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A PARTNERSHIP OF PROFESSIONAL CORPORATIONS

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May 5, 1995

HAND DELIVERED

Mr. Ed Kelley, Director  
Water and Waste Management Division  
New Mexico Environment Department  
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Post Office Box 26110  
Santa Fe, New Mexico 87502

Ms. Marcy Leavitt, Chief  
Ground Water Protection and Remediation Bureau  
New Mexico Environment Department  
Harold Runnels Building  
1190 St. Francis Drive  
Post Office Box 26110  
Santa Fe, New Mexico 87502

Re: Sparton Technology, Inc. ("Sparton") -  
Coors Road Facility, Albuquerque

Dear Mr. Kelley and Ms. Leavitt:

This letter and its attachments are the response of Sparton to a letter dated March 31, 1995 from the Groundwater Protection and Remediation Bureau ("GWPRB") concerning the above-referenced facility. The March 31st letter requests that Sparton install additional monitoring wells and proposes a groundwater monitoring program different than that currently in place.

In October, 1988, Sparton and EPA entered into a Consent Order ("Consent Order") pursuant to provisions of the federal Resource Conservation and Recovery Act ("RCRA"); a copy of the Consent Order is attachment 1 to this response. Pursuant to the Consent Order Sparton has instituted a groundwater monitoring program and has been implementing an interim measure for corrective action at the site. Also pursuant to the Consent Order, Sparton has conducted a RCRA <sup>Facility</sup> Feasibility Investigation ("RFI") and prepared an extensive corrective measures study report ("CMSR") which

← November, 1992

② Response to Comment (RTC)

[Letter public info. to SOB,

① identifies selected remedy

② provides info. re. community preferences

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① Statement on Basis (SOB) (CA decision doc.)

① identifies proposed remedy & rationale

② describes all remedies identified in RFI & CMS reports

③ solicits public review & comments

(General stds = human health/enviro. protect media cleanup stds attainment; control of sources)

analyzes possible corrective measures and proposes a final corrective measure. Sparton has been informed by EPA on several occasions that EPA's comments on the CMSR are forthcoming, but Sparton has not yet received such comments. True - Statement of Basis

Since entry of the Consent Order in 1988 substantially all regulatory activities with respect to the site have been handled pursuant to the Consent Order. Now, the GWPRB is attempting to take regulatory action after forgoing such action for many years. Sparton believes for the reasons set forth in this letter that such action is not legally authorized, is not appropriate as a matter of regulatory policy, and is not equitable under the circumstances. Sparton requests that the Director of the Water Management Division review this matter and awaits the Division Director's response.

The remainder of this letter is Sparton's detailed response to the GWPRB March 31 letter.

I. **BACKGROUND**

The Sparton facility is located on an approximate twelve-acre parcel of land located on the northwest side of Albuquerque, on State Highway 448 (Coors Road), about three-quarters of a mile north of the intersection of Coors Road and Paseo del Norte.

The Sparton facility began operation in 1961, and since that time has been engaged in the manufacture of electronic components, including printed circuit boards. The manufacturing process generated two waste streams - a plating waste stream and a solvent waste stream. The plating wastes were stored in an in-ground concrete basin until approximately 1975. This basin was replaced by a lined surface impoundment in 1975, termed the "West Pond". A second lined surface impoundment was installed around 1977. This pond was termed the "East Pond". Accumulated waste water was periodically removed from the ponds via vacuum truck for off-site disposal at a permitted facility.

After installation of the East Pond, the West Pond was not used again until January 1981. At that time, the West Pond was refurbished by providing a new liner and by constructing concrete sidewalls for liner support. From 1981 through August 1983, use of the two ponds was alternated so that each pond could be regularly inspected. No significant liner damage was identified during any of these inspections. In August 1983, Sparton ceased discharge to either pond and removed the plating wastes which were in the ponds at that time. The ponds have not been used since that time. Plating wastes are currently stored in drums in an on-site "less than ninety day" storage facility prior to

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shipment to a permitted off-site disposal facility.

Waste solvents were accumulated in an off-site concrete sump and allowed to evaporate. Use of this sump was discontinued in 1980, at which time Sparton began to store the waste solvents in drums prior to off-site disposal at a permitted facility.

In 1983, several groundwater monitoring wells were installed around the pond and sump area to determine whether there had been a release of hazardous constituents from the ponds or the sump. Analytical results from groundwater samples taken from these wells indicated a release resulting in concentrations of several constituents above state standards.

