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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

SDMS DocID 550385

UNITED STATES OF AMERICA, et al.,	:	
Plaintiffs	:	Civil Action No. H-79-704(JAC)
v.	:	
SOLVENTS RECOVERY SERVICE OF NEW ENGLAND, INC.,	:	
Defendant	:	

Superfund Records Center
SITE: SRS
BREAK: 10.4
OTHER: 550385

BRIEF OF SOLVENTS RECOVERY SERVICE OF NEW ENGLAND, INC. IN OPPOSITION TO THE MOTION OF THE UNITED STATES FOR INJUNCTIVE RELIEF AND ASSESSMENT OF PENALTIES, AND IN SUPPORT OF CROSS-MOTION FOR PENALTIES AGAINST THE UNITED STATES, FOR DISCOVERY AND FOR AN EVIDENTIARY HEARING

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PRELIMINARY STATEMENT

This motion by the United States Environmental Protection Agency ("EPA") to enforce the provisions of the Consent Decree is typical of the relationship between the EPA and Solvents Recovery Service of New England, Inc. ("SRSNE") since the Consent Decree was entered into in 1983. Throughout the relationship, the EPA has ignored its own obligations and responsibilities and has gone out of its way to accuse SRSNE - based on the most benign data - of every kind of misconduct.

The motion, brought in 1990, is concerned with alleged deficiencies in construction of the groundwater recovery system ("the on-site system") that took place over five years ago. Despite EPA's press releases in May and December of 1985 asserting, respectively, that it had supervised the well construction and that the system fulfilled a major portion of the Consent Decree, and despite EPA's failure to have advised SRSNE years ago if it found any fault with the construction, the EPA never gave SRSNE notification as required by the Consent Decree that it had identified construction deficiencies or an opportunity to explain the alleged deficiencies before making this application to the Court.

Much of what EPA complains about in its motion has come about because the natural conditions at the site proved to be different from those assumed by both the EPA

and SRSNE when the system was designed. For example, the SRSNE data indicate that at locations near wells 1 and 2 there was no groundwater when the wells were constructed and, therefore, no potential for contaminated groundwater to migrate from the SRSNE facility near those wells (See Hoagland Exhibits 14, 19-24 and 26). Yet, this helpful information somehow becomes for EPA a construction fault of SRSNE, even though EPA concedes that wells 1 and 2 went the required three feet into bedrock (See Hoagland Declaration, ¶36). In the circumstances, it is patently unreasonable to seek penalties from SRSNE when the natural conditions severely restrict what the on-site system can accomplish.

SRSNE cannot tolerate the EPA's arbitrary conduct in silence, especially since the penalties sought are so clearly unwarranted. SRSNE therefore cross-moves to enforce the Consent Decree against the EPA, and for sanctions. Only through such relief will the entire Consent Decree be enforced and the EPA's efforts be focused on remediation rather than retribution. To the extent fact issues need to be resolved SRSNE requests discovery and an evidentiary hearing.

SRSNE does not contend that implementation of the Consent Decree requirements has gone entirely smoothly or that its compliance with all of the Consent Decree obligations has been impeccable. SRSNE concedes that it has

failed for periods in the past to conduct certain monitoring activity and to provide the EPA with certain required reports. The record shows, however, that as soon as the EPA notified SRSNE of these deficiencies, SRSNE acted to correct them. Had EPA complied with its obligation to notify SRSNE in a timely fashion of its objections to the portions of the on-site system now complained about, SRSNE could have reached agreement regarding changes or invoked the dispute resolution provisions of the Consent Decree.

SRSNE is confident that upon evaluating the conduct of both the EPA and SRSNE, the Court will conclude that the EPA's breach of its Consent Decree obligations is far more serious than any breach of obligations by SRSNE, that the EPA's own conduct precludes it from recovering any of the substantial penalties that it seeks in its motion, and that the EPA as well as SRSNE should be required to cooperate in fulfilling the objectives of the Consent Decree.

COUNTERSTATEMENT OF FACTS

The Consent Decree, as set forth in the Declaration of Matthew Hoagland submitted by the EPA, contemplates three general types of activity to be undertaken by SRSNE. The first is the Facility Improvements and Pollution Prevention Measures contemplated by Paragraph 7 of the Consent Decree (Hoagland Dec., ¶11). The second is the Program for Abatement and Containment of Groundwater Pollution at and in the Immediate Vicinity of SRSNE contemplated by Paragraphs 8-11 of the Consent Decree ("on-site system", Hoagland Dec., ¶12). The third is the Program for Isolation and Containment of Groundwater Pollution Beyond the Influence of the Groundwater Recovery System contemplated by Paragraphs 12-13 of the Consent Decree ("off-site system," Hoagland Dec., ¶16). EPA limits its motion to the on-site system.

The EPA would have this Court believe that the off-site system is not at issue in this motion (EPA's brief at 5). In view of the draconian penalties sought by the EPA, however, SRSNE submits that the history of the off-site system is relevant to the issue of the good faith shown by SRSNE in attempting to comply with the Consent Decree, with very little cooperation from EPA or others.

The off-site system was timely completed by SRSNE, but has never been operated, principally because of EPA's negative comments on the draft discharge permit

issued by the Connecticut Department of Environmental Protection ("DEP"). Indeed, the EPA refused to approve the draft permit. Certification of James R. Hulm submitted herewith, Exhibit 17. The resulting inability to operate the off-site system is particularly frustrating because SRSNE proposed significant improvements to the system but was dissuaded from implementing them because EPA would not permit the necessary extension of the construction schedule (Hulm Cert., Exhibits 1,3,4,13,14 and 15). Although time was critical when SRSNE wished to improve the off-site system's capacity to remediate groundwater, it has stood still ever since the completion of the off-site system in its original form because of the dispute between the EPA and the Connecticut DEP.

