Attachment A

VERDANT
VERDANT LAW, PLLC

Danielle L. Schreiber
1025 Connecticut Ave., N.W.
Suite 1000
Washington, D.C. 20036
(202) 828-1233
verdantlaw.com
dschreiber@verdantlaw.com

December 4, 2019

VIA ELECTRONIC MAIL
Sandeep Mehta
U.S. EPA, Region 7
11201 Renner Boulevard
Lenexa, KS 66219
E-mail: mehta.sandeep@epa.gov

Re: 5th 5-Year Review for the Vogel Paint & Wax Company's Superfund Site

Dear Mr. Mehta:

Vogel Paint & Wax Company ("Vogel" or "the company") has serious concerns with the 5th 5-Year Review ("5YR") that EPA recently published for the company's Superfund Site in Maurice, Iowa. There were problems with both the process for developing the 5YR and with its content. The process lacked transparency: EPA disregarded comments on the first draft and the agency did not give Vogel or the Iowa Department of Natural Resources ("IDNR")—the lead agency— an opportunity to comment on substantial changes to the published version before its publication. These failures resulted in Vogel's Site appearing to be more contaminated than it actually is, appearing not to be adequately protective of human health and the environment, which it is, and appearing to need updated decision documents, when it doesn't.

The 5YR must be rescinded and reissued based on the points outlined below. In addition, Vogel expects EPA to engage in a transparent and fair process going forward.

A. Vogel objects to EPA's process and lack of transparency in finalizing the 5YR.

There were three versions of the 5YR – two draft versions, and a third version that was published. EPA's process to publication was deeply troubling. EPA did not give Vogel an opportunity to comment on the substantive changes to the second draft and the published draft of the 5YR regarding: 1) changing the point of compliance ("POC") for the Site's remedial action objective ("RAO") for groundwater, 2) returning the aquifer to "beneficial use," and 3) changing the institutional control for the Site. Moreover, these substantive changes were not logical outgrowths of the first (and only) draft that EPA shared with Vogel. The three versions are discussed below:

1) The first draft, dated June 7, 2019, EPA shared with Vogel for comment. Vogel submitted comments on this draft on June 20, 2019. EPA did not address any of Vogel's concerns. In particular, EPA disregarded Vogel's comment concerning the agency's misapplication of the 1% Rule. (*See* Section C, below.)

In addition, the first draft did not discuss changing the POC for the groundwater RAO, returning the aquifer to "beneficial use," or changing the institutional control on-site. When commenting on this first draft, Vogel was given no indication from EPA that it was considering changing the groundwater POC, even though we later learned that EPA had discussed this possibility with IDNR as early as May 20, 2019 during a conference call to evaluate whether any of the existing decision documents needed to be modified.[1] Moreover, based on the Site's status and the Administrative Record, there was no reason for Vogel to anticipate that EPA was contemplating changing the groundwater POC.

2) The second draft, dated June 28, 2019, discussed changing the POC for the groundwater RAO. EPA did not share this draft with Vogel. EPA only provided a copy to IDNR. Not sharing this draft with Vogel was surprising to say the least, especially when changing the POC was not a logical outgrowth of the first draft. Fortunately, IDNR provided a courtesy copy; however, we understand that EPA subsequently questioned IDNR for doing so. Under the time constraints, Vogel could not undertake a thorough review of the second draft and instead was forced to submit a letter to EPA on July 9, 2019, outlining the company's concerns with changing the groundwater POC.

Importantly, the second draft did not discuss returning the aquifer to "beneficial use" or changing the institutional control on-site. These changes were only included in the third, published version.

3) The third version of the 5YR was published on September 10, 2019. This version discussed changing the POC for the groundwater RAO, returning the aquifer to "beneficial use," and changing the institutional control on-site. EPA did not share this version with IDNR or Vogel before publication. All of these changes were not a logical outgrowth from the first draft shared with Vogel. Vogel and IDNR should have been given the opportunity to comment on the substantial changes made to the 5YR.

