GRAYDON HEAD

LEGAL COUNSEL | SINCE 1871

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Richard T. La Jeunesse
Partner
Direct: 513.629.2702
rlajeunesse@graydon.com

April 10, 2015

FEDERAL EXPRESS

Eric Schaaf, Esq.
Regional Counsel
United States Environmental Protection Agency Region II
290 Broadway
New York, NY 10007-1866

Re: Passaic River De Minimis Settlement

Dear Mr. Schaaf:

We represent Kao USA Inc. ("Kao") in connection with matters related to the 17-mile stretch of the Lower Passaic River and its tributaries from Dundee Dam to Newark Bay (collectively, the "Lower Passaic River Study Area" or the "LPRSA"). This letter follows up on your March 20, 2015 response to Daniel Riesel and the March 10, 2015 letter submitted on behalf of ten entities that have been named potentially responsible parties (PRPs) with respect to the LPRSA.

While we understand EPA's current view that a Record of Decision (ROD) is to be issued for the lower eight miles of the LPRSA before discussions regarding potential *de minimis* and *de micromis* settlements should take place, we ask that you reconsider this position in light of the unique circumstances surrounding the LPRSA. Specifically, information contained in EPA's Superfund Proposed Plan ("Proposed Plan") and the Focused Feasibility Study ("FFS") issued on April 11, 2014 for the lower 8 miles of the LPRSA or in the draft Remedial Investigation Report ("RI Report") for the LPRSA submitted on February 19, 2015 should be sufficient to identify PRPs that could be eligible for *de minimis* and *de micromis* settlements. Delaying discussions with these parties complicates efforts to select a remedy for the LPRSA, particularly with respect to interactions with the primary polluters affiliated with the former Diamond Shamrock Chemicals Company site on Lister Avenue. Laying the groundwork for *de minimis* and *de micromis* settlements now should simplify future negotiations once a ROD is issued.

Regardless of when these meetings occur, Kao asks that it be included in any future meetings or related communications between EPA and PRPs regarding potential *de minimis* and *de micromis* settlements for the LPRSA. While Kao shares many of the sentiments and concerns expressed in the March 10, 2015 letter submitted on behalf of ten PRPs with respect to the LPRSA, any nexus between Kao and the contamination in the LPRSA is even more attenuated than the connections described by those potentially *de minimis* parties. Therefore, for the

reasons stated below, we believe Kao meets EPA's criteria for *de minimis*, and potentially *de micromis*, settlements.

Background

Kao received a General Notice Letter from the United Sates Environmental Protection Agency ("EPA") dated September 15, 2003 relating to the LPRSA and has voluntarily cooperated with EPA for over 11 years without substantive discussions with EPA regarding *de minimis* or *de micromis* settlements for qualifying PRPs.

Knowing what we do today, Kao should not have been designated as a PRP. Yet since 2003 Kao has reluctantly participated and cooperated in extensive, and very expensive investigations and studies of the LPRSA, all without EPA providing Kao an opportunity to have a fair and balanced determination on the merits of Kao's appropriate classification as a *de minimis* or a *de micromis* party. This reluctant participation was prompted to avoid more draconian unilateral EPA actions threatened against Kao as a PRP. Forcing a marginal or improperly-designated PRP like Kao to participate in an extensive remedial investigation and feasibility study and remediation of the LPRSA for over eleven years without any opportunity to show its lack of contribution to the contamination of the LPRSA is contrary to the principals of due process and fair proceedings.

Operations at the Former Jergens Plant in Belleville, New Jersey

The Jergens brand traces its origins back to 1882 with the founding of the Andrew Jergens Company ("Jergens"). Jergens' products have been used in households throughout the world for over a century. Further, these non-toxic, non-hazardous personal care products are manufactured for direct application to human skin and safe disposal in domestic waste streams, and the products have been used in such a capacity for over 130 years.

Jergens operated a facility in Belleville, New Jersey near the Second River, more than a mile remote from the Passaic River, from around 1940 until the facility was sold in 1975. Jergens manufactured lotions, hand/face creams, shampoos/conditioners, essential oils (i.e. fragrance), and make-up (i.e. foundation powder) at the facility. The principal raw materials used in the Jergens manufacturing process at Belleville plant were deionized water, glycerin, oils & waxes, preservatives & fragrances, foam booster, conditioning agents, and alcohol.

After extensive investigation, Kao is not aware of any evidence that the Jergens plant in Belleville, New Jersey produced or discharged any dioxin, furans, PCBs, mercury, or any contaminants of concern identified in the FFS or the RI Report.

Alleged Discharge from the Former Jergens Plant in Belleville, New Jersey

It has been alleged that in the fall of 1973 the former Jergens plant in Belleville, New Jersey discharged boiler blowdown into the Second River. The 1973 Passaic Valley Sewerage

Commission ("PVSC") Annual Report characterizes the boiler blowdown from the former Jergens facility in Belleville, New Jersey as "polluting" without further defining the term or the reason for the characterization. According to the 1973 PVSC Annual Report, the former Jergens facility in Belleville, New Jersey was brought into compliance after installing a catch tank followed by sending the blowdown water directly to the sanitary system of the plant. Other than allowing the water to cool in the catch tank, no further treatment was indicated, and no discharge permit was required.

Kao has extensively studied and analyzed operations at its former plant and through a third-party boiler expert has concluded that the boiler did not contribute to the contamination of the LPRSA. The purpose of the boiler blowdown was to prevent scale building up inside the boiler as a result of dissolved solids found in the original river water. The feedwater in the closed boiler system, no matter how pristine, still would have had naturally occurring dissolved salts which would build up when the water boiled.