DESIGN OF THE ON-SITE SYSTEM

The initial engineering report relating to the on-site system was timely submitted to the EPA by SRSNE's consultants, York Wastewater Consultants, Inc. ("YWC") on June 23, 1983. EPA responded on September 23, 1983, requesting that SRSNE address certain issues (Hulm Cert., Exhibit 2). Of particular importance to this motion is EPA's comment requesting that SRSNE amend the design to include a projected zone of influence even though EPA admitted that a lack of field data would make the projection theoretical and nothing more than a "target." SRSNE

submitted a revised report on October 27, 1983 (Hulm Cert., Exhibit 5). When it submitted the revision, SRSNE reminded EPA that "approximate groundwater contours have been projected based upon theoretical analysis of groundwater withdrawal, however, actual field contours may be modified somewhat due to horizontal variation and lithology." EPA accepted SRSNE's revision on December 16, 1983, and found it to be in compliance with the Consent Decree (Hulm Cert., Exhibit 7).

The Consent Decree has several provisions relevant to this motion not mentioned by EPA Paragraph 14(C) of the Consent Decree provides:

> With regard to any approvals, and all certifications, reports, information an data submitted by SRSNE to EPA, if EPA disapproves or finds inadequate any proposed action, certification, report, information or data, it shall provide a written notice to SRSNE ... within sixty days ... which shall include: [the basis for EPA's conclusion, what further action it deems required and a proposed schedule].

Paragraph 14(D) provides that failure to indicate disapproval within 60 days is deemed approval.

Paragraph 15(B) of the Consent Decree, provides in relevant part:

> Any failure to comply with this Consent Decree which failure is a result of an act of God, or third parties not in contact with or under the direction or control of SRSNE, or is otherwise caused by circumstances

> beyond the control of SRSNE shall not result in penalties under paragraph 16.

As the discussion that follows indicates, EPA has ignored the obligations imposed on it by the provisions of Paragraph 14 and the justification provided to SRSNE by the provisions of paragraph 15(B).

On November 19, 1984, SRSNE submitted to EPA revised design plans and specifications for the on-site system, Hoagland Exhibit 10, which modified the previous plans and specifications in several ways material to this motion. First, the 1984 revised plans and specifications changed the well drilling method from the hollow-stem auger method[1] to the drive and wash method[2] and eliminated sieve analysis as a basis for selecting the well screen slot size. Instead, the slot size was to be determined based on the well driller's judgment of the appropriate slot size. Compare Hoagland Exhibit 10, 1984

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[1]The hollow stem auger method uses a hollow stem auger to drill a well. The hollow stem auger is a mechanical screw with a hole down the center of the screw. When the auger is screwed into the earth, the overburden material comes up this hole and may be collected for analysis, if needed, or discarded. Certification of William S. ("Pete") Duncan, III, submitted herewith, ¶12.

[2]The drive and wash method entails the hammering of case hardened pipe (the "well casing") into the ground with a hydraulic or cable tool rig. After the casing is hammered into the ground, a high-pressure water chisel is used to wash out the soil and overburden material inside the casing. See Duncan Cert., ¶12.

plans and specifications at 11, with Hoagland Exhibit 8, 1983 plans and specifications at 10 (Part 4). Second, the 1984 plans and specifications eliminated the provision requiring the installation of fail safe devices to shut down the system in the event of well failure. Compare Hoagland Exhibit 10 with Hoagland Exhibit 8.

CONSTRUCTION OF THE ON-SITE SYSTEM

The construction of the on-site system, which EPA and the U.S. Army Corps of Engineers observed and supervised, was completed on May 21, 1985.

The wells were constructed according to the 1984 designs and specifications, using the drive and wash method and drilling 3 feet into bedrock (See Duncan Cert., ¶12). In accordance with the 1984 plans and specifications, no sieve analysis was done (Duncan Cert. ¶13). The well driller selected a .006-inch slot size for the well screen because it was small enough to screen out silts and clay likely to be in the bedrock but had a capacity to pump fifteen times the maximum design pumping capacity of the system (Duncan Cert. ¶¶14, 15).

After the wells were installed, the driller "developed" the wells using an air pump to remove the water, grit and sand from the drilling activity that entered the well and were near the well screen. (Duncan Cert. ¶16). The amount of water, sand and grit removed

from each well was recorded. Id., referring to Hoagland Exhibit 26. While the specifications contemplated grouping the pumps according to well yields (Hoagland Dec., ¶¶49-54), a pumping test of several hours is required to determine well yield. The driller was not allowed to conduct pumping tests on the on-site system wells, however, because EPA required that SRSNE have a discharge permit for the water extracted from the wells during the pumping test. Duncan Cert., ¶18. Therefore, the driller connected the wells based on proximity and installed throttles so that flow for the wells in each cluster could be controlled. Id., ¶19.

On May 21, 1985 the EPA issued a press release (Hulm Cert., Exhibit 10), stating that the groundwater treatment system had been installed "by contractors to SRS working under supervision of EPA and the U.S. Army Corps of Engineers," and would begin operation as soon as SRSNE obtained an NPDES permit from the State of Connecticut. SRSNE received this permit and EPA issued another press release on December 20, 1985 (Hulm Cert., Exhibit 14), announcing that operation of the system had begun and stating: "The action fulfills a major portion of a 1983 consent decree between EPA, other intervening parties and SRS."

In response to an October 29, 1986 request from the EPA for information concerning the on-site system as

constructed, SRSNE provided as-built information on November 25, 1986. Hulm Cert., Exhibit 16. This information included the Well Construction Elevations and Map PZ-1, on which EPA relies in its motion. Id. See Hoagland Cert., ¶13, n.6.

PUMPS

As early as September of 1983, the EPA made suggestions as to the capacity of the pumps in the shallow well system, which were accepted and acceded to by SRSNE (See Hulm Cert., Exhibits 2 and 5). During the construction period, SRSNE advised the EPA that the contractor had found it necessary to switch from a single pump to multiple pumps and the EPA accepted this change (Hoagland Dec., Exhibit 10).