B. Vogel objects to the substantive changes made by EPA in the published 5YR.

EPA did not give Vogel or IDNR—the lead agency— an opportunity to comment on substantial changes to the third version of the 5YR before its publication. Those changes included: 1) changing the POC for the groundwater RAO, 2) returning the aquifer to "beneficial use," and 3) changing the institutional control on-site. These are discussed in detail below.

a. *Changing the point of compliance for the remedial action objective for groundwater.*

The first substantial change to the record was added in sections 5.2 and 5.2.5 of the published 5YR. There, EPA discusses its intent to change the POC for the groundwater RAO. The 2000 ESD requires Vogel to meet Maximum Contaminant Levels ("MCLs") at the Site's

[1] Vogel learned about this through IDNR in July 2019, months after the fact. Apparently, during a May 20, 2019, conference call among representatives of EPA Region 7, EPA Headquarters, and IDNR, EPA HQ suggested changing the groundwater POC from the Site's property boundary to "everywhere" throughout the Site. No one at EPA ever mentioned this possibility to Vogel, despite the company making multiple inquiries about the status of the conference call. Copies of our inquiries are attached to this letter. *See* Attachment A.

property boundary. EPA intends to change the POC for groundwater from the Site's property boundary to "everywhere" throughout the Site, i.e., Vogel must meet the MCLs for the contaminants of concern not at the property boundary, but at every single well throughout the Site. The new language states:

> RAOs and specifically point of compliance are not consistent with the EPA groundwater guidance and will need to be revised/clarified before site completion.
>
> ***
>
> The RAOs in the soil and groundwater, as identified in the ROD and ESDs are still valid, however the point of compliance for the groundwater as defined in the October 2000 ESDs document is not consistent with EPA guidance, "Summary of Key Existing EPA CERCLA Policies for Groundwater Restoration, June 26, 2009, OSWER Directive 9283.1-33". The successful completion of the Pilot study, should it be fully implemented, would provide information needed to evaluate the current remedy effectiveness and whether a change to the remedy is necessary. As part of the evaluation of the remedy effectiveness, evaluation of the RAOs for cleanup of the groundwater should also be addressed.

Changing the groundwater POC is completely at odds with the Site's history and is inconsistent with the Administrative Record. (The details of Vogel's concerns are outlined in Attachment B.) First, EPA has provided no new facts nor other reasonable basis for concluding that the groundwater POC now needs to be changed after 20 years of remediation at the Site under the current 2000 ESD. Second, the policy embodied in the 2009 guidance document cited by EPA is not new. It had been in effect for ten years when the 2000 ESD was adopted by <u>both</u> EPA and IDNR. (*See* 55 Fed. Reg. 8666 (March 8, 1990).) Moreover, the 2009 guidance document itself had been published by the time the Site's 2009 3rd 5YR and 2014 4th 5YR were finalized, yet neither five-year report mentioned the 2009 guidance or expressed any concern regarding the POC. Third, the nature and the extent of groundwater contamination at the Site has not materially changed since at least the 2009 3rd 5YR. Fourth, and most importantly, EPA concurred and approved the 2000 ESD that dictated that the groundwater POC should be the Site's property boundary. (*See* EPA's letter-- Attachment C.)

The 2000 ESD found that meeting the RAO for groundwater throughout the Site was not reasonable based on the Site's history, and as such, designated the Site's property boundary as the POC. The ESD stated:

> [I]t might be inferred that compliance with chemical-specific groundwater ARARs was applicable to all groundwater at the site. In the more than a decade of time that has elapsed since the original ROD, <u>it has become apparent that such a goal is not reasonable</u>.... Therefore, the site property boundary is being designated as the point of compliance for groundwater ARARs. (Emphasis added.)

Had EPA given IDNR or Vogel an opportunity to comment on the third version – or had the agency not ignored Vogel's letter outlining its concerns when the issue was initially mentioned in the second draft of the 5YR -- this matter could have been clarified and resolved.

Accordingly, because the quoted language above from sections 5.2 and 5.2.5 of the published 5YR is based on an error, the language should be removed from the 5YR. Section 6.0 includes similar language regarding the RAOs and the point of compliance. This language should also be removed from the document.

It must be noted that if EPA requires changing the POC for the groundwater RAO, not only would this be erroneous and contrary to the record, but also it would cause an unnecessary and lengthy administrative process for IDNR and EPA to change the decision documents. Vogel does not believe that new decision documents are needed based on the current status of the Site.

b. Returning the aquifer to "beneficial use."