Since this initial finding in 1983, investigation of the nature and extent of the contamination has continued. The wastes which were stored in the pond and sump area were typical of electronic manufacturing facilities. The waste stream stored in the ponds was an aqueous stream from the metal plating process which contained a variety of metal ions. The sump was used to store a mixture of waste solvents from processing and degreasing operations. Based on groundwater analyses, the primary hazardous constituents appear to include trichloroethylene (TCE) and 1,1,1-trichloroethane (TAC), with lesser amounts of methylene chloride (MeCl), acetone, and 1,1-dichloroethylene (DCE). Based on these analytical results from groundwater samples taken from on-site monitoring wells, it is apparent that the contaminant release originated primarily from the solvent storage sump.

*Crit 6 is a significant COC in groundwater*

During the period 1983 to 1987, Sparton worked closely with the New Mexico Environmental Improvement Division ("EID"). Also during this period, the ponds were closed, and the entire pond and sump area was capped under an EID-approved closure plan.

In 1987, when it became apparent that contaminants had migrated beyond facility boundaries, the EPA commenced negotiations with Sparton to develop the Consent Order. The Consent Order was signed and became effective on October 1, 1988. Under the provisions of this order, Sparton implemented an Interim Measure ("IM") in December, 1988 consisting of a groundwater recovery and treatment system. The purpose of the IM was to remove contaminants from the more concentrated areas of the contaminant plume in the uppermost flow zone.

*on-site P&T*

*AOC - 10/88  
IM - 12/88*

Since 1983, the results of the ongoing investigation have been published in a number of reports, copies of which have been previously furnished to EPA and EID. A list of these reports is Attachment 2 to this response. NMED has copies of most of these documents. Sparton will provide additional copies to NMED.

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In April, 1987, EID submitted to Sparton a proposed settlement agreement resolving issues with respect to reclamation. In June 1987, Sparton and EID entered into an Agreement In Principle ("AIP") which resolved many of the issues surrounding the extent of state and federal regulatory actions related to this matter. A copy of the AIP is attachment 3 to this response. EID and Sparton entered into the AIP after extensive negotiations, under which EID effectively turned this matter over to EPA, on the conditions that Sparton enter into a consent order with EPA incorporating New Mexico groundwater standards as the remediation standard to be set under the consent order. ?

6/87  
AIP

1987  
Investigation  
lead given by  
state to EPA  
(RCRA)

As stated above the Consent Order was entered into in October, 1988. Since that time, Sparton has complied with the Consent Order and the various regulatory steps required by that order leading to final regulatory action with respect to this site. Specifically, Sparton has prepared an RFI, Interim Measure Effectiveness Reports, and a CMSR. Since submission of the CMSR in November, 1992, Sparton has been awaiting comments of EPA with respect to its proposed corrective measure so that Sparton can complete this project. Sparton has been informed by EPA on several occasions that the comments will be forthcoming, but to date, Sparton has not received comments from EPA.

comments = SOP

Comments  
&  
responses  
exist

In addition to the resolution of the New Mexico Water Quality Act ("WQA") matters under the AIP, Sparton has been in contact throughout the course of this matter with the HRMB concerning matters related to the New Mexico Hazardous Waste Act ("HWA") and the state Hazardous Waste Management Regulations ("HWMR"). On March 28, 1986, Sparton submitted a post-closure permit application to the HRMB. After a series of correspondence between Sparton and HRMB resulting in revisions to the application, HRMB did not respond to Sparton's July 11, 1989 comments on the then-current draft until April 20, 1994 when NMED requested that Sparton file an updated post-closure permit application. In response to the NMED request, in February, 1995, Sparton submitted a post-closure care permit application for administrative review purposes only to the HRMB to allow the regulatory process to continue while awaiting EPA comments on the CMSR.

Notwithstanding Sparton's position with respect to the legal and regulatory policy issues raised by the March 31st letter to Sparton from GWPRB, Sparton is committed to bringing the matter to a successful conclusion. Sparton has demonstrated its commitment at this facility by undertaking voluntary corrective actions and by working with EPA, EID and NMED to mitigate the effects of contaminant release. Sparton has further demonstrated its commitment by expending over \$7 million at this facility for

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various corrective actions and investigative work since 1983 to the present time.

