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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, Washington 98101

August 25, 1998

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RCRA Compliance Section

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Reply To
Attn Of: ORC-158

Donald Verfurth
Carney Badley Smith & Spellman
701 Fifth Avenue, Suite 2200
Seattle, Washington 98104-7091

Re: Administrative Order on Consent (U.S. EPA Docket No. 1091-11203008(h)

Dear Mr. Verfurth:

This is in response to your July 22, 1998 letter regarding Container Properties, L.L.C.'s purchase of the property located at 9229 East Marginal Way South, Tukwila, Washington from Rhone-Poulenc. The following is EPA's response to Container Properties' suggested modifications to the above referenced Administrative Order on Consent (AOC):

Changing the terms "Owner" and "Controlling Entity" found in the Administrative Order on Consent to "Former Owner" and "Former Controlling Entity.

EPA agrees to the following changes made to Paragraph 1.2 of the AOC:

> This Consent Order is issued jointly to Rhone-Poulenc, Inc. ("RPI") ~~(Respondent)~~, the former owner and former controlling entity, and Container Properties, L.L.C., the current owner and current controlling entity of the RPI facility located at 9229 East Marginal Way South, Tukwila, Washington (RPI and Container Properties are herein referred to jointly as "Respondent").

Paragraph 4.1 of the AOC should be modified as follows:

> Respondent RPI is the former owner and operator, and Respondent Container Properties is the current owner and operator of a hazardous waste facility...Washington. Until its closure in April, 1991, ~~Respondent~~ RPI engaged in the storage...

The second sentence of Paragraph 4.2 of the AOC should be modified as follows:

> ~~Respondent~~ RPI purchased the Facility in October of 1986, and operated the Facility until April of 1991, when the Facility ceased operations. On [date] Northwest Container Properties purchased the Facility from RPI.

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EPA does not believe that the term "owner" should be universally changed to "former owner" in the AOC.

Adding the terms "Current Owner" and "Current Controlling Entity" which should be defined as Container Properties.

EPA does not believe this change is necessary except for the modification in Paragraphs 1.2 and 4.1 as discussed above.

Adding a provision stating that Container Properties shall be entitled to all of the rights provided under the terms of the Administrative Order on Consent.

EPA does not believe that this suggested modification is necessary, as Container Properties will necessarily be afforded all rights and liabilities afforded under the terms of the AOC if the AOC is modified to include both RPI and Container Properties as Respondents, and Container Properties properly executes the agreement.

Adding a provision stating that Container Properties agrees to complete all corrective action and response measures required by the EPA to comply with the Administrative Order on Consent...there should be a provision in the Consent Decree which indicates that all corrective action and response measures required by the EPA to comply with the Administrative Order on Consent shall be primarily undertaken by Container Properties and that Container Properties has the right to make all decisions concerning the obligations found in paragraph 6.1 through 27.1 of the Administrative Order on Consent, and finally, that the EPA need not obtain Rhodia or Rhone-Poulenc's consent to such determined decisions.

Several provisions in the AOC already state that the Respondent agrees to complete all actions required by EPA to comply with the AOC, thus additional language is not needed to address this issue as long as the term "Respondent" is modified to include Container Properties. For instance, Paragraph 2.5 states that "Respondent agrees to undertake all actions required by the terms and conditions of this Consent Order..."

EPA cannot agree to a provision stating that response measures shall be primarily undertaken by Container Properties because Container Properties and Rhodia will be jointly and severally responsible for all obligations under the AOC. Rhodia and Container Properties are at liberty to reach agreement among themselves as to which party will be primarily responsible for decision making and conducting the work under the AOC. However, regardless of any private agreement, Rhodia and Container Properties will be jointly and severally liable with respect to EPA's ability to require the performance of work and enforce the AOC.

Finally, a provision stating that EPA need not obtain Rhodia's consent to make decisions related to the AOC is not necessary, because EPA has retained all rights to compel performance

and make decisions related to the work to be performed at the Facility, and nothing in the AOC limits EPA's authority to do so.

Adding a provision stating that Rhodia and Rhone-Poulenc remain responsible for payment of any stipulated penalties pursuant to the AOC arising from Rhodia or Rhone-Poulenc's use, investigation or remediation of the property prior to July 13, 1998, and any penalties assessed following July 13, 1998, attributable to Rhodia or Rhone-Poulenc's action(s) or non-action(s).