EPA's second substantial change in the published 5YR asserts that IDNR made a mistake when establishing the current groundwater POC in the 2000 ESD. However, this is inconsistent with the record because both agencies—not just IDNR-- approved the 2000 ESD. EPA contends that as written, the POC would not return the aquifer to "beneficial use." To address this purported error, EPA inserted the following language to Section 6.1 of the published 5YR: "The point of compliance defined in the October 2000 ESD appears to be inconsistent with Iowa's state-wide classification of drinking water aquifers and the EPA's expectation to return groundwater to beneficial uses wherever practicable." (Emphasis added.) Although this statement concerns the POC, it is not a logical outgrowth of the second draft of the 5YR. EPA has never mentioned to IDNR nor Vogel any concern about returning the aquifer to "beneficial use."

Had EPA given either IDNR or Vogel an opportunity to comment before publication, EPA would have learned that IDNR did not err when establishing the current POC back in 2000. First, the 2000 ESD already concluded that a different POC was not "reasonable." It defies logic for EPA now to assert that it would be "practicable" to restore the aquifers to "beneficial use" when the agencies have already concluded that it would not be "reasonable" to change the POC. One is a prerequisite to the other. Second, since publication of the ESD in October 2000, there has been no change in Iowa's regulations and guidance for aquifers that would require a change to the POC. The same basic set of regulations and guidance have been in effect since the time that IDNR prepared, and EPA approved, the 2000 ESD. Iowa does not classify specific aquifers in the way EPA asserts. As such, IDNR and EPA would have considered and determined that it was not "practicable" to fully restore the aquifers in October 2000 when the agencies concluded it was not "reasonable" to apply the POC to all groundwater at the Site. Accordingly, the new language in Section 6.1 is erroneous and should be removed from the 5YR.

c. Institutional control.

The third substantial change in the published 5YR is EPA's assertion that there is no enforceable institutional control on-site, implying that the Site is not adequately protective of human health and the environment. This assertion is untrue and would have been addressed by Vogel and IDNR if EPA had given them an opportunity to comment on the published 5YR. The language added to Section 6.0 states: "Iowa's Registry of Hazardous Waste Disposal Sites does

not enable specific enforceable land use restrictions." Listing on the state registry is an enforceable land use restriction according to IDNR. Being listed requires any sale or significant change in use of the property to be approved by IDNR. Being listed also prohibits use of on-site groundwater. IDNR has informed us that the state registry will continue to exist if sites continue to be registered. The Site is registered and has been since 1984. As such, there is an enforceable institutional control on-site that is adequately protective of human health and the environment. Accordingly, the new erroneous language in Section 6.0 should be removed from the 5YR.

C. Vogel objects to EPA's misapplication of the "1% Rule," which leads to the incorrect assumption that the Site is more contaminated than it is.

EPA inexplicably ignored valid comments that Vogel submitted on the first draft 5YR. In its comments, Vogel informed EPA of its misapplication of the 1% Rule in Section 4.2.1. Applying this rule leads to the incorrect presumption that source material is present in or around 4 wells (installed in 1984 [TC wells] and 1996 [GMW-11]) that have had no measurable free product. The erroneous language states:

> Wells near MW-4R, including TC-2, TC-6D, TC-17, and GMW-11, are checked on a regular basis and have not shown free product. The area of free product appears to be limited and stable. However, it should be noted that these wells show concentrations of toluene, ethylbenzene and xylenes exceed 1% of their respective solubility limits which is presumptive evidence of source material/product at this portion of the site.

In our experience, the 1% Rule applies only to dense non-aqueous phase liquids ("DNAPL"). Since DNAPL are denser than water, they sink below the surface of a water-bearing zone and are very difficult to locate or observe. Hence, the 1% Rule would be applied to infer the possible presence of DNAPL. However, DNAPL were never present at Vogel's site.

The releases on Vogel's site were light non-aqueous phase liquids ("LNAPL") that are lighter than water. If free product of LNAPL were present, it would float on top of the water-bearing zone and could be observed in the nearby wells mentioned by EPA. Based on over 15 years of monitoring reports at over 30 on-site wells, including the 4 wells near MW-4R mentioned by EPA, MW-4R is the only well that had observable free product, which has been decreasing in measurable thickness in recent years. It is misleading for EPA to apply the 1% Rule to infer free product in or around TC-2, TC-6D, TC-17, and GMW-11 when the historical releases were LNAPL, not DNAPL and actual site monitoring results for over 15 years do not support such inference. Application of the 1% Rule should be removed from the 5YR.

