



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 10  
1200 Sixth Avenue  
Seattle, WA 98101

November 29, 2006

Reply to  
Attn Of: ECL-117

Mr. Doug Loutzenhiser  
Executive Vice President  
Legacy Site Services LLC  
468 Thomas Jones Way  
Exton, PA 19341-2528

Re: Arkema Inc Administrative Order on Consent for Removal Action, Docket No. 10-2005-0191; Dispute of EPA's Decision to Disapprove Arkema's July 2006 Engineering Evaluation/Cost Analysis (EE/CA) Work Plan and Modify the Work Plan, and Unresolved Directed Changes

Dear Mr. Loutzenhiser:

Please find enclosed my final written decision in the matter referenced above. In summary, I have supported the EPA Project Coordinator's decision to disapprove and modify the EE/CA and established a schedule for next steps. It is my expectation that EPA's development of Work Plan language on the definition of principle threat(s) and the other issues in dispute will provide the basis for final resolution in face-to-face discussion between EPA and Arkema. However, in the unfortunate event that agreement is not reached, I expect EPA's language to at least provide clarification in support of formal dispute resolution of the specific issues, if necessary.

I appreciate Arkema representatives' thoughtful approach to the information provided as part of this dispute process. I look forward to productive work between EPA and Arkema over the coming months culminating in an approved EE/CA Work Plan.

Sincerely,

  
Daniel D. Opalski, Director  
Office of Environmental Cleanup

Enclosure

November 29, 2006

Memorandum

Subject: Administrative Order on Consent for Removal Action,  
Docket No. CERCLA 10-2005-0191; Arkema Inc. Dispute Regarding EPA's  
Decision to Disapprove Arkema's July 2006 Draft Engineering Evaluation/Cost  
Analysis Work Plan and Modify the Work Plan, and Unresolved Directed  
Changes – Written Decision

From: Daniel D. Opalski  
Director, Office of Environmental Cleanup

To: File

Pursuant to the above-referenced Administrative Order on Consent (AOC), Arkema (most recently its agent Legacy Site Services LLC) has been engaged since June 2005 in production of an engineering evaluation/cost analysis (EE/CA) Work Plan. After Arkema's production of an initial draft EE/CA Work Plan, informal dispute on a number of EPA's directed changes to that initial draft, and Arkema's submittal of a revised draft EE/CA Work Plan, on September 21, 2006, the EPA Project Coordinator disapproved the revised draft EE/CA Work Plan and determined that EPA would modify the document. On October 4, 2006, Arkema disputed EPA's disapproval of the EE/CA Work Plan and decision to assume the work of modifying the document. Arkema further invoked formal dispute on EPA directed changes on the initial draft EE/CA Work Plan that were not previously resolved through the informal dispute resolution process. By memorandum dated October 20, 2006, the RPM elevated the dispute to the Director of the Office of Environmental Cleanup, requesting a decision on the narrow question of whether EPA had adequate basis to disapprove and modify the EE/CA Work Plan. By letter dated October 30, 2006, Arkema supplemented its dispute statement and proposed joint technical meetings as a means of resolving outstanding issues in order to move the project forward.

This memorandum documents my written decision of dispute as required by the AOC. A description of the administrative record that I relied upon to make this decision is attached.

**Discussion and Analysis**

The AOC provides broad authority for EPA to modify deliverables. Except for Arkema's right to dispute an EPA decision, EPA's modification authority is not expressly limited or qualified in any way in the AOC. Arkema, appropriately so, does not challenge the existence of this authority.

Arkema does, however, challenge EPA's exercise of its modification authority in this instance as "arbitrary, capricious, and an abuse of discretion."<sup>1</sup> I do not believe the record supports this assertion. Despite the many details presented, the overarching fact remains that production of the EE/CA Work Plan has gone well beyond the schedule presented in the statement of work (SOW) and a number of significant matters remain in dispute between the parties. The summary of the review process, whether the version presented by EPA or by Arkema, attests to the significant efforts between the parties to come to closure, yet those efforts have been unsuccessful to date. Given these circumstances, it was reasonable for the EPA Project Coordinator to consider the overall timeline and the rate of progress over time as factors in evaluating whether to continue the process followed to date (and to allow the attending additional extension of the schedule), or whether, in the alternative, other available approaches offered the prospect of more timely completion. Inherent in the Project Coordinator's decision was his recognition that EPA needed in any event to provide more definitive input on key topics to help move the process forward. While there certainly was no guarantee that the EPA modification approach would end up being more expeditious, the choice was not arbitrary and capricious.<sup>2</sup>