EPA will not agree to language limiting EPA's ability to take enforcement actions in the future. Nothing in the AOC prevents Rhodia and Container Properties from reaching a private agreement for the allocation of responsibility for stipulated penalties.

Adding a provision stating that should Container Properties fail to meet the obligation required of it under the AOC, Rhodia and Rhone-Poulenc remain liable to meet such obligation. Should Rhodia and Rhone-Poulenc take control of the corrective action and response measures required by the EPA to comply with the AOC, neither Rhodia nor Rhone-Poulenc will seek modification of any decisions made by Container Properties pursuant to the AOC, solely on the grounds that such decisions were made by Container Properties, rather than Rhodia or Rhone-Poulenc.

If the party performing the work under the AOC fails to meet its obligations, EPA will have the authority to compel performance from either party. This authority will exist upon the modification of the AOC to include Container Properties in the definition of "Respondent" and the proper execution of the AOC by Container Properties. Thus, additional language setting forth the liability of one party to conduct work when another party fails to meet its obligations is not necessary. Further, language restricting the ability of one party to object to decisions made by another party is not necessary. EPA will look to the parties as joint Respondents. Decisions made by the Respondent will be presumed by EPA to have been agreed upon by both parties. The AOC sets forth mechanisms for initiating disputes and the Respondent may invoke those procedures if it disagrees with a requirement being imposed by EPA.

Adding a provision stating that should Rhodia or Rhone-Poulenc become responsible for completing the required actions under the AOC, Rhodia or Rhone-Poulenc shall once again be entitled to all of the rights provided under the AOC and Rhodia or Rhone-Poulenc shall once again be responsible for making all decisions concerning the obligations found in paragraphs 6.1 to 27.1 of the AOC.

Since Rhodia will remain a Respondent under the AOC, Rhodia remains fully responsible at all times for completing all actions under the AOC, and Rhodia retains all of the rights provided in the AOC. Thus, the suggested language is not necessary.

<u>EPA's Suggested Changes</u>:

EPA suggests the following language changes to the AOC. The term "Respondent" as defined on page 7, Paragraph 33, must be defined as follows:

Respondent shall mean Rhone-Poulenc, Inc. ("RPI") and Container Properties, L.L.C.

In addition, Section XXIII of the AOC should be modified. Paragraph 23.1 should be stricken and replaced with the following language:

> Within thirty (30) days of entry of this Consent Order, Respondent shall establish and maintain financial security in the amount of $ 7 million. The mechanism(s) for obtaining and demonstrating financial assurance for corrective action must be one of the forms specified in Paragraphs (a) through (f) of 40 C.F.R. § 265.143. Respondent shall submit documentation of such financial assurance to EPA within seven (7) days after establishment of the financial assurance.

The first two sentences of Paragraph 23.2 beginning on line 11 and ending on line 20 should be stricken. The last two sentences of Paragraph 23.2 should remain the same.

As discussed in an earlier conversation, EPA will accept financial assurance from Container Properties in lieu of financial assurance from Rhodia. The financial assurance posted by Container Properties will constitute financial assurance for the purpose of satisfying the requirements of the AOC on behalf of Container Properties and Rhodia as joint Respondents. However, at no time may there be a lapse of financial assurance under the AOC. In other words, Respondent Rhodia may not withdraw the financial assurance it has posted without financial assurance from Container Properties being fully in place. If such a lapse were to occur, both Rhodia and Container Properties would be in violation of the AOC and subject to enforcement action by EPA for such violation.

Please note that Section XIII (Project Coordinator) requires that the Respondent designate a Project Coordinator who will be "EPA's designated representative at the Facility." Therefore, despite the addition of Container Properties as a signatory to the AOC, EPA expects to communicate with one Project Coordinator who represents both Container Properties and Rhodia. Please note the requirement to notify EPA in writing at least 10 days prior to changing the Project Coordinator.

Further, Paragraph 14.2 of the AOC requires that any submittal by Respondent be certified by a responsible corporate officer or a duly authorized representative. Thus, each submittal must be certified by a person duly authorized to jointly represent Container Properties and Rhodia as the Respondent to the AOC.

Any modifications agreed upon by EPA and Container Properties must also be agreed to by Rhodia, must be memorialized in the form of a written amendment to the AOC, and must be signed by Container Properties, Rhodia, and EPA.

I look forward to working with you to finalize the modifications to the AOC.

Sincerely,

Elizabeth McKenna
Assistant Regional Counsel

cc: Christy Brown, EPA
Kim Ogle, EPA
Chuck Blumenfeld, Bogle & Gates