D. Vogel objects to the purported deficiencies in Vogel's remedial efforts, which have already been addressed in Vogel's the Pilot Study Work Plan and North Area Work Plan.

EPA claims at least two deficiencies in Vogel's remedial efforts, which appear to imply that Vogel's clean-up progress and future clean-up work are inadequate. However, both of them have already been addressed in the comprehensive bioremediation Pilot Study Work Plan and the North Area Work Plan. EPA failed to acknowledge either of those efforts in the published 5YR.

First, EPA claims that Vogel is inadequately monitoring for metals in the metals soil disposal area. Section 6.1 of the 5YR states that "[t]he current groundwater monitoring program

is not providing data to completely and accurately evaluate the levels of contamination and transport of metals from the metal soils disposal area. Update the Groundwater Monitoring Plan …" EPA's assertion is inaccurate. Further characterization and monitoring of metals is occurring as part of the North Area Work Plan that was submitted and approved by EPA. Accordingly, the erroneous language should be removed from the 5YR and replaced with the following language: "A plan for further characterization of metals in groundwater in the metals disposal areas and in surface water in the nearby creek – the North Area Work Plan – was submitted and approved in 2019."

Second, EPA claims that Vogel should engage in additional efforts to reduce off-site migration and the on-site plume. Section 7.0 of the 5YR states, "[i]n order to be protective in the long term, additional efforts to reduce offsite migration and the plume footprint should be conducted." However, EPA fails to acknowledge the Pilot Study Work Plan's comprehensive bioremediation plan will do just that. The Pilot Study Work Plan is designed to meet the RAOs for groundwater at the Site's property boundary as required by the 2000 ESD. Vogel anticipates a substantial reduction of any remaining contamination throughout the Site as well. As such, the erroneous language should be removed from the 5YR.

E. Vogel objects to the inaccurate description of the status of the Site.

To Vogel's dismay, EPA's general tone in the 5YR is that Vogel's Site is more contaminated than it actually is and is not adequately protective of human health and the environment. The description in the Response Action Summary section of the published 5YR is anemic and does not reflect the work Vogel has accomplished. Vogel has spent millions of dollars over the past thirty years to remediate the Site. To date, an estimated 143,000 gallons of product have been removed, 70,000 cubic yards of soil have been excavated and treated, 285 million gallons of groundwater have been extracted and treated. The free product is essentially gone, except for potentially a small amount near one well-- MW-4R-- and all that is left is some remaining dissolved contamination in groundwater, which Vogel is addressing in its comprehensive and aggressive bioremediation Pilot Study Work Plan. EPA's description of Vogel's efforts should be updated to accurately reflect the Site's true status.

****

We need to further discuss having EPA rescind and reissue the 5YR. I will follow up with Mary Peterson shortly to arrange an in-person meeting or conference call.

Sincerely,

Danielle L. Schreiber

Encl.

cc: Peter Wright, EPA Assistant Administrator, Office of Land and Emergency Management
Mary Peterson, EPA Region 7 Superfund and Emergency Management Division Director
David A. Hoefer, EPA Region 7 Superfund Branch Chief
Jared Pessetto, EPA Region 7 Attorney Advisor
Alex Moon, Deputy Director IDNR
Amiee Davidson, Solid Waste Division IDNR
Hylton Jackson, Environmental Specialist IDNR
Meika Vogel, Vice President General Counsel, Diamond Vogel
Philip A. Moffat, Verdant Law, PLLC

Attachment A

From: **Eric Smith** <ESmith@ramboll.com>
Date: Fri, Apr 26, 2019 at 2:35 PM
Subject: RE: Vogel - Maurice Iowa Site
To: Hylton Jackson <hylton.jackson@dnr.iowa.gov>, Mehta, Sandeep <mehta.sandeep@epa.gov>
Cc: Scott.Heemstra@diamondvogel.com <Scott.Heemstra@diamondvogel.com>, Keith Delange <KDelange@geotekeng.com>

Dear Hylton and Sandeep:

Following-up regarding the status of the review and approval of the revised work plans and QAPP submitted on March 8, 2019 (see below) associated with the Vogel Paint & Wax Co. site located in Maurice Iowa. Please indicate an anticipated date/timeframe for issuance of formal approval of the revised documents. Please contact me if you have any additional comments or questions regarding these subject documents.

