

JAN. 31 89 11:52 LATHAM & WATKINS WASH., D.C.

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File-32

TO: **Sponsors of Hydrolysis Testing** DATE: **January 31, 1989**
FILE NO: **015237-0000**

FROM: **William K. Rawson** COPIES TO: **Robert M. Sussman**

SUBJECT: **Status of Hydrolysis Testing**

Attached is a memo summarizing yesterday's visit to ATS. We recommend that a conference call be scheduled to address the following issues.

1. Whether to proceed with ATS or switch to MRI or another laboratory. MRI has a window of availability, but needs to know this week if MCIA wants to switch laboratories.
2. Whether to accept contract modifications proposed by ATS.
3. Whether to request more than a two month extension of the due date for submission of the final report. Based on recent telephone calls with EPA, we believe a longer extension would be granted.

We are trying to arrange a conference call for this afternoon at four o'clock.

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TO: Sponsors of Hydrolysis
Testing

DATE: January 31, 1989

FILE NO: 015237-0000

FROM: William K. Rawson

COPIES TO: Robert M. Sussman

SUBJECT: Visit to ATS

On Monday, January 30, 1989, I visited ATS with Ed Hobbs (Dow Corning) and Dan Markham and Tim Lickly (Dow Chemical). The following is a report of the visit.

(1) Technical Issues. Ed Hobbs, Tim Lickly and Dan Markham toured the facility and spoke with Phil Simon at length concerning recent technical difficulties with the hydrolysis testing. I spoke with all three afterwards. Tim and Dan appear satisfied that ATS has identified and solved the hardware problem that resulted in low recoveries and high variability of test results. Tim stated that he felt ATS was analytically well-equipped to perform the testing. He noted that ATS performs this type of analysis (USEPA standard method 601) routinely. The principal open question pertains to biological contamination observed in some of the test samples. Tim said he would like to address this issue with Gary Klecka at Dow Chemical, to determine whether this presents a problem. However, he noted that ATS has identified steps that might be taken to eliminate the biological contamination. Overall, Tim and Dan appear to have a fairly high level of confidence in ATS' ability to perform the required testing. I have asked that Tim, Dan or Gary Klecka participate in our conference call to provide a more detailed report and answer questions.

(2) Contract Issues. I spent most of my time addressing contract issues, first with Phil Simon's attorney, then with both Phil Simon and his attorney, then with the attorney (following a consultation between Phil Simon and his attorney), and finally one last session with both. Most of their suggested changes were minor and appear acceptable. (See attached draft marked to show all requested changes.) However, there was a significant disagreement concerning the indemnity provisions in paragraphs 15 (pertaining to failure to comply with the final rule and GLPs) and 26 (pertaining to property damage and personal injury claims arising out of ATS' testing activities). ATS requested that their liability under each provision be limited to the amount paid under the contract. We

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rejected this approach with respect to both paragraphs. We said there should be no ceiling on paragraph 26, and they agreed. We suggested capping liability under paragraph 15 at the amount of ATS' insurance coverage, and they did not agree. Phil Simon proposed a cap at five times the amount paid under the contract. His arguments in support of this position were as follows: (1) the contract is too small to justify greater liability; (2) a potential penalty of five times the contract price (at least \$50,000) provides an adequate incentive for a facility of ATS' size to ensure proper performance; and (3) ATS has acted in good faith and already undertaken substantial efforts to complete the test program. I pointed out a number of reasons why MCIA members need the full protection of paragraph 15 for any test conducted under a Section 4 test rule. Ed Hobbs supported my comments, but Phil Simon was unwilling to change his position.

Draft 11/01/88

AGREEMENT
between
METHYL CHLORIDE INDUSTRY ASSOCIATION
and
ANN ARBOR TECHNICAL SERVICES, INC.

I. SCOPE AND PARTIES

1. The parties to this Agreement are Ann Arbor Technical Services, Inc. (ATS) and the Methyl Chloride Industry Association (MCIA).
2. MCIA will be represented during performance of this Agreement by Robert M. Sussman and William K. Rawson, its legal counsel. All written and oral communications with MCIA shall be addressed to Mr. Rawson or his designee. Copies of written communications will be simultaneously transmitted to Mr. E. Hobbs, of Dow Corning Corporation, MCIA's Chairman. *by those portions of*
3. ATS agrees to perform the hydrolysis tests required for methyl chloride ~~in~~ the Office of Solid Waste Chemicals Final Test Rule (53 Fed. Reg. 22300, June 15, 1988). *that are applicable to this contract.* The Final Test Rule is incorporated in this Agreement by reference and will become a part ~~ther~~ *of* *of* this Agreement.

A copy of the Final Test Rule is attached to this Agreement as Exhibit A.

