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August DRAFT.26, 2008

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(by e-mail & U.S. Mail)

(Communication in Furtherance of Settlement Talks)

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RE:
Gulfco Marine Maintenance Superfund Site, Freeport, Texas --
Follow up Conference call with UAO Respondents, Rejection of their Settlement Approach, and Suggestion of Some Alternatives

Dear Counsel:

Thank you for taking time on August 15 to discuss both the proposed order for removal of tanks at the Site and your clients' overall proposal concerning disposition of the Site. As an NPL Site for which EPA has issued your clients a Unilateral Order for Remedial Investigation

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and Feasibility Study (RI/FS Order)[1], the federal government remains concerned about moving forward with all clean up warranted for the Site.

Among other things, your clients propose speeding up significantly (perhaps by more than one year) the work called for by the RI/FS and also removing certain tanks now located on the Site. In return, and before EPA issues any Record of Decision for the Site, your clients seek, among other things: 1) An understanding from EPA that it will look to eliminate from the definition of this NPL site those portions of the Site on which are presently located slips and berthing piers, and 2) entry of a Consent Decree that would supersede the extant RI/FS Order, control the balance of the RI/FS work, and control the performance of further response action, if any.

Your clients believe that those portions of the Site equipped with berths and slips might be put to use right now and that – with the exception of one issue involving ground water – essentially all that remains of RI/FS work is to write up the results of the field work.. To the extent the federal government is concerned about the ground water, you also suggest some understanding that would evidence assurances that EPA would be looking to delist as appropriate area of the Site on which the berths or slips are located, in return for your clients' voluntarily removing of certain tanks from the Site.

Use of the Site is an important ant and appropriate goal to be done in harmony with steps needed to secure whatever clean up is warranted for the Site. We conclude that your proposal does not appropriately balance those important concerns and may well understate the possibilities of returning part of the Site to use while necessary investigatory and analytic work are completed (along with further clean up work, if warranted).

On use of portions of the Site (such as the slips and berths), please consider the information provided at [Insert citations suggested by Barbara for information on use of superfund sites][2]

As for the balance of your offer, we reject it because we disagree with you on a number of its premises. Some of our disagreements with you are summarized below.

If entry of a consent decree prior to issuance of a ROD would be legal here[3], that course would nonetheless be imprudent here. Some work remains to be done under the RI/FS order,

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[1] Amended Unilateral Administrative Order for Remedial Investigation / Feasibility Study at Gulfco Marine Maintenance Superfund Site, Freeport, Texas (U.S. EPA Region 6 CERCLA Docket No. 06-05-05A.

[2] **http://www.epa.gov/compliance/resources/publications/cleanup/superfund/top-10-ques.pdf, http://www.epa.gov/compliance/resources/publications/cleanup/brownfields/handbook/index.html, http://www.epa.gov/compliance/resources/policies/cleanup/superfund/rfr-deter-cmpt.pdf**

work that will help EPA understand the scope and nature of problems at the Site and whether any further response is warranted. Even if it were true that only remaining RI/FS activity was the "write up" the results of the work already done, that part of the work is crucial to the process. The "write up" includes analysis essential to proper investigation and study of remedial options. That ground water is issue here likely makes this analytic work especially important, given the challenges sometimes seen in properly characterizing and addressing such contamination.

Similarly, the "write up" required by the RI/FS Order may also reveal other information important to Agency decision making. While you maintain that commercial use is the only use for the Site, the Agency normally would seek the counsel of local groups and governments in assessing the likely uses for the Site and would consider those views in deciding whether and to what extent further response is warranted.

It may well be that your clients are correctly predicting what the Agency's final decisions will be for the Site, both as to further response and as to land use, but your clients' statements are only predictions and are made in advance of the process EPA follows in hopes of making good decisions under applicable law and guidance.

Here are alternative steps for your consideration. Please:

a. Consider the information on re-use of superfund sites, found at the locations noted in footnote 2; **EPA would be happy to meet with the current landowner and discuss reuse of the Site during and after completion of the cleanup of the Site.**

b. Consider speeding up the RI/FS work as much as you can. Your proposal suggests that more rapid progress on the RI/FS work is within your power. That result is not only in EPA's interest but also will contribute mightily to your clients' goals by securing sooner a greater degree of confidence about the ultimate status of the Site. That knowledge may well open up more options for the Site, especially if your clients believe they need more confidence about what kind of Site clean up will be necessary before use of the Site is a commercially viable prospect;

c. Pay the response costs already incurred at the Site, which already exceed $800,000 (and which continue to grow in principal and on account of interest); and

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[3] A consent decree that would direct the final clean up of the Site before EPA decides what if any clean up would be warranted might amount an inappropriate affirmative injunction give its inherent lack of specification. Similarly, one might also question whether such a decree meets the typical tests for entry of consent decree (fair, reasonable, in furtherance of the goals of the statute, etc.) where the decree is entered before final clean up has been subjected to appropriate administrative process, public comment, or is even selected.

d. Let Barbara Nann know if you remain interested in pursuing the previously discussed tank removal order. For reasons already noted in this letter, you should not expect that such an order would include the kinds of language you proposed on some issues (e.g., your proposals for paragraphs 11, 12, 23, 80, or 98), but some of the adjustments you sought might be workable (e.g., some of your proposal for paragraph 74).[4]

Thank you again for taking the time to talk with us on August 15. We are sorry to conclude that so much of your proposal should be rejected but hope that some of the alternatives we suggest will meet some of your goals and also foster clean up and cost recovery for the Site.

Sincerely,

Thomas A. Mariani, Jr.

Cc: B. Nann, A. Legare

[4] Paragraph references are to draft Order on Consent for Removal Action denoted by the footer 'AUSTIN248155.1'.