Message

From: David W. Nunn [dwnunn@eastmansmith.com]
Sent: 4/28/2016 5:34:26 PM
To: Ludmer, Margo [ludmer.margo@epa.gov]
Subject: RE: LLC AOC [ES-LEGAL.FID1587432]

Thank you Margo.

David

From: Ludmer, Margo [mailto:ludmer.margo@epa.gov]
Sent: Thursday, April 28, 2016 1:28 PM
To: David W. Nunn; 'Kevin C. Murphy (KMurphy@WladisLawFirm.com)'
Cc: Doyle, James
Subject: RE: LLC AOC [ES-LEGAL.FID1587432]

David and Kevin,

EPA accepts the PRPs' revisions to the SOW.

Margo

From: David W. Nunn [mailto:dwnunn@eastmansmith.com]
Sent: Wednesday, April 27, 2016 5:02 PM
To: Doyle, James <Doyle.James@epa.gov>
Cc: Ludmer, Margo <ludmer.margo@epa.gov>; 'Kevin C. Murphy (KMurphy@WladisLawFirm.com)' <KMurphy@WladisLawFirm.com>
Subject: RE: LLC AOC [ES-LEGAL.FID1587432]

That would be great. Thanks.

From: Doyle, James [mailto:Doyle.James@epa.gov]
Sent: Wednesday, April 27, 2016 5:01 PM
To: David W. Nunn
Cc: Ludmer, Margo; 'Kevin C. Murphy (KMurphy@WladisLawFirm.com)'
Subject: RE: LLC AOC [ES-LEGAL.FID1587432]

I'm checking. Margo and I heard that the issue had been worked out, but I don't know the details and am awaiting confirmation. Hope to have it to you before your call tomorrow so it can be presented as complete (if that is in fact the case).

From: David W. Nunn [mailto:dwnunn@eastmansmith.com]
Sent: Wednesday, April 27, 2016 4:56 PM
To: Doyle, James <Doyle.James@epa.gov>
Cc: Ludmer, Margo <ludmer.margo@epa.gov>; 'Kevin C. Murphy (KMurphy@WladisLawFirm.com)' <KMurphy@WladisLawFirm.com>
Subject: RE: LLC AOC [ES-LEGAL.FID1587432]

Jim,

I just circulated your email to the entire group and we are scheduling a time tomorrow to discuss. Do you know whether Pam is ok with the SOW language sent to her by Arcadis? Thanks.

David

From: Doyle, James [mailto:Doyle.James@epa.gov]
Sent: Wednesday, April 27, 2016 4:40 PM
To: David W. Nunn; 'Kevin C. Murphy (KMurphy@WladisLawFirm.com)'
Cc: Ludmer, Margo
Subject: LLC AOC

David and/or Kevin, thank you for the offer of forwarding this to the entire group.

All,

In response to the PRPs' comments on the Lower Ley Creek AOC, EPA proposes the attached changes to Subparagraph 65(a) of the order. This is the same document provided yesterday, and we hope it addresses your concern regarding the timing of our reimbursing ourselves.

As for the proposed insertion in Paragraph 88, we are not willing to include your proposed insertion in the agreement for the reasons we explained on our last group call. It is unnecessary text and serves no function, other than to potentially confuse matters.

As we discussed in the call, the three covenants you are providing in Paragraph 86 relate to (a) any direct or indirect claim for reimbursement from the Superfund, (b) any claim arising out of response actions at, or in connection with, the Lower Ley Creek OU, or (c) any claim against the United States pursuant to Sections 107 and 113 of CERCLA relating to the Work or payment of Future Response Costs under this AOC.

In providing these three covenants, or promises, you are not covenanting anything related to any of the following four things: (a) liability for the United States' costs NOT related to the AOC (i.e., not included within the definition of Future Response Costs), (b) liability for work other than required under the AOC (i.e., for the performance of response action OTHER THAN the Work), (c) liability for natural resource damages or assessments, or (d) liability at other sites altogether (i.e., arising from the past, present, or future disposal, release, or threat of release of Waste Materials outside of the Site). You are not promising not to sue us related to these, or many other potential claims out there, whether they be the IRS tax code, the FCC regulations, or anything else one can dream up.

So the language that is being proposed is surplusage. We strongly resist the inclusion of language that is unnecessary and redundant into our agreements. You may say, "but it was included in other agreements with EPA elsewhere?" That may be so, but we are not seeking to stoop to the lowest common denominator – if someone in another region of EPA was persuaded to include this text, that was their prerogative, but we are not willing to do so.

Also, the proposed text is misleading and could be confusing. The statement that "... the covenants not to sue in Paragraph 86 shall not apply in the event the United States brings a cause of action or issues an order pursuant to the reservations set forth in Subparagraphs 84 (b), (c), (e), and (f)..." carries with it a clear implication that, but for this condition precedent ("in the event that the United states brings a cause of action"), there IS a covenant made by you that may somehow apply. The fact of the matter is that regardless of whether the United States does or does not bring a cause of action under any of the four cited reservations, the covenants provided in Paragraph 86 do not apply to these reservations. I am hesitant to make this point for fear that someone may take out their pen and try to prolong this discussion by proposing different text to achieve this objective, but it is an objective that we feel is unnecessary and not appropriate.

I should add that this is not just the position of us and others here in the Region; we have discussed this question with the Department of Justice, an entity which always has an interest in any changes to the accepted language concerning

rights and covenants in settlements with the United States. The position we are expressing has been clearly, unambiguously, and enthusiastically supported by the Department.

This negotiation process has been an unusually long one, especially considering the scope of the work at issue and the fact that there is approximately $21M in a special account dedicated exclusively to this operable unit. We respect the zealous advocacy that all of you have demonstrated on behalf of your respective clients, and it has been professional and of the highest quality, but this negotiation process must come to an end. We feel that we have reasonably addressed your legitimate concern regarding Subparagraph 65(a), and we respectfully are unwilling to accept your proposed text (or any other) in Paragraph 88. Please confirm whether you can accept paragraph 88 as is (without the insertion) so we can confirm that the AOC is in a form we can all process for our respective client's signatures and get the SOW into a form that reflects the mutual agreement of the technical folks have apparently reached.

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