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identified in Paragraph 6

4. All changes in this Agreement, including any increases in cost, must be authorized in writing by MCIA's representatives identified in Paragraph 2. Such changes will be incorporated in an addendum to this Agreement and will become a part thereof.
5. ATS will be an independent contractor in the performance of this Agreement. Before subcontracting or assigning any portion of the work, ATS will obtain MCIA's written approval. No such approval will relieve ATS from any of its obligations under this Agreement. ATS agrees to bind each of the subcontractors to the provisions of this Agreement.
6. ATS agrees that testing under this Agreement will be directed and personally supervised by Philip B. Simon. If Philip B. Simon is unavailable to perform this function, ATS agrees to notify MCIA promptly, in which event the Agreement will be subject to renegotiation at MCIA's option.
7. This Agreement will become effective upon its execution by MCIA and ATS.

II. TERMS OF PAYMENT

8. ATS shall undertake the required testing on a time and materials basis, with monthly billings at ATS's standard rates set forth in ~~Attachment A~~ ^{Exhibit B}. Invoices shall be paid within ~~(30)~~ ^{thirty} days of receipt by MCIA. ATS has estimated

(Ten Thousand)

(Dollars)

that the required testing can be completed for approximately (\$10,000) [ATS shall not exceed this amount without prior written authorization from MCIA. *Billings by* *ATS shall perform its services*

III. SCHEDULE FOR TESTING AND REPORT SUBMISSION

9. The hydrolysis study must be completed and the final *under this Agreement at its facility in Ann Arbor, Michigan* results submitted to EPA on or before ~~January~~ 29, 1989. ATS will initiate the required testing upon execution of this agreement.
10. On or before [12 weeks], ATS will provide MCIA with one unbound original and one copy of a draft of the final report. MCIA will provide comments to ATS on the draft report within ¹⁴ days of its receipt. Within ¹⁴ days thereafter, ATS will provide MCIA with one unbound original and 8 copies of the final report. At the same time, ATS will provide a written response to any MCIA comments which are not incorporated in the final report. The final report will identify the objectives of the study, describe the methodology employed, record essential data, describe the statistical methods used to analyze the data, and discuss the study's results and conclusions.
12. Because timely submission of the report is essential for compliance with the Final Test Rule, the contract price will be reduced by ^{five (5%)} percent for any delay of more than ^{seven (7)} ~~two~~ days in receipt of the draft or final report as required by the schedule set forth in paragraph 10. Conversely, the contract price will be increased by 5

percent if ATS submits the draft report more than ^{seven (7)} ~~one~~ ^{days} ~~week~~ in advance of the scheduled delivery date.

IV. QUALITY ASSURANCE AND INTERPRETATION OF RESULTS

13. ATS will provide MCIA representatives with reasonable access to ATS's personnel and the portion of its facilities engaged in testing subject to this Agreement. ATS shall cooperate fully in facilitating audits, visits and inquiries by MCIA concerning the status of the hydrolysis testing.

14. ATS shall comply with all applicable ~~U.S. Government~~ ^{provisions of the Final Test Rule, with the test guidelines set forth at 40 CFR 796.7500} regulations, including EPA's TSCA Good Laboratory Practice ("GLP") regulations, 40 CFR, Part 792.

15. ATS understands that failure to comply with GLP ^{applicable} regulations or with the test guidelines or other ^{applicable} provisions of the Final Test Rule may result in the imposition of civil penalties under Section 16 of TSCA.

ATS agrees to protect, indemnify, and hold harmless MCIA and each of its members from any ^{such} and ~~all~~ penalties, and the ^{and amounts hereinto, including reasonable} ~~amounts~~, costs, expenses, attorney's fees, and other liabilities which may be ^{arise} ~~incurred~~ as a result of the ^{by ATS} ~~MCIA's~~ failure to follow GLP regulations or applicable test guidelines or ^{applicable provisions of} ~~otherwise comply~~ with the Final Test Rule, unless such failure occurs because of negligence, misconduct or nonperformance by MCIA or any of its

provisions of the Final Test Rule, with the test guidelines set forth at 40 CFR 796.7500 (Hydrolysis is a function of pH at 25°C), as amended in the Final Test Rule, and with

LATHAM & WATKINS WASH, D.C. were, that the maximum liability of ATS under this paragraph shall be no greater than five times the aggregate sum of money paid to member companies or because of ~~scientific~~ ^{ATS under this Agreement} factors beyond ATS's control.

16. In the event GLP violations, noncompliance with ^{applicable} test guidelines or other ^{non-compliance with applicable provisions of the Final Test Rule} ~~inadequate~~ performance by ATS results in the rejection by EPA of the test results of the hydrolysis testing ^{required} ~~encompassed~~ by this Agreement, ^{shall} ~~ATS agrees to~~ repeat testing within a reasonable period of time at no additional cost to MCIA, if requested to do so by MCIA.
17. ATS shall immediately inform MCIA in writing if it obtains information indicating that the hydrolysis study covered by this Agreement may not comply with GLP regulations, applicable test guidelines or other provisions of the Final Test Rule because of nonconformities in conducting these studies or because of deficiencies in general laboratory practices.

