941180

FROM: Department of Justice
Environment and Natural Resources Division
ENRD/EES REGION V
P.O. BOX 7611
BEN FRANKLIN STATION
WASHINGTON, D.C. 20044-7611

Fax No. 202-616-6584
Voice No. 202-514-3733

SENT BY: SUSAN SCHNEIDER, ESQ.

TO: MICHAEL BERMAN, EPA CHARLES DENTON

FAX No. 312-886-0747 616-336-7000

NUMBER OF PAGES SENT (INCLUDING COVER PAGE):

SPECIAL INSTRUCTIONS:

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

ALLEGAN METAL FINISHING COMPANY,

Defendant.
_____/

CIVIL ACTION NO.
K 86-441-CA4

JUDGE ENSLEN
MAGISTRATE JUDGE ROWLAND

JOINT STATUS REPORT
AND STIPULATION FOR TERMINATION OF CONSENT DECREE

The parties to the above action, by and through their attorneys, stipulate and agree as follows:

1. This Court entered a Consent Decree on August 1, 1989, pursuant to the parties' settlement of this dispute addressing Defendant's compliance with the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 et seq., at two surface impoundments at its Allegan, Michigan property.

2. Pursuant to the Consent Decree, Defendant has closed the two surface impoundments at issue, and the Michigan Department of

Environmental Quality (MDEQ) has certified that closure as of September 18, 1997.

3. The parties stipulate that the Consent Decree may now be terminated by Court order in the form attached. Notwithstanding this termination, Plaintiff's covenant not to sue in paragraph 17 of the Consent Decree shall survive and continue in full force and effect.

4. Defendant hereby withdraws its Petition for Review of Agency Action Pursuant to Consent Decree, filed in June 1991, as moot.

5. There is no need for the Court to retain continuing jurisdiction over this case.

Respectfully submitted,

FOR THE UNITED STATES:

LOIS J. SCHIFFER
Assistant Attorney General
Environmental Enforcement Section
Environment & Natural Resources Division

MICHAEL HAYES DETTMER
United States Attorney
Western District of Michigan

By: _____
FRANCESCA FERGUSON
Assistant United States Attorney

SUSAN SCHNEIDER, Senior Attorney
Environmental Enforcement Section
Environment & Natural Resources
Division
U.S. Department of Justice
P.O.Box 7611, Ben Franklin Station
Washington, DC 20044
(202) 514-3733

OF COUNSEL:

MICHAEL BERMAN
Assistant Regional Counsel
U.S. Environmental Protection
Agency Region V
230 S. Dearborn St.
Chicago, IL 60604

FOR DEFENDANT:

Charles M. Denton
Alfred L. Schubkegel
Varnum, Riddering, Schmidt &
Howlett
Bridgewater Place, P.O. Box 352
Grand Rapids, Michigan 49501
(616) 336-6000

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

CIVIL ACTION NO.
K 86-441-CA4

v.

JUDGE ENSLEN
MAGISTRATE JUDGE ROWLAND

ALLEGAN METAL FINISHING COMPANY,

Defendant.

_____/

ORDER

Pursuant to the Parties' Stipulation, it is hereby ORDERED that the Consent Decree in this matter, entered August 1, 1989, is terminationed, except that Plaintiff's covenant not to sue in Paragraph 17 shall remain in full force and effect.

_____
Hon. Richard A. Enslen

_____
date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

ALLEGAN METAL FINISHING COMPANY,

Defendant.

_____/

CIVIL ACTION NO.
K 86-441-CA4

JUDGE ENSLEN
MAGISTRATE JUDGE ROWLAND

ORDER

Pursuant to the Parties' Stipulation, it is hereby ORDERED that the Consent Decree in this matter, entered August 1, 1989, is terminated, except that Plaintiff's covenant not to sue in Paragraph 17 shall remain in full force and effect.

Hon. Richard A. Enslen

12-15-97
Date

163

VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP
ATTORNEYS AT LAW

BRIDGEWATER PLACE
POST OFFICE BOX 352 · GRAND RAPIDS, MICHIGAN 49501-0352
TELEPHONE 616/336-6000 · FAX 616/336-7000

CHARLES M. DENTON
ADMITTED IN MICHIGAN AND INDIANA

DIRECT DIAL 616/336-6358
E-MAIL cmdenton@varnlaw.com

October 13, 1997

TELECOPY

Ms. Susan L. Schneider
U.S. DEPARTMENT OF JUSTICE
Environmental Enforcement Section
Environmental and Natural Resources Div.
Washington, D.C. 20530

Re: U.S. v. Allegan Metal Finishing Company
Civil Action No. K 86-441-CA4 (W.D. Mich.)

Dear Ms. Schneider:

Enclosed for your review and approval is a draft Stipulation and proposed Order for satisfaction and termination of the Consent Decree in the above-referenced matter. This Stipulation is being submitted based upon the recent closure certification forwarded to you by my partner Fred Schubkegel.

Please call me at your next convenience to finalize this Stipulation for filing with the Federal Court.

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP

Charles M. Denton

/ss
Enclosure
cc: Walter Sosnowski
Ron Vriesman

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

ALLEGAN METAL FINISHING COMPANY,

Defendant.

Civil Action No. K 86-441-CA4

Honorable Richard A. Enslen

DRAFT

Susan L. Schneider
Environmental Enforcement Section
Environmental and Natural Resources Div.
U.S. DEPARTMENT OF JUSTICE
Washington, D.C. 20530
202/514-3733

Charles M. Denton (P33269)
Alfred L. Schubkegel, Jr. (P52099)
Attorneys for Defendant
VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP
Bridgewater Place, P. O. Box 352
Grand Rapids, MI 49501-0352
616/336-6000

STIPULATION FOR SATISFACTION AND TERMINATION OF CONSENT DECREE

NOW COME the parties to the above-captioned action, by and through their attorneys, and hereby stipulate and agree as follows:

1. This Court entered a Consent Decree on August 1, 1989, pursuant to the parties' settlement of this dispute addressing Defendant's compliance with the Federal Resource Conservation and Recovery Act (RCRA) hazardous waste management requirements for two (2) holding ponds at its Allegan, Michigan, property.

2. Pursuant to the Consent Decree, Defendant has closed the holding ponds at issue, and the Michigan Department of Environmental Quality (MDEQ) has certified that closure as of September 18, 1997. MDEQ has been delegated by the U.S. Environmental Protection Agency (EPA) authority to administer the State hazardous waste management law in lieu of RCRA.

3. Defendant hereby withdraws its petition for judicial review, and the parties hereby agree that there are no pending disputes between them regarding the subject matter of this action.

4. Plaintiff stipulates that Defendant has complied with and satisfied its obligations pursuant to the Consent Decree, and such may now be terminated by Court Order in the form attached hereto; however, notwithstanding this termination, Plaintiff's covenant

(1) Release from "enforcement provisions" for failure to maintain financial responsibility for pollution liability coverage
(2) Can no longer operate as a TSD
(3) Closure does not constitute a release from CIA

not to sue in Paragraph 17 of the Consent Decree shall survive and continue in full force and effect.

5. There is no need for the Court to retain continuing jurisdiction over this matter.

U.S. DEPARTMENT OF JUSTICE

Dated:_____ By:_____

Susan L. Schneider
Business Address & Telephone:
Environmental Enforcement Section
Environmental and Natural Resources Div.
Washington, D.C. 20530
202/514-3733

VARNUM, RIDDERING, SCHMIDT & HOWLETT L.L.P
Attorneys for Defendant Allegan Metal Finishing Company

DRAFT

Dated:_____ By:_____

Charles M. Denton (P33269)
Alfred L. Schubkegel, Jr. (P52099)
Business Address & Telephone:
Bridgewater Place, P. O. Box 352
Grand Rapids, MI 49501-0352
616/336-6000

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

ALLEGAN METAL FINISHING COMPANY,

Defendant.

Civil Action No. K 86-441-CA4

Honorable Richard A. Enslen

Susan L. Schneider
Environmental Enforcement Section
Environmental and Natural Resources Div.
U.S. DEPARTMENT OF JUSTICE
Washington, D.C. 20530
202/514-3733

Charles M. Denton (P33269)
Alfred L. Schubkegel, Jr. (P52099)
Attorneys for Defendant
VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP
Bridgewater Place, P. O. Box 352
Grand Rapids, MI 49501-0352
616/336-6000

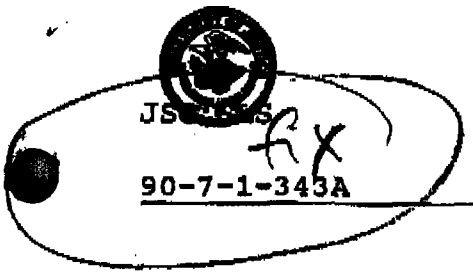
ORDER

Pursuant to the parties' Stipulation, and the records and files herein,

NOW, THEREFORE, it is hereby ordered that the Consent Decree entered August 1, 1989, is deemed satisfied and terminated, except the Plaintiff's covenant not to sue in

Paragraph 17 of the Consent Decree shall remain in full force and effect. The Court does not retain any continuing jurisdiction over this matter.

Hon. Richard A. Enslen



JS-5 S/S FAX

90-7-1-343A

U.S. Department of Justice

Environment and Natural Resources Division

Environmental Enforcement Section
P.O. Box 7611
Washington, D.C. 20044-7611

Tel: (202) 514-5293
Fax: (202) 616-6584

November 20, 1996

DRAFT

Charles M. Denton
Varnum, Riddering, Schmidt & Howlett
Suite 800
171 Monroe Avenue, N.W.
Grand Rapids, Michigan 49503

Re: United States v. Allegan Metal Finishing Co.
Civil Action No. 86-441-CA4

Dear Mr. Denton:

Thank you for completing and filing the recent Joint Status Report in this matter.

I wanted to follow-up with you on our discussions this past week regarding Allegan Metal Finishing's ("Allegan") compliance status with Paragraph 12 of the Consent Decree in this matter. As the U.S. EPA program person assigned to this case reviewed the draft Joint Status Report, she reviewed Allegan's compliance with the Consent Decree and found no quarterly insurance certifications for the past two years. The last certification she found is dated August 5, 1994. Thus, U.S. EPA appears to be missing nine quarterly certifications.

The Consent Decree is clear that the requirements that Allegan obtain liability insurance for sudden and non-sudden accidental occurrences, or certify its continuing good faith efforts to obtain such insurance, continues until the two surface impoundments at the facility have been closed in compliance with the approved amended closure plan. (Para. 12.) This condition has not yet been met, so the insurance requirements of the decree are continuing.

Please let me or Michael Berman know of Allegan's compliance with this Consent Decree requirement. Since this matter was reassigned in the last few months to another U.S. EPA program person, we also want to check whether the certifications were

sent but somehow did not get to the case file and current program person.

Thank you for your assistance with this matter. Please contact me if you have any questions.

Sincerely,

Assistant Attorney General
Environment and Natural Resources Division

By:

Susan L. Schneider
Senior Attorney
Environmental Enforcement Section
(202) 514-3733

cc: Michael Berman, EPA R5
W. Francesca Ferguson, AUSA

DRAFT

VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP
ATTORNEYS AT LAW

BRIDGEWATER PLACE
POST OFFICE BOX 352 · GRAND RAPIDS, MICHIGAN 49501-0352
TELEPHONE 616/336-6000 · FAX 616/336-7000

CHARLES M. DENTON
ADMITTED IN MICHIGAN AND INDIANA

DIRECT DIAL 616/336-6538

November 15, 1996

VIA TELECOPY 202/616-6584

Ms. Susan L. Schneider
Environmental Enforcement Section
Environmental and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

Re: United States v Allegan Metal Finishing Company,
Case No. K86-441-A-4 (W.D. Mich.)

Dear Susan:

Pursuant to our exchange of voice-mail messages yesterday, and my earlier correspondence, I have prepared a draft Joint Status Report for your review and comment. I understand you are out of the office until this afternoon, and will look forward to receiving your comments as soon as possible in order to file this with the Court in Kalamazoo today.

I have sought to keep the Joint Status Report factual in nature, and have requested that our consulting engineer, Dell Engineering, review this draft for accuracy. I have also respected your disinclination to predict any future time schedule, although I continue (for some reason) to be optimistic that we are close to the end of this matter.

Please call me as soon as possible with your comments, so that we can finalize this Joint Status Report and file it today.

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP

Charles M. Denton

/arz
Enc.
cc: Walter C. Sosnowski, AMFCO
PS I am still investigating the status of the pollution liability insurance provision of the Consent Decree and the compliance with that requirement by Allegan Metal Finishing Company. I believe there has been previous correspondence addressing this subject, and will forward that to you for our further discussion as soon as possible.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
v.
ALLEGAN METAL FINISHING COMPANY,
Defendant.

Civil Action No. K 86-441-CA4

Honorable Richard A. Enslen

Susan L. Schneider
Environmental Enforcement Section
Environmental and Natural Resources Div.
U.S. DEPARTMENT OF JUSTICE
Washington, D.C. 20530
202/514-3733

Charles M. Denton (P33269)
Alfred L. Schubkegel, Jr. (P52093)
Attorneys for Defendant
VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP
Bridgewater Place, P. O. Box 352
Grand Rapids, MI 49501-0352
616/336-6000

JOINT STATUS REPORT

NOW COME the parties to the above-captioned action, by and through their respective counsel of record, and, pursuant to the Court's October 28, 1996 Order, submit the following Joint Status Report:

1. On August 1, 1989, this Court entered the parties' Consent Decree addressing, among other things, closure of Allegan Metal Finishing Company's waste holding ponds at Defendant's Allegan, Michigan property. ~~Primary jurisdiction over this closure has been~~

delegated by the U.S. Environmental Protection Agency ("EPA") to the Michigan Department of Environmental Quality ("MDEQ", formerly "MDNR").

2. Pursuant to MDNR's delisting of the Defendant's waste residuals as described in a previous Status Report, the wastes and subsurface soils in the area of the holding ponds were removed and disposed off-site in 1993. Subsequently, Defendant submitted to U.S. EPA and MDNR its December 22, 1993 Holding Pond Closure Certification Report.

3. Subsequent to Allegan Metal Finishing Company's Closure Report, MDNR required further soil sampling in the vicinity of the former holding ponds, which was conducted and completed to the satisfaction of MDNR, and/or

4. U.S. EPA and MDEQ have still not approved Defendant's Closure Report to terminate this matter. MDEQ has raised concerns as to groundwater quality in the vicinity of the former holding ponds, despite quarterly groundwater monitoring reports filed with U.S. EPA and MDEQ which Defendant submits indicate no exceedances for any contaminants of concern. In an effort to amicably resolve this dispute, Defendant prepared and submitted a groundwater fate and transport model showing no off-site environmental impact from the former holding ponds, but MDEQ insisted on additional groundwater monitoring wells. Again in an effort to resolve this matter, Defendant has installed additional groundwater monitoring wells and split samples with MDEQ on two occasions: July 11, 1996 and October 16, 1996. The first set of results have been submitted to MDEQ; the second set of sample results have not yet been submitted, pending receipt of the MDEQ's split sampling results.

5. Defendant Allegan Metal Finishing Company contends that its Holding Pond Closure Certification Report should have been approved. Without waiving its claims, rights, or defenses, Defendant has been attempting to address the additional requirements of MDEQ to amicably resolve this matter with MDEQ and U.S. EPA.

6. In order to terminate this matter, U.S. EPA will need to review and approve MDEQ's anticipated clean closure approval. Defendant anticipates that MDEQ's further analysis and processing will require an additional six (6) months to complete. Plaintiff expresses no opinion as to the anticipated schedule for finalization of this matter.

Respectfully submitted,

U.S. DEPARTMENT OF JUSTICE
Attorneys for Plaintiff

Dated: _____ By: _____
Susan L. Schneider
Business Address:
Environmental Enforcement Section
Environmental and Natural Resources Div.
Washington, D.C. 20530
Phone: 202/514-3733

VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP
Attorneys for Defendant Allegan Meral Finishing Co.

Dated: _____ By: _____
Charles M. Denton (P 33269)
Alfred L. Schubkegel, Jr. (P52099)
Business Address:
Bridgewater Place, P. O. Box 352
Grand Rapids, MI 49501-0352
Phone: 616/336-6000

VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP
ATTORNEYS AT LAW

BRIDGEWATER PLACE
POST OFFICE BOX 352 · GRAND RAPIDS, MICHIGAN 49501-0352
TELEPHONE 616/336-6000 · FAX 616/336-7000

CHARLES M. DENTON
ADMITTED IN MICHIGAN AND INDIANA

DIRECT DIAL 616/336-6536

November 11, 1996

TELECOPY

Ms. Susan L. Schneider
Environmental Enforcement Section
Environmental and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

Re: United States v Allegan Metal Finishing Company,
Case No. K86-441-A-4 (W.D. Mich.)

Dear Susan:

Pursuant to Judge Enslen's Order requesting a Joint Status Report, I have placed a telephone call to you. In the interim, due to the holiday today, I am taking this opportunity to outline the developments since we last spoke.

As you may recall, Allegan Metal Finishing Company's consulting engineering, Dell Engineering, certified clean closure of the holding ponds at issue in 1993. Subsequent to that, the Michigan Department of Natural Resources (now Department of Environmental Quality, "MDEQ") has requested further confirmatory sampling. The sampling requests initially addressed the surface and subsurface conditions at and in the vicinity of the holding ponds. Most recently, further groundwater sampling was required by MDEQ. All of these further sampling events have confirmed that clean closure has been achieved. We are at this time awaiting the result of MDEQ's split sampling from the latest groundwater monitoring event this Fall, which we believe will confirm that clean closure should be approved for this facility.

It is our suggestion that U.S. EPA Region 5 should verify the status of this matter with MDEQ. The project manager for MDEQ, in the Waste Management Division, is Pete Quackenbush (517/373-7397). With the expectation that U.S. EPA will confirm the above situation for you, we request that a Stipulation be prepared and filed to the effect that the Consent Decree between U.S. EPA and Allegan Metal Finishing Company is satisfied and terminated. In essence, we do not perceive any further federal interest in this closure, and we should now affirm that this matter will be deferred to the authorized MDEQ hazardous waste management program.

VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP
ATTORNEYS AT LAW

Alternatively, our Joint Status Report to Judge Enslen can simply indicate that the parties expect MDEQ to approve the Defendant's clean closure certification within a specified time period (90 days?). Your suggestion that we withdraw our pending Petition would be acceptable only if the Federal Court Consent Decree is stipulated to be satisfied and terminated; otherwise, Allegan Metal Finishing Company needs to preserve its claims, rights and defenses relative to the closure certification conditions being imposed improperly in our view (even though we have been diligently pursuing amicable resolution of those disputed conditions).

I look forward to speaking with you Tuesday at your convenience, so that we can meet Judge Enslen's November 15 deadline.

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP

Charles M. Denton

/njh
c: Walter C. Sosnowski, AMFCO
Ronald Vriesman, Dell Engineering

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Civil Action No. K 86-441-CA4

v

HONORABLE RICHARD A. ENSLEN

ALLEGAN METAL FINISHING COMPANY,

Defendant.

/

Susan L. Schneider
Environmental Enforcement Section
Environmental and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530
202\514-3733

Charles M. Denton (P33269)
Edward J. McNeely III (P48818)
Attorneys for Defendant Allegan Metal Finishing Company
Varnum, Riddering, Schmidt & Howlett
Bridgewater Place, P.O. Box 352
Grand Rapids, MI 49501-0352
616\336-6000

/

DEFENDANT ALLEGAN METAL FINISHING COMPANY'S ADDITIONAL STATUS REPORT

Defendant Allegan Metal Finishing Company, by its attorneys Varnum, Riddering, Schmidt & Howlett, provides the following Additional Status Report:

1. Allegan Metal Finishing Company (AMFCO) last provided this Court with a Status Report dated September 9, 1993, concerning implementation of the Closure Plan for its holding ponds at its Allegan, Michigan facility. Primary jurisdiction over this Closure Plan, which is the subject of a prior Consent Decree in this case, has been delegated by U.S. EPA to the Michigan Department of Natural Resources (MDNR).

2. Since the last Status Report, AMFCO submitted its Holding Pond Closure Certification Report (HPCCR) to MDNR on December 22, 1993, for review and approval. The Closure Report included background information regarding the site, discussions of holding pond residual stabilization and removal, and subsurface soil sampling and removal in the area of the holding ponds and a discharge pipeline. In addition, the Closure Report documented AMFCO's compliance with applicable requiremens, including the Michigan Environmental Response (P.A. 307 of 1982), as amended, and relevant soil clean-up criteria.

3. As of this date, MDNR has not completed its review of the HPCCR or issued a Certification of Closure.

4. In a letter to U.S. EPA, dated September 6, 1994, MDNR indicated it had a few questions regarding technical issues contained in the HPCCR. AMFCO has contacted MDNR concerning these issues and believes they will be resolved shortly.

5. After resolution of these limited issues, AMFCO anticipates MDNR will certify clean closure of the holding ponds in satisfaction of applicable legal requirements, including the Consent Decree.

6. Upon MDNR's certification of closure, AMFCO anticipates that the parties to this action will stipulate:

a. To withdrawal of AMFCO's appeal for review of the Consent Decree provisions;

b. That AMFCO has complied with and satisfied the terms of the Consent Decree, dated August 1, 1989; and

c. To dismissal of this action.

Respectfully submitted,

VARNUM, RIDDERING, SCHMIDT & HOWLETT
Attorneys for Defendant Allegan Metal Finishing Company

Dated: January 17, 1995

By: _____

Charles M. Denton (P33269)
Edward J. McNeely (P48818)
Business Address:
Bridgewater Place, P.O. Box 352
Grand Rapids, MI 49501-0352
616/336-6000

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

95 JAN -3 PM 1:23

CLERK, U.S. DIST. COURT
WESTERN DIST. OF MICH.
BY

UNITED STATES OF AMERICA,

Plaintiff,

v

Case No. 4:86 CV 441

ALLEGAN METAL FINISHING COMPANY,

Defendant.

ORDER

Upon a review of this matter, it appears that a Stay Order was issued by this Court on December 10, 1991. The Court last received a status report from defendant on September 13, 1993 representing that the Michigan Department of Natural Resource's Closure Report was due on October 20, 1993. Defendant believed that upon receipt of the closure report it would withdraw its appeal for review of the Consent Decree and the case would be dismissed. The Court has received no further word from the parties. Therefore,

IT IS HEREBY ORDERED that the defendant shall file a status report within fourteen (14) days of the date of this Order, indicating the present status of the case. If such report is not received within the time specified, the file will be reactivated.

DATED: January 3, 1995

RICHARD A. ENSLEN
U.S. District Judge

90-7-1-343A

DEPARTMENT OF JUSTICE

JAN 17 1995

01/30/95

U.S. ENVIRONMENTAL PROTECTION AGENCY
REGION 5

F A X

PLEASE DELIVER THE FOLLOWING MATERIAL AS SOON AS POSSIBLE

DATE: January 30, 1995

FAX TO:

NAME: Susan Brauer,
FAX: (312) 353-4788
PHONE: (312) 353-6134
ADDRESS: U.S. EPA, Region V
77 W. Jackson Blvd., HRE-8J
Chicago, IL 60604

FROM:

Name: Michael Berman
Fax: (312/FTS) 886-7160
Phone: (312/FTS) 886-6837
Address: U.S. Environmental Protection Agency
Region 5
Office of Regional Counsel
77 West Jackson Boulevard, CS-29
Chicago, IL 60604

Total number of pages transmitted including this page: 5
Please contact sender immediately if all pages are not received.

The original of this transmittal will be sent by:
() regular mail; () messenger; () express mail;
(x) this will be the only form of delivery of this transmittal.

MESSAGE:

Re: Allegan Metal Finishing Company

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:

OCT 26 1994

Mr. Charles Denton
Varnum, Riddering, Schimidt & Howlett
Bridgewater Place
Post Office Box 352
Grand Rapids, Michigan 49501-0352

Re: U.S. v. Allegan Metal Finishing Company, Case No. K 86-441-A-4 (W.D. Mich.)

Dear Mr. Denton:

Thank you for your September 5, 1994 letter to Mr. Ben Fisherow of the United States Department of Justice on behalf of Allegan Metal Finishing Company (AMFCO). The United States Environmental Protection Agency (U.S. EPA) is responding on behalf of Ben Fisherow.

Your letter states, "It has now been nine (9) months since AMFCO completed its closure, yet U.S. EPA has failed to respond in kind by acknowledging satisfaction of this settlement. We again request that U.S. EPA promptly review and approve AMFCO's request for termination." As you are aware the State of Michigan is authorized to administer and enforce a hazardous waste management program in lieu of part of the Federal program under Subtitle C of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6921 et seq. subject to the Hazardous and Solid Waste Amendments of 1984 (HSWA) (Public Law 98-616, November 8, 1984), 42 U.S.C. 6926 (c) and (g). Therefore, U.S. EPA defers to the State's determination in evaluating the closure certification.

At the present time AMFCO remains a fully regulated treatment, storage, and disposal facility under RCRA interim status regulations until Michigan releases AMFCO's financial mechanism for closure. AMFCO must comply with all applicable regulations, meaning that even if a new, more stringent regulation becomes applicable after AMFCO submits its certified closure, AMFCO must comply with the new regulation. The settlement is not satisfied until several things happen. Michigan must complete its review and determine that the closure certification is adequate. Michigan must advise U.S. EPA of its determination and then U.S. EPA will evaluate AMFCO's compliance status with respect to the

Consent Decree. Michigan recently provided a partial evaluation to Ms. Sue Brauer of the RCRA Enforcement Branch. A copy of this letter is enclosed for your consideration.

If you have any questions about this letter, you may contact me at (312) 886-6837.

Sincerely yours,

Michael R. Berman

Michael R. Berman
Associate Regional Counsel

Enclosure

cc: Ben Fisherow, U.S. DOJ

bcc: Sue Brauer, REB (HRE-8J)
Connie Puchalski (ORC)

Mr. Charles Denton
Varnum, Riddering, Schimidt & Howlett
Bridgewater Place
Post Office Box 352
Grand Rapids, Michigan 49501-0352

Re: U.S. v. Allegan Metal Finishing Company, Case No. K 86-441-A-4 (W.D. Mich.)

Dear Mr. Denton:

Thank you for your September 5, 1994 letter to Mr. Ben Fisherow of the United States Department of Justice on behalf of Allegan Metal Finishing Company (AMFCO). The United States Environmental Protection Agency (U.S. EPA) is responding on behalf of Ben Fisherow.

Your letter states, "It has now been nine (9) months since AMFCO completed its closure, yet U.S. EPA has failed to respond in kind by acknowledging satisfaction of this settlement. We again request that U.S. EPA promptly review and approve AMFCO's request for termination." As you are aware the State of Michigan is authorized to administer and enforce a hazardous waste management program in lieu of part of the Federal program under Subtitle C of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6921 et seq. subject to the Hazardous and Solid Waste Amendments of 1984 (HSWA) (Public Law 98-616, November 8, 1984), 42 U.S.C. 6926 (c) and (g). Therefore, U.S. EPA defers to the State's determination in evaluating the closure certification.

At the present time AMFCO remains a fully regulated treatment, storage, and disposal facility under RCRA interim status regulations until Michigan releases AMFCO's financial mechanism for closure. AMFCO must comply with all applicable regulations, meaning that even if a new, more stringent regulation becomes applicable after AMFCO submits its certified closure, AMFCO must comply with the new regulation. The settlement is not satisfied until several things happen. Michigan must complete its review and determine that the closure certification is adequate. Michigan must advise U.S. EPA of its determination and then U.S. EPA will evaluate AMFCO's compliance status with respect to the

Consent Decree. Michigan recently provided a partial evaluation to Ms. Sue Brauer of the RCRA Enforcement Branch. A copy of this letter is enclosed for your consideration.

If you have any questions about this letter, you may contact me at (312) 886-6837.

Sincerely yours,

Michael R. Berman
Associate Regional Counsel

Enclosure

cc: Ben Fisherow, U.S. DOJ

bcc: Sue Brauer, REB (HRE-8J)
Connie Puchalski (ORC)

STATE OF MICHIGAN

JOHN ENGLER, Governor

DEPARTMENT OF NATURAL RESOURCES
John Hannah Building, P.O. Box 30241, Lansing, MI 48909

ROLAND HARMES, Director

September 6, 1994

Ms. Sue Rodenbeck Brauer
RCRA Enforcement Branch Region 5
Technical Enforcement Section 2
U.S. Environmental Protection Agency
77 West Jackson Boulevard
Chicago, IL 60604-3590

SUBJECT: Review of "Holding Ponds Closure Certification Report for Allegan Metal Finishing Company Allegan, Michigan" dated December 1993; MID 006 016 190

Dear Ms. Brauer:

I have reviewed the above referenced document and have concluded that Allegan Metal Finishing Company (AMFCO) has not certified "clean closure" of the holding ponds in accordance with their approved closure plan (with two addendums). Some of the major deficiencies with the closure certification are listed below:

1) The AMFCO has not done an adequate evaluation of the "rate and extent" of hazardous waste or hazardous waste constituents that have entered the groundwater from its facility. The AMFCO has been made aware of this fact many times since at least 1985 (see enclosed "Chronology of Groundwater Violations" that was compiled for our Compliance and Enforcement Section by Ms. Kay Miller for the period March 1985 to August 1992). The AMFCO has done an assessment of the rate of groundwater flow, but has done no assessment of the rate or extent of groundwater contaminants (hazardous waste or hazardous waste constituents). For the "rate" all that AMFCO has done is to make very general statements such as the following from Page 12 of their 1993 Annual Report (1993 Groundwater Monitoring Report-dated April 1994):

"Analytes dissolved in solution move along at various rates in the aquifer and therefore occur at different concentrations. The general attenuation of the analytes consists of anions (chlorides and nitrates) moving readily with water, cations moving slower in solution, and finally heavy metals moving the slowest. Therefore, a conservative estimate can be made that the site parameters chloride and nitrate nitrogen have traveled less than approximately 33 feet during 1993."

A Groundwater Assessment Plan that was approved in February, 1986 to delineate rate and extent has still not been completed. This was noted in the "Water Quality Evaluation" section of the 1992 Comprehensive Monitoring Evaluation (CME) and is still accurate. The following is a quote from the 1992 CME:

"The downgradient extent of the plume clearly has not been determined because the MW-4s and MW-4d cluster is the most downgradient well and also the most contaminated. AMFCO must better define the water quality at the leading edge of the plume. Delineation of the rate and extent of the cyanide and nitrate plumes will be required in closure certification for the north and south lagoons. Because of the close proximity of the Kalamazoo river, AMFCO will be required to demonstrate that the groundwater has been cleaned up to, or is of a concentration below the 1982 PA 307, as amended, Type B (risk based value), groundwater/surface water interface (GSI) number for all parameters of concern. This determination will then satisfy the intent of the Groundwater Assessment Plan, closure certification requirements, and Act 64 requirements."

Note that it is approximately 800 feet between the MW- 4s/4d wells and the Kalamazoo River. We still know nothing about groundwater quality over that approximately 800 feet, or what is possibly venting (from groundwater to surface water) into the Kalamazoo River. So, rate and extent of (possible) contamination has still not been delineated in the Holding Ponds Closure Certification Report (HPCCR).

2) The AMFCO proposed in their approved closure plan (dated April, 1984-revised April, 1985 and with Addendum No. 1 revised April, 1985 and June, 1987 and Addendum No. 2 dated April, 1991) on page 18 that:

"semi-annual groundwater monitoring following closure is recommended....Monitoring will consist of sampling groundwater wells installed in accordance with regulatory groundwater assessment requirements. Samples will be analyzed for the following parameters in accordance with approved EPA/MDNR procedures previously identified: Static water level, pH, Specific Conductance, Chlorides, Nitrate-N, Zinc, Cyanide-Total, Chromium-Total, Chromium-Hexavalent."

The HPCCR states the following on page 52:

"Based on the groundwater monitoring completed to date and the fact that all closure activities in the pond area are complete, no further investigation of groundwater is required. Therefore, no further sampling of monitoring wells on the AMFCO site or adjacent to the site is necessary and the monitoring wells for the AMFCO site will be abandoned in conformance with MDNR requirements."

To summarize, the approved closure plan called for semi-annual monitoring of groundwater following closure but the HPCCR states that groundwater monitoring is not necessary. Monitoring will be required for AMFCO until they have demonstrated clean closure (see #1 above); included in this is "rate and extent" and groundwater must be less than 307 Type B levels (as mentioned above). During the historical review of AMFCO's groundwater monitoring data, several exceedances had occured. Completing the assessment study to determine the rate, extent and severity of the potential plume(s) is **mandatory for a clean closure determination.**

3) There are some additional concerns with the HPCCR. On page 23 the HPCCR states:

"The April 1991 soils report concluded that the majority of subsurface soils impact was in the top one (1) foot of subsurface soils. However, in various areas in both ponds, impact to subsurface soils extended to depths greater than one (1) foot. It was determined that the areas in the ponds that had impact to greater than one (1) foot in depth would be excavated, stockpiled, and sampled, including confirmatory sampling performed in the area that was excavated. In addition, the top one (1) foot of subsurface soils, where the majority of impact was discovered, would be excavated, stockpiled and sampled."

Note, they said that the top one foot of subsurface soils would be excavated. On the very next page (p. 24) it states (for the south holding pond):

"This sampling followed residuals removal which included a minimum of 6 inches of underlying soil."

They stated on one page that one foot of the subsurface soils would be excavated and on the very next page that a minimum of six inches of underlying soil was removed. They didn't do what they stated that they would do for the south holding pond. Also, only four samples were taken to verify that soils which remained were acceptable. These four samples were randomly chosen and are labelled SLES-1 to

SLES-4. Of these four samples, 2 (SLES-3 and SLES-4) were unacceptably high in chromium in the leach (see copy of enclosed Table 6). Page 38 then states:

"The top one (1) foot of soils in the south pond represented by samples SLES-3 and SLES-4 were excavated and resampled prior to determining management alternatives. SLES-3B and SLES-4B were collected from the stockpile of SLES-3 and SLES-4 material. SLES-3B and SLES-4B subsequently met the Act 307 criteria therefore, the soil did not require removal from the site and was placed back into the excavation."

This is not the correct procedure. SLES-3 and SLES-4 grid radius should have been excavated, then properly disposed of, then confirmatory samples should have been taken in the area that had been excavated. To re-sample the (stockpiled) soils and then replace them into the excavation is totally unacceptable. It is essential to recognize that the soils underlying the excavated contaminated soils were never sampled to verify that the vertical extent of contamination was removed. This same procedure was used at other sampling points in the south holding pond (see page 37). At the top of page 37 it states:

"Sample locations SBS-4B, 1' -2'; SBS-7B, 1' -2'; SBS-9B, 6'-7'; and SBS-10B, 1' -2' were excavation confirmatory samples collected at the locations where the April 1991 soils report indicated that impact was present to depths greater than one foot.....As can be seen on Table 6, all four (4) of these sample locations meet the Act 307 criteria."

Table 6 (copy enclosed) does not, however, indicate that Act 307 criteria was met for sample location SBS-4B, 1' -2'. This particular sample had 0.14 mg/L chromium in the leach, which is above the 0.12 mg/L Act 307 clean-up criteria (and should have been "shaded" in Table 6, but was not). Thinking that maybe this value was simply a typographical error, I looked in Appendix J (which contains the holding pond subsurface soils analytical results) and found that 0.14 mg/L was correct (copy of results for SBS-4B, 1' -2' enclosed). Again, from page 37:

"Samples SLES-5, SLES-6, SLES-7 and SLES-8 were collected from the stockpiled soil from the excavation of SBS-4B, 7B, 9B and 10B, respectively. As can be seen on Table 6, SLES-5 and SLES-8 meet the Act 307 criteria. However, SLES-6 and SLES-7 did not initially meet the Act 307

criteria. The combined stockpile of SLES-6 and SLES-7 soils were resampled as location SLES-6B. Although two (2) samples were originally collected, one (1) sample was sufficient to comply with the sampling frequency requirements. Location SLES-6B met the Act 307 clean-up criteria, therefore all the stockpiled soils were replaced in the excavation."

So, again the procedure used was unacceptable (for the same reasons as above). These locations will have to be resampled to see whether or not contaminated soil has been removed. Also, samples will be required at lower elevations to confirm (underneath these questionable areas) that soils are not contaminated above Act 307 levels.

I have only listed and described some of the major problems with the HPCCR. Other issues may exist that I have not noted in this letter. The permit engineer has not had a chance to review the HPCCR. I will make sure that you receive a copy of the technical review letter when it is sent to AMFCO. If you have any questions, please call me at the number below.

Sincerely,

Clay Spencer

Clay Spencer
Environmental Quality Analyst
Technical Support Unit
Waste Management Division
517-373-7968

Enclosures
cc/enc: Ms. De Montgomery, DNR/U.S. EPA Reporting
Ms. JoAnn Merrick, DNR
Mr. Pete Quackenbush, DNR
HWP/C&E File

TABLE 6 (Page 1 of 3)

SUMMARY OF SOUTH HOLDING POND SUBSURFACE SOILS ANALYTICAL RESULTS

Allegan Metal Finishing Company
1274 Lincoln Road
Allegan, Michigan

December 1993

SAMPLE LOCATION	PARAMETER CONCENTRATION[1,2]														
	BARIUM		CADMIUM		CHROMIUM		COPPER		LEAD		SILVER		ZINC		FREE CYANIDE (mg/kg)
	TOTAL	LEACH	TOTAL	LEACH	TOTAL	LEACH	TOTAL	LEACH	TOTAL	LEACH	TOTAL	LEACH	TOTAL	LEACH	
SLES-1	7.8	0.16	0.109	0.0002	150	0.096	8.3	*	0.218	0.0036	1.09	0.0009	1,400	0.19	---
SLES-2	6.0	0.13	0.145	0.0001	190	0.063	6.3	0.016	0.407	0.0017	0.82	0.0011	910	0.53	---
SLES-3	13	0.42	0.165	0.035	260	0.70	9.3	0.021	0.528	*	2.36	*	2,300	68	---
SLES-3B	8.3	0.12	0.99	*	148	0.022	7.8	0.012	3.7	*	0.83	*	1,430	0.48	0.61
SLES-4	12	0.26	0.178	0.023	470	0.61	9.7	0.036	0.201	*	3.65	*	3,900	18	---
SLES-4B	19	0.10	3.8	*	305	0.061	9.4	0.014	6.8	*	11	*	2,700	0.72	1.64
SLES-5	---	---	---	---	220	0.065	---	---	---	---	---	---	1,900	0.60	0.4
SLES-6	---	---	---	---	39	0.24	---	---	---	---	---	---	280	0.52	6.1
SLES-6B	---	---	---	---	29.5	*	---	---	---	---	---	---	226	0.43	0.60
SLES-7	---	---	---	---	32	0.25	---	---	---	---	---	---	240	0.27	*
SLES-8	---	---	---	---	48	0.059	---	---	---	---	---	---	430	0.52	1.0
SBS-4B, 1'- 2'	---	---	---	---	14	0.14	---	---	---	---	---	---	27	0.041	*
Act 307 Clean-up Criteria	75	2.4	1.2	0.0035	18	0.12	32	1.3	21	0.004	1.0	0.033	47	2.3	3.0

NOTES:

1. Total parameter concentrations reported in mg/kg.
2. Leachable parameter concentrations reported in mg/l.
3. * = Below Detection Limits: see laboratory reports - Appendix J.
4. --- = No data.
5. Shading indicates that sample location initially exceeded Act 307 clean-up criteria for that parameter prior to subsequent excavation and processing or disposal.

SUMMARY OF SOUTH HOLDING POND SUBSURFACE SOILS ANALYTICAL RESULTS

Allegan Metal Finishing Company
1274 Lincoln Road
Allegan, Michigan

December 1993

SAMPLE LOCATION	PARAMETER CONCENTRATION[1,2]														
	BARIUM		CADMIUM		CHROMIUM		COPPER		LEAD		SILVER		ZINC		FREE CYANIDE (mg/kg)
	TOTAL	LEACH	TOTAL	LEACH	TOTAL	LEACH	TOTAL	LEACH	TOTAL	LEACH	TOTAL	LEACH	TOTAL	LEACH	
SBS-7B, 1'- 2'	---	---	---	---	2.6	*	---	---	---	---	---	---	18	0.038	*
SBS-7B, 7.5'- 8.5'	---	---	---	---	---	---	---	---	---	---	---	---	---	0.24	---
SBS-8B, 2.5'- 3.5'	---	---	---	---	---	---	---	---	---	---	---	---	---	0.12	---
SBS-9B, 6'- 7'	---	---	---	---	11	*	---	---	---	---	---	---	13	0.036	*
SBS-10B, 1'- 2'	---	---	---	---	14	*	---	---	---	---	---	---	34	0.081	*
SBS-17, 8'- 9'	---	---	---	---	---	0.068	---	---	---	---	---	---	---	0.48	---
SBS-18, 5'- 6'	---	---	---	---	---	0.021	---	---	---	---	---	---	---	0.14	---
SBS-19, 5'- 6'	---	---	---	---	---	0.033	---	---	---	---	---	---	---	0.23	---
SLC-1	---	---	---	---	---	---	---	---	---	---	---	---	---	---	*
SLC-2	---	---	---	---	---	---	---	---	---	---	---	---	---	---	*
SLC-3	---	---	---	---	---	---	---	---	---	---	---	---	---	---	*
SLC-4	---	---	---	---	---	---	---	---	---	---	---	---	---	---	*
Act 307 Clean-up Criteria	75	2.4	1.2	0.0035	18	0.12	32	1.3	21	0.004	1.0	0.033	47	2.3	3.0

NOTES:

1. Total parameter concentrations reported in mg/kg.
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5. Shading indicates that sample location initially exceeded Act 307 clean-up criteria for that parameter prior to subsequent excavation and processing or disposal.

SUMMARY OF SOUTH HOLDING POND SUBSURFACE SOILS ANALYTICAL RESULTS

Allegan Metal Finishing Company
1274 Lincoln Road
Allegan, Michigan

December 1993

SAMPLE LOCATION	PARAMETER CONCENTRATION[1,2]														
	BARIUM		CADMIUM		CHROMIUM		COPPER		LEAD		SILVER		ZINC		FREE CYANIDE (mg/kg)
	TOTAL	LEACH	TOTAL	LEACH	TOTAL	LEACH	TOTAL	LEACH	TOTAL	LEACH	TOTAL	LEACH	TOTAL	LEACH	
SLC-5	---	---	---	---	---	---	---	---	---	---	---	---	---	---	*
SLC-6	---	---	---	---	---	---	---	---	---	---	---	---	---	---	*
SLC-7	---	---	---	---	---	---	---	---	---	---	---	---	---	---	*
SLC-8	---	---	---	---	---	---	---	---	---	---	---	---	---	---	*
SLC-9	---	---	---	---	---	---	---	---	---	---	---	---	---	---	*
SLC-10	---	---	---	---	---	---	---	---	---	---	---	---	---	---	*
SLC-11	---	---	---	---	---	---	---	---	---	---	---	---	---	---	*
SLC-12	---	---	---	---	---	---	---	---	---	---	---	---	---	---	*
SLC-13	---	---	---	---	---	---	---	---	---	---	---	---	---	---	*
SLC-14	---	---	---	---	---	---	---	---	---	---	---	---	---	---	*
SLC-15	---	---	---	---	---	---	---	---	---	---	---	---	---	---	*
SLC-16	---	---	---	---	---	---	---	---	---	---	---	---	---	---	*
SLC-17	---	---	---	---	---	---	---	---	---	---	---	---	---	---	*
Act 307 Clean-up Criteria	75	2.4	1.2	0.0035	18	0.12	32	1.3	21	0.004	1.0	0.033	47	2.3	3.0

NOTES:

1 Total parameter concentrations reported in mg/kg.
2 Leachable parameter concentrations reported in mg/l.
3 * = Below Detection Limits; see laboratory reports - Appendix J.
4 --- = No data.
5 Shading indicates that sample location initially exceeded Act 307 clean-up criteria for that parameter prior to subsequent excavation and processing or disposal.

Sample ID: SLES-2 Lab ID: 9306143-04 Collected: 06/21/93

TEST	RESULT	UNITS	ANALYZED	BY	METHOD	MDL
Syn. Pcpt. Leaching Proc.	06/22/93	date extracted		MBR	EPA 1312	
Acid Digestion, Aqueous	06/24/93	date digested	06/24/93	WS	EPA 3010	
Barium	0.13	mg/L	06/25/93	JA	EPA 6010	0.01
Cadmium	0.0001	mg/L	06/28/93	WS	EPA 7131	0.0001
Chromium	0.063	mg/L	06/25/93	JA	EPA 6010	0.02
Copper	0.016	mg/L	06/25/93	JA	EPA 6010	0.01
Lead	0.0017	mg/L	06/28/93	WS	EPA 7421	0.0001
Silver	0.0011	mg/L	06/28/93	WS	EPA 272.2	0.0001
Zinc	0.53	mg/L	06/25/93	JA	EPA 6010	0.02

Sample ID: SBS-4B, 1'-2' Lab ID: 9306143-05 Collected: 06/21/93

TEST	RESULT	UNITS	ANALYZED	BY	METHOD	MDL
Free Cyanide	BDL	mg/kg dry wt.	06/29/93	CJK	EPA 9010A	0.1
Total Solids	96.4	% of sample	06/25/93	MJR	APHA 2540 B.	N/A
Acid Digestion, Solid	06/24/93	date digested	06/24/93	WS	EPA 3050	
Chromium	14	mg/kg dry wt.	06/25/93	JA	EPA 6010	1.0
Zinc	27	mg/kg dry wt.	06/25/93	JA	EPA 6010	1.0

Sample ID: SBS-4B, 1'-2' Lab ID: 9306143-06 Collected: 06/21/93

TEST	RESULT	UNITS	ANALYZED	BY	METHOD	MDL
Syn. Pcpt. Leaching Proc.	06/22/93	date extracted		MBR	EPA 1312	
Acid Digestion, Aqueous	06/24/93	date digested	06/24/93	WS	EPA 3010	
Chromium	0.14	mg/L	06/25/93	JA	EPA 6010	0.02
Zinc	0.041	mg/L	06/25/93	JA	EPA 6010	0.02

Sample ID: SBS-7B, 1'-2' Lab ID: 9306143-07 Collected: 06/21/93

TEST	RESULT	UNITS	ANALYZED	BY	METHOD	MDL
Free Cyanide	BDL	mg/kg dry wt.	06/29/93	CJK	EPA 9010A	0.1
Total Solids	96.5	% of sample	06/25/93	MJR	APHA 2540 B.	N/A
Acid Digestion, Solid	06/24/93	date digested	06/24/93	WS	EPA 3050	
Chromium	2.6	mg/kg dry wt.	06/25/93	JA	EPA 6010	1.0
Zinc	18	mg/kg dry wt.	06/25/93	JA	EPA 6010	1.0

Sample ID: SBS-7B, 1'-2' Lab ID: 9306143-08 Collected: 06/21/93

TEST	RESULT	UNITS	ANALYZED	BY	METHOD	MDL
Syn. Pcpt. Leaching Proc.	06/22/93	date extracted		MBR	EPA 1312	
Acid Digestion, Aqueous	06/24/93	date digested	06/24/93	WS	EPA 3010	
Chromium	BDL	mg/L	06/25/93	JA	EPA 6010	0.02
Zinc	0.038	mg/L	06/25/93	JA	EPA 6010	0.02

Sample ID: SBS-9B, 6'-7' Lab ID: 9306143-09 Collected: 06/21/93

TEST	RESULT	UNITS	ANALYZED	BY	METHOD	MDL
Free Cyanide	BDL	mg/kg dry wt.	06/29/93	CJK	EPA 9010A	0.1
Total Solids	96.1	% of sample	06/25/93	MJR	APHA 2540 B.	N/A
Acid Digestion, Solid	06/24/93	date digested	06/24/93	WS	EPA 3050	
Chromium	11	mg/kg dry wt.	06/25/93	JA	EPA 6010	1.0
Zinc	13	mg/kg dry wt.	06/25/93	JA	EPA 6010	1.0

BDL = Below Detection Limit

VARNUM, RIDDERING, SCHMIDT & HOWLETT

ATTORNEYS AT LAW

BRIDGEWATER PLACE
POST OFFICE BOX 352 · GRAND RAPIDS, MICHIGAN 49501-0352
TELEPHONE 616/336-6000 · FAX 616/336-7000

CHARLES M. DENTON
ADMITTED IN MICHIGAN AND INDIANA

DIRECT DIAL 616/336-6538

September 5, 1994

Mr. Ben Fisherow
Environmental Enforcement Section
U.S. Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044

Re: U.S. v. Allegan Metal Finishing Company,
Case No. K 86-441-CA-4 (W.D. Mich.)

Dear Mr. Fisherow:

On March 17, 1994, we wrote to you regarding Allegan Metal Finishing Company (AMFCO) and its RCRA closure. We advised you that AMFCO had finished closure of its surface impoundments in December and requested termination and a release from any further Consent Decree settlement obligations, including the quarterly financial assurance submittal requirement. I have not yet received a response from your department and so I am writing to renew our request (copy enclosed).

It has now been nine (9) months since AMFCO completed its closure, yet U.S. EPA has failed to respond in kind by acknowledging satisfaction of this settlement. We again request that U.S. EPA promptly review and approve AMFCO's request for termination.

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETT

Charles M. Denton

STR/HF
Enclosure
cc (w/enc): Mr. Walter C. Sosnowski, AMFCO
Mr. Andrew Tschampa, U.S. EPA

VARNUM, RIDDERING, SCHMIDT & HOWLETT

ATTORNEYS AT LAW

BRIDGEWATER PLACE
POST OFFICE BOX 352 · GRAND RAPIDS, MICHIGAN 49501-0352
TELEPHONE 616/336-6000 · FAX 616/336-7000

March 17, 1994

Mr. Ben Fisherow
Environmental Enforcement Section
U.S. Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044

Re: U.S. v. Allegan Metal Finishing Company
Case No. K 86-441-CA-4 (W.D. Michigan)

Dear Mr. Fisherow:

As I mentioned to you on the phone, our firm represents Allegan Metal Finishing Company in the captioned matter. This case included entry of a Consent Decree, a copy of which is attached for your convenience. Under the Consent Decree, Allegan Metal Finishing Company was to pay a civil penalty and to close its surface impoundments. The company has now completed those requirements. Copies of the closure certification from the owner and the consultant are enclosed. A closure report was provided to the Michigan Department of Natural Resources in December 1993, and is currently under review. Accordingly, we ask that you stipulate to termination of the Consent Decree and dismissal of this case. If you have any questions, please feel free to contact me.

Sincerely,

VARNUM, RIDDERING, SCHMIDT & HOWLETT

Scott T. Rickman

STR/ah
Enclosures
cc (w/enc): Mr. Andrew Tschampa
cc (w/o enc): Walter C. Sosnowski

VARNUM, RIDDERING, SCHMIDT & HOWLETT

ATTORNEYS AT LAW

BRIDGEWATER PLACE
POST OFFICE BOX 352 · GRAND RAPIDS, MICHIGAN 49501-0352
TELEPHONE 616/336-6000 · FAX 616/336-7000

JAMES N. DeBOER, JR.
WILLIAM K. VAN'T HOF
HILARY F. SNELL
PETER ARMSTRONG
ROBERT J. ELEVELD
KENT J. VANA
CARL E. VER BEEK
JON F. DeWITT
JOHN C. CARLYLE
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DIRK HOFFIUS
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BENHAM R. WRIGLEY, JR.
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TERESA S. DECKER
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LAWRENCE P. BURNS
MATTHEW D. ZIMMERMAN
WILLIAM E. ROHN
JOHN PATRICK WHITE
CHARLES M. DENTON
PAUL M. KARA
JEFFREY D. SMITH
H. LAWRENCE SMITH
THOMAS C. CLINTON
MARK L. COLLINS
JONATHAN W. ANDERSON
CARL OOSTERHOUSE
WILLIAM J. LAWRENCE III
GREGORY M. PALMER
SUSAN M. WYNGAARDEN
KAPLIN S. JONES
STEPHEN P. AFENDOULIS
ROBERT A. HENDRICKS
DAVID E. KHOREY
MICHAEL G. WOOLDRIDGE
TIMOTHY J. TORNGA
PERRIN RYNDERS
MARK S. ALLARD
TIMOTHY E. EAGLE
DAVID A. RHEM
DONALD P. LAWLESS
MICHAEL S. McELWEE
GEORGE B. DAVIS
JACQUELINE D. SCOTT
N. STEVENSON JENNETTE III
DAVID E. PRESTON
JEFFREY W. BESWICK
ELIZABETH JOY FOSSEL
JOEL E. BAIR
JOAN SCHLEEF
SCOTT A. HUIZENGA
RICHARD J. McKENNA
MICHAEL F. KELLY
KATHLEEN P. FOCHTMAN
JEFFREY J. FRASER
JAMES R. STADLER
RICHARD R. SYMONS
JINYA CHEN*
JEFFERY S. CRAMPTON
RONALD G. DeWAARD
MAUREEN POTTER
SCOTT T. RICKMAN
VICKI S. YOUNG
BRYAN K. ANDERSON
MARK A. DAVIS
ANDREW C. FARMER
ANDREW J. KOK
PATRICK A. MILES, JR.
ERIC J. GUERIN
STEVEN J. MORREN
KEVIN ABRAHAM RYNBRANDT
THOMAS J. AUGSPURGER
RANDY A. BRIDGEMAN
MICHAEL X. HIDALGO
THOMAS G. KYROS
BEVERLY HOLADAY
RANDALL J. GROENDYK
PAMELA J. TYLER
ROBERT C. RUTGERS, JR.
TERRI L. SHAPIRO
BRUCE H. VANDERLAAN
MARC DANEMAN

Counsel
WILLIAM J. HALLIDAY, JR.
EUGENE ALKEMA
TERRANCE R. BACON
PETER VISSERMAN
DAVID L. PORTEOUS
H. RAYMOND ANDREWS
KAREN SMITH KIENBAUM
MICHELLE ENGLER
JAMES R. VIVENTI

Of Counsel
JOHN L. WIERENGO, JR.
F. WILLIAM HUTCHINSON
R. STUART HOFFIUS
GORDON B. BOOZER

*ALSO ADMITTED IN PEOPLE'S REPUBLIC OF CHINA

August 5, 1994

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Andrew Tschampa (HRP-8J)
RCRA Enforcement Branch
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region V
77 W. Jackson Blvd.
Chicago, Illinois 60604

Ms. Lynn M. Spurr
Environmental Quality Analyst
Waste Management Division
MICHIGAN DEPARTMENT OF NATURAL RESOURCES
621 N. 10th Street
P.O. Box 355
Plainwell, Michigan 49080

Re: United States v Allegan Metal Finishing Company,
Case No. K 86-441-CA4 (W.D. Mich.)

Dear Mr. Tschampa and Ms. Spurr:

Pursuant to paragraph 12 of the Consent Decree in the above-referenced RCRA action, we are writing to confirm Allegan Metal Finishing Company's good faith but unavailing efforts to satisfy the pollution liability insurance requirements for the holding ponds at the defendant's Allegan, Michigan facility. Allegan Metal Finishing Company hereby certifies that, despite its good faith efforts, the Company did not obtain such insurance coverage during the period since our last certification.

As further evidence of Allegan Metal Finishing Company's efforts in regard to obtaining pollution liability insurance coverage for accidental occurrences from the holding ponds at issue, we are enclosing a letter from Walter Spiech, Treasurer of Allegan Metal Finishing Company, confirming the defendant's unavailing efforts in this regard. It is apparent that the restricted marketplace for this coverage continues, as the previously-referenced GAO study reflects.

Notwithstanding Allegan Metal Finishing Company's continuing good faith efforts to satisfy its pollution liability insurance requirements, it is the Company's position that it is no longer subject to these requirements. These requirements (contained in Michigan Administrative Rule R299.11003 [incorporating 40 C.F.R. § 265.147]) are applicable only to owners or operators of active hazardous waste treatment, storage or disposal facilities. The Allegan Metal Finishing Company has excavated and disposed of the residuals and any impacted soils previously contained within the holding ponds pursuant to its closure plan and a waste delisting approval from the Michigan Department of Natural Resources. In short, **the holding ponds are now closed.** Therefore, we submit that Allegan Metal Finishing Company should no longer be subject to the requirements of paragraph 12 of the Consent Decree.

Nevertheless, based upon the above and the enclosure, we submit that Allegan Metal Finishing Company remains in compliance with its obligations under this Consent Decree as to pollution liability insurance coverage. If you have any questions with regard to any of the above or the enclosure, please contact the undersigned.

Sincerely,

VARNUM, RIDDERING, SCHMIDT & HOWLETT

Scott T. Rickman

STR/ar
Enclosure
cc (w/enc): Walter C. Sosnowski
Walter Spiech

AMFCO
ALLEGAN METAL FINISHING COMPANY
TELEPHONE (616) 673-6604 • FAX (616) 673-7291
1274 LINCOLN ROAD • P.O. Box 217 • ALLEGAN, MICHIGAN 49010

August 4, 1994

RE: Pollution Liability Insurance

To Whom It May Concern:

This letter is to certify that I have tried once again to obtain pollution liability insurance as referenced by our RCRA "Consent Degree". I have not been successful despite my good faith efforts. The pollution insurance market remains virtually unchanged since my last endeavors in May, 1994. Frankenmuth, our present business insurance carrier, declined to write a pollution liability policy for our holding ponds when contacted this month.

If you have any questions or require further information, please contact the undersigned.

Sincerely,

ALLEGAN METAL FINISHING COMPANY

Walter Spiech

Walter Spiech
Treasurer

WS/jb

CC: Walter Sosnowski, President - AMFCO
Ronald Vriesman - Dell Engineering
Charles Denton - VRS&H

Post-it™ Fax Note 7671	Date 8/4/94	# of pages ▶ 1
To Scott Rickman	From Walt	
Co./Dept. Varnum/Riddering	Co. AMFCO	
Phone #	Phone # (616)673-6604	
Fax # 336-7000	Fax # (616)673-7291	

JUL 13 1994

HRE-8J

Mr. Ken Burda
Waste Management Division
Michigan Department of Natural Resources
P.O. Box 30241
Lansing, Michigan 48909

Re: Allegan Metal Finishing Company
Allegan, Michigan
U.S. EPA ID No.: MID 006 016 190
Case No. K 86-441-CA-4

Dear Mr. Burda:

Following Natalie Warkenthien's termination of her employment with the United States Environmental Protection Agency, I became the RCRA Enforcement Branch technical assignee for Allegan Metal Finishing Company (AMFCO). The purpose of this letter is to request that your staff provide me with an evaluation of the closure certification provided by AMFCO to Michigan Department of Natural Resources in December 1993.

AMFCO's counsel wrote to the United States Department of Justice (U.S. DOJ) in March 1994 to request that the consent decree (Case No. K 86-441-CA-4, W.D. Michigan) requiring compliance with the MDNR-approved closure plan be terminated. I would like to inform U.S. DOJ of MDNR's evaluation of the closure certification and of Allegan's compliance status with respect to the consent decree as soon as MDNR's evaluation is available. As De Montgomery and I discussed on July 11, 1994, Elaine Bennett's June 6, 1994 evaluation documents some concerns. (I have not yet received a copy of the June 6, 1994 evaluation.)

Would you please advise your staff to keep me up-to-date on the closure certification review? Providing me with a copy of MDNR correspondence at the time of issuance would be very helpful. I may be contacted at (312) 353-6134. Thank you for your assistance.

Sincerely yours,

Sue Rodenbeck Brauer, Environmental Scientist
Technical Enforcement Section 2
RCRA Enforcement Branch

bcc: Mike Berman, ORC (CS-29A)
Section Reading File

Branch Reading File

HRE-8J:SueBrauer:SRB:353-6134:F:\user\sbrauer\amfco1:7-12-94

CONCURRENCE REQUESTED FROM REB			
SEC/BR SECRTRY			
OTHER STAFF	REB STAFF	REB SECTION CHIEF	REB BRANCH CHIEF
7/13/94	SRB 7/12/94		

VARNUM, RIDDERING, SCHMIDT & HOWLETT

ATTORNEYS AT LAW

BRIDGEWATER PLACE
POST OFFICE BOX 352 · GRAND RAPIDS, MICHIGAN 49501-0352
TELEPHONE 616/336-6000 · FAX 616/336-7000

May 26, 1994

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Andrew Tschampa (HRP-8J)
RCRA Enforcement Branch
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region V
77 W. Jackson Blvd.
Chicago, Illinois 60604

Ms. Lynn M. Spurr
Environmental Quality Analyst
Waste Management Division
MICHIGAN DEPARTMENT OF NATURAL RESOURCES
621 N. 10th Street
P.O. Box 355
Plainwell, Michigan 49080

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Case No. K 86-441-CA4 (W.D. Mich.)

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As further evidence of Allegan Metal Finishing Company's efforts in regard to obtaining pollution liability insurance coverage for accidental occurrences from the holding ponds at issue, we are enclosing a letter from Walter Spiech, Treasurer of Allegan Metal Finishing Company, confirming the defendant's unavailing efforts in this regard. It is apparent that the restricted marketplace for this coverage continues, as the previously-referenced GAO study reflects.

