THOMPSON & KNIGHT LLP

ATTORNEYS AND COUNSELORS

1900 SAN JACINTO CENTER
98 SAN JACINTO BOULEVARD
AUSTIN, TEXAS 78701-4081
(512) 469-6100
FAX (512) 469-6180
www.tklaw.com

AUSTIN
DALLAS
FORT WORTH
HOUSTON
NEW YORK
SAN ANTONIO

ALGIERS
LONDON
MEXICO CITY
MONTERREY
PARIS

DIRECT DIAL: (512) 469-6130
EMAIL: James.Morriss@tklaw.com

January 12, 2010

Via Federal Express
Mr. Thomas A. Mariani, Jr.
Assistant Chief
U. S. Department of Justice
Environmental Enforcement Section
P. O. Box 7611
Washington, D.C. 20044-7611

Re: Gulfco Marine Maintenance Superfund Site, Freeport, Texas (the "Site") – Comments on the 12/08/2009 EPA Draft of Administrative Settlement Agreement And Order On Consent For Removal Action ("Settlement Agreement")

Dear Mr. Mariani:

As you know, we represent The Dow Chemical Company ("Dow") on this matter. Dow, Chromalloy American Corporation ("Chromalloy"), and LDL Coastal Limited, L.P. ("LDL"), collectively known as The Gulfco Restoration Group (the "Group"), have reviewed the draft Settlement Agreement that you provided to Bill Mahley in your letter of December 9th. As mentioned in Bill's initial response letter of December 18, 2009, the Group agrees to perform the tank removal and cap repair work at the Site. Although you have named Parker Drilling in the draft Settlement Agreement because it has been identified by EPA as a PRP and ordered by EPA on December 27, 2007, to join the RI/FS at this Site, it has not yet joined the Group or participated in RI/FS activities, and we do not have the authority to negotiate on behalf of, or name Parker Drilling in this Settlement Agreement. We, therefore, have deleted references to Parker Drilling in the draft Settlement Agreement.

This letter provides the Group's comments and the rationale for proposed changes to the Settlement Agreement. The comments we offer are based on the parties' practical and long-standing relationship with the Site, the existence of Site documents and plans already approved by EPA, and the over-arching goal to perform the removal actions efficiently while meeting all CERCLA requirements. The two guiding principles of our comments are (1) to conduct the removal action in a timely and efficient manner and (2) assure that the Settlement Agreement reflects current Site data germane to the specific tasks of the removal action. While at first glance, our comments may seem extensive, our purpose in providing this level of detail is to explain our rationale for how each comment furthers these two principles and thereby promotes the timely finalization of this Settlement Agreement. The comments are presented as follows: clarifying comments of a global nature are listed first, followed by specific substantive comments, comments intended to improve efficiency and timely performance, and lastly typographical and formatting corrections. All paragraph references are to the paragraphs as

numbered in EPA's December 9th draft Settlement Agreement. I have enclosed a redline of the Settlement Agreement showing our proposed changes to EPA's December 9th draft, as well as a clean copy of the agreement with our changes for ease in reading.

Clarifying Comments

- Throughout the Settlement Agreement when Dow's full name is used, it should be "The Dow Chemical Company."

- We have replaced Sequa Corporation with Chromalloy American Corporation. Chromalloy was the entity that was a prior owner of the Site.

- **Oversight Response Costs** – Based on our previous discussions, it is our understanding that EPA intends for the Respondents to agree to reimburse EPA for its oversight costs for this removal action, and not all oversight costs or other response costs incurred by EPA in connection with the Site to date. Paragraph 1 and former Paragraph 34. d. have been revised consistent with this understanding. In Paragraph 1, we also capitalized "Oversight Response Costs" because these costs are a defined term in the "Definitions" section. In Paragraph 8h., we inserted the statutory standard that EPA is entitled to recover Oversight Response Costs that are not inconsistent with the NCP. We clarified that EPA will begin to incur Oversight Response Costs from the Effective Date of the Settlement Agreement. We deleted the payment obligation in this definition because this obligation is already appropriately set out in Section XV "Payment of Oversight Response Costs."