After the system became operational, problems developed with pump failures when (as frequently happened) the wells were pumped dry. In December, 1985, the well driller, Pete Duncan, examined the pumps because they were burning out due to lower groundwater levels than expected near some wells (Duncan Cert., ¶21). In January, 1986 he installed smaller pumps in the wells as a way of solving the problem. Id. Despite this change, some of the pumps continued to burn out. On October 17, 1988, SRSNE's consultant wrote the EPA pointing out the problems with the existing pump system and requesting permission to try

out a different type of pneumatic pump in three of the wells (Hulm Cert., Exhibit 18). After some further correspondence in which EPA set some conditions on the use of new test pumps and SRSNE agreed to the conditions, EPA sent SRSNE a revised response on November 7, 1989. (Hulm Cert., Exhibit 19). EPA chose to interpret SRSNE's October 1988 letter concerning operational problems with the pumps as an admission of either a design or a construction problem with the system, but set forth no basis for that assertion. Id. SRSNE responded to this letter on November 22, 1989, stating that it intended to go ahead with the testing as a necessary first step to ensuring that the on-site system performed as designed (Hulm Cert., Exhibit 20).

MONITORING WELLS

The performance of the on-site system was designed to be monitored by eighteen monitoring or verification wells. As the EPA acknowledges (Hoagland Dec., ¶81), four of these wells were to be newly installed and, because of the hydrology of the area, were to be located not on SRSNE's property but on abutting land owned by other entities. This fact was known to the EPA as early as December 16, 1983 (see Hulm Cert., Exhibit 7).

Although SRSNE requested EPA's assistance, including the issuance of an order to the neighboring

entities requiring them to afford access for the drilling of monitoring wells (see Hulm Cert., Exhibit 9), no such order was ever issued. EPA insisted that SRSNE must deal itself with its uncooperative neighbors. After those negotiations failed, SRSNE filed a motion, in which the United States concurred, to join the neighboring entities as necessary parties in the within action to gain access to their land. The motion was granted by the Court on January 16, 1986.

As a result of this joinder, SRSNE was able to obtain an easement from one neighbor, and the well on his land was installed on December 6, 1986 (see Hoagland Dec., Exhibit 41). The other neighbor, however, responded by bringing an action in state court. SRSNE eventually settled both lawsuits by purchasing the property in June, 1988. The three wells on this property were constructed shortly thereafter, in September of 1988 (see Hoagland Dec., Exhibit 41).

In connection with its efforts to comply with Paragraph 12 of the Consent Decree and the off-site system that Paragraph 12 required, SRSNE developed an alternate design to be more effective at remediating off-site groundwater and submitted this alternative design to EPA on May 12, 1986 (Hulm Cert., Exhibit 10). This alternative included a new proposed recovery well in the area of

highest groundwater contamination and the elimination of a recovery well where groundwater was not contaminated. Id.

EPA responded on August 7, 1986 with approval subject to several conditions with strict time limitations (Hulm Cert., Exhibit 14). EPA also indicated that if SRSNE could not meet these conditions, it would be subject to penalties for not having constructed the original off-site system by the July 7 deadline. Id. SRSNE's consultants found some of EPA's conditions and time limits unattainable. For example, a meaningful flow net analysis could not be obtained in 14 days as EPA required. SRSNE was unable to convince EPA to modify the conditions to approval of the alternate system and was forced to abandon the alternative proposal (Hulm Cert., Exhibit 4). SRSNE also advised EPA why stipulated penalties for failure to meet the July 7, 1986 construction deadline were inappropriate in these circumstances. Id.

The off-site system has never operated. After Connecticut DEP issued a draft discharge permit, EPA refused to accept the permit as drafted. Hulm Exhibit 17. EPA's objections were based on technology related issues and methodology, although EPA conceded that Connecticut DEP's methodology would yield more stringent discharge limitations. Id. No final permit has ever been issued.

To date, SRSNE has expended approximately $950,574 in its effort to comply with the Consent Decree and satisfy the requirements not only of the EPA, but of the Connecticut DEP and the Town of Southington (Hulm Cert., Exhibit 22).

ARGUMENT

POINT I

THE ON-SITE SYSTEM WAS PROPERLY CONSTRUCTED AND THERE ARE NO DEFICIENCIES OF CONSTRUCTION OR PERFORMANCE

A. The Wells Were Constructed to the Proper Depth And No Construction Defect is Causing The System To Operate Improperly.

Representatives of YWC were present during the construction of the on-site system and kept a record of data concerning construction details of the wells (Hulm Cert., Exhibit 21). YWC's well log is very different from the Hoagland calculations concerning well depth into bedrock.

SRSNE provided this data to EPA in January, 1990 in response to EPA's information request (See Hulm Cert., ¶5). In his Declaration, Hoagland ignores this data entirely, and it is not included in his Exhibits. Except for one well, Well No. 5, it directly contradicts Hoagland's assertion that 13 wells were not drilled the required 3 feet into bedrock.

Well No.	Depth into Bedrock (Hoagland Dec., ¶ 36)	Depth into Bedrock (Hulm Cert., Exhibit 21)[3]
5	2'	2'
6	2.83'	3'
7	2.83'	3'

[3]The depth into bedrock is determined for each well by looking at the depths in the "cored interval" column of Hulm Cert., Exhibit 21.

8	2.75′	3′
9	2.92′	3′
10	2.83′	3′
11	2.75′	3′
12	2.58′	3′
13	2.92′	3′
17	2.92′	3′
19	2.25′	3′
20	2.75′	3′
21	2.92′	5′

Thus, contemporaneous data show that all wells, except perhaps well No. 5, went the required 3 feet into bedrock. It is likely that on-site observers would have noticed a 1 foot difference from the 3 foot requirement for Well No. 5 so this notation is probably a transcription error. Given the passage of time, however, it is unreasonable to expect anyone to remember the facts sufficiently to explain any entries in these logs.