I also wanted to follow up with you regarding the status of your (EPA Region 7) meeting with EPA HQ and IDNR regarding the decision documents. During our December 12, 2019 meeting, the goal was for the discussion with HQ to take place at the end of January. As the government was shut down then, it is unlikely that meeting occurred in January. However, has the meeting occurred since then? Are there plans to do so in the near future? Please let me know. We would very much like to resolve this pending issue.

Thank you for your assistance regarding these inquires.

Eric Smith, PG, CHG

Principal Consultant

D +1 (949) 7983603

esmith@ramboll.com

From: Eric Smith <ESmith@ramboll.com>
Sent: Tuesday, February 12, 2019 11:08 AM
To: Mehta, Sandeep <mehta.sandeep@epa.gov>; Hylton Jackson <hylton.jackson@dnr.iowa.gov>
Cc: 'Scott.Heemstra@diamondvogel.com' <Scott.Heemstra@diamondvogel.com>
Subject: RE: Vogel - Maurice Iowa Site

Sandeep and Hylton:

In light of the potential federal government shutdown beginning this Friday (February 15, 2019), I am writing to follow up with you regarding Vogel's submission on January 28, 2019 of the Pilot Study Work Plan, Response to Comments document, Northern Groundwater Plan, QAPP, and HASP. What is the status of EPA and IDNR's review? Does EPA and/or IDNR have any questions? Also, does EPA or IDNR have a status update regarding the conference call between EPA HQ, EPA Region 7, and IDNR regarding the decision documents? Insight would be greatly appreciated.

Additionally, I wanted to give EPA and IDNR an update on the status of the Bio-Trap study. Barring any setbacks due to weather, the plan is to begin the Bio-Trap study during the first week of March 2019.

Sincerely,

Eric Smith
Principal Consultant

D +1 (949) 7983603
esmith@ramboll.com

From: Eric Smith
Sent: Monday, January 28, 2019 3:10 PM
To: Mehta, Sandeep <mehta.sandeep@epa.gov>; Jackson, Hylton <hylton.jackson@dnr.iowa.gov>
Cc: Scott.Heemstra@diamondvogel.com; Keith Delange <KDelange@geotekeng.com>
Subject: Vogel - Maurice Iowa Site

Sandeep and Hylton:

Ramboll U.S. Corporation (Ramboll), on behalf of Vogel Paint and Wax Company, Inc. (Vogel), is submitting the following documents to the United States Environmental Protection Agency – Region 7 (USEPA) and the Iowa Department of Natural Resources (IDNR) in response to USEPA's December 28, 2018 follow-up comments letter regarding the Vogel site located at Grant Avenue Between 490th and 500th street in the City of Maurice, Sioux County, Iowa ("the Site"):

- Response to Follow-up Comments Document dated January 28, 2018;
- Pilot Study Work Plan for Enhancement of Groundwater Remediation (revised from *Remedial Action Work Plan for Groundwater Remediation*, 8-13-18);
- QUALITY ASSURANCE PROJECT PLAN (QAPP); AND
- Health and Safety Plan (HASP).

In addition, Ramboll is also submitting a revised *Work Plan for Additional Groundwater Characterization North of Former Source Area* that addresses September 11, 2018 USEPA comments regarding this prior work plan dated August 13, 2018.

Please indicate if hard copies of any of these documents is required.

USEPA's December 28, 2018 follow-up comments document included an outline of the discussion between Vogel and USEPA regarding the need for decision documents. Vogel would like to make some clarifications to what was outlined by USEPA because Vogel's position was not fully discussed. It is Vogel's contention that neither an ESD nor a ROD amendment is necessary to delist the site from the NPL upon completion of the Pilot Study. This is because: 1) the goal of the Pilot Study is for Vogel to meet the MCL's currently required in the 2003 ESD, 2) bioremediation was originally contemplated as an alternative remedy in the original 1989 ROD, and as such, the public would have reasonably anticipated its use at the site, and 3) IDNR has the authority to allow Vogel to turn off the pump-and-treat system if Vogel can show that there is no significant threat to human health and the environment, which Vogel believes it can show (Article VI, subsection 6(a) of the Consent Order).