**II. SPARTON'S EXISTING MONITORING SYSTEM IS ADEQUATE TO PROVIDE FOR REMEDIATION AT THE SITE**

*Doubtful!*

The March 31st letter from the GWPRB refers only to limited aspects of Sparton's groundwater monitoring program and does not reflect an analysis of the entire program. Attachment 4 to this response is a report from Black & Veatch, Sparton's consulting geohydrologist, that explains the adequacy of the existing monitoring system in response to the GWPRB letter.

**III. SPARTON IS IN COMPLIANCE WITH SECTION 1-203 OF THE WQCC REGULATIONS**

Section 1-203A.5 of the WQCC regulations is a very general provision which simply provides that the owner or operator of a facility "shall take such corrective actions as are necessary or appropriate to contain and remove or mitigate the damage caused by" a discharge to groundwater. As described in Section I of this letter, Sparton is in compliance with section 1-203A.5 because it has taken necessary or appropriate action to contain and remove or mitigate the damage caused by the discharges at issue by entering into the Consent Order, and filing a post-closure care permit application with the HRMB.

The Consent Order provides for an exhaustive process under which Sparton is required to identify the nature of the contamination, and propose corrective measures with respect to that contamination. Sparton has embarked upon and actively pursued that process. Until a meeting that precipitated the March 31, 1995 letter, NMED had not questioned this process as not being "necessary or appropriate" to contain, remove or mitigate the damage caused by the discharges at issue. That process has been appropriate for a period of over seven years since the AIP was entered into and continues to be appropriate. Nothing has come to the attention of Sparton that would deem the process it is following inappropriate or inadequate to remove or mitigate the contamination at issue.

**IV. NMED IS PROHIBITED BY THE AIP FROM TAKING ENFORCEMENT ACTION AGAINST SPARTON**

The AIP provides that if Sparton enters into the Consent Order, then EID agrees not to pursue any legal remedies it has, including civil penalties. Specifically, paragraph VIII of the AIP provides:

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*will not civil  
penalize STJ!*

"Upon execution of the final EPA CD/CAP and EID Settlement Agreement, if any, EID agrees it will not pursue or collect and hereby waives the civil penalties described in its letter of April 10, 1987".

In addition, paragraph II of the AIP states:

"If Sparton fails to comply with the EPA CD/CAP once signed, the EID reserves its right to pursue any legal remedies it has, if any, including penalties against Sparton for such noncompliance."

The April 10, 1987 letter from EID to Sparton enclosed a proposed draft Settlement Agreement addressing the reclamation of groundwater at the Sparton site. That letter refers to the general penalty provisions of the WQA, specifically, Section 74-6-10. The last paragraph of page 2 of the letter provides "EID will agree not to seek penalties against Sparton on the facts in the Statement of Dispute contained in the proposed Settlement Agreement" transmitted with that letter.

The Statement of Dispute referred to in the April 10, 1987 EID letter is set forth in paragraph 1 of the proposed Settlement Agreement. That section recites EID's general authority to administer Water Quality Control Commission ("WQCC") regulations. Paragraph 1 also recites the EID position that releases from Sparton's operation caused groundwater underlying the facility to be contaminated. It also states:

"EID further contends that Sparton has failed to take sufficiently, appropriate and necessary steps quickly enough to contain and remove or mitigate the damage caused by its discharges required by Section 1-203A.2 of the WQCC Regulations"

Settlement Agreement at page 4.

Thus, the Statement of Dispute in the proposed Settlement Agreement specifically refers to releases from Sparton's facility having caused groundwater contamination, to the general authority of EID to enforce the WQCC Regulations, and to Regulation 1-203A, which is the regulation relied upon by the GWPRB in its March 31st letter.

These references in the Statement of Dispute read together with paragraph VIII of the AIP make clear that NMED has waived penalties against Sparton for violation of the WQCC regulations. Moreover, paragraph II of the AIP necessarily implies that NMED has agreed not to pursue any legal remedies against Sparton

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unless Sparton violates the Consent Order, which it has not done.

**V. NMED IS PREEMPTED UNDER FEDERAL LAW FROM REQUIRING ANY  
REMEDIAL ACTION INCONSISTENT WITH REMEDIAL ACTION TAKEN  
UNDER THE CONSENT ORDER**

By entering into the Consent Order and the AIP, Sparton, NMED, and EPA have embarked upon a regulatory course under which EPA has assumed primary regulatory jurisdiction over this matter.

