.S. EPA was given a copy of this report immediately upon its completion.

11. In March, 1996, the City was provided with a list of approximately one hundred (100) residential properties that the U.S. EPA stated it intended to remediate in the near future. This list includes several homes with soil lead levels under 1,000 ppm. In May, 1996, the U.S. EPA resumed substantial excavation activities in Granite City.

12. The City has filed herewith its First Amended Counterclaim, seeking declaratory and injunctive relief to prevent Plaintiff from going forward with its proposed residential soil excavation at the NL Site until a residential soil remedial action plan has been selected that is appropriate and necessary, and is consistent with applicable law.

13. The interest of the City in prohibiting the implementation of this remedial plan is substantial and immediate, and the property, health, and safety interests of the City will be irreparably harmed if a temporary restraining order and preliminary injunction is not entered, for the following reasons:

(a) The residential soil removal will jeopardize the

health of residents, workers, and visitors in Granite City by generating lead-bearing dust which will be dispersed throughout the City. No showing has been made by the U.S. EPA that any benefit that may be derived from excavation will outweigh the increased risk resulting from the disturbance and dispersal of contaminated soil presently covered by vegetation.

(b) The residential soil removal will have a deleterious impact on the City's economic development efforts to rejuvenate the City's commercial and industrial sector, particularly the downtown area where much of the City's efforts are directed.

(c) By admission of the U.S. EPA, the residential soil removal will take years to complete, during which period construction workers, heavy earth-moving equipment, and dump trucks will continuously occupy Granite City and its streets.

(d) It is reasonably anticipated that Granite City will incur additional costs for the supervision of increased traffic flow during remedial activities.

(e) The U.S. EPA's plan seriously threatens the reconstruction of 16th Street, because adherence to the 500 ppm clean-up standard makes the project cost-prohibitive. Granite City Steel, the City's largest employer, as well as other industries, would benefit from this planned project.

(f) By failing to follow the CERCLA statutory requirements, and by failing to allow parties to submit comments regarding the Marcus Report, the U.S. EPA's implementation of its proposed residential soil excavation to a level of 500 ppm will

constitute a deprivation of the City's health and property interests without due process of law.

14. The City has no adequate remedy at law.

15. The threatened injury to the City outweighs any harm the granting of a temporary restraining order and preliminary injunction may inflict on the government.

16. The granting of the temporary restraining order and preliminary injunction will serve the public interest.

17. The City has a reasonable likelihood of success on the merits.

18. In further support hereof, the City refers the Court to its Memorandum in Support hereof.

WHEREFORE, Intervenor/Defendant, the City of Granite City, Illinois, prays that the Court enter a temporary restraining order and a preliminary injunction prohibiting the United States, the U.S. EPA, and their officers, agents, servants, and employees, and all other persons in active concert with them, from proceedings with the residential soil remedial action plan for the NL Industries/Taracorp Superfund site ("NL Site") as proposed in the Record of Decision (as modified by the Decision Document/Explanation of Significant Differences) for that Site until this Court has determined the merits of Intervenor/Defendant's First Amended Counterclaim and the issues in Phase I of this Court's First Case Management Order.

Respectfully submitted,

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