Specific Substantive Comments

- **Findings of Fact** – The Site descriptions, data and conditions recited in Paragraphs 10-20, 22-24 and 26-27 of the Findings of Fact are the same findings as in the original UAO issued in 2005, and the amended UAO issued in December 2007. These Findings are not germane to this removal action agreement which pertains to tank removal and cap repair. For example, the Findings in Paragraphs 19 and 20 and 22-23 recite now out-dated sampling results for site soils, the Intracoastal Waterway and groundwater beneath the Site. As you are aware, the parties have undertaken extensive remedial investigations and site studies approved by EPA. As a result, current data are now available regarding the Site, the tanks' contents and the integrity of the surface impoundments' cap. For these reasons, we propose replacing the Findings in Paragraphs 10-20, 22-24 and 26-27 with new Findings germane to the current condition of the above-ground storage tanks ("ASTs") and the surface impoundments' cap and any risks associated with these areas. The data in these new Findings are current and have been approved by EPA .

The Findings in former Paragraphs 21 and 28 concerning the Site's listing on the NPL and the Intracoastal Waterway's designation as a fishery have been moved up as new paragraphs 10

and 11.

- **Insurance** – Former Paragraph 94 requires Respondents to obtain and maintain insurance in specified amounts and to submit insurance certificates as well as insurance policies. In contrast, for the years the parties have been conducting the RI/FS under the UAO, they have submitted insurance certificates evidencing the insurance coverage of their contactors and subcontractors performing the on-site work. We do not understand the need to have the actual insurance policies if insurance certificates evidencing coverage have been provided. Requiring the submittal of the insurance policies could be problematic. Brokers have said that policy endorsements naming additional insureds and other policy provisions are subject to confidentiality requirements and are problematic to produce. To save time and consistent with the present UAO insurance requirements, this paragraph is revised to track the current practices the parties have been following under the UAO's insurance provision.

- **Financial Assurance** – Due to the expected short duration of this project, Respondents propose to update the financial assurance already submitted for the RI/FS under the UAO to include the costs to complete this removal work. This updated financial assurance will be submitted by the required annual financial assurance deadline.

- **Final Report** – In former Paragraph 45, the 14-day time period from completion of "all Work" and submittal of a final report is a significant decrease from the corresponding 45-day period in the March 2008 draft AOC. This short reporting period will be problematic because it may take weeks for all the waste manifests to come in from off-site disposal facilities. We, therefore, propose increasing the time for submittal of the final report to 45 days after receipt of all necessary documentation (including transporter and disposal facility manifests, weigh tickets, final survey drawings, final field density testing reports, etc.). The requirements in this same paragraph for OSC-Reports contents and for the inclusion of a "good faith estimate of total costs or a statement of actual costs incurred" in the final report appear to be related to Fund-lead removal actions. Respondents do not understand EPA's need for the cost information as it concerns costs incurred by the parties and not EPA. For these reasons, we propose deleting these requirements.

- **Post-removal Site Control (former Paragraph 43)** – It appears that this paragraph is not relevant to this removal action because the referenced NCP section (300.415(l)) and OSWER Directive (9360.2-02) are for Fund-financed actions. In any event, post-removal site control obligations will be addressed in the Record of Decision ("ROD") as part of the final Site remedy. For these reasons, we propose deleting this provision.

- The notice of conveyance provisions in part c. of former Paragraph 44 (Reporting) appear overly broad because they apply to the entire Site and are not tailored to particular areas requiring restriction. For example, notice of future conveyances may be appropriate for the capped area of the Site, but not for the redeveloped southern area. Furthermore, the

restrictive covenants already in place for the Site and the institutional controls to be implemented by the ROD make these requirements unnecessary. For these reasons, we propose deleting these provisions.

