

**BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.**

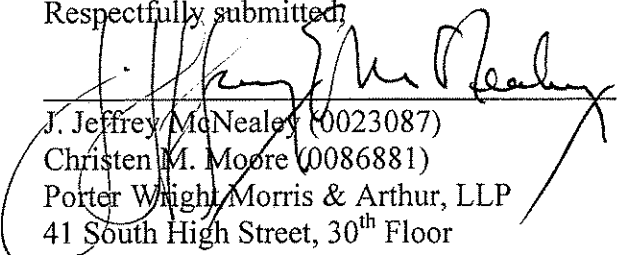
In re: NewChem, Inc. Facility  
EPA ID No. WVD074968413

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**NOTICE OF APPEAL**

NewChem, Inc. ("NewChem") seeks review of the Final Decision and Response to Comments ("Final Decision") issued by Abraham Ferdas, Director of U.S. EPA Region III, on November 29, 2011, and which NewChem first received on January 16, 2012. The Final Decision sets forth a Final Remedy for NewChem's New Cumberland, West Virginia Facility and requires, *inter alia*, that NewChem implement enhanced anaerobic bioremediation to treat groundwater contamination. An appeal brief is attached.

Respectfully submitted,

  
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**APPEAL BRIEF**

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## INTRODUCTION

NewChem, Inc. (“NewChem”) appeals the November 29, 2011 Final Decision and Response to Comments (“Final Decision”) of the Director of U.S. EPA Region III, which sets forth a Final Remedy for NewChem’s New Cumberland, West Virginia Facility and requires, *inter alia*, that NewChem implement enhanced anaerobic bioremediation to treat groundwater contamination. Because NewChem never received notice of the Statement of Basis from which the Final Decision was issued and, thus, never received opportunity to comment on the Proposed Final Remedy contained therein, the Environmental Appeals Board should order the Agency to withdraw the Final Decision, reopen the record for comment on the Statement of Basis, and reissue a final decision after NewChem has had adequate opportunity to comment on the Proposed Final Remedy.

## FACTUAL AND PROCEDURAL BACKGROUND

NewChem’s Facility is situated in Hancock County, West Virginia. The Facility comprises 13.71 acres, approximately six acres of which comprise the manufacturing portion of the Facility. The remainder of the Facility is wooded. The manufacturing portion of the Facility consists of a production area that is gated and fenced and a drum storage area located west of the production area, also gated and fenced. The Facility is relatively flat with a steep hillside at the western edge of the property that leads down to a gravel quarry and ponds remaining from quarrying operations. The Ohio River is located approximately 0.5 mile west of the Facility. Wooded land owned by the Mountaineer Race Track and Gaming Resort (MTR) is located south of the property.

Prior to NewChem’s acquisition of the Facility, the Facility operated in a manner that ran afoul of RCRA and CERCLA. As a result, from June 1993 through May 1996, EPA Region III

directed CERCLA emergency response activities at the Facility. All hazardous and non-hazardous waste drums were removed from the site during that period.

NewChem purchased the Facility and its assets from the previous owner out of a bankruptcy in 1997. As part of the purchase agreement, NewChem assumed all environmental liability for the Facility including the waste generated by the previous owner. NewChem began operating as a specialty chemical manufacturing facility. NewChem's operations included custom chemical manufacturing, solvent recovery, and production of powder biocides.

At the request of WVDEP for assistance in assessing environmental impacts at the Facility, in 2002 EPA issued an Administrative Order of Consent (ACO") to NewChem under Section 3008(h) of RCRA. The ACO required NewChem to conduct a site-wide environmental investigation to determine sources and extent of any contamination and to conduct interim measures, as necessary, at the Facility. NewChem fully complied with the ACO.

On August 25, 2011, Region III apparently issued a Statement of Basis under RCRA, in which the Region proposed to impose new requirements and conditions upon NewChem to remediate concentrations of trichloroethene ("TCE") in the groundwater surrounding the Facility. NewChem never received notice of the Statement of Basis. On November 29, 2011, the Region issued its Final Decision, adopting the Proposed Final Remedy contained in the Statement of Basis. NewChem did not receive notice of the Final Decision until January 16, 2012.

Counsel for NewChem and for USEPA Region III commenced discussion of informal ways to address these issues on January 29, 2012. On February 6, 2012, NewChem filed a Dispute Notification and Request for Withdrawal and Reconsideration of Agency Determination for NewChem, Inc. Facility (ID No. WVD074968413) and Request to Reopen the Record for

Statement of Basis with Region III. although USEPA Region III has acknowledged receipt of the Dispute Notification, it has taken no action thereon.

