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December 21, 1989

*rec'd 2/26
ARC*

Amy Chester, Esquire
Assistant Regional Counsel
UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY
26 Federal Plaza
New York, N.Y. 10278

Dear Amy:

Enclosed are the comments prepared on behalf of L'Henri, Inc. to the proposed settlement order. It is my understanding that Texaco and Esso would prefer that these comments be submitted directly to the EPA rather than be incorporated into a single set of comments to be submitted by all parties.

As is evident from the comments submitted, it is our position that a work plan acceptable to all parties should be negotiated along with the terms of this order. L'Henri will be able to submit a proposed work plan within twelve (12) weeks.

Please feel free to contact me if you wish to discuss this matter further. I look forward to hearing from you.

Sincerely,

Nancy D'Anna

Nancy D'Anna

ND:dcd
Enclosure

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COMMENTS ON EPA'S ORDER

Page No. 1 - Paragraph No. 1: The first sentence should read as follows: "This Administrative Order by Consent ("Order") is entered into with the above-captioned ...".

Page No. 2 - Paragraph No. 3: This paragraph should read as follows: "EPA and the Respondents", acting in good faith to resolve environmental conditions existing at the Site to further the public interest, to avoid prolonged and complicated litigation, and to undertake a remedial investigation and feasibility study to determine the extent of which Hazardous Substances are present at the Site, and to develop remedial alternatives, without trial or adjudication of any issues of fact or law and without admission by the Respondents to liability for any purpose, enter into this Consent Order".

Page No. 4, Part III, Paragraph No. 1: The order should apply to and be binding on Respondents and "all of their heirs, successors, and assigns".

Page No. 9, Paragraph No. 34: This paragraph should read as follows: "Benzene, 1, 2-Trans--DCE, PCE, toluene and TCE are Hazardous Substances".

Page No. 10, Part V, Paragraph No. 7: This paragraph should read as follows: "O'Henry Cleaners owned and/or operated the O'Henry facility at which one hazardous substances was disposed of ..."

Page No. 11, Part VI: A New Paragraph , Paragraph No. 3, should be added to read as follows: "The foregoing Findings, Conclusions and Determinations have been made by EPA and are specifically denied by Respondents. Without limitation, Respondents deny that they are "responsible parties" under Section 107(a) of CERCLA, 42 U.S.C. §9607(a); and that conditions at the Facility or surrounding area present or may present an imminent and substantial endangerment to the public health, welfare, and/or the environment within the meaning of §106(a) of CERCLA. By consenting to this Order, or by taking any actions under this Order, Respondents do not concede the correctness of any fact alleged, or the validity of any legal finding or determination asserted in the foregoing Findings, Conclusions, Determinations or elsewhere in this Order. Neither this Order nor any action taken by Respondents pursuant to this Order shall constitute any evidence against Respondents, an admission of liability or responsibility by Respondents, a waiver by Respondents of any rights or defenses, or an estoppel against Respondents with respect to any matter, act, claim or thing related in any manner to the Facility for

any purpose other than in an action by EPA to enforce the terms of this Order. No payment(s) by Respondents pursuant to this Order, except for any stipulated penalties that may be required under paragraph below, shall be construed to be a fine, penalty, or monetary sanction. Nevertheless, Respondents agree not to contest the authority of jurisdiction of the Regional Administrator to issue this Order, and agree not to contest the validity or terms of this Order in any action brought by EPA to enforce the terms hereof."

Page No. 11, Part VI: A new paragraph number 4 should be added to this part: "Notwithstanding any other provision of this Order, Respondents reserve the right to contest in any proceedings the propriety of any determination or other action of EPA under this Order except as provided in the above paragraph number 3."

Page No. 11, Part VII, Paragraph No. 1: Paragraph number one should read as follows: "The Regional Administrator, EPA Region II, hereby orders and agrees that ..."

Page No. 11, Part VII: The following paragraph should be included under Part VII. "The Work Plan, the Remedial Investigation Report, in addition to all other Reports, Work Plans and other writing required under the terms of this Order, upon approval by EPA, are incorporated into this Order."

Page No. 16, Paragraph No. 14: This paragraph should read as follows: "B. EPA will review Respondents' Work Plan, QAPA, and the HSP, and comment thereon in writing. EPA will address its initial comments to the conformance of the Work Plan, QAPA and the HSP with sound management, engineering and scientific practices; technological feasibility; and established environmental monitoring procedures. EPA will include in its initial comments an explanation of their basis. Within 5 business days of receipt of EPA's initial comments, Respondents will have an opportunity to meet with EPA to discuss such comments before they become final. Within 14 days of Respondents' receipt of the written final EPA comments, Respondents shall amend the Work Plan, QAPA and the HSP as required by those comments or as otherwise approved by EPA and submit the modified document to EPA."

