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Monzeglio, Hope, NMENV

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From: De Saillan, Charles, NMENV
Sent: Wednesday, April 04, 2007 5:10 PM
To: Bearzi, James, NMENV; Cobrain, Dave, NMENV; Monzeglio, Hope, NMENV; Kieling, John, NMENV
Subject: FW: GIANT/Draft Order for Bloomfield Refinery
Attachments: Letter to NMED 4-04-07.pdf

From: David Ortiz [mailto:DOrtiz@montand.com]
Sent: Wednesday, April 04, 2007 4:59 PM
To: De Saillan, Charles, NMENV
Subject: GIANT/Draft Order for Bloomfield Refinery

Mr. de Saillan,

Attached to this email is a letter dated today re the above referenced.

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April 4, 2007

VIA EMAIL
&
U.S. FIRST CLASS MAIL

Charles de Saillan
Assistant General Counsel
New Mexico Environment Department
P.O. Box 26110
Santa Fe, NM 87502-6110

Re: Draft Order for Bloomfield Refinery

Dear Charlie:

As we discussed at our meeting on March 27, 2007 with representatives of the New Mexico Environment Department ("NMED") and Giant Industries Arizona, Inc. ("Giant"), I am following up on several issues. They can be grouped into three categories. First, in accordance with our most extended discussion at the meeting, the draft Order and related draft Response to Public Comments from NMED should reflect that 40 CFR §268.1(c)(4) applies to the benzene stripper/tank system to be installed this summer for operation in conjunction with the aeration ponds. Second, Giant proposes revisions to the draft Order for several aspects of corrective action that were discussed briefly at the meeting. Finally, there are some important issues, although not discussed at the meeting, that Giant would like to address briefly.

I. BENZENE STRIPPER/TANK SYSTEM AND AERATION PONDS

At the conclusion of our March 27 meeting, the parties agreed that the method of operation described in 40 CFR §268.1(c)(4) will apply to the refinery as soon as the benzene stripper/tank system begins operation this summer. Further, Giant understood that NMED planned to consider various options for closure of the aeration ponds, consistent with the §268.1(c)(4) method of operation. The method of closure agreed to by the parties would either be described in the draft Order or in a separate document referenced by the draft Order. The closure, regardless of the method selected, would be part of corrective action, rather than addressed in a separate closure permit. Underlying this approach is the

understanding that Giant will no longer be operating a hazardous waste treatment, storage or disposal facility when the new benzene stripper/tank system begins operating.

Consistent with our discussions at the March 27 meeting, Giant requests that the draft Order and NMED's draft Response to Public Comments be modified to reflect the §268.1(c)(4) method of operation. In a brief review of these documents, Giant notes the following provisions where Giant recommends modifications be made:

1) March 2007 draft Order, page 132 – The Order now states that Corrective Action Work Plans for the North and South Aeration Lagoons are to be included in the "closure Permit Application." Giant recommends that reference to a closure permit application be deleted and, in substitution, a reference be made to a schedule for these work plans to be determined in this corrective action Order or a related enforceable document.

2) March 2007 draft Response to Comments, pages 6 and 7 – The Response to Comment 8 now states that "these [closure and corrective action] requirements will be implemented at very different times" and that "closure will not begin until some indeterminate time in the future." Giant recommends that the Response to Comment 8 be rewritten to reflect the understanding of the parties that closure will occur in the near future as part of corrective action.

3) March 2007 draft Response to Comments, pages 24-27 – The Response to Comment 27 appears to reject the §268.1(c)(4) method of operation as applicable to the refinery. That method of operation contemplates benzene decharacterization in the benzene stripper/tank system and recognizes that aggressive biological treatment in the ponds is equivalent to treatment under the Clean Water Act. Giant recommends that the Response to Comment 27 be rewritten to reflect the understanding of the parties that the §268.1(c)(4) method of operation is the basis for plans to close the ponds as part of corrective action.

4) March 2007 draft Response to Comments, pages 30 and 31 – The Response to Comment 35 now states that "[n]othing in the

> HWA or RCRA exempts releases of wastes into surface waters..." That statement and accompanying discussion appear to reject the §268.1(c)(4) method of operation as it applies to the refinery. Giant recommends that the Response to Comment 35 be rewritten to reflect that §268.1(c)(4) does apply to the refinery, as discussed above.

There may be other provisions of the draft Order and draft Response that should be modified to reflect the understanding of the parties that the §268.1(c)(4) method of operation applies to the refinery. Examples are paragraphs 51 and 62 of the Findings of Fact in the draft Order (at pages 12 and 16), where the ponds are described as treating benzene as a characteristic hazardous waste, and paragraph 4 of the Conclusions of Law in the draft Order (at page 26), where Respondents are described as treating hazardous waste. Giant recommends that such statements be revised to reflect that such treatment will no longer occur after the benzene stripper/tank system begins operation this summer. Giant does not claim to have identified all provisions of the draft Order and draft Response that should be modified to be consistent with the §268.1(c)(4) method of operation. Consequently, Giant recommends that the parties continue reviewing these documents to determine if other provisions should also be modified.

