HARLESS R. BENTHUL
ATTORNEY
LYRIC CENTRE
440 LOUISIANA, SUITE 600
HOUSTON, TEXAS 77002

PHONE: 713-223-0030 FAX: 713-223-0026

January 16, 2008

Via Overnight Mail and email @ www.hq.foia@epa.gov

National Freedom of Information Officer
U.S. E.P.A.
Records, FOIA and Privacy Branch
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460

Ref: Appeal of Denial of Freedom of Information Act ("FOIA") Request

Dear National Freedom of Information Officer:

I represent Higman Barge Lines, Inc. of Houston, Texas ("Higman"). In connection with that representation, I submitted a request for records pursuant to the Freedom of Information Act on July 25, 2007 ("request"), substantively as follows:

> Opinions of the General Counsel, programmatic interpretations or any other EPA statement of interpretation or position regarding the applicability of §§101(14) and 104(a)(2) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 62 U.S.C. §§0601(14) and 9604(a)(2), ("the petroleum exclusion") issued contemporaneously with or subsequent to a Memorandum dated July 31, 1987, entitled Scope of the CERCLA Petroleum Exclusion Under Sections 101(14) and 104(a)(2) from Francis S. Blake, General Counsel to J. Winston Porter, Assistant Administrator.
>
> My request is intended to include opinions, memoranda, interpretations, guidance, or any other such communication whether written, electronic or in any other form and whether originated in EPA Headquarters or a Regional Office or other EPA facility.

A copy of my request is enclosed as Exhibit 1.

My request was denied by letter dated December 18, 2007 signed by Mr. Dana Ott, Senior Counsel, Office of General Counsel, U.S.E.P.A ("denial"). A copy of the denial is enclosed as Exhibit 2.

EXHIBIT 5

I request that the denial be reversed for the reasons set forth below. The effect of the denial is to utterly frustrate the purpose of the FOIA by invoking exemption 5 in aid of perpetuating U.S. Environmental Protection Agency Region 6 ("EPA Region 6") efforts to incorrectly assert liability on the part of Higman for response costs associated with the Palmer Barge Line Superfund Site, Port Arthur, Texas ("Palmer Barge Site"). The basis of this appeal is best understood in the context of a brief history of the events that lead to this point.

1. Background

Region 6 sent Higman a Special Notice Letter ("NL") on August 18, 2000 for a removal action conducted at the site and subsequently sent a NL for a Remedial Investigation/Feasibility Study. Higman defended against liability on the basis that any transactions with the Palmer Barge Site fell within the petroleum exclusion of CERCLA (42 U.S.C. 9601(14). See Exhibit 3. Region 6 agreed with Higman by letter of July 25, 2002 (exhibit 4).

After the passage of almost five years Region 6 sent Higman a Unilateral Administrative Order ("UAO") on May7, 2007, again asserting liability on the part of Higman for response costs at the Palmer Barge Site (see Exhibit 5). Higman again defended against liability on the basis of the petroleum exclusion (Exhibit 6). As set forth in the Affidavit of David James enclosed as Exhibit 7, Region 6 through its attorney, Mr. Joseph Compton, III, asserted that Higman's liability and EPA's change in position was based on the holding of a federal court case (the so-called *Voda* case) that turned out to be non-existent[1] as a "petroleum exclusion" case. Mr. Compton later acknowledged that he was in error in the assertion about the *Voda* case (see Exhibit 8) and stated that the basis of EPA's change was "EPA policy supported by the Office of General Counsel...". In his letter of July 12, 2007 (Exhibit 9), Mr. Compton wrote in reply to Exhibit 6, in part:

> As we discussed, the Agency believes that vacuum gas oil (VGO) was commingled or otherwise intermixed with other known CERCLA hazardous substances at the Palmer Barge site. Under CERCLA and case law interpreting its cost recovery and contribution provisions, the commingled VGO *may* give rise to liability for response costs incurred. To the extent your client brought VGO to the Palmer Barge site that was commingled with CERCLA hazardous substances *at the site*, CERCLA's joint and several liability provisions *may* be applicable. (Emphasis supplied).[2]

The basis of EPA's change in position on the applicability of the petroleum exclusion to Higman remains a mystery. Assuming there is a basis in Agency records as Mr. Compton asserts,

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[1] There is a "*Voda*" case that involves a criminal prosecution for violation of the Clean Water Act initiated by Region 6 criminal investigators, but it has nothing to do with CERCLA or the petroleum exclusion. See *United States v. Voda*, 994 F.2d 149 (5th Cir. 1993).