Not surprisingly, a measure of emotional content has been inserted into this discussion by EPA's assertion, in essence, that Arkema has not been adequately responsive and/or cooperative.<sup>3</sup> Clearly Arkema believes to the contrary that the record shows that Arkema has been responsive, including making adjustments to what it characterizes as changing direction and requests from EPA over time. Arkema's rather vigorous defense of EPA's assertion is an understandable and predictable response from a party that sees itself as having invested substantial effort to satisfy stated requirements. My sense is that unfortunately in part due to how EPA presented its rationale, Arkema sees EPA's decision as a punitive measure, rather than an attempt to move the project forward so as to achieve the shared goal of efficient use of time and money in completing the Work Plan.

Arkema's overarching representation regarding schedule is that it has performed in accordance with all EPA approved schedules. Focusing just on timeliness,<sup>4</sup> I note that Arkema's revised summary of the review process reflects its meeting of numerous interim deadlines. It is not my intent to characterize Arkema's meeting of these dates as insignificant. To the contrary, I believe this record supports Arkema's assertion that it

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<sup>1</sup> I note that the phrase "an abuse of discretion" incorporates the tacit acknowledgement that this discretion (or authority) exists. I presume that abuse of this recognized discretion is alleged because its exercise is deemed arbitrary and capricious, making "an abuse of discretion" arguably superfluous.

<sup>2</sup> While I am not bound by the AOC to consider an arbitrary and capricious standard, in doing so (in much the same way that courts look at an arbitrary and capricious standard of review) the question is not whether Arkema (or I) necessarily would have ended up with the same decision or course of action, but whether the decision made reflects consideration of the available information and is within reason based upon that information.

<sup>3</sup> As stated previously, EPA's modification authority is not expressly limited or qualified in the AOC, so Arkema's level of responsiveness or cooperativeness need not have been an explicit factor in the decision.

<sup>4</sup> The concept of responsiveness includes, of course, both the timeliness of a deliverable and the content of that deliverable. Content is addressed subsequently.

has made real efforts to be responsive in terms of timeliness. But I also recognize that it has been necessary for EPA to provide (and/or approve) the various interim schedules principally to accommodate the need to work through the numerous issues in dispute between the parties. It is not Arkema's adherence to one or more specific dates that is at issue here, but rather the fact that it already has taken well over a year to produce a Work Plan that is still not finished.

As to the content of deliverables<sup>5</sup> in general, in its expanded summary of the review process, Arkema references many additional conversations and emails in addition to those identified by EPA in its initial summary. There generally is not sufficient information provided for me to accurately evaluate the communications (by representatives of either party) in terms of clarity, consistency, nuance, or appropriateness (i.e. responsiveness) of content. In fact, while on the one hand the frequency of communication can be viewed as positive, I also appreciate that this frequency can as easily be negative if the content is not thoughtfully managed - a responsibility shared by both parties. Assuming good faith commitment by both EPA and Arkema toward closure, I nonetheless conclude based upon my review of the record (and my meeting with both parties on November 2, 2006) that a number of different factors have likely been at play in communications between the parties, including mismatches in expectations regarding level of detail; bona fide evolution in thinking (and therefore comments/responses) by each party, likely at least in part as an artifact of iterative communications; multiple personnel communicating, increasing the likelihood for use of different terminology and/or differences in emphasis; the strong staking out of positions such that even compatible concepts presented by the other side are not heard or understood; focus on some issues the resolution of which is likely to be of little consequence to decision-making for this removal action; and nuances that are difficult to convey. In light of this conclusion, I further conclude that whether or not Arkema has itself been consistently responsive in terms of content, some modification of the approach was not only reasonable but warranted, because the parties appear to be at loggerheads on remaining issues working within the established approach.

