UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2
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NEW YORK, NY 10007-1866

July 28, 2005

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Re: Ringwood Mines/Landfill Superfund Site - Legal Issues

Dear Mr. Telsey:

In your letter dated July 13, 2005, you raise some fundamental objections to the terms of the Settlement Agreement/Administrative Order on Consent which EPA has proposed to the Borough of Ringwood ("Borough") and to the Ford Motor Company ("Ford") for Supplemental Investigative work at the Ringwood Mines/Landfill Superfund Site in Ringwood, New Jersey ("Site"). You assert, in particular, that the Borough is not liable for response costs at the Site and that Ford is solely responsible for conducting and paying for response actions at the Site. You also assert that EPA has no legal right to identify hundreds of acres of Ringwood as a facility or site but rather must identify the specific locations at which hazardous substances are found as separate facilities.

EPA has reviewed your legal and policy arguments and disagrees with your positions for the reasons explained below.

I. Background

Ford's wholly owned subsidiary Ringwood Realty Corporation ("RRC") gave O'Connor Trucking and Haulage Corporation ("O"Connor") a license to carry out landfilling operations on RRC's property in Ringwood, New Jersey ("the RRC Property.") O'Connor also had a contract with Ford to dispose of industrial waste, including paint sludge, drums with obsoleted hardener and cardboard and other packing materials from Ford's Mahwah, New Jersey manufacturing plant. Between approximately 1967 and April1971, O'Connor transported some or all of Ford's Mahwah industrial waste to the RRC Property and disposed of that waste in mining pits and at various other locations on the RRC Property. In November 1970, RRC transferred 289.89 acres of the RRC Property to the Borough of Ringwood. In 1973, RRC transferred approximately 100 acres of RRC Property to the New Jersey Department of Environmental Protection ("NJDEP") so the property could be added to the Ringwood State Park.

In 1983, EPA placed the Site on the National Priorities List and arranged for a Remedial Investigation/Feasibility Study ("RI/FS") and several removal actions to be conducted at the Site. In 1988, EPA issued a Record of Decision for the Site which called for a groundwater monitoring program and said that no additional paint sludge removal was necessary. In 1993, EPA announced it planned to delete the Site from the National Priorities List and asked for comments from the public. EPA consulted with NJDEP and Borough officials and reported that no one expressed concerns about the remedial work or objected to the deletion. The Borough did ask EPA to require Ford to continue the groundwater monitoring.

Meanwhile, EPA was taking enforcement actions related to the Site. In 1988, EPA notified Ford that it was a potentially responsible party for response costs at the Site pursuant to section 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a). Pursuant to a series of EPA Administrative Orders, Ford conducted the RI/FS and several removal actions at the Site. In 1990, EPA notified the Borough that it was also a responsible party under section 107(a) of CERCLA. In 1993, EPA entered into a Consent Decree with Ford and the Borough in which both entities agreed to pay EPA's unreimbursed past costs.

In March 2004, attorneys for certain residents of Upper Ringwood invited officials from EPA and other federal agencies, NJDEP, and the Borough and representatives of the press to view areas where paint sludge remained at the Site. The residents' attorneys also conducted a public meeting at which they described their concerns about the remedial work that had taken place and demanded that all contamination be removed from the Site. EPA agreed to reevaluate conditions at the Site and to arrange for the removal of any paint sludge or other industrial waste that posed an unacceptable risk to the residents and the environment at the Site.

In the fall of 2004, Ford began a comprehensive reinvestigation of the Site. In early 2005, EPA proposed that Ford and the Borough enter a Settlement Agreement/Administrative Order on Consent for Supplemental Investigations at the Site ("Agreement"). The Agreement would include a Statement of Work which describes the components of the Supplemental Investigations and sets forth a schedule for the completion of the work. The Agreement would also require the payment of EPA's unreimbursed Past Costs as well as EPA's Future Costs for the Supplemental Investigations.