- **Former Paragraph 48 (Site Access)** – We have clarified that Respondents will not be required to pay for access to property if the property owner is also a potentially responsible party at the Site (or that party's successor-in-interest). This approach has been adopted at another site in Region 6.

- **Former Paragraph 59 (Release Reporting)** – We have clarified that the OSC and National Response Center are required to be notified when CERCLA's reporting requirements have been triggered, and not for every non-reportable release that may occur at the Site. This approach has been adopted at another site in Region 6.

- **Former Paragraph 65 (Dispute Resolution)** – Clarifies that pursuant to former Paragraph 63, Respondents have within 30 days to initiate dispute resolution regarding billings for Oversight Response Costs. This revision has been permitted at another site in Region 6.

Comments Intended to Improve Efficiency and Timely Performance

In order to implement the removal action timely and efficiently, we propose using the work plan previously developed with EPA and the existing plans and procedures already approved and in place for the RI/FS. Revisions to the Settlement Agreement as follows will accomplish these objectives:

- **Paragraph 8a.** – We request a preliminary draft of EPA's Action Memorandum so that we may begin our review as soon as possible.

- **Paragraph 8q., new Paragraph 8t., former Paragraph 36 and former Paragraphs 39 and 40** – In conjunction with past discussions regarding removal of the tanks, Gary Miller, EPA's Project Manager, and the group's technical consultant, Eric Pastor, drafted a work plan for conducting the tank removal. To take advantage of this prior work, we propose attaching this work plan to the Settlement Agreement and its subsequent approval upon EPA's signing of the agreement. This approach will allow the parties to proceed directly with the removal work. The earlier work plan has been revised to address the cap repair activities mentioned in your December 9th letter and the containment decontamination measures raised by Mr. Miller in prior comments. This revised removal action work plan will be submitted to EPA for review in a separate letter in the near future. Because the requirements of a Statement of Work will be addressed by the work plan and/or the Settlement Agreement, these Statement of Work provisions can be deleted. For these reasons, changes are proposed for Paragraph 8q, former Paragraphs 39 and 40 and throughout the Settlement Agreement to incorporate an approved Work Plan. For example, former

Paragraph 41 is revised to provide that Health and Safety Plans for the removal activities will be prepared in accordance with the Work Plan which provides that the contractors for the AST Tank Farm and cap work will prepare Health and Safety Plans in accordance with EPA's Standard Operating Safety Guide (PUB 9285.1-03, PB 92-963414, June 1992) and all currently applicable regulations found at 29 CFR 1910.120.

In addition to further stream-line the removal action process, in former Paragraph 36, Respondents have designated Eric Pastor of Pastor, Behling & Wheeler, LLC as their Project Coordinator and have provided for EPA's pre-approval of this designation. Mr. Pastor is already approved by EPA as the Respondents' Project Coordinator for the RI/FS, so it makes sense to pre-approve him for this removal work. This pre-approval process has been used at another site in Region 6. We also increased the time to retain a new Project Coordinator should EPA disapprove Mr. Pastor in the future. Five days is just too short a time for Respondents to find and retain a new Project Coordinator.

- **Former Paragraph 35 (Contractor Designation)** – This paragraph requires 30 days prior notification to EPA for any contractors and subcontractors proposed for the Work. Given that the removal action will involve a number of subcontractors (trucking companies, disposal facilities, metal salvage firms, etc.), a 30-day advance notice requirement could substantially slow the completion of the removal action. To assure that this does not happen, we have revised this paragraph to provide that contractors and subcontractors already approved by EPA under the UAO do not have to be reapproved to work on the removal action. In addition, contactors previously approved under the UAO do not need to resubmit Quality Management Plans ("QMP") and subcontractors may work under their contractor's QMP, an approach approved for the RI/FS. With these changes, Respondents can proceed with the removal instead of duplicating efforts to approve contractors already approved by EPA for Site work. We also increased the time to retain a new contractor from 5 to 20 days because five days is just too short a time for Respondents to find and retain a new contractor if EPA disapproves of a contractor.