Small heating boilers, such as the one used at the former Jergens facility, do not create any new substances in their operation or discharge. Therefore, the boiler blowdown from this facility would only have discharged the feedwater taken out of the river at the start of the process. These dissolved solids should not be characterized as hazardous substances. Further, because they are dissolved, they would not settle in the river sediment.

The boiler at the former Jergens facility in Belleville, New Jersey was primarily used for heating purposes in winter months and providing heat for product manufacturing year round. The temperature of the blowdown water, based upon the reported operating conditions, was determined to be about 477°F. The heat of the water discharged during the boiler blowdown would have been the only reason for the determination at that time that the blowdown was "polluting," rather than the discharge of any hazardous substances.

The 1973 PVSC Report states that the solution for addressing blowdown from the former Jergens facility was to deploy a tank to catch the blowdown. The water was then delivered to the sanitary sewer system on site without the need for further treatment. If there were any hazardous substances in the boiler blowdown, additional treatment should have been required. However, that was not the case. The 1973 PVSC Report states that the source of pollution was eliminated. This outcome further supports the conclusion that the blowdown was referred to as "polluting" solely due to the temperature of the blowdown water rather than the discharge of any hazardous substance. Based on its investigations to date, Kao is not aware of any release or threatened released of contaminants of concern during production at the former Jergens plant in Belleville, New Jersey, particularly dioxins, furans, or PCBs.

Conditions for *De Minimis* and *De Micromis* Settlement

(i) Per CERCLA Section 122(g)(1)(A)(i): As described above, Kao is not aware of any release or threatened released of contaminants of concern during production at the former Jergens plant in Belleville, New Jersey, including dioxins, furans, or PCBs. The FFS and the RI

Report both identify 2,3,7,8-TCDD dioxin as the primary chemical of concern driving the need to remediate the river. In as much as the former Jergens plant in Belleville, New Jersey did not produce or discharge any dioxins, furans, or PCBs, any contribution by Kao should be *de minimis* (or nonexistent) in comparison to the total hazardous substance in the LPRSA.

Further, hundreds of parties have been identified as potential sources of hazardous substances found in the LPRSA, and the former Diamond Shamrock Chemicals Company, predecessor-in-interest to the Occidental Chemical Corporation ("Occidental"), has been linked to the extensive dioxin contamination throughout the LPRSA. Based on the nature of production at the former Jergens plant in Belleville, New Jersey, its contribution to the contamination of the LPRSA, if any, should be considered *de minimis* when compared to the total contribution of other PRPs, especially Occidental.

(ii) Per CERCLA Section 122(g)(1)(A)(ii): As stated above, after extensive investigation Kao is not aware of any evidence that the Jergens plant in Belleville, New Jersey produced or discharged any dioxin, furans, PCBs, mercury, or any contaminants of concern identified in the FFS or RI Report. Further, the products manufactured at the former Jergens plant in Belleville, New Jersey were non-toxic, non-hazardous personal care products manufactured for direct application to human skin and safe disposal in domestic waste streams.

***De Minimis* and *De Micromis* Settlements Are Appropriate at This Time**

A small group of PRPs previously petitioned EPA to provide an opportunity for *de minimis* settlement in a letter dated February 2, 2007. In a response letter from George Pavlou dated March 5, 2007, EPA indicated that it did not have sufficient information to distinguish among the various tiers of PRPs in order to identify potentially *de minimis* parties. On April 11, 2014, EPA issued the FFS, which provides detailed estimates of the concentrations of various contaminants of concern throughout the lower 8 miles of the Passaic River and proposes volumes of sediment to be removed from the LPRSA.

Subsequently, on February 19, 2015 a draft RI Report was submitted to EPA. The RI Report details contaminant concentrations throughout the entire LPRSA.

EPA began studying the Newark Bay Study Area in 1984. The Andrew Jergens Company (now Kao USA Inc.) voluntarily participated in the Administrative Order on Consent for Remedial Investigation and Feasibility Study dated February 13, 2004, agreeing to contribute to funding EPA's study of the LPRSA. Since then, Kao has reluctantly participated in two additional administrative orders regarding the study and remediation of the LPRSA.

After studying the LPRSA for over eleven years and Newark Bay for over three decades, it is time for EPA to give parties the opportunity to participate in *de minimis* and *de micromis* settlements. In the over eleven years marginal or improperly-designated PRPs like Kao have funded studies of the LPRSA, Kao has not uncovered any evidence that the Jergens plant in Belleville, New Jersey produced or discharged any dioxin, furans, PCBs, mercury, or other

contaminants of concern. If EPA did not possess sufficient information in 2007, it certainly has enough information to begin discussions regarding *de minimis* and *de micromis* settlements now that the FFS and the RI Report are available.

Kao intends to continue to observe its obligations under the previously signed administrative orders pertaining to the LPRSA. As discussed above, we believe discussions regarding potential *de minimis* and *de micromis* settlements would complement efforts to remediate the LPRSA; and therefore, beginning discussions regarding potential *de minimis* and *de micromis* settlements at this time is in the public interest.

Like the parties to the March 10, 2015 letter from Daniel Riesel, Kao is committed to cooperating in development of potential *de minimis* and *de micromis* settlements for the LPRSA and would like to meet with representatives from EPA to discuss a process for moving forward with *de minimis* and *de micromis* settlements.

Thank you for your consideration. Please send all questions and comments to Richard T. La Jeunesse at rlajeunesse@graydon.com and M. Zack Hohl at zhohl@graydon.com.

Respectfully submitted,

Richard T. La Jeunesse

RTL:srh
cc: Walter Mugdan
Dennis R. Ward, Esq.

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