II. The Borough of Ringwood is liable for response actions and costs at the Site.

EPA has determined that the Borough is liable for response costs under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a) for the following reasons:

Section 107(a) of CERCLA provides that, subject only to the defenses set forth in section 107(b), certain specified persons shall be liable for all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan. These persons shall also be liable for any other necessary costs of response incurred by any other person consistent with the national contingency plan as well as for natural

resource damages and the costs of any health assessment or health effects study carried out under section 9604(I). The liable persons include the current owner and operator of a facility and any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were placed.

A. The Borough is the current owner of nearly 300 acres of the Site.

The Deed of Gift shows that the Borough acquired 289.89 acres of land from RRC in November 1970. That acreage is within the Site. The Borough still owns much of this acreage and is, therefore, the current owner of a substantial part of the Site.

You assert that the Borough acquired 35 acres of the former RRC Property that were not included in the original Deed of Gift by tax foreclosure in 1981 and is not, therefore, liable under CERCLA. You did not provide any documentation of the tax foreclosure action but, assuming the facts are correct, the 35 acre parcel is only a part of the former RRC Property which is currently owned by the Borough.

B. The Borough is a person who, at the time of disposal of hazardous substances at the Site, owned and operated a part of the Site.

Records also indicate that the Borough owned and operated a portion of the Site during an approximately six month period from November 1970 until sometime in April1971 when O'Connor was disposing of industrial waste at the Site. It is likely that O'Connor was disposing of some or all of the waste in the Cannon Mine area of the Site during this time period. The Borough currently owns much of the Cannon Mine area. Before and after the O'Connor disposal period, the Borough also conducted disposal operations in the Cannon Mine area and other areas of the Site with municipal waste from Ringwood and New Milford. Municipal waste is known to contain hazardous substances from residential and commercial sources. Common sources of hazardous materials in municipal waste include lead and mercury from batteries, paint, paint thinner and other solvents, drain-opening chemicals, waste oil and oven cleaner.

III. The Borough does not meet the requirements of the liability defense provided by section 107(b)(3) of CERCLA.

You also argue that the Borough is not liable because it has a defense under section 107(b)(3) of CERCLA, specifically that the contamination at the Site was caused by the act of a third party other than an employee or agent of the defendant, or other than one whose act occurred in connection with a contractual relationship, existing directly or indirectly with the defendant.

A. The Borough had a contractual relationship with RRC, a Ford subsidiary.

The defense under section 107(b)(3) is not available to the Borough because, as discussed above, the Borough did have a contractual relationship with Ford through Ford's subsidiary RRC. The documents cited in your submission include the November 2, 1970 Deed of Gift from Ford

subsidiary RRC to the Borough which establishes a contractual relationship between the Borough and RRC/Ford within the meaning section 107(b) (3).

Section 101(35)(A) of CERCLA, 42 U.S.C. § 9601 provides:

> The term "contractual relationship", for the purpose of section 9607(b)(3) of this title, **includes** but is not limited to, land contracts, **deeds**, easements, leases, or other instruments transferring title or possession. . . .

B. The disposal or placement of hazardous substances at the Site took place both before and after the Borough acquired Site property. The Borough, moreover, knew that hazardous wastes had been disposed on the Site property.

Section 101(35)(A) further provides that a "third party" defense to liability will not be available if there is a contractual relationship

> **unless the real property** on which the facility concerned is located **was acquired** by the defendant **after the disposal or placement of the hazardous substance** on, or in, the facility, **and one or more of the circumstances** described in the clause (i), (ii), or (iii) **is also established** by the defendant by a preponderance of the evidence:

The O'Connor contract to dispose of Ford's Mahwah wastes at Ringwood was not terminated until May 1971. The Borough acquired the Site property in November 1970.

Section 101(35)(A) (i), referred to above, requires a defendant to establish not only that all disposal of hazardous waste on a property was acquired before the defendant acquired the property but also that it did not know, and had no reason to know that any hazardous substance which is the subject of the release or threatened release ws disposed of on, in or at the facility. [1]

Even if the disposal of all the hazardous substances from Ford's plant at the Site had taken place before the Borough acquired the property, the Borough cannot avail itself of the "innocent landowner defense" because it knew that industrial waste had been disposed of on, in and at the facility before it acquired the property.