IV. DISCLOSURE OF STUDY RESULTS

18. ATS and MCIA agree to full public disclosure of all scientific information contained in the final report prepared in accordance with this Agreement. ATS shall not release such information, however, without prior MCIA knowledge and review.
19. ATS will be solely responsible for scientific conclusions and professional judgments arising out of performance of testing under this Agreement. ATS, however, will not publish or otherwise release data,

conclusions, or manuscripts in a citable or quotable form without notifying and consulting with MCIA.

V. DATA RETENTION

20. All records, raw data or other documentation relating to the testing covered by this Agreement shall be retained for a period of ~~at least~~ ten (10) years from the date of conclusion of the test or until such ^{earlier} time as MCIA shall designate in writing.
21. ATS shall retain all files, informal notes, correspondence, memoranda, schedule sheets, copies of protocols, records of quality assurance inspection, or other comments relating to the planning, conduct or interpretation of testing covered by this Agreement, including documents generated by laboratory personnel or employees of MCIA and its member companies. Such documents shall be stored in a safe, secure manner and retained for a period of ten (10) years from the date of the conclusion of the test unless MCIA has notified ATS in writing that they may be discarded.
22. The materials retained pursuant to paragraphs 20 and 21 shall be stored in an archive which ensures that they will be maintained in a safe and secure manner and allows for their expeditious retrieval when needed. Materials retained in the archive shall be indexed by test substance, date of study, test system and nature of study. In the event that ATS or its archiving facility

discontinues operations, all raw data and other documentation pertaining to the testing covered by this Agreement shall be transferred to such other facility as MCIA may direct in accordance with EPA requirements for such transfer.

VII. DATA DISCLOSURE

23. ATS will not disclose any confidential business information it may receive from MCIA, its member companies, or any of their representatives, provided such information has been clearly designated as in writing "CONFIDENTIAL BUSINESS INFORMATION."
24. ATS will immediately notify MCIA of any private or governmental request for information on ^{pending} ~~ongoing~~ or completed testing conducted under this Agreement, including any subpoena or other legal instrument requesting information. ATS will cooperate fully with any effort by MCIA to respond to such a request. *ATS shall bill MCIA at its standard rates for such additional services.*
25. ATS shall permit duly designated EPA inspectors to inspect its facilities at reasonable times and in a reasonable manner. ATS shall immediately notify MCIA of any EPA inspection requests. ATS shall, upon request, provide MCIA with copies of any data or other materials furnished to EPA during an inspection of ATS's facilities. ATS shall also advise MCIA of the findings and observations of EPA inspectors and provide MCIA with

a copy of any written inspection report which it receives.

VIII. MISCELLANEOUS PROVISIONS

26. ATS, by entering into this Agreement, agrees to protect, defend, indemnify, and hold MCIA or its member companies harmless from any and all claims for property damage, personal injury or death which arise out of or in connection with ATS's performance of activities covered by this Agreement. ATS, however, shall not be liable for such claims to the extent that they arise out of the negligence ^{or misconduct} of MCIA or its member companies. ATS will carry comprehensive liability insurance in an amount adequate to cover the performance of this Agreement.

(requested
up as
liability
not
included)

27. ~~ATS agrees~~ ^{ATS shall} if requested by MCIA, ~~to~~ ^{any} meet with or prepare a written statement for EPA or other regulatory agencies regarding the testing covered by this

Agreement. Where such a request involves the validity of the test results obtained by ATS or the quality of its laboratory practices, ATS shall bear the costs associated with addressing the issues raised.

Otherwise, ATS's fees for such a meeting or statement will be negotiated, but will not exceed the fees ATS usually charges for such professional consultation.

ATS shall
bill MCIA
on a time
and
materials
basis at
its
standard
rates for
such services.

28. This Agreement and all documents incorporated by reference represent the entire contract on this subject between the parties. There are no oral or written

promises, terms, conditions, or obligations other than those contained herein, and this Agreement supersedes all previous communications, representations or agreements, either oral or written, between the parties on this subject.

29. This Agreement is subject to, and is to be construed under the laws of the ^{State of Michigan.} ~~District of Columbia, United States of America.~~ ~~Actions under this Agreement shall be brought in any court of competent jurisdiction in the District of Columbia.~~
30. The obligations imposed under this Agreement shall apply to the legal successors and assigns of ATS, including any acquirors of all or substantially all of its assets, and of NCIA.

ACCEPTED FOR:

ACCEPTED FOR:

METHYL CHLORIDE INDUSTRY
ASSOCIATION

ANN ARBOR TECHNICAL SERVICES,
INC.

Name Signed

Name Signed