Even assuming it to be correct, however, EPA has made no showing that an extra foot into bedrock at Well No. 5 would materially affect the performance of the on-site system. In fact, conditions are so materially different in the aquifer than were assumed in the design of the system that an extra foot at Well No. 5 would not affect the operation of the on-site system at all. See discussion infra.

SRSNE submits that the contemporaneous notes of the well construction are more reliable than the data on which Hoagland relies. Certainly, the conflicting data should have caused Hoagland to make further inquiry to determine which was more accurate. In fact, the Consent

Decree required Hoagland to advise SRSNE about any inadequacies or inconsistencies in the data, as is discussed below.[4]

B. The Projected Zone of Influence Is Not a Performance Standard

Although EPA's motion now asserts otherwise, the projected zone of influence contained in the design of the on-site system was never intended as a precise performance standard by either SRSNE or EPA. Back in 1983, EPA recognized "the complexity of determining the precise shape of the drawdown due to the non-homegeneous stratigraphy at the site" but insisted on a "target" cone of influence (Hulm Cert., Exhibit 2). SRSNE supplied the "target" zone of influence, which it clearly described as "approximate" and "theoretical analysis" and about which SRSNE cautioned that "actual field contours may be modified somewhat due to horizontal variation and lithology" (Hulm Cert., Exhibit 5). In December of 1985, David Webster, who was then EPA's site manager for SRSNE, filed an affidavit in this action in which he acknowledged that the projected zone of influence was not meant to be a bright-line performance standard. He said:

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[4]EPA's additional allegations of construction defects are equally without merit and are discussed elsewhere in this brief.

> Projections of the expected zone of influence, such as that provided by SRSNE, do not necessarily reflect actual field conditions. These projections are derived using analytical methods. According to engineering reports prepared by York Wastewater Consultants for SRSNE, the projection was based on estimated values of co-efficients of aquifer transmissivity and storage which were assumed to be equal throughout the area's surface material and bedrock. The projected zone of influence did not include the impact of recharge from precipitation or the possible presence of outwash deposits in the area.
>
> ...During operation of the groundwater recovery system, the actual zone of influence may differ significantly from the projection because of the actual heterogeneity and anisotrophy of the geologic formation and the impacts of precipitation and outwash deposits. (¶¶ 11-12, emphasis added).[5]

Between December 1985, when Webster filed his affidavit, and July 1990, when Hoagland filed his declaration, EPA's interpretation of the term "projected zone of influence" changed dramatically. Contrary to the previous interpretation and the course of dealing of the parties, Hoagland's understanding of the concept is such that it allows for no explanation other than wrongdoing by SRSNE if the on-site system fails to perform in accordance with the projection.

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[5]A copy of this affidavit is annexed to this brief as Exhibit A.

This understanding also misinterprets the valid scientific uses of such a projection. The projected zone of influence was based on a number of assumptions to simplify the calculation. The projection assumed that pumping the on-site system would not diminish the amount of water in the aquifer, that there was a uniform transmissivity, that no rainwater would seep through the ground and replenish water in the aquifer, and that the water table was flat.

These assumptions were simplifications used as a convenience to calculate a theoretical "target" value but were obviously not representative of actual site conditions. Clearly, there would be rain while the system was operating and pumping would reduce the water in the aquifer. Similarly, it was known from studies by Wehran Engineering that the water table was not flat. (Guswa Cert., Page 6).

As the well system was constructed, the data indicated additional field conditions that differed from those assumed in calculating the projected zone of influence. The actual well depths and the depth to the bedrock along the line of the recovery well system is not as deep as assumed in calculating the projected zone of influence (Guswa Cert., Page 8). The amount of water available for pumping from the aquifer and the ability of this water to move through the ground towards a well under

pumping conditions are also significantly lower than assumed (See Guswa Cert., Pages 9-10). The consequence of these differences is to lower the pumping rate attainable from the recovery well system and to reduce the actual zone of influence which can practically be achieved from the system when compared with the calculated projected zone of influence.

Despite these differences between the assumed and actual field conditions, the operation of the on-site system has been effective in removing contaminated groundwater from beneath the SRSNE site and has created a barrier to migration of contaminated groundwater therefrom (See Guswa Cert., Pages 2, 3 and 14).

POINT II

THE EPA'S FAILURE TO TAKE TIMELY ACTION TO CORRECT ANY ALLEGED DEFICIENCIES IN THE ON-SITE SYSTEM BARS IT FROM NOW SEEKING PENALTIES AGAINST SRSNE

A. The EPA Failed to Comply With the Requirements of Paragraph 14 of the Consent Decree.

Paragraph 14(C) of the Consent Decree provides:

> With regard to any approvals, and all certifications, reports, information and data submitted by SRSNE to EPA, if EPA disapproves or finds inadequate any proposed action, certification, report, information or data, it shall provide a written notice to SRSNE ... within sixty days ... which shall include: [the basis for EPA's conclusion, what further action it deems required, and a proposed schedule].

Paragraph 14(D) provides that a failure by EPA to indicate disapproval within this sixty-day time frame shall constitute approval.

The EPA was well aware in the early days of the Consent Decree of its obligations under Paragraph 14. Its early correspondence includes many references to the requirements of Paragraph 14 (See, e.g., Hulm Cert., Exhibits 2, 6 and 7). Yet in the papers submitted in support of its motion, the EPA, while purporting to "understand the requirements imposed upon SRSNE by [the] Consent Order" (Hoagland Dec., ¶4), makes no reference to its own obligations; indeed, it never mentions Paragraph 14 at all.

