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June 20, 2012

By Email and U.S. Mail
Gloria Moran, Esq.
Assistant Regional Counsel
Superfund Branch (6RC-S)
U.S. EPA, Region 6
1445 Ross Ave.
Dallas, TX 75202-2733

Re: Arkwood Superfund Site, near Omaha, AR;
McKesson's Right to Knowledge of and Involvement in Key Site Decisions.

Dear Ms. Moran:

As you know, we represent McKesson Corporation ("McKesson") which, as the party implementing the 1991 Consent Decree for the Arkwood Site ("Site") for the last 20 years, is a critically important stakeholder regarding the Site.

We have recently received and reviewed the first and second installment of documents provided by U.S. EPA in response to McKesson's Freedom of Information Act ("FOIA") request for correspondence between U.S. EPA and C.C. ("Bud") Grisham, Sr. and C.C. ("Curt') Grisham, Jr. regarding the Arkwood Site ("Site"). We are disturbed by the extensive record of communications between the agency and Curt Grisham almost entirely to the exclusion of McKesson, regarding, among other matters: 1) the proper scope of institutional and engineering controls at the Site (including deed restrictions); 2) development of a Ready for Reuse Determination for the Site; and 3) the Site's potential partial delisting from the National Priorities List ("NPL").

EPA's apparent intentional exclusion of McKesson, the Site's Project Coordinator, from nearly all of these communications and its related deliberations, requires that we write to demand that U.S. EPA Region 6 confirm in writing that going forward, EPA will include and contemporaneously communicate with McKesson regarding all discussions of these topics before any decisions are made, and will be invited to (and not excluded from) any calls and meetings

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regarding them. This commitment would be made by all EPA managerial, technical and property reuse personnel.

By way of background, McKesson's predecessor Mass Merchandisers, Inc. ("MMI") commenced a Remedial Investigation/Feasibility Study in May 1987, 25 years ago, and subsequently entered into a Consent Decree ("CD") with U.S. EPA to implement the remedial action identified in the Record of Decision ("ROD") issued by U.S. EPA in September 1990. McKesson, MMI's successor in interest, has been remediating the Site ever since. As a reminder, the investigation of the Site was only made possible after the United States sued Bud Grisham and others to obtain access to the Site (which they refused to provide, despite being PRPs), a suit in which MMI intervened, and which resulted in, among other things, the Settlement Agreement in which, as you know, Bud Grisham contractually agreed not to confer with any regulatory agencies about the Site, including USEPA, without McKesson's consent. McKesson has spent in excess of $20 million to date on soil and groundwater remediation since execution of the Settlement Agreement with the Site owners (including Bud Grisham) and the former operators, so it has a vested interest in making sure its costly and ongoing remedial efforts are protected and retain their long-term effectiveness. Per the CD, Jean Mescher is the designated Project Coordinator for MMI to monitor progress of the work and "to coordinate communication between Parties." (see CD, Section XII, "Project Coordinators.") Accordingly, McKesson expects that before U.S. EPA Region 6 contemplates taking any action affecting the completion of the remedial work under the CD, or the ROD, which is incorporated into the CD, or which may affect the completed remedial work (e.g. the Site cap), including but not limited to the recording of any amended deed restrictions or other institutional controls, pursuing a Ready for Reuse ("RfR") or Ready for Anticipated Use ("RAU") Determination, or initiating any effort to partially delist the Site from the NPL, that Region 6 will provide timely and detailed communication to McKesson's Project Coordinator.

The documents recently produced in response to McKesson's FOIA request demonstrate rather shockingly that such communications have not occurred, with Region 6 instead having repeated, unilateral communications with Curt Grisham on each of these issues with little or, in most cases, no communication with McKesson's Project Coordinator. This exclusion of the McKesson Project Coordinator from all of these critical decision-making processes is unacceptable to McKesson. Moreover, the documents reflect that Curt Grisham specifically requested that McKesson not be informed at all about the November 9, 2011 "Meeting with Curt Grisham" at which numerous topics directly relevant to the CD and ROD were discussed. (see C. Grisham October 20, 2011 email to C. Luckett Snyder, U.S. EPA-- "Can you confirm that the meeting will take place without any McKesson participation?") It is disturbing and unacceptable to McKesson that Region 6 honored this request from a person with no confirmed authority to even speak on behalf of the Site owner to keep McKesson's Project Coordinator, with whom U.S. EPA is supposed to coordinate all communications regarding the Site, completely ignorant of this meeting and the wide array of CD- and ROD-related issues reflected in the meeting agenda prepared by Region 6. Yet EPA saw fit to make available to Curt Grisham no fewer than

ten EPA employees for the meeting in-person or by phone. Adding insult to injury, EPA recently sent McKesson an invoice for oversight costs exceeding $55,000 that includes the costs of these very interactions from which McKesson was intentionally excluded. Improperly excluding the Site Project Coordinator from these communications and activities, but then charging it for their related oversight costs, is obviously unjust and inappropriate.

