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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
230 SOUTH DEARBORN ST.
CHICAGO, ILLINOIS 60604

JAN 24 1991

REPLY TO ATTENTION OF:

Juliette Richter
Associate General Counsel
Henkel Corporation
The Triad
Suite 200
2200 Renaissance Boulevard
Gulph Mills, Pennsylvania 19406

RE: Great Lakes Asphalt, Zionville, Indiana
Site No. FL

Dear Ms. Richter:

I am in receipt of your letter of January 4, 1991 regarding the Great Lakes Asphalt Site in which you expressed your client's position that the definition of covered matters in the de minimis settlement in U.S. v. American Waste Processing, et al. and U.S. v. United Technologies Automotive, Inc. preclude their liability for the Great Lakes Asphalt Site. In your letter you stated that you " . . . were aware of the Great Lakes Asphalt Site when the Consent Decree was drafted and relied upon the broad language of the covenant in agreeing to the settlement." In addition, you stated that the intent of the parties was ". . . clear since U.S. EPA specifically reserved claims not to sue as to the sole non-de minimis settlor -- Jeffboat."

Enclosed is a copy of language that was proposed for inclusion in the de minimis consent decree by the de minimis parties. As you will note, in Section VI, it states:

> Except as otherwise provided in Section VII below, the United States covenants not to sue the De Minimis Settling defendants with regard to "Covered Matters". For purposes of Section VI., "Covered Matters" shall refer to any liability that could be imposed upon any of them with respect to or in any way arising from the Site under Section 106 or 107 of CERCLA . . . and all other claims available under any state or federal statute or regulation or under common law (except as specifically exempted below), including without limitation, obligations or liability arising from off-site contamination which may have resulted from the disposal of waste material at the Site, obligations or liability arising from actions or omissions of the

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> **persons conducting or funding the remediation of the Site or their contractors, and obligations or liability arising from the Site by persons conducting or funding the remediation of the Site or their contractors and placement or disposal of such wastes or contaminated materials at any other site**.

The underlined language was proposed for inclusion by the de minimis parties. However, it was rejected by the U.S. EPA and was not included in the consent decree. Thus, by its rejection of the above quoted language, it is evident that it was not the intent of the U.S. EPA to release the de minimis parties for any potential liability that they may have at the Great Lakes Asphalt Site. If you are aware of any U.S. EPA employee who represented to you or to any other de minimis party that the settlement was to include a release for the Great Lakes Asphalt Site, please provide me with this individual's name. Upon obtaining such information, I would be willing to reconsider your position. Absent such information, U.S. EPA's rejection of the above quoted language clearly demonstrates that the covenant not to sue in the de minimis consent decree was not intended to exclude potential liability for the Great Lakes Asphalt site.

In support of your position you also rely on the exclusion for covered matters that was contained in Jeffboat's covenant. However, as you noted, Jeffboat was not a de minimis party. As you are aware, settlement with a de minimis party is governed by a separate section of CERCLA. Your attempt to imply that an intent to release the de minimis parties is clear because U.S. EPA used more exacting language for a non-de minimis party as opposed to de minims parties begs the questions of the scope of covered matters in the de minimis agreement. You are attempting to read a release by the absent of words rather than by an affirmative statement.

Lastly, you rely on the memorandum in support of the Motion to Enter the Consent Decree to support your position. You quote the Memorandum as stating that:

> " (t)he covenant not to sue Jeffboat is narrower than that provided the de minimis settlors.

However, the above quoted language regarding the definition of "covered matters" as to Jeffboat is in a footnote which follows the sentence "(i)n exchange for payments by the settling defendants, the United States covenants not to bring any civil or administrative action against them for "covered Matters", which are defined as claims under Sections 106 and 107 of CERCLA, and under Section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. Section 6973, with respect to the Envirochem Site." (emphasis added). The next sentence is the one that states that the covenant not to sue Jeffboat is narrower than that provided the de minimis settlors. The paragraph then goes on to identify this difference by stating that U.S EPA has reserved it right, as

provided in Section 122 of CERCLA, to proceed against Jeffboat in the event new information revels that the remedy at the Envirochem Site is not protective of human health or the environment, while the de minimis settlors are not subject to this reopener. Thus, contrary to your assertion, the memorandum does not state that the Jeffboat covenant is narrower then the de minimis covenant because of the definition of "covered matters" in the Jeffboat covenant.

I would refer you to the entire memorandum as evidence as to the scope of the covenant not to sue that was granted to the de minimis settlors. Nowhere in the memorandum is Great lakes Asphalt mentioned or even implied. However, the memorandum is replete with language that it covers the Envirochem site: specifically, pages 1-2, which state that the settlors will reimburse U.S. EPA for costs incurred in connection with the Envirochem site, pages 2-3, which talk about the two lawsuit the U.S. EPA filed in connection with the Envirochem site, page 3, regarding the site history, which only refers to Envirochem, page 4, which states that the consent decree resolves claims against the defendants in connection with the Envirochem site, page 8, which states that the decree is fair and results in an agreement with those parties responsible for contamination at the Envirochem site, pages 8-9, which state that the settlement provides for payment into Superfund a portion of U.S. EPA's costs in connection with the Envirochem site, and page 9, which discusses the recovery of funds from those generators who disposed of hazardous waste at the site.

Therefore, based on the above information, it is the U.S. EPA's position that the de minimis consent decree does not exempt or preclude the settling de minimis parties from liability at the Great Lakes Asphalt Site, and that the applicability of the defense of Section 107(b)(3) is not certain. The position that your client will take is obviously a matter for your mutual decision and analysis. This letter is merely to inform you of U.S. EPA's position as to the claims raised in your letter.

If you have any further questions regarding the Great Lakes Asphalt Site, please feel free to contact me.

Sincerely,

Peter M. Felitti
Assistant Regional Counsel

Enclosure