More specifically, Arkema calls out the definition of principal threat as significant in the overall ongoing dispute. Arkema states repeatedly that the lack of clearer definition by EPA of the principal threat(s) at this site is a barrier to completion of its work. Arkema states that "...the foundation of a non-time critical removal action (NTCRA) is to implement a removal action on the principal threat area of a site..." Arkema's submittals on the dispute go further to infer that addressing the principal threat is the only appropriate aim of a NTCRA. In fact, nothing in CERCLA or the NCP, or EPA guidance for that matter, constrains the scope or objective of an NTCRA to addressing principal threats.<sup>6</sup> More accurately, as provided in the NCP, the task of an EE/CA is, in part, to evaluate which threats can and should be addressed through a NTCRA that "...shall, to the extent practicable, contribute to the efficient performance of any anticipated long-term remedial action..." While it certainly makes sense to attempt

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<sup>5</sup> "Deliverables" refers to not just the drafts of the EE/CA Work Plan but the various interim deliverables called for as part of the ongoing process of clarification and working through issues.

<sup>6</sup> Department of Energy guidance is not particularly relevant to this circumstance.

to address higher end risks with a NTCRA, in some cases this may not be feasible given physical or other constraints. On the other hand, it may be that the effective difference in scope and scale between addressing higher end threats and addressing mid-range (or even low end) threats is small enough to indicate that a broader NTCRA (in terms of threat or risk reduction) is more appropriate. That being said, it is useful to look at the record relative to this particular NTCRA. Paragraph 21 of the AOC states that the removal action "...will address, at a minimum, the principal threat..." As such, the AOC does not expressly limit other considerations, but it is clear that the parties agreed to principal threat(s) as a key consideration. The SOW incorporated into the AOC further states that one of its primary purposes is to "...expedite the characterization, feasibility study, cleanup alternatives analysis, and performance of cleanup on the principal threat..." Again, this does not limit the scope of the removal action to only addressing principal threats, but the purpose description goes further to make clear that the removal action will not "...address all contamination and releases of hazardous substances from the Arkema Site that may be posing unacceptable risks to human health and the environment." Clearly the language in the AOC and SOW supports the notion that at the time of AOC signature the parties envisioned a central but not necessarily exclusive role for principal threat(s) in defining the extent of the removal action. Therefore, while I disagree with aspects of Arkema's rationale, I fundamentally agree with Arkema's need for more definitive input from EPA on how the agency is viewing the matter of principal threat(s) at this site.

A key aspect of the Work Plan that is related to principal threat is the description of the methodology for determining the removal action area (RAA). Based on the discussion above, I believe Arkema's synonymous or near synonymous use of "principal threat" and "removal action area" (RAA) is, at least at this point, premature and therefore not appropriate. Nonetheless, the definition of the principal threat(s) remains an important step in the process of establishing the RAA. Beyond the issue of principal threat, other criteria have been suggested by EPA. Arkema has begun to address some of these criteria, but this is clearly a high priority topic for work by and/or between the parties. At the same time, both parties acknowledge what they already agreed to in the AOC: the final boundaries of the RAA will be established in the EE/CA. Beyond the EE/CA Work Plan, there are two opportunities to refine the RAA boundary already built into the EE/CA process: the Removal Action Area Characterization Report and the EE/CA Report.<sup>7</sup> This being the case, significant investment in or emphasis on the RAA boundary at this time seems appropriate only to the extent that an overly limited representation may lead to insufficient data collection for identification of the appropriate final RAA boundary. Rather, the focus should be on refining the methodology for determining the RAA, identifying the types of data that are needed to support that methodology, and identifying the gaps in the available data that need to be addressed.

Several of the disagreements between the parties, while important to one or both for various reasons, do not appear to be critical to the objective of conducting the EE/CA, and as such do not seem necessary to resolve in order to move forward with the Work

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<sup>7</sup> There is, in fact, a third opportunity after completion of the EE/CA: EPA's selection of the removal action(s) in the action memorandum.

Plan and with the EE/CA itself. For example, directed changes 14 and 17, while potentially important for final remedial decisions at the site, are unlikely to have much, if any, bearing on the EE/CA or on the selection of appropriate removal action(s) for sediments. Likewise, completely resolving some of the details of the conceptual site model may be desirable but not strictly necessary to move forward with the EE/CA or to make support selection of appropriate removal actions.