II. OTHER ISSUES IN THE DRAFT ORDER

As we discussed at the March 27 meeting, Giant has several proposals for revisions to the draft Order.

A. Dispute Resolution

Giant recognizes that NMED has added a Dispute Resolution provision to the draft Order at Section III.R. Giant understands that the provision would apply to any dispute that may arise under the order, such as one that may involve financial assurance, cleanup levels or additional work. To confirm this understanding, Giant recommends the addition of the following language as a separate paragraph at the end of Section III.R:

> Unless otherwise specifically set forth herein, the failure to provide expressly for dispute resolution in any section of this Order is not intended and shall not bar Respondents from invoking this Section as to any dispute under this Order.

Also Giant recognizes that the Dispute Resolution provision allows the parties to "pursue any available legal remedy to resolve the dispute," if the parties are unable to resolve the dispute under the procedures provided. In order to clarify that a legal remedy is available to the Respondents, at least procedurally, Giant recommends the addition of the following language at the end of the existing third paragraph in Section III.R:

> The decision or other action forming the basis of the dispute shall be deemed final for purposes of judicial review once the negotiations in this Section III.R are complete.

B. Financial Assurance

As stated in its comments, Giant does not believe financial assurance is legally required at this interim status facility. However, Giant is willing to work with NMED to find a mutually acceptable approach. There are three areas that Giant would like to discuss with NMED. First, Giant recommends that the prohibition of a "pay-in-period" be applicable only to corrective action. Giant should be able to use pay-in provisions for any closure or post-closure costs included in the cost estimate. Second, Giant recommends that a corporate guarantee be allowed in combination with other methods through such language as: "Respondents can combine mechanisms guaranteeing performance with mechanisms guaranteeing payment, subject to the Department's review and approval." Third, Giant wants to avoid "double counting" when including a financial contingency amount on its books for a cost estimate for corrective action. Such an adjustment is allowed in the regulations for financial tests under the guarantee option. Suggested language is: "When calculating "Line 2 Total Liabilities" for Alternative 1 of 40 CFR §151(f), Respondents may deduct the portion of Line 1 that is included in the Total Liabilities on the year-end financial statements for the latest completed fiscal year of the entity providing the written guarantee, and Respondents may add that amount to Lines 3 and 4."

C. Parties Bound

As mentioned at the March 27 meeting, Giant does not believe the long list of parties bound in the first paragraph of Section III.E is necessary. Also, such language could impair Giant's ability to retain qualified consultants. Giant recommends that the first paragraph of Section III.E state simply: "This Order shall apply to and bind the Respondents, their officers when acting in their official capacity but not in their individual capacity, their agents, successors, and assigns."

Giant believes the last paragraph of Section III should satisfy NMED with respect to the actions of contractors, subcontractors, laboratories and consultants. Under that paragraph, Giant must require these persons "to comply with and abide by the terms of this Order."

D. Factual Errors

Giant notes the following erroneous factual statements in the March 2007 draft Order that should be corrected:

(1) Section II.B.2 and II.B.3, page 26 – Giant Industries Arizona, Inc. is the operator of the refinery, and San Juan Refining Company is the owner.

(2) Section V.A.1, page 49 – The July 3, 2006 date is no longer applicable. The report was submitted on June 29, 2006.

(3) Section V.A.2, page 49 – The June 30, 2006 date is no longer applicable. The report was submitted on June 28, 2006.

(4) Section V.B.1, page 51 – The August 28, 2006 date is no longer applicable. The report was submitted on August 25, 2006.

III. ISSUES NOT DISCUSSED ON MARCH 27

At the March 27 meeting, Giant understood that certain issues were "off the table" for discussion, such as NMED's jurisdiction under the Hazardous Waste Act and the unilateral versus consent form of the Order. Giant agreed with that approach because there were a number of other topics, such as those discussed above in this letter, that were worthy of discussion by representatives of NMED and Giant. Besides, there was no point in the parties debating points already made in written form.

Nonetheless, Giant respectfully requests NMED to consider deleting the imminent and substantial endangerment claim under Section 74-4-13 of the Hazardous Waste Act. Giant suggests that NMED can assure the protection of health and the environment without resort to that authority. Giant hopes that NMED can recognize that Giant has been and will continue to be committed to effective corrective action at the refinery. Giant also respectfully suggests that,

rather than issuing a unilateral order, NMED consider issuing a consent order, which would more accurately reflect the process undertaken by the parties.

In conclusion, Giant's purpose in sending this letter today is to respond promptly to NMED's request for follow up from the March 27 meeting. Giant intends to do its part in moving discussions forward as rapidly as possible. In doing so, Giant is not providing a conclusive or comprehensive position on all issues, but is merely attempting to advance the discussions. Giant reserves the right to expand and supplement the statements in this letter as well as take any action it considers necessary in the future.

Giant is optimistic that all issues in NMED's draft Order and draft Response to Public Comments can be resolved to the satisfaction of each party. Giant would be pleased to meet again with NMED in an effort to resolve all remaining issues.

Sincerely,

Edmund H. Kendrick

EHK/dho