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Via Email and First Class Mail

Sara Flanagan
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U.S. Environmental Protection Agency
290 Broadway – 17th Floor
New York, NY 10007-1866

Re: J. Wiss & Sons Co. (Bank Street and Littleton Avenue)
Lower Passaic River Study Area

Dear Ms. Flanagan:

We write on behalf of Cooper Industries, LLC (f/k/a Cooper Industries, Inc.) ("Cooper"). This letter responds to the December 11, 2009, Notice of Potential Liability for Response Actions in the Lower Passaic River ("EPA Notice") that was issued by the U.S. Environmental Protection Agency – Region 2 ("EPA") in connection with the former J. Wiss & Sons Co. plant on Littleton Avenue in Newark ("Littleton Plant") and a 19th Century cutlery business owned by Jacob Wiss on Bank Street, also in Newark ("Bank Street"). We ask that this response be placed in the Administrative Record in the above referenced matters.

We appreciate the several extensions that EPA granted Cooper to respond as it has taken all this time to conduct our investigation. As further explained below, (1) the Littleton Plant was acquired by Cooper on December 1, 1976 by Asset Purchase Agreement ("Wiss Asset Agreement") under which Cooper acquired the Littleton Plant, (2) Cooper assumed none of J. Wiss & Sons Co.'s environmental liabilities, (3) after the Wiss Agreement was consummated, J. Wiss & Sons Co. continued to exist as a non-Cooper affiliated corporate entity under the name Fredken, Inc., (4) J. Wiss & Sons Co. (incorporated May 22, 1900) never owned property at Bank Street and never operated a facility there, (5) although Jacob Wiss owned property at 26 Bank Street, he died in 1888, and as of 1900 when J. Wiss & Sons Co. was incorporated, the 26 Bank Street property had been owned by the Prudential Insurance Company for nearly two decades and it conducted Prudential business at that location, and (6) real title records do not show that Jacob Wiss ever owned property at either 7 or 13 Bank Street between 1848 and 1853.

As stated above, Cooper acquired the Littleton Plant by an Asset Purchase Agreement on December 1, 1976. Between December 1, 1976 and the time its operations at that location ceased in August 1983, a continuous non-contact cooling water effluent and an intermittent

effluent from other process operations at the Littleton Plant were discharged to the Passaic Valley Sewer Commission ("PVSC") which operated under a NPDES permit making such discharges exempt from CERCLA liability as a Federally permitted release. A review of the files of the PVSC evidence no permit exceedences by the Littleton Plant during this period

As a result, Cooper denies any and all CERCLA liability in connection with the allegations concerning the Littleton Plant or Bank Street as set forth in the Notice Letter. Cooper neither owned nor operated any plant or facility at Bank Street nor is it the successor to any owner or operator at Bank Street. Additionally, Cooper is not the legal successor to any owner or operator of the Littleton Plant. This includes the period up through December 1, 1976 when Cooper purchased the Littleton Plant from J. Wiss & Sons Co. After that date, all of the Littleton Plant's sewer effluent is not subject to CERCLA.

Cooper bases its analysis on a review of real property title records (1848 to the present), the asset purchase agreement relating to the sale of the Littleton Plant, records found within its own corporate files, and independent historical research. Additionally, in coming to our conclusions, we conducted an exhaustive review of the EPA Administrative Record, the EPA Lower Passaic River Study Area ("LPRSA") Site Files, the PVSC records, and the NJ Department of Environmental Protection ("DEP") records relating to the Littleton Plant. We further analyzed various governmental databases and scientific publications concerning the results of sampling and analyses with regard to the LPRSA. We also reviewed the June 3, 2009 "J. Wiss & Sons Co. PRP Data Extraction Form and Supporting Documents for General Notice Letter Candidates" ("CPG Report"). Lastly, we consulted with Mr. William Hengemihle ("Hengemihle"), the allocation consultant for the Cooperating Parties Group ("CPG") for the purpose of learning the basis of the allegations contained in the Notice Letter. We did so because it is our understanding that EPA has relied on the documents, summary sheets and analysis that were submitted to EPA by the CPG and/or its consultants, as opposed to undertaking its own independent investigation.