Vogel's alternative argument is that if EPA is unwilling to delist the site from the NPL without updating the decision documents, only an ESD would be necessary. This alternative argument was discussed in detail during the December 12, 2018 in-person meeting. This alternative

argument was the only argument that was included in USEPA's outline of the decision document discussion.

Vogel understands that IDNR and USEPA (Region 7) will be meeting with EPA headquarters to discuss whether new decision documents are necessary to delist Vogel's site upon completion of the Pilot Study. Please update us on the status of this discussion.

Sincerely,

Eric Smith

Principal Consultant
1692739 - Irvine

D +1 (949) 7983603
esmith@ramboll.com

Ramboll
5 Park Plaza
Suite 500
Irvine, CA 92614
USA
https://ramboll.com

Attachment B

VERDANT
VERDANT LAW, PLLC

Danielle L. Schreiber
1025 Connecticut Ave., N.W.
Suite 1000
Washington, D.C. 20036
(202) 828-1233
www.verdantlaw.com
dschreiber@verdantlaw.com

July 9, 2019

VIA ELECTRONIC MAIL
Sandeep Mehta, P.E.
EPA Region 7
11201 Renner Blvd
Lenexa, KS 66219
email: mehta.sandeep@epa.gov

Re: Vogel Paint & Wax Company Maurice, Iowa Superfund Site – Changing the Groundwater Point of Compliance

Mr. Mehta:

Vogel Paint & Wax Company ("Vogel" or "the company") would like clarity on whether EPA intends to change the Site's groundwater point of compliance. The company is questioning whether it can move forward with implementing the Pilot Study Work Plan without this information. This is because changing the Site's groundwater point of compliance significantly changes the goals and scope of the Pilot Study Work Plan. Additionally, changing the groundwater point of compliance is inconsistent with the Administrative Record.

Vogel is in the final stages of completing the Bio-Trap Study, and Ramboll is in the process of analyzing the Bio-Trap Study results to develop the Design Plan. However, the Pilot Study Work Plan was designed to satisfy the 2000 Explanation of Significant Differences ("ESD") remedial action objectives ("RAOs"), which are meeting the Maximum Contaminant Levels ("MCLs") at the Site's property boundary. Ramboll is currently designing the Design Plan to meet the current RAOs.

It is my understanding that EPA Region 7, EPA Headquarters ("HQ"), and Iowa Department of Natural Resources ("IDNR") had a conference call on May 20, 2019 to discuss the decision documents and delisting of the Site. Despite multiple inquiries to you requesting an update on the status of these discussions, Vogel only recently learned through IDNR that EPA HQ suggested changing the groundwater point of compliance from the Site's property boundary to "everywhere" throughout the Site. IDNR also recently provided a courtesy copy of an updated Draft 2019 Five-Year Review that includes information that was not previously shared with Vogel. In Section 6.1 of the revised Draft, EPA includes the following:

> RAOs for groundwater related to the point of compliance as defined in October 2000 Explanation of Significant Differences document are not consistent with the EPA guidance, "Summary of Key Existing EPA CERCLA Policies for

> Groundwater Restoration, June 26, 2009, OSWER Directive 9283.1-33" and will need to be revised/clarified before site completion.

Changing the groundwater point of compliance is completely at odds with the Site's history and is inconsistent with the Administrative Record. The policy embodied in the 2009 guidance document was in effect in 2000 when the ESD was adopted by EPA and IDNR. (See 55 FR 8666, March 8, 1990) Moreover, the actual 2009 guidance document itself cited in the Draft 2019 Five-Year Review has been in existence during Vogel's Five-Year Reviews in 2009 and 2014, yet that guidance has never affected EPA's past determinations.[1] EPA has provided no new facts or other basis for concluding that the groundwater point of compliance now needs to be changed. This is discussed in detail below.

In the 2000 ESD, IDNR concluded, and EPA concurred, that meeting the MCL's throughout the site was unreasonable.