Notwithstanding Allegan Metal Finishing Company's continuing good faith efforts to satisfy its pollution liability insurance requirements, it is the Company's position that it is no longer subject to these requirements. These requirements (contained in Michigan Administrative Rule R299.11003 [incorporating 40 C.F.R. § 265.147]) are applicable only to owners or operators of active hazardous waste treatment, storage or disposal facilities. The Allegan Metal Finishing Company has excavated and disposed of the residuals and any impacted soils previously contained within the holding ponds pursuant to its closure plan and a waste delisting approval from the Michigan Department of Natural Resources. In short, **the holding ponds are now closed.** Therefore, we submit that Allegan Metal Finishing Company should no longer be subject to the requirements of paragraph 12 of the Consent Decree.

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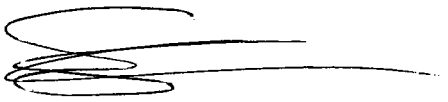
Sincerely,

VARNUM, RIDDERING, SCHMIDT & HOWLETT



Scott T. Rickman

STR/ar
Enclosure
cc (w/enc): Walter C. Sosnowski
Walter Spiech

VARNUM, RIDDERING, SCHMIDT & HOWLETT

ATTORNEYS AT LAW

BRIDGEWATER PLACE
POST OFFICE BOX 352 · GRAND RAPIDS, MICHIGAN 49501-0352
TELEPHONE 616/336-6000 · FAX 616/336-7000

March 17, 1994

Mr. Ben Fisherow
Environmental Enforcement Section
U.S. Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044

Re: U.S. v. Allegan Metal Finishing Company
Case No. K 86-441-CA-4 (W.D. Michigan)

Dear Mr. Fisherow:

As I mentioned to you on the phone, our firm represents Allegan Metal Finishing Company in the captioned matter. This case included entry of a Consent Decree, a copy of which is attached for your convenience. Under the Consent Decree, Allegan Metal Finishing Company was to pay a civil penalty and to close its surface impoundments. The company has now completed those requirements. Copies of the closure certification from the owner and the consultant are enclosed. A closure report was provided to the Michigan Department of Natural Resources in December 1993, and is currently under review. Accordingly, we ask that you stipulate to termination of the Consent Decree and dismissal of this case. If you have any questions, please feel free to contact me.

Sincerely,

VARNUM, RIDDERING, SCHMIDT & HOWLETT

Scott T. Rickman

STR/ah
Enclosures
cc (w/enc): Mr. Andrew Tschampa
cc (w/o enc): Walter C. Sosnowski

11.2 REGISTERED PROFESSIONAL ENGINEER

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine or imprisonment for knowing violations.

Furthermore, based on my inquiry of the person or persons directly responsible for the closure of the ponds at Allegan Metal Finishing Company in Allegan, Michigan, I certify that to the best of my knowledge and belief, closure was performed in accordance with the specifications in the approved closure plan, as amended, the delisting approval, as amended, and in a manner that does not require further maintenance, and that eliminates post-closure escape of leachate, contaminated rainfall, or waste decomposition products to the ground or surface waters or to the atmosphere. Closure of this site meets clean-up criteria identified in Michigan Act 307 as allowed for application to Michigan Act 64 sites by the Michigan Department of Natural Resources. This certification is completed pursuant to the requirements of Act 64 and Subtitle C of the Resource Conservation and Recovery Act (40 CFR 265.115)

PROFESSIONAL ENGINEER CERTIFICATION:

Signature Ronald R. Vriesman

Name Ronald R. Vriesman

Title Vice President

Company Dell Engineering, Inc.

Date December 21, 1993

Registration # 6201031046 (Michigan)

11.0 CERTIFICATION OF CLOSURE

11.1 OWNER

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine or imprisonment for knowing violations.

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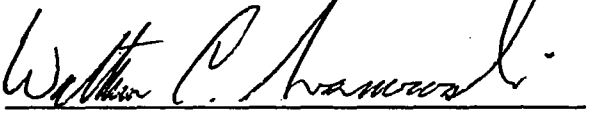
ALLEGAN METAL FINISHING COMPANY OWNER CERTIFICATION:

Signature 

Name Walter C. Sosnowski

Title President

Date December 21, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. ALLEGAN METAL FINISHING COMPANY Defendant.	Civil Action No. K 86-441-CA4 Hon. Richard A. Enslen

CONSENT DECREE

Plaintiff, the United States of America, on behalf of the United States Environmental Protection Agency ("United States"), and defendant, Allegan Metal Finishing Company ("Allegan"), have jointly moved the Court for entry of this consent decree.

The parties have agreed that settlement of this matter is in the public interest and that entry of this consent decree as the compromise of a disputed claim without further litigation is the most appropriate means of resolving this matter.

THEREFORE, without admission by Allegan of the allegations in the complaint, without trial of any issue of fact or law, and upon consent and agreement of the parties to this consent decree, it is ORDERED, ADJUDGED and DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction of the subject matter of this action pursuant to 42 U.S.C. § 6928(a) and 28 U.S.C. § 1331, 1345 and 1355. Venue is proper in this district.

2. This Court has personal jurisdiction over Allegan.

II. APPLICABILITY

3. This consent decree applies to and binds the parties hereto and their successors. This consent decree and Allegan's performance hereunder shall not create any rights or causes of action in any third-parties or inure to the benefit of any non-party.

III. BACKGROUND

4. The United States filed the complaint in this action on October 30, 1986, alleging that defendant Allegan violated the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 et seq., and violated the Consent Agreement and Final Order ("CAFO") entered into between the United States Environmental Protection Agency ("U.S. EPA") and Allegan. Allegan filed an Answer and Affirmative Defenses denying liability.

5. By October 31, 1987, Allegan ceased its discharge of wastewater from its facility to the two surface impoundments at issue.

6. The United States and Allegan filed motions for summary judgment. On June 6, 1988, the Court denied Allegan's motion and granted, in part, the United States' motion for summary judgment on issues of liability.

7. On November 9, 1988, pursuant to a joint motion by the United States and Allegan, the Court dismissed all claims of liability against Allegan arising from the complaint not resolved by the Court's June 6, 1988 Opinion and Order.

8. Under RCRA Allegan must close the two surface impoundments according to an approved closure plan. On September 27, 1985, the U.S. EPA approved a closure plan for these two surface impoundments. Because of an intervening change in the RCRA regulations (53 Fed. Reg. 31138 (August 17, 1988)), however, Allegan's originally approved closure plan must be amended. Allegan has submitted two proposed amendments for its closure plan to the Michigan Department of Natural Resources ("MDNR").

9. On October 30, 1986, pursuant to RCRA, the State of Michigan received authority from U.S. EPA to administer, in lieu of RCRA, the Michigan Hazardous Waste Management Act (1979 P.A. 64), including the authority to approve closure plans for hazardous waste management facilities located in Michigan. The United States and Allegan agree that the MDNR has authority to approve RCRA closure plans in Michigan, including amendments to Allegan's closure plan.

IV. COMPLIANCE

10. Except in full compliance with all federal and state laws and regulations and pursuant to this consent decree, Allegan shall not treat, store or dispose of any hazardous waste into or on any land treatment or land disposal unit at the Allegan facility. This prohibition shall not apply to any hazardous waste presently in the surface impoundments provided Allegan is in compliance with this consent decree.

11. Allegan shall close its two surface impoundments

as required by RCRA and consistent with the following provisions of this consent decree.

(a) Within 30 days after the entry of this consent decree, or MDNR rejection or approval of Allegan's previously submitted amendments, whichever is later, Allegan shall, as necessary depending upon the MDNR action on its amendments, submit to the MDNR an amended closure plan pursuant to the requirements of the Michigan Hazardous Waste Management Act and RCRA. Allegan's submittal of an amended closure plan to the MDNR may include and consideration shall be given to any method for closure that complies with the Michigan Hazardous Waste Management Act and RCRA, including, to the extent properly submitted and supported by Allegan, alternatives for management of the material in the surface impoundments other than off-site hazardous waste landfilling under 53 Fed. Reg. 31138 (August 17, 1988).

(b) Allegan shall implement the amended closure plan approved or issued by MDNR, as final agency action, according to the schedule set forth in the approved plan unless, within 30 days of such final approval or issuance, Allegan petitions the Court for alternative closure requirements under paragraph 24 of this consent decree. In the latter case Allegan shall close according to the Court's order.

(c) Allegan asserts that this Court has final authority to determine the nature and sufficiency of RCRA closure measures.

The United States asserts that this Court does not have such authority. The parties reserve their respective positions concerning whether or not this Court has authority to review RCRA closure plans or to authorize closure on terms other than those required by a State-approved plan. This consent decree does not confer or deny such authority to the Court.

12. Within thirty (30) days of the entry of this consent decree, Allegan shall attempt in good faith to satisfy the Michigan Administrative Rule R299.11003 (incorporating 40 C.F.R § 265.147) liability insurance requirement for sudden and non-sudden accidental occurrences from the two surface impoundments located at the Allegan facility. If Allegan does not satisfy said requirements despite its good faith efforts, it shall, not later than thirty (30) days after entry of this consent decree, and every ninety (90) days thereafter, provide written certification to the U.S. EPA and MDNR of Allegan's good faith efforts to satisfy the requirements for liability insurance coverage for sudden and non-sudden accidental occurrences. Unless otherwise notified by U.S. EPA in writing within 45 days, such good faith certification shall satisfy said requirement for the period of time covered by the certification. The quarterly submittal of said certification shall be required until the two surface impoundments at the Allegan facility have been closed in compliance with an approved amended closure plan under this consent decree.

V. SUBMITTALS

13. Any document or other item required by this consent decree to be submitted to U.S. EPA and MDNR shall be mailed or otherwise delivered to the following persons at the below specified addresses:

Joe Baker
U.S. EPA Region V
RCRA Enforcement Branch, 5HR-12
230 South Dearborn Street
Chicago, Illinois 60604

Lynn Spurr
Michigan Department of Natural Resources
Waste Management Division
621 N. 10th Street
P.O. Box 355
Plainwell, Michigan 49080

Delivery shall be deemed complete upon deposit of the material at issue in the U.S. Mail, certified mail, or with a reputable delivery service.

VI. CIVIL PENALTY

14. Allegan shall pay a civil penalty of forty-three thousand dollars ($43,000) to the United States of America in three equal installments every ninety (90) days, commencing thirty (30) days after entry of this consent decree.

15. Payments shall be made in the form of a certified check payable to the "Treasurer of the United States of America" and shall be tendered to U.S. EPA, Region V, P.O. Box 70753, Chicago, Illinois 60673. A copy of the transmittal of each payment shall be sent to the Waste Management Division, U.S. EPA

Region V, RCRA Enforcement Section, 5HR-12, 230 South Dearborn Street, Chicago, Illinois 60604, Attention: Joe Baker.

16. If any payment of the civil penalty is late, Allegan shall pay interest on the past due civil penalty. Interest shall accrue at the rate provided in 28 U.S.C. §1961(a), that is, a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of 52-week U.S. Treasury bills settled 30 days prior to the time of payment of the civil penalty. Interest shall be compounded annually.

X. GENERAL PROVISIONS

17. Approval and entry of this consent decree by the Court, and compliance with it by Allegan, shall constitute full and final settlement of the claims alleged in the complaint. In consideration for Allegan's full compliance with the terms of this consent decree the United States covenants not to sue Allegan, or its directors, officers or shareholders, for the claims alleged in the complaint.

18. Allegan shall make no reimbursement claim against the United States or the Hazardous Substance Superfund established by Section 221 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9631, for any closure costs incurred by Allegan in complying with this consent decree.

19. Except as provided by this consent decree, this consent decree does not eliminate the responsibility of Allegan

to comply with RCRA and other federal and state environmental laws to the extent such laws are applicable to Allegan.

20. The United States and Allegan expressly reserve all rights, claims, demands and causes of action each may have against any and all persons and entities that are not parties to this consent decree.

21. The United States and Allegan expressly reserve all rights, claims, demands and causes of action as to each other for matters not covered by this consent decree.

22. The United States has provided the State of Michigan with notice of the complaint filed in this action and of the lodging of the consent decree with the Court.

23. Each party to this action shall bear its own costs and attorneys fees.

24. The Court shall retain jurisdiction to enforce and modify this consent decree and to resolve disputes arising under it.

25. Approval by the United States and entry of this consent decree by the Court are subject to the Public Notice and Comment requirement of 28 C.F.R. § 50.7, which requires that notice of proposed consent decrees in certain environmental actions be given to the public, and that the public shall have at least thirty (30) days to submit comments on the proposed consent decree.

26. This consent decree shall terminate by motion of

either the United States or Allegan after each of the following has occurred:

(a) Allegan has complied with the terms of the consent decree.

(b) Allegan has paid the civil penalty and any late payment interest due pursuant to Section VI of this consent decree to the United States.

(c) Allegan has properly submitted a certification of closure for the two surface impoundments.

27. This consent decree shall be effective upon the date of its entry by the Court.

The undersigned representatives of each party to this consent decree certify that he or she is authorized by the party whom he or she represents to enter into the terms and conditions of this consent decree and to legally bind that party to it. By their undersigned counsel the parties enter into this consent decree and submit it to the Court for approval and entry.

Date: 8-1-89

HONORABLE RICHARD ENSLEN

UNITED STATES OF AMERICA
Plaintiff

DONALD A. CARR
Acting Assistant Attorney General
Land and Natural Resources Division
U.S. Department of Justice

ALLEGAN METAL FINISHING COMPANY
Defendant

WALTER C. SOSNOWSKI
President, Allegan Metal Finishing Company

JOHN SMIETANKA
United States Attorney
Western District of Michigan

~~THOMAS GEZON~~ EDITH A. LANDMAN
Assistant U.S. Attorney
399 Federal Building
110 Michigan, N.W.
Grand Rapids, Michigan 49503

for VALDAS V. ADAMKUS
Regional Administrator
Region V
U.S. Environmental Protection Agency

~~THOMAS L. ADAMS, JR.~~ EDWARD E. REICH
Acting Assistant Administrator
Office of Enforcement and Compliance Monitoring
U.S. Environmental Protection Agency

GORDON G. STONER
Attorney, Environmental Enforcement Section
Land and Natural Resources Division
U.S. Department of Justice

CONNIE PUCHALSKI
Assistant Regional Counsel
U.S. Environmental Protection Agency - Region V

CHARLES M. DENTON
Varnum, Riddering, Schmidt & Howlett
Attorneys for Allegan Metal Finishing Company

VARNUM, RIDDERING, SCHMIDT & HOWLETT
ATTORNEYS AT LAW

BRIDGEWATER PLACE
POST OFFICE BOX 352 · GRAND RAPIDS, MICHIGAN 49501-0352
TELEPHONE 616/336-6000 · FAX 616/336-7000

March 3, 1994

CERTIFIED MAIL
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Mr. Andrew Tschampa (5HR-12)
RCRA Enforcement Branch
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region V
230 South Dearborn Street
Chicago, Illinois 60604

Ms. Lynn M. Spurr
Environmental Quality Analyst
Waste Management Division
MICHIGAN DEPARTMENT OF NATURAL RESOURCES
621 N. 10th Street
P.O. Box 355
Plainwell, Michigan 49080

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Case No. K 86-441-CA4 (W.D. Mich.)

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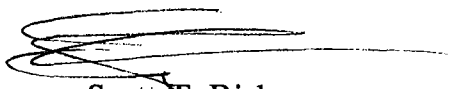
Notwithstanding Allegan Metal Finishing Company's continuing good faith efforts to satisfy its pollution liability insurance requirements, it is the Company's position that it is no longer subject to these requirements. These requirements (contained in Michigan Administrative Rule R299.11003 [incorporating 40 C.F.R. § 265.147]) are applicable only to owners or operators of active hazardous waste treatment, storage or disposal facilities. The Allegan Metal Finishing Company has excavated and disposed of the residuals and any impacted soils previously contained within the holding ponds pursuant to its closure plan and a waste delisting approval from the Michigan Department of Natural Resources. In short, **the holding ponds are now closed.** Therefore, we submit that Allegan Metal Finishing Company should no longer be subject to the requirements of paragraph 12 of the Consent Decree.

Nevertheless, based upon the above and the enclosure, we submit that Allegan Metal Finishing Company remains in compliance with its obligations under this Consent Decree as to pollution liability insurance coverage. If you have any questions with regard to any of the above or the enclosure, please contact the undersigned.

Sincerely,

VARNUM, RIDDERING, SCHMIDT & HOWLETT



Scott T. Rickman

STR/ar
Enclosure
cc (w/encl): Walter C. Sosnowski
Walter Spiech

VARNUM, RIDDERING, SCHMIDT & HOWLETT

ATTORNEYS AT LAW

BRIDGEWATER PLACE
POST OFFICE BOX 352 · GRAND RAPIDS, MICHIGAN 49501-0352
TELEPHONE 616/336-6000 · FAX 616/336-7000

November 19, 1993

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Andrew Tschampa (5HR-12)
RCRA Enforcement Branch
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region V
230 South Dearborn Street
Chicago, Illinois 60604

Ms. Lynn M. Spurr
Environmental Quality Analyst
Waste Management Division
MICHIGAN DEPARTMENT OF NATURAL RESOURCES
621 N. 10th Street
P.O. Box 355
Plainwell, Michigan 49080

Re: United States v Allegan Metal Finishing Company,
Case No. K 86-441-CA4 (W.D. Mich.)

Dear Mr. Tschampa and Ms. Spurr:

Pursuant to paragraph 12 of the Consent Decree in the above-referenced RCRA action, we are writing to confirm Allegan Metal Finishing Company's good faith but unavailing efforts to satisfy the pollution liability insurance requirements for the holding ponds at the defendant's Allegan, Michigan facility. Allegan Metal Finishing Company hereby certifies that, despite its good faith efforts, the Company did not obtain such insurance coverage during the period since our last certification.

As further evidence of Allegan Metal Finishing Company's efforts in regard to obtaining pollution liability insurance coverage for accidental occurrences from the holding ponds at issue, we are enclosing a letter from Walter Spiech, Treasurer of Allegan Metal Finishing Company, confirming the defendant's unavailing efforts in this regard. It is apparent that the restricted marketplace for this coverage continues, as the previously-referenced GAO study reflects.

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Sincerely,

VARNUM, RIDDERING, SCHMIDT & HOWLETT

Scott T. Rickman

STR/ar
Enclosure
cc (w/encl): Walter C. Sosnowski
Walter Spiech

VARNUM, RIDDERING, SCHMIDT & HOWLETT
ATTORNEYS AT LAW

BRIDGEWATER PLACE
POST OFFICE BOX 352 · GRAND RAPIDS, MICHIGAN 49501-0352
TELEPHONE 616/336-6000 · FAX 616/336-7000

October 26, 1993

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Andrew Tschampa (5HR-12)
RCRA Enforcement Branch
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region V
230 South Dearborn Street
Chicago, Illinois 60604

Ms. Lynn M. Spurr
Environmental Quality Analyst
Waste Management Division
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621 N. 10th Street
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Plainwell, Michigan 49080

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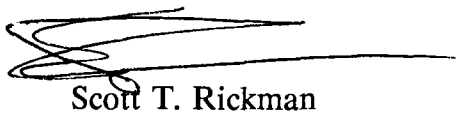

Scott T. Rickman

STR/ar
Enclosure
cc (w/encl): Walter C. Sosnowski
Walter Spiech

VARNUM, RIDDERING, SCHMIDT & HOWLETT

ATTORNEYS AT LAW

BRIDGEWATER PLACE
POST OFFICE BOX 352 · GRAND RAPIDS, MICHIGAN 49501-0352
TELEPHONE 616/336-6000 · FAX 616/336-7000

JAMES N. DeBOER, JR.
WILLIAM K. VAN'T HOF
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MARC DANEMAN

Counsel
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PETER VISSERMAN
DAVID L. PORTEOUS
H. RAYMOND ANDREWS
KAREN SMITH KIENBAUM
MICHELLE ENGLER
JAMES R. VIVENTI

Of Counsel
JOHN L. WIERENGO, JR.
F. WILLIAM HUTCHINSON
R. STUART HOFFIUS
GORDON B. BOOZER

*ALSO ADMITTED IN PEOPLE'S REPUBLIC OF CHINA

May 18, 1993

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Andrew Tschampa (5HR-12)
RCRA Enforcement Branch
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region V
230 South Dearborn Street
Chicago, Illinois 60604

Ms. Lynn M. Spurr
Environmental Quality Analyst
Waste Management Division
MICHIGAN DEPARTMENT OF NATURAL RESOURCES
621 N. 10th Street
P.O. Box 355
Plainwell, Michigan 49080

Re: United States v Allegan Metal Finishing Company,
Case No. K 86-441-CA4 (W.D. Mich.)

Dear Mr. Tschampa and Ms. Spurr:

Pursuant to paragraph 12 of the Consent Decree in the above-referenced RCRA action, we are writing to confirm Allegan Metal Finishing Company's good faith but unavailing efforts to satisfy the pollution liability insurance requirements for the holding ponds at the defendant's Allegan, Michigan facility. Allegan Metal Finishing Company hereby certifies that, despite its good faith efforts, the Company did not obtain such insurance coverage during the period since our last certification.

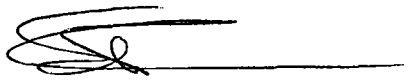
As further evidence of Allegan Metal Finishing Company's efforts in regard to obtaining pollution liability insurance coverage for accidental occurrences from the holding ponds at issue, we are enclosing a letter from Walter Spiech, Treasurer of Allegan Metal Finishing Company, confirming the defendant's unavailing efforts in this regard. It is apparent that the restricted marketplace for this coverage continues, as the previously-referenced GAO study reflects.

Notwithstanding Allegan Metal Finishing Company's continuing good faith efforts to satisfy its pollution liability insurance requirements, it is the Company's position that it is no longer subject to these requirements. These requirements (contained in Michigan Administrative Rule R299.11003 [incorporating 40 C.F.R. § 265.147]) are applicable only to owners or operators of active hazardous waste treatment, storage or disposal facilities. The Allegan Metal Finishing Company has submitted a revised closure plan for its facility pursuant to paragraph 11(a) of the Consent Decree. Therefore, we submit that Allegan Metal Finishing Company should no longer be subject to the requirements of paragraph 12 of the Consent Decree.

Nevertheless, based upon the above and the enclosure, we submit that Allegan Metal Finishing Company remains in compliance with its obligations under this Consent Decree as to pollution liability insurance coverage. If you have any questions with regard to any of the above or the enclosure, please contact the undersigned.

Sincerely,

VARNUM, RIDDERING, SCHMIDT & HOWLETT



Scott T. Rickman

STR/ar
Enclosure
cc (w/encl): Walter C. Sosnowski
Walter Spiech

AMFCO
ALLEGAN METAL FINISHING COMPANY
TELEPHONE (616) 673-6604 • FAX (616) 673-7291
1274 LINCOLN ROAD • P.O. Box 217 • ALLEGAN, MICHIGAN 49010

May 12, 1993

RE: Pollution Liability Insurance

To Whom It May Concern:

This letter is to certify that I have tried once again to obtain pollution liability insurance as referenced by our RCRA "Consent Degree". I have not been successful despite my good faith efforts. The pollution insurance market remains virtually unchanged since my last endeavors in February, 1993. Frankenmuth, our present business insurance carrier, declined to write a pollution liability policy for our holding ponds when contacted this month.

If you have any questions or require further information, please contact the undersigned.

Sincerely,

ALLEGAN METAL FINISHING CO.

Walter Spiech
Treasurer

WS/rg

CC: Walter Sosnowski, President - AMFCO
Ronald Vriesman - Dell Engineering
Charles Denton - VRS&H

U.S. Department of Justice

JCC:SLS:kb
90-7-1-343A

Washington, D.C. 20530

ATTORNEY WORK PRODUCT

March 18, 1993

overnight mail service

Richard S. Murray
Assistant United States Attorney
Western District of Michigan
Gerald R. Ford Federal Building
and U.S. Courthouse
110 Michigan Street, N.W.
Room 399
Grand Rapids, Michigan 49503

Re: United States v. Allegan Metal Finishing Co.
Civil Action No. 86-441-CA4

Dear Mr. Murray:

Enclosed is a status report by the United States in the above action. I would appreciate it if you could have it filed with the Court. It sets forth the position of the United States that Defendant's Petition For Review of Agency Action Pursuant to Consent Decree is now moot.

I would also appreciate it if you could send a copy of the file-stamped report to me. I will serve defense counsel by mail.

Thank you again for your help. Please call me if you have any questions.

Sincerely,

Assistant Attorney General
Environment and Natural Resources Division

By:

Susan L. Schneider
Senior Attorney
Environmental Enforcement Section
(202) 514-3733

cc: Mike Berman, EPA RV

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

CIVIL ACTION NO.
K 86-441-CA4

v.

JUDGE ENSLEN
MAGISTRATE JUDGE ROWLAND

ALLEGAN METAL FINISHING COMPANY,

Defendant.

_____/

THE UNITED STATES' ADDITIONAL STATUS REPORT
REGARDING DEFENDANT'S PETITION FOR REVIEW OF AGENCY ACTION
PURSUANT TO CONSENT DECREE

The United States, by its undersigned counsel, provides the following information to supplement the Parties' Joint Status Report of July 1992. The United States asserts that Defendant's Petition for Review of Agency Action Pursuant to Consent Decree, which Defendant filed in June 1991, is now moot.

1. On December 20, 1991, this Court stayed all proceedings in this matter until the Michigan Department of Natural Resources ("MDNR") made a final decision on Defendant Allegan Metal Finishing Company's ("AMFCO") pending petition to "delist" its wastewater treatment sludges and reclassify them as non-hazardous.

2. MDNR has determined to grant AMFCO's petition, and, in July 1992, published notice of its intent to grant this petition. A copy of the Public Notice to be published regarding this draft redesignation was included with the parties' previous report to the Court. Following close of the public comment period for the delisting application and draft redesignation, MDNR evaluated all comments received before it issued a final decision.

3. On December 17, 1992, MDNR signed and issued a Redesignation Approval for Allegan Metal Finishing Company, which granted Defendant's petition. MDNR sent a copy of the approval to Defendant by letter dated December 21, 1992. A copy of the Redesignation Approval and cover letter is attached.

4. MDNR's December 21, 1992 letter noted that Defendant's current closure plan needed to be amended to reflect the delisting. MDNR informed Defendant that MDNR was "in the process of amending the closure plan" and notified Defendant that it could "expect to receive the amendment to [Defendant's] closure plan shortly at which time [Defendant] may begin closure activities."

5. On January 21, 1993, MDNR wrote Defendant to inform it that MDNR had amended Defendant's closure plan to "allow excavated material from the North and South lagoons, that is treated in compliance with the approved redesignation, to be disposed at a facility that is in compliance with the Michigan

Solid Waste Management Act, 1978 P.A. 641, as amended." A copy of this letter is attached.

6. MDNR officials, including counsel for MDNR, have confirmed to undersigned counsel that MDNR's letter of January 21, 1993, constitutes a final amendment to Defendant's existing closure plan, and that as such constitutes final agency action. Although Defendant's counsel has recently contacted MDNR to discuss unspecified details of the closure plan, as far as the MDNR and the Michigan Attorney General's Office are concerned, Defendant's closure plan has been approved and amended as a final closure plan.

7. The Consent Decree in this action requires Defendant to implement an amended closure plan approved or issued by the MDNR. (Decree, ¶ 11.) Now that MDNR has issued a final decision on Defendant's delisting petition and amended Defendant's closure plan, Defendant is obligated to implement that plan. (See Decree, ¶ 11.b.) The Consent Decrees requires Defendant to:

> implement the amended closure plan approved or issued by MDNR, as final agency action, according to the schedule set forth in the approved plan unless, within 30 days of such final approval or issuance, Allegan petitions the Court for alternative closure requirements under paragraph 24 of this consent decree....

(Decree, ¶ 11.b.)[1] Defendant has made no such petition following MDNR's issuance of the amended closure plan as final agency action on January 21, 1993.

8. Thus, it is the position of the United States that Defendant's Petition for Review of Agency Action Pursuant to Consent Decree, which Defendant filed in June 1991, is now moot.

9. The United States asked Defendant to join in filing a joint status report of the parties that would inform the Court that its petition was now moot. Defendant refused to do so until it had resolved the unspecified details of the closure plan with the MDNR, noted in Paragraph 6, above. Defendant has not, however, made a timely petition to this Court, following MDNR's recent final agency action on the amended closure plan, for alternative closure requirements pursuant to Paragraph 11 of the Consent Decree. Thus, it is the position of the United States that Defendant's Petition for Review of Agency Action Pursuant to Consent Decree, which Defendant filed in June 1991, is now moot.

Respectfully submitted,

MYLES E. FLINT
Acting Assistant Attorney General
Environmental Enforcement Section
Environment & Natural Resources
Division

---

[1] Paragraph 11.c of the Consent Decree makes clear that the parties disagree as to whether this Court has jurisdiction to determine any disputes asserted by Defendant pursuant to Paragraph 11.b.

JOHN A. SMIETANKA
United States Attorney
Western District of Michigan

By: _____
RICHARD S. MURRAY
Assistant United States Attorney

Susan F. Schneider
SUSAN SCHNEIDER
Senior Attorney
Environmental Enforcement Section
Environment & Natural Resources
Division
U.S. Department of Justice
P.O.Box 7611
Ben Franklin Station
Washington, DC 20044
(202) 514-3733

OF COUNSEL:

MICHAEL BERMAN
Assistant Regional Counsel
U.S. Environmental Protection
Agency Region V
230 S. Dearborn St.
Chicago, IL 60604

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing United States' Additional Status Report Regarding Defendant's Petition for Review of Agency Action Pursuant to Consent Decree, has been served by regular mail this March 18, 1993, on the following:

Charles M. Denton
Scott T. Rickman
Varnum, Riddering, Schmidt & Howlett
Suite 800
171 Monroe Avenue, N.W.
Grand Rapids, Michigan 49503

Susan L. Schneider

VARNUM, RIDDERING, SCHMIDT & HOWLETT

ATTORNEYS AT LAW

JAMES N. DeBOER, JR.
GORDON B. BOOZER
WILLIAM K. VAN'T HOF
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ROBERT A. HENDRICKS
DAVID E. KHOREY
MICHAEL G. WOOLDRIDGE
TIMOTHY J. TORNGA
PERRIN RYNDERS
MARK S. ALLARD

SUITE 800
171 MONROE AVENUE, N.W.
P.O. BOX 352
GRAND RAPIDS, MICHIGAN 49501-0352
TELEPHONE (616) 459-4186
FAX (616) 459-8468
TELEX 1561593 VARN

THE VICTOR CENTER
SUITE 810
201 NORTH WASHINGTON SQUARE
LANSING, MICHIGAN 48933
TELEPHONE (517) 482-6237
FAX (517) 482-6937

350 EAST MICHIGAN AVENUE
KALAMAZOO, MICHIGAN 49007
TELEPHONE (616) 382-2300
FAX (616) 382-2382

321 WASHINGTON STREET
P.O. BOX 288
GRAND HAVEN, MICHIGAN 49417
TELEPHONE (616) 846-7100
FAX (616) 846-7101

TIMOTHY E. EAGLE
DAVID A. RHEM
DONALD P. LAWLESS
MICHAEL S. McELWEE
GEORGE B. DAVIS
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COUNSEL
WILLIAM J. HALLIDAY, JR.
EUGENE ALKEMA
TERRANCE R. BACON
PETER VISSERMAN
DAVID L. PORTEOUS
H. RAYMOND ANDREWS

OF COUNSEL
JOHN L. WIERENGO, JR.
F. WILLIAM HUTCHINSON
R. STUART HOFFIUS

RICHARD L. SPINDLE
1936-1975
CARL J. RIDDERING
1904-1977
CLIFFORD C. CHRISTENSON
1915-1982
ROBERT G. HOWLETT
1906-1988
WALTER K. SCHMIDT
1907-1991
LAURENT K. VARNUM
1895-1991

*ADMITTED IN
PEOPLE'S REPUBLIC OF CHINA

Grand Rapids
REPLY TO

February 8, 1993

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Andrew Tschampa (5HR-12)
RCRA Enforcement Branch
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
Region V
230 South Dearborn Street
Chicago, Illinois 60604

Ms. Lynn M. Spurr
Environmental Quality Analyst
Waste Management Division
MICHIGAN DEPARTMENT OF
NATURAL RESOURCES
621 N. 10th Street
P.O. Box 355
Plainwell, Michigan 49080

Re: United States v Allegan Metal Finishing Company,
Case No. K 86-441-CA4 (W.D. Mich.)

Dear Mr. Tschampa and Ms. Spurr:

Pursuant to paragraph 12 of the Consent Decree in the above-referenced RCRA action, we are writing to confirm Allegan Metal Finishing Company's good faith but unavailing efforts to satisfy the pollution liability insurance requirements for the holding ponds at the defendant's Allegan, Michigan facility. Allegan Metal Finishing Company hereby certifies that, despite its good faith efforts, the Company did not obtain such insurance coverage during the period since our last certification.

As further evidence of Allegan Metal Finishing Company's efforts in regard to obtaining pollution liability insurance coverage for accidental occurrences from the holding ponds at issue, we are enclosing a letter from Walter Spiech, Treasurer of Allegan Metal Finishing Company, confirming the defendant's

unavailing efforts in this regard. It is apparent that the restricted marketplace for this coverage continues, as the previously-referenced GAO study reflects.

Notwithstanding Allegan Metal Finishing Company's continuing good faith efforts to satisfy its pollution liability insurance requirements, it is the Company's position that it is no longer subject to these requirements. These requirements (contained in Michigan Administrative Rule R299.11003 [incorporating 40 C.F.R. § 265.147]) are applicable only to owners or operators of active hazardous waste treatment, storage or disposal facilities. The Allegan Metal Finishing Company has submitted a revised closure plan for its facility pursuant to paragraph 11(a) of the Consent Decree. Therefore, we submit that Allegan Metal Finishing Company should no longer be subject to the requirements of paragraph 12 of the Consent Decree.

Nevertheless, based upon the above and the enclosure, we submit that Allegan Metal Finishing Company remains in compliance with its obligations under this Consent Decree as to pollution liability insurance coverage. If you have any questions with regard to any of the above or the enclosure, please contact the undersigned.

Sincerely,

VARNUM, RIDDERING, SCHMIDT & HOWLETT

Scott T. Rickman

STR/ar
Enclosure
cc (w/encl): Walter C. Sosnowski
Walter Spiech

VARNUM, RIDDERING, SCHMIDT & HOWLETT

ATTORNEYS AT LAW

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MICHAEL G. [illegible]
WILLIAM H. [illegible]

SUITE 800
171 MONROE AVENUE, N.W.
GRAND RAPIDS, MICHIGAN 49503
TELEPHONE (616) 459-4186
FAX (616) 459-8468
TELEX 1561593 VARN

THE VICTOR CENTER
SUITE 810
201 NORTH WASHINGTON SQUARE
LANSING, MICHIGAN 48933
TELEPHONE (517) 482-6237
FAX (517) 482-6937

350 EAST MICHIGAN AVENUE
KALAMAZOO, MICHIGAN 49007
TELEPHONE (616) 382-2300
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321 WASHINGTON STREET
P.O. BOX 288
GRAND HAVEN, MICHIGAN 49417
TELEPHONE (616) 846-7100
FAX (616) 846-7101

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PEOPLE'S REPUBLIC OF CHINA

REPLY TO Grand Rapids

November 25, 1992

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Andrew Tschampa (5HR-12)
RCRA Enforcement Branch
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
Region V
230 South Dearborn Street
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Environmental Quality Analyst
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Plainwell, Michigan 49080

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As further evidence of Allegan Metal Finishing Company's efforts in regard to obtaining pollution liability insurance coverage for accidental occurrences from the holding ponds at issue, we are enclosing a letter from Walter Spiech, Treasurer of Allegan Metal Finishing Company, confirming the defendant's

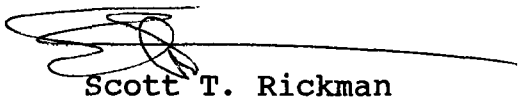
unavailing efforts in this regard. It is apparent that the restricted marketplace for this coverage continues, as the previously-referenced GAO study reflects.

Notwithstanding Allegan Metal Finishing Company's continuing good faith efforts to satisfy its pollution liability insurance requirements, it is the Company's position that it is no longer subject to these requirements. These requirements (contained in Michigan Administrative Rule R299.11003 [incorporating 40 C.F.R. § 265.147]) are applicable only to owners or operators of active hazardous waste treatment, storage or disposal facilities. The Allegan Metal Finishing Company has submitted a revised closure plan for its facility pursuant to paragraph 11(a) of the Consent Decree. Therefore, we submit that Allegan Metal Finishing Company should no longer be subject to the requirements of paragraph 12 of the Consent Decree.

Nevertheless, based upon the above and the enclosure, we submit that Allegan Metal Finishing Company remains in compliance with its obligations under this Consent Decree as to pollution liability insurance coverage. If you have any questions with regard to any of the above or the enclosure, please contact the undersigned.

Sincerely,

VARNUM, RIDDERING, SCHMIDT & HOWLETT



Scott T. Rickman

STR/ar
Enclosure
cc (w/encl): Walter C. Sosnowski
Walter Spiech

AMFCO

ALLEGAN METAL FINISHING COMPANY
TELEPHONE (616) 673-6604 • FAX (616) 673-7291
1274 LINCOLN ROAD • P.O. Box 217 • ALLEGAN, MICHIGAN 49010

November 16, 1992

RE: Pollution Liability Insurance

To Whom It May Concern:

This letter is to certify that I have tried once again to obtain pollution liability insurance as referenced by our RCRA "Consent Degree". I have not been successful despite my good faith efforts. The pollution insurance market remains virtually unchanged since my last endeavors in August, 1992. Frankenmuth Mutual, our present business insurance carrier, declined to write a pollution liability policy for our holding ponds when contacted this month.

If you have any questions or require further information, please contact the undersigned.

Sincerely,

ALLEGAN METAL FINISHING CO.

Walter Spiech
Treasurer

WS/ss

CC: Walter Sosnowski, President - AMFCO
Ronald Vriesman - Dell Engineering
Charles M. Denton - VRS&H

VARNUM, RIDDERING, SCHMIDT & HOWLETT

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PEOPLE'S REPUBLIC OF CHINA

REPLY TO Grand Rapids

August 17, 1992

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Andrew Tschampa (5HR-12)
RCRA Enforcement Branch
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
Region V
230 South Dearborn Street
Chicago, Illinois 60604

Ms. Lynn M. Spurr
Environmental Quality Analyst
Waste Management Division
MICHIGAN DEPARTMENT OF
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621 N. 10th Street
P.O. Box 355
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Case No. K 86-441-CA4 (W.D. Mich.)

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REPLY TO Grand Rapids

May 18, 1992

OFFICE OF RCRA
Waste Management Division
U.S. EPA, REGION V

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Scott T. Rickman

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Walter Spiech

AMFCO

ALLEGAN METAL FINISHING COMPANY
TELEPHONE (616) 673-6604 • FAX (616) 673-7291

1274 LINCOLN ROAD • P.O. Box 217 • ALLEGAN, MICHIGAN 49010

May 11, 1992

RE: Pollution Liability Insurance

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ALLEGAN METAL FINISHING COMPANY

Walter Spiech

Walter Spiech
Treasurer

WS/ss

cc: Walter Sosnowski, President - AMFCO
Ronald Vriesman - Dell Engineering
Charles M. Denton - VRS&H

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To Scott Rickman	From Walt Spiech
Co. Vernon Riddering	Co. AMFCO
Dept.	Phone # (616) 673-6604
Fax # (616) 459-8468	Fax # (616) 673-7291

VARNUM, RIDDERING, SCHMIDT & HOWLETT

ATTORNEYS AT LAW

JAMES N DeBOER JR.
GORDON B BOOZER
WILLIAM K VAN T HOF
HILARY F SNELL
PETER ARMSTRONG
ROBERT J ELEVELD
KENT J VANA
CARL E VER BEEK
JON F DeWITT
JOHN C CARLYLE
DONALD L JOHNSON
DANIEL C MOLHOEK
GARY P SKINNER
THOMAS T HUFF
TIMOTHY J CURTIN
H EDWARD PAUL
JOHN E McGARRY
DIRK HOFFIUS
J TERRY MORAN
BENHAM R WRIGLEY, JR
THOMAS J MULDER
THOMAS J. BARNES
ROBERT D. KULLGREN
RICHARD A. KAY
LARRY J. TITLEY
BRUCE A BARNHART
FREDRIC A SYTSMA
JACK D SAGE
JEFFREY L SCHAD
THOMAS G DEMLING
JOHN W PESTLE
ROBERT P. COOPER
FRANK G DUNTEN
TERRANCE R BACON
NYAL D DEEMS
RICHARD A. HOOKER
RANDALL W KRAKER
PETER A. SMIT
MARK C HANISCH
MARILYN A LANKFER
THOMAS L. LOCKHART
ROBERT L DIAMOND
BRUCE G HUDSON
BRUCE GOODMAN
JOSEPH J. VOGAN
ERIC J. SCHNEIDEWIND
THOMAS A. HOFFMAN
TERESA S DECKER
JEFFREY R HUGHES
RICHARD W BUTLER JR
LAWRENCE P. BURNS
MATTHEW D ZIMMERMAN
WILLIAM E ROHN
JOHN PATRICK WHITE
CHARLES M DENTON
PAUL M. KARA
JEFFREY D. SMITH
H LAWRENCE SMITH
THOMAS C. CLINTON
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JONATHAN W ANDERSON
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WILLIAM J LAWRENCE III
GREGORY M. PALMER
SUSAN M WYNGAARDEN
KAPLIN S JONES
STEPHEN P. AFENDOULIS
ROBERT A. HENDRICKS
DAVID E. KHOREY
MICHAEL G WOOLDRIDGE

SUITE 800
171 MONROE AVENUE, N.W.
GRAND RAPIDS, MICHIGAN 49503
TELEPHONE (616) 459-4186
FAX (616) 459-8468
TELEX 1561593 VARN

THE VICTOR CENTER
SUITE 810
201 NORTH WASHINGTON SQUARE
LANSING, MICHIGAN 48933
TELEPHONE (517) 482-6237
FAX (517) 482-6937

350 EAST MICHIGAN AVENUE
KALAMAZOO, MICHIGAN 49007
TELEPHONE (616) 382-2300
FAX (616) 382-2382

321 WASHINGTON STREET
P.O. BOX 288
GRAND HAVEN, MICHIGAN 49417
TELEPHONE (616) 846-7100
FAX (616) 846-7101

WILLIAM H MERRILL
TIMOTHY J TORNGA
PERRIN RYNDERS
MARK S. ALLARD
TIMOTHY E EAGLE
DAVID A. RHEM
DONALD P. LAWLESS
MICHAEL S. McELWEE
GEORGE B. DAVIS
JACQUELINE D SCOTT
N STEVENSON JENNETTE III
MICHAEL A SHIELDS
DAVID E. PRESTON
JEFFREY W. BESWICK
ELIZABETH J. FOSSEL
JOEL E BAIR
JOAN SCHLEEF
SCOTT A HUIZENGA
RICHARD J. McKENNA
JEFFREY D. NICKEL
MICHAEL F. KELLY
ADNA H UNDERHILL, JR
KATHLEEN P FOCHTMAN
JEFFREY J. FRASER
JAMES R STADLER
RICHARD R SYMONS
JINYA CHEN*
DAWN D BRACKMANN
MATTHEW V PIWOWAR
RICHARD T KNAUER
JEFFERY S CRAMPTON
RONALD G DeWAARD
MAUREEN POTTER
SCOTT T RICKMAN
VICKI S YOUNG

BRYAN K ANDERSON
MARK A DAVIS
ANDREW C FARMER
ANDREW J. KOK
BEVERLY HOLADAY
RANDALL J GROENDYK
PAMELA J TYLER

OF COUNSEL
JOHN L. WIERENGO JR
F WILLIAM HUTCHINSON
CHESTER C WOOLRIDGE
WILLIAM J HALLIDAY JR
EUGENE ALKEMA
R STUART HOFFIUS
PETER VISSERMAN
DAVID L. PORTEOUS

RICHARD L. SPINDLE
1936-1975
CARL J RIDDERING
1904-1977
CLIFFORD C. CHRISTENSON
1915-1982
ROBERT G. HOWLETT
1906-1988
WALTER K. SCHMIDT
1907-1991
LAURENT K VARNUM
1895-1991

*ADMITTED IN
PEOPLE'S REPUBLIC OF CHINA

REPLY TO Grand Rapids

February 21, 1992

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Andrew Tschampa (5HR-12)
RCRA Enforcement Branch
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
Region V
230 South Dearborn Street
Chicago, Illinois 60604

Ms. Lynn M. Spurr
Environmental Quality Analyst
Waste Management Division
MICHIGAN DEPARTMENT OF
NATURAL RESOURCES
621 N. 10th Street
P.O. Box 355
Plainwell, Michigan 49080

Re: United States v Allegan Metal Finishing Company,
Case No. K 86-441-CA4 (W.D. Mich.)

Dear Mr. Tschampa and Ms. Spurr:

Pursuant to paragraph 12 of the Consent Decree in the above-referenced RCRA action, we are writing to confirm Allegan Metal Finishing Company's good faith but unavailing efforts to satisfy the pollution liability insurance requirements for the holding ponds at the defendant's Allegan, Michigan facility. Allegan Metal Finishing Company hereby certifies that, despite its good faith efforts, the Company did not obtain such insurance coverage during the period since our last certification.

As further evidence of Allegan Metal Finishing Company's efforts in regard to obtaining pollution liability insurance coverage for accidental occurrences from the holding ponds at issue, we are enclosing a letter from Walter Spiech, Treasurer of Allegan Metal Finishing Company, confirming the defendant's

unavailing efforts in this regard. It is apparent that the restricted marketplace for this coverage continues, as the previously-referenced GAO study reflects.

Notwithstanding Allegan Metal Finishing Company's continuing good faith efforts to satisfy its pollution liability insurance requirements, it is the Company's position that it is no longer subject to these requirements. These requirements (contained in Michigan Administrative Rule R299.11003 [incorporating 40 C.F.R. § 265.147]) are applicable only to owners or operators of active hazardous waste treatment, storage or disposal facilities. The Allegan Metal Finishing Company has submitted a revised closure plan for its facility pursuant to paragraph 11(a) of the Consent Decree. Therefore, we submit that Allegan Metal Finishing Company should no longer be subject to the requirements of paragraph 12 of the Consent Decree.

Nevertheless, based upon the above and the enclosure, we submit that Allegan Metal Finishing Company remains in compliance with its obligations under this Consent Decree as to pollution liability insurance coverage. If you have any questions with regard to any of the above or the enclosure, please contact the undersigned.

Sincerely,

VARNUM, RIDDERING, SCHMIDT & HOWLETT

Scott T. Rickman

STR/ar
Enclosure
cc (w/encl): Walter C. Sosnowski
Walter Spiech

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

ALLEGAN METAL FINISHING COMPANY,

Defendant.

_____/

CIVIL ACTION NO. K 86-441-CA4

HONORABLE: RICHARD A. ENSLEN

ORDER

Based upon the parties' Joint Motion to stay the proceedings in the above action pending a decision by the Michigan Department of Natural Resources ("MDNR") on Defendant's pending waste delisting petition, IT IS HEREBY ORDERED, that:

1. All proceedings in this matter are stayed pending MDNR's final decision on AMFCO's delisting petition.

2. Based on the parties' representations that the MDNR is expected to issue its final decision on the delisting petition by March 1992, the parties are FURTHER ORDERED to file a joint status report with the Court by March 31, 1992, as to the status of the MDNR delisting petition and the status of this pending action.

Honorable Richard A. Enseln

12/20/91
DATE

DRAFT
12/6/91

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff, CIVIL ACTION NO. K 86-441-CA4

v. HONORABLE: RICHARD A. ENSLEN

ALLEGAN METAL FINISHING COMPANY,

Defendant.

_____/

STIPULATION AND ORDER TO STAY PROCEEDINGS

The parties, by their respective counsel, stipulate to the following:

1. On August 1, 1989, this Court entered a Consent Decree in the above action to resolve a dispute between the United States and Allegan Metal Finishing Company ("AMFCO") arising under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§6901 et seq. Among other things, the Consent Decree requires AMFCO to implement an amended closure plan approved or issued by the Michigan Department of Natural Resources ("MDNR"). On June 26, 1991, AMFCO petitioned this Court, pursuant to Paragraph 11 of the Consent Decree, for

review of a final agency action of the MDNR, which AMFCO contends unilaterally amended AMFCO's closure plan.

2. AMFCO has also filed a petition in the Courts for the State of Michigan, seeking review of the MDNR-issued closure plan. As noted below, the parties in these proceedings have stipulated to a stay of that proceeding.

3. AMFCO operated two surface impoundments at its facility at 1274 Lincoln Road, in Allegan, Michigan, into which it discharged treated wastewater from zinc electroplating operations conducted at this facility. The United States Environmental Protection Agency ("U.S. EPA") has characterized these wastewater treatment ~~residuals~~ sludges as listed hazardous waste No. F006 ("...wastewater treatment ~~residuals from non-segregated zinc electroplating...."~~ sludges from electroplating operations except from the following processes: ... zinc plating (segregated basis) on carbon steel ...") (See 40 CFR 261.31). Discharges to the surface impoundments ceased by late 1987.

4. Because AMFCO had neither a permit to operate these surface impoundments nor could demonstrate compliance with the RCRA interim status requirements, AMFCO was required to close the surface impoundments in accordance with 40 CFR 265 Subpart G. U.S. EPA conditionally approved a plan for the closure of the surface impoundments on September 27, 1985 ("Closure Plan"). The Closure Plan required the excavation ~~and removal~~ of the wastewater treatment ~~residuals~~ sludges from the surface impoundments and off-site disposal of the ~~residuals~~ sludges at a hazardous waste ~~landfill.~~ licensed facility.

[~~isn't this the same plan mdnr amended~~]

Because of intervening changes in the RCRA regulations, Allegan's 9/27/85 approved closure Plan had to be amended. On 10/30/86, the state of Michigan received authority to approve closure plans for hazardous waste management facilities in Michigan. On 5/30/91, MDNR reapproved the 9/27/85 Closure Plan with additional conditions.

5. AMFCO filed a petition on June 23, 1986, requesting U.S. EPA to "delist" the wastewater treatment residuals, reclassifying them as non-hazardous. U.S. EPA denied AMFCO's petition on September 17, 1990. AMFCO appealed the denial to the United States Court of Appeals for the District of Columbia. On September 25, 1991, the United States and AMFCO lodged an agreement with the Court of Appeals which provided that U.S. EPA would withdraw its denial and AMFCO would withdraw its federal delisting petition and proceed with its delisting petition pending with the Michigan Department of Natural Resources ("MDNR").

6. On July 8, 1991, AMFCO petitioned MDNR under the Michigan Hazardous Waste Management Act ("Act 64") to delist the wastewater treatment residuals. U.S. EPA had delegated to the State of Michigan authority to review such petitions on April 23, 1991. (See Fed. Reg. 18517 (Apr. 23, 1991).

7. ~~MDNR is expected to rule on~~ AMFCO's petition by March 1992. ~~If~~ Michigan delists the wastes, AMFCO will not be required to dispose of the ~~residuals~~ sludges in a hazardous waste licensed facility, assuming the waste is not hazardous for some other reason. ~~landfill.~~ AMFCO will have to implement the MDNR a closure plan at its facility, ~~but that closure plan will contain some requirements that are different than those in the Closure Plan presently approved by the MDNR.~~ which may be modified to incorporate the conditions of the delisting, if the delisting is approved. Because the delisting (may) require excavation & treatment of the sludges, the surface impoundments still require closure pursuant to RCRA.

8. MDNR and Allegan Metal Finishing Company entered into a Stipulation and Order on November 18, 1991, in the 48th Circuit Court for the County of Allegan, State of Michigan, which

provided that MDNR would stay enforcement of the Closure Plan pending its final decision on AMFCO's waste delisting petition.

9. In light of the foregoing facts and history, the parties request that the Court stay any further proceedings in this matter until MDNR has made a final decision on AMFCO's delisting petition.

10. A proposed Order is attached.

Respectfully submitted,

The United States of America:
Barry M Hartman
Acting Assistant Attorney General
Environment and Natural Resources Division

Allegan ~~AMFCO~~ Metal Finishing Co.:

Susan L. Schneider
Senior Attorney
Environmental Enforcement Section
Environment and Natural Resources
Washington, D.C. 20514
(202) 514-3733

Charles M. Denton
Varnum, Riddering, Schmidt & Howlett
Attorneys for Allegan Metal Finishing Co.
Grand Rapids, Michigan 49503
(616) 459-4186

7. MDNR is expected to rule on AMFCO's petition by March 1992. If Michigan delists the wastes, AMFCO will not be required to dispose of the sludges in a hazardous waste licensed facility, assuming the sludges are not hazardous for some other reason. Because the delisting will require excavation and treatment of the sludges, the surface impoundments still require closure pursuant to RCRA. Therefore, AMFCO will have to implement the MDNR Closure Plan at its facility, which may be modified to incorporate the conditions of the delisting, if the delisting is approved.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff, CIVIL ACTION NO. K 86-441-CA4

v. HONORABLE: RICHARD A. ENSLEN

ALLEGAN METAL FINISHING COMPANY,

Defendant.

ORDER

Based upon the parties Stipulation to stay the proceedings in the above action pending a decision by the Michigan Department of Natural Resources ("MDNR") on Defendant's pending delisting petition, IT IS HEREBY ORDERED, that:

1. All proceedings in this matter are stayed pending MDNR's final decision on AMFCO's delisting petition.

2. Based on the parties' representations that the MDNR is expected to issue its final decision on the delisting petition by March 1992, the parties are FURTHER ORDERED to file a joint status report with the Court by March 31, 1992 as to the status of the MDNR delisting petition and the status of this pending action.

_____
Honorable Richard A. Enseln

_____
DATE

xc: Tom Skop
Dave Slayton
+ retain
Thanks
John

VARNUM, RIDDERING, SCHMIDT & HOWLETT

ATTORNEYS AT LAW

SUITE 800
171 MONROE AVENUE, N.W.
GRAND RAPIDS, MICHIGAN 49503
TELEPHONE (616) 459-4186
FAX (616) 459-8468
TELEX 1561593 VARN

SUITE 700
ONE MICHIGAN AVENUE
120 NORTH WASHINGTON SQUARE
LANSING, MICHIGAN 48933
TELEPHONE (517) 482-6237
FAX (517) 482-6937

350 EAST MICHIGAN AVENUE
KALAMAZOO, MICHIGAN 49007
TELEPHONE (616) 382-2300
FAX (616) 382-2382

321 WASHINGTON STREET
P.O. BOX 288
GRAND HAVEN, MICHIGAN 49417
TELEPHONE (616) 846-7100
FAX (616) 846-7101

REPLY TO

Grand Rapids

November 19, 1991

Chuck ____
file ____

xc: EPA Rpt.
12-2-91

Clerk of the Court
48th Circuit Court
County Building
113 Chestnut
Allegan, MI 49010

Re: Allegan Metal Finishing Company v MDNR
Case No.: 91-13781-AA

Dear Clerk:

Enclosed please find an original and two copies of a Stipulation and Order to Stay Proceedings in reference to the above-captioned matter.

If the same is agreeable with Judge Corsiglia, please have him sign the same and return the two copies to the undersigned.

Thank you for your time and assistance in this matter.

Sincerely,

Varnum, Riddering, Schmidt & Howlett

Scott T. Rickman

/ar
Enclosures

cc (w/encl): Steven E. Chester
Walter C. Sosnowski

STATE OF MICHIGAN
IN THE 48TH CIRCUIT COURT
FOR THE COUNTY OF ALLEGAN

ALLEGAN METAL FINISHING COMPANY,

Appellant,

v

MICHIGAN DEPARTMENT OF NATURAL RESOURCES,

Appellee.

CASE NO.: 91-13781-AA

HONORABLE GEORGE R. CORSIGLIA

STIPULATION AND ORDER TO STAY PROCEEDINGS

Charles M. Denton (P33269)
Scott T. Rickman (P44131)
Varnum, Riddering, Schmidt & Howlett
Attorneys for Appellant
171 Monroe Avenue, N.W., Suite 800
Grand Rapids, MI 49503
(616) 459-4186

Steven E. Chester (P32984)
Assistant Attorney General
Attorney for Appellee
P.O. Box 30212
Lansing, MI 48909
(517) 373-7780

The parties, by their respective counsel, stipulate to the following:

1. Allegan Metal Finishing Company ("AMFCO") filed a Verified Motion for Stay Pending Review with this Court on October 18, 1991.

2. In its Verified Motion for Stay Pending Review, AMFCO requested that this Court stay enforcement of MDNR's amendment of AMFCO's Closure Plan during the pendency of this appeal.

3. AMFCO has pending with MDNR a petition to delist the materials in the holding ponds which are the subject of the Closure Plan under review by this Court, which if granted could result in the materials being re-characterized by MDNR as non-hazardous waste.

4. MDNR anticipates that, if it receives necessary information from AMFCO, it will be able to reach a decision on AMFCO's waste Delisting Petition by March 1992. The parties agree that favorable resolution of that Delisting Petition by MDNR is expected to avoid the need for this Court's review of the Closure Plan.

5. The parties have therefore agreed that AMFCO hereby withdraws its Verified Motion for Stay Pending Review and, in its place, agree to entry of an Order by this Court to stay proceedings in this matter and enforcement of the Closure Plan pending MDNR's final decision on AMFCO's waste Delisting Petition.

VARNUM, RIDDERING, SCHMIDT & HOWLETT
Attorneys for Appellant Allegan Metal Finishing Company

Dated: November 18, 1991

BY: _____
Charles M. Denton (P33269)
Scott T. Rickman (P44131)
BUSINESS ADDRESS:
171 Monroe Avenue, N.W., Ste. 800
Grand Rapids, MI 49503
TELEPHONE NO.:
(616) 459-4186

ASSISTANT ATTORNEY GENERAL FOR
ENVIRONMENTAL PROTECTION
Attorney for Appellee Michigan
Department of Natural Resources

Dated: November 18, 1991

BY: Steven E. Chester by STR per phone con. dated 11/18/91.
Steven E. Chester (P32984)
BUSINESS ADDRESS:
P.O. Box 30212
Lansing, MI 48909
TELEPHONE NO.:
(517) 373-7780

O R D E R

At a session of said Court held in the Allegan County Building, Allegan, Michigan, this _____ day of November, 1991.

PRESENT: **HONORABLE GEORGE R. CORSIGLIA**

Upon the above Stipulation, IT IS HEREBY ORDERED that all proceedings in this matter and on the Appellee MDNR's enforcement of the Closure Plan of Appellant AMFCO be stayed until Appellee MDNR's final decision on Appellant AMFCO's waste Delisting Petition as set forth in more detail in the preceding Stipulation.

_____
Honorable George R. Corsiglia

EXAMINED, COUNTERSIGNED, & ENTERED:

ATTEST: A TRUE COPY

By: _____
Deputy County Clerk

By: _____
Deputy County Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALLEGAN METAL FINISHING COMPANY, Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	No. 90-1598

SETTLEMENT AGREEMENT

WHEREAS, on June 23, 1986, Allegan Metal Finishing Company ("AMFCO") petitioned EPA to exclude ("delist") certain wastes at its Allegan, Michigan facility from the lists of hazardous wastes pursuant to section 3001 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6921; 40 C.F.R. §§ 260.20, 260.22;

WHEREAS, EPA denied AMFCO's petition to delist in a final rule, published at 55 Fed. Reg. 38,058 (September 17, 1990).

WHEREAS, on December 14, 1990, AMFCO filed a petition for review of EPA's decision in this Court, pursuant to RCRA section 7006, 42 U.S.C. § 6976;

WHEREAS, subsequent to the filing of AMFCO's petition for review, in a final rule published at 56 Fed. Reg. 18,517 (April 23, 1991), effective on June 24, 1991, EPA authorized the State of Michigan to operate a Michigan delisting program in lieu of the federal program;

WHEREAS, AMFCO and EPA have agreed to resolve all disputes arising out of EPA's decision not to delist the wastes identified in AMFCO's June 23, 1986 delisting petition without further briefing or a decision on the merits by this Court;

NOW THEREFORE, in consideration of the mutual agreements contained herein, the parties stipulate and agree as follows:

1. Within sixty days of the date that this settlement agreement is filed with the Court, EPA shall publish in the Federal Register a notice withdrawing its September 17, 1990 final rule denying AMFCO's delisting petition.

2. Upon publication of the Federal Register notice referenced in paragraph "1" above, AMFCO agrees to withdraw from EPA its June 23, 1986 delisting petition, and EPA shall be under no further obligation to process that petition.

3. Upon withdrawal of the June 23, 1986 delisting petition from EPA, AMFCO will refer that petition to the State of Michigan for its independent evaluation and decision.

4. EPA shall thereafter exercise only such oversight of the Michigan analysis and evaluation of AMFCO's delisting petition as the Agency would ordinarily exercise over any delisting proceeding in an authorized state. EPA may provide any data or technical assistance requested by the State of Michigan. Notwithstanding the preceding sentence, in no event shall EPA require or otherwise advise or suggest that: (a) the State of Michigan use any particular fate and transport model to evaluate

AMFCO's delisting petition, or (b) that the State of Michigan analyze the petition using any particular disposal scenario.

5. Upon publication of the notice described in paragraph "1" above, AMFCO will join EPA in a joint motion to dismiss petition for review No. 90-1598, pending in this Court.