Although the path forward selected by the EPA Project Coordinator and that proposed by Arkema are different, they are based on several important areas of agreement. First, both parties recognize that in its revised draft Work Plan Arkema made progress in addressing EPA's comments on the initial draft. Second, the parties agree that communication between the parties at the project level needs improvement in order for the project to move forward in a more timely fashion. Third, the parties agree that a critical next step is for EPA to provide more definitive information and/or comments on issues such as its definition of principal threat(s) at the site. Finally, the parties agree that disputed directed changes left unresolved during prior informal negotiations need to be resolved through the pathway forward resulting from this final dispute resolution. (EPA's position is that its modified Work Plan will either resolve the prior disputes or provide the basis for re-engaging in the informal dispute process, while Arkema suggests that the prior disputes can be resolved directly through joint technical meetings.) With the two alternative approaches proffered and these areas of agreement, I see the choice before me as selecting one of the two alternatives or requiring some variation.

Finally, a critical consideration for moving ahead is the impact of this work on other work at the Portland Harbor Superfund Site, and vice versa. In particular, a major deliverable for the site-wide, in-water remedial investigation/feasibility study will be delivered to EPA and its partners for their review on February 21, 2007. Review of this deliverable is expected to be very resource intensive. Therefore, to avoid the likely loss of several additional months in the Arkema removal action schedule, the EE/CA Work Plan needs to be substantially complete by no later than February 21, 2007, so that Arkema can proceed with development of the field sampling plan(s).

### **Final Decision**

I find that the EPA Project Coordinator acted within his authority in disapproving the revised EE/CA Work Plan and deciding that EPA will modify the document. He took into account the extended period of time it has taken to develop the Work Plan to its current state, recognized the need for EPA to provide more definitive positions on key issues still needing resolution, weighed the potential for time and cost savings, and determined a path within his authority that does, in fact, offer potential time and cost benefits. However, in order to reduce the likelihood of future disputes on the EE/CA Work Plan issues, it is important to move forward with a process that also allows for continued engagement and opportunity for input by Arkema before the Work Plan is considered final.

Therefore, the EPA and Arkema Project Coordinators shall agree upon a date that shall be no later than February 20, 2007, and a location, to meet in person for at least a full day. No less than seven working days prior to the agreed upon date of the meeting, EPA shall provide Arkema in writing EE/CA Work Plan language that addresses, at a minimum, the definition of principal threat(s) at the site, the methodology for determining the RAA, and the remaining disputed issues between the parties. EPA shall provide the language in a red-line/strike-out format to facilitate Arkema's review. At the meeting, the parties shall focus first and foremost on the principal threat definition and the RAA methodology. Other topics shall be taken up as time allows. Arkema shall have the opportunity to ask questions about and propose modifications to the language. The parties shall ensure that the resources (e.g. a computer and projector) are available in the meeting to allow for displaying the language and facilitate making real-time changes based upon discussions.

Although the objective for EPA's development of modified language and the follow-up meeting is to develop and incorporate final EE/CA Work Plan language, Arkema shall have the right to raise for formal dispute any issues still remaining in disagreement.

### **Administrative Record**

#### **Administrative Order on Consent for Removal Action, Docket NO. CERCLA 10-2005-0191; Arkema Inc. Dispute Regarding EPA's Decision to Disapprove Arkema's July 2006 Draft Engineering Evaluation/Cost Analysis Work Plan and Modify the Work Plan – Written Decision**

1. EPA Dispute Position Statement, October 20, 2006
2. Arkema (LSS) Dispute Position Statement, October 30, 2006
3. Administrative Order on Consent Docket No. 10-200500191
4. Memorandum on Proposed Screening Approach, D. Livermore & M. Herrenkohl to L. Patterson, November 30, 2005
5. Revised Draft EE/CA Work Plan, July 14, 2006
6. EPA Comments to Arkema December 2005 through June 12, 2006
7. CERCLA, as amended
8. National Oil and Hazardous Substances Pollution Contingency Plan