

MEMORANDUM

To: Albert “Kell” Kelly
From: HHQ Ventures, LLC
Re: Summary of Remaining Issues with Region 2’s Proposed Administrative Order on Consent for the Troy Chemical Corporation, Inc. Newark Plant Site
Date: October 4, 2017

Troy Chemical Corporation, Inc. (Troy) received a revised Administrative Order on Consent (AOC) from EPA Region 2 on the evening of September 29, with a cover email that a final decision on the AOC is needed within one week. As with prior versions, EPA rejected many of Troy’s proposed changes. Nonetheless, in the spirit of compromise, Troy is willing to forgo the bulk of its proposed changes and focus on only a few key issues in order to finalize the agreement. The following is a brief summary of the remaining issues with regard to the AOC:

- **Covenant not to sue:** The AOC includes a provision that Troy covenants not to sue the United States with regard to matters addressed by the AOC. Troy proposed limiting the covenant not to sue to any future claims against EPA, instead of the United States as a whole, since the U.S. Government is potentially liable for contributing to the contamination at the site. The ditch/culvert that traverses the Troy site historically carried industrial wastewater from a large section of an area of Newark that has been heavily industrialized since the early 20th century. Initial research indicates that several upstream and on-site industrial sources had strong connections with the U.S. Government, including as government contractors and suppliers during World War II, which may trigger liability for the government either as an “operator” under CERCLA or based on specific contract provisions. In light of this information, we believe the covenant not to sue in ¶89 should be limited to future claims against EPA, rather than the United States as a whole. **EPA’s Position: At our Sept. 14 meeting, Region 2 stated they would need approval from the Department of Justice to make this revision, and that Troy would need to provide evidence that a federal entity is a PRP. Troy agreed to get further information to EPA. However, the 9/29 version of the AOC received from EPA retained the standard covenant that would release the United States as a whole.**
- **Findings of Fact:** The Findings of Fact in the AOC only discuss historic contamination that originated on the Troy plant site. However, the principal contaminated area on the site is a drainage ditch which was formerly part of the City of Newark industrial and storm water system. Therefore, contaminants from upgradient industrial facilities as well as from former on-site entities are present in the ditch at the Troy plant site. Troy has proposed a revised Findings of Fact section that provides a more balanced and complete set of facts regarding the site

and potential sources of contamination. This issue is important to avoid public misperception of the nature and sources of the contamination at Troy's plant site.

EPA's Position: Region 2 accepted revising the headings to "EPA's Findings of Fact" and "EPA's Conclusions of Law", but did not agree to further changes to the facts.

- **EPA Oversight of Offsite Waste Shipments:** The AOC contained standard language that EPA will oversee all offsite waste shipments. This standard language does not work for operating sites like Troy's that regularly generate waste from operations that are unrelated to the remediation work under CERCLA. Troy suggested limiting EPA oversight of off-site waste shipments/releases to wastes *generated by the remediation work* in three places, but EPA accepted only one of those changes. In ¶41(a), EPA accepted our revision that EPA's oversight of off-site waste shipment is limited to the waste generated by the remediation work. However, EPA rejected a similar change in paragraph 41(b) with regard to out of state shipments, which appears inconsistent. EPA also rejected a similar change in ¶44(b). This is an important issue to be corrected to ensure that the AOC does not interfere with Troy's on-going plant operations. **EPA's Position: Given that EPA accepted this revision in ¶41(a), it is unclear why EPA rejected a similar change in paragraphs 41(b) and 44(b).**
- **Limitation of Oversight Costs:** EPA rejected Troy's suggested revision to ¶82 that indirect costs would be reduced by 50% if Troy provided timely, adequate deliverables. As we pointed out to Region 2, EPA's Recent Superfund Task Force Report recommends reducing oversight costs "for PRPs that perform timely, high quality work. This may include a compromise that reduces indirect cost charging." Report at v. The Report also recommends that EPA: "Develop a plan to provide financial incentives in the form of reduced oversight to PRPs who perform timely, quality work under an agreement by reducing the costs associated with EPA's oversight, including adjustments to indirect costs." Report at 10. Based on this recent directive from EPA Headquarters, Troy is disappointed that Region 2 did not agree to provide this proposed provision re using oversight cost reductions to incentivize timely, high quality deliverables under the AOC. **EPA's Position: Region 2 said the Regions have been directed by Headquarters that the findings of the Task Force Report will not be implemented until sometime in 2018 so they have no basis to consider this request now. EPA representatives also stated that the overhead rate for indirect costs is set by Headquarters not the Region.**