6. Each party will bear its own costs before this Court.

CHARLES M. DENTON
Varnum, Riddering, Schmidt
& Howlett
171 Monroe Avenue, N.W.
Suite 800
Grand Rapids, Michigan 49503

LYNN L. BERGESON
KURT J. OLSON
STEVEN F. HIRSCH
Weinberg, Bergeson & Neuman
1300 I Street, N.W.
Suite 600 East
Washington, D.C. 20005

ROBERT LEFEVRE
U.S. Department of Justice
Environment & Natural Resources
Division
10th & Constitution
Washington, D.C. 20530

P366684957

SEP 05 1991

5HR-12

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
Mr. Charles Denton
Varnum, Riddering, Schmidt & Howlett
Suite 800
171 Monroe Avenue, N.W.
Grand Rapids, Michigan 49503

Re: Allegan Metal Finishing Company
EPA ID No. MID 006 016 190
Civil Action No. K 86-411-CA4

Dear Mr. Denton:

Thank you for your letter dated August 19, 1991, regarding Allegan Metal Finishing Company's compliance with paragraph 12 of the Consent Decree. My staff noted, however, that your response disregarded a June 28, 1991, letter signed by Mr. Paul Dimock on my behalf. In the event that you did not receive that letter, a copy has been enclosed for your reference.

Please note that Ms. Sue Rodenbeck replaced Mr. Andrew Tschampa as the RCRA Enforcement Branch contact for Allegan Metal Finishing Company. Also, the United States Environmental Protection Agency does not concur with your assertion regarding the applicability of the requirements for pollution liability insurance coverage (see enclosed letter).

If you have any questions regarding this letter, please contact Ms. Sue Rodenbeck. Her telephone number is (312) 353-6134.

Sincerely yours,

Joseph M. Boyle, Chief
RCRA Enforcement Branch

Enclosure

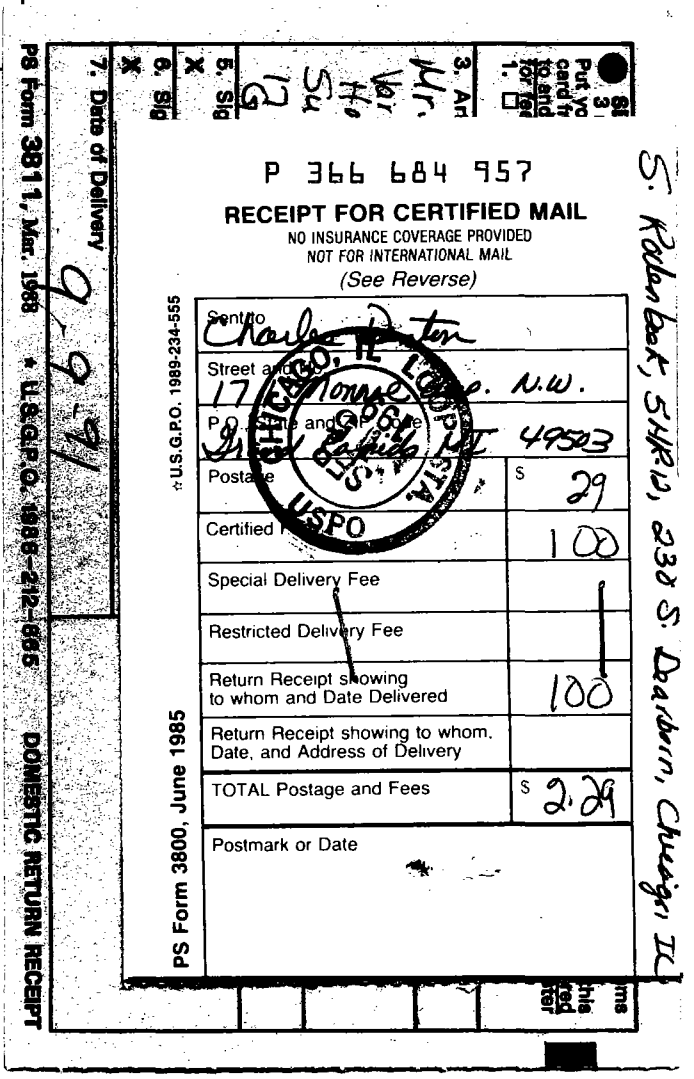
cc: Ms. Susan Schneider, U.S. DOJ
Mr. Tom Gezon, Acting U.S. Attorney
Mr. Tom Leep, MDNR Plainwell
Mr. Dennis Drake, MDNR Lansing

bcc: Mr. Rich Traub, RPB, 5HR-13
Mr. Steve Kaiser, ORC, 5CS-TUB-3
S.Rodenbeck, WP 5.1, 3.5" Disk2, a:\allegan2, 08-28-91

ok 9/4/91

CONCURRENCE REQUESTED FROM REB			
OTHER STAFF	REB STAFF	REB SECTION CHIEF	REB BRANCH CHIEF
	SAR 8/29/91	8/29/91	JMP 9/4/91

SIGNATURE/INITIAL CONCURRENCE REQUEST FROM ORC				
OTHER STAFF	ASS'T REGIONAL COUNSEL	S.W.E.R. SECTION CHIEF	S.W.E.R. BRANCH CHIEF	REGIONAL COUNSEL
	SPK 8/29/91			



VARNUM, RIDDERING, SCHMIDT & HOWLETT

ATTORNEYS AT LAW

JAMES N. DeBOER, JR.
GORDON B. BOOZER
WILLIAM K. VAN'T HOF
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SUITE 800
171 MONROE AVENUE, N.W.
GRAND RAPIDS, MICHIGAN 49503
TELEPHONE (616) 459-4186
FAX (616) 459-8468
TELEX 1561593 VARN

SUITE 700
ONE MICHIGAN AVENUE
120 NORTH WASHINGTON SQUARE
LANSING, MICHIGAN 48933
TELEPHONE (517) 482-6237
FAX (517) 482-6937

350 EAST MICHIGAN AVENUE
KALAMAZOO, MICHIGAN 49007
TELEPHONE (616) 382-2300
FAX (616) 382-2382

321 WASHINGTON STREET
P.O. BOX 288
GRAND HAVEN, MICHIGAN 49417
TELEPHONE (616) 846-7100
FAX (616) 846-7101

MARK S. ALLARD
TIMOTHY E. EAGLE
DAVID A. RHEM
DONALD P. LAWLESS
MICHAEL S. McELWEE
GEORGE B. DAVIS
JACQUELINE D. SCOTT
N. STEVENSON JENNETTE III
MICHAEL A. SHIELDS
DAVID E. PRESTON
JEFFREY W. BESWICK
ELIZABETH J. FOSSEL
JOEL E. BAIR
JOAN SCHLEEF
SCOTT A. HUIZENGA
RICHARD J. McKENNA
BOYD C. FARNAM
JEFFREY D. NICKEL
MICHAEL F. KELLY
NANCY G. LOCKHART
ADNA H. UNDERHILL, JR.
KATHLEEN P. FOCHTMAN
JEFFREY J. FRASER
LANCE R. JONES
JAMES R. STADLER
RICHARD R. SYMONS
JINYA CHEN*
DAWN D. BRACKMANN
MATTHEW V. PIWOWAR
RICHARD T. KNAUER
KELLY W. BHIRDO
JEFFERY S. CRAMPTON
RONALD G. DeWAARD
MAUREEN POTTER
SCOTT T. RICKMAN
MICHELLE K. BEHAYLO

ANNMARIE BLACK
VICKI S. YOUNG
BRYAN K. ANDERSON
BRIDGET TUCKER GONDER
MARY C. MEATHE
BEVERLY HOLADAY
RANDALL J. GROENDYK

OF COUNSEL
LAURENT K. VARNUM
JOHN L. WIERENGO, JR.
F. WILLIAM HUTCHINSON
CHESTER C. WOOLRIDGE
WILLIAM J. HALLIDAY, JR.
EUGENE ALKEMA
R. STUART HOFFIUS
PETER VISSERMAN
WILLIAM H. MERRILL
DAVID L. PORTEOUS

RICHARD L. SPINDLE
1936-1975
CARL J. RIDDERING
1904-1977
CLIFFORD C. CHRISTENSON
1915-1982
ROBERT G. HOWLETT
1906-1988

WALTER K. SCHMIDT
(RETIRED)

*ADMITTED IN
PEOPLE'S REPUBLIC OF CHINA

Grand Rapids
REPLY TO

August 19, 1991

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Andrew Tschampa (5HR-12)
RCRA Enforcement Branch
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
Region V
230 South Dearborn Street
Chicago, Illinois 60604

Ms. Lynn M. Spurr
Environmental Quality Analyst
Waste Management Division
MICHIGAN DEPARTMENT OF
NATURAL RESOURCES
621 N. 10th Street
P.O. Box 355
Plainwell, Michigan 49080

Re: United States v Allegan Metal Finishing Company,
Case No. K 86-441-CA4 (W.D. Mich.)

Dear Mr. Tschampa and Ms. Spurr:

Pursuant to paragraph 12 of the Consent Decree in the above-referenced RCRA action, we are writing to confirm Allegan Metal Finishing Company's good faith but unavailing efforts to satisfy the pollution liability insurance requirements for the holding ponds at the defendant's Allegan, Michigan facility. Allegan Metal Finishing Company hereby certifies that, despite its good faith efforts, the Company did not obtain such insurance coverage during the period since our last certification.

As further evidence of Allegan Metal Finishing Company's efforts in regard to obtaining pollution liability insurance coverage for accidental occurrences from the holding ponds at issue, we are enclosing a letter from Walter Spiech, Treasurer of Allegan Metal Finishing Company, confirming the defendant's

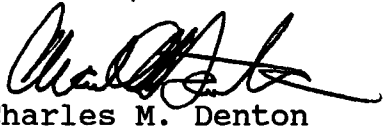
unavailing efforts in this regard. It is apparent that the restricted marketplace for this coverage continues, as the previously-referenced GAO study reflects.

Notwithstanding Allegan Metal Finishing Company's continuing good faith efforts to satisfy its pollution liability insurance requirements, it is the Company's position that it is no longer subject to these requirements. These requirements (contained in Michigan Administrative Rule R299.11003 [incorporating 40 C.F.R. § 265.147]) are applicable only to owners or operators of active hazardous waste treatment, storage or disposal facilities. The Allegan Metal Finishing Company has submitted a revised closure plan for its facility pursuant to paragraph 11(a) of the Consent Decree. Therefore, we submit that Allegan Metal Finishing Company should no longer be subject to the requirements of paragraph 12 of the Consent Decree.

Nevertheless, based upon the above and the enclosure, we submit that Allegan Metal Finishing Company remains in compliance with its obligations under this Consent Decree as to pollution liability insurance coverage. If you have any questions with regard to any of the above or the enclosure, please contact the undersigned.

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETT



Charles M. Denton

CMD/AMB/clw
Enclosure
cc: Walter C. Sosnowski
Walter Spiech

JUN 28 1991

5HR-12

Mr. Charles Denton
Varnum, Riddering, Schmidt & Howlett
Suite 800
171 Monroe Avenue, N.W.
Grand Rapids, Michigan 49503

Re: Allegan Metal Finishing Company
EPA ID No. MID 006 016 190
Civil Action No. K 86-411-CA4

Dear Mr. Denton:

This letter reiterates the provisions of the consent decree entered by the United States of America and Allegan Metal Finishing Company ("Allegan") in the United States District Court for the Western District of Michigan Southern Division, on August 1, 1989. Also, for your information, the United States Environmental Protection Agency (U.S. EPA) contact in the Resource Conservation and Recovery Act (RCRA) Enforcement Branch has changed from Mr. Andrew Tschampa to Ms. Sue Rodenbeck.

U.S. EPA is responding to Allegan's position regarding financial assurance, as stated in a May 21, 1991, letter to U.S. EPA from Ms. AnnMarie Black of Varnum, Riddering, Schmidt & Howlett. That letter states,

> "Notwithstanding Allegan Metal Finishing Company's continuing good faith efforts to satisfy its pollution liability insurance requirements, it is the Company's position that it is no longer subject to these requirements. . . . Therefore, we submit that Allegan Metal Finishing Company is no longer subject to the requirements of paragraph 12 of the Consent Decree" (p. 2).

The U.S. EPA disagrees.

The U.S. EPA's position is based, in part, upon the regulations given at MAC R 299.9502(8) and R 299.11003(1)(n), incorporating by reference 40 CFR 265.115 (financial assurance for closure costs) and 40 CFR 265.147(e) (liability coverage). These regulations provide relief from the financial assurance requirements for closure and liability upon acceptance of the closure certification by the authorized Agency, which is the MDNR. (Note that financial assurance requirements for post-closure care continue to apply if Allegan cannot complete closure by removal.) Also, you may wish to refer to the definition of "active life" given at MAC R 299.9101 (n) (40 CFR 260.10).

In addition, the consent decree specifically states,

> "This consent decree shall terminate by motion of either the United States or Allegan after each of the following has occurred: . . . (c) Allegan has properly submitted a certification of closure for the two surface impoundments" (paragraph 26, page 9).

Clearly, Allegan is required to continue the quarterly certifications required by paragraph 12 of the consent decree.

If you have any questions about this letter, please contact Ms. Sue Rodenbeck of my staff. Her telephone number is (312) 353-6134.

Sincerely yours,

Joseph M. Boyle, Chief
RCRA Enforcement Branch

cc: Ms. Susan Schneider, U.S. DOJ
Mr. Thomas Gezon, Acting U.S. Attorney
Mr. Tom Leep, MDNR Plainwell
Mr. Dennis Drake, MDNR Lansing
Mr. Ken Burda, MDNR Lansing
bcc: Mr. Rich Traub, RPB, 5HR-13
Mr. Steve Kaiser, ORC, 5CS-TUB-3
S.Rodenbeck, WP 5.1, 3.5" Disk 2, a:\allegan1, sar06-13-91

6/27/91

SIGNATURE/INITIAL CONCURRENCE REQUESTED - RCRA ENFORCEMENT BRANCH (REB)

TYP.	AUTH	IL/IN TES CHIEF	MI/WI TES CHIEF	MN/OH TES CHIEF	IL/MI/WI EPS CHIEF	IN/MN/OH EPS CHIEF	REB BRANCH CHIEF	RCRA ASSOC. DIR.	WMD DIVISION DIRECTOR
	SAR 6-26-91		6/26/91				6-27-90		

SIGNATURE/INITIAL CONCURRENCE REQUEST FROM ORC

OTHER STAFF	ASS'T REGIONAL COUNSEL	S.W.E.R. SECTION CHIEF	S.W.E.R. BRANCH CHIEF	REGIONAL COUNSEL
				SPK 6/26/91

Schneider 5

VARNUM, RIDDERING, SCHMIDT & HOWLETT

ATTORNEYS AT LAW

SUITE 800
171 MONROE AVENUE, N.W.
GRAND RAPIDS, MICHIGAN 49503
TELEPHONE (616) 459-4186
FAX (616) 459-8468
TELEX 1561593 VARN

SUITE 700
ONE MICHIGAN AVENUE
120 NORTH WASHINGTON SQUARE
LANSING, MICHIGAN 48933
TELEPHONE (517) 482-6237
FAX (517) 482-6937

350 EAST MICHIGAN AVENUE
KALAMAZOO, MICHIGAN 49007
TELEPHONE (616) 382-2300
FAX (616) 382-2382

321 WASHINGTON STREET
P.O. BOX 288
GRAND HAVEN, MICHIGAN 49417
TELEPHONE (616) 846-7100
FAX (616) 846-7101

REPLY TO Grand Rapids

Dear - I'll message - Block

June 26, 1991

Clerk of the Court
United States District Court
Western District of Michigan
Room B 35
410 W. Michigan Avenue
Kalamazoo, MI 49005

Re: United States of America v Allegan Metal Finishing Company
Case No.: K 86-441-CA4

Greetings:

Please find enclosed for the above-referenced matter:

1. DEFENDANT'S PETITION FOR REVIEW OF AGENCY ACTION PURSUANT TO CONSENT DECREE

2. PROOF OF SERVICE.

letter of stipo

Thank you for your attention in this matter.

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETT

AnnMarie Black

AMB/clw
Enclosures
cc: Walter C. Sosnowski
Susan Schneider

90-7-1-343

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v

ALLEGAN METAL FINISHING COMPANY,

Defendant.

/

CIVIL ACTION NO.: K 86-441-CA4

HONORABLE: RICHARD A. ENSLEN

DEFENDANT'S PETITION FOR REVIEW OF AGENCY ACTION PURSUANT TO CONSENT DECREE

NOW COMES Defendant Allegan Metal Finishing Company, by and through its attorneys Varnum, Riddering, Schmidt & Howlett, and hereby petitions this Court for review of the attached May 30, 1991, final agency action of the Michigan Department of Natural Resources ("MDNR") unilaterally amending Defendant's closure plan. In support of Defendant's Petition for Review, it states as follows:

1. The Plaintiff United States of America and Defendant Allegan Metal Finishing Company entered into a Consent Decree settling the above-entitled action which was entered by this Court on August 1, 1989.

2. The Consent Decree resolved a dispute between the parties arising under the federal Resource Conversation and Recovery Act ("RCRA") (42 U.S.C. § 6901 et seq.). The MDNR is the state agency authorized to administer this hazardous waste management program in Michigan.

3. Settlement of the action pursuant to the Consent Decree consisted of Defendant's payment of a settlement sum and provided for the closure of Defendant's two on-site holding ponds pursuant to the Defendant's closure plan and two previously filed proposed amendments thereto.

a. The MDNR has failed to act on (and has thereby approved) Defendant's first amendment to its previously approved closure plan, and has unreasonably refused to approve the proposed second amendment to that plan or the subsequently submitted May 16, 1990 closure plan amendment with November 28, 1990 supplement, pursuant to ¶ 11 of the Consent Decree.

b. By letter dated May 30, 1991, Defendant was notified by the MDNR that the agency had taken final action by unilaterally amending Defendant's closure plan. This amendment requires Defendant to implement closure pursuant to the unilateral action of the agency purportedly taken with Plaintiff U.S. EPA's authorization and approval.

4. Pursuant to Paragraph 24 of the Consent Decree, this Court retained jurisdiction "to enforce and modify this consent decree and to resolve disputes arising under it." Specifically, Paragraph 11(b) of the Consent Decree states that "Allegan shall implement the amended closure plan approved or issued by the MDNR, as final agency action, according to the schedule set forth in the approved plan unless, within 30 days of such final approval or issuance, Allegan petitions the Court for alternative closure

requirements under Paragraph 24 of this consent decree. In the latter case, Allegan shall close according to the Court's order."

5. The MDNR's May 30, 1991, unilateral amendment of the closure plan contravenes the provisions of the Consent Decree, RCRA, Michigan law and established administrative procedures for review of closure plans. The MDNR's unilateral amendment of Defendant's closure plan on behalf of Plaintiff was therefore unreasonable, arbitrary, capricious, and contrary to law, and Defendant hereby petitions for alternative closure requirements consistent with its May 16, 1990 amended closure plan with November 28, 1990 supplement (copies attached).

6. The May 30, 1991, action of the MDNR is final agency action reviewable under the terms of the Consent Decree and this Petition is timely filed thereunder.

WHEREFORE, Defendant Allegan Metal Finishing Company respectfully requests that this Court review Defendant's closure requirements pursuant to the Consent Decree and applicable law, and further grant Defendant such relief as the Court may deem appropriate in the circumstances, together with Defendant's costs and attorneys' fees related to this Petition.

VARNUM, RIDDERING, SCHMIDT & HOWLETT
Attorneys for Defendant Allegan
Metal Finishing Company

Dated: June 26, 1991.

By _____
Charles M. Denton
AnnMarie Black
Business Address:
171 Monroe Avenue, N.W., Suite 800
Grand Rapids, Michigan 49503
(616) 459-4186

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff, CIVIL ACTION NO.: K 86-441-CA4

v HONORABLE: RICHARD A. ENSLEN

ALLEGAN METAL FINISHING COMPANY,

Defendant.

Charles M. Denton (P-33269)
VARNUM, RIDDERING, SCHMIDT & HOWLETT
Attorneys for Appellant
171 Monroe Avenue, N.W., Suite 800
Grand Rapids, MI 49503
(616) 459-4186

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF KENT)

I, Callie L. Weick, being first duly sworn, deposes and says that I am an employee at Varnum, Riddering, Schmidt & Howlett, attorneys for Allegan Metal Finishing Company, and that on the 26th day of June, 1991, I served a copy of the **DEFENDANT'S PETITION FOR REVIEW OF AGENCY ACTION PURSUANT TO CONSENT DECREE**, by placing said copies in an envelope with postage fully prepaid in the United States mail to:

Susan Schneider
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

Callie L. Weick

Callie L. Weick

Subscribed and sworn to before me, a Notary Public, this 24th day of June, 1991.

Barbara Smith

Barbara Smith
Notary Public, Kent County, MI
My Commission Expires: 8/16/94

YC: Chuck Bikfalvy
Jim Roberts
Sue Rodenbeck, U.S. E.P.A.

VARNUM, RIDDERING, SCHMIDT & HOWLETT

ATTORNEYS AT LAW

SUITE 800
171 MONROE AVENUE, N.W.
GRAND RAPIDS, MICHIGAN 49503
TELEPHONE (616) 459-4186
FAX (616) 459-8468
TELEX 1561593 VARN

SUITE 700
ONE MICHIGAN AVENUE
120 NORTH WASHINGTON SQUARE
LANSING, MICHIGAN 48933
TELEPHONE (517) 482-6237
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321 WASHINGTON STREET
P.O. BOX 288
GRAND HAVEN, MICHIGAN 49417
TELEPHONE (616) 846-7100
FAX (616) 846-7101

REPLY TO Grand Rapids

June 19, 1991

Clerk of the Court
48th Circuit Court
County Building
113 Chestnut
Allegan, MI 49010

ATTORNEY GENERAL
ENVIRONMENTAL PROTECTION
JUN 20 1991
Assigned to

Re: Allegan Metal Finishing Company v MDNR

Greetings:

Enclosed, please find the Claim of Appeal and the Proof of Service regarding the above-referenced matter, together with filing fee of $10.00

Thank you for your attention to this matter.

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETT

Charles M. Denton

CMB/AMB/clw
Enclosures
cc: Walter C. Sosnowski
A. Michael Leffler
Delbert Rector

RECEIVED
JUN 1991
OFFICE OF RCRA
Waste Management Division
U.S. EPA, REGION V

RECEIVED
JUN 26 1991
Waste Management
Division

STATE OF MICHIGAN
IN THE 48TH CIRCUIT COURT
FOR THE COUNTY OF ALLEGAN

ALLEGAN METAL FINISHING COMPANY,

Appellant,

v

MICHIGAN DEPARTMENT OF NATURAL RESOURCES,

Appellee.

CASE NO.: 90-12093-AA

HONORABLE: George R. Corsiglia

Charles M. Denton (P-33269)
AnnMarie Black (P-44166)
Attorneys for Appellant
171 Monroe Avenue, N.W., Suite 800
Grand Rapids, MI 49503
(616) 459-4186

CLAIM OF APPEAL

Appellant, Allegan Metal Finishing Company, by its attorneys Varnum, Riddering, Schmidt & Howlett, hereby claims an appeal from the Final Agency Order entered by the Michigan Department of Natural Resources ("DNR"), on May 30, 1991, (copy attached), pursuant to MCR 7.104(A).

Respectfully submitted,

VARNUM, RIDDERING, SCHMIDT & HOWLETT

Dated: June 19, 1991

By: _____
Charles M. Denton (P-33269)
AnnMarie Black (P-44166)
Business Address and Telephone:
171 Monroe Avenue, N.W., Suite 800
Grand Rapids, Michigan 49503
(616) 459-4186

STATE OF MICHIGAN
IN THE 48TH CIRCUIT COURT
FOR THE COUNTY OF ALLEGAN

ALLEGAN METAL FINISHING COMPANY,

Appellant,

v

MICHIGAN DEPARTMENT OF NATURAL RESOURCES,

Appellee.

CASE NO.: _____ AA

HONORABLE: _____

Charles M. Denton (P-33269)
VARNUM, RIDDERING, SCHMIDT & HOWLETT
Attorneys for Appellant
171 Monroe Avenue, N.W., Suite 800
Grand Rapids, MI 49503
(616) 459-4186

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF KENT)

I, Callie L. Weick, being first duly sworn, deposes and says that I am an employee at Varnum, Riddering, Schmidt & Howlett, attorneys for Allegan Metal Finishing Company, and that on the 19th day of June, 1991, I served a copy of the **CLAIM OF APPEAL** by placing said copies in an envelope with postage fully prepaid in the United States mail to:

A. Michael Leffler
Assistant Attorney General
Law Building, 6th Floor
525 W. Ottawa
P.O. Box 30212
Lansing, MI 48909

Delbert Rector
Department of Natural Resources
Stevens T. Mason Building
P.O. Box 30028
Lansing, MI 48909

Callie L. Weick

Callie L. Weick

Subscribed and sworn to before me, a Notary Public, this 19th day of June, 1991.

Kim J. Kerkstra

Kim J. Kerkstra,
Notary Public, Ottawa County, MI
Acting in Kent County, MI
My Commission Expires: 12/1/92

Attn.: Charles Reito.

STATE OF MICHIGAN

John Engler
~~JAMES J. BLANCHARD~~, Governor

DEPARTMENT OF NATURAL RESOURCES

STEVENS T MASON BUILDING
P.O. BOX 30028
LANSING, MI 48909

Delbert Rector ~~DAVID F. HALES~~, Director

May 30, 1991

Mr. Walter C. Sosnowski, President
Allegan Metal Finishing Company
1274 Lincoln Road
Allegan, Michigan 49010

Dear Mr. Sosnowski:

SUBJECT: Allegan Metal Finishing Company
Closure Plan Amendment
MID 006 016 190

Background

Allegan Metal Finishing Company (AMFCO) submitted a closure plan dated April, 1985 which was modified by AMFCO on August 29, 1985. This closure plan was conditionally approved by the U.S. Environmental Protection Agency (U.S. EPA) on September 27, 1985. Subsequently AMFCO submitted a closure plan amendment request on June 11, 1987, which was denied by the Department of Natural Resources (Department) on June 29, 1987. The Company submitted a closure plan amendment request on January 17, 1989, which was denied by the Department on February 21, 1989. In accordance with the federal Consent Decree, the Department modified and approved a closure plan for AMFCO on December 27, 1989. In an agreement with AMFCO, the Department rescinded this closure plan modification on April 16, 1990, to allow AMFCO one more opportunity to submit a comprehensive closure plan amendment. Pursuant to this agreement, AMFCO submitted a closure plan amendment request on May 16, 1990. This request was denied by the Department on November 1, 1990. AMFCO then resubmitted a closure plan amendment request on November 28, 1990.

Conclusion

The November 28, 1990, closure plan amendment request is essentially the same proposed closure plan amendment which was denied by the Department on November 1, 1990. The only substantial difference in the November 28, 1990, proposed closure plan amendment is a modified ~~subsurface~~ sampling

plan. This proposed amendment is unapprovable as submitted, for the reasons set forth below.

Given that AMFCO remains in noncompliance with federal and state hazardous waste law and the company's November 28, 1990, proposal is unapprovable, the Department hereby reapproves the September 27, 1985, U.S. EPA conditionally approved closure plan with the following stipulations. Accordingly, AMFCO must close its hazardous waste units at its Allegan, Michigan location in compliance with the terms of the 1985 conditionally approved closure plan and the additional conditions of approval listed below.

1. The sampling plan from the November 28, 1990, proposed closure plan amendment is incorporated into the closure plan and made a part thereof with the following conditions.

   a) If significant impact is found at the 15 foot depth, AMFCO shall continue soil borings to greater depths to determine the depth of contamination.

   b) The sampling plan shall extend the gridded area laterally beyond the edge of the surface impoundment to determine the lateral extent of contamination.

   c) The sampling plan must include sample locations along the effluent discharge pipelines.

   d) Cleanup standards for the surface impoundments and discharge pipeline will be taken from the cleanup standards established in Michigan Act 307 of 1982, as amended.

   e) Background standards will be established using a minimum of four samples. The statistical procedure for determining levels of contamination of foreground samples will be explained.

   f) To ensure proper decontamination of equipment between samples, a field rinsate sample will be taken using a final rinsate of deionized water passed over the sampling equipment to check for residual contamination.

   g) Detection limits for specific test procedures shall be the lowest levels which Western Michigan Environmental Services, Inc. can meet.

The Waste Management Division recently received a sampling report submitted by AMFCO which will be reviewed to determine if the company has complied with the approved sampling plan.

2. The Company must comply with the federal land disposal restrictions.

3. The closure plan certification document must contain the following:

   - a copy of the approved closure plan;
   - a copy of the closure plan approval letter and any modifications;
   - a field sampling report;
   - a final analytical report;
   - a QA/QC report on closure activities such as sampling and removal (including deviations from the approved closure plan);
   - verification documentation of "clean" (i.e., exact grid locations, elevations of samples and excavations, mathematics, etc.);
   - documentation of further removal events and verification;
   - certification statement by owner/operator (to be signed by the authorized representative);
   - certification statement by an independent registered professional engineer (make sure there is an original signature and stamp);
   - a document verifying the ground water monitoring program is adequate and that a "clean" condition has been met; and
   - a post-closure plan if the "clean" closure was not achieved as planned.

4. Excavation equipment must be triple rinsed with a high pressure water stream or with a detergent solution for the decontamination process.

5. The closure cost estimate and financial assurance mechanism shall be updated to reflect current costs for all closure activities. The closure financial mechanism shall be submitted to the Department by June 30, 1991.

As stipulated in Section IV(11) of the Consent Decree, dated August 1, 1989, AMFCO shall implement the closure plan as stated above.

Deficiencies of the November 28, 1990 Closure Plan Amendment

Listed below are the deficiencies for the November 28, 1990, closure plan amendment. The deficiencies are the basis for denying the closure plan amendment request.

1. The proposed closure plan amendment does not address the final action to close this facility. The options listed in the proposed closure plan amendment are listed below with the Department's response.

   a) Delist and Landfill Off-site as Nonhazardous

   The U.S. EPA formally denied Allegan Metal Finishing Company's delisting petition in Volume 55, Number 180, Federal Register dated September 17, 1990. The Company filed a motion for stay in the United States Court of Appeals for the District of Columbia. The motion for stay was denied and filed on March 19, 1991. The proposal to list this as an option for closure does not make sense since this option has been denied by the Federal Government.

   b) Remove for Off-site Recycle, Reclaim, or Reuse

   Your May, 1990 closure plan amendment request states that if a delisting petition is not granted, AMFCO will pursue a recycling/reuse option or an in-place closure. The Department has discussed the recycling options of your waste with your company in the past. The Company received a January 4, 1988, letter from the Department and an October 13, 1989, letter from the U.S. EPA which clearly states that recycling options which you were pursuing are subject to the land disposal restrictions under RCRA and HSWA. According to AMFCO, the determination that land disposal restrictions apply to your recycling/reuse options eliminates them from consideration.

   To date, the Department has not received any additional recycling/reuse options. Due to the serious compliance problem with the closure schedule and the length of time to review these options, the Department cannot consider any further recycling/reuse options.

c) Solidify, Fixate and Close On-site as Hazardous

The closure plan amendment in-place closure option does not meet the surface impoundment and landfill design requirements of Michigan Act 64 administrative rules R 299.9603, R 299.9616(3), R 299.9619, R 299.9620, R 299.9621, and R 299.9622.

Michigan Act 64 administrative rule R 299.9616(3) states:

> "The owner or operator of an existing surface impoundment shall not close the impoundment as a landfill in accordance with 40 CFR 264.228 unless both of the following provisions are complied with:
>
> (A) The site of the surface impoundment meets the location standards of R 299.9603 or can be engineered to meet these standards.
>
> (B) The Director does either of the following:
> (i) Determines that all contaminated subsoils cannot be practically removed.
> (ii) Issues a construction permit for a facility alteration."

The in-place closure option does not meet the location standards established in R 299.9603(5). This rule states that a landfill or surface impoundment may not be placed in an area with a permeability of more than .000001 cm/sec. The original surface impoundment was designed to be a groundwater discharge unit and does not meet this requirement.

The site may be engineered to meet the location standards. This would require the excavation of the hazardous waste and hazardous waste contaminated subsoil and the construction of a landfill which meets the requirements of R 299.9619, R 299.9620, R 299.9621, and R 299.9622. Even with the engineered site location standards, a demonstration that the subsoils cannot be practically removed would have to be made.

d) Excavate and Treat Off-site as Hazardous

This is the method approved in the September 27, 1985, conditionally approved closure plan, which is reapproved with the stipulations specified on page 1 and 2 of this letter.

e) Other

The federal Hazardous and Solid Waste Amendments of 1984 required that all hazardous waste surface impoundments meet minimum technology design requirements and be permitted under the hazardous waste program or initiate closure by November 8, 1986. Consequently, the Department lacks the authority and flexibility to allow AMFCO to research new alternatives for closure. The Company must initiate closure in accordance with the requirements of the state and federal hazardous waste requirements.

2. The closure plan amendment does not document the steps necessary to conduct the closure operation, including the methods and equipment used during closure and the decontamination as required by 40 CFR 265.112(a) and R 299.9601(3).

3. The closure plan amendment does not include the provisions for the following documentation for the certification of closure to be submitted to the Department following completion of closure activities:

- a copy of the approved closure plan;
- a copy of the closure plan approval letter and any modifications;
- a field sampling report;
- a final analytical report;
- a QA/QC report on closure activities such as sampling and removal (including deviations from the approved closure plan);
- verification documentation of "clean" (i.e., exact grid locations, elevations of samples and excavations, mathematics, etc.);
- documentation of further removal events and verification;
- certification statement by owner/operator (to be signed by the authorized representative);

- certification statement by an independent registered professional engineer (make sure there is an original signature and stamp);
- a document verifying the ground water monitoring program is adequate and that a "clean" condition has been met; and
- a post-closure plan if the "clean" closure was not achieved as planned.

(40 CFR 265.115 and R 299.9601(3))

4. The closure plan amendment does not contain a closure cost estimate which accurately reflects the cost of closure, as required by 40 CFR 269.142 and R 299.9601(3).

5. The closure plan amendment does not contain a description of the removal methods, equipment used during removal, and decontamination procedures, as required by 40 CFR 265.228(a) and R 299.9601(3).

6. The closure plan amendment does not include a description of the treatment process and how the treatment will meet the land disposal restrictions established in the federal Hazardous and Solid Waste Amendments of 1984, as required by 40 CFR Part 268, R 299.9311, and R 299.9627.

If you have any questions concerning this matter, please contact Mr. Jim Roberts, Waste Management Division, Department of Natural Resources, P.O. Box 30241, Lansing, Michigan 48909, at telephone number 517-373-2487.

Sincerely,

Mindy Koch

Mindy Koch, Acting Chief
Waste Management Division
517-373-9523

cc: Mr. Rich Traub, U.S. EPA
Ms. Laura Lodisio, U.S. EPA
Ms. Lorraine Kosik, U.S. EPA
Mr. Tom Leep, DNR - Plainwell
Ms. [redacted], DNR
Ms. Kay Brower, DNR
Ms. Elaine Bennett, DNR
Mr. Jim Roberts, DNR
HWP/C&E File

VARNUM, RIDDERING, SCHMIDT & HOWLETT

ATTORNEYS AT LAW

JAMES N. DeBOER, JR.
GORDON B. BOOZER
WILLIAM K. VAN'T HOF
HILARY F. SNELL
PETER ARMSTRONG
ROBERT J. ELEVELD
KENT J. VANA
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SUITE 800
171 MONROE AVENUE, N.W.
GRAND RAPIDS, MICHIGAN 49503
TELEPHONE (616) 459-4186
FAX (616) 459-8468
TELEX 1561593 VARN

SUITE 700
ONE MICHIGAN AVENUE
120 NORTH WASHINGTON SQUARE
LANSING, MICHIGAN 48933
TELEPHONE (517) 482-6237
FAX (517) 482-6937

350 EAST MICHIGAN AVENUE
KALAMAZOO, MICHIGAN 49007
TELEPHONE (616) 382-2300
FAX (616) 382-2382

321 WASHINGTON STREET
P.O. BOX 288
GRAND HAVEN, MICHIGAN 49417
TELEPHONE (616) 846-7100
FAX (616) 846-7101

PERRIN RYNDERS
MARK S. ALLARD
TIMOTHY E. EAGLE
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JINYA CHEN*
DAWN D. BRACKMANN
MATTHEW V. PIWOWAR
KAREN R. BOWMAN
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KELLY W. BHIRDO
JEFFERY S. CRAMPTON
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ANNMARIE BLACK
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OF COUNSEL
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JOHN L. WIERENGO, JR.
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CLIFFORD C. CHRISTENSON
1915-1982
ROBERT G. HOWLETT
1906-1988

WALTER K. SCHMIDT
(RETIRED)

*ADMITTED IN
PEOPLE'S REPUBLIC OF CHINA

REPLY TO Grand Rapids

May 21, 1991

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Andrew Tschampa (5HR-12)
RCRA Enforcement Branch
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
Region V
230 South Dearborn Street
Chicago, Illinois 60604

Ms. Lynn M. Spurr
Environmental Quality Analyst
Waste Management Division
MICHIGAN DEPARTMENT OF
NATURAL RESOURCES
621 N. 10th Street
P.O. Box 355
Plainwell, Michigan 49080

Re: United States v Allegan Metal Finishing Company,
Case No. K 86-441-CA4 (W.D. Mich.)

Dear Mr. Tschampa and Ms. Spurr:

Pursuant to paragraph 12 of the Consent Decree in the above-referenced RCRA action, we are writing to confirm Allegan Metal Finishing Company's good faith but unavailing efforts to satisfy the pollution liability insurance requirements for the holding ponds at the defendant's Allegan, Michigan facility. Allegan Metal Finishing Company hereby certifies that, despite its good faith efforts, the Company did not obtain such insurance coverage during the period since our last certification.

As further evidence of Allegan Metal Finishing Company's efforts in regard to obtaining pollution liability insurance coverage for accidental occurrences from the holding ponds at issue, we are enclosing a letter from Walter Spiech, Treasurer of

Allegan Metal Finishing Company, confirming the defendant's unavailing efforts in this regard. It is apparent that the restricted marketplace for this coverage continues, as the previously-referenced GAO study reflects.

Notwithstanding Allegan Metal Finishing Company's continuing good faith efforts to satisfy its pollution liability insurance requirements, it is the Company's position that it is no longer subject to these requirements. These requirements (contained in Michigan Administrative Rule R299.11003 [incorporating 40 C.F.R. § 265.147]) are applicable only to owners or operators of active hazardous waste treatment, storage or disposal facilities. The Allegan Metal Finishing Company has submitted a revised closure plan for its facility pursuant to paragraph 11(a) of the Consent Decree. Therefore, we submit that Allegan Metal Finishing Company is no longer subject to the requirements of paragraph 12 of the Consent Decree.

Nevertheless, based upon the above and the enclosure, we submit that Allegan Metal Finishing Company remains in compliance with its obligations under this Consent Decree as to pollution liability insurance coverage. If you have any questions with regard to any of the above or the enclosure, please contact Charles Denton of this office or the undersigned.

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETT

AnnMarie Black

AMB/clw
Enclosure
cc: Walter C. Sosnowski
Walter Spiech

VARNUM, RIDDERING, SCHMIDT & HOWLETT
ATTORNEYS AT LAW

SUITE 800
171 MONROE AVENUE, N.W.
GRAND RAPIDS, MICHIGAN 49503
TELEPHONE (616) 459-4186
FAX (616) 459-8468
TELEX 1561593 VARN

CHARLES M. DENTON
ADMITTED IN MICHIGAN AND INDIANA

February 22, 1991

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Andrew Tschampa (5HR-12)
RCRA Enforcement Branch
United States Environmental Protection Agency
Region V
230 South Dearborn Street
Chicago, IL 60604

Ms. Lynn M. Spurr
Environmental Quality Analyst
Waste Management Division
Michigan Department of Natural Resources
621 N. 10th Street
P.O. Box 355
Plainwell, MI 49080

Re: United States v Allegan Metal Finishing Company, Case No. K86-441-CA4 (W.D. Mich.)

Dear Mr. Tschampa and Ms. Spurr:

Pursuant to paragraph 12 of the Consent Decree in the above-referenced RCRA action, we are writing to confirm Allegan Metal Finishing Company's good faith but unavailing efforts to satisfy the pollution liability insurance requirements for the holding ponds at the defendant's Allegan, Michigan facility. Allegan Metal Finishing Company hereby certifies that, despite its good faith efforts, the Company did not obtain such insurance coverage during the period since our last certification.

As further evidence of Allegan Metal Finishing Company's efforts in regard to obtaining pollution liability insurance coverage for accidental occurrences from the holding ponds at issue, we are enclosing a letter from Walter Spiech, Treasurer of Allegan Metal Finishing Company, confirming the defendant's unavailing efforts in this regard. It is apparent that the restricted marketplace for this coverage continues, as the previously-referenced GAO study reflects.

Notwithstanding Allegan Metal Finishing Company's continuing good faith efforts to satisfy its pollution liability insurance requirements, it is the Company's position that it is no longer subject to these requirements. These requirements (contained in Michigan Administrative Rule R299.11003 [incorporating 40 C.F.R. § 265.147]) are applicable only to owners or operators of active hazardous waste treatment, storage or disposal facilities. The Allegan Metal Finishing Company has submitted a revised closure plan for its facility pursuant to paragraph 11(a) of the Consent Decree. Therefore, we submit that Allegan Metal Finishing Company is no longer subject to the requirements of paragraph 12 of the Consent Decree.

Nevertheless, based upon the above and the enclosure, we submit that Allegan Metal Finishing Company remains in compliance with its obligations under this Consent Decree as to pollution liability insurance coverage. If you have any questions with regard to any of the above or the enclosure, please contact the undersigned.

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETT

Charles M. Denton

CMD/njh
Enclosure
c: Walter C. Sosnowski
Walter Spiech

AMFCO
ALLEGAN METAL FINISHING COMPANY
TELEPHONE (616) 673-6604
1274 LINCOLN ROAD • P.O. Box 217 • ALLEGAN, MICHIGAN 49010

February 20, 1991

RE: Pollution Liability Insurance

To Whom It May Concern:

This letter is to certify that I have tried once again to obtain pollution liability insurance as referenced by our RCRA "Consent Decree". I have not been successful despite my good faith efforts. The pollution insurance market remains virtually unchanged since my last endeavors in October 1990. Liberty Mutual and Frankenmuth Mutual our present business insurance co-carriers, Federated Insurance and Wausau Insurance Company all declined to write a pollution liability policy for our holding ponds when contacted this month.

If you have any questions or require further information, please contact the undersigned.

Sincerely,

ALLEGAN METAL FINISHING COMPANY

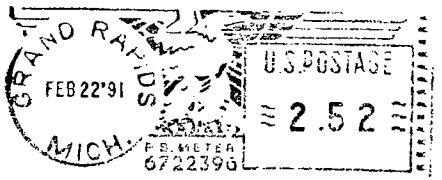
Walter Spiech
Treasurer

WS/gt
cc: Walter Sosnowski, President AMFCO
Ronald Vriesman, Dell Engineering
Charles M. Denton, VRS&H

CERTIFIED

P 490 153 813

MAIL



VARNUM, RIDDERING, SCHMIDT & HOWLETT

ATTORNEYS AT LAW

SUITE 800

171 MONROE AVENUE, N.W.

GRAND RAPIDS, MICHIGAN 49503

Is your **RETURN ADDRESS** completed on the reverse side?

HR

Mr. Andrew Tschampa (5HR-12)
RCRA Enforcement Branch
United States Environmental
Protection Agency
Region V
230 South Dearborn Street
Chicago, IL 60604

Return Receipt Service.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALLEGAN METAL FINISHING COMPANY,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

Docket No. 90-1598

PETITION FOR REVIEW

Pursuant to Section 7006 (a)(1) of the Solid Waste Disposal Act, 42 U.S.C. § 6976(a)(1), and Rule 15 of the Federal Rules of Appellate Procedure, Allegan Metal Finishing Company hereby petitions this Court for review of a final rule promulgated by the United States Environmental Protection Agency denying Allegan Metal Finishing Company's petition to delist, published at 55 Fed. Reg. 38058-64 (Sept. 17, 1990).

Respectfully submitted,

Charles M. Denton
William H. Merrill
AnnMarie Black
VARNUM, RIDDERING, SCHMIDT & HOWLETT
171 Monroe Avenue, N.W.
Suite 800
Grand Rapids, Michigan 49503
(616) 459-4186

Lynn L. Bergeson
WEINBERG, BERGESON & NEUMAN
1300 Eye Street, N.W.
Suite 600 East
Washington, D.C. 20005
(202) 962-8585

Counsel for Allegan Metal
Finishing Company

December 14, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. ALLEGAN METAL FINISHING COMPANY Defendant.	)	Civil Action No. K 86-441-CA4
	)	Hon. Richard A. Enslen

UNITED STATES' DISPUTED FACTS

The United States of America, by and through its attorneys, hereby sets forth those fact issues disputed by Defendant.

1. Allegan did not submit a Part A permit application for any activity at the Allegan facility to U.S. EPA on or before November 19, 1980.

2. Allegan is the owner and operator of a hazardous waste land disposal facility.

3. Allegan did not submit to U.S. EPA documentation of financial assurance for closure by August 15, 1985.

4. Allegan did not submit to U.S. EPA a statement certifying compliance with the financial responsibility requirements for the Allegan facility on or before November 8, 1985.

5. Allegan has not demonstrated financial responsibility for bodily injury and property damage to third parties caused by sudden accidental occurrences arising form the operation of the Allegan facility.

6. Allegan has not demonstrated financial responsibility for bodily injury and property damages to third parties caused by non sudden accidental occurrences arising from operation of the Allegan facility.

7. Allegan failed to pay to the U.S. EPA the $16,000 penalty required by the CAFO.

8. Allegan does not have a RCRA permit for the Allegan facility.

9. Allegan has not implemented its U.S. EPA approved Closure Plan for the Allegan facility.

Respectfully submitted,

UNITED STATES OF AMERICA
By Its Attorneys

ROGER J. MARZULLA
Assistant Attorney General
Land and Natural Resources Division

JOHN A. SMIETANKA
United States Attorney
Western District of Michigan

BY: _____

GORDON G. STONER
U.S. Department of Justice
Environmental Enforcement Section
Land and Natural Resources Division
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044

THOMAS GEZON
Chief, Assistant United States
Attorney

OF COUNSEL:

CONNIE PUCHALSKI
Assistant Regional Counsel
U.S. Environmental Protection
Agency - Region V
230 South Dearborn Street
Chicago, Illinois 60604

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing United States' Disputed Fact Issues was this 6th day of April 1988 was mailed, postage prepaid, addressed to:

Charles M. Denton
Suite 800
171 Monroe Avenue, N.W.
Grand Rapids, MI 49503

Gordon G. Stoner
Attorney
Land and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044

VARNUM, RIDDERING, SCHMIDT & HOWLETT

ATTORNEYS AT LAW

JAMES N. DeBOER, JR.
GORDON B. BOOZER
WILLIAM K. VAN'T HOF
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SUITE 800
171 MONROE AVENUE, N.W.
GRAND RAPIDS, MICHIGAN 49503
TELEPHONE (616) 459-4186
FAX (616) 459-8468
TELEX 1561593 VARN

SUITE 700
ONE MICHIGAN AVENUE
120 NORTH WASHINGTON SQUARE
LANSING, MICHIGAN 48933
TELEPHONE (517) 482-6237
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350 EAST MICHIGAN AVENUE
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1915-1982
ROBERT G. HOWLETT
1906-1988

WALTER K. SCHMIDT
(RETIRED)

*ADMITTED IN
PEOPLE'S REPUBLIC OF CHINA

REPLY TO

Grand Rapids

November 1, 1990

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Andrew Tschampa (5HR-12)
RCRA Enforcement Branch
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
Region V
230 South Dearborn Street
Chicago, Illinois 60604

Ms. Lynn M. Spurr
Environmental Quality Analyst
Waste Management Division
MICHIGAN DEPARTMENT OF
NATURAL RESOURCES
621 N. 10th Street
P.O. Box 355
Plainwell, Michigan 49080

Re: United States v Allegan Metal Finishing Company,
Case No. K 86-441-CA4 (W.D. Mich.)

Dear Mr. Tschampa and Ms. Spurr:

Pursuant to paragraph 12 of the Consent Decree in the above-referenced RCRA action, we are writing to confirm Allegan Metal Finishing Company's good faith but unavailing efforts to satisfy the pollution liability insurance requirements for the holding ponds at the defendant's Allegan, Michigan facility. Allegan Metal Finishing Company hereby certifies that, despite its good faith efforts, the Company did not obtain such insurance coverage during the period since our last certification.

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Allegan Metal Finishing Company, confirming the defendant's unavailing efforts in this regard. It is apparent that the restricted marketplace for this coverage continues, as the previously-referenced GAO study reflects.

Notwithstanding Allegan Metal Finishing Company's continuing good faith efforts to satisfy its pollution liability insurance requirements, it is the Company's position that it is no longer subject to these requirements. These requirements (contained in Michigan Administrative Rule R299.11003 [incorporating 40 C.F.R. § 265.147]) are applicable only to owners or operators of active hazardous waste treatment, storage or disposal facilities. The Allegan Metal Finishing Company has submitted a revised closure plan for its facility pursuant to paragraph 11(a) of the Consent Decree. Therefore, we submit that Allegan Metal Finishing Company is no longer subject to the requirements of paragraph 12 of the Consent Decree.

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Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETT

Charles M. Denton

AMB/jad
Enclosure
cc: Walter C. Sosnowski
Walter Spiech

AMFCO
ALLEGAN METAL FINISHING COMPANY
TELEPHONE (616) 673-6604
1274 LINCOLN ROAD • P.O. Box 217 • ALLEGAN, MICHIGAN 49010

October 11, 1990

RE: Pollution Liability Insurance

To Whom It May Concern:

This letter is to certify that I have tried once again to obtain pollution liability insurance as referenced by our RCRA "Consent Decree". I have not been successful despite my good faith efforts. The pollution insurance market remains virtually unchanged since my last endeavors in February 1990. Liberty Mutual Insurance Company, our present insurance carrier, Federated Insurance Company and Wausau Insurance all declined to write a pollution liability policy for our holding ponds when contacted this month.

If you have any questions or require further information, please contact the undersigned.

Sincerely,

ALLEGAN METAL FINISHING COMPANY

Walter Spicch

Walter Spicch
Treasurer

WS/ss

cc: Walter Sosnowski, President - AMFCO
Ronald Vriesman - Dell Engineering
Charles M. Denton - VRS & H

Lynn ——
file ——

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

STANLEY D. STEINBORN
- *Chief Assistant Attorney General*

FRANK J. KELLEY
ATTORNEY GENERAL

LANSING
48909

April 30, 1990

Mr. Charles M. Denton
Attorney at Law
Varnum, Riddering, Schmidt
& Howlett
171 Monroe Avenue, N.W.
Suite 800
Grand Rapids, MI 48503

Re: United States -v- Allegan Metal Finishing Company
Civil Action No. K86-441-CA4

Dear Mr. Denton:

I am writing in response to your January 3, 1990 letter regarding closure of two surface impoundments located at the Allegan Metal Finishing Company's Allegan, Michigan, facility. As you know, the Consent Decree entered into by the United States and Allegan Metal in the above-listed action expressly requires the Company to close its two surface impoundments consistent with the requirements of the Resource Conservation and Recovery Act, 42 USC 6901 et seq. Under the Decree, closure of the surface impoundments must occur as follows:

> "Within 30 days after the entry of this consent decree, or MDNR rejection or approval of Allegan's previously submitted amendments, whichever is later, Allegan shall, as necessary depending upon the MDNR action on its amendments, submit to the MDNR an amended closure plan pursuant to the requirements of the Michigan Hazardous Waste Management Act and RCRA."
> Consent Decree, ¶11(a)

cc: EPA Rpt.
5/2/90

In our opinion, Allegan Metal has failed to timely comply with the above-quoted requirements of the federal Decree. Contrary to your claim, on June 29, 1987, MDNR rejected the Company's first proposed amendment (dated June 11, 1987) to its 1985 closure plan. On that date, Mr. James Roberts of the MDNR informed Mr. Ronald Vriesman of Allegan Metal it was important for the Company to remain on a closure schedule to avoid any additional enforcement actions. See Attachment 1. Mr. Roberts further clarified his rejection of the initial proposed amendment by letter dated April 27, 1988 and addressed to Mr. Walter Sosnowski, President of Allegan Metal. See Attachment 2. Therein, Mr. Roberts unequivocally stated the 1985 closure plan was not amended for the reason there had been no written approval for such amendment given by MDNR. More to the point, Mr. Roberts informed Allegan Metal that closure activities should have been initiated at its surface impoundments no later than February 6, 1987.[1]

Similarly, MDNR has rejected Allegan Metal's proposed second amendment (dated January 17, 1989) to the 1985 closure plan. By letter dated February 21, 1989, Mr. Roberts informed Mr. Vriesman that MDNR could not approve of this proposed second amendment. See Attachment 3. Mr. Roberts even identified specific

---

[1]Your claim that the original June, 1987 amendment was never rejected by MDNR is, as discussed above, untenable. Nevertheless, even assuming you are correct, your statement that "[b]ecause the MDNR has failed to respond to the proposed amendment, dated June 1987, we are proceeding under the assumption that there are no objections to that proposed amendment and in any event your objections would be deemed waived under applicable regulations", is meritless. As you undoubtedly are aware, the owner or operator of a hazardous waste management facility must submit a written request to amend to MDNR in order to authorize a change to an approved closure plan. 40 CFR 265.112(c). This request must include a copy of the proposed amended plan. Id. Unless minor in nature, proposed amendments to approved closure plans are subject to public comment and, where appropriate, public hearing procedures. 40 CFR 265.112(c)(3). At no time were these regulatory procedures invoked with respect to the June, 1987 amendment. More importantly, MDNR cannot waive the public's right to participate in the closure plan development process.

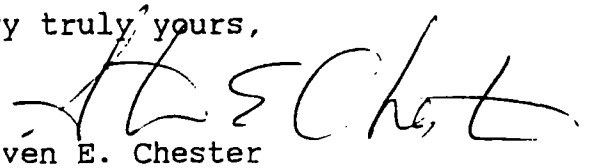
deficiencies with the proposed amendment. Even though discussions occurred and letters were sent subsequent to this rejection, at no time did Allegan Metal correct the deficiencies outlined by Mr. Roberts in his February 21, 1989 letter.

As an additional matter, in your January 3, 1990 correspondence, you suggest that Allegan Metal's 1985 closure plan provides that subsurface soils are to be analyzed pursuant to the EP toxicity test rather than being considered a listed hazardous waste. In response thereto, I suggest you reread the September 27, 1985 letter to Walter Sosnowski from Basil Constantelos of the United States Environmental Protection Agency. See Attachment 4. Therein, Mr. Constantelos indicated the Company's closure plan was approved subject to the conditions described in the enclosure. Condition No. 1 of the enclosure requires that any soils/subsoils containing levels of metals in concentrations over the background level be managed as a hazardous waste. Since F006 waste was directly discharged to the impoundments, under RCRA any contaminated soils/subsoils excavated during closure must be treated as a listed hazardous waste and, therefore, subject to the land ban requirements.

Despite our obvious disagreement regarding the above-discussed matters, the parties have reached a compromise resolution. As you know, Allegan Metal has dismissed with prejudice its Claim of Appeal regarding the December 27, 1989 decision by MDNR to conditionally approve a closure plan for the Company's surface impoundments. As the quid pro quo, MDNR has rescinded its December approval action by letter dated April 16, 1990. Consistent with the compromise and the requirements of the federal decree, Allegan Metal has until May 16, 1990 to submit a comprehensive amended closure plan for MDNR's review. After MDNR takes final action on such a proposed amendment, the Company will have the opportunity to seek judicial review of MDNR's action. The question left open for now, but hopefully resolved before MDNR takes final action on Allegan Metal's submittal, is what forum will be the proper forum for such review; i.e., will it be pursuant to the federal Decree or will it be pursuant to circuit court review?

In the meantime, we are attempting to schedule a meeting on this matter. Your cooperation in this regard will be appreciated.

Very truly yours,



Steven E. Chester
Assistant Attorney General
Environmental Protection Division
P.O. Box 30212
Lansing, MI 48909
Telephone: (517) 373-7780

SEC/js
Attachments
cc: Gordon Stoner
Walter Sosnowski
Ronald Vriesman
Andrew Tschampa

STATE OF MICHIGAN

JAMES J. BLANCHARD, Governor

DEPARTMENT OF NATURAL RESOURCES

STEVENS T. MASON BUILDING
BOX 30028
LANSING, MI 48909

Gordon E. Guyer, Director

June 29, 1987

Mr. Ronald R. Vriesman, P.E.
Senior Project Manager
Dell Engineering, Inc.
245 East Lakewood Blvd.
Holland, Michigan 49424-2006

Dear Mr. Vriesman:

I have received a closure plan addendum for Allegan Metal Finishing Co. (A.M.F.C.) which you submitted to Mr. Richard Traub on June 11, 1987. As stated in the conclusion of your addendum, A.M.F.C. would like to have the option to address closure of the surface impoundments as non-regulated units if a delist is granted for the F006 waste generated at the facility. If A.M.F.C. is granted a delist for the waste, the surface impoundments would not have to be closed under Michigan Act 64 or RCRA. The surface impoundments will still be subject to closure under Michigan Act 245 because of contaminated groundwater at the facility.

I would like to take this opportunity to caution you on waiting for a delisting decision from the U.S. EPA before starting closure of the surface impoundments. U.S. EPA has typically taken two or more years to arrive at delisting decision. Considering the current enforcement action being taken against the company, by the U.S. EPA/Dept. of Justice, and the November 1988 deadline for permitting or closing all land disposal units, it is very important for the company to remain on a closure schedule that will avoid any additional enforcement actions.

If you have any questions concerning this matter, please contact me.

Sincerely,

James D. Roberts

James D. Roberts
Environmental Engineer
Waste Management Division
517-373-2730

cc: Mr. Ken Burda/C&E File
Ms. Lynn Spurr Plainwell
Mr. Rich Traub
Mr. Joe Baker
Ms. Mary Murphy

ATTACHMENT 1

STATE OF MICHIGAN

JAMES J. BLANCHARD, Governor

DEPARTMENT OF NATURAL RESOURCES

STEVENS T. MASON BUILDING
BOX 30028
LANSING, MI 48909

GORDON E. GUYER, Director

April 27, 1988

Mr. Walter Sosnowski, President
Allegan Metal Finishing Company
1274 Lincoln Road
Allegan, Michigan 49010

Dear Mr. Sosnowski:

I have received a letter from Mr. Ronald R. Vriesman dated March 18, 1988, written on behalf of Allegan Metal Finishing Company (AMFC). The letter was written to notify the Michigan Department of Natural Resources (MDNR) about the status of closure of your Michigan Act 64 regulated hazardous waste surface impoundments and to request an extension of time to conduct the closure operation.

I am aware that AMFC is currently working with the U.S. Department of Justice (DOJ) towards a settlement of an enforcement action against AMFC. The enforcement action was initiated when the surface impoundments at your facility remained in use after the November 8, 1986, deadline for applying for a hazardous waste permit or going through closure as mandated in the Hazardous and Solid Waste Amendments of 1984 (HSWA).

Under the Resource Conservation and Recovery Act (RCRA) interim status standards, all regulated units are required to go through closure within 90 days after receiving the final volume of waste or within 90 days after approval of the closure plan (40 CFR 265.113). If a company did not apply for a permit to operate the land disposal unit, the last day the unit could receive waste was November 8, 1986, therefore, AMFC should have initiated closure activities by February 6, 1987.

An approval for an extension of time to initiate closure is not appropriate since you are currently under an enforcement action. When AMFC reaches a settlement with the DOJ, the consent order will contain a schedule for compliance. As part of your settlement you should discuss your closure implementation needs with the DOJ.

With regard to the addendum sent in on June 11, 1987, a letter was sent to Mr. Vriesman on June 29, 1987. This letter addressed the delisting petition and how it affects your closure plan. The closure plan for AMFC, as approved September 25, 1985, is not amended in any manner without written approval from this Division.

ATTACHMENT 2

STATE OF MICHIGAN

JAMES J. BLANCHARD, Governor

DEPARTMENT OF NATURAL RESOURCES

STEVENS T. MASON BUILDING
P.O. BOX 30028
LANSING, MI 48909

DAVID F. HALES Director

February 21, 1989

Mr. Ronald R. Vriesman, P.E.
Senior Project Manager
Dell Engineering, Inc.
245 East Lakewood Boulevard
Holland, Michigan 49424-2066

Dear Mr. Vriesman:

The Michigan Department of Natural Resources (Department) has received your request for an amendment to the Allegan Metal Finishing Company closure plan. The proposed amendment to the closure plan suggests that hazardous waste (F006) from the surface impoundments may be taken off-site as a raw material product or as a recyclable material.

The Department cannot approve the proposed amendment as written. The amendment request must include specific information on 1) where the waste will be sent; 2) how the waste will be transported (including manifesting); 3) how the waste will be recycled or disposed; and 4) whether the facility receiving the waste is licensed to handle it. If you make a final determination that the F006 waste will be sent off-site as a recyclable material or a raw material product, then a closure plan amendment should be submitted at that time. The closure plan amendment must include the information listed above. The Department will review future requests as we receive them.