I. COOPER IS NOT RESPONSIBLE FOR THE CERCLA LIABILITIES ALLEGED IN EPA'S NOTICE LETTER

EPA's Notice Letter is vague and unspecific as to the timing, nature, location or frequency concerning any alleged releases from the Littleton Plant or Bank Street to the Passaic River. Nevertheless, the CPG Report alleges two speculative scenarios as to how hazardous substances could have been released to the Passaic River ("River") from either location.

Without any factual information whatsoever concerning the nature of the processes utilized, operations maintained, raw materials used, water consumption data, or waste management information, the CPG baldly claims that based on "general cutlery industry practice" in the mid-19th Century, operations at Bank Street between 1848 and 1887 and at Littleton Avenue between 1887 to 1924 directly discharged hazardous substances to the River through outfalls alleged to have existed before the PVSC interceptor sewer and treatment works became operational in 1924 ("Alleged Direct Discharges"). As best as we can determine, neither

the CPG nor the EPA has any evidence to support this allegation. Indeed, the Administrative Record is devoid of any supporting information as to this allegation. Also, there are no streams, ditches or culverts that traverse either address; Cooper knows of no allegation that there were any direct discharges from either location to the River. The Littleton Plant was located more than one mile from the River and the Bank Street property was located more than one-half mile from the River

The Government has the burden of proof to show that hazardous substances were released to the River from the Bank Street or Littleton Plant and Cooper contends that the purported current allegations of alleged Direct Discharges are unsubstantiated. *See United States v. Kramer*, 757 F. Supp. 397, 417 (D.N.J. 1991) ("To establish a prima facie case for liability under section 107, the government must show that: (1) the site is a 'facility'; (2) a 'release' or 'threatened release' of a 'hazardous substance' from the site has occurred; (3) the release ... has caused the United States to incur response costs; and (4) the defendants fall within at least one of the four classes of responsible persons ...."). Thus, even if Cooper was responsible for Wiss operations at these two sites, there is simply no evidence to support the current allegations that hazardous substances were released.

A. Cooper Is Not the Successor to Either Bank Street or the Littleton Plant

i. Bank Street

J. Wiss & Sons Co. was incorporated in New Jersey on May 22, 1900. We have exhaustively researched the title record for the three Bank Street addresses that CPG references in its report and J. Wiss & Sons Co. never owned property at 7, 13 or 26 Bank Street. The land record shows that Jacob Wiss owned real property at or about 26 Bank Street at the time of his death in 1888. We find no record that he owned property at 7 or 13 Bank Street. By the terms of his will, Mr. Wiss' property was devised to his children. They conveyed 26 Bank Street to the Prudential Insurance Company of America by deed dated February 1, 1889. By the time J. Wiss & Sons Co. was incorporated in 1900, the area of Bank Street in question was the location of the Prudential Insurance building. In short, not only was Cooper never an owner or operator of **any** facility at Bank Street, neither was J. Wiss & Sons Co. Thus, Cooper cannot be held liable as a successor to the owner or operator of the Bank Street property.

ii. The Littleton Property

Cooper Industries, Inc. ("Cooper Industries") acquired the Littleton Property from J. Wiss & Sons Co. ("Wiss") by a deed dated December 1, 1976, pursuant to the November 8, 1976 Wiss Asset Agreement. Prior to that date, J. Wiss & Sons Co. acquired the property by a series of transactions beginning with a May 31, 1900 deed from Frederick Wiss et al. to J. Wiss & Sons Co. Cooper Industries transferred the Littleton Plant property as of April 12, 1988, to Newark Venture, Inc., which subsequently transferred it to current owner Victory Temple National Holiness Church, Inc.