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[1] Section 101(35)(A)(ii) refers to government entities that acquire property involuntarily or by exercising eminent domain. This would apply to property that the Borough acquired by tax default. Section 101(35)(A)(ii) refers to defendants who acquire property through inheritance or bequest.

Section 101(35)(B) provides in subparagraph (i);

> To establish that the defendant had no reason to know of the matter described in subparagraph (A)(i), the defendant must demonstrate to a court that - (I) on or before the date on which the defendant acquired the facility, the defendant carried out all appropriate inquiries, as provided in clauses (ii) and (iv), into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices;

Documents provided by the Borough and Ford in response to EPA's Requests for Information provide substantial evidence that Borough officials were well aware that O'Connor was disposing of industrial waste from Ford's Mahwah plant at the Site. See, for example, the January 3, 1968 letter from the Borough Clerk to the Borough Board of Health indicating that O'Connor has a contract with Ringwood Realty in order to conduct sanitary landfill operation using "primarily industrial refuse and dirt fill" and that the Borough will continue to dump the Borough's heavy trash in this area also. In fact, Borough wastes were layered with Ford's industrial wastes in several locations, including the Cannon Mine Pits. See also the August 1970 letter from Borough Mayor Kulik to Ford which says that "[t]he Ringwood Council and myself have permitted the dumping of all the industrial waste from the Mahwah assembly plant to be disposed of in this area known as the Ringwood Mines."

C. Since acquiring the property, the Borough has not taken the reasonable steps required by the section 107(b)(3) defense to prevent or limit human or environmental exposure to hazardous substances.

In addition to the knowledge requirement, section 107(b)(3) of CERCLA requires the defendant arguing a third party defense to demonstrate it has exercised due care with respect to the hazardous substances at the facility or that it took precautions against the foreseeable acts or omissions of the third party involved and the consequences that could foreseeably result. The required steps are specified in more detail in section 101(35)(B) (II) of CERCLA. This provision requires a defendant to demonstrate it took reasonable steps (after acquiring the property) to - (aa) stop any continuing release; (bb) prevent any threatened future release; and (cc) prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substance.

There is no evidence in the record that the Borough took any precautionary steps during or after the O'Connor disposal period in 1970-71. In a letter dated November 24, 1967, Borough Health Officer Betts told the Mayor and the Council that he had notified RRC to discontinue dumping in the mine holes on its property. He notified the Counsel that all dumping must be discontinued. In its January 2, 1968 response, the Council advised him, as discussed above, that O'Connor had an agreement with RRC to dispose of industrial refuse and that the Borough would continue dumping in this area as well. The Council advised Mr. Betts that if, after an inspection, the dumping site did not meet with his approval, they would appreciate his "further comments." He responded that although he believed the agreement was illegal, he would abide by that so long

as no violations occurred. In fact, O'Connor continued to dispose of industrial waste at the Site for three more years. In 1972, NJDEP cited the Borough for violations in the Cannon Mine area, including failure to comply with landfill regulations and failing to prevent fires in landfilled mine pits.

There are currently no fences and no signs on Borough property which might limit human exposure to hazardous substances in the areas in which paint sludge and other wastes were disposed of and can be found today. The Borough has not taken any action even when residents and EPA have pointed out paint sludge which remain on Borough property, including "sludge hill' in the Cannon Mine area and in the former O'Connor Disposal area.

III. EPA has appropriately identified much of the area formerly owned by RRC as a facility for purposes of response under CERCLA.