If you have any questions regarding this issue, please contact me.

Sincerely,

James D. Roberts

James D. Roberts
Environmental Engineer
Waste Management Division
517-373-7718

cc: Mr. Joe Baker, EPA
Mr. Rich Traub, EPA
Ms. Marilyn Sabadaszka, EPA
Mr. Ken Burda, DNR/C&E File
Ms. Lynn Spurr, DNR

RECEIVED
FEB 24 1989

R1026
8/88

XC: Gordon Stoner - USDOJ

ATTACHMENT 3

COPY

5HS-13

SEP 2 7 1985

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Walter Sosnowski
Allegan Metal Finishing Company
1274 Lincoln Road
Allegan, Michigan 49010

RE: Closure Plan
Allegan Metal Finishing Co.
MID 006 016 190

Dear Mr. Sosnowski:

We have reviewed the closure plan dated April, 1985 and the revisions to the plan dated August 29, 1985. These plans are hereby approved subject to the conditions described in the enclosure to this letter. Please be aware that closure does not terminate interim status. A corrective action order may be issued to your facility, if the United States Environmental Protection Agency determines that a release of hazardous waste or hazardous waste constituents is taking or has taken place.

When closure is completed please submit the certification required by 40 CFR 265.115.

If you have any questions regarding the plans, please contact Mr. Richard Traub of my staff, at (312) 886-6138.

Sincerely,

Basil G. Constantelos, Director
Waste Management Divison

cc: Alan J. Howard, MDNR w/enclosure
John Wonunsky, MDNR w/enclosure

RECEIVED
OCT 9 1985
HAZARDOUS WASTE DIVISION

ATTACHMENT 4

CLOSURE PLAN APPROVAL CONDITIONS

1. In order to meet the requirements of 40 CFR 265.228(a) and (b) regarding clean closures, underlying and surrounding contaminated soils must be removed. Any soils/subsoils which contain concentration levels of chromium, cyanide, cadmium and nickel, above background levels for those constituents are considered contaminated and must be handled and disposed of as a hazardous waste. Concentration levels are to be determined by analysis for total metals.

2. A sampling grid is to be determined for each lagoon, with grid spacing no more than 40 feet, and samples shall be taken at each grid intersection.

3. To determine if a grid sample is contaminated, the concentration level of the grid sample shall be compared to the concentration level of the background sample using the Students t-test at the 95% confidence level. If the grid sample concentration level is higher than the background level and by the t-test, this difference is determined to be statistically significant, then that grid sample is considered contaminated. Further excavation within a radius of 30 feet from that point is required.

4. Analysis of samples shall be in accordance with methods described in Test Methods for Evaluating Solid Waste, Physical/Chemical Methods, EPA SW-846, Second Edtion, 1982.

5. As of May 8, 1985 the placement of bulk or non-containerized liquid hazardous waste in a landfill is prohibited, even if absorbents have been added. The waste must be stabilized or treated and solidified by other means, prior to its off-site disposal in a landfill.

6. Submit the following within 10 days of determination:

   - background concentrations
   - grid sampling pattern
   - grid sample point concentrations
   - results of statistical comparison between grid point values and background.

7. Any soil contaminated as a result of removing piping or other appurtenances to the impoundments must be considered a hazardous waste and handled accordingly.

Tom ✓
Lynn ✓
File ORDER

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

STANLEY D. STEINBORN
Chief Assistant Attorney General

FRANK J. KELLEY
ATTORNEY GENERAL

LANSING
48909

cc: EPA Mar Rpt.
3/19/90

March 5, 1990

RECEIVED
MAR 7 1990
WMD-PLAINWELL

Clerk of the Court
Allegan County Circuit Court
County Building
113 Chestnut Street
Allegan, MI 49010

Re: Allegan Metal Finishing Company -v- Michigan Department of Natural Resources
Allegan County Circuit Court File No. 90-12093-AA

Dear Clerk:

Enclosed, for filing in the above-entitled matter, please find the original Notice of Hearing, together with Proof of Service.

Very truly yours,

Steven E. Chester
Assistant Attorney General
Environmental Protection Division
P.O. Box 30212
Lansing, MI 48909
Telephone: (517) 373-7780

SEC/js
Enclosures

cc: Charles M. Denton
Assignment Clerk

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ALLEGAN

ALLEGAN METAL FINISHING COMPANY,

Appellant,

v

MICHIGAN DEPARTMENT OF NATURAL RESOURCES,

Appellee.

File No. 90-12093-AA

Honorable George R. Corsiglia

Steven E. Chester (P32984)
Assistant Attorney General
Environmental Protection Division
P.O. Box 30212
Lansing, MI 48909
Telephone: (517) 373-7780
Attorney for Appellee

Charles M. Denton (P33269)
Varnum, Riddering, Schmidt & Howlett
171 Monroe Avenue, N.W.
Suite 800
Grand Rapids, MI 48503
Telephone: (616) 459-4186
Attorney for Appellant

NOTICE OF HEARING

TO: Clerk of the Court

Assignment Clerk

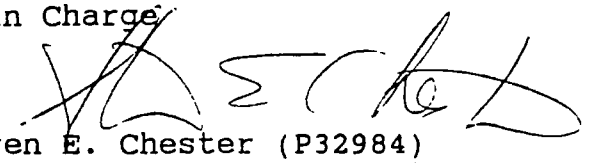
Charles M. Denton
Varnum, Riddering, Schmidt & Howlett
171 Monroe Avenue, N.W.
Suite 800
Grand Rapids, MI 48503

PLEASE TAKE NOTICE that Michigan's Motion to Dismiss Appellant's Claim of Appeal will be brought on for hearing before Honorable George R. Corsiglia on Friday, April 27, 1990, at 3:30 p.m.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Stewart H. Freeman
Assistant Attorney General
In Charge



Steven E. Chester (P32984)
Assistant Attorney General
Environmental Protection Division
P.O. Box 30212
Lansing, MI 48909
Telephone: (517) 373-7780

Dated: March 5, 1990
js/sec7/amnh

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ALLEGAN

ALLEGAN METAL FINISHING COMPANY,

Appellant,

File No. 90-12093-AA

v

MICHIGAN DEPARTMENT OF
NATURAL RESOURCES,

Appellee.

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF INGHAM)

Susan Bertram, being first duly sworn, deposes and says that on March 5, 1990, she served a copy of Notice of Hearing upon the individuals listed below by enclosing same in an envelope with postage fully prepaid thereon and depositing same in the United States Post Office for transmittal by first class mail, plainly addressed as follows:

Charles M. Denton
Varnum, Riddering, Schmidt
& Howlett
171 Monroe Avenue, N.W.
Suite 800
Grand Rapids, MI 48503

Susan Bertram

Subscribed and sworn to before me this 5th day of March, 1990.

Jeri Sherwood, Notary Public
Ingham County, Michigan
My Commission Expires: 8/24/91

VARNUM, RIDDERING, SCHMIDT & HOWLETT
ATTORNEYS AT LAW

SUITE 700
ONE MICHIGAN AVENUE
120 NORTH WASHINGTON SQUARE
LANSING, MICHIGAN 48933
TELEPHONE (517) 482-6237
FAX (517) 482-6937

SUITE 800
171 MONROE AVENUE, N.W.
GRAND RAPIDS, MICHIGAN 49503
TELEPHONE (616) 459-4186
FAX (616) 459-8468
TELEX 1561593 VARN

350 EAST MICHIGAN AVENUE
KALAMAZOO, MICHIGAN 49007
TELEPHONE (616) 382-2300
FAX (616) 382-2382

REPLY TO GRAND RAPIDS

CHARLES M. DENTON
ADMITTED IN MICHIGAN AND INDIANA

February 26, 1990

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Andrew Tschampa (5HR-12)
RCRA Enforcement Branch
United States Environmental
Protection Agency
Region V
230 South Dearborn Street
Chicago, IL 60604

Ms. Lynn M. Spurr
Environmental Quality Analyst
Waste Management Division
Michigan Department of
Natural Resources
621 N. 10th Street
P.O. Box 355
Plainwell, MI 49080

Re: United States v Allegan Metal Finishing Company
Case No. K 86-441-CA4 (W.D. Mich.)

Dear Mr. Tschampa and Ms. Spurr:

Pursuant to paragraph 12 of the Consent Decree in the above-referenced RCRA action, we are writing to confirm Allegan Metal Finishing Company's good faith but unavailing efforts to satisfy the pollution liability insurance requirements for the holding ponds at the defendant's Allegan, Michigan facility. Allegan Metal Finishing Company hereby certifies that, despite its good faith efforts, the Company did not obtain such insurance coverage during the period since our November 27, 1989 certification.

As further evidence of Allegan Metal Finishing Company's efforts in regard to obtaining pollution liability insurance coverage for accidental incurrences from the holding ponds at issue, we are enclosing the Company's correspondence dated February 21, 1990 confirming their unavailing efforts in this regard. As you can see, none of the referenced insurers was willing to underwrite this risk and provide pollution liability coverage for the ponds. It is apparent that the restricted marketplace for this coverage continues, as the previously referenced GAO study reflects.

Based upon the above and the enclosure, we submit that Allegan Metal Finishing Company remains in compliance with its obligations under this Consent Decree as to pollution liability insurance coverage. If you have any questions with regard to any of the above or the enclosure, please contact the undersigned.

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETT

Charles M. Denton

CMD/njv
c: Walter C. Sosnowski
Walter Spiech

AMFCO
ALLEGAN METAL FINISHING COMPANY
TELEPHONE (616) 673-6604
1274 LINCOLN ROAD • P.O. Box 217 • ALLEGAN, MICHIGAN 49010

February 21, 1990

RE: Pollution Liability Insurance

To Whom It May Concern:

This letter is to certify that I have tried once again to obtain pollution liability insurance as referenced by our RCRA "Consent Decree". I have not been successful despite my good faith efforts. The pollution insurance market remains virtually unchanged since my last endeavors in November 1989. Liberty Mutual, our present insurance carrier, Federated Insurance and Wausau Insurance Company all declined to write a pollution liability policy for our holding ponds when contacted this month.

If you have any questins or require further information, please contact the undersigned.

Sincerely,

ALLEGAN METAL FINISHING COMPANY

Walter Spiech
Treasurer

WS/jw
cc/ Walter Sosnowski, President AMFCO
Ronald Vriesman, Dell Engineering
Charles M. Denton, VRS&H

Lynn
file
XC: EPA JAN Rpt 1/26

VARNUM, RIDDERING, SCHMIDT & HOWLETT

ATTORNEYS AT LAW

SUITE 800
171 MONROE AVENUE, N.W.
GRAND RAPIDS, MICHIGAN 49503
TELEPHONE (616) 459-4186
FAX (616) 459-8468
TELEX 1561593 VARN

SUITE 700
ONE MICHIGAN AVENUE
120 NORTH WASHINGTON SQUARE
LANSING, MICHIGAN 48933
TELEPHONE (517) 482-6237
FAX (517) 482-6937

350 EAST MICHIGAN AVENUE
KALAMAZOO, MICHIGAN 49007
TELEPHONE (616) 382-2300
FAX (616) 382-2382

REPLY TO Grand Rapids

January 25, 1990

FEDERAL EXPRESS

Court Clerk
United States District Court
Western District of Michigan
410 W. Michigan
Kalamazoo, MI 49005

Re: United States v Allegan Metal Finishing Company
Case No. K86-441-CA4

To The Court Clerk:

Enclosed please find an original and one copy of Defendants' Petition for Review of Agency Action Pursuant to Consent Decree and Proof of Service for the above-referenced matter.

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETT

Theresa M. Pouley

TMP/njv
Enclosure
c: Walter C. Sosnowski
Gordon G. Stoner
Connie Puchalski
Thomas J. Gezon
Lynn M. Spurr ✓

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff, Civil Action No. K 86-441-CA4

v Honorable Richard A. Enslen

ALLEGAN METAL FINISHING COMPANY,

Defendant.
_____/

DEFENDANT'S PETITION FOR REVIEW OF AGENCY ACTION PURSUANT TO CONSENT DECREE

NOW COMES Defendant, Allegan Metal Finishing Company, by and through its attorneys, Varnum, Riddering, Schmidt & Howlett, and hereby petitions this Court for review of the attached December 27, 1989 final agency action of the Michigan Department of Natural Resources ("MDNR") unilaterally amending Defendant's closure plan. In support of Defendant's Petition for Review, it states as follows:

1. The Plaintiff United States of America and Defendant Allegan Metal Finishing Company entered into a Consent Decree settling the above-entitled action which was entered by this Court on August 1, 1989.

2. The Consent Decree resolved a dispute between the parties arising under the federal Resource Conversation and Recovery Act ("RCRA") (42 U.S.C. § 6901 et seq.). The MDNR is the state agency authorized to administer this hazardous waste management program in Michigan.

3. Settlement of the action pursuant to the Consent Decree consisted of Defendant's payment of a settlement sum and provided for the closure of Defendant's two on-site holding ponds pursuant to the Defendant's closure plan and two previously filed proposed amendments thereto.

a. The MDNR has failed to act on (and has thereby approved) Defendant's first amendment to its previously approved closure plan, and has unreasonably refused to approve the proposed second amendment to that plan.

b. By letter dated December 27, 1989, Defendant was notified by the MDNR that the agency had taken final action by unilaterally amending Defendant's closure plan. This amendment requires Defendant to implement closure pursuant to the unilateral action of the agency purportedly taken with Plaintiff's authorization and approval.

4. Pursuant to Paragraph 24 of the Consent Decree, this Court retained jurisdiction "to enforce and modify this consent decree and to resolve disputes arising under it." Specifically, Paragraph 11(b) of the Consent Decree states that "Allegan shall implement the amended closure plan approved or issued by the MDNR, as final agency action, according to the schedule set forth in the approved plan unless, within 30 days of such final approval or issuance, Allegan petitions the Court for alternative closure requirements under Paragraph 24 of this consent decree. In the latter case, Allegan shall close according to the Court's order."

5. The MDNR's December 27, 1989 unilateral amendment of the closure plan contravenes the provisions of the Consent Decree, RCRA, Michigan law and established administrative procedures for review of closure plans. The MDNR's unilateral amendment of Defendant's closure plan on behalf of Plaintiff was therefore unreasonable, arbitrary, capricious, and contrary to law.

6. The December 27, 1989 action of the MDNR is final agency action reviewable under the terms of the Consent Decree, and this Petition is timely filed thereunder.

WHEREFORE, Defendant Allegan Metal Finishing Company respectfully requests that this Court review Defendant's closure requirements pursuant to the Consent Decree and applicable law, and further grant Defendant such relief as the Court may deem appropriate in the circumstances, together with Defendant's costs and attorneys' fees related to this Petition.

VARNUM, RIDDERING, SCHMIDT & HOWLETT
Attorneys for Defendant Allegan
Metal Finishing Company

Date: January 25, 1990

By: _____

Charles M. Denton (P-33269)
Theresa M. Pouley (P-40818)
Business Address:
Suite 800, 171 Monroe Avenue, N.W.
Grand Rapids, Michigan 49503
(616) 459-41862

STATE OF MICHIGAN

JAMES J. BLANCHARD, Governor

DEPARTMENT OF NATURAL RESOURCES

STEVENS T. MASON BUILDING
P.O. BOX 30028
LANSING, MI 48909

DAVID F. HALES, Director

December 27, 1989

Mr. Walter Sosnowski, President
Allegan Metal Finishing Company
1274 Lincoln Road
Allegan, Michigan 49010

Dear Mr. Sosnowski:

SUBJECT: Closure Plan Amendment
MID 006 016 190

In accordance with Section III.8 of the Department of Justice consent decree dated August 1, 1989, the Michigan Department of Natural Resources is hereby amending Allegan Metal Finishing Company's closure plan, which was approved on September 27, 1985. The closure plan is amended by adding the following condition:

> "Sludge and contaminated soil from the surface impoundment operation must be disposed in accordance with the land disposal restrictions as identified in the August 17, 1988 Federal Register and the approved closure plan."

You were notified on February 21, 1989, that the proposed closure plan amendment dated January 17, 1989, was not approved. Therefore, the condition approved by this letter constitutes the final agency action on the closure plan as specified in Section IV.11.b of the consent decree. Closure must be conducted as set forth in Michigan Act 64 administrative rule R 299.9601 and 40 CFR 265.113.

If you have any questions concerning this matter, please contact Ms. Lynn Spurr at 616-685-9886, or Mr. Jim Roberts at 517-373-2487.

Sincerely,

Alan J. Howard, Chief
Waste Management Division
517-373-9523

cc: Mr. Charles Denton, Varnum, Riddering, Schmidt, & Howlett
Mr. Gordon Stoner, U.S. Department of Justice
Mr. Rich Traub, U.S. EPA
Ms. Marilyn Sabadaszka, U.S. EPA
Ms. Laura Lodisio, U.S. EPA
Mr. Ken Burda, DNR
Mr. Steve Buda, DNR
Ms. Lynn Spurr, DNR, Plainwell
Mr. Jim Roberts, DNR

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff, Civil Action No. K 86-441-CA4

v Honorable Richard A. Enslen

ALLEGAN METAL FINISHING COMPANY,

Defendant.

STATE OF MICHIGAN)
) SS.
COUNTY OF KENT)

Nancee J. Van Dyke, being first duly sworn, deposes and says that she is employed as a secretary for the firm of Varnum, Riddering, Schmidt & Howlett, and that on January 25, 1990, she served a copy of **Defendant's Petition for Review of Agency Action Pursuant to Consent Decree** upon:

Mr. Gordon G. Stoner
Environmental Enforcement Section
Land and Natural Resources Division
U.S. Department of Justice
Washington, D.C.

by placing the same in sealed envelopes addressed as above indicated and depositing the same in the U.S. mail with first class postage fully prepaid thereon.

Nancee J. Van Dyke

Nancee J. Van Dyke

Subscribed and sworn to before me
this 25th day of January , 1990.

Judith A. Taunt

JUDITH A. TAUNT
Notary Public, Kent County, MI
My Commission Expires June 14, 1993

Copy faxed to: A. Tschampa
B Stoner
12/14/89

Draft - 12/13/89
Coded - DENTON.

Charles M. Denton, Attorney at Law
Varnum, Riddering, Schmidt, and Howelett
Suite 800, 171 Monroe Avenue NW
Grand Rapids, Michigan 49503

Dear Mr. Denton:

Subject: Allegan Metal Finishing Company, #MID006016190, Docket Number V-W-85-R-007

On November 2, 1989, we spoke when I called to determine whether Allegan Metal Finishing Company had pursued other legitimate recycle options after receiving the October 13, 1989, response from the U.S. Environmental Protection Agency regarding the company's proposed plan to ship the electroplating sludge to a fertilizer additive manufacturer. At that time, I informed you that the company needed to submit detailed documentation which indicated how the company would ship the hazardous waste sludge to the fertilizer manufacturer and meet all of the requirements of the Federal Resource Conservation and Recovery Act, 1976, as amended (RCRA), and the Michigan Hazardous Waste Management Act, 1979 PA 64, as amended (Act 64), or submit an alternate plan in sufficient detail to allow for a complete review. I indicated that the company would not be given an unlimited amount of time to pursue other closure options and that I expected the submittal within a month so that this issue could be resolved by the end of December. To date, a submittal has not been received.

The consent decree signed and entered into Federal Court by the U.S. Environmental Protection Agency and Allegan Metal Finishing Company on August 2, 1989, indicates that, "within 30 days after the entry of the consent decree, or MDNR rejection or approval of Allegan's previously submitted amendments, whichever is later, Allegan shall, . . . submit to the MDNR an amended closure plan . . . ." According to our files, the company was notified in a February 21, 1989, letter from Jim Roberts of the Waste Management Division that the second closure plan amendment dated January 17, 1989, was not approved as submitted.

There were many discussions throughout 1989 concerning the company's disagreement over the Department's position regarding the regulations affecting the use of the hazardous waste sludge for a fertilizer additive. The regulatory requirements were clarified in the October 13, 1989, letter from Andy Tschampa of the U.S. Environmental Protection Agency.

In summary, the closure plan amendment was rejected by the MDNR on February 21, 1989. The U.S. Environmental Protection Agency's letter outlined regulatory requirements affecting the recycling of the sludge which were not addressed in either the closure plan amendment or subsequent correspondence and discussions. It is clear that the decision not to approve the January 17, 1989, second amendment still stands. An amended closure plan was not submitted within 30 days of the MDNR's action on the previously submitted amendment as required by Section IV, 11(a) of the consent decree. Therefore, Allegan Metal Finishing Company must implement closure in accordance with the plan which was approved on September 27, 1985. A new stipulation has been added to the approval of that plan to meet current land disposal ban requirements. This stipulation satisfies the need for the amendment required in Section III, 8 of the consent decree. A copy is enclosed.

I can be reached at 616-685-9886 if you have any questions regarding this matter.

Sincerely,

Lynn M. Spurr
Environmental Quality Analyst
Waste Management Division
Plainwell District

LMS:ls

Enclosure

cc: U.S. EPA - Region V

VARNUM, RIDDERING, SCHMIDT & HOWLETT
ATTORNEYS AT LAW

SUITE 800
171 MONROE AVENUE, N.W.
GRAND RAPIDS, MICHIGAN 49503
TELEPHONE (616) 459-4186
TELECOPIER (616) 459-8468
TELEX 1561593 VARN

SUITE 700
ONE MICHIGAN AVENUE
120 NORTH WASHINGTON SQUARE
LANSING, MICHIGAN 48933
TELEPHONE (517) 482-6237
TELECOPIER (517) 482-6937

350 EAST MICHIGAN AVENUE
KALAMAZOO, MICHIGAN 49007
TELEPHONE (616) 382-2300
TELECOPIER (616) 382-2382

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WALTER K. SCHMIDT
(RETIRED)

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REPLY TO
Grand Rapids

November 27, 1989

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Andrew Tschampa (5HR-12)
RCRA Enforcement Branch
United States Environmental
Protection Agency
Region V
230 South Dearborn Street
Chicago, IL 60604

Ms. Lynn M. Spurr
Environmental Quality Analyst
Waste Management Division
Michigan Department of
Natural Resources
621 N. 10th Street
P.O. Box 355
Plainwell, MI 49080

Re: United States v Allegan Metal Finishing Company,
Case No. K86-441-CA4 (WD Mich)

Dear Mr. Tschampa and Ms. Spurr:

Pursuant to paragraph 12 of the Consent Decree in the above-referenced RCRA action, we are writing to confirm Allegan Metal Finishing Company's good faith but unavailing efforts to satisfy the pollution liability insurance requirements for the holding ponds at the defendant's Allegan, Michigan facility. Allegan Metal Finishing Company hereby certifies that, despite its good faith efforts, the Company did not obtain such insurance coverage during the period since our August 29, 1989 certification.

As further evidence of Allegan Metal Finishing Company's efforts in regard to obtaining pollution liability insurance coverage for accidental occurrences from the holding ponds at

issue, we are enclosing correspondence from Federated Insurance (November 13, 1989), Liberty Mutual (November 15, 1989), and Wausau Insurance Companies (November 22, 1989). As you can see, none of these insurers is willing to underwrite this risk and provide pollution liability coverage for the ponds.

Not only is coverage restricted by the environmental enforcement claims currently known regarding these holding ponds, but there is also, as documented previously, a restricted marketplace for this coverage. We are unaware of any "softening" in the pollution liability insurance market and submit that the General Accounting Office (GAO) study referenced in our August 29, 1989 correspondence is still reflective of market conditions.

Based upon the above and the enclosures, we submit that Allegan Metal Finishing Company remains in compliance with its obligations under this Consent Decree as to pollution liability insurance coverage. If you have any questions with regard to any of the above or the enclosures, please contact the undersigned.

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETT

Charles M. Denton

CMD/njv
c: Walter C. Sosnowski
Walter Spiech

2450 44th Street, S.E.
Kentwood, Michigan 49512-3800
Telephone: (616) 455-1700

LIBERTY MUTUAL

November 15, 1989

Mr. Walter Spiech
Allegan Metal Fininshing Co., Inc.
1274 Lincoln Road
P.O. Box 217
Allegan, MI 49010

RE: Pollution Liability Coverage

Dear Walt:

In response to your recent query there has been no change in the underwriting stance regarding pollution liability insurance for the ponds containing waste sludge. As I had initially indicated, the opinion exists that unfavorable occurrences are more likely to occur during the removal procedures and these circumstances constitute adverse selection.

I am sorry we are not able to be of assistance in offering coverage.

Sincerely,

Judith Ballweg

J.A. Ballweg
Manager

JAB/cas

RECEIVED NOV 17 1989

FEDERATED INSURANCE

RICK WHITCOMB, MARKETING REPRESENTATIVE
6140 28TH SE • SUITE 215 • GRAND RAPIDS, MI 49546
BUS. (616) 942-8388 • RES. (616) 538-8005 • FAX. (616) 942-4786

November 13, 1989

Mr. Walt Spiechs, Controller
Allegan Metal Finishing
1274 Lincoln Road
Allegan, Michigan 49010

Dear Walt,

I have resubmitted an application to our underwriting department and our position remains the same as specified in our letter of August 14, 1989 regarding the possibility of writing a pollution clean-up policy on Allegan Metal Finishing.

After review by our loss control department of your location on 1274 Lincoln Road, we are unable to offer a pollution insurance policy for the following reasons: 1. You presently have a pollution incident underway. 2. You have some sludge ponds which contain potential pollutants at this time. 3. Your close proximity to city wells and the Kalamazoo River.

I would like to thank you for your inquiry regarding pollution insurance with Federated. If you have any questions regarding this, please feel free to give me a call.

Sincerely,

Rick Whitcomb per KB

Rick Whitcomb
Marketing Representative

RW/kab

RECEIVED NOV 16 1989

Wausau Insurance Companies

A Member of the Nationwide® Group

Mr. Walter Spiech
Allegan Metal Finishing Co., Inc.
1274 Lincoln Road
PO Box 217
Allegan, MI 49010

November 22, 1989

Re: Pollution Liability Coverage

Walt, when I was in yesterday you asked me if Wausua Insurance would write pollution liability coverage on your two ponds containing waste sludge.

I called our underwriting department at our branch office in Southfield and was informed by them that we do not write coverage for that type of risk.

I want to thank you for the opportunity but I am sorry I can't be any assistance at this time.

Marshall G. Champion, Jr.
Account Representative

MGC:bp

VARNUM, RIDDERING, SCHMIDT & HOWLETT

ATTORNEYS AT LAW

SUITE 800
171 MONROE AVENUE, N.W.
GRAND RAPIDS, MICHIGAN 49503
TELEPHONE (616) 459-4186
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WALTER K. SCHMIDT
(RETIRED)

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REPLY TO
Grand Rapids

November 21, 1989

FEDERAL EXPRESS

Mr. Joseph Carra, Director
Permits and State Programs Division
Office of Solid Waste
United States Environmental
Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Re: Allegan Metal Finishing Company Delisting Petition
(Docket No. F-89-ALDP-FFFFF)

Dear Mr. Carra:

The Petitioner Allegan Metal Finishing Company hereby requests an administrative hearing pursuant to 40 CFR § 260.20(d) on the Agency's proposed denial of delisting petition No. 0652, as published at 54 Fed. Reg. 46737 (Nov. 7, 1989). The Petitioner Allegan Metal Finishing Company requests a hearing to present testimony and evidence for consideration of the following issues:

1. Whether use of the VHS model by the Agency in reviewing this delisting petition was unreasonable, arbitrary and capricious, or otherwise contrary to law in light of the site and waste specific data provided by Petitioner;

2. Whether the VHS model's "worst case" disposal and pollution assumptions are inappropriate due to the post-delisting

conditions explicitly and implicitly inherent on this delisting petition;

3. Whether the proposed methods of treatment and disposal were or should have been specifically addressed by the Agency, and if so, whether that data supported the Petitioner's requested exclusion; and

4. Whether the Agency's proposed denial of this petition is erroneous where the waste characterization data provided by the Petitioner fully supports the non-hazardous character of the materials and thus the granting of the delisting petition.

These issues are most appropriately considered following testimony and submission of evidence, and written comments may not alone be sufficient for meaningful review of this proposed delisting petition denial. An administrative hearing is also required to discover and examine the Agency personnel and staff involved in selection, application and analysis of the VHS model and review of this petition, in order to develop a further record of agency action for judicial review of this matter.

For all of these reasons, Petitioner Allegan Metal Finishing Company respectfully requests that its request for an administrative hearing to consider this delisting petition be granted.

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETT

Charles M. Denton

CMD/njv
c: Walter C. Sosnowski
Ronald Vriesman
James R. Kent
Docket Clerk, U.S. EPA Office of Solid Waste (OS-305)
Andrew Tschampa
Joan Peck, MDNR
Rep. Fred Upton

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

President
Walter C. Sosnowski
Allegan Metal Finishing Company
1274 Lincoln Road
Allegan, Michigan 40901

October 26, 1989

Dear Mr. Sosnowski:

Enclosed please find a signed copy of the proposed denial notice for the one-time upfront exclusion of wastewater treatment sludges, EPA Hazardous Waste No. F006, generated at Allegan's Allegan, Michigan facility. This will be published in the Federal Register either the week of October 30, 1989 or November 6, 1989.

Should you have any questions or require any additional information, please do not hesitate to contact me at (202) 382-4488.

Sincerely,

James R. Kent
Variances Section

Enclosure

cc: Henry Huppert, SAIC
Chichang Chen, EPA HQ
Allen Debus, Region V
Laura Lodisio, Region V

XC: EPA Rpt.
10/9/89

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v

ALLEGAN METAL FINISHING COMPANY,

Defendant.
_____/

Civil Action No. K86-441-CA4

Hon. Richard A. Enslen

BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiff's Complaint against Defendant is subject to summary dismissal because the allegations presently pending in this Court are identical to the allegations previously settled between Plaintiff (U.S. EPA) and Defendant pursuant to an administrative Consent Agreement and Final Order. Thus, there has been an accord and satisfaction between these parties. In addition, the prior CAFO operates as res judicata to bar Plaintiff from re-litigating these claims. Therefore, Plaintiff is estopped from alleging the same violations that have been settled and satisfied and this action should be dismissed.

FACTS

The facts of this case, as confirmed by discovery herein, illustrate a myriad of actions taken by the Defendant Allegan Metal Finishing Company in complying with the federal Resource Conservation and Recovery Act ("RCRA") (42 U.S.C. § 6901 et seq.) pursuant to an administrative Consent Agreement and Final Order

("CAFO") previously entered into with the United States Environmental Protection Agency (U.S. EPA). The CAFO settled the parties' dispute on the hazardous waste regulation of certain waste holding ponds at Defendant's Allegan, Michigan facility.[1]

In 1972, Defendant commenced use of two wastewater holding ponds on its premises pursuant to a State of Michigan stipulation. (Defendant's Response to Plaintiff's Request to Admit No. 21.) On June 23, 1980, Defendant submitted to the U.S. EPA a Notification of Hazardous Waste Activity based upon Defendant's understanding that the waste by product which it placed in the ponds could possibly be classified as hazardous waste no. F006. (Complaint ¶ 17.) In November of 1980, the U.S. EPA revised its description of waste no. F006 to exclude "treatment sludges from zinc plating (segrated basis) on carbon steel" from regulation. 40 C.F.R. § 261.31. As a result, Defendant thereafter deleted from its initial notification of Hazard Waste Activity concerning the production of waste no. F006. (Defendant's Response to Plaintiff's Request to Admit No. 19.)

Subsequently, a RCRA compliance inspection of the Defendant's facility was conducted by the Michigan Department of Natural Resources ("MDNR") on behalf of U.S. EPA. At the time of that inspection in 1984, the MDNR noted that Defendant had allegedly placed regulated hazardous wastes in the two holding ponds. Thus, long after Defendant notified the U.S. EPA of its claimed exemp-

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1 Defendant does not admit that the wastes placed in the ponds were or are "hazardous" under RCRA, as reflected by the Company's pending de-listing petition. See Defendant's Response to Plaintiff's Request to Admit No. 14 (at Exhibit I).

tion from RCRA requirements, and many years after the State stipulation or permit to place these wastes in the holding ponds, the MDNR determined that the Defendant's wastestream discharge allegedly did not qualify for an exemption from the RCRA hazardous waste listing.

Subsequent to and on the basis of the MDNR inspection, on December 4, 1984, the U.S. EPA filed an administrative complaint against Defendant alleging violations of the RCRA interim status permit requirements for waste disposal facilities. (Exhibit B.) The RCRA violations claimed in that administrative complaint were: (a) General inspection requirements; (b) personnel training; (c) contingency plan; (d) groundwater monitoring; (e) closure plan; (f) closure cost estimates; (g) financial assurance for closure; and (h) insurance for environmental liability. The U.S. EPA ordered that Defendant meet all of the said requirements, and in addition specifically provided that: "Respondent's Part A Application, when received, shall be accepted as if timely filed." (Exhibit B, ¶ 15.) Finally, the administrative complaint sought civil penalties of $17,500 against the Defendant.

Following Defendant's response to the administrative complaint, all of the alleged violations were settled by the parties and confirmed in the administrative CAFO which was entered by the U.S. EPA Regional Administrator on June 28, 1985. (Exhibit A.) The parties to this action thus settled all of the claimed RCRA violations by several stipulations in the Consent Agreement as incorporated in the Agency's Final Order.

The original administrative complaint which was settled by the CAFO related the same RCRA claims as are at issue on the Plaintiff's Complaint presently pending in this Court. Specifically, the present Complaint again alleges a violation of the "interim status" permit requirements of RCRA because a Part A permit application was not filed by November 19, 1980. (Complaint ¶ 18.) All of the remaining claims in the present Complaint relate to Defendant's performance of the CAFO requirements; however, Defendant has satisfied those requirements in complete settlement of this dispute. Each of the items required by the CAFO have been submitted by Defendant, the U.S. EPA has accepted and substantively approved each submittal, and the U.S. EPA has accepted the Defendant's $3,000 settlement check (Exhibit C) without protest or notification that it was in any way deficient under the CAFO. Thus, the Defendant Allegan Metal Finishing Company has satisfied the settlement agreement made with the U.S. EPA and the Plaintiff may not properly assert those claims herein.

LAW AND ARGUMENT

It is undisputed that the Defendant has submitted the necessary documentation in satisfaction of the administrative settlement confirmed by the CAFO. As such, the completion of these steps by the Defendant constitutes a satisfaction of the accord that was reached with the U.S. EPA, and further, the prior proceedings which culminated in the entry of the CAFO bars the relitigation of such claims by the United States herein.

A. The Elements of the Common Law Doctrine of Accord and Satisfaction.

Whether federal or state substantive law applies to the Court's determination of an accord and satisfaction herein, the basic elements of the doctrine do not vary. Intern. U., United Auto., Aero., Etc. v. Yard-Man, 716 F.2d 1476, 1487 (6th Cir. 1983) (holding that the principles of accord and satisfaction are well established in both the general common law, which is subsumed into federal substantive common law, and the law of Michigan). Those elements are: A disputed claim, a substituted performance agreed upon and accomplished, and valuable consideration. Id., 716 F.2d at 1487-88; Fritz v. Marantette, 404 Mich. 329 (1978); Gitre v. Kessler Products Co., Inc., 387 Mich. 619 (1972); Fuller v. Integrated Metal Technology, 154 Mich. App. 601 (1986); Newport West Condo v. Veniar, 134 Mich. App. 1 (1984).

Once an accord has been reached in settlement of the parties' dispute, and the performance has been tendered as required by the accord, there will be a discharge of the underlying obligation. Thus, the parties involved can only sue on a breach of the accord. The Sixth Circuit has opined that: "The tendering of performance as called for in the agreed accord makes it impossible to rescind the agreement, except upon breach, . . . the performance extinguishes the underlying obligation." Bowater North American Corp. v. Murray Machinery 773 F.2d 71 at 75 (6th Cir. 1985). See also, Ohlendiek v. Schuler, 299 Fed. 182 (6th Cir.

1924) cert den 266 U.S. 608 (1924); American Textile Machinery Corp. v. U[illegible]., 220 F.2d 584 (6th Cir. 1955).

B. Application of the Doctrine of Accord and Satisfaction Herein.

The result of applying the doctrine of accord and satisfaction in this case is that, based upon the Defendant's performance of the CAFO requirements, the Plaintiff cannot re-assert any claimed RCRA violations as were settled by the CAFO. It should be noted that all of the twenty-five violation factors the Plaintiff is alleging herein pre-date or arise from the CAFO. (Plaintiff's Answer to Defendant's Interrogatory No. 3 at Exhibit J.) Thus, an examination of Defendant's actions in satisfaction of the parties' settlement accord (the CAFO) confirms that it has "tendered performance" sufficient to estop the Plaintiff from asserting any claimed RCRA violations relative to the prior administrative proceeding.[2]

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2 It is undisputed that the Defendant took the following specific RCRA compliance steps under the CAFO. Pursuant to CAFO, ¶ 2.A., on May 15, 1985, a contingency plan was submitted to the U.S. EPA and the MDNR. On June 15, 1985, a revised contingency plan was sent to both the U.S. EPA and the MDNR.

CAFO ¶ 2.B. required that Defendant submit a Closure Plan for the holding ponds at its facility. On April 5, 1985, Defendant's Closure Plan was submitted to the U.S. EPA. On August 2, 1985, the U.S. EPA requested more changes in the Closure Plan and requested a submission of the revisions by August 31, 1985. On August 29, 1985, the revisions to the Closure Plan were submitted to the U.S. EPA. On September 27, 1987, the U.S. EPA approved the Company's Closure Plan pursuant to further revisions defined by the U.S. EPA. Thus, the second condition of CAFO that a Closure Plan be submitted was satisfied by the Defendant.

In addition, CAFO ¶ 2.C. requires that the waste facility personnel successfully complete a program of instruction. On August 15, 1985, Defendant transmitted to U.S. EPA its hazardous waste personnel training records, to which no objection was

... a party accepts satisfaction of a settlement agreement, it cannot later assert that such satisfaction is insufficient. Where there is an accord, "... plaintiff may not accept the defendant's substituted performance and then sue on the original claims." Geisco, Inc. v. Honeywell, Inc., 682 F.2d 254 at 257 (2d Cir. 1982). In Geisco, the defendant sent a letter and check indicating it was in satisfaction of the disputed claim. The plaintiff accepted it and then brought suit. The court held that once plaintiff signified its acceptance of the letter saying the check was in satisfaction of the claim and cashed the check, the claim was satisfied and they could not subsequently sue the Defendant. Id., 682 F.2d at 259. Accord: Fuller v. Integrated Metal Technology, supra.

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received. Defendant has thus satisfied the requirement for personnel training.

CAFO ¶ 3 required that a Groundwater Assessment Plan be submitted by May 3, 1985. On April 23, 1985, Allegan Metal Finishing submitted to the U.S. EPA a Groundwater Assessment Plan. On July 26, 1985, the U.S. EPA sent a letter indicating perceived deficiencies in the Groundwater Assessment Plan. This Plan was revised and transmitted to the U.S. EPA on August 29, 1985. On September 20, 1985, the U.S. EPA responded to the Defendant's Groundwater Assessment Plan and on November 11, 1985, Defendant once again submitted to the U.S. EPA a revised Groundwater Assessment Plan. On December 20, 1985, the U.S. EPA responded to the November, 1985 revised Groundwater Assessment Plan, and on January 7, 1986, the U.S. EPA indicated that it was acceptable to allow the deadline for further revisions to be extended to January 27, 1986. On January 20, 1986, the revised Groundwater Assessment Plan was transmitted to the U.S. EPA, and such was approved by the U.S. EPA in satisfaction of this requirement.

1. Plaintiff's claim as to a permit for Defendant's holding ponds.

The Complaint herein (Court I) alleges that Defendant is in violation of RCRA because it has not obtained "interim status" by filing a RCRA Part A permit application for the holding ponds by November 19, 1980. However, Defendant has fulfilled this requirement in several respects.

Prior to 1984, Defendant operated the ponds under the 1972 State Stipulation or permit, and understood it was not required to file any RCRA permit application under the waste listing exemption. Moreover, when Defendant was notified it was allegedly required to file a Part A permit application by the U.S. EPA administrative complaint, such stated that when the application was submitted it would be accepted as if "timely filed". Defendant's filing of its Part A permit application pursuant to that administrative proceeding was therefore deemed timely by U.S. EPA.

Finally, this alleged violation pre-dates the June, 1985 CAFO settlement agreement and is exactly the same claim as the administrative complaint which was thereby settled. Thus, U.S. EPA is estopped from asserting this claim because this prior complaint merged into the subsequent CAFO and bars this action under the doctrine of accord and satisfaction.

2. Defendant's satisfaction of the CAFO settlement requirements.

On this Complaint, beyond the claim relating to a permit for the Defendant's holding ponds, Plaintiff is alleging four deficiencies in the Defendant's execution of the CAFO: First, that Defendant has not timely commenced closure of the holding ponds

pursuant to the approved Closure Plan submitted under the CAFO (Complaint ¶ 29); second, that Defendant filed the financial assurance letter of credit for closure late (Complaint, ¶ 27); third, that Defendant has not obtained environmental liability insurance coverage (Complaint Count II); and finally, that Defendant paid an insufficient settlement amount by tendering $3,000 (Complaint ¶ 28 and Count III). However, Plaintiff had accepted prior to his action the Defendant's settlement check, letter of credit and Closure Plan as tendered consistent with the CAFO, and Defendant has documented the impossibility of obtaining the environmental liability insurance coverage to stay or excuse that requirement.

a. Timely closure of the holding ponds under the Defendant's approved Closure Plan

As to the first claimed deficiency in Defendant's performance under the CAFO, the Closure Plan accepted and approved by the U.S. EPA pursuant to and in satisfaction of the CAFO indicated that Defendant could and would not begin closure of the holding ponds until its wastewater treatment system was fully operational. (Exhibit D.) For instance:

> "[T]his plan takes into account operation of the lagoons until such time when the treatment system at AMFCO is upgraded and surface water discharge is begun according to NPDES permit No. MI0042772. *** Because of the need to complete the wastewater treatment facility upgrading prior to lagoon closure, . . . *** At such time when their wastewater treatment system is upgraded and discharge to the Kalamazoo River is implemented, AMFCO anticipates stopping the discharge to the lagoons. *** Thus, at the time of lagoon closure, utilization of the lagoons

for wastewater treatment will no longer be required."[3]

Closure was thus specified to commence only when the holding ponds could be bypassed by the wastewater treatment system NPDES discharge. This is admitted by Plaintiff. (Plaintiff's Answer to Defendant's Interrogatory No. 15.) The U.S. EPA-approved pre-conditions to closure (i.e., completion of the upgraded treatment system and NPDES permit) were not satisfied by the time of the Complaint herein, despite Defendant's best efforts toward good faith compliance with the Closure Plan, and there thus is no violation. Defendant is simply not late in meeting the approved Closure Plan deadlines.

this is problem with case

b. Financial assurance for closure

The second claimed deficiency in satisfying the CAFO regards documentation of financial assurance for closure. As noted above, as a pre-condition for closure to begin, it was expressly necessary for Defendant to develop and build a wastewater treatment system to cease using the ponds. Construction of this wastewater treatment system was to be funded by Defendant primarily by government assistance bonds (Small Business Administration (SBA) and Job Development Authority (JDA)), as U.S. EPA was advised, and these bonds were not approved until late December, 1985.

U.S. EPA was advised of Defendant's delay in obtaining the necessary closure financial assurance as a consequence of this project financing. However, it is not disputed that Defendant has

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3 Note that these provisions also may constitute a permit for the Defendant's continued use of the ponds pending closure.

satisfied th[redacted] requirement as well. O[redacted] January 31, 1986, Defendant submitted to the U.S. EPA an Irrevocable Letter of Credit in the amount of $260,000 with Standby Trust as surety for closure under RCRA. (Exhibit E.) See also, Affidavit of Steven J. Alexander confirming compliance with financial assurance and U.S. EPA's acceptance of such as timely (Exhibit F). Thus, documentation of financial assurance for closure has also been satisfied by Defendant.

c. Impossibility of performance bars any claim by Plaintiff as to satisfaction by Defendant of the environmental liability insurance requirement of the CAFO.

The third portion of the CAFO which is in dispute requires documentation of environmental liability insurance coverage. Notably, however, the CAFO expressly indicates that "this requirement may be stayed by U.S. EPA for such period of time as Respondent can throughly document that, despite diligent effort, it is unable to secure the liability insurance required by this subparagraph." (CAFO ¶ 2.D.; Complaint ¶ 23). Pursuant to this provision, on April 29, 1985, Defendant sent to U.S. EPA correspondence and information that it had received from The Graham Company, an insurance brokerage, indicating that liability insurance of this type was unavailable for metal finishers in Defendant's situation. Further, additional attempts by Defendant to obtain environmental insurance for liability related to the holding ponds have been documented. (Exhibit G; Defendant's Response to Plaintiff's Request No. 19.) In essence, liability insurers are unwilling to underwrite the risks associated with waste storage or

disposal, especially where such waste activity is the subject of a government enforcement action.

As previously indicated, the U.S. EPA had expressly stated that good faith attempts at securing this environmental liability insurance would be sufficient to comply with the terms of the CAFO and RCRA. Nevertheless, the Plaintiff is alleging herein (Complaint, Count II) that Defendant is in violation of RCRA because it does not have this liability insurance, although such is impossible to obtain in the marketplace. Plaintiff's apparent refusal to stay this provision (Complaint ¶ 26), without any prior notice to Defendant or justification, is in bad faith.[4]

Beyond the terms of the CAFO, the common law defense of impossibility precludes this claim. Once again, whether federal or state substantive law is applicable to this case, impossibility of performing this portion of the CAFO is a valid defense as a matter of law. Assuming arguendo that Michigan law controls the contractual relations between the parties under the settlement agreement in this case, the defense of impossibility or commercial impracticability should excuse the Defendant from strict compliance with this term of the CAFO. Bissell v. L.W. Edison Co., 9 Mich. App. 276 (1967). The elements of this defense were explained by Williston:

> "The essence of the modern defense of impossibility is that the promised performance was at the making of the contract or thereafter

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4 This is especially so since the general difficulty for owners of waste facilities to obtain this liability insurance has been acknowledged by the U.S. EPA. (50 Fed. Reg. 33902, 33906 at Exhibit H.)

> became impracticable owing to some extreme or unreasonable difficulty, expense, injury, or loss involved, rather than that it is scientifically or actually impossible.... The important question is whether an unanticipated circumstance has made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract. If so, the risk should not fairly be thrown upon the promisor."

Annot., "Modern Status of the Rules Regarding Impossibility of Performance as Defense in Action for Breach of Contract," 84 ALR 2d at 51, quoting 6 Williston on Contracts § 1931.

Assuming the applicability of federal law, the Defendant should also be excused from this portion of the CAFO. It has been held in other instances of environmental regulation that impossibility is a defense to claims of non-compliance. For example, the Sixth Circuit has held that impossibility is available as a defense for non-compliance in a federal or state enforcement proceeding under the Clean Air Act. Buckeye Power, Inc. v. Environmental Protection Agency, 481 F.2d 162 (6th Cir. 1973); followed in Indiana and Michigan Electric Company v. EPA, 509 F.2d 839 (7th Cir. 1985).

In this case, regardless of whether this Court applies federal or state law, the Defendant should be excused from performance of this environmental liability insurance provision of the CAFO. The Defendant simply cannot obtain in the marketplace this insurance coverage. As a matter of construction, due to the impossibility of performance of the particular provision requiring that the Defendant obtain liability insurance, the entire provision concerning liability coverage should be read out of the contract.

Rogers Plaza, Inc. v. S.S. Kresge Co., 32 Mich. App. 724 (1971). Alternatively, upon a showing that the required insurance cannot be obtained by Defendant (which has already been provided to the U.S. EPA), the Plaintiff should be required to act in good faith to refrain from enforcing a provision with which the Defendant cannot possibly comply.

d. Defendant has paid the agreed upon settlement amount in satisfaction of the CAFO.

Finally, the $3,000 amount was specified as a mitigated civil penalty payable under the CAFO upon completion of the requirements of that CAFO. Defendant's tender of the $3,000 upon the filing of the closure financial assurance (letter of credit) is therefore consistent with the terms of the settlement CAFO.[5] The CAFO required that the Defendant pay a civil penalty in the amount of $16,000, unless the Company successfully completed the agreed-upon items discussed above, in which case the amount of the penalty would be mitigated to $3,000. On January 28, 1986, upon Defendant's compliance with the requirements of the CAFO, Allegan Metal Finishing Company submitted a check for $3,000 to the U.S. EPA. This settlement check was accepted by the U.S. EPA and was negotiated without protest. (Exhibit C.)

The elements of accord and satisfaction are undeniably present herein: The CAFO was a substituted agreement for consideration

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5 Any ambiguity in this regard must be construed against Plaintiff as the drafter of the CAFO. Central Jersey Dodge Truck Center, Inc. v. Sightseer Corp., 608 F.2d 1106 (6th Cir. 1979) (applying Michigan law); Liberty Mut. Ins. Co. v. Vanderbush Sheet Metal Co., 512 F. Supp. 1159 (E.D. Mich. 1981); Potovello v. Murray, 139 Mich. App. 639 (1984).

made between the two parties to a dispute; the two parties agreed on the terms of the CAFO; and the Defendant satisfied the CAFO in all respects. In each case of alleged non-performance of the CAFO, Defendant has in fact performed in accordance with that settlement accord and thus satisfied the CAFO. Plaintiff, by accepting the Closure Plan with its express condition on commencement of closure, the closure letter of credit, the documentation of environmental liability insurance being unavailable, and the settlement check for $3,000, all without protest, cannot now denounce that satisfaction. This action is therefore barred and subject to summary dismissal.

II. THE DOCTRINE OF RES JUDICATA BARS THE PLAINTIFF'S CLAIMS AGAINST THE DEFENDANT AS SUCH CLAIMS HAVE BEEN PREVIOUSLY SETTLED.

The doctrine of res judicata provides that, once parties to a dispute have litigated that dispute to a final resolution, each of the parties will be estopped from re-litigating those same claims. Socialist Workers Party v. Secretary of State, 412 Mich. 571 (1982). In order for an adjudication to bar subsequent litigation, the court must find that the judgment meets three requirements: that the judgment is final, valid, and on the merits. Senior Accountants Analysts & Appraiser Ass'n v. Detroit, 399 Mich. 449 (1976); Storey v. Meijer, Inc., 160 Mich. App. 589 (1987).

It must initially be determined whether a Final Order which has been issued by an administrative agency pursuant to a Consent Agreement is a sufficient judgment upon the merits of a claim to meet the requirements of res judicata. It is well established law

that, for res judicata purposes, a final administrative agency order is a "judgment". Senior Accountants v. Detroit, 399 Mich. 449 (1976); Roman Cleanser Co. v. Murphey, 386 Mich. 698 (1972); Storey v. Meijer, Inc., 160 Mich. App. 589 (1987). Thus, the unappealed Final Order of the U.S. EPA herein is a "judgment" under the doctrine of res judicata.

The second issue is whether a consent judgment is "on the merits" for res judicata purposes. There is strong support for the concept that consent orders should be res judicata as to subsequent litigation covering the same violations settled by the administrative proceeding. In Chesapeake Bay Foundation v. Bethlehem Steel Corporation, 652 F. Supp. 620 (D. Md. 1987), the court was faced with the problem of res judicata of consent judgments and the applicability of such to a U.S. EPA enforcement action under the Clean Water Act. First, the court assumed that the consent judgment was in fact a final adjudication. The court's analysis further assumed that, if in fact the State had initiated administrative enforcement action which culminated in a consent judgment covering the same matters, the subsequent claim would be precluded by res judicata. Id., 652 F. Supp. at 629.

In addition, in Student Public Interest Research v. Georgia Pacific, 615 F. Supp. 1419 (D. N.J. 1985), the court indicated that a consent judgment which resolved a previous action would foreclose subsequent litigation as to all claims addressed therein. In George Pacific, the U.S. EPA had initiated an enforcement action and subsequently entered into a consent judgment whereby Georgia Pacific agreed to pay a certain amount of money and to

install equipment that would bring it into compliance with the Clean Water Act. Subsequent to that, a citizen's suit was filed alleging the same violations that were previously settled. The court held that, in this instance, the consent judgment totally barred any subsequent litigation, even though the parties were not identical. Id., 615 F. Supp. at 1432.

In the case at bar, there was an administrative complaint filed and answered, conferences on the substance of the complaint, and ultimately a complete settlement of the dispute between the parties in a consent order. These facts meet the requirements of res judicata. All of the claims alleged in the Complaint were the subject of the prior administrative proceeding and have been resolved by the Final Order of the U.S. EPA. These claims are therefore merged into the CAFO and the result is that the Plaintiff is barred or estopped from asserting any claims which were or could have been the subject of that administrative proceeding.

RELIEF REQUESTED

For all of the above reasons, Defendant respectfully requests that this Honorable Court grant Defendant's Motion for Summary Judgment dismissing with prejudice this action, and award Defendant its costs and attorneys' fees herein, together with such

XC: EPA Aug Rpt. 8/30/89

VARNUM, RIDDERING, SCHMIDT & HOWLETT
ATTORNEYS AT LAW

SUITE 800
171 MONROE AVENUE, N.W.
GRAND RAPIDS, MICHIGAN 49503
TELEPHONE (616) 459-4186
TELECOPIER (616) 459-8468
TELEX 1561593 VARN

SUITE 700
ONE MICHIGAN AVENUE
120 NORTH WASHINGTON SQUARE
LANSING, MICHIGAN 48933
TELEPHONE (517) 482-6237
TELECOPIER (517) 482-6937

350 EAST MICHIGAN AVENUE
KALAMAZOO, MICHIGAN 49007
TELEPHONE (616) 382-2300
TELECOPIER (616) 382-2382

JAMES N. DeBOER, JR
GORDON B. BOOZER
WILLIAM K. VAN'T HOF
HILARY F. SNELL
PETER ARMSTRONG
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KENT J. VANA
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JINYA CHEN*

OF COUNSEL
LAURENT K. VARNUM
JOHN L. WIERENGO, JR.
F. WILLIAM HUTCHINSON
CHESTER C. WOOLRIDGE
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R. STUART HOFFIUS

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1906-1988

WALTER K. SCHMIDT
(RETIRED)

*ADMITTED ONLY IN PEOPLE'S REPUBLIC OF CHINA

REPLY TO
Grand Rapids

August 29, 1989

Lynn
file

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Andrew Tschampa (5HR-12)
RCRA Enforcement Branch
United States Environmental
Protection Agency
Region V
230 South Dearborn Street
Chicago, IL 60604

Ms. Lynn M. Spurr
Environmental Quality Analyst
Waste Management Division
Michigan Department of
Natural Resources
621 N. 10th Street
P.O. Box 355
Plainwell, MI 49080

Re: United States v Allegan Metal Finishing Company
Case No. K86-441-CA4

Dear Mr. Tschampa and Ms. Spurr:

Pursuant to paragraph 12 of the RCRA Consent Decree in the above-referenced action, we are writing to confirm Allegan Metal Finishing Company's good faith efforts to satisfy the pollution liability insurance requirements for the holding ponds at the defendant's Allegan, Michigan facility. Allegan Metal Finishing Company hereby certifies that, despite its good faith efforts, the Company did not obtain such insurance coverage.

Two specific examples of Allegan Metal Finishing Company's efforts in regard to obtaining pollution liability insurance coverage for accidental occurrences from the holding ponds are related by the enclosed letters from Liberty Mutual (dated July 5,

1989) and Federated Insurance (dated August 14, 1989). Through The Graham Company, we have also been advised that American International Group (AIG) would not be willing to provide coverage for the ponds. Allegan Metal Finishing Company has other insurance coverage placed with Liberty Mutual, while Federated Insurance apparently offers pollution liability coverage in the limited market and The Graham Company serves the National Association of Metal Finishers (NAMF) of which Allegan Metal Finishing Company is a member. As you can see, these insurers are unwilling to underwrite the risk of occurrences from the holding ponds due not only to the restricted marketplace for this coverage, but also the environmental enforcement claims currently known regarding these holding ponds resulting in "a case of adverse selection" (as Liberty Mutual described it).

We also reference the General Accounting Office (GAO) study: Hazardous Waste: The Costs and Availability of Pollution Insurance (October 1988), supplementing the prior GAO report (Hazardous Waste: Issues Surrounding Insurance Availability (October 1987)). The GAO study confirms a consistently diminishing number of insurers providing pollution liability insurance coverage both in terms of numbers of policies and dollar amount of coverage. On the other hand, the premium costs for pollution liability insurance have continued to increase dramatically.

Furthermore, the GAO study observes, importantly, at page 19, that:

> The decrease in the number of insurers writing pollution liability insurance after 1984 and in the number of policies written, together with the corresponding increases in the cost of insurance, do not fully reveal the increasing tightening of the market. Insurers who continued writing pollution insurance, even to a limited degree, also took other steps to limit their exposure by introducing changes in the coverage they afforded.

Therefore, even if coverage was reasonably available, GAO noted (at page 22) that such policies resulted in providing the insured companies "with no real protection from financial losses arising from pollution damage."

Allegan Metal Finishing Company's experience in attempting to obtain pollution liability insurance for the ponds is therefore completely consistent with the United States GAO report. In fact,

in these circumstances, it would be surprising if any insurer was willing to underwrite the risk of pollution occurrences from the defendant's holding ponds. Nevertheless, towards compliance with the RCRA Consent Decree, Allegan Metal Finishing Company will periodically reassess its ability to obtain such coverage, and certify the results of its good faith efforts every 90 days until closure of the ponds.

If you have any questions with regard to any of the above or the enclosures, please contact the undersigned.

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETT

Charles M. Denton

CMD/njv
c: Walter C. Sosnowski
Walter Speich

98 East Fulton Street
Grand Rapids, Michigan 49503-3279
Telephone: (616) 454-8241

LIBERTY MUTUAL

July 5, 1989

Mr. Walter Spiech
Allegan Metal Finishing Co., Inc.
1274 Lincoln Road
P.O. Box 217
Allegan, MI 49010

RE: Pollution Liability Coverage

Dear Walt:

I am sorry to advise you that we will be unable to provide Pollution Liability insurance to cover the two ponds on your property. I understand the ponds contain waste sludge and that you intend to dispose of the sludge. Your request for insurance is precipitated by the removal process; therefore any unfavorable occurrence would be more likely to happen under the circumstances. This prevents a case of adverse selection, and as such is in direct opposition to basic underwriting principles. For this reason we must decline to offer Pollution Liability Coverage.

I am sorry I can not be of assistance in this matter.

Sincerely,

Judith Ballweg

J.A. Ballweg
Manager

JAB/cas

FEDERATED INSURANCE

RICK WHITCOMB, MARKETING REPRESENTATIVE
6140 28TH SE • SUITE 215 • GRAND RAPIDS, MI 49546
BUS. (616) 942-8388 • RES. (616) 538-8005 • FAX. (616) 942-4786

August 14, 1989

Mr. Walt Spiechs, Controller
Allegan Metal Finishing
1274 Lincoln Road
Allegan, Michigan 49010

Dear Walt,

I would like to clarify Federated Insurance Company's position regarding the possibility of writing a pollution clean-up insurance policy on Allegan Metal Finishing.

After review by our loss control department of your location on 1274 Lincoln Road, we are unable to offer a pollution insurance policy for the following reasons. 1. You presently have a pollution incident underway. 2. You have some sludge ponds which contain potential pollutants at this time. 3. Your close proximity to city wells and the Kalamazoo River.

I would like to thank you for your inquiry regarding pollution insurance with Federated. If you have any questions regarding this, please feel free to give me a call.

Sincerely,

Rick Whitcomb
Marketing Representative

RW/kab

RECEIVED AUG 16 1989

VARNUM, RIDDERING, SCHMIDT & HOWLETT
ATTORNEYS AT LAW

SUITE 800
171 MONROE AVENUE, N.W.
GRAND RAPIDS, MICHIGAN 49503
TELEPHONE (616) 459-4186
TELECOPIER (616) 459-8468
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ONE MICHIGAN AVENUE
120 NORTH WASHINGTON SQUARE
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Environmental Quality Analyst
Waste Management Division
Michigan Department of
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621 N. 10th Street
P.O. Box 355
Plainwell, MI 49080

Re: United States v Allegan Metal Finishing Company
Case No. K86-441-CA4

Dear Mr. Tschampa and Ms. Spurr:

Pursuant to paragraph 12 of the RCRA Consent Decree in the above-referenced action, we are writing to confirm Allegan Metal Finishing Company's good faith efforts to satisfy the pollution liability insurance requirements for the holding ponds at the defendant's Allegan, Michigan facility. Allegan Metal Finishing Company hereby certifies that, despite its good faith efforts, the Company did not obtain such insurance coverage.

Two specific examples of Allegan Metal Finishing Company's efforts in regard to obtaining pollution liability insurance coverage for accidental occurrences from the holding ponds are related by the enclosed letters from Liberty Mutual (dated July 5,

1989) and Federated Insurance (dated August 14, 1989). Through The Graham Company, we have also been advised that American International Group (AIG) would not be willing to provide coverage for the ponds. Allegan Metal Finishing Company has other insurance coverage placed with Liberty Mutual, while Federated Insurance apparently offers pollution liability coverage in the limited market and The Graham Company serves the National Association of Metal Finishers (NAMF) of which Allegan Metal Finishing Company is a member. As you can see, these insurers are unwilling to underwrite the risk of occurrences from the holding ponds due not only to the restricted marketplace for this coverage, but also the environmental enforcement claims currently known regarding these holding ponds resulting in "a case of adverse selection" (as Liberty Mutual described it).