[2] Mr. Compton's use of the word "may" twice in connection with Higman's alleged liability is telling in connection with that potential liability as is his assertion that commingling of VGO at the site may lead to liability. Liability will be the subject of a petition for reimbursement of amounts paid by Higman to comply with the UAO. However, we note in passing that the site operator recovered VGO from Higman's barges for sale. *See Affidavit of Randy Laughlin*, Exhibit 3. If the operator subsequently commingled the VGO with other material onsite (although EPA has not provided Higman with evidence to that effect), that mishandling by the operator does not create CERCLA liability on the part of Higman.

Higman did and does not now have the benefit of knowing what those records contain, if they exist.

Under the threat of the punitive sanctions available to EPA under CERCLA, Higman complied with the UAO understanding that a right to petition for reimbursement existed if EPA were wrong as to Higman's liability. Through the various changes in its explanation of its change in position and now, the use of Exemption 5, the EPA has denied Higman the benefit of those records. This a clear abuse of Exemption 5 because it forces parties in Higman's situation to litigate the liability issue in order to find out why EPA believes that Higman is liable and , in this case, why EPA changed its position. A more dramatic example of abuse of the FOIA is difficult to imagine and EPA's conduct is certainly contrary to the purpose and spirit of the FOIA.

2. Discussion and Argument

A. The denial is inadequate because, *as to every single document withheld,* it fails to include even a brief description of the contents of the documents, let alone an indication of the issues addressed which render the document(s) exempt from disclosure. Examination of the denial (Exhibit 2) removes any doubt as to the pervasive existence of this deficiency. This results in EPA serving as sole arbiter of not only responsive documents but also applicability of exemptions and in this case, further obscures the reasons for the EPA's change in position.

B. The denial of access to records said to be the basis of agency action frustrates minimal evaluation of the basis of EPA's change in position. The purpose of the FOIA is disclosure of government records, unless specifically exempted. *Vaughn v. Rosen, 484 F. 2d 820, U.S.App. D.C.(1973).* When the government denies access to records the burden is on the agency to prove *de novo* in trial court that the information sought fits under one of the exemptions. *Id.* The denial of access to records that might explain a basis for the change in EPA's position on applicability of the petroleum exclusion to Higman combined with the coercive powers of CERCLA over a PRP under §106 of CERCLA subject an otherwise innocent party to double litigation just to establish fairness. Such cannot be acceptable conduct on the part of an agency of the United States.

C. The records denied must be part of the administrative process leading to the agency decision, here to subject Higman to CERCLA liability. *Inderjit Badhwar v. United States Department of the Air Force*, 622 F. Supp. 1364, (D.C. Dist. 1985)[3]. That decision was the issuance of the UAO on May 7, 2007 which reversed the July 25, 2002 decision agreeing with Higman. The decision-making in this case therefore took place in that time interval. The dates of the withheld records range from November 24, 1987 to May 6, 1997. The gap between May 6, 1997 and July 25, 2002 (or realistically some later date closer to May 7, 2007) begs the question, how are the withheld documents part of the decision to subject

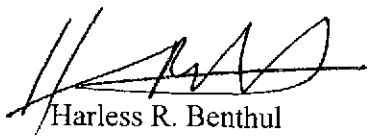
[3] Quoting Mead Data Central v. United States Department of the Air Force,184 U.S. App. D.C. 350, 566 F.2d 242 (D,C, Cir. 1977). "Predicisional materials are not exempt merely because they are predecisional; they must also be part of the deliberative process within a government agency…".

Higman to CERCLA liability that was made at least five years (and more likely nearly ten years) later? There is no indication of record that the withheld documents were part of the decision-making process that led to the UAO.

For all the foregoing reasons, I respectfully request that the denial be reversed and that the EPA respond to my FOIA request in a manner consistent with the arguments made herein and in accordance with the spirit of the FOIA.

For your information, the email version of this request is being submitted without enclosures pursuant to a telephone conversation with Mr. Kevin Miller on January 14, 2008. The enclosures are being transmitted by overnight mail this date.

Sincerely,



Harless R. Benthul

Enclosures

cc: Mr. Kevin Miller via email @ www.miller.kevin@epa.gov
Mr. David James