> While the ROD called for development of criteria for ceasing remedial action based on monitoring results, no such criteria have previously been established. Therefore, it might be inferred that compliance with chemical-specific groundwater ARARs was applicable to all groundwater at the site. In the more than a decade of time that has elapsed since the original ROD, it has become apparent that **such a goal is not reasonable**...
>
> The remedial action objective (RAO) for groundwater prescribed in the ROD is to reduce contaminants in groundwater to established health-based standards for drinking water. This ESD clarifies this RAO by specifying where health-based standards must be achieved. With institutional controls applicable to the site property, the use of on-site groundwater for drinking water will be prohibited. However, the potential exists for contaminants migrating off-site to enter a drinking-water supply, even if such a water supply does not currently exist. By ensuring that groundwater does not leave the site with contaminants at levels in excess of drinking-water standards, off-site exposure to contaminants from the site in groundwater at concentrations in excess of health-based standards will not be possible. Therefore, the site property boundary is being designated as the point of compliance for groundwater ARARs.

(emphasis added)

---

[1] It must be noted that the 2009 Guidance document includes the following Footnote:

> This document provides guidance to Regional staff regarding how the Agency intends to interpret and implement the National Oil and Hazardous Substance Pollution Contingency Plan (NCP) which provides the blueprint for CERCLA implementation. However, this document does not substitute for those provisions or regulations, nor is it a regulation itself. Thus, it cannot impose legally binding requirements on EPA, states, or the regulated community, and may not apply to a particular situation based on circumstances.

(See Footnote 1) As such, EPA cannot now rely on its 2009 guidance document as if it is a binding regulation. Moreover, according to the guidance document itself, the particular circumstances of the situation might require deviation from the guidance. The record clearly establishes that the 1990 NCP Federal Register preamble was available to EPA and IDNR during the 2000 ESD discussions and during all Five-Year Reviews. EPA and IDNR determined that Vogel's situation required deviation from the 1990 guidance.

In EPA Region 7's October 30, 2000 letter (Attachment A), signed by the then-director of the Superfund Division, Michael Sanderson, EPA concurred with IDNR's 2000 ESD.

> The proposed October 2000 ESD (enclosed), was prepared by the Iowa Department of Natural Resources (IDNR) and submitted to EPA for review and comment. The IDNR is the lead agency for this site. As the support agency, the EPA is provided the opportunity to concur with the ESD. The EPA hereby concurs with the ESD....

(emphasis added)

In 2000, when EPA and IDNR determined that the groundwater point of compliance should be the property boundary, the policy embodied within the 2009 guidance cited by EPA in Section 6.1 of the updated Draft 2019 Five-Year Review was already in existence. (See 55 FR 8666, 8753, March 8, 1990) Indeed, the section specific to groundwater point of compliance (see page 9 of the 2009 guidance) was taken from the National Contingency Plan's March 8, 1990 preamble, which states "remediation levels generally should be attained throughout the contaminated plume..." (*Id.*) As such, when IDNR and EPA made the determination that achieving the RAOs everywhere was not reasonable, the policy had been in existence for 10 years. Moreover, when EPA finalized the Five-Year Reviews in 1998, 2004, 2009, and 2014, neither EPA nor IDNR recommended changing the groundwater point of compliance.

Additionally, even if EPA could argue that the 2009 guidance document was "new" guidance published in 2009, the document was readily available to all agencies' staff during Vogel's Five-Year Reviews in 2009 and 2014. The groundwater point of compliance guidance in existence did not affect the site status during those reviews.

EPA cites no reasonable basis for concluding that the groundwater point of compliance now needs to be changed. Therefore, Vogel would like clarity on EPA's intention to change the groundwater point of compliance. The company is questioning whether to move forward with implementing the Pilot Study Work Plan without this information. Changing the Site's point of compliance to the entire Site, as opposed to the Site's property boundary line, significantly changes the goal and scope of the Pilot Study Work Plan. Additionally, changing the groundwater point of compliance is inconsistent with the Administrative Record and years of past determinations.

We would like the opportunity to discuss this with EPA Region 7 and IDNR as soon as possible.

Best,

Danielle L. Schreiber

Encl.