In the Wiss Asset Agreement, Cooper did not assume Wiss environmental liabilities arising out of J. Wiss & Sons Co.'s ownership or operation of the Littleton Plant (or any other Wiss facility).[1] Because Cooper Industries did not own the property prior to December 1, 1976, and because it did not assume Wiss environmental liabilities, Cooper cannot be held responsible for CERCLA liabilities attributable to alleged Direct or Indirect Discharges at the Littleton Avenue site on or before December 1, 1976. Further, no viable arguments exist that this was an asset purchase in name only. J. Wiss & Sons Co. maintained its corporate existence after the asset purchase agreement was consummated: On December 1, 1976, J. Wiss & Sons Co. changed its named to Fredken Corp. The Wiss shareholders received no Cooper stock as part of the transaction and were not involved in Wiss management following the transaction. In short, Wiss purchased assets in an arms length commercial transaction and it assumed no environmental liabilities. Any CERCLA liability associated with J. Wiss & Sons Co.'s Littleton Avenue operations remains with J. Wiss & Sons Co. under the Fredken name.

B. Any Alleged Release Purported to Have Occurred From the Littleton Plant During the Entire Period that Cooper Had A Relation to the Littleton Plant Is Exempt from CERCLA Liability as a Federally Permitted Release

A defense is made to CERCLA liability if the release of a hazardous substance was a "federally permitted release" which includes discharges to a sewer authority treatment works that is permitted. CERCLA Sections 101(10), 107(j).[2] The PVSC obtained National Pollutant Discharge Elimination System No. NJ21016 ("NPDES") discharge permit under the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 et seq., effective February 28, 1975, which included the Clay Street CSO as one of the "permitted" discharge points to the River. A review of all the PVSC files related to the Littleton plant shows no permit exceedences there.[3] Thus, the Littleton Plant is exempt from CERCLA liability for any alleged release to the River through the permitted CSOs during the entire period that Cooper owned the Littleton Plant (acquired December 1, 1976/sold April 12, 1988). All alleged releases during this period would be "federally permitted releases" and not subject to liability under CERCLA.

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[1] Cooper only agreed to assume specifically identified financial obligations either referenced on a closing balance sheet or not required under GAAP accounting rules to be so identified. Per the Agreement, Cooper did not agree to assume liability or obligations except as expressed therein and did not agree to assume any environmental liabilities.

[2] 42 U.S.C. §§ 9601 (10), 9607 (j).

[3] The Littleton plant operated under PVSC Sewer Connection Permit 20400752.

C. The CPG Allegations Regarding Plant Operations, Effluent, and Discharges Are Wrong and Based on Speculation

1. CPG Is Wrong When It Assumes Continuous Plating Room Effluent Discharged at the Clay Street CSO

In its Report the CPG merely assumes that the discharge from the plating operations at Littleton was continuous and makes a calculation based on one analytical result collected in 1978 that the facility discharged several thousands of pounds of various metals which "would have been subject to bypass" to the River during wet weather overflow periods or periods when they allege the Clay Street CSO was open due to maintenance at the PVSC treatment plant. (*See* CPG Report at 13).

Contrary to CPG's assertion, the effluent from the plating operation was not continuous but was intermittent, which is supported by CPG's own attachments to the CPG Report. CPG Report Attachment 19 contains the "Passaic Valley Sewerage Commissioners Industrial Wastewater Questionnaire." The questionnaire lists both "continuous" and "intermittent" for the process discharge frequency (see CPG Attachment 39 Bates No. 846050004). This is not in error because one discharge (plating room) is an intermittent flow while the other, Outlet B (boiler room – non contact cooling water), is a continuous flow. Further evidence of the intermittent nature of the alleged "plating room effluent" discharge is the diagram (see CPG Attachment 39 Bates No. 846050009) showing Outlet A which receives effluent from the plating operation. The diagram shows that the configuration of the discharge mechanism is via a float operated sump pump with a very small diameter influent and effluent. The operation of the pump is intermittent because the sump has to fill before the float activates the pump to discharge the "plating room effluent" to the sewer. The CPG merely assumes the flow is continuous, disregarding contrary documentation, and provides no information from which EPA can prove frequency of discharge.

EPA has the burden of proving causation which it has not met because neither EPA nor the CPG provides any data that a CSO overflow occurred at the time there were alleged process discharges to the sewer from so called "plating operations" at the Littleton plant. *See, e.g., New Jersey Turnpike Authority v. PPG Industries, Inc.*, 197 F.3d 96 (3d Cir. 1999).