We also reference the General Accounting Office (GAO) study: Hazardous Waste: The Costs and Availability of Pollution Insurance (October 1988), supplementing the prior GAO report (Hazardous Waste: Issues Surrounding Insurance Availability (October 1987)). The GAO study confirms a consistently diminishing number of insurers providing pollution liability insurance coverage both in terms of numbers of policies and dollar amount of coverage. On the other hand, the premium costs for pollution liability insurance have continued to increase dramatically.

Furthermore, the GAO study observes, importantly, at page 19, that:

> The decrease in the number of insurers writing pollution liability insurance after 1984 and in the number of policies written, together with the corresponding increases in the cost of insurance, do not fully reveal the increasing tightening of the market. Insurers who continued writing pollution insurance, even to a limited degree, also took other steps to limit their exposure by introducing changes in the coverage they afforded.

Therefore, even if coverage was reasonably available, GAO noted (at page 22) that such policies resulted in providing the insured companies "with no real protection from financial losses arising from pollution damage."

Allegan Metal Finishing Company's experience in attempting to obtain pollution liability insurance for the ponds is therefore completely consistent with the United States GAO report. In fact,

in these circumstances, it would be surprising if any insurer was willing to underwrite the risk of pollution occurrences from the defendant's holding ponds. Nevertheless, towards compliance with the RCRA Consent Decree, Allegan Metal Finishing Company will periodically reassess its ability to obtain such coverage, and certify the results of its good faith efforts every 90 days until closure of the ponds.

If you have any questions with regard to any of the above or the enclosures, please contact the undersigned.

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETT

Charles M. Denton

CMD/njv
c: Walter C. Sosnowski
Walter Speich

FEDERATED INSURANCE

RICK WHITCOMB, MARKETING REPRESENTATIVE
6140 28TH SE • SUITE 215 • GRAND RAPIDS, MI 49546
BUS. (616) 942-8388 • RES. (616) 538-8005 • FAX. (616) 942-4786

August 14, 1989

Mr. Walt Spiechs, Controller
Allegan Metal Finishing
1274 Lincoln Road
Allegan, Michigan 49010

Dear Walt,

I would like to clarify Federated Insurance Company's position regarding the possibility of writing a pollution clean-up insurance policy on Allegan Metal Finishing.

After review by our loss control department of your location on 1274 Lincoln Road, we are unable to offer a pollution insurance policy for the following reasons. 1. You presently have a pollution incident underway. 2. You have some sludge ponds which contain potential pollutants at this time. 3. Your close proximity to city wells and the Kalamazoo River.

I would like to thank you for your inquiry regarding pollution insurance with Federated. If you have any questions regarding this, please feel free to give me a call.

Sincerely,

Rick Whitcomb
Marketing Representative

RW/kab

RECEIVED AUG 16 1989

98 East Fulton Street
Grand Rapids, Michigan 49503-3279
Telephone: (616) 454-8241

LIBERTY MUTUAL

July 5, 1989

Mr. Walter Spiech
Allegan Metal Finishing Co., Inc.
1274 Lincoln Road
P.O. Box 217
Allegan, MI 49010

RE: Pollution Liability Coverage

Dear Walt:

I am sorry to advise you that we will be unable to provide Pollution Liability insurance to cover the two ponds on your property. I understand the ponds contain waste sludge and that you intend to dispose of the sludge. Your request for insurance is precipitated by the removal process; therefore any unfavorable occurrence would be more likely to happen under the circumstances. This prevents a case of adverse selection, and as such is in direct opposition to basic underwriting principles. For this reason we must decline to offer Pollution Liability Coverage.

I am sorry I can not be of assistance in this matter.

Sincerely,

Judith Ballweg

J.A. Ballweg
Manager

JAB/cas

VARNUM, RIDDERING, SCHMIDT & HOWLETT

ATTORNEYS AT LAW

SUITE 800
171 MONROE AVENUE, N.W.
GRAND RAPIDS, MICHIGAN 49503
TELEPHONE (616) 459-4186
TELECOPIER (616) 459-8468
TELEX 1561593 VARN

SUITE 700
ONE MICHIGAN AVENUE
120 NORTH WASHINGTON SQUARE
LANSING, MICHIGAN 48933
TELEPHONE (517) 482-6237
TELECOPIER (517) 482-6937

350 EAST MICHIGAN AVENUE
KALAMAZOO, MICHIGAN 49007
TELEPHONE (616) 382-2300
TELECOPIER (616) 382-2382

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GORDON B. BOOZER
WILLIAM K. VAN'T HOF
HILARY F. SNELL
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RICHARD J. McKENNA
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JEFFREY D. NICKEL
MARY C. MEATHE
JINYA CHEN*

OF COUNSEL
LAURENT K. VARNUM
JOHN L. WIERENGO, JR.
F. WILLIAM HUTCHINSON
CHESTER C. WOOLRIDGE
WILLIAM J. HALLIDAY, JR.
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1906-1988

WALTER K. SCHMIDT
(RETIRED)

*ADMITTED ONLY IN
PEOPLE'S REPUBLIC OF CHINA

REPLY TO

Grand Rapids

August 29, 1989

Mr. Joseph S. Carra
Director
Permits and State Programs Division
Office of Solid Waste
United States Environmental
Protection Agency
Washington, D.C. 20460

Re: Allegan Metal Finishing Company,
Delisting Petition No. 0652

Dear Mr. Carra:

We continue to dispute your office's intention to deny the pending delisting petition (No. 0652) of Allegan Metal Finishing Company (AMFCO), of Allegan, Michigan, based upon application of the vertical and horizontal spread (VHS) model, and other waste specific factors. This is to followup on certain of the matters set forth in your June 5, 1989 letter, and supplements our prior correspondence and communications on this petition.

AMFCO has requested a delisting for its retreated wastewater treatment sludges allowing such to be disposed at a properly licensed non-hazardous waste landfill. The delisting precedents we have cited, contrary to your characterizations of them, do support the granting of AMFCO's delisting petition: Both the Tricil and Nameplate exclusions imposed post-delisting conditions, just as AMFCO's petition proposes. Although, as you have noted, AMFCO would not be required to dispose of its delisted waste within State of Michigan boundaries, AMFCO's closure of the holding ponds from which the residuals would be excavated would be subject to State of Michigan oversight. As part of AMFCO's closure plan, an

acceptable disposal facility will have to be designated, to the reasonable satisfaction of the Michigan Department of Natural Resources (MDNR). This, coupled with our understanding that the MDNR would also have to approve the delisting of these retreated residuals, provides the appropriate environmental protections to satisfy your concerns. This is also yet another reason we consider the Agency's application of the VHS model to be inappropriate on this petition.

The alternative designation of a recycling facility rather than a non-hazardous waste landfill upon delisting is a priority for AMFCO. As you have noted, the potential sale or recycling arrangements for the AMFCO residuals is "simply another scenario of choice for management of the wastes subsequent to their delisting." As set forth above, RCRA regulation is claimed to continue despite the delisting of these wastes due to the holding ponds' closure and MDNR involvement. While you have rightly stated that the recycling process itself is exempt from RCRA regulation, the delisting of these residuals may be necessary to facilitate the recycling alternatives for the potential recyclers to accept and temporarily accumulate the materials prior to recycling, and also in light of the RCRA "land ban" restrictions that may apply to the recycled product if such is derived from "F006" wastes. Therefore, we continue to submit that this is an appropriate subject for due consideration on this delisting petition.

Although you do not believe a meeting on this delisting petition would be warranted, we nevertheless expect that you will be willing to consider our comments in support of this delisting petition, provide the Agency's response to the same, and reconsider your preliminary denial decision and grant AMFCO's delisting petition consistent with the above. Please contact the undersigned or Ronald Vriesman of Dell Engineering (616/396-1296) at your next convenience with regard to this matter.

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETT

Charles M. Denton

CMD/njv
c: Walter C. Sosnowski
Ronald Vriesman
Jim Kent
Andrew Tschampa
Joan Peck
Lynn Spurr
Gordon G. Stoner
Rep. Fred Upton

XC: EPA August Rpt.
8/11/89

VARNUM, RIDDERING, SCHMIDT & HOWLETT

ATTORNEYS AT LAW

SUITE 800
171 MONROE AVENUE, N.W.
GRAND RAPIDS, MICHIGAN 49503
TELEPHONE (616) 459-4186
TELECOPIER (616) 459-8468
TELEX 1561593 VARN

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1906-1988

WALTER K. SCHMIDT
(RETIRED)

*ADMITTED ONLY IN
PEOPLE'S REPUBLIC OF CHINA

REPLY TO

Grand Rapids

August 10, 1989

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. John C. Scherbarth
Assistant Attorney General
Environmental Protection Division
720 Law Building
525 West Ottawa
Lansing, MI 48913

Re: United States vs. Allegan Metal Finishing Company, No. K86-441-CA4 (WD Mich 1989)

Dear Mr. Scherbarth:

Based upon our prior communications, I am hereby providing you with a copy of the Consent Decree entered August 1 by Judge Enslen and filed August 2, 1989 in the United States District Court for the Western District of Michigan. This Consent Decree constitutes the settlement of the dispute relative to operation and closure of Allegan Metal Finishing Company's holding ponds under the federal Resource Conservation and Recovery Act (RCRA). As well, as you know, this Consent Decree expressly involves the Michigan Department of Natural Resources (MDNR) in proceedings subsequent and pursuant to the settlement, including most notably closure of the holding ponds at issue. A copy of the Consent Decree is therefore also being provided by copy of this letter to Jim Roberts and Lynn Spurr of the MDNR.

If you have any questions with regard to any of the above or the enclosure, please contact the undersigned or Gordon Stoner, attorney for the United States in this case.

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETT

Charles M. Denton

CMD/njv
c: Walter C. Sosnowski
Gordon G. Stoner
Jim Roberts
Lynn Spurr

XC: EPA August Report 5/7/89

5/10/89 FINAL

AMFCO Orig. file - RCRA

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. ALLEGAN METAL FINISHING COMPANY Defendant.	)	Civil Action No. K 86-441-CA4 Hon. Richard A. Enslen

CONSENT DECREE

Plaintiff, the United States of America, on behalf of the United States Environmental Protection Agency ("United States"), and defendant, Allegan Metal Finishing Company ("Allegan"), have jointly moved the Court for entry of this consent decree.

The parties have agreed that settlement of this matter is in the public interest and that entry of this consent decree as the compromise of a disputed claim without further litigation is the most appropriate means of resolving this matter.

THEREFORE, without admission by Allegan of the allegations in the complaint, without trial of any issue of fact or law, and upon consent and agreement of the parties to this consent decree, it is ORDERED, ADJUDGED and DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction of the subject matter of this action pursuant to 42 U.S.C. § 6928(a) and 28 U.S.C. § 1331, 1345 and 1355. Venue is proper in this district.

2. This Court has personal jurisdiction over Allegan.

II. APPLICABILITY

3. This consent decree applies to and binds the parties hereto and their successors. This consent decree and Allegan's performance hereunder shall not create any rights or causes of action in any third-parties or inure to the benefit of any non-party.

III. BACKGROUND

4. The United States filed the complaint in this action on October 30, 1986, alleging that defendant Allegan violated the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 et seq., and violated the Consent Agreement and Final Order ("CAFO") entered into between the United States Environmental Protection Agency ("U.S. EPA") and Allegan. Allegan filed an Answer and Affirmative Defenses denying liability.

5. By October 31, 1987, Allegan ceased its discharge of wastewater from its facility to the two surface impoundments at issue.

6. The United States and Allegan filed motions for summary judgment. On June 6, 1988, the Court denied Allegan's motion and granted, in part, the United States' motion for summary judgment on issues of liability.

7. On November 9, 1988, pursuant to a joint motion by the United States and Allegan, the Court dismissed all claims of liability against Allegan arising from the complaint not resolved by the Court's June 6, 1988 Opinion and Order.

8. Under RCRA Allegan must close the two surface impoundments according to an approved closure plan. On September 27, 1985, the U.S. EPA approved a closure plan for these two surface impoundments. Because of an intervening change in the RCRA regulations (53 Fed. Reg. 31138 (August 17, 1988)), however, Allegan's originally approved closure plan must be amended. As of 8/1/89, Allegan has submitted two proposed amendments for its closure plan to the Michigan Department of Natural Resources ("MDNR").

9. On October 30, 1986, pursuant to RCRA, the State of Michigan received authority from U.S. EPA to administer, in lieu of RCRA, the Michigan Hazardous Waste Management Act (1979 P.A. 64), including the authority to approve closure plans for hazardous waste management facilities located in Michigan. The United States and Allegan agree that the MDNR has authority to approve RCRA closure plans in Michigan, including amendments to Allegan's closure plan.

IV. COMPLIANCE

10. Except in full compliance with all federal and state laws and regulations and pursuant to this consent decree, Allegan shall not treat, store or dispose of any hazardous waste into or on any land treatment or land disposal unit at the Allegan facility. This prohibition shall not apply to any hazardous waste presently in the surface impoundments provided Allegan is in compliance with this consent decree.

11. Allegan shall close its two surface impoundments

as required by RCRA and consistent with the following provisions of this consent decree.

(a) Within 30 days after the entry of this consent decree, or MDNR rejection or approval of Allegan's previously submitted amendments, whichever is later, Allegan shall, as necessary depending upon the MDNR action on its amendments, submit to the MDNR an amended closure plan pursuant to the requirements of the Michigan Hazardous Waste Management Act and RCRA. Allegan's submittal of an amended closure plan to the MDNR may include and consideration shall be given to any method for closure that complies with the Michigan Hazardous Waste Management Act and RCRA, including, to the extent properly submitted and supported by Allegan, alternatives for management of the material in the surface impoundments other than off-site hazardous waste landfilling under 53 Fed. Reg. 31138 (August 17, 1988).

(b) Allegan shall implement the amended closure plan approved or issued by MDNR, as final agency action, according to the schedule set forth in the approved plan unless, within 30 days of such final approval or issuance, Allegan petitions the Court for alternative closure requirements under paragraph 24 of this consent decree. In the latter case Allegan shall close according to the Court's order.

(c) Allegan asserts that this Court has final authority to determine the nature and sufficiency of RCRA closure measures.

The United States asserts that this Court does not have such authority. The parties reserve their respective positions concerning whether or not this Court has authority to review RCRA closure plans or to authorize closure on terms other than those required by a State-approved plan. This consent decree does not confer or deny such authority to the Court.

12. Within thirty (30) days of the entry of this consent decree, Allegan shall attempt in good faith to satisfy the Michigan Administrative Rule R299.11003 (incorporating 40 C.F.R § 265.147) liability insurance requirement for sudden and non-sudden accidental occurrences from the two surface impoundments located at the Allegan facility. If Allegan does not satisfy said requirements despite its good faith efforts, it shall, not later than thirty (30) days after entry of this consent decree, and every ninety (90) days thereafter, provide written certification to the U.S. EPA and MDNR of Allegan's good faith efforts to satisfy the requirements for liability insurance coverage for sudden and non-sudden accidental occurrences. Unless otherwise notified by U.S. EPA in writing within 45 days, such good faith certification shall satisfy said requirement for the period of time covered by the certification. The quarterly submittal of said certification shall be required until the two surface impoundments at the Allegan facility have been closed in compliance with an approved amended closure plan under this consent decree.

V. SUBMITTALS

13. Any document or other item required by this consent decree to be submitted to U.S. EPA and MDNR shall be mailed or otherwise delivered to the following persons at the below specified addresses:

Joe Baker
U.S. EPA Region V
RCRA Enforcement Branch, 5HR-12
230 South Dearborn Street
Chicago, Illinois 60604

Lynn Spurr
Michigan Department of Natural Resources
Waste Management Division
621 N. 10th Street
P.O. Box 355
Plainwell, Michigan 49080

Delivery shall be deemed complete upon deposit of the material at issue in the U.S. Mail, certified mail, or with a reputable delivery service.

VI. CIVIL PENALTY

14. Allegan shall pay a civil penalty of forty-three thousand dollars ($43,000) to the United States of America in three equal installments every ninety (90) days, commencing thirty (30) days after entry of this consent decree.

15. Payments shall be made in the form of a certified check payable to the "Treasurer of the United States of America" and shall be tendered to U.S. EPA, Region V, P.O. Box 70753, Chicago, Illinois 60673. A copy of the transmittal of each payment shall be sent to the Waste Management Division, U.S. EPA

Region V, RCRA Enforcement Section, 5HR-12, 230 South Dearborn Street, Chicago, Illinois 60604, Attention: Joe Baker.

16. If any payment of the civil penalty is late, Allegan shall pay interest on the past due civil penalty. Interest shall accrue at the rate provided in 28 U.S.C. §1961(a), that is, a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of 52-week U.S. Treasury bills settled 30 days prior to the time of payment of the civil penalty. Interest shall be compounded annually.

X. GENERAL PROVISIONS

17. Approval and entry of this consent decree by the Court, and compliance with it by Allegan, shall constitute full and final settlement of the claims alleged in the complaint. In consideration for Allegan's full compliance with the terms of this consent decree the United States covenants not to sue Allegan, or its directors, officers or shareholders, for the claims alleged in the complaint.

18. Allegan shall make no reimbursement claim against the United States or the Hazardous Substance Superfund established by Section 221 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9631, for any closure costs incurred by Allegan in complying with this consent decree.

19. Except as provided by this consent decree, this consent decree does not eliminate the responsibility of Allegan

to comply with RCRA and other federal and state environmental laws to the extent such laws are applicable to Allegan.

20. The United States and Allegan expressly reserve all rights, claims, demands and causes of action each may have against any and all persons and entities that are not parties to this consent decree.

21. The United States and Allegan expressly reserve all rights, claims, demands and causes of action as to each other for matters not covered by this consent decree.

22. The United States has provided the State of Michigan with notice of the complaint filed in this action and of the lodging of the consent decree with the Court.

23. Each party to this action shall bear its own costs and attorneys fees.

24. The Court shall retain jurisdiction to enforce and modify this consent decree and to resolve disputes arising under it.

25. Approval by the United States and entry of this consent decree by the Court are subject to the Public Notice and Comment requirement of 28 C.F.R. § 50.7, which requires that notice of proposed consent decrees in certain environmental actions be given to the public, and that the public shall have at least thirty (30) days to submit comments on the proposed consent decree.

26. This consent decree shall terminate by motion of

either the United States or Allegan after each of the following has occurred:

(a) Allegan has complied with the terms of the consent decree.

(b) Allegan has paid the civil penalty and any late payment interest due pursuant to Section VI of this consent decree to the United States.

(c) Allegan has properly submitted a certification of closure for the two surface impoundments.

27. This consent decree shall be effective upon the date of its entry by the Court.

The undersigned representatives of each party to this consent decree certify that he or she is authorized by the party whom he or she represents to enter into the terms and conditions of this consent decree and to legally bind that party to it. By their undersigned counsel the parties enter into this consent decree and submit it to the Court for approval and entry.

Date: 8/1/89

original signed by?

HONORABLE RICHARD ENSLEN

UNITED STATES OF AMERICA
Plaintiff

DONALD A. CARR
Acting Assistant Attorney General
Land and Natural Resources Division
U.S. Department of Justice

ALLEGAN METAL FINISHING COMPANY
Defendant

WALTER C. SOSNOWSKI
President, Allegan Metal Finishing Company

JOHN SMIETANKA
United States Attorney
Western District of Michigan

Edith A. Landman
~~THOMAS GEZON~~ EDITH A. LANDMAN
Assistant U.S. Attorney
399 Federal Building
110 Michigan, N.W.
Grand Rapids, Michigan 49503

for Frank M. Covington
VALDAS V. ADAMKUS
Regional Administrator
Region V
U.S. Environmental Protection
Agency

~~THOMAS L. ADAMS, JR.~~ EDWARD E. REICH
Acting Assistant Administrator
Office of Enforcement and
Compliance Monitoring
U.S. Environmental Protection
Agency

GORDON G. STONER
Attorney, Environmental
Enforcement Section
Land and Natural Resources
Division
U.S. Department of Justice

CONNIE PUCHALSKI
Assistant Regional Counsel
U.S. Environmental Protection
Agency - Region V

CHARLES M. DENTON
Varnum, Riddering, Schmidt &
Howlett
Attorneys for Allegan Metal
Finishing Company

VARNUM, RIDDERING, SCHMIDT & HOWLETT

ATTORNEYS AT LAW

SUITE 800
171 MONROE AVENUE, N.W.
GRAND RAPIDS, MICHIGAN 49503
TELEPHONE (616) 459-4186
TELECOPIER (616) 459-8468
TELEX 1561593 VARN

SUITE 700
ONE MICHIGAN AVENUE
120 NORTH WASHINGTON SQUARE
LANSING, MICHIGAN 48933
TELEPHONE (517) 482-6237
TELECOPIER (517) 482-6937

350 EAST MICHIGAN AVENUE
KALAMAZOO, MICHIGAN 49007
TELEPHONE (616) 382-2300
TELECOPIER (616) 382-2382

JAMES N. DeBOER, JR.
GORDON B. BOOZER
WILLIAM K. VAN'T HOF
HILARY F. SNELL
PETER ARMSTRONG
ROBERT J. ELEVELD
KENT J. VANA
CARL E. VER BEEK
JON F. DeWITT
DONALD L. JOHNSON
DANIEL C. MOLHOEK
GARY P. SKINNER
THOMAS T. HUFF
TIMOTHY J. CURTIN
H. EDWARD PAUL
JOHN E. McGARRY
DIRK HOFFIUS
J. TERRY MORAN
BENHAM R. WRIGLEY, JR.
THOMAS J. MULDER
THOMAS J. BARNES
ROBERT D. KULLGREN
RICHARD A. KAY
LARRY J. TITLEY
BRUCE A. BARNHART
JEFFREY L. SCHAD
THOMAS G. DEMLING
JOHN W. PESTLE
ROBERT P. COOPER
FRANK G. DUNTEN
TERRANCE R. BACON

NYAL D. DEEMS
RICHARD A. HOOKER
RANDALL W. KRAKER
PETER A. SMIT
FREDRIC A. SYTSMA
JACK D. SAGE
MARK C. HANISCH
MARILYN A. LANKFER
THOMAS L. LOCKHART
ROBERT L. DIAMOND
BRUCE G. HUDSON
BRUCE GOODMAN
JOSEPH J. VOGAN
ERIC J. SCHNEIDEWIND
THOMAS A. HOFFMAN
TERESA S. DECKER
JEFFREY R. HUGHES
RICHARD W. BUTLER, JR.
LAWRENCE P. BURNS
MATTHEW D. ZIMMERMAN
WILLIAM E. ROHN
JOHN PATRICK WHITE
CHARLES M. DENTON
PAUL M. KARA
JEFFREY D. SMITH
H. LAWRENCE SMITH
JUDY E. BREGMAN
THOMAS C. CLINTON
MARK L. COLLINS
JONATHAN W. ANDERSON
JOHN W. BOLEY

CARL OOSTERHOUSE
WILLIAM J. LAWRENCE III
GREGORY M. PALMER
SUSAN M. WYNGAARDEN
KAPLIN S. JONES
STEPHEN P. AFENDOULIS
ROBERT A. HENDRICKS
DAVID E. KHOREY
MICHAEL G. WOOLDRIDGE
MICHAEL D. FISHMAN
HEATHER E. HUDSON
PERRIN RYNDERS
MARK S. ALLARD
TIMOTHY E. EAGLE
DAVID A. RHEM
DONALD P. LAWLESS
MICHAEL S. McELWEE
GEORGE B. DAVIS
JACQUELINE D. SCOTT
PAUL D. FOX
N. STEVENSON JENNETTE III
JOHN T. BEUKER II
MICHAEL A. SHIELDS
MICHAEL J. DUNN
THERESA M. POULEY
DAVID E. PRESTON
JAN D. REWERS
JEFFREY W. BESWICK
MICHAEL L. RESNICK
ELIZABETH J. FOSSEL
JOEL BAIR

JOAN SCHLEEF
SCOTT HILL-KENNEDY
SCOTT A. HUIZENGA
RICHARD J. McKENNA
STEVEN E. SKOLNICK
BOYD C. FARNAM
JEFFREY D. NICKEL
MARY C. MEATHE
JINYA CHEN*

OF COUNSEL
LAURENT K. VARNUM
JOHN L. WIERENGO, JR.
F. WILLIAM HUTCHINSON
CHESTER C. WOOLRIDGE
WILLIAM J. HALLIDAY, JR.
EUGENE ALKEMA
R. STUART HOFFIUS

RICHARD L. SPINDLE
1936-1975
CARL J. RIDDERING
1904-1977
CLIFFORD C. CHRISTENSON
1915-1982
ROBERT G. HOWLETT
1906-1988

WALTER K. SCHMIDT
(RETIRED)

*ADMITTED IN
PEOPLE'S REPUBLIC OF CHINA

REPLY TO Grand Rapids

March 31, 1989

Court Clerk
United States District Court
Western District of Michigan
410 W. Michigan
Kalamazoo, MI 49005

Re: United States v Allegan Metal Finishing Company
Case No. K86-441

To The Court Clerk:

Enclosed please find an original and one copy of Defendant's Response in Concurrence with Plaintiff's Motion for Enlargement of Time to Lodge Consent Decree and Proof of Service for the above-referenced matter.

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETT

Charles M. Denton

Charles M. Denton

CMD/njv
Enclosures
c: Walter C. Sosnowski
Gordon G. Stoner
Connie Puchalski
Thomas J. Gezon

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v

ALLEGAN METAL FINISHING COMPANY,

Defendant.

Civil Action No. K86-441

Hon. Richard A. Enslen

PROOF OF SERVICE

STATE OF MICHIGAN)
) SS.
COUNTY OF KENT)

Nancee J. Van Dyke, being first duly sworn, deposes and says that she is employed as a secretary for the firm of Varnum, Riddering, Schmidt & Howlett, and that on March 31, 1989, she served a copy of Defendant's Response in Concurrence with Plaintiff's Motion for Enlargement of Time to Lodge Consent Decree upon:

Mr. Gordon G. Stoner
Environmental Enforcement Section
Land and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

by placing the same in a sealed envelope addressed as above indicated and depositing the same in the U.S. mail with first class postage fully prepaid thereon.

Nancee J. Van Dyke

Nancee J. Van Dyke

Subscribed and sworn to before
me this 31st day of March, 1989.

Patricia A. Gietzen

PATRICIA A. GIETZEN
Notary Public, Kent County, MI
My Commission Expires Mar. 16, 1991

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v

ALLEGAN METAL FINISHING COMPANY,

Defendant.

Civil Action No. K86-441

Hon. Richard A. Enslen

DEFENDANT'S RESPONSE IN CONCURRENCE WITH PLAINTIFF'S MOTION FOR ENLARGEMENT OF TIME TO LODGE CONSENT DECREE

NOW COMES Defendant Allegan Metal Finishing Company, by and through its attorneys, Varnum, Riddering, Schmidt & Howlett, and hereby responds to Plaintiff's Motion to Modify the Court's Order of March 10, 1989, and to Enlarge the Time Within Which to Lodge the Consent Decree as follows:

1. Solely to facilitate the negotiated settlement of this long-standing dispute, Defendant concurs in Plaintiff's request for an extension of time within which to lodge the Consent Decree with this Court.

2. For the record, the delay in lodging the Consent Decree with the Court is in no way attributable to Defendant, as Allegan Metal Finishing Company executed the Consent Decree and transmitted the same to U.S. EPA for sign-off by duly authorized representatives of Plaintiff on February 17, 1989.

3. It should also be noted for the record that the processing of the Consent Decree for the settlement of this action has recently been delayed by Plaintiff's request to re-negotiate a substantive provision of the Consent Decree

previously agreed upon. Representatives of Plaintiff during the course of sign-off on the Consent Decree previously executed by Defendant have requested that a portion of one of the substantive sections of the Consent Decree be deleted. In its continued good faith efforts to reach an amicable resolution and full settlement of this dispute, Defendant has agreed to Plaintiff's request.

4. Based upon the above, Defendant expects along with Plaintiff that the Consent Decree should be fully executed by all necessary representatives on behalf of the parties for lodging with the Court and commencement of the requisite 30 day public comment period within 45 days. Again, to facilitate the consummation of this settlement, Defendant joins in Plaintiff's request for an extension of time beyond the Court's March 27, 1989 deadline for the lodging of the Consent Decree with the Court.

WHEREFORE, Defendant respectfully requests that the Court's Order of March 10, 1989 be modified to require that the United States lodge the Consent Decree with the Court on or before May 12, 1989.

VARNUM, RIDDERING, SCHMIDT & HOWLETT
Attorneys for Defendant Allegan
Metal Finishing Company

Dated: March 31, 1989

By: _____

Charles M. Denton (P-33269)
Theresa M. Pouley (P-40818)
Business Address:
Suite 800
171 Monroe Avenue, N.W.
Grand Rapids, MI 49503
Business Telephone:
(616) 459-4186

U.S. Department of Justice

DTB:GGS:
90-7-1-343

Washington, D.C. 20530

March 28, 1989

Charles M. Denton
Suite 800
171 Monroe Avenue, N.W.
Grand Rapids, Michigan 49503

Re: United States v. Allegan Metal Finishing,
Civil Action No. K 86-441-CA4

Dear Charles:

This letter is confirm to the agreement between the United States and Allegan Metal Finishing Company to delete from paragraph 11(a) of the consent decree in the above captioned civil action the following sentence: "Allegan shall continue in good faith to seek final approval of an amended closure plane from MDNR."

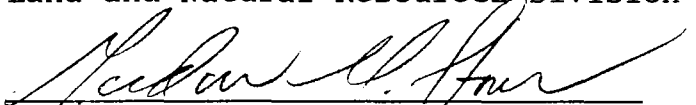
As we discussed by telephone, I have removed from the original consent decree, which Allegan has signed, page four and replaced it with a new page four from which the sentence of paragraph 11(a) identified above has been deleted. I have enclosed a copy of this consent decree.

We agreed that it is not necessary for Allegan Metal Finishing Company to re-sign the consent decree. This letter confirms that the enclosed consent decree is a copy of the original consent decree signed by Allegan, and currently at U.S. EPA for signature.

If this is not your understanding of the agreement that we reached regarding paragraph 11(a) of the consent decree, please contact me at once.

Sincerely yours,

Donald A. Carr
Acting Assistant Attorney General
Land and Natural Resources Division

By: 
Gordon G. Stoner, Attorney
Environmental Enforcement Section

Enclosure

cc: Thomas Gezon
Connie Puchalski

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. ALLEGAN METAL FINISHING COMPANY Defendant.	)	Civil Action No. K 86-441-CA4 Hon. Richard A. Enslen

CONSENT DECREE

Plaintiff, the United States of America, on behalf of the United States Environmental Protection Agency ("United States"), and defendant, Allegan Metal Finishing Company ("Allegan"), have jointly moved the Court for entry of this consent decree.

The parties have agreed that settlement of this matter is in the public interest and that entry of this consent decree as the compromise of a disputed claim without further litigation is the most appropriate means of resolving this matter.

THEREFORE, without admission by Allegan of the allegations in the complaint, without trial of any issue of fact or law, and upon consent and agreement of the parties to this consent decree, it is ORDERED, ADJUDGED and DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction of the subject matter of this action pursuant to 42 U.S.C. § 6928(a) and 28 U.S.C. § 1331, 1345 and 1355. Venue is proper in this district.

2. This Court has personal jurisdiction over Allegan.

II. APPLICABILITY

3. This consent decree applies to and binds the parties hereto and their successors. This consent decree and Allegan's performance hereunder shall not create any rights or causes of action in any third-parties or inure to the benefit of any non-party.

III. BACKGROUND

4. The United States filed the complaint in this action on October 30, 1986, alleging that defendant Allegan violated the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 et seq., and violated the Consent Agreement and Final Order ("CAFO") entered into between the United States Environmental Protection Agency ("U.S. EPA") and Allegan. Allegan filed an Answer and Affirmative Defenses denying liability.

5. By October 31, 1987, Allegan ceased its discharge of wastewater from its facility to the two surface impoundments at issue.

6. The United States and Allegan filed motions for summary judgment. On June 6, 1988, the Court denied Allegan's motion and granted, in part, the United States' motion for summary judgment on issues of liability.

7. On November 9, 1988, pursuant to a joint motion by the United States and Allegan, the Court dismissed all claims of liability against Allegan arising from the complaint not resolved by the Court's June 6, 1988 Opinion and Order.

8. Under RCRA Allegan must close the two surface impoundments according to an approved closure plan. On September 27, 1985, the U.S. EPA approved a closure plan for these two surface impoundments. Because of an intervening change in the RCRA regulations (53 Fed. Reg. 31138 (August 17, 1988)), however, Allegan's originally approved closure plan must be amended. Allegan has submitted two proposed amendments for its closure plan to the Michigan Department of Natural Resources ("MDNR").

9. On October 30, 1986, pursuant to RCRA, the State of Michigan received authority from U.S. EPA to administer, in lieu of RCRA, the Michigan Hazardous Waste Management Act (1979 P.A. 64), including the authority to approve closure plans for hazardous waste management facilities located in Michigan. The United States and Allegan agree that the MDNR has authority to approve RCRA closure plans in Michigan, including amendments to Allegan's closure plan.

IV. COMPLIANCE

10. Except in full compliance with all federal and state laws and regulations and pursuant to this consent decree, Allegan shall not treat, store or dispose of any hazardous waste into or on any land treatment or land disposal unit at the Allegan facility. This prohibition shall not apply to any hazardous waste presently in the surface impoundments provided Allegan is in compliance with this consent decree.

11. Allegan shall close its two surface impoundments

as required by RCRA and consistent with the following provisions of this consent decree.

(a) Within 30 days after the entry of this consent decree, or MDNR rejection or approval of Allegan's previously submitted amendments, whichever is later, Allegan shall, as necessary depending upon the MDNR action on its amendments, submit to the MDNR an amended closure plan pursuant to the requirements of the Michigan Hazardous Waste Management Act and RCRA. Allegan's submittal of an amended closure plan to the MDNR may include and consideration shall be given to any method for closure that complies with the Michigan Hazardous Waste Management Act and RCRA, including, to the extent properly submitted and supported by Allegan, alternatives for management of the material in the surface impoundments other than off-site hazardous waste landfilling under 53 Fed. Reg. 31138 (August 17, 1988).

(b) Allegan shall implement the amended closure plan approved or issued by MDNR, as final agency action, according to the schedule set forth in the approved plan unless, within 30 days of such final approval or issuance, Allegan petitions the Court for alternative closure requirements under paragraph 24 of this consent decree. In the latter case Allegan shall close according to the Court's order.

(c) Allegan asserts that this Court has final authority to determine the nature and sufficiency of RCRA closure measures.

The United States asserts that this Court does not have such authority. The parties reserve their respective positions concerning whether or not this Court has authority to review RCRA closure plans or to authorize closure on terms other than those required by a State-approved plan. This consent decree does not confer or deny such authority to the Court.

12. Within thirty (30) days of the entry of this consent decree, Allegan shall attempt in good faith to satisfy the Michigan Administrative Rule R299.11003 (incorporating 40 C.F.R § 265.147) liability insurance requirement for sudden and non-sudden accidental occurrences from the two surface impoundments located at the Allegan facility. If Allegan does not satisfy said requirements despite its good faith efforts, it shall, not later than thirty (30) days after entry of this consent decree, and every ninety (90) days thereafter, provide written certification to the U.S. EPA and MDNR of Allegan's good faith efforts to satisfy the requirements for liability insurance coverage for sudden and non-sudden accidental occurrences. Unless otherwise notified by U.S. EPA in writing within 45 days, such good faith certification shall satisfy said requirement for the period of time covered by the certification. The quarterly submittal of said certification shall be required until the two surface impoundments at the Allegan facility have been closed in compliance with an approved amended closure plan under this consent decree.

V. SUBMITTALS

13. Any document or other item required by this consent decree to be submitted to U.S. EPA and MDNR shall be mailed or otherwise delivered to the following persons at the below specified addresses:

Joe Baker
U.S. EPA Region V
RCRA Enforcement Branch, 5HR-12
230 South Dearborn Street
Chicago, Illinois 60604

Lynn Spurr
Michigan Department of Natural Resources
Waste Management Division
621 N. 10th Street
P.O. Box 355
Plainwell, Michigan 49080

Delivery shall be deemed complete upon deposit of the material at issue in the U.S. Mail, certified mail, or with a reputable delivery service.

VI. CIVIL PENALTY

14. Allegan shall pay a civil penalty of forty-three thousand dollars ($43,000) to the United States of America in three equal installments every ninety (90) days, commencing thirty (30) days after entry of this consent decree.

15. Payments shall be made in the form of a certified check payable to the "Treasurer of the United States of America" and shall be tendered to U.S. EPA, Region V, P.O. Box 70753, Chicago, Illinois 60673. A copy of the transmittal of each payment shall be sent to the Waste Management Division, U.S. EPA

Region V, RCRA Enforcement Section, 5HR-12, 230 South Dearborn Street, Chicago, Illinois 60604, Attention: Joe Baker.

16. If any payment of the civil penalty is late, Allegan shall pay interest on the past due civil penalty. Interest shall accrue at the rate provided in 28 U.S.C. §1961(a), that is, a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of 52-week U.S. Treasury bills settled 30 days prior to the time of payment of the civil penalty. Interest shall be compounded annually.

X. GENERAL PROVISIONS

17. Approval and entry of this consent decree by the Court, and compliance with it by Allegan, shall constitute full and final settlement of the claims alleged in the complaint. In consideration for Allegan's full compliance with the terms of this consent decree the United States covenants not to sue Allegan, or its directors, officers or shareholders, for the claims alleged in the complaint.

18. Allegan shall make no reimbursement claim against the United States or the Hazardous Substance Superfund established by Section 221 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9631, for any closure costs incurred by Allegan in complying with this consent decree.

19. Except as provided by this consent decree, this consent decree does not eliminate the responsibility of Allegan

to comply with RCRA and other federal and state environmental laws to the extent such laws are applicable to Allegan.

20. The United States and Allegan expressly reserve all rights, claims, demands and causes of action each may have against any and all persons and entities that are not parties to this consent decree.

21. The United States and Allegan expressly reserve all rights, claims, demands and causes of action as to each other for matters not covered by this consent decree.

22. The United States has provided the State of Michigan with notice of the complaint filed in this action and of the lodging of the consent decree with the Court.

23. Each party to this action shall bear its own costs and attorneys fees.

24. The Court shall retain jurisdiction to enforce and modify this consent decree and to resolve disputes arising under it.

25. Approval by the United States and entry of this consent decree by the Court are subject to the Public Notice and Comment requirement of 28 C.F.R. § 50.7, which requires that notice of proposed consent decrees in certain environmental actions be given to the public, and that the public shall have at least thirty (30) days to submit comments on the proposed consent decree.

26. This consent decree shall terminate by motion of

either the United States or Allegan after each of the following has occurred:

(a) Allegan has complied with the terms of the consent decree.

(b) Allegan has paid the civil penalty and any late payment interest due pursuant to Section VI of this consent decree to the United States.

(c) Allegan has properly submitted a certification of closure for the two surface impoundments.

27. This consent decree shall be effective upon the date of its entry by the Court.

The undersigned representatives of each party to this consent decree certify that he or she is authorized by the party whom he or she represents to enter into the terms and conditions of this consent decree and to legally bind that party to it. By their undersigned counsel the parties enter into this consent decree and submit it to the Court for approval and entry.

Date:_____

_____
HONORABLE RICHARD ENSLEN

UNITED STATES OF AMERICA
Plaintiff

ALLEGAN METAL FINISHING COMPANY
Defendant

_____
DONALD A. CARR
Acting Assistant Attorney General
Land and Natural Resources Division
U.S. Department of Justice

_____
WALTER C. SOSNOWSKI
President, Allegan Metal Finishing Company

JOHN SMIETANKA
United States Attorney
Western District of Michigan

THOMAS GEZON
Assistant U.S. Attorney
399 Federal Building
110 Michigan, N.W.
Grand Rapids, Michigan 49503

CHARLES M. DENTON
Varnum, Riddering, Schmidt & Howlett
Attorneys for Allegan Metal Finishing Company

VALDAS V. ADAMKUS
Regional Administrator
Region V
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THOMAS L. ADAMS, JR.
Assistant Administrator
Office of Enforcement and Compliance Monitoring
U.S. Environmental Protection Agency

GORDON G. STONER
Attorney, Environmental Enforcement Section
Land and Natural Resources Division
U.S. Department of Justice

CONNIE PUCHALSKI
Assistant Regional Counsel
U.S. Environmental Protection Agency - Region V

UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

ALLEGAN METAL FINISHING COMPANY,

Defendant.
_____/

Hon. Richard A. Enslen

File No. K86-441 CA4

ORDER

This matter is before the court on the United States' Motion To Modify The Court's Order Of March 10, 1989, To Enlarge The Time Within Which To Lodge The Consent Decree. There being no opposition to such motion, it will be granted, and the United States shall have until May 12, 1989 to lodge the consent decree with the court.

IT IS SO ORDERED.

Doyle A. Rowland

DOYLE A. ROWLAND
United States Magistrate

DATED: March 27, 1989

3/25/89

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. ALLEGAN METAL FINISHING COMPANY Defendant.	)	CIVIL ACTION NO. K 86-441-CA4 JUDGE ENSLEN

UNITED STATES' PROPOSED JURY INSTRUCTION NO. 30.

If you find in favor of the United States on the claimed violation of the terms of CAFO entered into between EPA and defendant, you shall put an "X" in the box marked "YES" next to the question on the verdict form that asks, "Did defendant fail to comply with the CAFO in a timely manner. Otherwise, you shall put an "X" in the box marked "NO".

[redacted]

VARNUM, RIDDERING, SCHMIDT & HOWLETT

ATTORNEYS AT LAW

SUITE 800
171 MONROE AVENUE, N.W.
GRAND RAPIDS, MICHIGAN 49503
TELEPHONE (616) 459-4186
TELECOPIER (616) 459-8468
TELEX 192818015 VARN

January 29, 1988

U.S. District Court
Western District of Michigan
410 W. Michigan
Kalamazoo, MI 49005

Re: United States v Allegan Metal Finishing Company
Case No. K86-441-CA4

To The Court Clerk:

Enclosed for filing please find an original and one copy of Defendant's Reply Brief in Opposition to Plaintiff's Motion for Partial Summary Judgment with Exhibits for the above-referenced matter. Also enclosed is the Proof of Service.

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETT

Charles M. Denton

CMD/njv
c: Walter C. Sosnowski
Leroy R. Dell, P.E.
Gordon G. Stoner
Thomas J. Gezon
Connie Puchalski

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA,

Plaintiff,

v

ALLEGAN METAL FINISHING COMPANY,

Defendant.
/

No. K 86-441

Hon. Richard A. Enslen

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF KENT)

Nancee J. Van Dyke, being first duly sworn, deposes and says that she is employed as a secretary for the firm of Varnum, Riddering, Schmidt & Howlett, and that on January 29, 1988, she served a copy of Defendant's Reply Brief in Opposition to Plaintiff's Motion for Partial Summary Judgment with Exhibits upon:

Mr. Gordon G. Stoner
Environmental Enforcement Section
Land and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

attorney for Plaintiff, by placing the same in a sealed envelope addressed as above indicated and depositing the same in the U.S. mail with first class postage fully prepaid thereon.

Nancee J. Van Dyke

Nancee J. Van Dyke

Subscribed and sworn to before me
this 29th day of January, 1988.

Nancy L. Wierenga

NANCY L. WIERENGA
Notary Public, Kent County, MI
My Commission Expires Sept. 5, 1990

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA,

Plaintiff,

v

ALLEGAN METAL FINISHING COMPANY,

Defendant.

No. K 86-441

Hon. Richard A. Enslen

DEFENDANT'S REPLY BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The parties to this action have exchanged motions for summary judgment under Federal Rule of Civil Procedure 56, addressing Defendant's alleged liability under the federal Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 et seq. The focus of these cross-motions for summary judgment is upon the alleged RCRA permit requirement for Defendant's wastewater holding ponds and the effect to be given in this action of the parties' prior administrative settlement in a Consent Agreement and Final Order (CAFO) entered by the United States Environmental Protection Agency (U.S. EPA). Both parties have submitted, based upon discovery completed to date, that there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. A review of Plaintiff's Motion and supporting Memorandum belies that this is true on Plaintiff's Motion for Partial Summary Judgment on Issues of Liability, and such should therefore be denied.

LAW AND ARGUMENT

I. PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT MISCHARACTERIZES AND MISSTATES CERTAIN MATERIAL FACTS.

A. There is a Genuine Dispute as to Plaintiff's Characterization of Defendant's Holding Ponds as a "Hazardous Waste Land Disposal Facility".

Plaintiff's Motion for Partial Summary Judgment on Issues of Liability relies upon the characterization of Defendant's holding ponds as a "hazardous waste land disposal facility" subject to federal RCRA regulation. There is, however, a genuine dispute as to whether or not these two holding ponds at Defendant's Allegan, Michigan facility received any "hazardous wastes" for "land disposal", and therefore whether Defendant was required to comply with the referenced RCRA permit requirements.

The wastewaters discharged to Defendant's holding ponds were understood by Defendant to be non-hazardous or exempt from hazardous waste regulation. (See, e.g., Walter C. Sosnowski depo., p. 43.) As well, the holding ponds were permitted by the State of Michigan.[1] (Defendant's Response to Plaintiff's Request for Admission No. 22 (at Exhibit R); Walter C. Sosnowski depo., p. 30.) Therefore, Defendant did not submit a Part A permit application for RCRA "interim status" in 1980. In fact, despite numerous intervening inspections and full notice of the use of the holding ponds, Defendant was only first notified of the

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[1] Query, whether the State of Michigan permit for discharge of wastewaters to the holding ponds excludes RCRA regulation under the definition of "solid waste" at 42 U.S.C. § 6903(27). See, Fishel v. Westinghouse, infra at 1538. See also, Walter C. Sosnowski depo., p. 63 (1972 State Stipulation to operate holding ponds transformed to NPDES permit for discharge).

government's allegation that the holding ponds were RCRA-regulated by the compliance inspection in December, 1984, which gave rise to the administrative complaint proceeding by the U.S. EPA. (Defendant's Response to Plaintiff's Request for Admission No. 2.) Defendant did then, however, toward resolution of that U.S. EPA administrative proceeding, file a RCRA Part A permit application for interim status on February 21, 1985. Pursuant to the U.S. EPA administrative proceeding, such permit application was deemed timely filed and the Defendant therefore obtained interim status under RCRA, Plaintiff's various statements to the contrary notwithstanding. (See, e.g., Plaintiff's Memorandum in Support of Partial Summary Judgment, p. 5 at fn. 7.)

The characterization of the wastewaters placed in the holding ponds is subject to a good faith dispute. First, the alleged listing of these wastewaters as RCRA "F006" hazardous wastes is not the end of the analysis, as the regulatory listing of F006 wastes excludes wastewaters from zinc electroplating on carbon steel. 40 C.F.R. § 261.31. (See, Walter C. Sosnowski depo, p. 9; Edward C. Sosnowski depo., p. 9.) The delineation of wastes generated by Allegan Metal Finishing Company in Plaintiff's Memorandum (at p. 13) does not fairly or accurately characterize the wastewaters discharge to the holding ponds, as not all of those substances were discharged to the ponds. (See, e.g., Edward C. Sosnowski depo., pp. 11 & 20) (F008 wastes generated but not discharged to ponds).) Further, the discharged wastewaters were pretreated (neutralized) through the Defendant's wastewater treatment system rendering a homogenous discharge legitimately believed by

Defendant to be "non-hazardous". (Walter C. Sosnowski depo., pp. 35 & 57-59.) Finally, Defendant has submitted through a delisting petition that the wastes in the holding ponds should be characterized as "non-hazardous" for purposes of further management and closure. (See, Defendant's Responses to Plaintiff's Requests for Admissions Nos. 10, 12 & 14.)

Not only is there a genuine dispute as to the "hazardous" nature of the wastewaters discharged to the holding ponds, but the further characterization of such holding ponds as "land disposal" is denied. The discovery herein has established Defendant's position that these holding ponds were for temporary storage of these wastewaters, which Defendant believed to be non-hazardous and which were not intended to remain in the ponds. (See, Defendant's Response to Plaintiff's Request for Admission No. 8.) "Disposal facility" means a facility at which hazardous waste is intentionally placed and at which waste will remain after closure. 40 C.F.R. § 260.10.

While Defendant intended to place the wastewaters into the holding ponds, there was no intent to place any "hazardous" wastes in the ponds and the holding of these wastewaters was only temporary. This facility never intended to be a hazardous waste disposal or even storage facility. (See, Walter C. Sosnowski depo., p. 27; February 21, 1985 correspondence to U.S. EPA at Exhibit Q.) Further, the U.S. EPA-approved closure plan calls for removal of all wastes from the existing holding ponds for transportation and disposal at an off-site licensed facility. See, Fishel v. Westinghouse Electric Corp., 617 F. Supp. 1531,

1537 (M.D. Pa. 1985): Finding fact question created on summary judgment motion, as "disposal facility" definition "clearly contemplates intentional conduct on the part of the operator . . . because a person could hardly be called upon to obtain a permit for property upon which he does not anticipate disposing of wastes." Finally, Plaintiff's use of a stipulation within the parties' settlement agreement to attempt to establish liability contradicts Federal Rule of Evidence 408, and further mischaracterizes such stipulation as the referenced paragraph of the CAFO indicates Defendant's facility is for waste "management" not "land disposal" as Plaintiff alleges.

Thus, contrary to Plaintiff's statement, there are genuine issues of material fact precluding Plaintiff's Motion for Partial Summary Judgment on Issues of Liability. Discovery herein establishes a good faith dispute as to the characterization of the wastewaters discharged to the holding ponds as "hazardous" wastes. Further, there is a genuine dispute as to whether these ponds constitute "land disposal" or temporary storage, although the only evidence produced thus far would deny the characterization of these holding ponds as "land disposal". The threshold elements for Plaintiff to obtain the summary determination of liability requested are therefore fatally flawed and Plaintiff's Motion should be denied.

B. Plaintiff's Ability to Proceed with this Enforcement Action in Light of Clear State Primary Jurisdiction

Plaintiff has asserted on its Motion for Partial Summary Judgment that the federal authorization of the State of Michigan hazardous waste management program in lieu of the federal RCRA law

does not interfere with this enforcement action. However, Plaintiff has not pled or met the requirements for federal enforcement where there is an authorized state program. While the Plaintiff acknowledges that the State of Michigan was granted final authorization by the U.S. EPA effective October 30, 1986,[2] and thereby has primary enforcement authority to take enforcement action under RCRA (Plaintiff's Memorandum, p. 2 at fn. 4), the Complaint herein (filed October 30, 1986) does not plead notice to the State prior to commencing this civil action, as required by RCRA § 3008(a)(2) (42 U.S.C. § 6928(a)(2)) or that the State of Michigan has chosen not to act and waived its right of primary enforcement. See, U.S. v. Conservation Chemical Company, 660 F. Supp. 1263 (N.D. Ind. 1987) and Civil No. H86-9 (Slip Op., September 18, 1987).

This deference to state enforcement under RCRA indicates a clear legislative intent to avoid dual or redundant enforcement of RCRA.[3] See, e.g., Northside Sanitary Landfill, Inc. v. Thomas, 804 F.2d 371, 382 (7th Cir. 1986)(EPA dissatisfaction with prior state enforcement or settlement does not justify independent federal RCRA action). Moreover, this preference for primary enforcement in one sovereign involves the issue of joinder of the State of Michigan which is presently on appeal in this case from Magistrate Rowland's denial of Defendant's Motion for Joinder of the State of Michigan as a party-plaintiff. Finally, this legislative policy

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2 The U.S. EPA published notice of the State of Michigan's final RCRA authorization on October 16, 1986. 51 Fed. Reg. at 36804. Plaintiff therefore knew of such authorization prior to filing this Complaint, and in any event is bound by these RCRA obligations as the State was authorized when the Complaint was filed.

is applicable by analogy to the prior U.S. EPA enforcement in this case, in that a company should only be subject to one hazardous waste enforcement action relative to the same claims. The Defendant herein, therefore, based upon compliance with the U.S. EPA settlement agreement, should not be subject to this subsequent RCRA enforcement litigation. In essence, the Plaintiff is now expressing dissatisfaction with its prior settlement agreement, and seeks to re-open this enforcement without regard to that prior settlement or the State of Michigan's primary enforcement role.

II. THE DEFENDANT, NOT PLAINTIFF, IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

The Plaintiff appears to agree with Defendant that the U.S. EPA administrative complaint and CAFO address the same permitting and interim status issues as are the subject of this litigation. (Plaintiff's Memorandum, p. 7.) Even assuming arguendo that Defendant stored or disposed of hazardous wastes in the holding ponds, Plaintiff's RCRA permit argument is flawed. In settlement of the prior U.S. EPA administrative proceeding, Defendant filed a Part A permit application and was deemed to have timely achieved interim status; Defendant complied with the RCRA groundwater monitoring and financial assurance requirements under the CAFO to continue that permitted status; and Defendant is in compliance with the U.S. EPA-approved closure plan for the holding ponds. There therefore has been no violation of RCRA to support any of the claims for relief on Plaintiff's Complaint, and Defendant not Plaintiff is entitled to summary judgment on the issue of Defendant's alleged RCRA liability.

A. Defendant's Compliance with the CAFO Settlement Constitutes a RCRA Permit Precluding this Action.

Plaintiff's Memorandum in Support of Partial Summary Judgment outlines "interim status" under RCRA with the requirements for "land disposal" facility owners and operators. (Plaintiff's Memorandum, p. 3.) All of those listed requirements under 40 C.F.R. Part 265, without Defendant admitting any storage or disposal of hazardous wastes, have been met or satisfied by Defendant pursuant to the CAFO. As was pointed out above, Defendant did obtain interim status and is not a "non-notifier" (Plaintiff's Memorandum, p. 3). Further, the loss of interim status (LOIS) argument of Plaintiff under RCRA § 3005(e)(2) (42 U.S.C. § 6926(e)(2)) addresses only Defendant's compliance with the financial responsibility requirements as it is not disputed that Defendant's groundwater monitoring program and closure plan were accepted and approved by U.S. EPA. The two financial responsibility regulations at issue require first, financial assurance for closure, and second, environmental liability insurance coverage. Defendant has met both of these financial responsibility requirements pursuant to the CAFO, and the November 8, 1985 LOIS date was effectively waived or superseded by that settlement agreement.

As to the financial assurance for closure provision, such was addressed fully in Defendant's Motion and Supporting Brief for Summary Judgment. Suffice to say here that Defendant filed the $260,000 closure letter of credit under RCRA pursuant to the CAFO and that such letter of credit with standby trust agreement was accepted by the U.S. EPA without objection. (See, Steven J. Alexander Affidavit at Exhibit G to Defendant's Summary Judgment

Brief; Walter C. Sosnowski depo., p. 53; and Edward C. Sosnowski depo., p. 22.)

The second financial responsibility requirement at issue relates to environmental liability insurance coverage for occurrences arising from the holding ponds. The Defendant has attempted in good faith to obtain such insurance, but has found such unavailable to it. These efforts have been documented and evidence provided to the U.S. EPA pursuant to the CAFO provision that such requirement would be stayed. (See, Exhibit H to Defendant's Summary Judgment Brief; Edward C. Sosnowski depo., p. 25; Walter C. Sosnowski depo., p. 48.) The U.S. EPA has, in apparent bad faith, refused to stay this requirement consistent with the CAFO, although the first and only notice of this refusal was the filing of this lawsuit seeking daily penalties for non-compliance.

Defendant has submitted that U.S. EPA had an implied good faith obligation under the CAFO provision on environmental liability insurance which precludes this claim. See, K.M.C. Company v. Irving Trust Company, 757 F.2d 752 (6th Cir. 1985) (lender's abilities to demand repayment and advance funds under financing agreement subject to implied obligation of good faith, and refusal to advance funds without prior notice deemed in bad faith and "arbitrary and capricious"). Furthermore, U.S. EPA's refusal to stay the environmental liability insurance requirement under the CAFO may be deemed "arbitrary and capricious" and subject to being set aside by this Court pursuant to the Administrative Procedures Act. See, 5 U.S.C. § 706(2)(a) (reviewing court shall, inter alia, "determine the meaning or applicability or the terms of an

agency action. . . . [and] (1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be -- (A) arbitrary, capricious, an abuse of discretion, * * * [or] (F) unwarranted by the facts . . .").

Not only is this claim subject to attack under the terms of the CAFO itself, but the requirement of environmental liability insurance is subject to the defense of impossibility or commercial impracticability as delineated in Defendant's Brief In Support of Summary Judgment (at pp. 11-14). An instructive decision on the impossibility of obtaining environmental liability insurance is the U.S. EPA administrative law judge's opinion in The Matter of Landfill, Inc., Docket No. IV-85-62-R (September 16, 1986) (finding that respondent was not liable for failure to have liability insurance coverage based upon good faith belief of government waiver and that respondent could not obtain the requisite insurance: "More important, however, is that the respondent's genuine efforts to obtain insurance proved fruitless. Simple justice requires that respondent should not be held responsible for its failure to accomplish an impossible task"). The impossibility or commercial impracticability of obtaining this environmental liability insurance, especially for a company such as Defendant that is subject to a hazardous waste enforcement action, is so well documented that the Court may even be in a position to take judicial notice of that fact under Federal Rule of Evidence 201. See, e.g., Superfund Amendments and Reauthorization Act § 208--"Insurability Study" (42 U.S.C. § 9651); Superfund Amend-

ments and Reauthorization Act § 210--"Pollution Liability Insurance" (42 U.S.C. § 9671 et seq.); U.S. EPA "Enforcement Guidance for a Constrained Insurance Market" (Exhibit K); 15 Environment Reporter (BNA) 1660 (February 15, 1985) (Exhibit L); and other materials at Exhibits M-O.

Defendant's compliance with the CAFO is characterized as an accord and satisfaction or res judicata on Defendant's Motion for Summary Judgment. In addition to the matters discussed above, the CAFO (at ¶ 5) provides for payment of the mitigated civil penalty of $3,000 in lieu of the $16,000 civil penalty. The deadline for payment of the lesser settlement amount, however, was not 60 days from the date of the CAFO but rather was triggered by compliance with all other requirements of the CAFO. Defendant accomplished full compliance with the CAFO by the January 31, 1986 letter of credit filing, which is also when the settlement payment was made and accepted by the U.S. EPA. (See, Walter C. Sosnowski depo., p. 55; Exhibit C to Defendant's Summary Judgment Brief.)

The CAFO does operate to bar this enforcement action as Defendant has shown compliance with the CAFO and the alleged subsequent violation of the RCRA financial responsibility requirements was in fact addressed by the CAFO. The allegation in Plaintiff's Memorandum (at p. 24) that Defendant was still in violation of the RCRA financial responsibility requirements and failed to comply with the CAFO as of the filing of this action on October 30, 1986, is inaccurate. The only alleged continuing noncompliance with the RCRA financial responsibility requirements relates to the environmental liability insurance, as the financial

assurance for closure was submitted and accepted. Moreover, under the CAFO there was no non-compliance on the environmental liability insurance and impossibility remains a further defense to that claim.

The defenses of estoppel or waiver are applicable to the equitable relief sought by Plaintiff herein in light of the U.S. EPA acceptance of Defendant's submittals as complying with the CAFO and without objection. As well, these equitable defenses relate to the effect of the CAFO as an accord and satisfaction or res judicata. See, U.S. v. Utah Construction and Mining Company, 384 U.S. 394, 422; 86 S. Ct. 1545, 1560; 16 L.Ed.2d 642, 661 (1966); Pettus v. American Airlines, Inc., 587 F.2d 627 (4th Cir. 1978), both supporting the application of res judicata in this action.[3] To deny that the CAFO precludes a subsequent enforcement action on the same issues would be to encourage litigation and discourage settlement of administrative disputes under RCRA, as there would no certainty or finality to consent order settlements. Clearly, this would be a policy contrary to the public interest. See, Thomas v. State of Louisiana, 534 F.2d 613, 615 (5th Cir. 1976): "Settlement agreements have always been a

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3 On the preclusive effect to be given administrative decisions, see also, 4 K. Davis, Administrative Law Treatise § 21.9, p. 78 (2d Ed. 1983): "[The law of res judicata] consists entirely of an elaboration of the obvious principle that a controversy should be resolved once, not more than once. The principle is as much needed for administrative decisions as for judicial decisions. To the extent that administrative adjudications resemble courts' decisions--a very great extent--the law worked out for courts does and should apply to agencies." Cited with approval in University of Tennessee v. Elliott, ____ U.S. ____; 106 S. Ct. 3220, 3226 at fn. 6; 92 L. Ed.2d 635 (1986).

favored means of resolving disputes. When fairly arrived at and properly entered into, they are generally viewed as binding, final, and as conclusive of rights as a judgment." See also, Williams v. First National Bank, 216 U.S. 582, 595; 30 S. Ct. 441, 445; 54 L.Ed. 675 (1910) (settlement is a favored method of resolving disputes).

B. Even to the Extent Defendant's Facility is Deemed Unpermitted, Closure is Proceeding Consistent with the U.S. EPA-Approved Closure Plan under RCRA.