As is evident from the exhibits to the Hulm Certification, the EPA was kept constantly informed of the progress of the design and construction of the on-site system. Representatives of the EPA visited the site during well construction activities (Certification of William S. ("Pete") Duncan, III, submitted herewith, ¶9), and, indeed, the EPA publicly announced that it had supervised the construction (Hulm Cert., Exhibit 10). Thus, the absence of failsafe devices and the grouping of wells by proximity were known by EPA from the beginning. The as-built data from which Mr. Hoagland calculated the other alleged deficiencies in the well construction were submitted to the EPA on November 25, 1986 (Hulm Cert., Exhibit 16).[6]

Therefore, even if EPA chooses to ignore the contemporaneous data showing that the construction was proper, see discussion supra, EPA had the data on which it

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[6]The Court should not be misled by the implication in the Hoagland Declaration (see, e.g., ¶¶ 32, 36), that the EPA obtained the information and data on which its motion is based only in 1990, via an Information Request Letter. The "Well Construction Elevations" and "Map PZ-1" referred to in Footnote 6 to the Hoagland Declaration were also included with the as-built documents.

One of the few documents included in SRSNE's answer to the Information Request letter that was not already in the EPA's possession was the well log prepared by YWC (Hulm Cert., ¶5 and Exhibit 22.) Yet, Hoagland does not rely on this information to support his conclusions. See discussion supra at _____.

bases its claim of improper well construction as early as 1986. EPA had both the opportunity and the obligation to raise the alleged construction defects issue with SRSNE by January 25, 1987 within the time framework provided by Paragraph 14. If it had done so, SRSNE could have invoked the dispute resolution procedures contemplated by Paragraph 17 of the Consent Decree to show EPA that its conclusion of construction defects is in error. Or, alternatively if SRSNE agreed with EPA, it could have corrected any defect years ago. Because EPA failed to provide notice under Paragraph 14 SRSNE was entitled to regard its silence as approval and to rely on that approval in its continuing efforts to keep the system operational.

EPA's obligation under the Consent Decree was to notify SRSNE of its objections within sixty days of receiving the pertinent information -- not to serve SRSNE with moving papers demanding enormous penalties, five years after the system was constructed. In the circumstances, to allow the EPA to collect the penalties it seeks concerning construction defects is not only a violation of the Consent Decree, but is fundamentally unfair.

It is similarly unfair for EPA to contend now that hydraulic performance reports filed on February 3, 1986; March 13, 1986; May 15, 1986; June 5, 1986; November

20, 1986; June 5, 1987 and October 23, 1987 were inadequate. EPA ignored its Paragraph 14 obligations and waited close to 3 to 4 years to raise questions about the adequacy of these reports.

The provisions of Paragraph 14 of the Consent Decree are designed to avoid the very situation presented in this Motion. SRSNE has dealt with numerous people within EPA in connection with the on-site system (See Hulm Cert., ¶3). Each person brings its own viewpoint to the project; each has its own interpretation of the data. Paragraph 14 protects SRSNE from a new project manager years later raising issues concerning reports and data that previous project managers accepted without comment. Such is the situation here.

B. <u>The EPA is Barred From the Relief Sought by Laches, Waiver and Estoppel</u>.

EPA's motion for sanctions against SRSNE is barred also by the equitable doctrines of laches, estoppel and waiver. Each of these doctrines embody equitable concepts that provide, in circumstances such as exist here, that it is unfair to permit EPA to obtain penalties from SRSNE because of EPA's own conduct and delay in violation of Paragraph 14 of the Consent Decree.

The doctrine of laches requires proof that EPA has inequitably delayed raising its claim without an excuse and that SRSNE has suffered undue prejudice as a

result of the delay. See, Connecticut Fund for the Environment, Inc. v. Upjohn Company, 660 F. Supp. 1397, 1413 (D. Conn. 1987). Laches is a flexible doctrine that depends upon the facts of each case. Stone v. Williams, 873 F.2d 620, 624 (2d Cir. 1989).

Here, EPA had the data on which its motion is based years ago and had an obligation under Paragraph 14 of the Consent Decree to raise complaints arising from the data within 60 days of its receipt. There is no reason why EPA could not have conducted the analysis contained in its motion within 60 days of receipt of the data. Given the provisions of Paragraph 14 of the Consent Decree, any delay by EPA in raising criticisms beyond 60 days of receipt of the data on which the criticism is based is unreasonable.

Here, the delay has caused undue prejudice to SRSNE. First, the extraordinary delay has limited SRSNE's ability to contest the allegations concerning construction defects, because the specific details of the construction concerning each well in the on-site system are no longer available. See, Stone, supra. In addition, EPA personnel involved with the on-site system at the time of events EPA now complains of are, upon information and belief, no longer with EPA and not readily available to SRSNE as witnesses.

The circumstances here also estop EPA from seeking the penalties it seeks. Under Paragraph 14 of the Consent Decree, EPA had an obligation to speak within 60 days of receipt of relevant information if it found defects with SRSNE's compliance with the Consent Decree. Failure to do so was deemed approval.

According to the explicit provisions of Paragraph 14, SRSNE was entitled to rely on EPA's silence as approval. That reliance was to SRSNE's detriment because now, years later, EPA seeks $1,623,000 in stipulated penalties for alleged construction defects. (EPA's brief 37-38). Similarly, EPA had hydraulic verification reports in 1986 and 1987 about which it had an obligation to speak within 60 days of receipt if the reports were inadequate. SRSNE relied on EPA's silence as approval and did so to its detriment because EPA now seeks $1,210,000. (EPA's brief at 39).

These circumstances also justify an estoppel against EPA. Its failure to comply with Paragraph 14 when it deemed SRSNE's performance of activities required in the Consent Decree defective constitutes a misrepresentation of fact on which SRSNE reasonably relied to its detriment. Heckler v. Community Health Services of Crawford County, 467 U.S. 51 (1984).

Finally, EPA's failure to comply with Paragraph 14 of the Consent Decree should be deemed a waiver of its

right to obtain penalties from SRSNE. Paragraph 14 imposed time limits on EPA's right to complain about SRSNE's performance of its Consent Decree obligations. EPA knowingly relinquished its right to complain by failing to comply with Paragraph 14. Metro-Goldwyn-Mayer, Inc. v. Ross, 509 F.2d 930, 933 n.3 (2d Cir. 1975).

