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**FMPC CONSENT AGREEMENT: COMMENTS BY PADDYS RUN ROAD SITE
PROJECT**

05/31/1990

**PRRS
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LETTER**

USEPA

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PADDYS RUN ROAD SITE PROJECT
P. O. Box 26683
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May 31, 1990

CERTIFIED MAIL

Mr. Dan O'Riordan
Community Relations Coordinator
U.S. Environmental Protection Agency (5PA-14)
230 South Dearborn Street
Chicago, Illinois 60604

Re: FMPC Consent Agreement: Comments by
Paddys Run Road Site Project

Dear Mr. O'Riordan:

This letter constitutes the comments by Mobil Mining and Minerals Company, a division of Mobil Oil Corporation, Albright & Wilson Americas Inc., and Ruetgers Nease Chemical Company Inc. (the "Companies") regarding the referenced FMPC Consent Agreement ("Agreement") between the United States Environmental Protection Agency ("USEPA") and the United States Department of Energy ("DOE"). The Companies are currently conducting a Remedial Investigation/Feasibility Study ("RI/FS") south of DOE's Feed Material Production Center ("FMPC"). That RI/FS is known as the Paddys Run Road Site Project ("PRRS"). The comments contained in this letter are directed to you in accordance with the instructions set forth in the USEPA's May 1990 Project Update provided to the attendees of the Public Meeting held on May 9, 1990 in Ross, Ohio ("Public Meeting").

The Companies are generally pleased with the Agreement and believe that its implementation will result in a cleanup of the FMPC and the surrounding area that will be protective of human health and the environment. It is particularly noteworthy that DOE has agreed to fully accept liability for the contamination it has caused. In several respects, however, the Agreement can, and should be, improved. The comments in this letter are intended to assist USEPA and DOE in addressing the interests of the public and former and present landowners in the vicinity of the FMPC through the terms of the Agreement.

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1. Breadth of Chemical Testing in the South Plume

Section VII of the Consent Agreement presents USEPA's Findings of Fact/Conclusions and Determinations of Law. Paragraph A.3. of that Section explains the production processes employed at the FMPC and concludes that as "a result of these processes, the plant has generated both radioactive and non-radioactive hazardous waste." Paragraph B.1. contains the USEPA's determination that

Hazardous substances, pollutants, or contaminants as defined in Section 101(14) and (33) of [Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, ("CERCLA")] CERCLA..., and hazardous constituents as listed in Appendix VIII to 40 Code of Federal Regulations (CFR) Part 261 and Appendix IX to 40 CFR Part 264 [hazardous constituents under the Resource Conservation and Recovery Act, as amended, ("RCRA")] have been released at and from the facility within the meaning of Sections 101(22), 104, 106, and 107 of CERCLA...

USEPA's finding and determination that non-radioactive RCRA and CERCLA hazardous substances and constituents have been released at and from the FMPC was confirmed during the Public Meeting. At the Public Meeting, USEPA reported that the removal action addressing the contaminated water under Plant 6 at the FMPC (Removal Number 1) had been halted because high levels of volatile organic chemicals were discovered in the effluent generated by that removal action.

Despite USEPA's confirmed finding and determination, the Companies have learned that DOE has not adequately tested the groundwater in the area south of the FMPC known as the "South Plume" (Removal Number 3) for constituents other than uranium. As the Companies understand the situation, DOE tested the first round groundwater samples for all substances listed on the Hazardous Substances List ("HSL"). Thereafter, however, DOE was permitted to eliminate testing for certain substances not found in the first round samples. DOE apparently used this permission to eliminate testing for all substances except uranium, with two exceptions. First, DOE continued to test a certain percentage of wells within the FMPC boundaries for substances on the HSL. Second, DOE tested for other substances in areas where it already suspected such other substances to be present.

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At the time DOE eliminated all substances except uranium from testing, it had not installed any monitoring wells in the vicinity of the South Plume outside of FMPC boundaries. Moreover, only three wells subsequently installed in the South Plume have been tested for any substances other than uranium. Apparently, DOE has never tested any wells in the South Plume for the entire HSL.