2. CPG's Assumptions Regarding Low pH Plant Effluent Are Not Supported by the Evidence

CPG allegations regarding the character of Wiss' effluent at the Littleton Avenue site are also erroneous. The CPG Report states

> *"Their [Wiss] effluent therefore would have historically been low in pH and high in dissolved metals indicated by the 1978 sampling." (June 3, 2009, Lower Passaic River Study Area PRP Data Extraction Form, J. Wiss & Sons Co., page 5).*

CPG assumes a low pH (acidic) plant effluent and therefore would have high concentrations of dissolved metals.[4] Available data do not support CPG's allegations regarding an alleged low pH effluent.[5] Based on a review of all available PVSC Discharge Monitoring Reports for the Littleton plant, the Littleton plant's effluent pH ranged from 6.5 (slightly acidic to neutral) to 10.4 (alkaline) contrary to CPG's low pH allegation. The CPG's assumption that the Littleton Plant's "plating room effluent" was high in metals because of an alleged acidic pH was mere speculation and is wrong.

3. Sewer Segment Analysis Shows Effluent From Wiss Plant May Not Have Discharged to the Passaic River from CSO

In light of the intermittent plating discharge operation, CPG's statements also do not prove that any of Wiss' effluent discharged to the Sewer during the period from 1924 until 1975 (when the PVSC received its NPDES Permit) actually made it through the sewer into the Passaic River.

An analysis of the PVSC Sewer System Evaluation Survey, Phase II-B Results, City of Newark (North Central Area) ("PVSC Report"), Prepared by Elson T. Killam Associates, Inc., August 1985, shows the effluent from the plant was at times blocked, or restricted, or leaked out (ex-filtrated the sewer), or diluted with clean water before it discharged to Clay Street CSO if it made it to the CSO. A review of the PVSC Report shows that approximately 9,100 feet of sewer between the Facility's outlets at Littleton and the Clay Street CSO was severely compromised, including two segments with obstructions, three segments with root intrusions, and several sections with significant sediment and debris. These compromises would have either stopped flow or restricted flow in the sewer. Furthermore, there were over 1,000 linear feet of cracked sewer pipe (16% of the total length of evaluated sewer segment) and many other segments had sewer defects, including missing brick, missing mortar, outside voids, and bulges, which more likely than not allowed ex-filtration of effluent from the sewer to surrounding soil and subsurface. Lastly, the portion of the evaluated sewer segment received over 621,000 gallons per day of infiltration and the major source of the infiltration was attributed by the PVSC to be clean water from water main breaks. This indicates that the sewer not only leaked effluent (ex-filtration) but also that clean water from water main breaks in the vicinity of the sewer line infiltrated the sewer as well.

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[4] While it is reasonable to assume an acidic solution would tend to have higher concentrations of dissolved metals when compared to a neutral or slightly alkaline solution (all things being equal), this assumption fails when compared to the available pH test results of the actual effluent from the Littleton Avenue plant. These test results all show that the effluent was neutral to slightly alkaline.

II. CONCLUSION

For the reasons stated herein, we contend that Cooper is not liable as alleged in EPA's Notice Letter regarding either the Littleton Avenue plant or Bank Street. Cooper neither owned/operated the Bank Street property nor is it the legal successor to any corporate entity that did. Furthermore, Cooper did not assume any Wiss environmental liabilities related to the Littleton Plant or any other property. It acquired that property by asset transfer. Moreover, no evidence from the Administrative Record or otherwise establishes that it is more likely than not that purported releases of hazardous substances from either Bank Street or Littleton Avenue reached the River. Indeed, the evidence is to the contrary.

Although Cooper contends that it has no CERCLA liability in this matter, it reserves its right to modify its position as appropriate, depending on the discovery of new information and further dialogue with EPA or the CPG. Cooper also welcomes the opportunity to consider any additional information the Agency may have in its possession and to meet with EPA to discuss this letter or any other issue the Agency may wish to discuss with Cooper in connection with the Diamond Alkali Superfund Site/Lower Passaic River Study Area matter.

Respectfully submitted,

Christopher Marraro /sp

Christopher H. Marraro

cc: Keith Odenweller,Esq.
William H. Hyatt, Esq.