- **Quality Assurance Project Plans and QA/QC Procedures** – Former Paragraph 40 requires Respondents to prepare a new Quality Assurance Project Plan ("QAPP") and Paragraph 42 addresses Quality Assurance/Quality Control ("QA/QC") procedures. To avoid unnecessary duplication of effort, the Respondents propose to use the QAPP and the QA/QC procedures already in place and approved by EPA for the RI/FS activities. The removal action work plan that we propose attaching to the Settlement Agreement also includes a QA/QC section discussing QA/QC procedures specific to the removal action.

- **Former Paragraph 44 (Reporting)** – The progress reporting frequency in part a. of this paragraph (every 14th day) has been increased by EPA from the monthly reporting proposed in an earlier draft. Due to the expected short-term duration of this work, we do not see the need for such frequent reporting and, thus, propose the earlier-suggested monthly reporting.

Typographical and Formatting Corrections

- When the full name of the Settlement Agreement is used in the text, we have added "for Removal Action" so the name in the text is the same as the name listed in the agreement's caption.

- We have changed "Attachment" to "Appendix" to be consistent with the title pages for the appendices.

- Additional typographical and formatting corrections were made in the following Paragraphs: No. 8d. (changed "Effective Date" section to "XXXI"), No. 29 and through-out agreement (changed "track" to "tract"), No. 34 (there are two separate paragraphs on page 13 numbered 34; this error has been corrected), Nos. 34.e. and 49 (typographical corrections), Nos. 51 and 52 (deleted the brackets around the phrase, "and the State"), No. 67 (typographical correction), No. 76 (reference to Paragraph 28 in the last line does not appear to be correct), No. 79 (references to Paragraph 44 in line 3 and Paragraph 51 in line 13 do not appear to be correct), No. 101 (reference to Paragraph 76 in the last line does not appear to be correct), No. 103 (work plan has been changed from a defined term to a general term because any work plan for additional removal actions will require another work plan or an amendment to the existing work plan), Nos. 105 and 107 (typographical corrections)

With these proposed changes, we believe we are very close to having a final agreement for the removal work. We will, of course, need to submit the final documents to upper management for final review and approval.

Once you have had the opportunity to review these proposed changes, please let me know if you would like to have a conference call or meeting to discuss the changes. We look forward to finalizing the agreement and proceeding with the work.

Very truly yours,

James C. Morriss

James C. Morriss III

by EAW

JCM/eaw

Enclosures

cc: Barbara Nann
U. S. Environmental Protection Agency
Region 6
Assistant Regional Counsel
1445 Ross Avenue (6RC-S)
Dallas, Texas 75202-2733

Via Federal Express

cc: Ms. Shannon Slowey
The Dow Chemical Company
100 Independence Mall West
Philadelphia, PA 19106-3227

Via Regular Mail

cc: Donnie Belote
The Dow Chemical Company
2301 N. Brazosport Blvd., Bldg. BM 54
Freeport, TX 77541-3257

Via Regular Mail

cc: William Mahley
Strasburger & Price, LLP
1401 McKinney, Suite 2200
Houston, Texas 77010.4035

Via Regular Mail

cc: Brent Murray
Environmental Quality, Inc.
212 U.S. Highway One, Suite 18
Tequesta, FL 33469

Via Regular Mail

cc: LDL Coastal Limited, L.P.
c/o Allen Daniels
6363 Woodway Dr., Suite 730
Houston, TX 77057

Via Regular Mail

cc: Elizabeth Webb, Firm

cc: Mr. Eric F. Pastor
Pastor, Behling & Wheeler, L.L.C.
2201 Double Creek Dr., Suite 404
Round Rock, TX 78664