POINT III

THE EPA'S CLAIM FOR PENALTIES WITH RESPECT TO ALLEGED CONSTRUCTION DEFECTS AND INADEQUATE REPORTS IS BARRED BY THE FORCE MAJEURE CLAUSE OF THE CONSENT DECREE

The force majeure clause of the Consent Decree in Paragraph 15B provides:

> Any failure to comply with this Consent Decree which failure is a result of an act of God, or third parties not in contact with or under the direction or control of SRSNE, or is otherwise caused by circumstances beyond the control of SRSNE shall not result in penalties under paragraph 16.

Force majeure provides an obvious justification for many of the circumstances EPA contends are defects. Hydrogeologic conditions turned out to be significantly different from the conditions assumed by both EPA and SRSNE when the on-site system was designed (See Guswa Cert., Pages 2, 8-11). Bedrock was significantly higher in some locations, meaning that there was less depth needed to place a well 3 feet into bedrock and less water available to be extracted by a well there (Guswa Cert., Page 8). Transmissivity of the aquifer[7] was also less than what was assumed (Guswa Cert., Page 10). This change meant that the aquifer would yield less water than

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[7]Transmissivity is defined and discussed in Guswa Cert., Pages 9-10.

expected and the pumping wells would affect a smaller area of the aquifer. Id.

These factors were totally beyond SRSNE's control. They explain why the area of drawdown is not as great as predicted, why not all wells extended 25 feet deep, and why the water level in some wells was not as deep as the projected drawdown for those wells.

They also explain why the pumps have failed. The change in transmissivity means that the pumps are lowering the water table near the wells by as much as three feet more than anticipated, causing the aquifer to be pumped dry in that area and the pumps to burn out (Guswa Cert., Pages 10-11).

While the pumps can be replaced with pumps of a different design -- and, indeed, this is in the process of being done (see Hulm Cert., Exhibit 20) -- it is basically the field conditions at the site, rather than any defects of construction or operation, that limit the extent to which the on-site system is capable of recovering groundwater that has migrated beyond the boundary of the property. The on-site system is functioning as efficiently as any groundwater recovery system could function in the area (Guswa Cert., Pages 12-14). Its failure to perform precisely as set forth in the design is the result of force majeure and therefore cannot render SRSNE liable for penalties.

Two other circumstances of which EPA complains were caused by the acts of others whom SRSNE does not control and, therefore, are justified by force majeure. One circumstance was caused by EPA and the other by SRSNE's adjoining landowners.

EPS's complaint that SRSNE did not connect wells of similar yield was caused by EPA's own conduct. To determine well yield, a pump test on each well of several hours is required (Duncan Cert., ¶16). SRSNE was unable to determine well yields for the on-site system because it had no discharge permit or permission from EPA to discharge the water to be extracted from the wells during the pumping test (Duncan Cert., ¶¶17-18). Therefore, SRSNE connected wells by proximity and installed throttles to assure that similar flows for wells connected together could be attained (See Duncan Cert., ¶19).

Neighboring landowners prevented SRSNE from constructing the four monitoring wells located for which the EPA seeks to exact $1,461,500 in stipulated penalties with respect to the delayed construction (EPA's brief at 38) and an additional $1,210,000 because monitoring reports did not include results from these [nonexistent] wells in its monitoring reports (EPA's brief at 39) was caused by neighboring landowners. SRSNE was unable to obtain permission from the neighboring landowners to construct the wells until 1986 (as to one well) and 1988

(as to the others). See discussion supra. Moreover, this situation was perfectly well known to the EPA, which could have remedied it at will by issuing an order granting access to the properties. See discussion supra. SRSNE did everything in its power to obtain access, including ultimately purchasing the property on which three of the wells were to be located, and is clearly not liable for penalties arising from the uncooperativeness of its neighbors.

POINT IV

SRSNE'S ALLEGED FAILURES TO COMPLY WITH THE CONSENT DECREE DO NOT JUSTIFY THE DRACONIAN STIPULATED PENALTIES SOUGHT BY THE EPA.

SRSNE has already shown why stipulated penalties are unwarranted for EPA's claims of construction defects, operation defects, failure to install verification wells and filing of inadequate reports. This discussion focuses on EPA's claims for penalties for failure to file verification reports.

SRSNE concedes that it filed only six (6) Hydraulic Verification Reports during the time period from December 17, 1985 to December 31, 1987. These six (6) reports, however, contain hydraulic verification data for the period from December 17, 1985 to the end of September, 1987. Accordingly, SRSNE provided the data it was required to provide for the initial ten (10) reporting periods. SRSNE concedes that it failed to file nine (9) Hydraulic Verification Reports, those for the last quarter of 1987 and for all of 1988 and 1989. These shortcomings were unintentional and the result of an administrative oversight (See Hulm Cert., ¶6). In addition, these were reporting requirements only and caused no threat of environmental harm. Also, the reports were apparently of little value to EPA because it never asked SRSNE to submit

them until November, 1989 at which time SRSNE began again to submit them (See Hoagland Dec., Exhibits 12, 42 and 43).

POINT V

THE CIRCUMSTANCES DO NOT WARRANT THE IMPOSITION OF COERCIVE PENALTIES UPON SRSNE

In addition to the stipulated penalties, the EPA seeks coercive penalties, or civil contempt sanctions, for violating the Consent Decree by failing to operate the system continuously. This application must fail, however, because, as this brief and the supporting certifications have demonstrated, the standards for imposition of civil contempt are not present here.

The civil contempt power may be utilized when the obligation imposed by the order is unambiguous, the non-compliance is clear, and the party in contempt has not been reasonably diligent in attempting to comply with the order. Powell v. Ward, 643 F.2d 924, 931 (2d Cir.), cert. denied 545 U.S. 832 (1981). Here, EPA misinterprets the Consent Decree obligations imposed on SRSNE and then contends that this interpretation follows unambiguously from the language of the Decree and that SRSNE's failure to comply with it is clear. EPA's interpretation, however, ignores the conduct of the parties and is facile and -- as to some provisions -- obviously wrong.