## **ARGUMENT**

### **A. USEPA's Rules And Guidance Documents Dictate That NewChem Should Have Been Timely Notified Of The Statement Of Basis.**

Basic fairness and USEPA's own rules and guidance documents require that the Agency grant NewChem's request. The Agency failed to timely provide NewChem with notice of Region III's August 25, 2011 Statement of Basis. 40 C.F.R. subpart 25 requires USEPA to "encourage . . . and assist the participation of the public" in its decision-making. 40 C.F.R. 25.3(a). The purpose of this requirement is to "assure that the government does not make any significant decision on any activity . . . without consulting interested and affected segments of the public." *Id.* at 25.3(c)(2). The Agency is further required to develop and maintain a list of persons and organizations who have expressed an interest in, or may be affected by, the Agency's activities. 40 C.F.R. 25.4(b)(5). Those interested parties are entitled to timely and periodic notification regarding the Agency's activities. *Id.* at 25.4(b)(5)-(c). USEPA's own guidance documents also require the public participation described above. *See* Guidance of RCRA Corrective Action Decision Documents: Statement of Basis and Response to Comments, EC-G-2002-103 (Apr. 29, 1991).

NewChem, as the owner of the Facility subject to Region III's Final Decision, clearly is an interested party and is entitled to receive notice of USEPA's actions that affect the Facility. Because it did not receive the required notice of the August 25, 2011 Statement of Basis within the time provided for comments, Region III's Final Decision should be withdrawn, the record should be reopened to allow NewChem to comment on the Statement of Basis, and the Agency should reconsider and revise its Final Decision in light of those comments.

**B. The ACO Required USEPA To Provide NewChem With Timely Notice Of The Statement Of Basis.**

Section XII.A.2 of the ACO requires that all “reports, correspondence, approvals, disapprovals, notices, or other submissions relating to” the ACO be sent to Robert Elefante, NewChem’s CEO, Thomas Walsh, a representative of CEC, NewChem’s environmental consultant, and J. Jeffrey McNealey, counsel for NewChem. Neither Mr. Elefante, Mr. Walsh, nor Mr. McNealey received notice of the August 25, 2011 Statement of Basis prior to receiving notice of Region III’s Final Decision adopting the Statement of Basis. Because the Agency failed to notify any of the individuals listed in the ACO of its Statement of Basis, the Agency should be required to withdraw the Final Decision, reopen the record for NewChem to comment on the Statement of Basis, and reconsider and revise the Final Decision in light of those comments.

**C. The Existence Of Additional Relevant But Unconsidered Information Requires That The Record Be Reopened And Supplemented.**

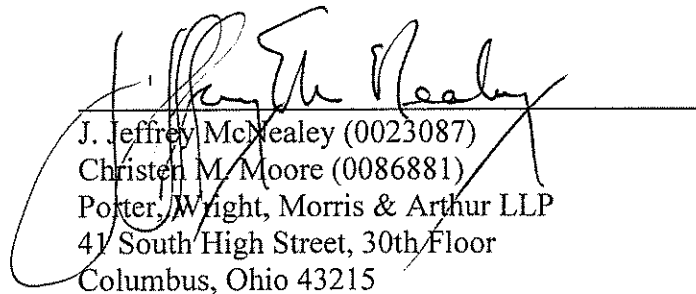
Region III bases its Final Decision on sampling conducted in May 2006, November 2009, and May 2010. The record does not, however, reflect the information contained in a January 2010 environmental site assessment report that Triad Engineering, Inc. prepared for NewChem’s parent, Deltech Resins Company. Nor does it reflect the Phase I assessment that CEC prepared for NewChem in March 2011. It also does not reflect three other environmental site assessment reports prepared and submitted in 2002 and 2003. And, it does not reflect the Progress Reports that NewChem submitted to Region III pursuant to the ACO. These documents contain new and additional information that is relevant to Region III’s analysis of NewChem’s Facility and the probable source and migration of TCE. Further, it does not include other information and analyses prepared on behalf of NewChem in 2010 and 2011 in anticipation of further discussions

with USEEPA Region III once it had reached a tentative conclusion and requested comments thereon. Thus, the record should be reopened to allow NewChem to submit, and the Agency to consider, this additional, highly relevant information.

### CONCLUSION

For the reasons set forth above, NewChem respectfully requests the Environmental Appeals Board to order the Agency to withdraw and reconsider its November 29, 2011 Final Decision and to reopen the record for the Statement of Basis issued August 25, 2011, to allow NewChem to comment on the Proposed Final Remedy contained therein and submit additional relevant information for the Region's consideration.

Respectfully submitted,



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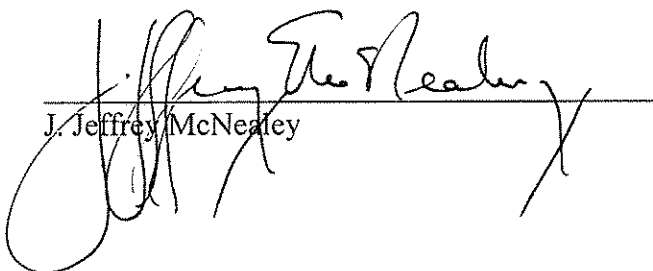


**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing was served via regular U.S. mail, postage prepaid, this <sup>14</sup>15<sup>th</sup> day of February, 2012 upon:

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