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April 9, 1985

VIA MESSENGER

Honorable Crane Winton
1307 Mount Curve Avenue
Minneapolis, Minnesota 55403

Re: U.S.A., et al v. Reilly Tar & Chemical Corporation, et al

Dear Judge Winton:

I have just returned from a four-day out-of-town trip over the Easter weekend, and this is accordingly my first opportunity to forward to you in writing some of my comments regarding the letters given to you by the plaintiffs in this matter at and for the meeting we had last Thursday, April 4.

As promised, enclosed for your review is a memorandum concerning the question of the non-recoverability of litigation costs by the plaintiffs in this case, particularly with regard to CERCLA, but also with comments concerning any attempt by the State to recover attorneys fees under other statutes involved. The memorandum sets forth our basic position on this point, and I will let it speak for itself rather than summarize it here. It shows, as you will find, that even the EPA is of the opinion that litigation costs are not recoverable here.

As regards the remainder of the items addressed in the plaintiffs' letters, while we take issue with their statements concerning several of them, on reflection I believe that an extended response is better left to the next set of settlement negotiations including technical personnel which are scheduled for next week, April 17-18. There are, however, a few of their statements which I believe can and should be cleared up at this time.

In their discussion of "general observations" on page 4 of their April 4, 1985 letter to you, the State implies that

there may be some fundamental transformations taking place in the nature of this case and, consequently, in settlement negotiations due to the governments' attempt to change their case, at least in part, from the injunction action they began 4 1/2 years ago to some form of cost recovery action. As Judge Magnuson has recently made clear as part of his ruling on Reilly's motion for a preliminary injunction against the possible accrual of penalties under CERCLA and MERLA, no such change is going to occur because of any recent governmental decisions to go ahead with all or part of the remedy themselves:

> In the present case, the government came into court seeking a mandatory injunction requiring Reilly to clean up a hazardous waste site. The government bears the burden of proving in this case that its remedy is appropriate and cost-effective. In other words, Reilly Tar has a right to a de novo determination of the appropriateness and cost-effectiveness of the government's remedy. It would be peculiar, indeed, to conclude that the government could now avoid review of the appropriateness and cost-effectiveness of its proposed remedy by simply issuing an administrative order on the eve of trial.

Memorandum Order of April 5, 1985, slip op. at 20 n. 5.

Furthermore, the statements made by the State (at page 4 of their letter) and by the United States (at pages 5-6 of Mr. Hird's letter to you of April 2, 1985) regarding the history of negotiations on the GAC plant are not entirely accurate and may give an incorrect impression as to what is and has been Reilly's position concerning construction of the GAC plant. For a more detailed and documented description of the events and positions concerning the question of the GAC plant, I urge you to read pages 3-8 of the Reply Brief of Reilly Tar & Chemical Corporation in Support of Motion for Preliminary Injunction, dated March 15, 1985, the Affidavits of Carl F. Lesher and of John C. Craun, both dated March 15,

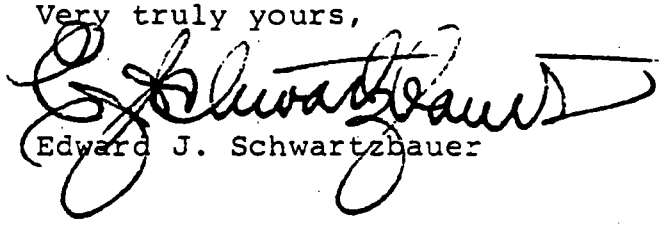
1985, submitted therewith, and attachments 1-10 to the Affidavit of Michael J. Wahoske dated March 15, 1985, and also submitted therewith. (The parties and the Court already have copies of these documents, and I have enclosed a set of them for your review.) As those documents clearly show, throughout the course of settlement negotiations Reilly has taken and continues to take the position that neither GAC nor other special water treatment beyond what St. Louis Park otherwise has is necessary for health reasons at any of the St. Louis Park municipal wells. Because of the insistence of the City and the State that some visible form of treatment was necessary for any settlement to be politically acceptable, Reilly agreed, solely for settlement purposes, that a GAC system could be included as part of a global settlement.

When, in the second half of 1984, first the federal government and then the State attempted to end-run the litigation and its settlement negotiations by administratively ordering Reilly to design and build a GAC plant, Reilly protested vehemently. Because of the threat of penalties, however, Reilly undertook to comply with the orders, but only on the condition that the government recognized its right to reimbursement should the GAC plant later be found by the Court to be unnecessary. Reilly in fact had Calgon Corporation design a markedly cheaper GAC system, and submitted that design to the governments involved. When the press of trial preparation became overbearing, and when the governments had not agreed to Reilly's reimbursement right condition, Reilly informed the governments that it could not proceed further to implement the ordered remedies while the case remained in litigation. Reilly remains willing, however, to stand by its offer to build a GAC plant according to its designs <u>if</u> a total settlement of the matter can be achieved.

I hope this letter and the accompanying memorandum are helpful in your understanding of Reilly's position on these matters. Please let us know if there is anything else we could provide you with in this regard. On behalf of Reilly, may I say that we welcome your active participation in the

settlement negotiations. We look forward to resuming them on the 17th.

Very truly yours,



Edward J. Schwartzbauer

EJS/MJW/kmh
Enclosures
cc: The Honorable Paul A. Magnuson
All Counsel of Record
Robert Leininger, Esq.
Paul Zerby, Esq.