EPA contends that SRSNE has violated Paragraph 8(D) of the Consent Decree, which provides "unambiguously" (EPA's brief at 40) that "SRSNE shall operate the ground-water system continuously in accordance with the approved

design operating criteria", because not all the pumps were operating all the time. This provision, however, is far from unambiguous.

Neither ¶8(D) nor any other document states that all pumps will operate at all times. EPA's unsupported assertion is contrary to its previous interpretation of Paragraph 8(D).

In September of 1983, for example, the EPA interpreted Paragraph 8(D) to require that certain amount of water be captured by the on-site system, and suggested that a "tamper-proof flow totalizer" should be added to monitor the flow (Hulm Cert., Exhibit 2). SRSNE's response pointed out that "total annual volume of groundwater recovered could vary significantly, depending upon precipitation received in any particular year, and therefore cannot by definition be regulated as a requirement for the system" (Hulm Cert. Exhibit 5).

SRSNE has operated the system continuously (See Hoagland Cert., Exhibits 32 to 36). To the extent the volumes of water captured do not meet the volumes of water predicted in the design, the explanation is that there was less water in the aquifer, that the aquifer characteristics were different than expected. See discussion supra. This situation is a justifiable force majeure event.

Finally, a civil contempt sanction requires that the party sanctioned must not have been reasonably diligent in attempting to comply with the order. The record reflects that over the years, it was SRSNE that was diligent and the EPA that dragged its feet in attempting to bring the system into operation, whether the issue was access to property to install monitoring wells, or the decision to try a new type of pump when the original design proved to be poorly suited for the job (Hulm Cert., Exhibits 18 and 19).

SRSNE also showed good faith in connection with the off-site system. Despite an approved design and severe time pressures, SRSNE attempted to modify the design to improve its effectiveness. See discussion supra. Time was so important to EPA, however, that SRSNE could not convince EPA to modify the schedule to give SRSNE sufficient time to meet EPA's conditions for improving the system. Id. SRSNE succumbed to EPA's time demands and built the off-site system as originally designed only to wait for a discharge permit. SRSNE is still waiting. Id. No contempt sanctions are warranted here.

The EPA also contends that SRSNE should be punished for violating Paragraph 8(G) of the Consent Decree, which requires SRS to modify the system if it cannot meet the projected zone of influence "due to design or

construction deficiencies". Sanctions are not warranted for this claim either. Although this language is clear, the EPA misinterprets its meaning. There must be a cause and effect relationship between a construction defect and a failure to meet the projected zone of influence in order to violate Paragraph 8(G). It is the actual field conditions, not the construction of the system, that are the cause of any problems. See Point III, supra.

Even if SRSNE's conduct were deemed to constitute contempt, EPA has not justified the amount of penalties it seeks. Contempt sanctions should be based on the amount deemed necessary to compel future compliance. Perfect Fit Industries, Inc. v. Acme Quilting Co. Inc., 673 F.2d 53, 56 (2d Cir. 1982); Vuitton et Fils S.A. v. Carousel Handbags, 592 F.2d 126, 130 (2d Cir. 1979). Here, SRSNE needs no sanction to compel compliance. Whenever EPA has told SRSNE that it should do something different to better comply with the Consent Decree, SRSNE has done so. See Hoagland Dec., Exhibits 12 (requesting groundwater contour maps in quarterly reports) and Exhibits 42 and 43 (including contour maps).

POINT VI

THE EPA IS LIABLE FOR STIPULATED PENALTIES BECAUSE OF ITS CONSISTENT DISREGARD OF ITS OBLIGATIONS UNDER THE CONSENT DECREE.

The party to the Consent Decree that has been less than diligent is honoring its obligations is not SRSNE, but the EPA. The provisions of Paragraphs 14(C) and 14(D) are clear and unambiguous; yet despite submitting two binders full of exhibits in support of its motion, EPA has not produced one document to indicate its compliance with its Paragraph 14 obligations with regard to the construction and operation of the on-site system. EPA's noncompliance is both clear and unjustified.

The EPA has had complete data concerning the construction of the on-site system since 1986.[8] For almost five years, it has made no reasonable attempt to comply with its Paragraph 14 obligations and has permitted SRSNE to operate the on-site system in the belief that the system was approved by the EPA.

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[8]Even if EPA received data and information showing noncompliance in January 1990 response to the Information Request Letter, EPA was still obliged to notify SRSNE in writing by March 1990 of any defects of construction or operation that appeared from the data. Instead, it chose to file this motion.

Under these circumstances, EPA is subject to penalties for its violations of the Consent Decree.[9] An appropriate sanction should include a dismissal of EPA's motion and require EPA to reimburse SRSNE for its costs, attorneys' fees and expert fees incurred responding to this motion.

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[9]If SRSNE were to adopt the EPA view regarding penalties for noncompliance with the Consent Decree, SRSNE could seek penalties from EPA well in excess of $1 million. From December 1, 1986, when the EPA came into possession of the as-built information concerning the on-site system, to July 23, 1990, when it filed its motion, is a period of approximately 1,330 days. Applying the same $1,000 per day penalty that EPA would impose on SRSNE as a sanction, EPA should be required to pay $1,330,000 to SRSNE.

POINT VII

IF THE COURT DETERMINES THERE ARE MATERIAL FACTUAL ISSUES, AN EVIDENTIARY HEARING IS REQUIRED

SRSNE has shown conclusively that force majeure events justify the facts of which EPA complains and that EPA has failed to comply with the Consent Decree. Therefore, EPA's motion should be dismissed.

To the extent factual issues exist, such as the appropriate sanction for EPA's noncompliance with the Consent Decree, they must be resolved through an evidentiary hearing. In re Corrugated Container Anti-Trust Litigation, 752 F.2d 137 (5th Cir. 1985); Russell v. Puget Sound Tug & Barge Co., 737 F.2d 1511 (9th Cir. 1984); Millner v. Norfolk & W.R. Co., 643 F.2d 1005, 1009 (4th Cir. 1981).