The AIP provides that if Sparton enters into a Consent Order with EPA incorporating the New Mexico Groundwater Standards, EPA assumes primary authority over the process governing remediation at the Sparton site. The Consent Order has in fact been entered into, incorporates the New Mexico Groundwater Standards and provides for an extensive process under which an appropriate corrective measure will be determined for purposes of providing for reclamation that will meet New Mexico Groundwater Standards.

The CMSR submitted to EPA in November, 1992 proposes a corrective action for the Sparton site, and is still under review by EPA. Case law interpreting RCRA and its relationship to state law makes clear that where EPA has assumed primary enforcement authority by entering into a consent order under RCRA, a state may not later impose remedies which are inconsistent with remedies approved by EPA under the consent order. See Hermes Consolidated, Inc. v. Wyoming, 849 P.2d 1302 (Wyo.1993) (state environment department held preempted by EPA consent decree entered into pursuant to RCRA from imposing remedies in conflict with remedies ordered under consent decree); People v. Teledyne, Inc. 599 NE 2d 472 (Ill. App. 3d 1992) (administrative order of EPA entered under RCRA preempted remedies sought by state regulatory agency and county where remedies sought by state and county were in conflict with remedies specified under consent order.); US v. Akzo Coating of America, Inc., 949 F 2d 1409 (6th cir 1991) (once consent decree is entered into by Federal Court, alternative state remedies may not be pursued under CERCLA).

Thus, because NMED may not impose a remedy that conflicts with any remedy which may be imposed by EPA under the Consent Order, NMED may not at this point prescribe remedies or require Sparton to take action which may be inconsistent with action being taken pursuant to the Consent Order.

**VI. EQUITY REQUIRES THAT NMED REFRAIN FROM ASSERTING ITS  
ENFORCEMENT AUTHORITY**

Under New Mexico law, a governmental agency is subject to the doctrine of equitable estoppel when it has conveyed information

*Consent Ord  
will be  
closed out  
by approval of  
the CMS (??)*

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that the facts are inconsistent with those which the agency subsequently attempts to assert; the agency had the intention or the expectation that its conduct would be acted upon by the other parties; and the governmental agency had knowledge, actual or constructive, of the real facts. See Stuckey's Stores, Inc. v. O'Cheskey, 93 N.M. 312 1979 (New Mexico state agency was estopped to assert position that parties were not entitled to payment of compensation for removal of highway signs, where agency had authorized private parties to engage in acts which would make them ineligible for compensation).

Approximately eight years ago, EID entered into the AIP and subsequently has taken no action to enforce the WQA and the regulations of the WQCC. Sparton has relied on the actions of NMED by embarking upon the regulatory process provided for under the Consent Order, rather than the process provided for under WQCC regulation 1-203A. Sparton has relied to its detriment on the actions of EID and NMED in following the federal regulatory process. Therefore, because the very actions of EID and NMED have caused Sparton to pursue one regulatory process rather than the regulatory process now asserted to be applicable by the GWPRB, the doctrine of equitable estoppel should apply. It would be unfair or inequitable to allow NMED to enforce Section 1-203 against Sparton at this time.

**VII. REQUEST FOR DIVISION REVIEW OF THE CONTEMPLATED ACTION OF THE GWPRB**

Sparton requests that the Director of the Water and Waste Management Division and other appropriate NMED officials conduct a legal and regulatory policy review of the action contemplated in the March 31, 1995 letter from the GWPRB to Sparton, in view of the facts and law set forth in this response. Sparton stands willing to meet with you and your staff at your convenience to provide you with additional information and to attempt to resolve this matter.

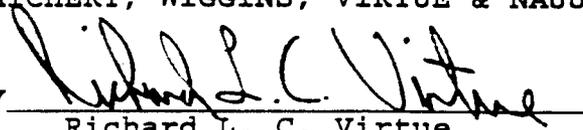
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Finally, Sparton reiterates its continued willingness to work with NMED in a constructive manner to implement the Consent Order.

Very truly yours,

TAICHERT, WIGGINS, VIRTUE & NAJJAR

By



Richard L. C. Virtue  
Santa Fe Office

cc w/enc.: Hon. Mark Weidler, Secretary, NMED  
Tracy Hughes, General Counsel, NMED  
Jan Appel, General Counsel, Sparton

cc: Pierce Chandler, Black & Veatch  
Gary Richardson, Metric Corporation

sparton kelley.ltr