Plaintiff's argument on summary judgment essentially states that a facility which is not permitted must proceed with an approved closure plan or be in violation of RCRA.[4] Although Defendant does not admit any unpermitted use of the holding ponds, there can be no dispute that the express terms and conditions of the U.S. EPA-approved closure plan have been met. (See, Defendant's Document Production Response No. 13, at Exhibit I to Defendant's Summary Judgment Brief.)

As more fully described in Defendant's Brief in Support of Summary Judgment, the closure plan was submitted pursuant to the CAFO and provided that the holding ponds would essentially be excavated and transported to an off-site disposal facility. That closure plan, however, as approved, specifically and expressly, at various places, stated that closure could not commence until the Defendant's waste water treatment system was upgraded and that Defendant would continue to use the holdings ponds until that

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4 Cf., March 25, 1985 U.S. EPA correspondence (at Exhibit P) stating: "An approvable closure plan that covers all of the regulated units at the Allegan facility, would be acceptable to us in lieu of the Part B."

time. (Defendant's Summary Judgment Brief, p. 9.) Plaintiff has admitted that pre-condition to closure. (Plaintiff's Answer to Defendant's Interrogatory No. 15, at Exhibit J to Defendant's Summary Judgment Brief.)

Therefore, even if Plaintiff prevails on the argument that Defendant failed to meet the financial responsibility requirements for a RCRA permit, which Defendant denies, Plaintiff's argument continues that closure of the holding ponds would thereby be required. Under the CAFO, Defendant has operated consistent with and pursuant to its U.S. EPA-approved closure plan regarding the holding ponds, and liability therefore may not ensue.

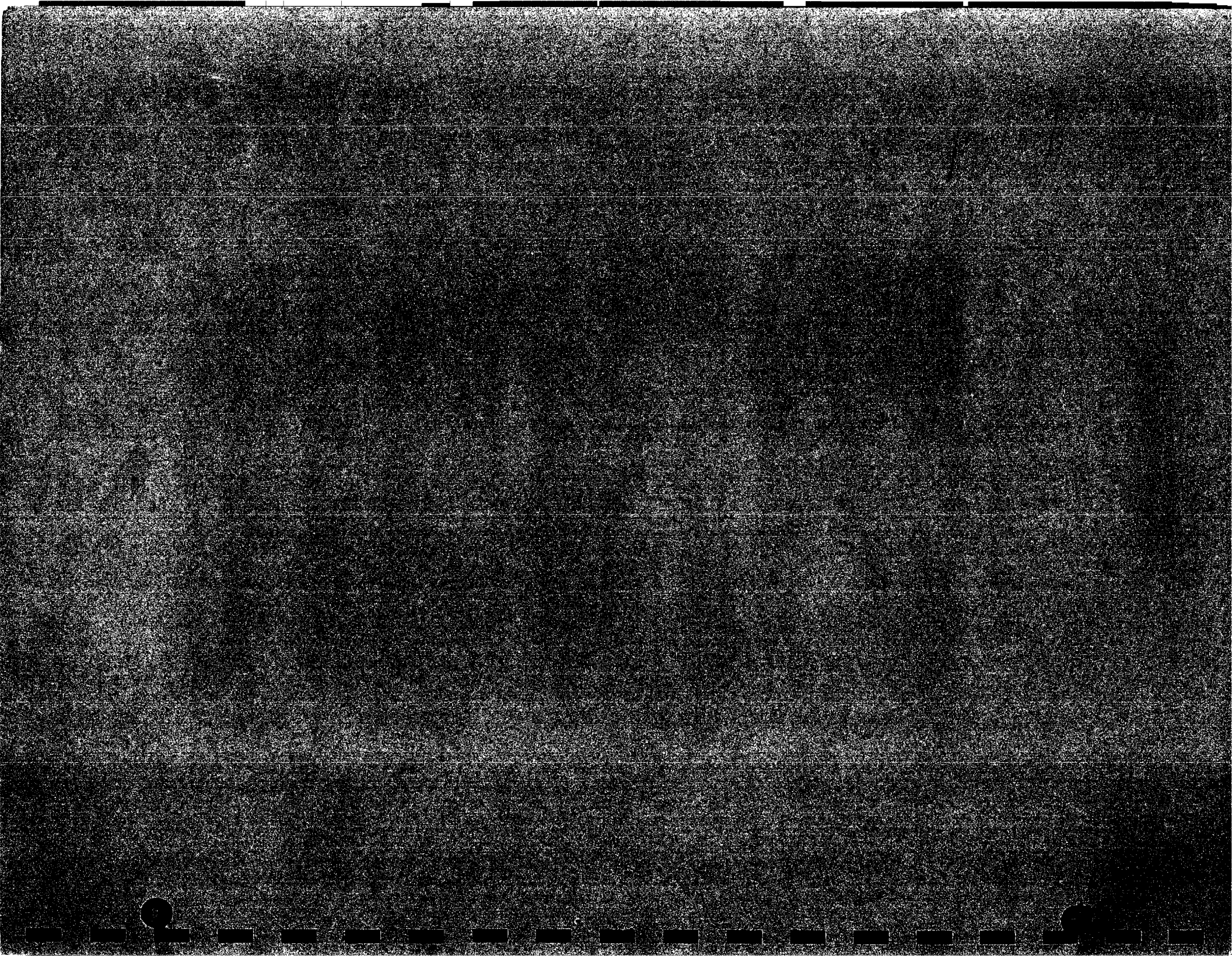
RELIEF REQUESTED

For all of the above reasons, Defendant respectfully requests that Plaintiff's Motion for Partial Summary Judgment be denied and that Defendant's Motion for Summary Judgment dismissing Plaintiff's Complaint with prejudice be granted, and that Defendant be awarded its costs and attorneys' fees on this action, together with such further and other legal and equitable relief as may be just under the circumstances.

VARNUM, RIDDERING, SCHMIDT & HOWLETT
Attorneys for Defendant Allegan
Metal Finishing Company

Dated: January 27, 1988

By: _____
Charles M. Denton (P-33269)
Theresa M. Pouley (P-40818)
Business Address:
Suite 800
171 Monroe Avenue, N.W.
Grand Rapids, Michigan 49503
Business Telephone:
(616) 459-4186



Index to Exhibits

K. "Enforcement Guidance for a Constrained Insurance Market," U.S. EPA (January 30, 1985)

L. 15 Environment Reporter (BNA) 1660 (February 15, 1985)

M. "Insurance Lack Perils Cleanup of Toxic Waste," Grand Rapids Press (February 10, 1985)

N. "Ballooning Cost of Liability Insurance has Far-Reaching Effect on Business," Grand Rapids Press (September 29, 1985)

O. "Environmental Damage Liability Insurance -- A Primer," 39 The Business Lawyer 333 (November, 1983)

P. U.S. EPA Correspondence Re: Part B Permit Application and Closure Plan (March 25, 1985)

Q. Correspondence to U.S. EPA Re: Interim Status and Closure Plan (February 21, 1985)

R. Defendant's Responses to Plaintiff's First Set of Requests for Admissions of Fact*

*Please note that Exhibit I to Defendant's Summary Judgment Brief was misidentified, as such Exhibit was in fact Defendant's Responses to Plaintiff's First Request for Production of Documents

DRAFT

MEMORANDUM

SUBJECT: Enforcement Guidance for a Constrained Insurance Market

FROM: Jack W. McGraw
Courtney M. Price

TO: Division Directors, Regions I-X
Regional Counsels, Regions I-X

INTRODUCTION

This guidance describes appropriate enforcement responses to RCRA facilities facing a constrained insurance market. The enforcement approaches described herein are meant as interim measures until the insurance market's health is restored. We recognize that the approach described herein is a stopgap measure and does not constitute a long term solution to this problem. Consequently the Agency will be working with the insurance industry to identify problem areas and develop a long term solution. In the meantime, the following guidance should be used in dealing with the regulated community. This guidance will remain in effect through January 31, 1986.

BACKGROUND

In accordance with Part 265, Subpart H requirements, approximately 4800 facilities are subject to sudden liability requirements, and approximately 1000 surface impoundments, land disposal and landfill facilities are subject to nonsudden liability requirements. The requirements for nonsudden liability insurance have been phased in over time on the basis of owner and operator size, with the smallest owners and operators (those with sales and revenues less than five million dollars) needing to obtain nonsudden liability insurance by January 16, 1985.

Due to a reduced market for environmental impairment liability (EIL) insurance, owners and operators may experience difficulty meeting requirements for nonsudden coverage (CFR 265.147(b)). Moreover, because of court decisions broadening sudden coverage under comprehensive general liability (CGL) policies, some insurance companies are eliminating sudden coverage from such policies. Therefore, some owners and operators may have difficulty meeting

the requirement for sudden liability coverage (CFR 265.147(a)). The reduced market is a result of: (1) an apparent willingness of the courts to extend coverage into instances that were not

The reduced market is a result of: (1) an apparent willingness of the courts to extend coverage into instances that were not anticipated to be covered by the insurer; (2) some major losses on EIL policies from non-RCRA events which have reduced the reinsurance market; and (3) a resultant reduction in the number of insurers offering coverage.

The current insurance market has left many owners and operators subject to the RCRA sudden and nonsudden environmental liability coverage requirements in a difficult situation. The situation for land disposal facilities is further complicated by the recent amendment (§3005(e)) requiring facilities to self-certify compliance with ground water monitoring and financial responsibility requirements and submit a part B application by November 8, 1985 or lose interim status. Without having liability coverage, or being on a compliance schedule to obtain such coverage, these firms will be unable to certify compliance with all financial responsibility requirements.

GUIDANCE

The purpose of this memorandum is to provide an Agency enforcement response guidance for: (1) dealing with the immediate problem of owners and operators who have less than five million dollars in sales and revenues and are subject to the January 15, 1985 compliance deadline for nonsudden liability insurance; and (2) those other firms facing the shrinking insurance market who have had either a nonsudden policy cancelled or have had sudden coverage removed from their CGL policy.

The underlying principle of this guidance is that actions will have to be taken at a facility specific level. Regional officials are advised to take enforcement action against violators of the insurance requirements within the context of current inspection and enforcement priorities. The general rationale for taking action is explained below.

Decisions at the facility specific level should be made in light of the following conditions:

(1) Would the facility's environmental condition and management practices make it ineligible for insurance regardless of current market conditions? For example, would the facility's history of noncompliance with RCRA regulations cause an insurer to be unwilling to issue a policy. In the absence of the violations of the insurance requirements, is the facility a high-priority violator?*

(2) Does the owner's or operator's financial condition impede its payment of an insurance premium? In other words, does the facility claim that it cannot obtain insurance because it cannot afford it.

(3) Did the owner or operator make a "good faith" effort to obtain/renew insurance? Can the owner or operator provide the Agency official with documentation of attempts to gain insurance with known insurers.

If a facility is ineligible for insurance due to either conditions (1) or (2) the following actions leading to closure should be taken whether or not the facility has made a good faith effort to obtain insurance:

° cite the owner/operator for failure to obtain coverage, issue a RCRA §3008 order to the facility to cease receiving wastes and close, and have the owner/operator submit the closure plan (CFR 265.112(c)(2)); or

° request the facility's part B, evaluate it for completeness, if incomplete for failure to obtain liability insurance, terminate interim status (CFR 270.10(e)(5)), and have the owner/operator submit a closure plan (CFR 265.112 (c)(1)).

When taking a closure action, it is important to review the adequacy of the closure and post-closure cost estimates as well as the adequacy of the financial assurance mechanism.

If it is determined that the owner/operator does not fall into conditions (1) or (2), the enforcement official should determine whether the facility has made a "good faith" effort to obtain/renew insurance. Among the factors that should be reviewed in defining a good faith effort are:

° Did the owner or operator submit an application to insurance company(ies) in a timely fashion, allowing for the insurance firm to process and issue the policy?

° Did the owner or operator submit his application to a "known" supplier(s) of EIL insurance?

° Did the owner or operator submit a quality application, i.e., one that the insurer could act upon?

With regard to timeliness, existing information indicates that in a healthy insurance market, insurance firms need at least three months to process straightforward applications, and at least nine months to review more complex applications, e.g., for applications covering multiple facilities. Thus, when reviewing good faith claims of owner/operator subject to January 15, 1985

deadline, the enforcement official should check to see whether the application was filed no later than three months prior to that date or October 15, 1984.

The Agency official should evaluate carefully an owner or operator claim that he was unable to locate an insurer should be evaluated carefully. For example, the owner or operator should have approached/applied to a "known" supplier(s) of EIL insurance

(see attached list of brokers and underwriters). Failure to apply to a "known" insurer should serve as an indicator that the owner/operator did not make a good faith attempt to find insurance.

The determination of whether the application is of sufficient quality to be considered "good faith" is a difficult question. One means by which an owner/operator could demonstrate good faith is to show the inspector documentation that s/he had a risk assessment prepared, and submitted that assessment to the insurance company along with the application. However, it should be noted that not preparing such a risk assessment need not indicate "bad faith" as the preparation of such an assessment is not an application requirement for all insurance companies.

Facilities adjudged to be making a good faith effort, and who would otherwise be insurable in a healthy market, should be placed on a compliance schedule. While penalties are not generally advised for "good faith" attempts, there may be cases, e.g., where the owner or operator applied to but one insurer, where a penalty may be warranted. Key dates for inclusion in the compliance schedule are: application dates for new submission (if earlier submission was to a company who dropped out of the business of writing policies for environmental liability); dates for completion of an exposure assessment and identification of prior releases; and date for receipt of insurance. The identification of prior releases and the provision of exposure assessment information provides an insurance firm with improved information on the risk it is insuring. Knowing the magnitude of the risk should result in the insurance company's abilities to evaluate the application in a more efficient manner. The date for receipt of insurance should not exceed one year from issuance of the order. Under current market conditions, smaller firms should be able to obtain insurance in a six to eight month timeframe.

One option for dealing with owners and operators which have not demonstrated good faith is to assess penalties for their failure to comply and place them on compliance schedules to obtain insurance. These schedules should include a penalty structure for violations of that schedule (see Enforcement Response Policy). Another option is to force facility closure for failure to obtain coverage. This option is attractive in that the owners or operator's environmental and financial condition did not preclude obtaining coverage and, despite this, the facility made no attempt to gain coverage. Again, the Agency official should review the facility's closure

and post closure cost estimate as well as the adequacy of the financial assurance document prior to taking this action.

While the second option listed is viable, the enforcement official may select the first option for the following reasons: (1) the facility is not a significant environmental concern and devoting additional resources to it by seeking closure may divert resources from more important areas; and (2) the owner/ operator has a good record of compliance. However, if the first option is selected, compliance schedules should make it extremely clear that failure to act in an environmentally sound manner may lead to the termination of interim status.

The guidance is an interim measure and subsides on January 31, 1986. Compliance schedules written previous to that date may exceed this date, but no new actions should be intiated. Should you have any questions regarding this guidance please call Jackie Tenusak (382-2004) or Bob Linett (382-4644) of the RCRA Enforcement Division.

Special Report

PRESENT MARKET FOR POLLUTION INSURANCE IS DECLINING, BUT INSURANCE INDUSTRY OFFICIALS PREDICT INCREASED DEMAND

The market for insurance policies to cover environmental damage and personal injuries caused by the gradual or non-accidental release of pollutants is declining, but the potential demand for pollution insurance justifies high expectations for future growth, according to James C. Morrow, chairman of the board of directors of the Pollution Liability Insurance Association (PLIA).

Even though five out of 10 major primary insurance carriers now offering environmental impairment liability coverage may discontinue this coverage, insurance industry officials expressed optimism for the future of pollution insurance at the American Insurance Association's March 20 conference on environmental injury compensation in Washington, D.C., and in interviews with BNA.

As companies that deal with hazardous substances and government regulators become aware of the enormous potential losses associated with environmental injuries, the market for environmental impairment insurance has potential for tremendous expansion, Morrow, a vice president with Nationwide Insurance Co., told the conference.

The magnitude of the potential liabilities associated with personal injury from environmental hazards probably will exceed that of asbestos product liability litigation because of the larger number of insured companies dealing with hazardous substances, according to Dennis R. Connolly, a senior AIA attorney. If potential liabilities for natural resource damages under the Comprehensive Environmental Response, Compensation, and Liability Act (the superfund law) are included, environmental liability insurance will have to cover potential losses larger than those covered by all other forms of insurance combined, Connolly told BNA March 27.

Any company that works with materials that could escape and pollute the environment needs insurance to protect against the potential liability, Morrow said. The potential liabilities are pervasive, extending from nationally recognized industries such as the chemical industry to any entity having a gasoline storage tank on the premises, according to the pollution insurance association chairman.

While potential liability for losses caused by environmental exposure to pollutants is not new, the damages resulting from environmental disasters such as those at Love Canal in New York and Times Beach, Mo., have recently generated

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outpouring of concern from the government, public, and insurance industry, he said.

Most purchasers of insurance now are aware of the potential liabilities, but may be unaware of what coverage to purchase and where it is obtainable, Morrow said.

Some Reasons for Size of Present Market

The field of environmental impairment liability insurance is declining in part because potential customers feel they are covered already by their existing general liability policies and are not aware of their need for separate pollution coverage, Morrow said.

The total premium volume for environmental impairment policies currently is between $20 million and $30 million annually, Morrow told the conference. PLIA has 150 policies with an aggregate premium volume of $800,000, "which is hardly worth talking about," he commented.

Another reason companies are not lining up to buy environmental impairment insurance may be that very few companies realize the extent to which they are required by state law to have coverage, Connolly said.

A compilation of all such state requirements is the AIA's "1984 Survey of Environmental Pollution Legislation and Regulation," Connolly said. The survey examines statutes and regulations in effect through January 1984 that affect the liability of companies for environmental hazards, he said. These hazards include hazardous wastes and substances, solid and radioactive wastes, and oil pollution, the association attorney said (See related item, p. 2189.).

Occurrence Policies, Claims-Made Policies

The insurance industry is engaged in a controversy over pollution insurance contract language affecting the type and number of claims and the period of time covered by the insurance, participants at the AIA conference said. The controversy is over whether a policy should insure against claims filed while the policy is in effect, or against damages that occur during a policy's term.

The "occurrence" language used in present general liability policies leads to unquantifiable claims and uninsurable losses related to exposure to gradual or non-accidental pollution that occurs during normal business operations, James L. Kimble, another senior AIA attorney, told BNA March 26. This result could be avoided by using "claims-made" policy language in environmental impairment liability insurance, according to Kimble.

Insurance carriers writing environmental impairment policies favor coverage of potential liability that can arise only through claims filed during the term of the policy, Kimble said. The claims-made language makes it possible for the carrier to quantify its potential liability and charge a premium that makes the coverage profitable, he said. This claims-made policy covers the insured party's liability for claims made while the policy is in effect, regardless of when the injury occurred, Kimble said.

In the past, general liability policies that included coverage for gradual or non-accidental pollution covered potential liability from injuries that occurred while the policy was in effect, even if the claim for the loss was filed after the policy's expiration, Kimble explained. In effect, the policies offered retroactive coverage, making a profitable premium calculation almost impossible, he said. An occurrence-type policy may be subject to an unlimited number of claims filed any time in the future, he explained.

PLIA only reinsures the potential liabilities of member insurance companies that write claims-made policies, Morrow said.

The pollution insurers' association chairman told the conference that the only "true solution" to the problems of the current language in general liability policies is to exclude all pollution coverage and write the coverage on a separate insurance policy.

A less attractive option is to remove any exclusion on the current liability policy and price the coverage corresponding to the potential liability of the individual insured company, he said.

General Liability Policies, Pollution Coverage

The insurance industry has moved away from offering general liability policies without specific exclusions for gradual, non-accidental pollution and toward general liability policies that only include sudden, accidental occurrence-type coverage, Morrow said. This trend, in part, created the need for separate environmental impairment liability insurance, he added.

In June 1970, the Insurance Services Office, an industry clearinghouse that pools actuarial data and drafts standard insurance forms, issued an exclusion to the general liability policy applying to potential liability for pollution damage, according to Morrow. The general liability policy would cover only discharges, disposals, releases, or escapes of pollutants into the environment that were sudden and accidental, he said.

This exclusion is in the current liability contract used by the vast majority of primary carriers, Morrow said. The intent was to return the policy coverage for environmental pollution to an accidental basis, he said.

The exclusion has come under increasing attack as insured companies, government regulators, and courts look for ways to obtain pollution coverage under the current general liability contracts, according to Morrow. Some lower state courts have interpreted general liability policies designed to cover only accidental release of pollutants as covering pollution extending over a period of time, he said.

The U.S. Court of Appeals for the First Circuit upheld the exclusion Feb. 2 in *Great Lakes Container Corp. v. National Union Fire Insurance Co.* (No. 83-1607), holding that the state insurance authority's formal disapproval of policy exclusions for gradual, non-accidental pollution could not be legally enforced because the New Hampshire insurance commissioner had violated the state Administrative Procedures Act in adopting this view. The appeals court also upheld the exclusion because the insurance policy was clear and unambiguous, according to Connolly (Current Developments, March 2, p. 1918).

A bill (HR 4813) introduced by Rep. James J. Florio (D-NJ) to provide for compensation for persons harmed by exposure to toxic substances would create liabilities that cannot be quantified, Connolly said. The bill is ill-conceived because it distorts factors insurance companies have relied on in making insurance, he said.

Officials at Crum & Forster Insurance Companies, one of the largest participants in the environmental impairment insurance market, "are, quite frankly, absolutely terrified by what a growing number of courts and legislatures either have done, or propose doing, to our nation's principal compensation systems," according to Leslie Cheek, the organization's vice president for federal affairs.

However, congressional staff members familiar with the bill disagreed with the insurance industry's assessment of the legislation. The financial responsibility provisions of the bill do not differ from existing law regarding the liability of insurers, the staff members told BNA.

The monetary limits of the general liability policy and its exclusions would apply under the Florio bill as long as the insurer acts in good faith, which is a concept that has been defined through a long line of court decisions, the staff members said. An example of bad faith on the insurance company's part would be its refusal to respond to an occurrence that should be covered under the policy, they said.

Reinsurance: A Limiting Factor

One factor limiting the availability of environmental liability insurance is the ability of a primary insurance carrier to obtain reinsurance from another carrier or group of carriers, Morrow said.

PLIA is a pool of 49 insurance companies that reinsures the Insurance Services Office pollution coverage form for environmental impairment liability insurance written by member companies, he said. PLIA does not write just gradual or non-accidental coverage, but insists on a claims-made policy that combines both the accidental and non-accidental coverages in the same contract, according to Morrow.

He warned that splitting the two coverages between two different insurance carriers virtually ensures denial of coverage by both carriers in the event of a claim. "We feel each carrier will argue that the other's policy should respond," he told the conference.

The organization reinsures all potential pollution liability and not just hazardous waste liability, Morrow noted. However, PLIA does not accept all insurance risks, excluding companies such as chemical manufacturers or a company involved in maintaining a hazardous waste site accepting wastes from all sources, he said. PLIA member companies must find alternative markets for reinsurance of unacceptable risks, according to Morrow.

Companies that need non-accidental pollution coverage may buy a policy from an insurance carrier or a pool of carriers that are "admitted" or licensed and closely regulated by state insurance authorities, or they may buy a policy from the alternative markets, the largely unregulated excess and surplus lines carriers. These excess and surplus lines carriers cover insurance risks the admitted companies do not wish to cover, aiming at companies with potentially severe liability involving hazardous wastes.

The excess and surplus lines carriers reinsure a significant portion of their customers with insurance companies outside the United States, especially the Lloyds market, Morrow said. They generally write an environmental liability insurance policy that is aimed at gradual or non-accidental liability only, typically allowing the accidental coverage to remain on the general liability policy, he said.

The largest portion of potential hazardous waste liability may be self-insured, according to Morrow. The 50 largest chemical manufacturing firms are virtually all self-insured with the majority of their wastes disposed of on their own sites, he said.

The Future of Pollution Insurance

Losses now becoming apparent from environmental disasters, as well as from pending lawsuits, are requiring a substantial increase in premiums, according to Morrow. In addition, these losses have the effect of reducing the capacity of the reinsurance market, he said.

However, the major admitted carriers that have avoided writing pollution coverage will need to provide the coverage in the future to remain competitive in the insurance marketplace, according to Morrow.

Despite the present period of decline, environmental impairment policies present potentially the largest single insurance market in the world, Connolly said. The emerging losses include claims for natural resource damages filed by states and the U.S. government under the superfund law, such as the $1.8 billion suit against Shell Oil Co. by the U.S. Army, Connolly said (Dec. 16, 1983, p. 1436).

Another example of this kind of loss is the consent order reached between the Diamond Shamrock Chemicals Co. of Dallas and the New Jersey Department of Environmental Protection to clean up dioxin contamination at a former company site in Newark, N.J. That order requires the company to attempt to obtain liability insurance indemnifying itself and the state against claims of property damage and bodily injury (See related article, p. 2184.).

To provide the needed coverage, the larger carriers will retain environmental impairment insurance within their own accounts and look to their reinsurers for protection, Morrow predicted. The smaller carriers that feel uncomfortable with the potential liabilities may well opt for a solution such as PLIA, or attempt to secure their own individual reinsurance coverage, he said.

Many excess and surplus lines companies are having problems obtaining reinsurance, which was available in the past, according to Morrow. If these carriers leave the environmental impairment liability insurance market because they cannot obtain reinsurance, pressure from state and federal regulators may create the kind of problem the insurance industry faced in the middle 1970s over products liability coverage, Morrow said.

Certain kinds of products in the 1970s became so burdened with adverse liability so suddenly that they became virtually uninsurable, Connolly said. The cost for insurers of covering machine tool manufacturers, for example, was three or four times greater than the premiums being charged to the manufacturer, he said.

Comparing environmental liability to the asbestos product liability litigation, Morrow predicted that the insurance industry is likely to incur many more suits and loss payments than contemplated at the time the industry wrote pollution coverage into insurance contracts.

If the challenge to the general liability policy exclusion succeeds, the emerging losses could dry up admitted company and reinsurance capacity and leave pools like PLIA as the only way to provide volunteer coverage, Morrow said.

If courts choose to shift the entire liability for environmental impairment onto the insurance industry, the industry will collapse because it cannot absorb the losses from 500 cases like the Shell Oil case, Connolly said. A brand new insurance industry with a clean slate, free from the retroactive liability of past practices would then begin, and that new market would become the largest insurance market in the world, according to Connolly.

Although the market seems now to be declining, environmental impairment liability insurance eventually will have to cover more than all the other forms of insurance combined, he said.

"We are just starting to scratch the surface," Morrow said. "Because the potential liabilities are shared by the majority of American industries, environmental impairment liability will become more and more a subject for insurance coverage in the future," he said.

According to Morrow, the insurance industry must be prepared to provide the necessary coverage and to charge the proper premiums to make environmental impairment liability insurance a profitable venture.

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Insurance Lack Perils Cleanup of Toxic Waste

By Kathryn Kahler
Newhouse News Service

WASHINGTON — A crisis is looming in the insurance industry that threatens to slow the cleanup of abandoned hazardous waste dumps and jeopardize the disposal of toxic chemicals currently in use.

In the last two years, virtually every insurance company that provided liability coverage for pollution-related events has pulled out of the marketplace.

Without insurance, private companies cannot legally clean up abandoned toxic waste dumps such as those on the federal government's Superfund list of high-priority contamination sites. Under federal law, businesses that transport and dispose of hazardous waste cannot meet Environmental Protection Agency regulations and operate without the insurance.

"If insurance is not available, the cleanup could slow down under the current framework," says William N. Hedeman Jr., head of the Environmental Protection Agency's Office of Emergency and Remedial Response. "This is a very serious problem we must deal with before the marketplace dries up all together."

The 1,000 landfills in the United States that accept hazardous waste and the 4,800 treatment, storage and disposal facilities could face the loss of their license once their insurance policies lapse.

Only one company, American International Group of New York, is writing insurance for high-risk pollution problems associated with landfills and hazardous waste disposal sites, according to several insurance executives. Two other companies, Swett and Crawford of New York and Pollution Liability Insurance Association of Chicago, are insuring some lower-risk ventures, including generators of hazardous waste.

Insurance companies have been scared away from the pollution market by the high cost of taking care of problems that may not be discovered until many years later, such as when groundwater is contaminated by chemicals that began seeping from a landfill several years earlier.

To complicate matters further, courts have reinterpreted policies to cover environmental contamination that insurers claim they never intended to cover and for which they never collected premiums.

"The courts have perverted the intent of insurance contracts," says Les Cheek, vice president for federal affairs of the Crum & Forster Insurance Co. in Washington. "If this continues, the insurance industry — one of the cleanest industries — could end up paying the cost of the nation's hazardous waste problem."

Several courts also have awarded extremely high judgments for pollution-related damage. This has led insurance companies to say that they cannot develop a method for determining their risks, a crucial ingredient in setting the terms of the coverage and its cost.

"The courts have played Robin Hood and paid off the poor homeowners," says George Garland, chief of EPA's financial responsibility branch.

The pollution insurance crisis has been further aggravated by the pullout of the reinsurers, companies that assume part of the risk and cost of the policies. Without reinsurers, it is too expensive for a single company to bear the cost of a potential claim.

Now, insurance companies are retaliating. Pollution problems are being deleted from general business liability policies, and will be written only as separate policies or endorsements and sold separately.

The Environmental Protection Agency has just started trying to work out an enforcement strategy that would let toxic waste disposers continue to operate if they are making good-faith efforts to obtain insurance.

Ballooning Cost of Liability Insurance Has Far-Reaching Effect on Business

By Susan B. Garland
Newhouse News Service

WASHINGTON — Until recently, the Nashville, Tenn. architectural-engineering firm of Gobbell, Hays and Pickering made a lot of money overseeing the removal of asbestos products like tiles and fireproofing from buildings — particularly from schools.

The firm is staying away from such business these days.

Last March, its insurance company refused to renew the asbestos-related portion of Gobbell, Hays and Pickering's policy. Without that protection, the firm could be driven to bankruptcy if a worker came down with lung disease and sued.

Gobbell, Hays and Pickering contacted 60 insurance companies, and none would insure the firm for its asbestos work. Moreover, its premiums for general liability insurance more than doubled, from $17,000 for $2 million of coverage to $40,000 for $500,000 coverage — even though the firm never had been sued.

"The bottom line is that there are a lot of hazardous conditions in schools all over the country," said the firm's president Ronald Gobbell.

"Nobody can deal with it, because you can't take the risk without insurance."

Gobbell and other architects are not alone. Most professions and many businesses that need liability insurance are facing skyrocketing premium increases of up to 1,000 percent in a single year. They include doctors, lawyers, accountants, directors of corporations, hospitals, school boards, city governments, nurse-midwives, bus and truck drivers, taverns, commercial fishing fleets, and companies that own satellites.

Many businesses, like day care centers and handlers of toxic wastes, can't get insurance at all. For some, the premiums are so high that they are going out of business.

Southwest Tank Liners Inc., a small family business in El Centro, Calif., is shutting down because it cannot afford to pay $75,000 a year for liability insurance. Its premium last year was $17,000. The company coats the interiors of gasoline, water and sewage tanks to prevent their leaking.

"It would seem to me that with all the problems with ground, water and air pollution, this preventive maintenance is extremely important to environmental protection," corporate secretary Anna Sessions wrote in a letter to the National Insurance Consumer Organization in Alexandria, Va.

U.S. Rep. James J. Florio, D-N.J., chairman of a House subcommittee with an interest in the problem, said "The crisis is threatening to cut off critical services such as child care from the American public, and to hamper the ability of American businesses to operate responsibly."

In New Jersey, Gov. Thomas Kean declared an insurance emergency on Sept. 17 and ordered the 512 property-casualty insurance companies operating in the state not to cancel policies or increase rates on any commercial liability policy until the state adopts new regulations.

The insurance industry pins most of the blame on the legal system: the explosion in litigation, an increase in defense costs and jury awards, and a shift in the courts to liability standards that favor the victim even when an injury hasn't necessarily been caused by negligence on the part of the defendant.

The industry says large financial losses in the past several years have forced insurance companies to drop certain lines or offer reduced coverage at much higher rates.

Consumer advocates say the insurance industry is raising rates even for businesses that rarely have been sued, as a ploy to scare Congress and state legislatures into weakening the rights of injured persons to sue.

"What we are witnessing is a manufactured crisis intended to bloat insurer profits and reduce victims' rights," said J. Robert Hunter, president of the National Insurance Consumer Organization.

Professionals, consumer advocates and others worry about social consequences and the impact on health and safety if the liability insurance situation continues.

For example:

— Firms that remove asbestos, toxic wastes and other environmentally harmful products are going out of business or dropping out of the market. Firms working on municipal treatment plants or projects involving emissions or recycling of waste products will no longer be covered for these activities in future policies.

— Dramatic increases in premiums are driving obstetricians out of practice.

In July, the Mutual Fire Marine and Inland Insurance Co. of Philadelphia terminated its master policy with 1,400 nurse-midwives who deliver babies of women who are not expected to encounter complications. Nurse-midwives traditionally serve poor women, and any increase in insurance premiums probably would be passed on to their patients.

— As a result of sexual abuse cases, child care centers, family day care homes and Head Start programs are facing astronomical premium increases, policy cancellations and non-renewals. Many child care facilities are closing — at a time when demand for them is growing.

Rep. George Miller, D-Calif., chairman of the House Select Committee on Children, Youth and Families, says 1 percent of child abusers are child care employees, and that the number of claims filed against centers is very low.

"The child care industry has been undeservedly labeled bad-risk," Miller said.

— School districts and municipalities are facing similar difficulties. Insurance companies point to a survey showing 28 percent of 1,244 cities surveyed said their public officials had been sued this year, compared with 14 percent of 937 cities surveyed in 1982.

In August, a Maryland township took its police off the streets for several days when it could not find liability insurance.

Since the beginning of September, the Seattle, Wash. school district has decided to take its chances without insurance because of difficulty finding adequate coverage at an affordable price.

Insurance executives say they suffered their worst year in history last year, when underwriting losses of $21.3 billion surpassed investment income of $19.4 billion, for a net loss of $3.9 billion.

But consumer activists like Hunter and Ralph Nader say the insurance industry actually made a profit because of huge tax writeoffs. They point to a government study that shows the industry made a $300 million profit last year.

The insurance industry and consumer groups don't disagree too much on the market conditions that have led to huge rate increases and policy cancellations.

> *"What we are witnessing is a manufactured crisis intended to bloat insurer profits and reduce victims' rights."*
> — J. Robert Hunter, of the National Insurance Consumer Organization

During the period of high interest rates in the 1970s, insurance companies slashed premium prices on policies and opened new lines of insurance in order to attract money to put in high-yielding investments. In many cases, companies knew that they would have to pay out claims that were larger than the premiums they were taking in, but were confident that investment income from the premiums would be larger than the claims payout.

That changed when interest rates began dropping in recent years.

"When interest rates drop, they can't make enough money to pay for losses so rates have to go up," said Debra Wozniak, associate counsel of the Alliance of American Insurers.

Nader says the increases are far beyond what is necessary, and that they are a tool in an industry "conspiracy" to force legislatures to toughen liability laws.

"There seems to be an underwriters' 10-year itch of greed operating here," Nader told Florio's subcommittee in hearings on the subject this month. "Ten years ago, the companies bellowed about the medical malpractice and product liability crises, and got higher premiums from state authorities and favorable changes in the laws in many states ... Insurer profits soared."

Insurers counter that the changes in liability laws are necessary.

"Recent court decisions have created new and unpredictable liabilities for property-casualty insurers," said T. Lawrence Jones, president of the American Insurance Association. "Some decisions have gone so far as to rewrite policy terms and create coverage which insurers never intended to provide and for which no premiums were collected."

The Grand Rapids Press, Sunday, September 29, 1985

Environmental Damage Liability Insurance—A Primer

*By Turner T. Smith, Jr.**

Corporate counsel must increasingly concern themselves with environmental damage liability insurance. Accustomed by now to the regulatory risks imposed by federal environmental laws of the 1970s, lawyers representing corporations face a raft of massive new (and rapidly developing) liability risks for hazardous waste damage.[1] Environmental damage liability insurance for "gradual" pollution, not widely available or used in the past, is increasingly available as a tool for coping with these new risks. And in some situations it is required, as a practical matter, by new regulatory provisions designed to insure financial responsibility.

This insurance field is in flux, however, both as to risks and as to coverage. As to risks, the case law defining liability risks under recent federal statutes such as Superfund[2] is only now developing, and Congress is considering wide-ranging new federal toxic tort victim compensation legislation that could revolutionize private damage actions.[3] And as to coverage, the forms are relatively new, flexible, and evolving, since the product is still being formed in response to needs of insureds, underwriters, and the public. The policy forms are frequently composites of several basic policy types and can differ importantly between underwriters. The scope of coverage is frequently modest, but is negotiable on many points and can frequently be tailored to a specific situation. Pricing varies, due to the lack of significant claims experience. The meaning of basic policy

*Mr. Smith is a member of the Virginia bar and practices law with Hunton & Williams in Richmond.

Editor's note: Martin S. Seltzer of the Ohio bar, Robert S. Faron of the District of Columbia bar, and William A. Anderson of the Virginia bar served as reviewers for this article.

1. For a discussion of these risks, *see* Hall, *The Problem of Unending Liability for Hazardous Waste Management*, 38 Bus. Law. 593 (1983).

2. The Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9657 (Supp. IV 1980). Superfund imposes liability for hazardous substance cleanup costs.

3. *See* S. 917, 98th Cong., 1st Sess. (1983) (Sen. Stafford's bill); S. 945 and S. 946, 98th Cong., 1st Sess. (1983) (Sen. Mitchell's bills); H.R. 2330 and H.R. 2482, 98th Cong., 1st Sess. (1983) (Rep. LaFalce's bills); H.R. 2582, 98th Cong., 1st Sess. (1983) (Rep. Markey's bill).

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terms, even those in use for many years, is frequently not yet well settled by the courts. Uncertainty abounds.[4]

Further, new financial responsibility requirements are arising as new federal legislation extends its regulatory concern to long-term disposal of hazardous wastes and shifts its focus from the pattern of administrative regulation typical of the 1970s to a new emphasis on judicial imposition of cleanup and damage liability.[5] The most important example of the new financial responsibility requirements for companies handling hazardous wastes is the set of regulations promulgated recently by the Environmental Protection Agency (EPA) under the Resource Conservation and Recovery Act (RCRA).[6] These rules require owners and operators of hazardous waste management facilities (HWMFs) to meet financial tests involving such factors as net worth, working capital, and bond rating, or to purchase environmental damage liability insurance in amounts ranging from $1 million to $6 million, depending on the situation.

Environmental damage liability insurance can serve several important corporate purposes. It can be used to protect the financial security of a client, to comply with federal or state financial responsibility requirements of the sort just noted, or to facilitate business transactions by packaging and bounding the new liability risks and thus aiding in their allocation.

The available policy forms require careful study, however, if intelligent judgment is to be passed on what your client is getting for his money, and what palpable risks, outside the insurance coverage, remain for him to bear. Environmental issues are complex and not easily fitted into the procrustean bed of insurance policy language.[7] And as already noted, both risks and coverage are in flux. Further, as discussed below, purchasing insurance in this area means potentially involving an insurance company in certain aspects of your client's normal management and operations and makes the insurer a silent partner in your client's regulatory and public relations efforts when a risk materializes into environmental damage. For all of these reasons, lawyers representing clients dealing with hazardous wastes must plunge into the thicket of insurance policies and insurance law, like it or not.

This article attempts a basic road map to help ease this journey. It provides an historical context for the subject, briefly assesses the risks to be insured, and sets out examples of the insurance options currently available for covering them. Its focus is on the central issues (and policy language) governing the type and scope of coverage found in samples of the two principle types of policy forms now in use for covering gradual pollution damage. It comments briefly on factors to consider when purchasing insurance and on pitfalls to avoid.[8]

THE HISTORY OF ENVIRONMENTAL DAMAGE LIABILITY INSURANCE[9]

The traditional form of commercial property-casualty insurance is the Comprehensive General Liability (CGL) policy, which covers bodily injury and property damage suffered by third parties.[10] CGL policies, while originally silent as to environmental risks, can easily be read to include such risks.[11] CGL policies were generally changed in the late 1960s and early 1970s, after the Torrey Canyon oil spill and other environmental incidents, to exclude all pollution coverage, except where associated with "sudden and accidental" occurrences. For a number of years thereafter, environmental liability insurance expressly covering the more common gradual pollution releases (e.g., leakage of hazardous substances from a facility) was simply unavailable.[12]

Environmental liability insurance for gradual occurrences did not come about until the late 1970s, when Environmental Impairment Liability (EIL) policies were developed. There is no standard EIL policy, but the form used for analysis

4. Indeed, in this area, one may well buy only the right to sue the insurance company if the loss proves to be big. One company, apparently seriously, now specializes in insuring the costs of litigating with your insurance company. *Lawyers Unsure of Ultimate Hedge, An Insurance Policy Against Insurers*, Nat'l L. J., Feb. 14, 1983, at 3, 6.

5. *See* Macbeth, *Superfund: Impact on Environmental Litigation*; Q. Newsletter Standing Committee Envtl. L. A.B.A., 1-2, 5-6 (Winter 1982-83).

6. 42 U.S.C. §§ 6901-81 (1976). For a discussion of these requirements, *see* Committee on Business Management Liability Insurance, in cooperation with the Committee on Environmental Controls, *Liability Insurance Against Environmental Damage: A Status Report, June 1982*, 38 Bus. Law. 217, 224-31 (1982) [hereinafter cited as CBBL Report]. For a survey of corresponding state financial responsibility requirements, see app. B-1, U.S. Dep't of Treasury Report, Hazardous Substance Liability Insurance, A Report in Compliance With §§ 301(b), 107(k)(4)(A) of Pub. L. No. 96-510 (Mar. 1982) [hereinafter cited as Treasury Report].

7. Environmental lawyers, in particular, must be prepared to learn a whole new language when dealing with insurance contracts and insurance law. There is a lot of fine print, all written in "insuranceese" instead of "environmentalese," much of which has not yet been construed by courts. Reading an insurance contract is like reading a statute, not a novel; it can only be done with great time and care, at least until the basic terms of art are readily understood. And it is damnably frustrating, since age-old insurance concepts are being applied to phenomena the environmental lawyer is used to organizing in terms of standard environmental regulatory concepts—a classic case of square environmental pegs and round insurance holes. In short, environmental lawyers can expect culture shock the first time they have to deal with environmental insurance policies. And while there are similarities among policies, each underwriter's form can differ materially from those of its competitors, meaning that each must be read with great care and precision.

8. The CBBL Report on environmental damage liability insurance contains a helpful bibliography on this subject. CBBL Report, *supra* note 6, at 237-39.

9. A more extensive history of environmental damage liability insurance is set out in the Treasury Report, *supra* note 6, at 49-79.

10. Such policies (referred to as third-party insurance) cover an insured's liability to third parties for losses, as opposed to insuring the insured's own person or property (coverage for which is called first-party insurance).

11. *See, e.g.*, the typical insuring agreement language of a CGL policy set out [illegible] at text accompanying notes 45-46.

12. The attempt to disclaim liability in CGL policies for gradual pollution has been undermined by courts that construe the term sudden to mean, as a practical matter, no more than accidental. *See, e.g.*, Jackson Township Mun. Utilities Auth. v. Hartford Accident and Indemnity Co., 186 N.J. Super. 156, 451 A.2d 990 (1982) (contamination of groundwater due to gradual seepage of liquid wastes from township landfill found to be sudden and accidental because the result was unexpected and unintended); Lansco, Inc. v. Department of Environmental Protection, 138 N.J. Super. 275, 350 A.2d 520 (1975) (oil seepage into river held sudden and accidental).

and discussion below is EIL 1080, a precursor to today's many variations on EIL policies, that is readily available for analysis because it is reprinted in the Treasury Superfund Report on environmental liability insurance.[13]

Recently, a second type of policy covering gradual occurrences has been developed. This policy, prepared by the Insurance Services Office (ISO)[14], covers both sudden and gradual pollution incidents.[15] The availability of this insurance has been widened by the formation of the first American environmental liability reinsurance pool, named the Pollution Liability Insurance Association (PLIA), which will apparently use the ISO form.[16]

CONSIDERATIONS WHEN BUYING INSURANCE

The basic considerations when buying environmental damage liability insurance are:

(1) the nature and extent of the risk to be insured;
(2) the purposes the insurance is to serve;
(3) the available types of policies, scopes of coverage, available limits, deductibles, and prices;
(4) the extent to which the issues just noted are governed by mandatory governmental insurance requirements (i.e., where the insurance is being used to satisfy federal or state financial responsibility requirements);
(5) the importance of disclosures in answers to the warranty questions in the application form;
(6) the extent to which the actual scope of coverage in various competing policies serves the insured's purposes, given the nature and extent of the risks involved;
(7) the extent to which the rights of the insurance company under the policy may affect your client's freedom to pursue the appropriate regulatory or public relations strategy after an environmentally damaging release;

13. *See* Treasury Report *supra* note 6, at app. D-1 [hereinafter cited as EIL]. This policy was developed in October 1980 (thus its name—EIL 1080). Other EIL forms with subsequent dates are in use by various underwriters, differ as between underwriters, and may differ materially from the form discussed here. This discussion should, however, alert the reader to the nature of the issues involved.

14. Treasury Report, *supra* note 6, at Appendix E [hereinafter cited as ISO]. Underwriters using this form also vary its terms. Some underwriters use some provisions from this form and some EIL-type provisions. Others have simply struck off on their own.

15. The policy comes with an endorsement designed expressly to exclude sudden and accidental pollution occurrences from an insured's normal CGL coverage; see the Description of Filing contained in the New ISO Policy.

16. *Insurance Industry Forming Hazardous Waste Liability Pool*, Hazardous Waste Litigation Rep., Sept. 1, 1981, at 1287; *Chicago Pollution Liability Reinsurance Pool Now Writing Policies*, Hazardous Waste Litigation Rep. Feb. 16, 1982, at 1999. A reinsurance pool is essentially an agreement among insurance companies to pool their resources, so that they can take on larger risks and offer higher limits as a group than they can do individually.

(8) the advantages and disadvantages of self-insurance; and
(9) the need for close coordination between legal counsel, environmental managers, and those in charge of insurance for the client on all of these matters.

Various of these considerations are addressed below.[17]

THE RISKS TO BE INSURED

The environmental risks a company runs in doing business today are legion. Most are now subject to pervasive administrative regulatory schemes designed to reduce such risks through use of control equipment or practices.[18] The spate of federal legislation in the 1970s governing air pollution, water pollution, and solid waste disposal is typical of this regulatory pattern.[19] There are exceptions to current regulatory coverage, however. The most prominent of these involve old dump sites and past hazardous waste disposal practices. Here Congress has enacted the cleanup liability provisions of Superfund in place of traditional regulation. These liability provisions also overlap many aspects of the current regulatory system where present and future releases of hazardous substances are involved.

Third-party liability due to environmental risks can arise in several different ways. First, state tort law theories can lead to recovery of compensatory damages (and sometimes punitive or exemplary damages) by private or public parties. Recent efforts to obtain such damages in federal court under theories of federal common law and implied rights of action have been defeated in the Supreme Court.[20] Currently, however, there is a vigorous debate in Congress over whether to reverse these Supreme Court decisions.[21] Congress is also

17. A helpful checklist of things to consider when establishing a hazardous waste insurance program is contained in the CBBL Report, *supra* note 6, at 224.

18. Regulation does not always reduce environmental risk (and thus exposure to third-party liability) to zero, of course. Residual risk may remain either because a regulatory agency has misestimated, or simply not foreseen at all, the likelihood or severity of harm, or because it has chosen to "live with" a residual level of harm on the grounds, for example, that further control was not "worth it" after a formal or informal consideration of costs and benefits.

19. Clean Air Act, 42 U.S.C. §§ 7401-7642 (Supp. I 1977); Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1976); Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6987 (1976). The typical compliance costs (i.e., costs for control equipment or practices) imposed on a business by these regulatory schemes—while an environmental *business* (and financial) risk—are not normally insurable through third-party liability insurance, since no liability for third-party losses is involved. The same is true for such regulatory costs of noncompliance as civil penalties or fines—the underwriting of which is normally prohibited as against public policy in any case. But as noted in text *infra*, liability for cleanup costs due to pollutant releases imposed either directly by statute, or indirectly through the granting of injunctive relief, may be insurable.

20. *See* Milwaukee v. Illinois, 451 U.S. 304 (1981); Middlesex Co. Sewerage Auth. v. National Sea Clammers Assoc., 453 U.S. 1 (1981).

21. Senator Stafford has proposed allowing the federal courts to create liberal rules of compensation by having Congress declare the preservation of a "federal common law." 127 Cong. Rec. S12, 246 (daily ed. Oct. 27, 1981) (remarks of Sen. Stafford); *see also* 127 Cong. Rec. S15,640 (daily ed. Dec. 16, 1981) (remarks of Sen. Stafford); *cf.* H.R. Rep. 198, 98th Cong., 1st Sess. 49 (1983)

debating at the same time the larger question whether it should create express federal victim compensation remedies in the toxic torts area.[22]

In addition to common law or statutory actions for damages, third-party liability can arise in a second way—as cleanup costs under Superfund's section 107 provisions and the analogous provisions of section 311 of the Clean Water Act. Superfund, for example, imposes cleanup and natural resource damage liability for releases of hazardous substances on the following persons: (1) the owner and operator of any vessel or facility; (2) anyone who, at the time of disposal of any hazardous substance, owned or operated the facility; (3) any person who by contract or otherwise arranged for disposal or treatment, or transportation for disposal or treatment, of hazardous substances, at a facility owned or operated by someone else; and (4) any person who accepted a hazardous substance for transport to disposal on treatment facilities or sites selected by such person.[23]

Third, costs analogous to cleanup costs can be imposed on insureds through injunctive relief granted in the course of common law or statutory tort actions of the sort discussed above, or through enforcement powers granted by various environmental statutes, such as section 7003 of RCRA and section 106 of Superfund. One court has recently held costs imposed by injunctive relief to be "damages" of the sort covered by insurance policies.[24]

Finally, while third-party liability does not arise independently under financial responsibility requirements, these rules may well determine the risks that must be insured.

THE AVAILABLE INSURANCE

THE BASIC TYPES

At present, an insured can get environmental damage liability insurance that includes both gradual and sudden coverage by purchasing both a CGL and an EIL policy, or by purchasing just an ISO policy. As discussed below, the CGL policy differs from EIL and ISO policies in its basic approach (the former is an "occurrence" policy while the latter are "claims-made" policies), and EIL and ISO policies differ in their coverage (for example, as to on-site and off-site coverage). Which policy type is best (as well as which version or combination of each type offered by different companies is best) depends on an insured's needs, the nature of the risks his operation presents, and the price and scope of the various coverages available (bearing firmly in mind the great uncertainty as to what the *actual* scope of coverage of yet untested language will turn out to be).

WHO WRITES IT

The simplest and probably the best way to canvass the available market for environmental liability insurance is to contact an insurance broker knowledgeable about this type of insurance. One such broker indicates that the number of underwriters writing gradual pollution coverage has risen from three in 1980 to "at least a dozen" by mid-1982.[25] The increasing number of companies selling this insurance are listed in various places.[26]

(RCRA federal common law amendment); H.R. 2867, 98th Cong., 1st Sess. § 11(c) (1983) (pending RCRA reauthorization bill) Superfund Section 301(e) Study Group, Senate Comm. on Environment and Public Works, Injuries and Damages from Hazardous Wastes—Analysis and Improvement of Legal Remedies 97th Cong., 2d Sess. 323-24 (comments of George C. Freeman, Jr.) [hereinafter cited as Superfund § 301(e) Report]. This proposal was debated at recent congressional hearings. *Proposed Amendments to the Clean Water Act: Hearings on S. 757 Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 98th Cong., 1st Sess. (1983) (e.g., statement of George C. Freeman, Jr., on Apr. 6, 1983).

22. This debate grows out of an extensive study of the subject by a blue ribbon panel. Superfund § 301(e) Report, *supra* note 21. Other reports have come out. National Service Foundation, Compensation for Victims of Toxic Pollution—Assessing the Scientific Knowledge Base (Mar. 1983); Jeffrey Trauberman, Statutory Reform of "Toxic Torts": Relieving Legal, Scientific and Economic Burdens on the Chemical Victim (Environmental Law Institute, 1983); Office of Technology Assessment, United States Congress, Technologies and Management Strategies for Hazardous Waste Control (Mar. 1983). So also are administration and other studies: *See OMB Launches Massive Interagency Policy Project on Victim Compensation*, 2 Inside Ad. 5 (1983), Nelson, *98th Congress Weighs Changes in Tort Liability, Compensation*, 5 Legal Times 1 (1983) (referencing NAM, CMA and API studies). Finally, in addition to the "toxic tort" bills noted *supra* note 3, similar bills are being introduced on related subjects. *See* S. 44, 98th Cong., 1st Sess. (1983) (Kasten products liability bill); Asbestos Compensation Coalition, Occupational Disease Compensation Improvement Act (1982); H.R. 3175, 98th Cong., 1st Sess. (1983) (Rep. Miller's occupational disease compensation act); H.R. 1961, 98th Cong., 1st Sess. (1983) (Rep. Daschle's Agent Orange Compensation Bill); S. 921, 98th Cong., 1st Sess. (1983) (radiogenic cancer compensation act). The Corporation, Banking and Business Law Section of the American Bar Association is following all of these developments through its Ad Hoc Committee on Tort Law Reform, chaired by William Kennedy.

23. See *supra* note 1 for reference to discussions of Superfund and of § 311.

24. United States Aviex Co. v. Travelers Ins. Co., Hazardous Waste Rep., 4044 (Mich. Ct. App. May 7, 1983). *But see, e.g.*, Aetna Casualty and Surety Co. v. Hanna, 224 F.2d 499 (5th Cir. 1955).

25. W.A. Mahoney, *A Risk Manager's Guide to Pollution Liability Policies*, Risk Mgmt. Mag., July 1982 [hereinafter cited as Mahoney]. Mr. Mahoney, a vice president of Marsh & McLennan, Inc. (a large insurance brokerage firm), is coordinator of M&M's hazardous waste management program in New York and has lectured widely on pollution liability policies.

26. A number, many of them foreign, are noted in the Treasury Report, *supra* note 6, at 72 n.2. Other lists can be found in Milvy, *Environmental Impairment Liability Insurance and Risk Assessment*, Envtl. F., 30, Oct. 1982, at 34 [hereinafter cited as Milvy], and in Mahoney, *supra* note 25, at 7. The 39 American companies in the PLIA, and from whom insurance under the ISO policy can apparently be obtained, are listed in the Hazardous Waste Litigation Rep., Feb. 16, 1982, at 2000.

POLICY LIMITS

Policy limits of $5 to $10 million are now available, with $10 to $20 million annual aggregate not uncommon.[27] PLIA is apparently offering ISO policies with $5 million/$10.9 million limits, with "catastrophe reinsurance for up to $50 million for qualifying companies."[28] Coverage of up to $50 million is reported to be available on a routine basis in some cases.[29] Deductibles are apparently required in all policies.[30]

The minimum policy limits required by the EPA's phased RCRA regulations for owners of active HWMFs that choose to demonstrate their financial responsibility through purchased insurance are (1) for sudden occurrences, at least $1 million per occurrence, with an annual aggregate coverage limit of at least $2 million, in each case exclusive of legal defense costs, and (2) for nonsudden occurrences, $3 million and $6 million, respectively, exclusive of legal defense costs (only required in certain cases).

PREMIUMS

Because there is not yet adequate claims experience with environmental risks, premiums are set on the basis of sales, policy limits, and extent of perceived risk.[31] There is some indication that the insured's attitude toward loss prevention may affect the premium. While industry sources indicate that "pricing has not been without fair competition," they note that more competitive pricing should develop as more underwriters become involved.[32]

The EPA believed as of November 1981 that premiums for $5 million/$10 million coverage at state-of-the-art HWMFs will range between one-half and one percent of sales for a facility with annual sales of up to $3 million, one-half percent of sales between $3 and $5 million, and one-quarter percent of sales between $20 and $50 million.[33] Premium schedules are reported not to be linear as liability limits increase, so it is useful to look for bargain premiums by obtaining a full schedule of liability limits and deductible amounts, with associated premium quotations. Sometimes, for example, fifty percent more insurance may be available for a twenty-percent premium increase, while doubling the insurance may double the premium.[34]

27. Mahoney, *supra* note 25, at 7.

28. *Chicago Pollution Liability Reinsurance Pool Now Writing Policies*, Hazardous Waste Litigation Rep., Feb. 16, 1982, at 1999.

29. Personal communication from William A. Anderson II, Bracewell and Patterson, Washington, D.C.

30. CBBL Report, *supra* note 6, at 221.

31. *See* CBBL Report, *supra* note 6, at 223; Milvy, *supra* note 26, at 36-37; Mahoney, *supra* note 25, at 7.

32. Mahoney, *supra* note 25, at 7.

33. Treasury Report, *supra* note 6, at 77 (the Treasury Report does not clarify the omission of an estimate for sales between $5 million and $20 million).

34. Personal communication from William A. Anderson II.

THE BASIS ON WHICH ENVIRONMENTAL DAMAGE LIABILITY INSURANCE IS WRITTEN

THE INDEPENDENT RISK ASSESSMENT

Environmental liability policies are sold only after the applicant has undergone a written risk assessment or survey, generally at the applicant's expense, performed by an independent consultant.[35] This risk assessment evaluates the safety and integrity of the client's operation at each specified site, apparently including off-site HWMFs to which the applicant ships wastes, where relevant. It is used by the insurance company, along with the applicant's written representations in the application form, to decide whether to accept the risk, (and on what conditions), what the scope of coverage should be, and how to price the policy.[36] Industry sources indicate that coverage will not be written on any sites presently targeted under Superfund. Other known high-risk situations, once disclosed to the insurer as they must be, may also be refused coverage.

OCCURRENCE VS. CLAIMS-MADE COVERAGE

The traditional CGL policies available for sudden and accidental coverage are written on the basis a layman normally associates with insurance—an occurrence basis. Occurrence policies cover damages resulting from incidents which take place while the policy is in effect (normally one year at a time), without regard to when the claims arising from such occurrences are presented.

The EIL and ISO policies have a different conceptual basis, one that is much more limited and cautious. They are claims-made policies rather than occurrence policies. A claims-made policy insures only for claims presented during the annual policy period (as long as the incident or occurrence giving rise to the claim took place within the retroactive time period specified in the policy). EIL and ISO claims-made policies are normally written for only one year at a time, and there is, of course, no obligation on the part of the insurer to renew. Such policies usually restrict their retroactive coverage to incidents or occurrences within no more than one to two years of the policy issuance date,[37] although longer retroactive periods are sometimes used.[38] Indeed, some insurance companies are apparently willing to negotiate extended retroactive dates, and one of the largest underwriters offers coverage under EIL 1080 without any retroactive date. Without such extended retroactive dates, claims-made policies may be of little use when dealing with long discharge or release times (e.g., due to seepage or percolation) or long latency periods (e.g., cancer).

35. Credit for a portion of this cost is sometimes given on the policy premium. Mahoney, *supra* note 25, at 4, 6. And some underwriters may bind coverage conditionally prior to completion of the survey. *Id.* at 7.

36. For a discussion of the practical aspects of these procedures, see Milvy, *supra* note 26, at 34-37.

37. Treasury Report, *supra* note 6, at 71.

38. Mahoney, *supra* note 25, at 5.

Both types of policies may also contain cancellation or renegotiation provisions that effectively give insurers the right to terminate coverage on short notice or to renegotiate its terms, even before the end of the policy term. These cancellation (on thirty days' notice, in paragraph VII.9. of the ISO policy) or renegotiation (due to material change in facts or increase in risk, in paragraph V.9. of the EIL policy) provisions must be closely examined. Where the policy is used to satisfy the EPA's financial responsibility regulations, cancellation can only be effective sixty days after a written notice is received by EPA (and "any other termination," only thirty days after such a notice).

Cancellation or renegotiation provisions of the sort just described would normally be subject to the insured's rights under "extended discovery" provisions. The extended discovery provisions of a claims-made policy permit an insured to purchase an additional period of time (usually one year) during which claims arising from occurrences prior to the policy's termination or expiration may be presented to the insurance company, even if the insurer cancels the policy or refuses to renew it at all.[39] The terms on which such provisions are made available, and the price, should be examined.[40]

The net effect of these terms is that with claims-made insurance, permanent coverage of occurrences within any given time period cannot be assured. At any time, subject of course to the specific terms of a policy, coverage for such occurrences not yet subject to a claim may evaporate through refusal to write the policy for the next year or through cancellation or renegotiation of the policy within its annual policy term, even though the risk that was being insured remains. This fundamental uncertainty adds to that attendant on use of largely untested policy language to make environmental claims-made insurance much less useful as a business planning tool than traditional occurrence insurance. Without use of the claims-made approach, however, environmental impairment insurance might well not be offered at all.

THE SCOPE OF COVERAGE FOR ENVIRONMENTAL RISKS

Scope of coverage issues are legion. The following discussion sets out the general coverage and pollution exclusion from a typical CGL policy and then compares the insuring agreement, exclusions, and some of the conditions in the EIL 1080 policy form reprinted in the Treasury Report with those in the standard ISO form.[41] Material differences between these provisions and those of certain more current policy forms are also discussed.