You also argue that EPA has no legal basis for calling hundreds of acres a "facility" for the purposes of the proposed Agreement. However, as you noted in your letter, section 109(a) of CERCLA provides that a facility can be any site or area where a hazardous substance has been deposited, stored, disposed of, or placed. As we have discussed, Borough residents and their attorneys have pointed out to Borough officials, EPA, NJDEP, and the media, that paint sludge from Ford's Mahwah plant is still found at the Site. Ford is currently conducting a Site Reconnaissance Survey and has found significant amounts of paint sludge remaining in various areas of upper Ringwood. These areas include "sludge hill" and other parts of the Cannon Mine Area and the O'Connor Disposal Area, both Borough properties. Paint sludge has been found on at least one residential property as well as on an abandoned road (also Borough property) which is being used by a another group of residents as part of their property. Contrary to statements in your letter, Ford has not yet removed any of this paint sludge. (Ford has removed some paint sludge from the state park.) Since the paint sludge and some drum remnants have been found in various areas of the former RRC property, EPA has determined that it is prudent to investigate that entire property and some adjacent property to make sure that all areas of industrial waste have been identified.

IV. Federal case law supports EPA's determination that the area can be considered one facility or site.

In support of your argument that EPA cannot legally identify a large area as one facility, you cite the case Sierra Club v. Seaboard Farms, 387 F. 3d 1167 (C.A. 10 Okla. 2004). In that case, the owner of a large farm argued that an entire farm complex could not be a facility but that individual contaminated areas should be identified as individual facilities within the farm complex. The court held, however, that the farm complex as a whole, as opposed to every barn, lagoon and land application area within the complex, constituted a single "facility" under CERCLA.

This holding is consistent with that of other courts that have considered the issue. In United States v. Rohm and Haas Co., 2 F.3 1265 (3d Cir. 1993), a case within our federal circuit, the court examined liability under Section 107 of CERCLA in a situation where an owner argued it was not "the owner" of a facility because it owned less than 10% of the contaminated area. This defendant had asserted that EPA, when faced with a release involving several disparately owned properties, must define each property as a facility and bring separate enforcement actions against the owners.

The court disagreed and stated "we think it evident from the broad statutory definition of 'facility' that Congress did not intend EPA to be straight-jacketed in this manner in situations involving a release transcending property boundaries." Id. at 1279. The court went on to say:

> [w]e decline to attribute to Congress an intention to distinguish between single owner and multiple owner situations. A current owner of a facility may be liable under § 107 without regard to whether it is the sole owner or one of several owners. . . . [w]e do recognize that holding the owner of a small portion of the site jointly and severally liable for response costs for the whole site may involve some unfairness. However, the solution to this potential unfairness is apportionment and contribution in appropriate circumstances. Id. at 1279, 1280.

In another case, Akzo Coatings, Inc. v. Aigner Corp., 960 F. Supp. 1354 (N.D. Ind. 1996), certain defendants argued that because the Site in this case could be divided into five distinct geographic areas, each area was a distinct facility. The court found that what mattered for purposes of defining the scope of facility is where the hazardous substances have come to be located. There was no dispute that hazardous substances had "otherwise come to be located" in several locations at that Site. EPA had placed the entire area where wastes from a chemical manufacturing plant had come to be located on the National Priorities List as a whole, and not as separate and distinct facilities, and had consistently treated that entire site as one facility. The court said that

> [t]o suggest otherwise [than identifying this whole area one facility] could have disastrous consequences, for ultimately every separate instance of contamination, down to each separate barrel of hazardous waste, could feasibly be construed to constitute a separate CERCLA facility. To require a plaintiff to establish the liability of a defendant with respect to each separate facility at this level would defeat the purpose of imposing strict liability under CERCLA, because it would require a plaintiff to trace each harm to a defendant before liability for contribution may be imposed. Id. at 1359.

The Akzo court went on to state "that the harm may be divisible based upon geographic location goes not to the issue of liability under § 107 but to the allocation of contribution under § 113." Id.

During investigation phases of response actions, EPA often identifies large study areas to be investigated and conducts the activitics in phases. Your letter identifies the Borough's real concern when you say that the Borough supports the investigative activities but does not believe it should have to pay for any of them. EPA does expect Ford to take care of most of the proposed work and expenses. EPA, however, also identified the Borough as a responsible party more than ten years ago for the reasons discussed above. We urge you to work with Ford to complete a thorough investigation of the Site.

Yours truly,

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