Page No. 17, Paragraph No. 2: This paragraph should read as follows: "EPA will review the Preliminary RI Report and comment thereon in writing. EPA will address its initial comments to the conformance of the Preliminary RI Report with the NCP and the Work Plan. EPA will include in its initial comments an explanation of their basis. Within 5 business days of receipt of EPA's initial comments, Respondents will have an

opportunity to meet with EPA to discuss such comments before they become final. Within 30 days of Respondents' receipt of such written final EPA comments, Respondents shall amend the Preliminary RI Report as required by those comments or as otherwise agreed upon by EPA, and shall promptly submit the amended report ("the RI Report") to EPA. EPA may, if necessary to accomplish the goals of the RI/FS as stated in the approved Work Plan, require the performance of additional investigatory work consistent with the provisions of the NCP and in conformance with a schedule to be set forth by EPA."

Page No. 18, Part VIII, Paragraph No. 2: This paragraph should read: "Respondents shall use their best efforts ...".

Page No. 20, Paragraph No. 3: This paragraph should read as follows: "Respondents shall grant access to the areas in the Tutu Wells Site, which are under their control, to EPA, DPNR, the various Respondents and each parties' respective representatives, agents, employees, contractors, and consultants. The Respondents shall permit EPA and DPNR representative to be present at those areas in the Tutu Well Site which are under their control, at any and all times and to observe any and all activities conducted pursuant to this Order."

Page No. 21, Paragraph No. 7: This paragraph should read as follows: "Upon request by EPA or DPNR, two business days in advance, Respondents shall provide split samples of any material samples in connection with the implementation of this Order."

Page No. 21, Part X, Paragraph No. 1: This paragraph should read as follows: "If EPA disapproves any plan, report, or other items required to be submitted to EPA for approval pursuant to this Order, unless otherwise provided by this Order, Respondents shall have ...".

Page No. 23, Part XIII: The following two new paragraphs should be added to this part: "6. Nothing contained in this Order shall affect any right, claim, interest, defense or cause of action of Respondents with respect to EPA or third parties." "Nothing in this Order shall be construed as any determination by EPA or by Respondents as to the appropriate degree of relative contribution of Respondents in the performance of this Order, or with respect to any other matter arising out of the operations of the Facility, or with respect to any indemnity obligations as between Respondents and other persons, or as a waiver of any rights or contribution and indemnity."

Page No. 24, Paragraph No. 4: This paragraph should read as

follows: "If Respondents fail to conform ... and such failure is not excused by a force majeure event or by an extension of the time frame granted in accordance ...".

<u>"Days After Required Date</u>	<u>Stipulated Penalties</u>
0-5	\$ 0 for each day
6-10	\$ 250 for each day
11-20	\$ 500 for each day
greater than 21	\$1,000 for each day

Page No. 24, Paragraph 5: The last sentence of this paragraph should be deleted.

Page No. 25, Part XVII: The following paragraphs should be substituted in this section: "Respondents' activities under this Order shall be performed within the time limits set forth herein unless performance is delayed by events which constitute a force majeure. For purposes of this Order, a force majeure is defined as any event arising from caused beyond Respondents' control. Increased costs or changed financial circumstances shall not be considered a force majeure. Respondents shall orally notify EPA's designated representative and EPA's project coordinator as soon as possible following Respondents' awareness that circumstances constituting a force majeure have occurred or are likely to occur. If the designated representative or the project coordinator cannot be contacted, Respondents shall attempt to leave a message at the office of each person who could not be contacted. In addition, Respondents shall notify EPA in writing, over the signature of a responsible official of Respondents, as soon as possible but not later than five (5) business days after Respondents became aware that circumstances constituting a force majeure have occurred. Respondents shall have the burden of proving that any failure to comply with any requirement of this Order is excused by this paragraph. Respondent's failure to notify EPA in a timely manner as required by this sub-paragraph shall render the remaining provisions of this sub-paragraph null and void insofar as they may entitle Respondents to an extension of time (unless EPA in fact had actual knowledge of such circumstances)."

"Respondents shall use their best efforts to avoid or minimize any delay or prevention of performance of its obligations under this Order. Respondents shall provide written notification to EPA of any circumstances which have caused, or which Respondents believe are likely to cause, a delay of performance. Such written notice: (1) shall be provided as soon as possible, but not later than ten (10) days after the date when Respondents knew or should have known of the

occurrence of such circumstances; (2) shall be accompanied by all available documentation, including but not limited to third-party correspondence; and (3) shall include: (a) a description of the circumstances causing or potentially causing the delay; (b) the actions (including pertinent dates) that Respondents have taken and/or plan to take to minimize any delay; and (c) the date by which, or time period within which, Respondents propose to complete delayed activities. Such notification does not relieve the Respondents of any obligation under this Order."

Page No. 28, Part XXII: The two paragraphs of this section can and should be deleted. A consent was given in the new paragraph number 3 of Part VI.