39. *See* EIL, *supra* note 13, ¶ I.5. and ISO, *supra* note 14, ¶ V.

40. For example, it is important to determine whether a policy restricts this right to situations where the insurer fails to renew, making it unavailable on cancellation. Mahoney, *supra* note 25, at 3.

41. *See supra* notes 13 and 14. The forms selected for discussion are not necessarily representative; they are, however, illustrative. The Treasury Report, *supra* note 6, at 70-79, also discusses the coverage of EIL and ISO forms. The CBBL Report, *supra* note 6, at 222-23, lists typical policy exclusions. For a table comparing various EIL forms used by a number of companies, see Treasury Report, *supra* note 6, at Appendix D-2. For a more recent table comparing various EIL and ISO forms, *see* Mahoney, *supra* note 25, at 3-5.

THE CGL POLICY

The insuring agreement in the standard CGL policy provides:

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent.[42]

The endorsement excluding gradual pollution provides:

> It is agreed that the insurance does not apply to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.[43]

EIL POLICIES

The EIL policy discussed here is a claims-made policy that "indemnifies the insured"[44] for "compensatory damages"[45] imposed by reason of liability for "environmental impairment" in connection with the business of the insured at the locations designated in the policy declarations, where such environmental impairment causes:

(1) "Personal Injury," including death at any time resulting therefrom,
(2) "Property Damage", or

42. Treasury Report, *supra* note 6, at 66-67 (quoting *Long-Term Risks of Hazardous Waste Sites: Post-Closure Liability: Hearing Before the Subcomm. on Transportation and Commerce of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 2d Sess. (Statement of American Insurance Association) (1980) at 39-40).

43. *Id.* at 67.

44. Mahoney believes that the "indemnifies the insured" language is less advantageous to an insured than is the ISO's "pay on behalf of" language when considering the underwriter's duty to defend. Mahoney, *supra* note 25, at 1. *See infra* text accompanying notes 98-109.

45. A later EIL form omits the word "compensatory." EIL 881 at ¶ I.1. A recent form used by Great American Surplus Lines covers "loss," which it defines as "monetary awards or settlement of damages not including fines or penalties whether imposed by law or otherwise." Great American form ¶¶ I.A, II.B.1. A recent form used by the Pacific Insurance Company covers "compensatory but not punitive or exemplary damages." Pacific form ¶ I.A. As noted *supra* at note 13, one court has even been willing to construe the term damages to include the costs of responding to injunctive relief.

(3) "Impairment or diminution of or other interference with any other environmental right or amenity protected by law"

"arising within the Territorial Limits designated in the Declarations."[46]

The term environmental impairment is defined to include virtually any release of any contaminant:

(1) "the emission, discharge, dispersal, disposal, seepage, release or escape of any liquid, solid, gaseous or thermal irritant, contaminant or pollutant into or upon land, the atmosphere or any watercourse or body of water," or

(2) "the generation of smell, noises, vibrations, light, electricity, radiation, changes in temperature or any other sensory phenomena but not fire or explosion"

"arising out of or in the course of the Insured's operations, installations, or premises, all as designated in the Declarations."[47]

Personal injury is defined to include "bodily injury, mental anguish, shock, sickness, disease or disability." Property damage means "physical injury to or physical destruction of tangible property, including loss of use of tangible property whether or not physically injured or destroyed," which would seem to cover certain damages due to temporary or longer-term evacuation during a release incident.

The persons insured under the EIL policy are carefully designated to include the principals of an organization and an employee "while acting within the scope of his duties as such."[48] The persons insured under the ISO form are much the same.

Thus the scope of the environmental impairment insured is broad (although most policies do not expressly mention releases to groundwater) and damage to "any environmental right or amenity protected by law"[49] is covered in addition to personal injury or property damage.[50] However, coverage is carefully limited to damage that arises in connection with the business or operations of the insured and from sites listed in the policy.[51] In addition, normally only compensatory damages are covered.[52]

There is separate coverage in the EIL insuring agreements for *off-site* cleanup costs[53] (i.e., "outside the insured's premises") caused by environmental impairment, to the extent that such costs have been incurred or have become payable "as a result of a legal obligation" or "in the endeavour to avert a loss covered by this Policy, . . . provided that such costs and expenses, except in respect of emergency measures undertaken to avert loss, are incurred with prior written consent of Insurers, such consent not to be unreasonably withheld."[54]

The exclusions in this EIL policy[55] preclude coverage for:

(1) war and other related risks,
(2) nuclear risks,
(3) workers' compensation and other employee occupational risks,
(4) "known" noncompliance with legal requirements that is not either cured by reasonable action or excused by government authority,
(5) certain transportation and other risks,
(6) airport ownership or operation risks,
(7) product liability risks and completed operations risks (away from insured's premises),
(8) sudden or accidental happenings (which are covered under the CGL policy), whether the environmental impairment is sudden or not,[56]
(9) genetic and teratogenic damage risks,
(10) damage to the insured's own property,[57]
(11) fines and penalties,

46. EIL, *supra* note 13, at ¶ I.1. The territorial limits are normally restricted to the United States, its territories or possessions, and Canada, although Mahoney reports speculation that worldwide coverage may be in the offing. Mahoney, *supra* note 25, at 6.

47. EIL, *supra* note 13, at ¶ III.1. Some recent policies define environmental impairment to include the emission, etc., of "smoke, vapors, soot, fumes, irritants, contaminants or pollutants" (Home Insurance Companies policy ¶ III.6.(a)); others also include "acid, alkalis, toxic chemicals, liquids, or gases, [or] waste materials" (e.g., Great American form ¶ II.F.1.); or include "changes in groundwater" (Home form ¶ III.6.b.).

48. EIL, *supra* note 13, at ¶ III.7.

49. This term would seem to cover Superfund's natural resource damage liability.

50. Scores of coverage issues are raised by these definitions. For example, under what conditions is psychological distress or emotional damage alone included within bodily injury? Are preventive medicine costs (i.e., medical checkups) or increased risk of cancer covered under bodily injury? Are damage to commercial business interests, cleanup costs (statutory costs or costs of compliance with court-ordered equitable relief), precleanup costs of investigation, mitigating measures such as providing alternative water supplies, postcleanup monitoring costs, or Superfund natural resource damage costs within property damage?

51. The Great American form, on the other hand, limits coverage to environmental impairment "arising out of or in the course of the INSURED'S operations" and does not seem otherwise to directly limit coverage to specified or disclosed sites.

52. EIL 881 provides coverage for punitive damages, to the extent allowed by state law.

53. The term "cleanup costs" is not defined in the EIL form.

54. EIL, *supra* note 13, at ¶ I.3. The more recent EIL 881 extends such cleanup cost coverage to on-site conditions and to situations where necessary "to . . . reduce" a covered loss, but still only with the prior written consent of the insurer.

The Home form has similar on-site coverage. The Great American form provides on-site cleanup cost coverage "for which the INSURED is legally liable," without the prior written consent provision, but only for environmental impairment "occurring on and confined to the INSURED'S premises," and only up to 10% of the policy limits. *See also infra*, note 67.

55. EIL, *supra* note 13, at ¶¶ II.1-13. These, or similar exclusions, are found in many of the current forms, with some variation in language.

56. Some recent policy forms read: "environmental impairment which is sudden and accidental." *E.g.*, Great American form ¶ IV.A.

57. This exclusion apparently is not intended to defeat recovery for on-site cleanup costs where appropriate. Note also that the Michigan Court of Appeals in *Arntex*, *see* text accompanying note 24, *supra*, held that this exclusion did not apply to damage to groundwater beneath the insured's property where the insured could not be said, under state law, to own percolating groundwater. Hazardous Waste Litigation Rep., May 17, 1983, at 4046.

(12) liability or costs arising *on site* from (a) correcting preexisting conditions at insured's premises, or at premises "for which the Insured may otherwise be responsible," (b) normal or routine cleanup operations, or (c) operating, cleaning up, or inactivating "any waste disposal sites used directly or indirectly by the Insured or for which they may otherwise be responsible,"

(13) deliberate and intentional dumping in the open seas.

Some of these exclusions reflect the availability of other forms of insurance to cover the excluded risk (e.g., nuclear risks, transportation risks, and worker occupational risks). Many of the exclusions (or similar ones found in other EIL policies) are negotiable on a case-by-case basis and can be "bought out" of a policy for an adjustment in the premium.

In short, after consideration of its exclusions, the EIL policy examined here essentially covers off-site compensatory damages and cleanup costs due to conditions at such of the insured's own sites (i.e., locations where the insured has "operations, installations, or premises") as are designated in the policy's declarations, apparently including his own waste disposal sites so designated (and, apparently, whether or not those disposal sites are inactive or closed, although the underwriter may simply refuse to include such sites in the policy's declarations).[58] Cleanup costs on the insured's own property, even if imposed by the government under Superfund, are not compensable under this EIL form.[59] Cleanup costs or other liability incurred by the generator-client under Superfund or other law due to third-party transporter or disposer releases are not covered.

The EIL form discussed here has a special provision for "joint and several" liability, insuring in full (up to the limits of the policy) the insured's "ascertained contribution" and insuring eighty percent of that portion of the liability (subject to a separate deductible) that goes beyond his ascertained contribution.[60] Counsel should be particularly careful to determine how joint and several liability is handled under a policy. In some cases, only the client's proportionate share may be covered, yet liability may end up being joint and several under Superfund or other applicable law (so that the insured ends up paying, at least initially, for *all* of the damage or cleanup costs). It is also important to determine whether liability for common law "contribution" is covered.

58. As noted, *supra* note 54, the standard exclusion precludes waste site coverage only for *on-site* damages or costs. Some of the companies using composite forms expressly exclude any coverage of *inactive* or *closed* dump sites, e.g., Home form ¶ II.(h). Several also expressly exclude costs or expenses of closing dump sites, e.g., Great American form ¶ II.6.

59. As noted earlier, however, on-site cleanup cost coverage is available under certain circumstances in EIL 881 and from some companies using composite forms. *Supra* note 54.

60. EIL, *supra* note 13, at ¶ I.2. EIL 881 expressly provides full "joint and several" coverage, including any contractually assumed liability. EIL 881 ¶ I.2. The insurer is subrogated to any right of contribution. EIL 881 ¶ V.6. Newer revisions of the EIL form, however, preclude coverage where the insured has an opportunity to control the extent of his liability after an environmental impairment has taken place.

THE ISO POLICY

The ISO policy is structured differently. It is a claims-made policy that "pays on behalf of the insured"[61] all compensatory damages that the insured becomes legally obligated to pay because of a "pollution incident" commencing after the date of the policy (or the retroactive date specified in it) that causes "bodily injury" or "property damage."[62] The term pollution incident is defined to mean virtually any form of release of any form of contaminant[63] directly *from* the "*insured site* onto, into or upon land, the atmosphere, or any watercourse or body of water," (emphasis added) provided that such release results in "environmental damage."[64] The term environmental damage is defined to mean the injurious presence of the covered pollutant in or upon the covered places.[65]

The term bodily injury does not include mental anguish, shock, or disability, but the term property damage expressly includes contamination of tangible property as well as its physical injury or destruction, and property "evacuated, withdrawn from use, or rendered inaccessible because of a *pollution incident*."[66] The term insured site is defined to include both locations specified in the declarations of the policy and "any site to which waste materials were legally consigned or delivered by a *named insured* for storage, disposal, processing, or treatment" provided that this third-party waste site is not and never was associated with the insured and was properly authorized by state or federal authority at the time of the consignment or delivery.[67]

61. *See supra* note 44.

62. ISO, *supra* note 14, at ¶ I.A.

63. The definition covers "solid, liquid, gaseous, or thermal contaminants, irritants, or pollutants." ISO, *supra* note 14, at ¶ VI.

64. *Id.*

65. *Id.*

66. *Id.* (emphasis in original).

67. *Id.* One crucial question, of course, is whether a site with "interim status" under RCRA is "duly authorized for such storage, disposal, processing, or treatment under a permit issued by state or federal authority and in force at the time of all such consignment or delivery." *Id.* Since no actual "permit" is involved, an overly literal reading might exclude interim status sites. *Id.* Only one of the composite current forms I have seen has a provision comparable to this ISO coverage. The Home form defines environmental impairment to include: "any other sensory phenomena arising directly ... from waste materials produced from the Insured's operations at the insured site which are legally consigned for delivery or delivered to a waste facility duly licensed by state or federal authority. ...." ¶ III.6. It is not clear whether this provision applies only to "any other sensory phenomena" or to the main portion of the environmental impairment definition as well. By its use of the term "licensed," and its omission of the "permit" requirement, this provision may more clearly cover RCRA "interim status" HWMF's. As to *one* other form, the Great American, it can be argued that the form covers liability for off-site *damages* (as opposed to *cleanup costs*, which are expressly limited to those on or confined to the insured's premises) from third-party HWMF releases since it does not appear expressly to limit compensatory damage coverage to specified insured sites, but rather seems to cover any qualifying damage "arising out of or in the course of the INSURED'S operations." ¶ II.F. And this result seems contemplated by other language in the same policy excluding cleanup costs "incurred in connection with cleaning up any WASTE DISPOSAL SITE which is not owned or operated by the INSURED," but which excepts from the exclusion "any ENVIRONMENTAL IMPAIRMENT which occurs away from such WASTE

The policy territory is limited to the United States, its territories or possessions, Puerto Rico, or Canada, and to original suits for damages brought in those locations.[68]

The ISO policy also covers "reasonable and necessary clean-up costs"[69] incurred by the insured in the "discharge of a legal obligation validly imposed through governmental action which is initiated during the policy period," provided that those costs are due to covered environmental damage caused by a pollution incident (defined to include releases *from* an insured's site or a properly licensed third-party's waste site) commencing after the date specified in the policy.[70] The policy also covers other reasonable and necessary cleanup costs incurred with the prior written consent of the insurer. This consent will be granted only when, in its sole discretion, the insurer concludes that the existence or the threat of a covered "*pollution incident* presents an imminent and substantial danger of *bodily injury*, *property damage*, or *environmental damage*."[71]

Many exclusions similar to those found in the EIL policy are included in the ISO policy. The chief differences are that the ISO policy (as well as many of the current policy forms other than EIL 881) also excludes:

(1) expected or intended damage,[72]
(2) liability existing solely because assumed under a contract or agreement,[73]
(3) liability arising from property formerly owned by the insured,[74]
(4) liability for pollution incidents at inactive or closed waste sites, whether or not closed in compliance with law,[75] and
(5) liability arising out of acid rain damage.[76]

Further, it does not exclude sudden and accidental occurrences, since this policy covers both sudden and gradual pollution. Attached to the policy are endorsements that override the normal sudden and accidental coverage for pollution incidents in the CGL policies carried by the insured.

COMPARING THE EIL AND ISO COVERAGES FOR ENVIRONMENTAL RISKS

The chief coverage differences between EIL and ISO policies appear to be the following. First, the ISO term "pollution incident" is more limited than the EIL term "environmental impairment," because it covers only "direct" releases that result in "injurious amounts" of the pollutant. Nor does the ISO form cover "sensory phenomena" such as smell, noises, etc., which are expressly included in the EIL form examined. Second, the ISO policy does not cover "impairment or diminution of . . . any other environmental right or amenity protected by law."

Third, the EIL policy examined covers only damages and off-site cleanup costs due to conditions at an insured's own premises.[77] The ISO policy, on the

DISPOSAL SITES." Great American form ¶ IV.M. It can even be argued that compensatory damage liability for releases from third-party HWMFs is covered under other forms where "arising out of or in the course of the insured's operations" is an *independent* basis for coverage and those operations (and perhaps the insured's third-party waste disposal practices) are described in the policy declarations.

Whether Superfund liability for cleanup costs, as opposed to compensatory damages, will be covered at third-party HWMFs is a separate issue. The ISO policy provides such coverage off site, but apparently not on site. *See infra* notes 70 and 71. And as indicated *supra* note 54, only the Home form seems to contemplate such coverage both on site and off site, and apparently even if the insured's liability arises from cleanup costs at a third-party HWMF. The EIL forms might allow such coverage on the rationale set out above if the underwriter allows inclusion of the third-party HWMF site in the declarations. An argument can be made for such coverage in forms where environmental impairment includes the "insured's operations" as an independent basis for coverage and the cleanup cost provision does not expressly limit coverage, as the Great American form does, to environmental impairment "occurring on or confined to the INSURED'S premises." Any cleanup cost coverage for third-party HWMF releases found in such cases might extend to cleanup on site at such an HWMF as well as off site, since both locations are arguably "off site" as to the insured's own premises. Note the dramatic potential expansion of underwriter liability if courts were both to stretch policies to include the third-party HWMF exposure and to require underwriters to respond where one contributor, perhaps a small one, is held jointly and severally liable for cleanup of an entire HWMF.

68. ISO, *supra* note 14, at ¶ IV.

69. Cleanup costs are defined to include "expenses for the removal or neutralization of contaminants, irritants, or pollutants." ISO, *supra* note 14, at § VI. The Great American form defines cleanup costs as "costs and expenses of operations designed to remove, neutralize, or clean up any released or escaped substance which has caused ENVIRONMENTAL IMPAIRMENT or could cause ENVIRONMENTAL IMPAIRMENT is [sic] not removed, neutralized or cleaned up." The closure costs for a waste disposal site are expressly excluded. Great American form ¶ II.G. The questions noted *supra* note 50 as to the meaning of the terms personal injury and property damage are equally pertinent here.

70. ISO, *supra* note 14, at ¶ I.B. This language seems to cover only off-site cleanup costs. *See supra* notes 54, 67; *infra* note 78. Some current forms include environmental impairment as long as it is sustained "wholly *or in part*" prior to the retroactive date (Evanston Insurance Company form) or exclude environmental impairment "which commenced prior to the inception date of this policy unless (1) such environmental impairment continues to take place subsequent to any retroactive date, and (2) the *Insured* had no knowledge prior to the inception date of this policy of such *environmental impairment*" (emphasis in original) (Home form ¶ II.(o)).

71. ISO, *supra* note 14, at ¶ I.B. (Emphasis in original). This provision is apparently intended, through the "threat" language, to allow recovery, with the consent of the underwriter, for on-site releases that threaten, but do not result in, off-site damage. *Cf.*, Mahoney, *supra* note 25, at 2, 3.

72. ISO, *supra* note 14, at ¶ I.(a).

73. ISO, *supra* note 14, at ¶ I.(b). This exclusion, as well as the next two listed, may exclude coverage needed by companies for problems at old dump sites that they bought, sold, or still own. The combination in some of the current composite forms of retroactive date provisions and exclusions for preexisting conditions known to the insured also limit such coverage. Of course, even where these exclusions are not in a policy, the underwriter may well refuse coverage once known dump sites or preexisting conditions are disclosed to it in the policy application.

74. ISO, *supra* note 14, at ¶ I.(f).

75. ISO, *supra* note 14, at ¶ I.(i).

76. ISO, *supra* note 14, at ¶ I.(m).

77. Some current forms may provide for on-site cleanup costs under certain circumstances. *See supra* notes 54, 67.

other hand, covers damages and certain (apparently *off-site*)[78] cleanup costs at properly licensed, active third-party hazardous waste sites.[79]

Fourth, the ISO policy covers only fortuitous damages, by excluding "expected or intended" damage.[80] Note, however, that it is apparently the *damage*, not the *release*, which must be expected or intended.[81] The EIL policy apparently has no provision limiting its coverage to fortuitous events, although it does exclude sudden and accidental happenings covered under the CGL policies.[82] Thus, arguably, normal operating releases in compliance with legal obligations, but which cause compensable damages nonetheless,[83] are covered under the EIL policy examined. And they might also be covered under the ISO policy to the extent that the *damage* they cause is neither expected nor intended.

Fifth, the EIL form has no retroactive date and fewer exclusions that would defeat coverage of damages from old dump sites. The ISO policy has both a retroactive date provision and certain exclusions that do defeat such coverage.[84]

Sixth, neither policy insures for the costs of closure and postclosure care at HWMFs. Unless Congress makes changes, Superfund's Post-Closure Liability Fund (PCLF) is supposed to become available as federal government insurance (to be funded by a $2.13 per ton tax on wastes deposited in "interim status" or fully permitted RCRA HWMFs) for the long-term future risks of hazardous waste disposal at currently active, properly licensed sites. The PCLF would pick up liability for damage at a properly closed RCRA-permitted HWMF *after* the initial five-year closure period, and for the costs of monitoring and maintenance *after* thirty years (including the five-year closure period).[85] Prior to both these times, however, these burdens remain on the HWMF owner or operator, and, to the extent imposed under Superfund or other law (e.g., state tort law), on each generator that contributed wastes to the site in question. Still, at present there is apparently little or no private insurance available for closure and postclosure risks at HWMFs, nor is any likely to be forthcoming soon,

78. Mahoney indicates that underwriters interpret the ISO policy as covering *only* off-site cleanup costs at third-party HWMFs, a very significant limitation in coverage. Personal communication, Apr. 22, 1983. *See supra* note 70. But the ISO form appears to allow the underwriter to cover on-site costs at the time they occur if he chooses. *See supra* note 71.

79. Several other current forms may also provide or allow for this coverage, in one case perhaps even for on-site cleanup costs at a third-party HWMF. *See supra* note 67.

80. This is an example of a provision the real scope of which cannot now be predicted with any certainty, particularly not as related to the continuing (and thus arguably expected or intended) nature of the releases and damage characteristic of environmental risks.

81. Once again, it is not at all clear that courts will make fine distinctions of this sort.

82. Or in some of the current forms, sudden and accidental environmental impairment. *See supra* note 56. Note the perverse effect in this context of prior court decisions expanding the scope of the term sudden and accidental in the context of CGL policies to include gradual pollution (by reading the term "sudden" out of the policy). *See supra* note 12. Such case law now introduces uncertainty as to the ability of EIL policies containing the sudden and accidental exclusion to cover the gradual pollution they are obviously intended to cover.

83. *See supra* note 18.

84. *See supra* note 73.

85. For a discussion of the PCLF, see Treasury Report, *supra* note 6, at 118-21.

according to the Treasury Report.[86] Thus, there is a "risk gap" for those liable for releases from HWMFs, between the preclosure risks insured by the policies discussed above and the longer-term postclosure risks to be assumed at certain postclosure points by the PCLF, gaps that future changes to present insurance policies or federal legislation may or may not close.[87]

Seventh, the ISO policy has no explicit provision dealing with the question of joint and several liability. Liability under the policy for damages or cleanup costs beyond the insured's proportional share seems to be covered since the terms of the insuring agreement do not limit coverage to damage or cleanup costs *caused* by the *insured* or his *operations*. Rather, coverage flows from damage or cleanup costs resulting from releases from insured sites (which include active, properly licensed HWMFs used by the insured, releases from which may trigger massive joint and several liability under Superfund that runs well beyond the insured's proportional share).[88]

Eighth, the noncompliance exclusion under the ISO policy is materially different from that under the EIL policy being examined. Under the EIL policy, noncompliance is disqualifying only if, after it becomes "actually known by any officer or director of the Insured or any employee with specific responsibility for environmental control, the Insured fails to take reasonable and necessary action, in a timely and proper manner, to cure such noncompliance," although noncompliance is not excluded where it is covered by "a compliance schedule or programme or waiver of compliance contained in a permit, order or other valid instruction [by] competent government authority."[89] The noncompliance provision in the ISO policy, on the other hand, excludes damage arising from any pollution incident "which results from or is directly or indirectly attributable to failure to comply with any applicable statute, regulation, ordinance, directive or other order" if failure to comply is "a willful or deliberate act or omission of the *insured*," or any "member, partner, or executive officer thereof," except that even willful or deliberate noncompliance is covered where the liability is vicarious—that is to say, where someone other than a member, partner, or executive officer is responsible for it.[90]

POLICY PROVISIONS GOVERNING THE INSURANCE COMPANY'S ROLE IN YOUR CLIENT'S NORMAL OPERATIONS

As noted above, the insurance company will carefully investigate the environmental risks an insured's operation entails. Both EIL and ISO policies have

86. Treasury Report, *supra* note 6, at 113-45. Ron Janke of Jones, Day, Reavis & Pogue of Cleveland, Ohio, reports, however, that St. Paul Surplus Lines Insurance Company now offers a closure and postclosure insurance policy.

87. Treasury Report, *supra* note 6, at 144.

88. Of course, as already noted, the policy may cover only *off-site* damages and cleanup costs in such a case. For other policy provisions that may have a similar effect, *see supra* notes 54 and 67.

89. EIL, *supra* note 13, at ¶ II.4.

90. ISO, *supra* note 14, at ¶ I.(1).

provisions designed to allow the insurance company to monitor those risks on a continuing basis—provisions that are obviously designed to key into the cancellation and renegotiation provisions discussed above.[91]

The EIL policy examined requires written notification to the insurance company within thirty days of material changes in facts supplied in the application form or in the risks insured.[92] It also requires prompt written notice of "any *incident* or claim or proceedings relating" (emphasis added) to the insurance,[93] a provision that might extend to notice at the time a Discharge Monitoring Report, section 311, or Superfund release notice is filed. The ISO policy only requires reporting of any claim against the insured or any action or proceeding for cleanup costs.[94]

Both the EIL and the ISO policies give the insurer broad rights to inspect the client's property or operations at any time,[95] and the EIL policy also allows the insurance to be suspended if, after written notice, the insured does not take reasonable steps to correct or minimize any defect or danger to the satisfaction of the insurer.[96] The EIL policy also expressly grants rights to inspect certain records and requires the insured to furnish annual updates on any estimates furnished by him that entered into the calculation of the premium.[97] In addition to being conditions on policy coverage, these policing provisions are backstopped by the cancellation and renegotiation provisions discussed above.

91. *See supra* text accompanying note 19.

92. EIL, *supra* note 13, at ¶ V.9.

93. EIL, *supra* note 13, at ¶ V.2.

94. ISO, *supra* note 14, at ¶ VII.3. These notice provisions, and the related provisions dealing with when an incident or claim has arisen and how such terms apply to continuing releases or environmental damage, can vary between policies and must be examined with care.

95. EIL, *supra* note 13, at ¶ V.10., ISO, *supra* note 14, at ¶ VII.2.

96. EIL, *supra* note 13, at ¶ V.10. There are indications that the government is looking to such action by insurance companies, much to their distress, as a market mechanism to supplement its efforts to decide which sites to license and when to enforce its rules once sites are licensed. Both the EIL and ISO policies go out of their way to say that no warranty of safety is created by the policies' "policing" provisions.

97. EIL, *supra* note 13, at ¶ V.7.

THE SCOPE OF LEGAL DEFENSE COSTS COVERAGE AND INSURANCE COMPANY DEFENSE PARTICIPATION RIGHTS

The EIL and ISO policies both cover costs of litigation,[98] those costs being apparently included within the limits of liability in the EIL policy,[99] but not in the ISO policy.[100]

In the EIL policy, where the insurance company only indemnifies the insured, the insurer is liable for litigation costs that are incurred with its written consent.[101] The insurer has the right, but not the duty, to take over the defense "at their own expense and for their own benefit," and the insured "shall give all such information and assistance as the Insurers may reasonably require."[102]

In the ISO policy, where the insurer must "pay on behalf of the *insured*," the insurer has the duty, as well as the right, to defend bodily injury and property damage claims.[103] And it has the right, but no duty, to defend cleanup cost claims.[104] In fact, the language granting the latter right gives the insurance company broad ability to participate in *all related legal proceedings*: "The company shall have the right, but not the duty, to participate at its expense in any proceeding seeking to impose legal obligations because of such *environmental damage*."[105] The only provision in the EIL policy dealing in any way with related proceedings extends full legal defense cost coverage to cases seeking both covered compensatory damages and noncovered punitive or exemplary damages.[106] This provision is absent in the ISO policy.

The EIL policy has a provision on prohibited concessions that may bear on an insured's ability to maneuver in the regulatory and public relations contexts after a release: "The Insured shall not, without the consent in writing of the Insurers, make any admission or negotiate any offer, promise or payment in

98. Current composite forms have a variety of different provisions on costs of litigation. The nature of the underwriter's obligations, the types of costs covered (e.g., whether reimbursable costs of investigation cover salary and office expenses of the insured), and the amount of control over litigation and choice of counsel can vary significantly between policies. An interesting question is whether the various types of language now in use cover an opponent's attorneys' fees and costs of litigation where assessable against an insured under "citizen suit" provisions in various federal environmental laws (e.g., where such a suit is coupled with a suit for damages).

99. EIL, *supra* note 13, at ¶ I.4. Because of the huge costs serious environmental litigation can impose, it is a considerable advantage not to have those costs subject to, and thus eating up, the available coverage limits.

100. ISO, *supra* note 14 at 6. The ISO policy is designed to respond to the EPA RCRA insurance requirements for owners and operators of HWMFs, which require that legal defense costs *not* be included within policy limits.

101. EIL, *supra* note 13, at ¶ I.4. EIL 1080 also includes costs "recovered against the insured." This language is absent from EIL 881.

102. EIL, *supra* note 13, at ¶ V.5.

103. ISO, *supra* note 14, at ¶ I.A (emphasis in original).

104. ISO, *supra* note 14, at ¶ I.B.

105. ISO, *supra* note 14, at ¶ I.B (emphasis in original).

106. EIL, *supra* note 14, at ¶ I.4. EIL 881 substitutes the terms "fines or ...ties" for the terms "punitive or exemplary damages."

connection with any incident or claim related to the Insurance herein expressed."[107]

The ISO policy has an extensive section entitled "Assistance and Cooperation of Insured" that imposes various duties on the insured once a claim is made, ending with the following provision: "The *insured* shall not, except at the *insured's* own cost, voluntarily make any payment, assume any obligation, or incur any expense."[108]

Both policies have provisions requiring written consent of the insurer before voluntary cleanup costs are incurred, as discussed above.

The upshot of all this is that the insurance company must be kept constantly informed as an insured copes with an incident, and that its interest in avoiding civil liability may not coincide with the insured's need to contain the situation, satisfy the regulators, solve its public relations problems, and ensure the continuation of the normal business operations that are its economic lifeblood.[109] While the insurance companies have the power under these policies to be difficult if they choose, there may be no real concern to the extent that they are sophisticated in dealing with environmental incidents and to the extent that they are themselves insuring some portion of the cleanup cost, the imposition of which is in the hands of the regulators.

CONCLUSION

As can be seen, insurance policies only yield up their secrets to close, careful study—study that demands considerable familiarity with their basic structure and terminology. This article is designed to give the uninitiated a hand in gaining that familiarity. A moment's reflection on the many implications of the matters discussed, however, shows that it has only scratched the surface. And it has in any case dealt only with the standard form ISO provisions and one specific EIL policy—any particular underwriter's form may differ in material ways. Finally, the liabilities involved and the role of insurance with regard to them are in fundamental ferment. They may well change as Congress addresses the issues of victim compensation in the hazardous waste context and the possible role of insurance to replace or supplement the PCLF during the postclosure period. The nature of the relatively new and flexible insurance product offered in the market will continue to evolve as underwriters and insureds search for the best balance between coverage and cost.

107. EIL, *supra* note 13, at ¶ V.3.

108. ISO, *supra* note 14, at ¶ VII.3.

109. For example, where an underwriter must take over the defense, or chooses to do so, it may employ its own lawyers, who may not be expert in environmental law, and may engage in hard-nosed litigation tactics without regard to the insured's regulatory and public relations strategy.

5HS-13

MAR 2 5 1985

RECEIVED
APR 1 1985
DELL
ENGINEERING

Mr. Ronald Vriesman, P.E.
Project Manager
Dell Engineering
245 East Lakewood Boulevard
Holland, MI 49423-2066

RE: Hazardous Waste (Part B)
Permit Application
Allegan Metal Finishing Co.
MID 006 016 190

Dear Mr. Vriesman:

This is to advise you that we are taking no action on your February 21, 1985, request for an extension of the due date for the referenced Part B permit application. The application is late and, as a result, Allegan Metal Finishing Co. is subject to enforcement action by our Agency.

Your letter commits to your submission, on behalf of Allegan, of a closure plan to our office by April 1, 1985. We will not refer Allegan to our Hazardous Waste Enforcement Branch for action on the late Part B prior to April 1, 1985. We will determine how to proceed, after April 1, depending on what Allegan actually submits (or you submit on their behalf). An approvable closure plan that covers all of the regulated units at the Allegan facility, would be acceptable to us in lieu of the Part B.

Please contact James Mayka, of my staff, at (312) 886-6136, if you have any questions.

Sincerely yours,

Karl J. Klepitsch, Jr.
Chief, Solid Waste Branch

cc: Alan Howard/MDNR

cc: Lynn Spurr-MDNR
Wally Sosnowski-AMFCO
(4-1-85 RRV)

DELL ENGINEERING
245 EAST LAKEWOOD BLVD.
HOLLAND, MI 49423-2066
PHONE 616-396-1296

February 21, 1985

U.S. EPA
Region V
5HS-13
230 South Dearborn Street
Chicago, Illinois 60604

Attn: Ms. Edith Ardiente
Chief, Technical Program Section

Re: Allegan Metal Finishing Company
EPA I.D. No.: MID006016190

Dear Ms. Ardiente:

On March 1, 1985, the Part B RCRA Permit Application becomes due for our client, Allegan Metal Finishing Company (AMFCO). We are currently working with Ms. Pat Vogtman and Mr. Robert Leininger from your regional office in order to bring AMFCO into compliance with interim status storage facility standards. This facility never intended to be, nor does it wish to continue to be, a hazardous waste storage facility.

We are presently in the process of preparing a closure plan, for submittal to our office, which calls for removal of all on-site hazardous waste from existing storage lagoons. This waste will be transported and disposed of at an off-site licensed facility. In this manner, no post closure care will be required of the AMFCO site.

Per a suggestion from Mr. Joe Boyle of your office during a recent informal meeting, we do hereby request a deferral for submittal of the Part B RCRA permit application. Hopefully, if closure at AMFCO progresses as presently anticipated, Part B submittal will never be required. We will be submitting a detailed closure plan for AMFCO to your office by April 1, 1985.

Should you have any questions or desire any additional information, do not hesitate to contact either Mr. Lee Dell or myself at 616-396-1296. Consideration of this deferral request at your earliest convenience would be appreciated.

Sincerely,

Ronald R. Vriesman (JR)

Ronald R. Vriesman, P.E.
Project Manager

RRV:jr(84825)

cc: Mr. Wally Sosnowski, AMFCO
Mr. Ed Sosnowski, AMFCO
Ms. Lynn Spurr, MDNR
Ms. Pat Vogtman, U.S. EPA (5HE-12)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v

ALLEGAN METAL FINISHING COMPANY,

Defendant.
_____/

Civil Action No. K86-441-CA4

Hon. Richard A. Enslen

DEFENDANT'S RESPONSES TO PLAINTIFF'S FIRST SET OF REQUESTS FOR ADMISSIONS OF FACT

For its responses to Plaintiff's requests for admissions, Defendant says as follows:

REQUEST:

1. Allegan is a corporation organized under the laws of the State of Michigan.

RESPONSE:

Admitted.

REQUEST:

2. Allegan is a "person" within the meaning of 42 U.S.C. § 6903(15).

RESPONSE:

Admitted. By way of further answer, the admission of the fact that Allegan is a "person" in no way admits any hazardous waste liability.

REQUEST:

3. Allegan owns an industrial facility located at 1274 Lincoln Road, Allegan, Michigan.

RESPONSE:

Admitted.

REQUEST:

4. At the Allegan facility, Allegan engages in zinc chloride/zinc cyanide electroplating on carbon steel.

RESPONSE:

Admitted only that Allegan's business includes zinc electroplating on carbon steel and post-treating said materials.

REQUEST:

5. As part of its operations, Allegan produces various wastewaters. These wastewaters primarily result from rinse tanks on plating lines and include:

1. zinc cyanide rinses
2. zinc chloride rinses
3. chromium rinses
4. acid and alkali rinses; and
5. boiler breakdown

RESPONSE:

Admitted, although such are treated and neutralized within Allegan's process system before any discharge.

REQUEST:

6. Allegan commenced electroplating operations at its facility prior to November 19, 1980.

RESPONSE:

Admitted.

REQUEST:

7. As part of its operations at the Allegan facility, Allegan maintained and still maintains on-site holding ponds for its waste by-products.

RESPONSE:

Admitted. By way of further answer, Allegan no longer uses the two on-site holding ponds at issue for waste by-products. Pursuant to the U.S. EPA Consent Agreement and Final Order, Allegan is presently using on a trial basis its approved wastewater treatment system for discharge of its treated waste by-products. All wastes discharged previously to the holding ponds were treated and neutralized within Allegan's process system prior to discharge and such are the subject of a pending de-listing petition to the U.S. EPA confirming such as non-hazardous.

REQUEST:

8. Allegan's use of its holding ponds is "land disposal" within the meaning of 42 U.S.C. § 3004(k).

RESPONSE:

Denied. By way of further answer, Defendant denies the characterization of its holding ponds as a "land disposal" within the meaning of 42 U.S.C. § 3004(k) as such definition indicates an intended permanent disposal site, while the holding ponds at Allegan Metal Finishing are not for permanent land disposal.

REQUEST:

9. The on-site holding ponds at the Allegan facility were in existence prior to November 19, 1980.

RESPONSE:

Admitted. By way of further answer, to the extent this question seeks to draw a legal conclusion, no answer is required. Further, Defendant incorporates its answer to Request 7, above.

REQUEST:

10. At various times both before and after November 19, 1980, Allegan used its on-site holding ponds to treat and store its waste by-products from electroplating operations.

RESPONSE:

Denied. By way of further answer, Defendant incorporates its answers to Requests 7 & 8, above. Further, Allegan's holding ponds for these non-hazardous materials (as per Allegan's de-listing petition) do not constitute such as permanent storage facilities under the definitions of RCRA.

REQUEST:

11. Allegan's on-site holding ponds are "surface impoundments" within the meaning of 40 C.F.R. § 261.10 (sic).

RESPONSE:

Denied. By way of further answer, "surface impoundments", by definition (40 C.F.R. § 260.10), denote holding ponds that are designed to hold liquid waste or free liquids, and Allegan uses the ponds at issue only for temporarily holding non-hazardous materials as described above.

REQUEST:

12. At various times after November 19, 1980, the waste by-products Allegan placed in its on-site holding ponds were hazardous wastes within the meaning of Section 1004(5) of RCRA, 42 U.S.C. (§ 6903(5)).

RESPONSE:

Denied. By way of further answer, the pre-treated materials discharged to the holding ponds, as described above, are not hazardous waste within the meaning of RCRA as per Allegan's de-listing petition pending with the U.S. EPA to confirm such materials as non-hazardous.

REQUEST:

13. At various times after November 19, 1980, the waste by-products Allegan placed in its on-site holding ponds were hazardous wastes within the meaning of 40 C.F.R. Part 261.

RESPONSE:

Denied. By way of further answer, Defendant incorporates its answer to Request 12, above.

REQUEST:

14. At various times after November 19, 1980, Allegan placed waste by-products in its on-site holding ponds that are designated by U.S. EPA as hazardous waste No. F006.

RESPONSE:

Admitted in part, and denied in part. Defendant admits only that the U.S. EPA asserts the materials in the two holding ponds at issue are designated as F006 under 40 C.F.R. Part 261, Subpart D. However, all materials discharged to the holding ponds are pre-treated and neutralized within Defendant's process prior to discharge to the ponds. As well, Defendant has a de-listing petition pending with the U.S. EPA to confirm such materials are non-hazardous based upon analytical results and prior de-listings of similar materials. Finally, the RCRA definition of "F006"

waste specifically excepts from that definition zinc plating on carbon steel, and Defendant therefore further denies the propriety of U.S. EPA's characterization on this basis.

REQUEST:

15. At various times after November 19, 1980, Allegan placed waste by-products in its on-site holding ponds that are designated by U.S. EPA as hazardous waste No. F008.

RESPONSE:

Denied. By way of further answer, Allegan did not place any hazardous waste F008 into its holding ponds. Allegan did generate and have, at one time, wastes allegedly characterized as F008 in drum containers on-site. The Michigan DNR required Allegan to dispose of that waste and such was neutralized within Allegan's process pre-treatment prior to discharging it to the holding ponds. The treatment for the alleged F008 waste was such that it changed the composition of the material to be consistent with the other non-hazardous materials in the holding ponds per Allegan's de-listing petition. Thus, Allegan never placed F008 hazardous waste into its on-site holding ponds.

REQUEST:

16. At various times both before and after November 19, 1980, Allegan used its on-site holding ponds to store its plating bath sludges from the bottom of its plating tanks.

RESPONSE:

Denied. By way of further answer, Allegan incorporates its answer to Request 15, above, regarding alleged F008 wastes. The terms and characterizations imply that Allegan has placed

untreated hazardous wastes into its on-site holding ponds, and Allegan only used those holding ponds for its pre-treated waste-stream as described above.

REQUEST:

17. On or about June 23, 1980, Allegan submitted a Notification of Hazardous Waste Activity, EPA Form 8700-12 (6-80) to U.S. EPA.

RESPONSE:

Admitted. Defendant does not, however, admit any discharge of any hazardous wastes to the holding ponds at issue herein and completed said form under the impression such was required generally by the government of companies within its industry without exception. Moreover, the apparent characterization of Allegan as generating F006 waste was a mere approximation by the Defendant without sufficient expertise or understanding to fairly complete the said form.

REQUEST:

18. The document attached hereto as Exhibit A is a true and accurate copy of the notification referred to in the preceding request for admission.

RESPONSE:

Admitted. Further, for the record, said form was executed on behalf of the Company by Mr. E. C. Sosnowski who signed for Mr. Walter C. Sosnowski. In further answer, Defendant incorporates its answer to Request 17, above.

REQUEST:

19. On or about November 11, 1982, Allegan submitted an amended notification of Hazardous Waste Activity to U.S. EPA.

RESPONSE:

Admitted. Further, said document deleted any reference to F006 as being generated due the regulatory exception for zinc plating on carbon steel and the perceived non-hazardous nature of the pre-treated materials discharged by the Company. The reference to F008 was apparently based upon the circumstances referred to in answer to Request 15, above.

REQUEST:

20. The document attached hereto as Exhibit B is a true and accurate copy of the notification referred to in the preceding request for admission.

RESPONSE:

Admitted. Further, for the record, said form was executed and transmitted on behalf of the Company by Mr. E. C. Sosnowski, who signed for Mr. Walter C. Sosnowski. In further answer, Defendant incorporates its answer to Request 19, above.

REQUEST:

21. Allegan did not submit a Part A permit application for any activity at the Allegan facility to U.S. EPA or MDNR by November 19, 1980.

RESPONSE:

Admitted. By way of further answer, to the extent such Request seeks to show any wrongdoing on the part of Allegan such is denied. Moreover, Allegan did operate the two holding ponds at

issue under an approved permit by the MDNR (Stipulation No. V-00250) since 1972. Further, Allegan was advised by the MDNR that these materials were not hazardous and thus did not trigger any requirement of a Part A permit application. It was not until 1984 that Allegan was notified that the Part A permit was allegedly required. In settlement of this dispute, Allegan submitted a Part A permit application in early 1985.

REQUEST:

22. On or about February 21, 1985, Allegan submitted a Part A permit application to U.S. EPA.

RESPONSE:

Admitted. By way of further answer, to the extent such answer seeks to draw a legal conclusion, no answer is required. To the extent such answer seeks to show any wrongdoing on the part of Allegan, such is denied, and Defendant's answer to Request 21, above, is incorporated.

REQUEST:

23. The document attached hereto as Exhibit C is a true and correct copy of the Part A Permit Application referred to in the preceding request for admission.

RESPONSE:

Admitted. Further, Defendant incorporates its answer to Request 21, above.

REQUEST:

24. Allegan did not apply for final administrative disposition of a permit concerning any hazardous waste treatment, storage or disposal activities at its facility by November 9, 1985.

RESPONSE:

Denied. By way of further answer, to the extent this question seeks to draw a legal conclusion, no answer is required. Assuming that the reference to "final administrative disposition of a permit" refers to a RCRA Part B permit, such is denied to be applicable to Defendant. Further, the U.S. EPA Consent Agreement and Final Order entered into does not require that Allegan submit such a permit application. Allegan was also advised by the U.S. EPA and MDNR that submission of an "approvable" closure plan was in lieu of the applicable requirements of a Part B permit. Finally, Allegan had a State of Michigan Stipulation to use and operate the holding ponds at issue, and no hazardous wastes were placed therein per Allegan's de-listing petition.

REQUEST:

25. Allegan has not submitted a Part B permit application to U.S. EPA or to MDNR for the Allegan facility.

RESPONSE:

Admitted. By way of further answer, to the extent this question seeks to draw a legal conclusion, no answer is required. Further, although Allegan did not submit a Part B permit application to the U.S. EPA or to the MDNR for the Allegan facility, Allegan was informed by the U.S. EPA that submittal of an "approvable Closure Plan" would be acceptable in lieu of a Part B permit. Thus, although Allegan did not submit a Part B permit application, Allegan was informed by the U.S. EPA that it

was not required to submit a Part B permit application. Further, Defendant incorporates its answer to Request 24, above.

REQUEST:

26. Allegan did not submit any certification to U.S. EPA or to MDNR by November 8, 1985, stating that the Allegan facility is in compliance with applicable financial responsibility requirement.

RESPONSE:

Denied. By way of further answer, by transmittal dated April 29, 1985, Defendant's consultant, Dell Engineering, sent to U.S. the EPA information on the unavailability of environmental impairment liability insurance. Further, Allegan began attempting to procure the necessary insurance to be in compliance with the applicable financial responsibility requirements prior to the November 8, 1985 date. Allegan was unable, despite good faith and diligent efforts, to obtain this liability insurance. Furthermore, Allegan did subsequently on January 31, 1986, in satisfaction of the Consent Agreement and Final Order financial responsibility requirements, obtain an irrevocable standby letter of credit. Finally, throughout these steps toward settlement of this dispute, Defendant denies the applicability of the RCRA requirements based upon the non-hazardous nature of the materials at issue per Allegan's de-listing petition.

REQUEST:

27. Allegan did not submit a certification to U.S. EPA or to MDNR by November 8, 1985 stating that the Allegan facility is in compliance with applicable groundwater monitoring requirements.

RESPONSE:

Denied. Allegan has on several occasions submitted certification to the U.S. EPA and MDNR stating that the Allegan facility was in compliance with any allegedly applicable groundwater monitoring requirements based upon monitoring wells on-site for many years. On April 23, 1985, Allegan submitted a groundwater assessment plan based upon and in settlement of the U.S. EPA administrative proceeding, which was subsequently finalized through communications between the parties. Thus, pursuant to all of the correspondence and deadlines that were set by the U.S. EPA, Allegan did submit certification to the U.S. EPA by November 8, 1985 and timely complied with allegedly applicable groundwater monitoring requirements pursuant to Defendant's settlement with the U.S. EPA.

REQUEST:

28. At no time since November 19, 1980, has Allegan satisfied the criteria for interim status set forth in Section 3005(e)(1) of RCRA, 42 U.S.C. § 3005(e)(1).

RESPONSE:

Denied. By way of further answer Allegan did meet those alleged requirements as reflected in its above answers to Requests 8, 12, 14-15, & 24-27. In addition, Allegan has complied with the U.S. EPA Consent Agreement and Final Order, but without any admission of the applicability of such RCRA requirements to Defendant's holding ponds. Further, Defendant undertook and satisfied the specified requirements to continue interim status, and addition-

ally used and operated the holding ponds at issue pursuant to a State of Michigan Stipulation.

REQUEST:

29. Allegan did not, by May 19, 1981, install and operate at its facility, a groundwater monitoring system consisting of at least one well located hydraulically upgradient and three wells located hydraulically downgradient from its surface impoundments.

RESPONSE:

Denied. By way of further answer, to the extent this Request seeks to draw a legal conclusion, no answer is required. To the extent the question seeks to show wrongdoing on the part of Allegan such is denied. Further, Allegan has had one monitoring well upgradient and three wells downgradient from the holding ponds since 1979. See also, answer to Request 27, above, and site plan map accompanying Part A permit application.

REQUEST:

30. On December 4, 1984, U.S. EPA filed an administrative complaint against Allegan alleging various violations of RCRA.

RESPONSE:

Admitted as to date of Complaint only.

REQUEST:

31. The document attached hereto as Exhibit D is a true and accurate copy of the administrative complaint referred to in the preceding request for admission.

RESPONSE:

Admitted. However, Defendant does not hereby admit any of the factual or legal allegations contained therein.

REQUEST:

32. On May 20, 1985, Allegan signed a Consent Agreement and Final Order in settlement of the U.S. EPA administrative action which had been filed against it.

RESPONSE:

Admitted that the disputed claim of the U.S. EPA as to the alleged applicability of RCRA to Defendant's holding ponds at issue was settled and resolved by the Consent Agreement and Final Order, which is binding upon Plaintiff herein.

REQUEST:

33. The document attached hereto as Exhibit E is a true and accurate copy of the Consent Agreement and Final Order referred to in the preceding request for admission.

RESPONSE:

Admitted. Further, for the record, said Consent Agreement was executed on behalf of the Company by Mr. Walter C. Sosnowski who signed for Mr. E. C. Sosnowski.

REQUEST:

34. Allegan did not submit to U.S. EPA documentation of financial assurance for closure by August 15, 1985.

RESPONSE:

Admitted. However, Allegan promptly made an application for such financial assurance pursuant to the Consent Agreement, but processing delays at the financial institution issuing the

letter of credit and trust instruments, as the U.S. EPA was timely advised, delayed actual issuance thereof.

REQUEST:

35. Allegan did not pay any penalty to U.S. EPA until January 28, 1986.

RESPONSE:

Admitted that settlement payment of $3,000 paid by Defendant consistent with Consent Agreement and Final Order upon Completion of settlement requirements acceptable to U.S. EPA.

REQUEST:

36. Allegan paid $3,000 to U.S. EPA on January 28, 1986.

RESPONSE:

Admitted.

Walter C. Sosnowski,
President Allegan Metals
Finishing Company

STATE OF MICHIGAN)
) ss.
COUNTY OF ALLEGAN)

Subscribed and sworn to before me, a Notary Public in and for said county, this 22 day of October, 1987.

Notary Public: Allegan County, Michigan
My commission expires: 3-25-89

WALTER J. SCHMIDT
Notary Public, Allegan County, MI
My Commission Expires 3-25-89

VARNUM, RIDDERING, SCHMIDT & HOWLETT
Attorneys for Defendant Allegan
Metal Finishing Company

By: _____
Charles M. Denton (P-33269)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v

ALLEGAN METAL FINISHING COMPANY,

Defendant.
/

Civil Action No. K86-441-CA4

Hon. Richard A. Enslen

PROOF OF SERVICE

STATE OF MICHIGAN)
) SS.
COUNTH OF KENT)

Nancee J. Van Dyke, being first duly sworn, deposes and says that she is employed as a secretary for the firm of Varnum, Riddering, Schmidt & Howlett, and that on October 30, 1987, she served a copy of Defendant's Responses to Plaintiff's First Set of Requests for Admissions of Fact upon:

Gordon G. Stoner
Environmental Enforcement Section
Land and Natural Resource Division
U.S. Department of Justice
Washington, D.C. 20530

by placing the same in a sealed envelope addressed as above indicated and depositing the same in the U.S. mail with first class postage fully prepaid thereon.

Nancee J. Van Dyke
Nancee J. Van Dyke

Subscribed and sworn to before
me this 30th day of October, 1987.

Sandra L. Beyer
Sandra L. Beyer, Notary Public
Kent County, Michigan
My commission expires: 1/22/91

1/6/89

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

HONORABLE RICHARD A. ENSLEN

BENCH TERM SCHEDULE

FEBRUARY 6, 1989 THROUGH MARCH 24, 1989

ALL FINDINGS OF FACT AND CONCLUSIONS OF LAW AND TRIAL BRIEFS MUST BE SUBMITTED TO THE KALAMAZOO COURT ONE WEEK PRIOR TO THE BEGINNING OF THIS TERM (January 30, 1989) REGARDLESS OF WHERE YOUR CASE APPEARS ON THIS LIST.

TRIAL WILL COMMENCE AT 8:30 A.M. TRIAL WILL BE HELD FROM 8:30 A.M. TO 1:00 P.M., WITH A TEN MINUTE RECESS IN MID MORNING (unless otherwise directed by the Court). ALL ATTORNEYS, WITNESSES AND PARTIES ARE TO BE IN THE COURTROOM AND READY TO PROCEED AT 8:30 A.M. Any case that settles or reaches verdict during any given day will result in the next unsettled case commencing the following day at 8:30 a.m. It will be your responsibility to check with counsel on the cases ahead of you to determine when your case may actually begin.

COUNSEL SHOULD PAY PARTICULAR ATTENTION TO REQUIREMENTS ENUMERATED IN PARAGRAPH 11C OF THE PRETRIAL NOTICE.

If your case does not go to trial during this term, it will be rescheduled for the term commencing May 15, 1989.

1.	K86-441	U.S. v Allegan Metal Finishing	F. Henry Habicht, II (Washington, D.C.) John A. Smietanka Thomas J. Gezon (Grand Rapids, MI) Gordon G. Stoner (Washington, D.C.) Jon F. DeWitt Charles M. Denton (Grand Rapids, MI) Robert Leininger (Chicago, MI) Carolyn Tillman (Washington, D.C.)

2.	G84-1268	Central Transport v Roberto, et al.	Daniel F. Berry Thomas Fallucca Michael A. Nedelman (Birmingham, MI) Brad A. Rayle (Kalamazoo, MI) John D. Tully (Grand Rapids, MI)
3.	K86-81	Huss, et al. v U.S.A., et al.	Sheldon L. Miller Sheldon D. Erlich Jeffrey S. Cohen (Detroit, MI) John A. Smietanka Anne Vandermale Tuuk (Grand Rapids, MI) Frank J. Kelley Robert L. Willis (Detroit, MI) Richard Bensinger (Gaylord, MI)
4.	K86-161	Rodriguez, et al. v Berrybrook Farms, et al.	Gary N. Gershon Janice R. Morgan (Berrien Springs, MI) John Dewane (St. Joseph, MI) Kendall MacLeod (Kalamazoo, MI)
5.	G87-553	Steelcase, Inc., v American Motorists, et al.	Paul T. Sorensen John D. Dunn (Grand Rapids, MI) David Bloss (Grand Rapids, MI) James Nelson (Grand Rapids, MI) William M. Savino Gary D. Centola Lawrence A. Levy (Uniondale, NY)

6. K87-375 Emmons, et al. v U.S.A.

Sanford L. Steiner
Frank J. DeFrancesco
(Kalamazoo, MI)
John A. Smietanka
Anne Vandermale Tuuk
(Grand Rapids, MI)

7. G87-808 Pioneer v O.K. Janitorial

John A. Waters
(Grand Rapids, MI)
Gabriel A. Avram
(Winston-Salem, NC)

Dated: January 6, 1989

RICHARD A. ENSLEN
U.S. DISTRICT JUDGE

By: Susan A. Smith
Susan A. Smith
Case Manager/Courtroom Deputy

U.S. Department of Justice

DBT:GGS
90-7-1-343

Washington, D.C. 20530

March 23, 1989

C. Duke Hynek, Clerk
U.S. District Court
167 Federal Building
410 W. Michigan Avenue
Kalamazoo, Michigan 49005

Re: United States v. Allegan Metal Finishing Company, Civil Action No. K86-441-CA4D

Dear Mr. Hynek:

Enclosed for filing is the original and one copy of the Motion of the United States to Modify the Court's Order of March 10, 1989, and to Enlarge the Time within which to Lodge the Consent Decree.

Sincerely yours,

Donald A. Carr
Acting Assistant Attorney General
Land and Natural Resources Division

By: _____
Gordon G. Stoner
Environmental Enforcement Section

cc: Connie Puchalski
Tom Gezon

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	Civil Action No. K 86-441-CA4
v.	)	
	)	
ALLEGAN METAL FINISHING COMPANY	)	Hon. Richard A. Enslen
	)	
Defendant.	)	
	)	

MOTION OF THE UNITED STATES TO MODIFY THE COURT'S ORDER OF MARCH 10, 1989, AND TO ENLARGE THE TIME WITHIN WHICH TO LODGE THE CONSENT DECREE

Plaintiff, the United States of America, by and through the undersigned attorneys, and on behalf of the Environmental Protection Agency ("EPA"), hereby moves the Court to modified the Court's order of March 10, 1989, and for an enlargement of time within which to lodge the consent decree to May 12, 1989. In support of its motion, the Plaintiff states as follows:

1. On February 3, 1989, the United States notified the Court that it had reached an agreement with defendant Allegan Metal Finishing Company ("Allegan") to enter into a consent decree in settlement of this civil action.

2. 28 C.F.R. § 50.7, as set forth in paragraph 25 of the consent decree, requires that notice of this consent decree be given to the public, and that the public shall have at least thirty (30) days to comment on the consent decree. Therefore, the consent decree must be lodged with the Court for the purpose of this public comment period before the consent decree may be entered by the Court.

3. On February 17, 1898, Allegan signed the consent decree.

4. On March 10, 1989, the Court issued an order that required a final judgment order be submitted to the Court for its signature prior to March 27, 1989.

5. Before the consent decree signed by Allegan can be lodged with the Court, the decree must be reviewed and signed by the Regional Administrator of EPA Region V, the Assistant Administrator for Enforcement and Compliance Monitoring of EPA, the United States Attorney for the Western District of Michigan and the Acting Assistant Attorney General for the Land and Natural Resources Division of the Department of Justice. This review and sign-off procedure can take as long as two to three months. Under an expedited procedure this process can be completed in this case in approximately 45 days.

6. Therefore, the United States requests that the Court's order of March 10, 1989, be modified to require that the United States lodge the consent decree with the Court on or before May 12, 1989.

7. Defendant has no objection to this motion.

Respectfully submitted,

UNITED STATES OF AMERICA
By Its Attorneys

DONALD A. CARR
Acting Assistant Attorney General
Land and Natural Resources Division

JOHN A. SMIETANKA
United States Attorney
Western District of Michigan

By: _____

GORDON G. STONER, Attorney
Environmental Enforcement Section
Land and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044

THOMAS GEZON
Chief, Assistant United States
Attorney

OF COUNSEL:
CONNIE PUCHALSKI
Assistant Regional Counsel
U.S. Environmental Protection
Agency, Region V
230 South Dearborn Street
Chicago, Illinois 60604

CERTIFICATE OF SERVICE

I certify that a copy of the Motion of the United States to Modify the Court's Order of March 10, 1989, and to Enlarge to time within which to lodge the Consent Decree, was this 23rd day of March, 1989, mailed, postage prepaid, addressed to:

Charles M. Denton
Suite 800
171 Monroe Avenue, N.W.
Grand Rapids, MI 49503

Gordon G. Stoner
Attorney
Land and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044

STAFF ATTORNEY C&P 2/24/89
SECTION CHIEF C&P 2/24/89
BRANCH CHIEF
DEPUTY REG. COUNSEL
REGIONAL COUNSEL
OTHER WEM 3/23/89

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. ALLEGAN METAL FINISHING COMPANY Defendant.	)	Civil Action No. K 86-441-CA4 Hon. Richard A. Enslen

CONSENT DECREE

Plaintiff, the United States of America, on behalf of the United States Environmental Protection Agency ("United States"), and defendant, Allegan Metal Finishing Company ("Allegan"), have jointly moved the Court for entry of this consent decree.

The parties have agreed that settlement of this matter is in the public interest and that entry of this consent decree as the compromise of a disputed claim without further litigation is the most appropriate means of resolving this matter.

THEREFORE, without admission by Allegan of the allegations in the complaint, without trial of any issue of fact or law, and upon consent and agreement of the parties to this consent decree, it is ORDERED, ADJUDGED and DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction of the subject matter of this action pursuant to 42 U.S.C. § 6928(a) and 28 U.S.C. § 1331, 1345 and 1355. Venue is proper in this district.

2. This Court has personal jurisdiction over Allegan.

II. APPLICABILITY

3. This consent decree applies to and binds the parties hereto and their successors. This consent decree and Allegan's performance hereunder shall not create any rights or causes of action in any third-parties or inure to the benefit of any non-party.

III. BACKGROUND

4. The United States filed the complaint in this action on October 30, 1986, alleging that defendant Allegan violated the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 et seq., and violated the Consent Agreement and Final Order ("CAFO") entered into between the United States Environmental Protection Agency ("U.S. EPA") and Allegan. Allegan filed an Answer and Affirmative Defenses denying liability.

5. By October 31, 1987, Allegan ceased its discharge of wastewater from its facility to the two surface impoundments at issue.

6. The United States and Allegan filed motions for summary judgment. On June 6, 1988, the Court denied Allegan's motion and granted, in part, the United States' motion for summary judgment on issues of liability.

7. On November 9, 1988, pursuant to a joint motion by the United States and Allegan, the Court dismissed all claims of liability against Allegan arising from the complaint not resolved by the Court's June 6, 1988 Opinion and Order.

8. Under RCRA Allegan must close the two surface impoundments according to an approved closure plan. On September 27, 1985, the U.S. EPA approved a closure plan for these two surface impoundments. Because of an intervening change in the RCRA regulations (53 Fed. Reg. 31138 (August 17, 1988)), however, Allegan's originally approved closure plan must be amended. Allegan has submitted two proposed amendments for its closure plan to the Michigan Department of Natural Resources ("MDNR").