The Companies recently learned that DOE now intends to test samples from wells in which it finds uranium for all substances on the HSL. Although such additional testing is a step in the right direction, it is entirely inadequate to address the possibility that non-radioactive contaminants from the FMPC have been released into the area of the South Plume. It assumes that substances, such as the volatile organic compounds found under Plant 6, are likely to be travelling in the aquifer at the same rate as uranium. There is, however, no basis for this assumption, and the described testing program is unlikely to provide an accurate picture with respect to such substances.

In order to ensure that the full range of contaminants released by the FMPC are addressed in any removal or remedial actions, it is essential that DOE be required to test groundwater samples from all existing and future wells in the South Plume for all HSL substances identified or suspected to be present within FMPC boundaries. This additional testing should be performed until such time as DOE and USEPA have fully identified which contaminants are present in the South Plume. If a full range of testing is not performed, there can be no assurance to the public that any removal or remedial actions taken will be protective of human health and the environment.

2. The Administrative Record

Section XXXIV, Paragraph D, provides that DOE will establish and maintain an administrative record in accordance with Section 113(k) of CERCLA and the NCP. At the same time, however, USEPA "retains the right to make final determinations as to the contents of the administrative record."

Part 300.800(a) of Title 40 of the Code of Federal Regulations, 55 FR 8665, 8859 (March 8, 1990), which is part of the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"), provides that the "lead agency shall establish an administrative record that contains the documents that form the basis for the selection of a response action." During the public comment period on the

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NCP, several commenters "expressed concern that the lead agency would have the discretion to include in the administrative record only those documents that support EPA's selected remedy." 55 FR at 8800.

USEPA rejected those comments, stating that they were ~~"based on a misunderstanding of what the phrase 'forms the basis of' means as it was used in the proposed rule." Id.~~ USEPA then clarified that it

intends that the regulatory language defining the administrative record file embody general principles of administrative law concerning what documents are included in an "administrative record" for an agency decision. As a result, contrary to the suggestion of the commenters, the proposed definition of the administrative record does not mean that the record will contain only those documents supporting the selected response action.

Id.

The completeness of the administrative record is imperative because under Section 113(j) of CERCLA, "judicial review of any issues concerning the adequacy of any response action taken or ordered by the President shall be limited to the administrative record." The courts are required to "uphold the President's decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law." If the administrative record is not complete, or is assembled by DOE and USEPA to merely support the response actions they select, a court would not be in position to fairly review the adequacy of those response actions.

To ensure the completeness of the administrative record, DOE and USEPA should bear in mind their duty to include documents relevant to all potential response actions. They should not attempt in any way to limit the record to documents that support selected response actions.

During the Public Meeting, USEPA indicated an intent to use its authority under the Agreement to make final determinations as to the contents of the administrative record to delete unspecified "background materials" from the current administrative record. Although USEPA indicated that the background materials are informative and helpful to a complete understanding of the site, it did not believe that those materials were "directly relevant" to the response actions contemplated under the Agreement.

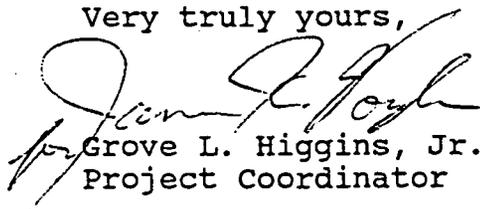
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In editing the administrative record, USEPA should be particularly sensitive to its duty to maintain a complete record. The FMPC is a complex facility with multiple sources of contamination and several contaminant exposure pathways. Background information that may seem irrelevant at one point in time may turn out to be critical information in the actual response selection process. USEPA should, therefore, ~~exercise the highest degree of care in~~ determining what, if anything, can properly be deleted from the current administrative record.

In order to give the public and other interested parties the opportunity to participate meaningfully in the development of the administrative record, they should be allowed to request, on the record, that additional documents be added to the administrative record at any time before the completion of any response action. If DOE or USEPA deny such a request, the reason for the denial should be stated in writing and placed in the record.

The Companies appreciate your careful consideration of their comments. Please do not hesitate to write or call if I can provide any clarification of the Companies' position on any issue raised in these comments.

Very truly yours,


Grove L. Higgins, Jr.
Project Coordinator

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