CC via email:

Lynn Juett, Juett.Lynn@epa.gov
Jared Pessetto, Pessetto.Jared@epa.gov
Hylton Jackson, hylton.jackson@dnr.iowa.gov
Amie Davidson, amie.davidson@dnr.iowa.gov
Alex Moon, alex.moon@dnr.iowa.gov
David Scott, david.scott@dnr.iowa.gov
Meika Vogel, Meika.Vogel@diamondvogel.com
Scott Heemstra, Scott.Heemstra@diamondvogel.com
Eric Smith, esmith@ramboll.com
Keith Delange, KDelange@geotekeng.com

Attachment C

EPA/ESD/R07-01/571
2001

EPA Superfund
Explanation of Significant Differences:

VOGEL PAINT & WAX CO.
EPA ID: IAD980630487
OU 01
ORANGE CITY, IA
10/31/2000

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
901 NORTH 5TH STREET
KANSAS CITY, KANSAS 66101

October 31, 2000

Ms. Susan Dixon
Iowa Department of Natural Resources
Henry A. Wallace Building
900 East Grand
Des Moines, Iowa 50319

Dear Ms. Dixon:

By this letter, the U.S. Environmental Protection Agency (EPA) provides its comments to the proposed Explanation of Significant Differences (ESD) for the groundwater component of the Record of Decision (ROD) for the Vogel Paint & Wax Company site.

The proposed October 2000 ESD (enclosed), was prepared by the Iowa Department of Natural Resources (IDNR) and submitted to EPA for review and comment. The IDNR is the lead agency for this site. As the support agency, the EPA is provided the opportunity to concur with the ESD. The EPA hereby concurs with the ESD, with the following comments.

First, EPA comments that an ESD is the appropriate method to document the changes to the selected remedy. The proposed ESD describes a secondary technology for free product removal that enhances the primary technology of the existing pump and treat groundwater system. The pump and treat system was described in the September 1989 ROD. The secondary technology consists of excavation and replacement of contaminated soil, with subsequent soil vapor extraction and bioventing treatment. Under the proposed ESD, the groundwater pump and treat system will continue during and after the free product removal. The groundwater pump and treat system will be discontinued only after a determination that the groundwater cleanup goals have been met.

Second, EPA comments that additional public comment on the proposed ESD is not necessary. The proposed excavation and replacement of contaminated soil, with subsequent soil vapor extraction and bioventing treatment, is similar to the SW-3 soils cleanup alternative described in the September 1989 ROD. The SW-3 alternative described soil management to enhance biotreatment and volatilization of contaminants, and was selected as the soils component remedy in the ROD and successfully implemented on site. Because of this similarity, the combination of such a soil management component with the existing groundwater pump and treat system could have been reasonably anticipated based on the information available to the public at the time of the September 1989 ROD.

RECYCLE

Finally, EPA comments that it is reasonable to anticipate that the proposed free product removal activities will result in air emissions of volatile organic contaminants. Such air emissions were anticipated and occurred during implementation of the SW-3 alternative. Based on this experience, the proposed ESD appropriately states that air emissions from the free product removal activities will comply with the applicable, relevant and appropriate requirements (ARARs) for air, as those ARARs were specified in the September 1989 ROD and the July 1994 ESD for the soils component of the remedy, and that measures will be taken during the free product removal activities to manage and prevent odor problems. To effect this requirement in the proposed ESD, a comprehensive air sampling and monitoring strategy must be developed and implemented at the site to assure that the free product removal activities are protective of human health and the environment.

Based upon our October 26 phone conversation, and a follow-up conversation between Jim Colbert of my staff and Bob Drustrup of IDNR, it is evident that IDNR recognizes the importance of community concerns and implementation of a comprehensive air sampling strategy during the construction and operation of the Soil Vapor Extraction/bioventing system. Indeed, an October 23 letter from IDNR to EPA indicates that the two closest neighbors have already been informed of the upcoming activities and that IDNR intends to publish a notice that briefly describes the ESD in the local newspaper.

Thank you for the cooperation and attention displayed by you and your staff with respect to the Vogel Paint & Wax Company site. Please contact Jim Colbert at (913) 551-7489 if you have any additional questions regarding EPA concurrence with this proposed ESD.

Sincerely,

Michael L. Sanderson
Director
Superfund Division

Enclosure

cc: Bob Drustrup, IDNR (w/ encl.)