9. On October 30, 1986, pursuant to RCRA, the State of Michigan received authority from U.S. EPA to administer, in lieu of RCRA, the Michigan Hazardous Waste Management Act (1979 P.A. 64), including the authority to approve closure plans for hazardous waste management facilities located in Michigan. The United States and Allegan agree that the MDNR has authority to approve RCRA closure plans in Michigan, including amendments to Allegan's closure plan.

IV. COMPLIANCE

10. Except in full compliance with all federal and state laws and regulations and pursuant to this consent decree, Allegan shall not treat, store or dispose of any hazardous waste into or on any land treatment or land disposal unit at the Allegan facility. This prohibition shall not apply to any hazardous waste presently in the surface impoundments provided Allegan is in compliance with this consent decree.

11. Allegan shall close its two surface impoundments

as required by RCRA and consistent with the following provisions of this consent decree.

(a) Within 30 days after the entry of this consent decree, or MDNR rejection or approval of Allegan's previously submitted amendments, whichever is later, Allegan shall, as necessary depending upon the MDNR action on its amendments, submit to the MDNR an amended closure plan pursuant to the requirements of the Michigan Hazardous Waste Management Act and RCRA. Allegan shall continue in good faith to seek final approval of an amended closure plan from MDNR. Allegan's submittal of an amended closure plan to the MDNR may include and consideration shall be given to any method for closure that complies with the Michigan Hazardous Waste Management Act and RCRA, including, to the extent properly submitted and supported by Allegan, alternatives for management of the material in the surface impoundments other than off-site hazardous waste landfilling under 53 Fed. Reg. 31138 (August 17, 1988).

(b) Allegan shall implement the amended closure plan approved or issued by MDNR, as final agency action, according to the schedule set forth in the approved plan unless, within 30 days of such final approval or issuance, Allegan petitions the Court for alternative closure requirements under paragraph 24 of this consent decree. In the latter case Allegan shall close according to the Court's order.

(c) Allegan asserts that this Court has final authority to determine the nature and sufficiency of RCRA closure measures.

The United States asserts that this Court does not have such authority. The parties reserve their respective positions concerning whether or not this Court has authority to review RCRA closure plans or to authorize closure on terms other than those required by a State-approved plan. This consent decree does not confer or deny such authority to the Court.

12. Within thirty (30) days of the entry of this consent decree, Allegan shall attempt in good faith to satisfy the Michigan Administrative Rule R299.11003 (incorporating 40 C.F.R § 265.147) liability insurance requirement for sudden and non-sudden accidental occurrences from the two surface impoundments located at the Allegan facility. If Allegan does not satisfy said requirements despite its good faith efforts, it shall, not later than thirty (30) days after entry of this consent decree, and every ninety (90) days thereafter, provide written certification to the U.S. EPA and MDNR of Allegan's good faith efforts to satisfy the requirements for liability insurance coverage for sudden and non-sudden accidental occurrences. Unless otherwise notified by U.S. EPA in writing within 45 days, such good faith certification shall satisfy said requirement for the period of time covered by the certification. The quarterly submittal of said certification shall be required until the two surface impoundments at the Allegan facility have been closed in compliance with an approved amended closure plan under this consent decree.

V. SUBMITTALS

13. Any document or other item required by this consent decree to be submitted to U.S. EPA and MDNR shall be mailed or otherwise delivered to the following persons at the below specified addresses:

Joe Baker
U.S. EPA Region V
RCRA Enforcement Branch, 5HR-12
230 South Dearborn Street
Chicago, Illinois 60604

Lynn Spurr
Michigan Department of Natural Resources
Waste Management Division
621 N. 10th Street
P.O. Box 355
Plainwell, Michigan 49080

Delivery shall be deemed complete upon deposit of the material at issue in the U.S. Mail, certified mail, or with a reputable delivery service.

VI. CIVIL PENALTY

14. Allegan shall pay a civil penalty of forty-three thousand dollars ($43,000) to the United States of America in three equal installments every ninety (90) days, commencing thirty (30) days after entry of this consent decree.

15. Payments shall be made in the form of a certified check payable to the "Treasurer of the United States of America" and shall be tendered to U.S. EPA, Region V, P.O. Box 70753, Chicago, Illinois 60673. A copy of the transmittal of each payment shall be sent to the Waste Management Division, U.S. EPA

Region V, RCRA Enforcement Section, 5HR-12, 230 South Dearborn Street, Chicago, Illinois 60604, Attention: Joe Baker.

16. If any payment of the civil penalty is late, Allegan shall pay interest on the past due civil penalty. Interest shall accrue at the rate provided in 28 U.S.C. §1961(a), that is, a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of 52-week U.S. Treasury bills settled 30 days prior to the time of payment of the civil penalty. Interest shall be compounded annually.

X. GENERAL PROVISIONS

17. Approval and entry of this consent decree by the Court, and compliance with it by Allegan, shall constitute full and final settlement of the claims alleged in the complaint. In consideration for Allegan's full compliance with the terms of this consent decree the United States covenants not to sue Allegan, or its directors, officers or shareholders, for the claims alleged in the complaint.

18. Allegan shall make no reimbursement claim against the United States or the Hazardous Substance Superfund established by Section 221 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9631, for any closure costs incurred by Allegan in complying with this consent decree.

19. Except as provided by this consent decree, this consent decree does not eliminate the responsibility of Allegan

to comply with RCRA and other federal and state environmental laws to the extent such laws are applicable to Allegan.

20. The United States and Allegan expressly reserve all rights, claims, demands and causes of action each may have against any and all persons and entities that are not parties to this consent decree.

21. The United States and Allegan expressly reserve all rights, claims, demands and causes of action as to each other for matters not covered by this consent decree.

22. The United States has provided the State of Michigan with notice of the complaint filed in this action and of the lodging of the consent decree with the Court.

23. Each party to this action shall bear its own costs and attorneys fees.

24. The Court shall retain jurisdiction to enforce and modify this consent decree and to resolve disputes arising under it.

25. Approval by the United States and entry of this consent decree by the Court are subject to the Public Notice and Comment requirement of 28 C.F.R. § 50.7, which requires that notice of proposed consent decrees in certain environmental actions be given to the public, and that the public shall have at least thirty (30) days to submit comments on the proposed consent decree.

26. This consent decree shall terminate by motion of

either the United States or Allegan after each of the following has occurred:

(a) Allegan has complied with the terms of the consent decree.

(b) Allegan has paid the civil penalty and any late payment interest due pursuant to Section VI of this consent decree to the United States.

(c) Allegan has properly submitted a certification of closure for the two surface impoundments.

27. This consent decree shall be effective upon the date of its entry by the Court.

The undersigned representatives of each party to this consent decree certify that he or she is authorized by the party whom he or she represents to enter into the terms and conditions of this consent decree and to legally bind that party to it. By their undersigned counsel the parties enter into this consent decree and submit it to the Court for approval and entry.

Date:_____

_____
HONORABLE RICHARD ENSLEN

UNITED STATES OF AMERICA
Plaintiff

_____
DONALD A. CARR
Acting Assistant Attorney General
Land and Natural Resources Division
U.S. Department of Justice

ALLEGAN METAL FINISHING COMPANY
Defendant

Walter C. Sosnowski

WALTER C. SOSNOWSKI
President, Allegan Metal Finishing Company

JOHN SMIETANKA
United States Attorney
Western District of Michigan

CHARLES M. DENTON
Varnum, Riddering, Schmidt & Howlett
Attorneys for Allegan Metal Finishing Company

THOMAS GEZON
Assistant U.S. Attorney
399 Federal Building
110 Michigan, N.W.
Grand Rapids, Michigan 49503

VALDAS V. ADAMKUS
Regional Administrator
Region V
U.S. Environmental Protection Agency

THOMAS L. ADAMS, JR.
Assistant Administrator
Office of Enforcement and Compliance Monitoring
U.S. Environmental Protection Agency

GORDON G. STONER
Attorney, Environmental Enforcement Section
Land and Natural Resources Division
U.S. Department of Justice

CONNIE PUCHALSKI
Assistant Regional Counsel
U.S. Environmental Protection Agency - Region V

VARNUM, RIDDERING, SCHMIDT & HOWLETT

ATTORNEYS AT LAW

SUITE 800
171 MONROE AVENUE, N.W.
GRAND RAPIDS, MICHIGAN 49503
TELEPHONE (616) 459-4186
TELECOPIER (616) 459-8468
TELEX 1561593 VARN

SUITE 700
ONE MICHIGAN AVENUE
120 NORTH WASHINGTON SQUARE
LANSING, MICHIGAN 48933
TELEPHONE (517) 482-6237
TELECOPIER (517) 482-6937

350 EAST MICHIGAN AVENUE
KALAMAZOO, MICHIGAN 49007
TELEPHONE (616) 382-2300
TELECOPIER (616) 382-2382

JAMES N. DeBOER, JR.
GORDON B. BOOZER
WILLIAM K. VAN'T HOF
HILARY F. SNELL
PETER ARMSTRONG
ROBERT J. ELEVELD
KENT J. VANA
CARL E. VER BEEK
JON F. DeWITT
DONALD L. JOHNSON
DANIEL C. MOLHOEK
GARY P. SKINNER
THOMAS T. HUFF
TIMOTHY J. CURTIN
H. EDWARD PAUL
JOHN E. McGARRY
DIRK HOFFIUS
J. TERRY MORAN
BENHAM R. WRIGLEY, JR.
THOMAS J. MULDER
THOMAS J. BARNES
ROBERT D. KULLGREN
RICHARD A. KAY
LARRY J. TITLEY
BRUCE A. BARNHART
JEFFREY L. SCHAD
THOMAS G. DEMLING
JOHN W. PESTLE
ROBERT P. COOPER
FRANK G. DUNTEN
TERRANCE R. BACON
NYAL D. DEEMS
RICHARD A. HOOKER
RANDALL W. KRAKER
PETER A. SMIT
FREDRIC A. SYTSMA
JACK D. SAGE
MARK C. HANISCH
MARILYN A. LANKFER
THOMAS L. LOCKHART
ROBERT L. DIAMOND
BRUCE G. HUDSON
BRUCE GOODMAN
JOSEPH J. VOGAN
ERIC J. SCHNEIDEWIND
THOMAS A. HOFFMAN
TERESA S. DECKER
JEFFREY R. HUGHES
RICHARD W. BUTLER, JR.
LAWRENCE P. BURNS
MATTHEW D. ZIMMERMAN
WILLIAM E. ROHN
JOHN PATRICK WHITE
CHARLES M. DENTON
PAUL M. KARA
JEFFREY D. SMITH
H. LAWRENCE SMITH
JUDY E. BREGMAN
THOMAS C. CLINTON
MARK L. COLLINS
JONATHAN W. ANDERSON
JOHN W. BOLEY
CARL DOSTERHOUSE
WILLIAM J. LAWRENCE III
GREGORY M. PALMER
SUSAN M. WYNGAARDEN
KAPLIN S. JONES
STEPHEN P. AFENDOULIS
ROBERT A. HENDRICKS
DAVID E. KHOREY
MICHAEL G. WOOLDRIDGE
MICHAEL D. FISHMAN
HEATHER E. HUDSON
PERRIN RYNDERS
MARK S ALLARD
TIMOTHY E. EAGLE
DAVID A. RHEM
DONALD P. LAWLESS
MICHAEL S. McELWEE
GEORGE B. DAVIS
JACQUELINE D. SCOTT
PAUL D. FOX
N. STEVENSON JENNETTE III
JOHN T. BEUKER II
MICHAEL A. SHIELDS
MICHAEL J. DUNN
THERESA M. POULEY
DAVID E. PRESTON
JAN D. REWERS
JEFFREY W. BESWICK
MICHAEL L. RESNICK
ELIZABETH J. FOSSEL
JOEL BAIR
JOAN SCHLEEF
SCOTT HILL-KENNEDY
SCOTT A. HUIZENGA
RICHARD J. McKENNA
STEVEN E. SKOLNICK
BOYD C. FARNAM
JEFFREY D. NICKEL
MARY C. MEATHE
JINYA CHEN*

OF COUNSEL
LAURENT K. VARNUM
JOHN L. WIERENGO, JR.
F. WILLIAM HUTCHINSON
CHESTER C. WOOLRIDGE
WILLIAM J. HALLIDAY, JR
EUGENE ALKEMA
R. STUART HOFFIUS

RICHARD L. SPINDLE
1936-1975
CARL J. RIDDERING
1904-1977
CLIFFORD C. CHRISTENSON
1915-1982
ROBERT G. HOWLETT
1906-1988

WALTER K. SCHMIDT
(RETIRED)

*ADMITTED IN
PEOPLE'S REPUBLIC OF CHINA

REPLY TO Grand Rapids

February 17, 1989

FEDERAL EXPRESS

Ms. Connie Puchalski
United States Environmental
Protection Agency
Region V
230 South Dearborn Street
Chicago, IL 60604

Re: United States v Allegan Metal Finishing Company
Case No. K86-441-CA4

Dear Connie:

Please find enclosed the Consent Decree for the above-referenced RCRA action as executed by Mr. Walter C. Sosnowski on behalf of Allegan Metal Finishing Company and myself as one of the attorneys for the defendant. This Consent Decree is being forwarded to you for further sign-off by the Agency and on behalf of the plaintiff, as directed by U.S. Attorney Gordon Stoner.

Please keep us advised of the further processing of this Consent Decree for full and final settlement of this action. As

well, please do not hesitate to contact me with any questions or concerns you might have in regard to consummating this settlement.

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETT

Charles M. Denton

CMD/njv
c: Walter C. Sosnowski
Gordon G. Stoner

XC: EPA Rpt. 10-9-89 Lynn ✓ file Order

VARNUM, RIDDERING, SCHMIDT & HOWLETT

ATTORNEYS AT LAW

SUITE 800
171 MONROE AVENUE, N.W.
GRAND RAPIDS, MICHIGAN 49503
TELEPHONE (616) 459-4186
TELECOPIER (616) 459-8468
TELEX 1561593 VARN

SUITE 700
ONE MICHIGAN AVENUE
120 NORTH WASHINGTON SQUARE
LANSING, MICHIGAN 48933
TELEPHONE (517) 482-6237
TELECOPIER (517) 482-6937

350 EAST MICHIGAN AVENUE
KALAMAZOO, MICHIGAN 49007
TELEPHONE (616) 382-2300
TELECOPIER (616) 382-2382

REPLY TO
Grand Rapids

February 9, 1989

Ms. Lynn M. Spurr
Environmental Quality Analyst
Waste Management Division
Michigan Department of
Natural Resources
621 N. 10th Street
P.O. Box 355
Plainwell, MI 49080

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Re: United States v Allegan Metal Finishing Company

Dear Lynn:

This letter is to confirm our February 8, 1989 telephone conversation with regard to the above-referenced hazardous waste management litigation. The State of Michigan Department of Natural Resources (DNR) has of course been integrally involved in these proceedings throughout the entire relevant time period, including having conducted the RCRA inspection giving rise to the enforcement action. According to the allegations in the Complaint, the State of Michigan was given notice of this action prior to its filing and has also been indirectly involved in this litigation through our motion for joinder of the State as a party-plaintiff.

Most recently, we have been in contact with your office and John Scherbarth of the State Attorney General's Office concerning a potential settlement of this litigation. In fact, a draft Consent Decree was submitted to Assistant Attorney General Scherbarth for his review and consideration of the possibility of the State being a signatory. In light of the integral role of the State in the matters giving rise to this action, as well as

the continuing role for the DNR in the closure of the holding ponds at issue, it seemed appropriate for the State to be a party to the settlement agreement.

Although the State Attorney General's Office has indicated an unwillingness to devote the necessary resources to review and formally approve the Consent Decree now being negotiated, it has been affirmed that the State does not object to the settlement agreement in principle. This letter is to confirm further that neither the Michigan DNR or Attorney General's Office intends to pursue Allegan Metal Finishing Company for the same violations settled by the Consent Decree after prior notice to the State of the lawsuit and the settlement. This potentiality has always been of concern to Allegan Metal Finishing Company, and we appreciate the comfort given by you and Mr. Scherbarth on this point, as Allegan Metal Finishing Company has no interest in entering into a settlement of the pending litigation only to be faced with a new State enforcement action for alleged hazardous waste management violations relative to the holding ponds at issue. Based upon your assurances, Allegan Metal Finishing Company will continue to pursue settlement of this dispute to resolve these claims.

Thank you for your involvement in facilitating a settlement of this matter, and we look forward to continuing to work with you on developing a reasonable, feasible closure of the ponds. If you have any questions with regard to any of the above, please contact me.

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETT

Charles M. Denton

CMD/njv
c: Walter C. Sosnowski
John Scherbarth
Gordon Stoner

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

LEONARD GREEN
CLERK

538 U.S. POST OFFICE & COURTHOUSE BUILDING
CINCINNATI, OHIO 45202-3988

TELEPHONE
(513) 684-2953
FTS 684-2953

February 6, 1989

Theresa M. Pouley, Esq.
171 Monroe Avenue, N.W.
Suite 800
Grand Rapids, MI 49503

Charles M. Denton, Esq.
Varnum, Riddering, Schmidt & Howlett
171 Monroe, N.W.
Suite 800
Grand Rapids, MI 49503

RE: 88-2100
USA vs. Allegan Metal Fin
District Court No. 86-00441

Dear Counsel:

Enclosed is a copy of an order which was entered today in the above-styled case.

Very truly yours,

Leonard Green, Clerk

Tom Bennignus
Deputy Clerk

enclosure

cc:

F. Henry Habicht II
Thomas J. Gezon
Gordon G. Stoner
Robert Leininger
Carolyn Tillman
Martin W. Matzen
David C. Shilton

No. 88-2100

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United States of America,

Plaintiff-Appellee,

v.

Allegan Metal Finishing Company,

Defendant-Appellant.

ORDER

BEFORE: KENNEDY and NELSON, Circuit Judges, PECK, Senior Circuit Judge.

Defendant, Allegan Metal Finishing Company (AMFCO), filed two appeals from the same judgment, docketed as 88-1835 and 88-2100. A motion to consolidate the appeals was denied. The appeal in 88-1835 has been dismissed for lack of jurisdiction. We raise, sua sponte, the appealability of the order of which AMFCO seeks review in this appeal.

Plaintiff, the United States, brought this action under the Federal Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq., with respect to AMFCO's operation of two holding ponds. AMFCO seeks review of two portions of that order which denied its motion to join the state of Michigan as a party plaintiff and denied a motion to impanel an advisory jury. The order did not dispose of the entire case nor was it certified for appeal pursuant to Rule 54(b), Fed. R. Civ. P.

The denial of a motion to join a party is generally not appealable. See e.g., Minnesota v. Picklands & Mather, 636 F.2d 251 (8th Cir. 1980); U.S. v. Taylor, 632 F.2d 530 (5th Cir. 1980) (per curiam); Fowler v. Merry, 468 F.2d 242 (10th Cir. 1972);

Metalock Repair Service v. Harman, 216 F.2d 611 (6th Cir. 1954) (per curiam). Further, the denial of the joinder motions does not fall within the collateral order exception. To be appealable as a collateral order, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits, and be effectively unreviewable on appeal from final judgment. Gulfstream Aerospace Corp. v. Mayacamas Corp., 108 S.Ct. 1133, 1136 (1988), quoting Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978). The district court's refusal to join the state of Michigan as a party may be reviewed in an appeal from a final judgment. Difficulties in addressing the issue at that point have little bearing on whether the order is appealable. Stringfellow v. Concerned Neighbors in Action, 107 S.Ct. 1177, 1182 (1987).

Denial of AMFCO's motion for an advisory jury is likewise nonappealable. See Morgantown v. Royal Insurance Co., 337 U.S. 254 (1949); Howard v. Parisian, Inc., 807 F.2d 1560, 1566 (11th Cir. 1987).

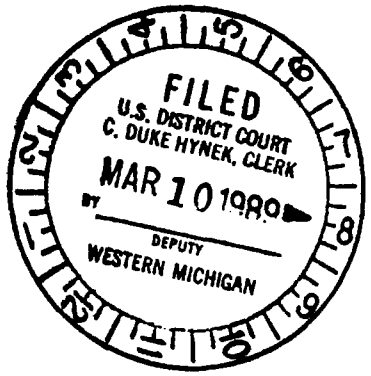
Since the order of which AMFCO seeks review is nonappealable, it is **ORDERED** sua sponte that the appeal is dismissed. See Rule 9(b), Local Rules.

ENTERED BY ORDER OF THE COURT

Leonard Green

Clerk

Mr. Robert Leininger, Esq.
U.S. Environmental Protection Agency
Region V
230 S. Dearborn Street
Chicago, IL 60604



UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA,

Plaintiff,

v Case No. K86-441 CA4

ALLEGAN METAL FINISHING COMPANY,

Defendant.
_____/

ORDER

On February 3, 1989 the Court was informed that the above-captioned matter had been settled. Accordingly, a final judgment order is to be submitted to the Court for its signature prior to March 27, 1989

DATED in Kalamazoo:

3-10-89

RICHARD A. ENSLEN
U.S. District Judge

U.S. Department of Justice

DBT:GGS

Washington, D.C. 20530

EXPRESS MAIL

February 2, 1989

Honorable Richard Enslen
United States District Judge
United States District Court
410 West Michigan Avenue
Kalamazoo, Michigan 49005

Re: United States v. Allegan Metal Finishing Company,
Civil Action No. K 86-441

Dear Judge Enslen:

This letter is to inform you that the United States and Allegan Metal Finishing Company have reached an agrement in principle on the terms of a consent decree in settlement of the above-captioned case. The parties informed your office of this agrement by telephone today.

After the consent decree has been signed by the parties, the consent decree will be lodged with the Court for entry after the 30 day public comment period required by 28 C.F.R. § 50.7.

Sincerely yours,

Donald A. Carr
Acting Assistant Attorney General
Land and Natural Resources Division

By: Gordon G. Stoner
Gordon G. Stoner, Attorney
Environmental Enforcement Section

cc: Charles Denton
Tom Gezon
Connie Puchalski

U.S. Department of Justice

DTB:GGS:
90-7-1-343

Washington, D.C. 20530

Honorable Doyle A. Rowland
United States District Court
410 W. Michigan Avenue
Kalamazoo, Michigan 49005

January 30, 1989

Re: United States v. Allegan Metal Finishing,
Civil Action No. K 86-441-CA4

Dear Magistrate Rowland:

Pursuant to paragraph 11 of the Court's Pre-trial Order of January 19, 1989, at page 56, the United States hereby states its objections to Defendant's Supplemental Exhibits List.

The United States objects to the following exhibits on the grounds of relevance: Exhibit 00000; PPPPP; QQQQQ; RRRRR; SSSSS; TTTTT; VVVVV; XXXXX; YYYYY; AAAAAA; CCCCCC; DDDDDD; EEEEEE;FFFFFF; GGGGGG; HHHHHH; IIIIII; JJJJJJ; KKKKKK; MMMMMM.

The United States also objects to the following exhibits on the grounds of hearsay: Exhibit RRRRR; SSSSS; DDDDDD. For exhibit SSSSS the United States preserves its objections as defendant has not produced exhibit.

As to other exhibits proposed by defendant, so long as such represent true and accurate copies of the originals, and subject to defendant laying a proper foundation through an appropriate witness for each proposed exhibit, plaintiff does not object to the introduction into evidence at trial of this matter of such documents.

Sincerely yours,

Acting Assistant Attorney General
Land and Natural Resources Division

By: _____
Gordon G. Stoner, Attorney
Environmental Enforcement Section
Land and Natural Resources Division

cc: Charles Denton
Connie Puchalski
Tom Gezon

DRAFT 1/30

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. ALLEGAN METAL FINISHING COMPANY Defendant.	)	Civil Action No. K 86-441-CA4 Hon. Richard A. Enslen

CONSENT DECREE

Plaintiff, the United States of America, on behalf of the United States Environmental Protection Agency ("United States"), and defendant, Allegan Metal Finishing Company ("Allegan"), have jointly moved the Court for entry of this consent decree.

The parties have agreed that settlement of this matter is in the public interest and that entry of this consent decree as the compromise of a disputed claim without further litigation is the most appropriate means of resolving this matter.

THEREFORE, without admission by Allegan of the allegations in the complaint, without trial of any issue of fact or law, and upon consent and agreement of the parties to this consent decree, it is ORDERED, ADJUDGED and DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction of the subject matter of this action pursuant to 42 U.S.C. § 6928(a) and 28 U.S.C. § 1331, 1345 and 1355. Venue is proper in this district.

2. This Court has personal jurisdiction over Allegan.

II. APPLICABILITY

3. This consent decree applies to and binds the parties hereto and their successors. This consent decree and Allegan's performance hereunder shall not create any private rights or causes of action in any third-parties or inure to the benefit of any non-party.

III. BACKGROUND

4. The United States filed the complaint in this action on October 30, 1986 alleging that defendant Allegan violated the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 et seq., and violated the Consent Agreement and Final Order ("CAFO") entered into between the United States Environmental Protection Agency ("U.S. EPA") and Allegan. Allegan filed an Answer and Affirmative Defenses denying liability.

5. The United States and Allegan filed motions for summary judgment. On June 6, 1988, the Court denied Allegan's motion and granted, in part, the United States' motion for summary judgment on issues of liability.

6. By October 31, 1987, Allegan ceased its discharge of wastewater from its facility to its two surface impoundments.

7. On November 9, 1988, pursuant to a joint motion by the United States and Allegan, the Court dismissed all claims of liability against Allegan arising from the complaint not resolved by the Court's June 6, 1988, Opinion and Order.

8. Under RCRA Allegan must close the two surface impoundments according to an approved closure plan. On September 27, 1985, the U.S. EPA approved a closure plan for these two surface impoundments. Because of an intervening change in the RCRA regulations, however, Allegan's originally approved closure plan must be amended. Allegan has submitted two proposed amendments for its closure plan to the Michigan Department of Natural Resources.

9. On October 30, 1986, pursuant to RCRA, the State of Michigan received authority from U.S. EPA to administer, in lieu of RCRA, the Michigan Hazardous Waste Management Act, including the authority to approve closure plans for hazardous waste management facilities located in Michigan. The United States and Allegan agree that the Michigan Department of Natural Resources ("MDNR"), has authority to approve RCRA closure plans in Michigan, including amendments to Allegan's closure plan. Allegan asserts that this Court has final authority to determine the nature and sufficiency of RCRA closure measures. The United States asserts that this Court does not have such authority.

IV. COMPLIANCE

10. Except in full compliance with all federal and state laws and regulations and pursuant to this consent decree, Allegan shall not treat, store or dispose of any hazardous waste into or on any land treatment or land disposal unit at the Allegan facility.

11. Allegan shall close its two surface impoundments as required by RCRA and consistent with the following provisions of this consent decree.

(a) Within 30 days the entry of this consent decree, Allegan shall submit to the MDNR an amended closure plan pursuant to the requirements of the Michigan Hazardous Waste Management Act and RCRA. Allegan shall continue in good faith to seek final approval of an amended closure plan from MDNR. Allegan's submittal of an amended closure plan to the MDNR may include any request for closure that complies with the Michigan Hazardous Waste Management Act and RCRA, including, to the extent properly submitted and supported by Allegan, ~~consideration of~~ alternatives for ~~disposal~~ of the material in the surface impoundments other than by land disposal.

(b) Allegan shall implement the amended closure plan approved or issued by MDNR, as final agency action, according to the schedule set forth in the approved plan unless, within 30 days of such final approval or issuance, Allegan petitions the Court for alternative closure requirements under paragraph ~~25~~ 24 of this consent decree and the Court ultimately grants such relief. In the latter case Allegan shall close subject to terms and according to a schedule imposed by the Court.

(c) The parties reserve their respective positions concerning whether this Court has authority to review RCRA closure plans or to authorize closure on terms other than those

required by a State-approved plan. This consent decree does not confer or deny such authority to the Court.

12. Within thirty (30) days of the entry of this consent decree, Allegan shall ~~satisfy~~ attempt in good faith to satisfy the Michigan Administrative Rule R299.11003 liability ~~requirement~~ insurance for ~~non-sudden~~ sudden or non-sudden accidental occurrences ~~for~~ from the two surface impoundments ~~and for sudden accidental occurrence, to the extent applicable to Allegan, for~~ located at the Allegan facility. all hazardous waste treatment, storage, and disposal units ~~located at the Allegan facility.~~ If Allegan is unable to satisfy said requirement(s) despite its good faith efforts, it shall, not later than thirty (30) days after entry of this consent decree, and every ninety (90) days thereafter, provide written certification to the U.S. EPA and MDNR of Allegan's good faith efforts to satisfy the requirements for liability coverage for sudden and non-sudden accidental occurrences. Unless otherwise notified by U.S. EPA in writing within 45 days, such good faith certification shall satisfy said requirement for the period of time covered by the certification. The quarterly submittal of said certification ~~for non-sudden accidental liability coverage~~ shall be required until the two surface impoundments at the Allegan facility have been closed in compliance with ~~an amended~~ an approved closure plan ~~approved by MDNR and this consent decree.~~ under this Consent Decree.

V. SUBMITTALS

13. Any document or other item required by this consent decree to be submitted to U.S. EPA and MDNR shall be

mailed or otherwise delivered to the following persons at the below specified addresses:

Joe Baker
EPA Region V
RCRA Enforcement Branch, 5HR-12
230 South Dearborn Street
Chicago, Illinois 60604

Lynn Spurr
Michigan Department of Natural Resources
Waste Management Division
621 N. 10th Street
P.O. Box 355
Plainwell, Michigan 49080

Delivery shall be deemed complete upon deposit of the material at issue in the U.S. Mail, certified mail, or with a reputable delivery service.

VI. CIVIL PENALTY

14. Allegan shall pay a civil penalty of forty-three thousand dollars ($43,000) to the United States of America in three equal installments every ninety (90) days, commencing thirty (30) days after entry of this consent decree.

15. Payments shall be made in the form of a certified check payable to the "Treasurer of the United States of America" and shall be tendered to U.S. EPA, Region V, P.O. Box 70753, Chicago, Illinois 60673. A copy of the transmittal of the payments shall be sent to the Waste Management Division, U.S. EPA Region V, RCRA Enforcement Section, 5HR-12, 230 South Dearborn Street, Chicago, Illinois 60604, Attention: Joe Baker.

16. If any payment of the civil penalty is late, Allegan shall pay interest on the civil penalty. Interest shall

accrue at the rate provided in 28 U.S.C. §1961(a), that is, a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of 52-week U.S. Treasury bills settled 30 days prior to the time of payment of the civil penalty. Interest shall be compounded annually.

X. GENERAL PROVISIONS

17. Approval and entry of this consent decree by the Court, and compliance with it by Allegan, shall constitute full and final settlement of the claims alleged in the complaint. In consideration for Allegan's full compliance with the terms of this consent decree the United States covenants not to sue Allegan ~~and~~ or its officers, ~~employees~~, shareholders directors for the claims alleged in the complaint.

18. Allegan shall make no reimbursement claim against the United States or the Hazardous Substance Superfund established by Section 221 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9631, for any costs incurred by Allegan in complying with this consent decree.

19. Except as provided by this consent decree, this consent decree does not eliminate the responsibility of Allegan to comply with RCRA and other federal and state environmental laws to the extent such laws are applicable to Allegan.

20. The United States and Allegan expressly reserve all rights, claims, demands and causes of action each may have

against any and all persons and entities that are not parties to this consent decree.

21. The United States and Allegan expressly reserve all rights, claims, demands and causes of action as to each other for matters not covered by this consent decree.

22. The United States has provided the State of Michigan with notice of the complaint filed in this action and of the lodging of the consent decree with the Court.

23. Each party to this action shall bear its own costs and attorneys fees.

24. The Court shall retain jurisdiction to enforce and modify this consent decree and to resolve disputes arising under it.

25. Approval by the United States and entry of this consent decree by the Court are subject to the Public Notice and Comment requirement of 28 C.F.R. § 50.7, which requires that notice of proposed consent decrees in certain environmental actions be given to the public, and that the public shall have at least ~~thirty~~ thirty (30) days to submit comments on the proposed consent decree.

26. This consent decree shall terminate by motion of either the United States or Allegan after each of the following has occurred:

(a) Allegan has complied with the terms of the consent decree.

(b) Allegan has paid the civil penalty and interest, due pursuant to the consent decree to the United States.

(c) Allegan has received approval from MDNR of Allegan's certification of closure for the two surface impoundments.

27. This consent decree shall be effective upon the date of its entry by the Court.

The undersigned representatives of each party to this consent decree certify that he or she is authorized by the party whom he or she represents to enter into the terms and conditions of this consent decree and to legally bind that party to it. By their undersigned counsel the parties enter into this consent decree and submit it to the Court for approval and entry.

Date:_____

_____
HONORABLE RICHARD ENSLEN

UNITED STATES OF AMERICA
Plaintiff

ALLEGAN METAL FINISHING COMPANY
Defendant

_____
DONALD A. CARR
Acting Assistant Attorney General
Land and Natural Resources Division
U.S. Department of Justice

_____
WALTER C. SOSNOWSKI
President, Allegan Metal Finishing Company

JOHN SMIETANKA
United States Attorney
Western District of Michigan

_____
CHARLES M. DENTON
Varnum, Riddering, Schmidt & Howlett

Attorneys for Allegan Metal Finishing Company

THOMAS GEZON
Assistant U.S. Attorney
399 Federal Building
110 Michigan, N.W.
Grand Rapids, Michigan 49503

VALDAS V. ADAMKUS
Regional Administrator
Region V
U.S. Environmental Protection Agency

THOMAS L. ADAMS, JR.
Assistant Administrator
Office of Enforcement and Compliance Monitoring
U.S. Environmental Protection Agency

GORDON G. STONER
Attorney, Environmental Enforcement Section
Land and Natural Resources Division
U.S. Department of Justice

CONNIE PUCHALSKI
Assistant Regional Counsel
U.S. Environmental Protection

Agency - Region V

U.S. Department of Justice

DBT:GGS
90-7-1-343

Washington, D.C. 20530

January 26, 1989

Clerk
U.S. District Court
167 Federal Building
410 W. Michigan Avenue
Kalamazoo, Michigan 49005

Re: United States v. Allegan Metal Finishing Company,
Civil Action No. K86-441-CA4D

Dear Mr. Hynek:

Enclosed for filing is the original and one copy of the United States' Motion In Limine and supporting memorandum.

Sincerely yours,

Donald A. Carr
Acting Assistant Attorney General
Land and Natural Resources Division

By: Gordon G. Stoner
Environmental Enforcement Section

Enclosure

cc: Connie Puchalski
Tom Gezon

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. ALLEGAN METAL FINISHING COMPANY, Defendant.	)	Civil Action No. K86-441 JUDGE ENSLEN

UNITED STATES' MOTION IN LIMINE FOR A PRETRIAL RULING ON THE ADMISSIBILITY OF EVIDENCE RELATING TO THE ADMISSIBILITY OF EVIDENCE RELATING TO THE NATURE AND SUFFICIENCY OF ALLEGAN'S CLOSURE OF ITS TWO SURFACE IMPOUNDMENTS

Plaintiff, United States of America, hereby moves this Court for a pretrial ruling on the admissibility of evidence relating to the nature and sufficiency of defendant Allegan Metal Finishing Company's ("Allegan") closure obligations for it two surface impoundments. As set forth in the supporting memorandum, the United States has not requested that the Court determine the specific measures that Allegan must undertake for closure. Moreover, because RCRA confers authority to determine closure obligations on the authorized administrative agency, the Court lacks authority to make the determination regarding the nature and sufficiency of closure. For these reasons, evidence introduced at trial by defendant that relates to the specific measures that Allegan must take to close its two surface impoundments should be excluded.

A Memorandum in support of this Motion is attached.

Respectfully submitted,

DONALD A. CARR
Acting Assistant Attorney General
Land & Natural Resources Division

JOHN SMEITANKA
United States Attorney
Western District of Michigan

By: 
GORDON G. STONER
Attorney
United States Department of Justice
Environmental Enforcement Section
Land & Natural Resources Division
P. O. Box 7611
Ben Franklin Station
Washington, D. C. 20044

THOMAS GEZON
Assistant United States Attorney
Western District of Michigan

OF COUNSEL
CONNIE PUCHALSKI
United States Environmental
Protection Agency
230 South Dearborn Street
Chicago, Illinois 60604

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. ALLEGAN METAL FINISHING COMPANY, Defendant.	)	Civil Action No. K86-441-CA4

UNITED STATES' MEMORANDUM IN SUPPORT OF ITS MOTION IN LIMINE FOR A PRETRIAL RULING ON THE ADMISSIBILITY OF EVIDENCE RELATING TO THE NATURE AND SUFFICIENCY OF ALLEGAN'S CLOSURE OF ITS TWO SURFACE IMPOUNDMENTS

I. Introduction

This memorandum is in support of the United States' Motion In Limine for a pretrial ruling of the admissibility of evidence relating to the nature and sufficiency of defendant Allegan Metal Finishing Company's ("Allegan") closure obligations for its two surface impoundments. The trial in this case is to determine the appropriate injunctive relief and civil penalties for violations of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 et seq., and the Consent Agreement and Final Order ("CAFO") by Allegan. The United States will request that the Court order Allegan to close its two surface impoundments pursuant to an amended closure plan approved by the State of Michigan. The United States has not requested that the Court determine the specific measures Allegan must undertake for closure. Moreover, because RCRA confers authority to determine

closure obligations on the authorized administrative agency, the Court lacks authority to make the determination regarding the nature and sufficiency of closure. For these reasons, evidence introduced at trial by defendant that relates to the specific measures that Allegan must take to closure its two surface impoundments should be excluded.

II. EVIDENCE AT TRIAL RELATING TO THE NATURE AND SUFFICIENCY OF ALLEGAN'S CLOSURE OF ITS TWO SURFACE IMPOUNDMENTS SHOULD BE EXCLUDED

The United States will show at trial that Allegan must close its two surface pursuant to RCRA. Because the State of Michigan is authorized to administer a RCRA program in lieu of the federal program, the United States requests that Allegan be ordered to close its two surface impoundments according to the State of Michigan's closure regulations as administered by the Michigan Department of Natural Resources ("MDNR"). At trial, defendant is likely to introduce evidence that relates to the specific measures that the Court should require Allegan to perform in closing its surface impoundments. As discussed in detail below, such evidence is not relevant to the injunctive relief that the United States seeks or that the Court has authority to issue under RCRA.

Section 3004 of RCRA, 42 U.S.C. § 6924, authorized U.S. EPA to promulgate regulations establishing performance standards for facilities subject to RCRA. EPA has promulgated regulations implementing RCRA in 40 C.F.R. Parts 260-266, 270, and 271. Part 265 contains standards applicable to facilities, such as Allegan,

that are subject to regulation as "interim status" facilities.

Section 3006 of RCRA, 42 U.S.C. § 6926, provides that any state wishing to administer a hazardous waste program under RCRA may apply to the Administrator of U.S. EPA for authorization of the program. If the administrator determines that the state program satisfies specified standards, the state is authorized to administer its program "in lieu of" the federal program. A state will obtain authorization if its program is "substantially equivalent" to the federal program. 42 U.S.C. § 6926(c).

On October 30, 1986, the State of Michigan obtained authorization from U.S. EPA to administer its RCRA program. As of that date, pursuant to Section 3005 of RCRA and the implementing regulations, owners and operators of hazardous waste facility located in Michigan that are subject to the interim status regulations under Section 3005(a) of RCRA must comply with the standards and requirements of the Michigan Hazardous Waste Management Act, Mich. Comp. Laws § 299.501 et seq. (1979) and the Michigan Administration Rules R 299.9101 - R 299-11107, 1985 MR 12.

The Michigan Department of Natural Resources ("MDNR") is the agency of the State of Michigan that administers these laws and regulations. The closure requirements governing any facility in Michigan that has lost authority to discharge hazardous waste are determined by the MDNR. Because Michigan's regulations incorporate the provisions of 40 C.F.R. Part 265, the regulations for closure under Michigan law are identical to

federal regulations under 40 C.F.R. Part 265. Nevertheless, the MDNR remains responsible for determining the nature of Allegan's closure of its two surface impoundments in accordance with the laws and regulations of the State of Michigan.

Owners and operators of facilities subject to interim status regulation must close their hazardous waste units pursuant to the requirements of 40 C.F.R. Part 265, Subpart G. These closure regulations are concerned with ensuring that wastes remaining in or around any units after closure do not endanger human health and the environment. 40 C.F.R. § 265.11. This general standard is implemented through site-specific technical requirements which require specific control measures for the areas that were actually used for hazardous waste management. These site-specific technical requirements are set forth in a facility's closure plan.

Pursuant to 40 C.F.R. § 265.112, the owners or operators of the facility must prepare and submit a closure plan to U.S. EPA (or the authorized state). 40 C.F.R. § 265.112(d). The closure plan is subject to review and modification or approval by U.S. EPA (or the authorized state). The owner or operator must implement the approved or modified closure plan according to the time periods set forth in 40 C.F.R. § 265.113.

Allegan received an approved closure plan from U.S. EPA in September 27, 1986. (U.S. EPA had authority to approve the closure plan because Michigan did not obtain final authorization for its RCRA program until October 30, 1986.) Pursuant to the

requirements of 40 C.F.R. §§ 265.112 and 113, Allegan is required to implement its closure plan. Before Allegan can implement its approved closure plan, however, its closure plan must be amended to comply with the requirements of the land disposal restriction, which went into effect on August 8, 1988. 53 Fed. Reg. 31,138 (August 17, 1988). Allegan must obtained approval from the State of Michigan for an amended closure plan.

The United States requests that the Court order Allegan to submit an amended closure plan to the MDNR within 15 days the date of its order, and that Allegan implement the approved amended closure plan in accordance with the schedule set forth in the approved amended closure plan.

The Unites States does not seek to have this Court determine the specific closure measures that Allegan must under take to close its two surface impoundments. The requirements for closure, which are concerned with ensuring that waste remaining in or around any facility after closure does not endanger human health and the environment, are site-specific technical requirements that require specific control measures.

The determination of the specific control measures that will ensure the protection of human health and the environment requires scientific and technical expertise and detailed knowledge of the facility to be closed. The agency responsibly for administering the RCRA program, in this instance the MDNR, has such expertise and knowledge. The Court should defer to that expertise and knowledge.

Because RCRA confers authority to determine closure obligations on the authorized administrative agency, the Court lacks such authority. In Northside Sanitary Landfill, Inc. v. Thomas, 804 F.2d 371, (7th Cir. 1986), the Seventh Circuit, in rejecting Northside Sanitary Landfill's petition that the court review certain comments made by EPA relating to closure for lack of standing, stated:

> Distilled to its essence, Northside's argument asks us to either determine the proper scope of closure or to order the EPA to hold a formal evidentiary hearing for it to do so. Neither is a remedy that we have the authority to grant.

Northside, at 386.

The United States is unaware of any instance in which a Court has ordered specific closure measures to be performed as part of the Court's injunctive relief.

Given the scientific and technical expertise and detailed knowledge of the Allegan facility by the MDNR, and the fact that no court has issued injunctive relief that set the specific measures for closure, the United States urges the Court to deny any request by Allegan to examine the nature and sufficiency of the closure of the two surface impoundments by excluding the introduction of evidence at trial relating to the specific measures of Allegan's closure. Evidence of this nature is not relevant to the injunctive relief that the United States has requested or that the Court has authority to grant under RCRA. The United States, therefore, request that the Court exclude from trial any evidence introduced by defendant that

relates to the nature and sufficiency of Allegan's closure obligation under RCRA.

Respectfully submitted,

DONALD A. CARR
Acting Assistant Attorney General
Land and Natural Resources Division

JOHN A. SMEITANKA
United States Attorney
Western District of Michigan

By: _____
GORDON G. STONER
Environmental Enforcement Section
Land and Natural Resources Division
U.S. Department of Justice
Washington, D.C.

THOMAS GEZON
Assistant United States Attorney
Western District of Michigan

OF COUNSEL:

CONNIE PUCHALSKI
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region V
230 South Dearborn Street
Chicago, Illinois

CERTIFICATE OF SERVICE

I certify that a copy of the United States' Motion In Limine and supporting memorandum was this 26th day of January, 1989, mailed, postage prepaid, addressed to:

Charles M. Denton
Suite 800
171 Monroe Avenue, N.W.
Grand Rapids, MI 49503

Gordon G. Stoner
Attorney
Land and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044

order file
cc: EPA Rpt.
10/5/89

VARNUM, RIDDERING, SCHMIDT & HOWLETT

ATTORNEYS AT LAW

SUITE 800
171 MONROE AVENUE, N.W.
GRAND RAPIDS, MICHIGAN 49503
TELEPHONE (616) 459-4186
TELECOPIER (616) 459-8468
TELEX 1561593 VARN

SUITE 700
ONE MICHIGAN AVENUE
120 NORTH WASHINGTON SQUARE
LANSING, MICHIGAN 48933
TELEPHONE (517) 482-6237
TELECOPIER (517) 482-6937

350 EAST MICHIGAN AVENUE
KALAMAZOO, MICHIGAN 49007
TELEPHONE (616) 382-2300
TELECOPIER (616) 382-2382

REPLY TO ✗ Grand Rapids

January 23, 1989

TELECOPY

Mr. Gordon G. Stoner
Environmental Enforcement Section
Land and Natural Resource Div.
U.S. Department of Justice
Washington, D.C. 20530

Re: United States v. Allegan Metal Finishing Company
Case No. K86-441-CA4 (WD Mich.)

Dear Gordon:

Pursuant to your settlement proposal at our January 19, 1989 final pre-trial conference, enclosed is a draft revision of the Consent Decree. Please note that this is our initial response only, to highlight those areas where we believe revision will be required. This submittal, and any settlement to be consummated herein, are subject to approval by the board of directors for Allegan Metal Finishing Company. The board of directors is meeting this Friday, January 27, 1989, and we would therefore appreciate your timely response to the enclosure.

One matter which is not set forth in the enclosure is the participation by the State of Michigan in this settlement. In light of the intention that the closure plan to be developed and implemented under the Consent Decree is the responsibility of the Michigan Department of Natural Resources (MDNR), it is only reasonable and logical that the State of Michigan intervene as a party-plaintiff and sign onto this Consent Decree. For that

reason, I am copying the Michigan Assistant Attorney General assigned to this file, and soliciting his input.

We look forward to hearing from you at your earliest convenience.

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETT

Charles M. Denton

Charles M. Denton

CMD/njv
Enclosure
c: Walter C. Sosnowski
John Scherbarth

DRAFT 1/23/89

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Civil Action No. K 86-441-CA4

v

ALLEGAN METAL FINISHING COMPANY,

Hon. Richard A. Enslen

Defendant.

CONSENT DECREE

Plaintiff, the United States of America, on behalf of the United States Environmental Protection Agency ("United States"), and Defendant, Allegan Metal Finishing Company ("AMFCO"), hereby stipulate and jointly move the Court for entry of this Consent Decree as follows:

The parties' stipulate and agree that the execution of this Consent Decree is for settlement purposes only, and the Defendant expressly makes no admission herein of fact or liability. Nothing in this Consent Decree shall be deemed an admission by Defendant of any violation of law or regulation, and AMFCO reserves the right to dispute in any subsequent proceeding, other than an action to enforce this Consent Decree, the validity of any factual or legal allegation herein, and neither such allegations nor this Consent Decree itself may be used or admitted in any other subsequent proceeding. The parties to this Consent Decree expressly reserve all rights, claims, demands and causes of action they have against any and all persons and

entities who are not parties to this Consent Decree, and as to each other for matters not covered hereby.

I. JURISDICTION AND VENUE

Solely for purposes of this settlement, the parties stipulate and agree for any action to enforce this Consent Decree that:

1. This Court has jurisdiction of the subject matter of this action pursuant to 42 U.S.C. § 6928(a) and 28 U.S.C. §§ 1331, 1345 & 1355. Venue is proper in this district.

2. This Court has personal jurisdiction over AMFCO.

II. APPLICABILITY

3. This Consent Decree applies to and binds the parties hereto and their successors. This Consent Decree and AMFCO's performance hereunder shall not create any private rights or causes of action in any third-parties or inure to the benefit of any non-party.

III. BACKGROUND

4. The United States filed the Complaint in this action on October 30, 1986, alleging that Defendant AMFCO's use of two on-site holding ponds for wastewater treatment residuals generated at its Allegan, Michigan facility violated the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 et seq., and _____, 1985 the administrative Consent Agreement and Final Order ("CAFO") entered into between the United States Environmental Protection Agency ("U.S. EPA") and AMFCO. AMFCO filed an Answer and Affirmative Defenses denying liability.

5. The United States and AMFCO filed motions for summary judgment. On June 6, 1988, the Court denied AMFCO's motion and granted, in part, the United States' motion for summary judgment on issues of liability. In its June 6, 1988 Opinion, the Court held that, after November 5, 1985, AMFCO had lost permitted status authority under RCRA and the parties' CAFO to discharge wastewater treatment residuals to the two holding ponds at the Defendant's Allegan, Michigan facility. All remaining liability claims on the Complaint were dismissed pursuant to stipulation by the Court's _____, 1988 Order. AMFCO ceased all discharges of the wastewater residuals to the two on-site holding ponds in October, 1987.

6. (a) To the extent applicable, RCRA requires AMFCO to close the two holding ponds according to an approved closure plan. On September 29, 1985, the U.S. EPA approved a closure plan for these two holding ponds. Because of an intervening change in the RCRA regulations, however, AMFCO's originally approved closure plan must be amended. Two amendments to the Defendant's closure plan have been submitted by AMFCO: the first regarding delisting of the ponded residuals, and the second addressing recycling, reclamation and reuse of the residuals.

what abt the land ban?

(b) On October 30, 1986, pursuant to RCRA, the State of Michigan received authorization from U.S. EPA to enforce the Michigan Hazardous Waste Management Act (1979 P.A. 64) in lieu of RCRA, including authority to approve closure plans for hazardous waste management facilities located in Michigan. The parties

agree that the Michigan Department of Natural Resources ("MDNR"), acting through its Director, has authority to approve RCRA closure plans in Michigan, including any amended closure plan submitted by AMFCO. AMFCO asserts further that this Court has final authority to determine the nature and sufficiency of any required RCRA closure measures.

7. In an effort to avoid unnecessary and costly litigation, and toward settlement of this dispute, AMFCO has submitted an amended closure plan to MDNR. At the time of entry into this Consent Decree, it is likely that AMFCO and MDNR will agree on an amended closure plan and that AMFCO will then implement it.

IV. COMPLIANCE

8. AMFCO shall not, without a permit, treat, store or dispose of any hazardous waste into or on any land treatment or land disposal unit at the Defendant's Allegan, Michigan facility. So long as AMFCO is in compliance with this Consent Decree, however, this prohibition shall not apply to the residual materials now in the Defendant's on-site holding ponds. Further, this prohibition does not encompass or include materials which satisfy the requirements described in 40 C.F.R. § 266 or are otherwise exempted from RCRA regulation.

9. AMFCO shall close its two on-site holding ponds as and to the extent required by RCRA. AMFCO's activities in this regard will be consistent with the following provisions of this Consent Decree:

(a). AMFCO shall continue in good faith to seek final approval of an amended closure plan from MDNR, and U.S. EPA shall provide in good faith its best efforts, cooperation and assistance in obtaining such approval. To the extent properly submitted and supported by AMFCO, the amended closure plan may include and due consideration shall be given alternatives for disposition of the residual materials in the holding ponds which involve delisting, recycling, reclamation, reuse, variance, use, or other appropriate methods of disposition of the materials contemplated by the approved Michigan regulatory program and other approved regulatory programs as applicable to the particular activities which are proposed to be undertaken. The U.S. EPA and MDNR shall use good faith efforts to assist AMFCO in identifying and reviewing such alternatives.

(b). Allegan shall remove and manage the materials contained in the holding ponds in accordance with all other applicable laws to the extent that RCRA is found to be inapplicable to the removal and/or management activities, and shall further conduct all remaining closure activities in accordance with applicable laws and plans prepared pursuant thereto.

(c). AMFCO shall implement the amended closure plan approved or issued by MDNR as a final

determination of that agency, according to the schedule set forth in the approved plan unless, within 30 days of such final approval or issuance, AMFCO petitions the Court for review of such closure requirements. Upon any such final decision by this Court, AMFCO shall close subject to the terms and according to a schedule imposed by the Court's final order.

(d). The parties reserve their respective positions concerning whether this Court has authority to review RCRA closure plans or to authorize closure on terms other than those required by a State-approved plan.

10. Within thirty (30) days of the entry of this Consent Decree, AMFCO shall attempt in good faith to satisfy the Michigan Hazardous Waste Management regulation (R299.11003) liability insurance requirement for sudden and non-sudden accidental occurrences from the two on-site holding ponds located at the Defendant's Allegan, Michigan facility. If AMFCO is unable reasonably and practicably to satisfy said requirement(s), it shall, not later than thirty (30) days after entry of this Consent Decree, and every ninety (90) days thereafter until closure is complete, provide written certification to the U.S. EPA and MDNR of AMFCO's good faith efforts to satisfy the requirements for liability insurance coverage for sudden and non-sudden accidental occurrences. Such good faith certification shall satisfy said requirement for the period of time covered by

the certification, and U.S. EPA and MDNR shall acknowledge such upon receipt of AMFCO's written certification hereunder. Any objections by U.S. EPA or MDNR as to the adequacy of AMFCO's certification shall be deemed waived unless submitted with specificity in writing to AMFCO within thirty (30) calendar days of such certification. The quarterly submittal of said certification for accidental liability insurance coverage shall be required until the two holding ponds at the Defendant's Allegan, Michigan facility have been certified by U.S. EPA and MDNR as closed in compliance with this Consent Decree, which certification of closure shall not be unreasonably delayed or withheld.

V. SUBMITTALS

11. Any document or other item required by this Consent Decree to be submitted to U.S. EPA and MDNR shall be mailed or otherwise delivered to the following persons at the below specified addresses:

Joe Baker
EPA Region V
RCRA Enforcement Branch, 5HS-12
230 South Dearborn Street
Chicago, Illinois 60604

Lynn Spurr
Michigan Department of Natural Resources
Waste Management Division
621 N. 10th Street
P.O. Box 355
Plainwell, Michigan 49080

Delivery shall be deemed complete upon deposit of the material at issue in the U.S. Mail, certified, or with a reputable delivery

service.

VI. CIVIL PENALTY

12. AMFCO shall pay a civil penalty of forty-three thousand dollars ($43,000) to the United States of America in three equal installments every 90 days, commencing thirty (30) days after entry of this Consent Decree.

13. Payments shall be made in the form of a certified check payable to the "Treasurer of the United States of America" and shall be tendered to the U.S. EPA, Region V, P.O. Box 70753, Chicago, Illinois 60673. A copy of the transmittal of the payments shall be sent to the Waste Management Division, U.S. EPA, Region V, RCRA Enforcement Section, 5HS-12, 230 South Dearborn Street, Chicago, Illinois 60604, Attention: Joe Baker.

14. If the payment of the civil penalty is late, AMFCO shall pay interest on the civil penalty. Said interest shall accrue at the rate provided in 28 U.S.C. § 1961(a), that is, a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of 52-week U.S. Treasury bills settled 30 days prior to the time of payment of the civil penalty, and such interest shall be compounded annually.

X. GENERAL PROVISIONS

15. (a). Approval and entry of this Consent Decree by the Court, and compliance with it by AMFCO, shall constitute full and final settlement and resolution of the claims which were or could have been alleged herein arising from the transactions and

occurrences at issue. It is specifically recognized that this Consent Decree is a compromise of a disputed claim, and its admissibility or use is therefore limited by Federal Rule of Evidence 408.

(b). The parties further stipulate and agree that, upon AMFCO's full compliance with this Consent Decree, including performance of the closure plan hereunder, the Defendant shall have no further liability for the operation and closure of the two on-site holding ponds at issue herein and shall not be liable for any payment or obligation with regard to such matters in excess of or in addition to the obligations performed pursuant to this Consent Decree. This Consent Decree shall be fully dispositive and resolve each and all of the duties and liabilities of AMFCO for the operation, management and closure of the two on-site holding ponds at issue, all other matters covered hereby, and with respect to the actions taken and to be taken by AMFCO hereunder.

(c). In consideration for AMFCO's full compliance with the terms of this Consent Decree, the United States covenants not to sue the Defendant, the Defendant's directors, officers, employees, shareholders and agents in their capacities as corporate representatives and as individuals, and Defendant's successors, assigns, and subsidiaries for the obligations satisfactorily performed by the Defendant hereunder and for the claims which were or could have been alleged herein arising from the transactions and occurrences at issue.

16. Except as provided by this Consent Decree, the United States does not waive any rights or remedies available to it against AMFCO under federal or state laws, regulations or permitting conditions, including specifically the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601 et seq., as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. Law 99-499, 100 Stat. 1613 (Oct. 17, 1986). AMFCO reserves the right to defend and oppose any such actions.

17. Nothing herein is intended to release, discharge, or in any way affect any claims, causes of action or demands in law or equity which the parties may have against any person, firm partnership or corporation not a party to this Consent Decree, for any liability it may have arising out of, or relating in any way to the generation, storage, treatment, handling, transportation, release or disposal of any materials, hazardous substances, hazardous wastes, contaminants or pollutants at, to or from the Defendant's facility. The parties to this Consent Decree expressly reserve all rights, claims, demands and causes of action they have against any and all other persons and entities who are not parties to this Consent Decree, and as to each other for matters not covered hereby.

18. Nothing in this Consent Decree is intended to release or waive any claim, cause of action, demand or defense in law or equity that any party to this agreement may have against any person or entity not a party to this settlement.

19. AMFCO shall make no claim for costs incurred by AMFCO in complying with this Consent Decree against the United States or the Hazardous Substance Superfund established by CERCLA § 221 (42 U.S.C. § 9631).

20. The United States has provided the State of Michigan with notice of the Complaint filed in this action and of the lodging of the Consent Decree with the Court.

21. The United States and the State have determined that the terms and procedures authorized by this Consent Decree are consistent with the authority of the United States and the State under applicable law to further the implementation of Defendant's closure plant.

22. Each party to this action shall bear its own costs and attorneys' fees.

23. The Court shall retain jurisdiction to enforce and modify this Consent Decree and to resolve disputes arising under it.

24. The U.S. EPA and MDNR shall in good faith use their best efforts to assist the Defendant in obtaining such permits and approvals as may be necessary for all activities conducted in furtherance of this Consent Decree and the closure plan hereunder.

25. To the extent any claimed violation of this Consent Decree by Defendant is due to a force majeure, such shall be excused. For purposes of this Consent Decree, a force majeure is defined as any event arising from unforeseen causes beyond the

reasonable control of AMFCO which delays or prevents the performance of any obligation under this Consent Decree, including the closure plan implementation, and which is not a result of the fault or negligence of AMFCO. Force majeure shall include but not be limited to delay in obtaining permits necessary for the work, access to property upon which the work is to be done, delay by local, state or federal agencies in acting upon submittals or applications for the work hereunder, labor strikes or work stoppages, acts of God, adverse weather conditions which unreasonably impede performance of the work hereunder, and acts or omissions of third-parties, providing that any such delay could not have been overcome by the reasonable efforts of AMFCO. 26. Approval by the United States and entry of this Consent Decree by the Court are subject to the Public Notice and Comment requirement of 28 C.F.R. § 50.7, which requires that notice of proposed consent decrees in certain environmental actions be given to the public and that the public shall have at least thirty (30) days to submit comments on the proposed Consent Decree.

27. The obligations of Defendant as set forth by the terms of this Consent Decree shall be deemed satisfied upon receipt by Defendant of written notice from U.S. EPA and the State of Michigan that Defendant has completed the applicable requirements of its closure plan. Such written notice shall not be unreasonably delayed or withheld.

28. The parties may seek amendment, modification or

variance of this Consent Decree by subsequent stipulation or motion to the Court.

29. This Consent Decree shall be effective upon the date of its entry by the Court.

The undersigned representative of each party to this Consent Decree certifies that he or she is authorized by the party whom he or she represents to enter into the terms and conditions of this Consent Decree and to legally bind that party to it. By the undersigned, the parties enter into this Consent Decree and submit it to the Court for approval and entry.

UNITED STATES OF AMERICA,
Plaintiff

DONALD A. CARR
Acting Assistant Attorney General
Land and Natural Resources Division
U.S. Department of Justice

JOHN SMIETANKA
United States Attorney
Western District of Michigan

THOMAS GEZON
Assistant U.S. Attorney
399 Federal Building
110 Michigan, N.W.
Grand Rapids, MI 49503

ALLEGAN METAL FINISHING COMPANY,
Defendant

WALTER C. SOSNOWSKI
President, Allegan Metal Finishing Company

CHARLES M. DENTON
Varnum, Riddering, Schmidt & Howlett
Attorneys for Allegan Metal Finishing Company

VALDAS V. ADAMKUS
Regional Administrator
Region V
U.S. Environmental Protection
Agency

THOMAS L. ADAMS, JR.
Assistant Administrator
Office of Enforcement and
Compliance Monitoring
U.S. Environmental Protection
Agency

GORDON G. STONER
Attorney, Environmental
Enforcement Section
Land and Natural Resources
Division
U.S. Department of Justice

CONNIE PUCHALSKI
Assistant Regional Counsel
U.S. Environmental Protection
Agency - Region V

IT IS SO ORDERED, ADJUDGED and DECREED.

Date:_____

HONORABLE RICHARD ENSLEN