CONCLUSION

For the foregoing reasons, defendant SRSNE respectfully requests that the EPA's motion to enforce the Consent Decree and for penalties be denied, and that SRSNE's cross-motion for penalties against the EPA be granted by this Court.

Respectfully submitted,

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By: _____
Steven Berglass

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

0015427

UNITED STATES OF AMERICA, Plaintiff CONNECTICUT FUND FOR THE ENVIRONMENT, INC. and BOARD OF WATER COMMISSIONERS FOR THE TOWN OF SOUTHINGTON, Plaintiffs-Intervenors VS. SOLVENTS RECOVERY SERVICE OF NEW ENGLAND, INC., Defendant	CIVIL ACTION NO. H-79-704(JAC)

AFFIDAVIT OF DAVID M. WEBSTER

1. My name is David M. Webster. I am employed by the U.S. Environmental Protection Agency (EPA) as a Physical Scientist in the MA/CT/VT Enforcement Section, Superfund Branch, Waste Management Division, Region I. In such capacity, I am a Site Manager responsible for overseeing remedial actions by responsible parties at hazardous waste sites.

2. The Solvents Recovery Service of New England, Inc. (SRSNE) site in Southington, Connecticut is among the sites for which I am responsible. I have been the Site Manager for this site since January, 1985.

3. My duties as Site Manager for the SRSNE site include ensuring the proper implementation by SRSNE of the Consent Decree between EPA and SRSNE entered by this Court on February 23, 1983, and providing information to EPA officials concerning technical issues which arise during implementation of the Consent Decree. I have personal knowledge of the following facts.

4. Paragraph 8.A. of the Consent Decree requires SRSNE to abate and contain groundwater pollution at and in the immediate vicinity of the SRSNE facility by constructing and operating a multi-point shallow well system as close as possible to the eastern and part of the southern property boundaries of the

SRSNE facility. The purpose of this system is to prevent the off-site migration of subsurface contamination. The Consent Decree requires that the system extend its cone of influence off-site to the maximum practicable extent.

5. Pursuant to Paragraph 8. B., SRSNE was required to submit to EPA final engineering designs and specifications for a groundwater recovery system which would accomplish these goals. These engineering designs were required to include a projection of the expected off-site influence of the system and plans for a monitoring system which would verify the off-site influence of the groundwater recovery system.

6. The required engineering designs and specifications were submitted by SRSNE to EPA. A system of 25 shallow groundwater recovery wells were proposed by SRSNE and approved by EPA. The 25 shallow wells were constructed in 1985 near the eastern and part of the southern property boundaries of the SRSNE site.

7. In accordance with Paragraph 8. B., SRSNE submitted with the design plans, its projection of the influence of the groundwater recovery system in the form of a drawing of a projected cone of influence. The projected cone of influence surrounds the 25 multi-point wells and extends 100 to 150 feet in all off-site, downgradient directions.

8. The hydraulic verification system proposed by SRSNE to monitor whether the projected influence was being attained included the placement of four downgradient verification wells. The proposed locations of three of the downgradient verification wells is on the property of Cianci Construction Corporation, 70 to 90 feet from the shallow wells on the SRSNE property and 10 to 35 feet from Cianci's property boundary with the Boston and Maine Railroad right of way. The proposed location of the fourth downgradient verification well is 50 feet from the shallow wells and 20 feet south of the SRSNE property boundary. It is my understanding that this location is on the property of the Estate of Patrick J. Delahunty.

9. The proposed locations of all of the downgradient verification wells are on the periphery of the properties of the Cianci Construction Corporation and the Delahunty Estate. Relative to other portions of these properties, these proposed well locations are far from municipal road access and close to the Boston and Maine railroad right of way.

10. EPA approved the hydraulic verification system proposed by SRSNE and described in the preceding two paragraphs.

11. A hydraulic verification system such as that proposed by SRSNE and approved by EPA is necessary to verify whether the groundwater recovery system is preventing off-site migration of subsurface contaminants and is extending its cone of influence off-site to the maximum extent practicable. Projections of the expected cone of influence, such as that provided by SRSNE, do not necessarily reflect actual field conditions. These projections are derived using analytical methods. According to engineering reports prepared by York Wastewater Consultants for SRSNE, their projection was based on estimated values of coefficients of aquifer transmissivity and storage which were assumed to be equal throughout the area's surficial material and bedrock. The projected cone of influence did not include the impact of recharge from precipitiation or the possible presence of outwash deposits in the area.

12. During operation of the groundwater recovery system, the actual cone of influence may differ significantly from the projection because of the actual heterogeneity and anisotrophy of the geologic formation and the impacts of precipitation and outwash deposits. Periodic field measurements of the hydraulic head in the off-site area are necessary to verify that the cone of influence extends off-site to the maximum practicable extent. A hydraulic performance verification system satisfies this need.

13. Placement of downgradient verification wells in off-site locations such as those proposed by SRSNE and approved by EPA is the most reliable means to verify whether the groundwater recovery system is extending its cone of influence to the maximum extent practicable. Were the verification wells to be placed on the property of SRSNE, it would be necessary to project the off-site cone of influence using analytical techniques rather than relying on actual off-site downgradient field measurements. Such a compromise of the hydraulic performance verification system design would increase the probability that the groundwater recovery system could operate in a manner which allows subsurface contaminants to migrate off-site. It would also increase the likelihood that the groundwater recovery system would not extend its influence off-site to the maximum extent practicable. As a result, there would be less certainty that the objectives of the Consent Decree would be satisfied.

Signed under pains and penalties of perjury based upon personal knowledge, information and belief.

Dated: 12/31/85

David M. Webster

Sworn and subscribed to before me this 31st day of December, 1985.

Notary Public