The Site owner's desire to return the property to economic use, and EPA's apparent desire to take credit for doing so, cannot trump neither McKesson's obligations under the CD to complete the Site remedy (the Site cap) and to protect it from future disturbance nor EPA's own obligation to protect human health and the environment from Site risks. Yet, EPA seems to have lost sight of its obligation.

For example, as noted on EPA's own website entry regarding the Site, "[a] Site Preliminary Closeout Report was finalized on June 28, 1996 to officially complete the Soils Remedy. EPA and ADEQ considered a partial NPL deletion for the main Site area. However, they determined that unrestricted use of the main Site could not occur until the RP has completed cleanup of the New Cricket Spring, as this might re-contaminate New Cricket Spring due to the fractured hydrogeology at the site." Where is the documentation establishing EPA's technical reasoning for why its earlier determination is apparently no longer applicable? Has this earlier determination even been reconsidered? Although McKesson has made great progress (at great expense) towards remediation of the Site consistent with the remedial goals set in the Site's ROD, including completion of soil remediation and the implementation of ozone water injections to accelerate groundwater remediation, groundwater quality still does not meet regulatory standards on a consistent basis, so the need for groundwater treatment continues, along with the need for continued protection of past soil remedial efforts, including the soil cap.

Accordingly, McKesson requests the following additional actions and assurances from Region 6.

1. Deed Restrictions.

We now see from EPA's delayed production of documents in response to our FOIA request that EPA has had, and is potentially continuing to have, extensive communications with Curt Grisham about the proper deed restrictions to be recorded on the Site without any communication with McKesson whatsoever on this topic. McKesson, as Project Coordinator, should not have to learn of such matters through document productions compelled through FOIA requests. McKesson requests that EPA actively involve it, through its designated Project Coordinator, in all discussions involving amendments to the existing deed restrictions. We have reviewed your pair of November 18, 2011 emails to Curt Grisham and your comment that EPA will revise the current deed notice "with input from McKesson" to "insure it reflects the metes and bounds and the uses that are legally appropriate for the site", and that McKesson will be entitled to make comments on the revised draft Deed Restriction. Yet, since the date of your emails, McKesson has been given no opportunity to provide any input, while during this period

EPA has had extensive communications with Mr. Grisham. McKesson looks forward to timely receipt of all proposed draft revisions to the Deed Restriction and to providing to Region 6 relevant comments to insure the final recorded version complies fully with all requirements of all relevant administrative documents, including the ROD, which provides that a "notice will be [recorded on] the deed to the property allowing industrial use but **warning against future excavation on the [S]ite**." (ROD, p. 65) (emphasis added). The currently recorded deed restriction (so far as we know) does not provide any such warning, despite McKesson's prior multiple requests for language to be included explaining the residual risk and for protection of the Site cap. EPA should be requiring that the deed restriction be amended to warn against future excavation and prohibit disturbance of the Site cap.

2. Ready for Reuse.

McKesson was surprised to learn in Region 6's Third Five Year Report that "[i]n January 2011, EPA made a site-wide Ready for Reuse determination at the Arkwood Site" without any advance notice to McKesson whatsoever. We were not aware any request had been made for such a determination before that time. Moreover, we are now confused as to how this determination was made without any supporting process or documentation reflecting that Region 6 had conducted the required technical administrative review in compliance with OSWER # 9365.0-33, "Guidance for Preparing Superfund Ready for Reuse Determinations" ("RfR Guidance") to insure that the Site was, in fact, determined to be "Ready for Reuse." The format and content of the two documents in which RfR determinations are to be documented are set forth in Section IV of the RfR Guidance and Attachment 1 thereto. Moreover, it is our understanding that the RfR Guidance has been superseded by subsequent guidance in OSWER # 9200.1-74, "Guidance for Documenting and Reporting Performance in Achieving Land Revitalization" ("RAU Guidance").

Our confusion is magnified by our review of Ms. Luckett Snyder's emails to Mr. Curt Grisham (again, without any communication to McKesson's Project Coordinator), including her November 9, 2011 email to him providing the "Conroe Creosoting RfR Certificate, the RfR Executive Summary and the main body of the RfR," and asking him to let her know if he is "interested in pursuing this avenue." This email was followed by her November 22, 2011 email to him stating that "I've initiated the process to start developing a Ready for Reuse Determination for the site as you requested last week." Apart from the fact that Region 6 is discussing pursuit of this determination with a person who had no demonstrated legal authority to act on behalf of the Site owner, without any notice to the Site Project Coordinator, this email makes clear that EPA has, in fact, not yet made a "Ready for Reuse" or "Ready for Anticipated Use" determination at the Site. Indeed, it has only just initiated the determination process. This "cart before the horse" situation is further confirmed in Mr. Harris' January 10, 2012 email to Ms. Casey Luckett Snyder in which he refers to "polishing our *draft RfR Determination* for the Arkwood Site." (Emphasis added.)

Moreover, the Ready for Reuse Guidance provides that "RfR determinations should not be issued in instances where institutional controls are required by the ROD or other decision documents and have not been implemented. If the institutional controls have not been implemented, the site may not be protective for the types of uses that would be specified in an RfR determination." Similarly, as also noted in Mr. Harris' email to Ms. Luckett Snyder referring to the RAU Guidance (which supersedes the RfR Guidance), "I think the lack of the [institutional control] requirement in the decision documents may undermine the Sitewide RAU determination for the Site." Here a defective deed restriction has been recorded (incorrect metes and bounds), which also lacks the specific warning (*i.e.* prohibition against future disturbance of the cap) required in the Arkwood ROD (apparently Mr. Harris was not informed of this requirement). Accordingly, no RfR or RAU Determination should be issued until these deed restriction defects are remedied at a minimum.

Typically, as reflected in the Conroe Creosoting RfR sent by Ms. Luckett Snyder to Mr. Grisham, such determinations are based on analysis presented in a technical decision document discussing the remedies implemented and the institutional and engineering controls and O&M requirements required for the remedies to remain protective of human health and the environment. (See also LEDC Parcels of Land at the South Point Plant Superfund Site Are Ready for Reuse, U.S. EPA Region 5 (10/26/04)). This is consistent with the requirement in the Ready for Reuse Guidance that "[i]f a RfR determination is issued for a restricted use site, then it should clearly and precisely specify the types of uses for which the conditions of the property are determined to be protective, and any ongoing activities or obligations that are required (*e.g.* maintenance of a fence or land use controls) or prohibited (*e.g.* no digging below 18 inches) in EPA decision documents." Yet, the "Ready for Reuse Determination" statement set forth in Region 6's Third Five Year Report contains no such details and we have been provided with no other formal determination documentation containing such information. However, we have seen Ms. Luckett Snyder's February 28, 2012 letter to the Northwest Arkansas Economic Development District indicating that the property is ready for industrial reuse with no reference to any other restrictions on activities, obligations or prohibitions whatsoever, such as the requirement to not disturb the existing soil cap remedy, which is deeply disturbing to McKesson, which again, was not consulted in any way before this letter was issued.

McKesson makes two requests with respect to U.S. EPA's Ready for Reuse/Ready for Anticipated Use programs as they apply to the Site. First, McKesson requests a written statement from Region 6 that either it has *not* made a site-wide Ready for Reuse or Ready for Anticipated Use determination at the Arkwood Site, or that it retracts any designation that it did make, since it never conducted the required determination process or generated the appropriate supporting documentation. Moreover, McKesson requests that if Region 6 continues pursuing a RfR or RAU determination for the Site, that it: 1) complete the required analysis and documentation supporting it per the RfR/RAU Guidance, fully identifying all the institutional and engineering controls and other requirements with which compliance remains necessary

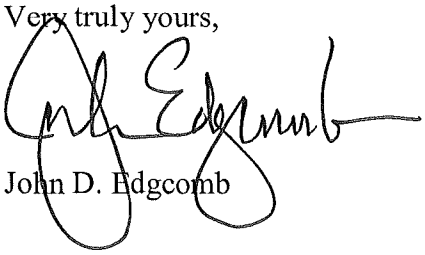
during any proposed reuse to protect the remedy and requiring their recordation on title; and 2) fully involve and affirmatively seek the input of McKesson's Project Coordinator in that process.

3. Delisting from the NPL.

As with the deed restriction and Ready for Reuse/Ready for Anticipated Use issues, as the only responsible Party to the CD, and the party responsible for implementing the remedy at the Site, McKesson expects to be fully involved in all administrative decision-making regarding any steps taken toward removing the soil portion of the Site from the NPL. We have reviewed Carlos Sanchez's November 25, 2011 email to Curt Grisham stating that based on a letter from him, Region 6 is moving forward with the partial NPL delisting process for the Site. Again, we cannot understand why such actions are being taken without any notice to the Site Project Coordinator from McKesson, the party that has been investigating and remediating the Site under the CD with U.S. EPA for the last 25 years at a cost of over $20 million and remains responsible for completing and preserving the Site remedy under the terms of the CD. Again, McKesson requests that if Region 6 continues pursuing a partial delisting of the Site from the NPL, that it: 1) complete the required analysis and documentation supporting it per the delisting guidance; and 2) fully involve and affirmatively seek the input of McKesson's Project Coordinator in that process.

We think it is appropriate to have a conference call as soon as possible to discuss the above items, among other issues. Please let us know when would be a convenient date and time for you, Region 6 management, and the Region 6 RfR/RAU personnel to discuss these issues. We look forward to working cooperatively with U.S. EPA Region 6 to complete remediation of this Site and to protect the remedy implemented.

Very truly yours,



John D. Edgcomb

cc:

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