

From: Michael Leffler
To: Andrew Hogarth; Arthur Nash, Jim Sygo; JoAnn Merrick
Date: 10/3/02 11:05AM
Subject: Proposed Dow "Corrective Action Consent Order"

Art,

I have briefly reviewed the Dow "Corrective Action Consent Order" ("CACO") which we received, at approximately 3:30 PM, on Tuesday October 1, 2002. I have also had preliminary discussions with staff of the DEQ and attorneys in my Division. I must inform you that, even based on this cursory review, it is apparent the CACO, as drafted, is illegal and the DEQ lacks the authority to sign it. This is so for a number of reasons, some (but by no means all) of which are outlined below.

First of all, and contrary to representations that were earlier made to me, the CACO clearly purports, both in form and practical effect, to be a release of liability. In a number of provisions, including but not limited to paragraphs 17.2, 17.3, 17.7, and 21.1 the agreement either expressly (see 21.1) or by implication constitutes a de facto covenant not to sue (CNTS) for everything not having to do with the enforcement of the provisions of the CACO itself. Paragraph 21.1 specifically states that "Compliance by Dow with the provisions of the Consent Order satisfies Dow's corrective action obligationswith respect to the PCDD/Fs (polychlorinated dibenzodioxin and dibenzofuran isomers) in soils off-site from Dow's facility..." (subject to certain qualifiers not relevant to the general character of the release of liability). Paragraph 17.7 can only be read as barring DEQ from bringing a claim relating to PCDD/Fs, even if that claim was prompted by an actual substantial and imminent hazard to health or the environment. As DEQ well knows, only the Attorney General can grant a release of liability and such a release would never be granted in such a way as to preclude a state agency, in any context, from responding to an event posing an "actual substantial and imminent" threat to health or the environment. In addition, independently of the issue of DEQ's lack of authority to grant a release, the agency simply can not legally agree to forgo its basic public duty to protect the health of Michigan's citizens or the environment in response to imminent and substantial threats to either.

Second, both the interim action level of 1.0 microgram per kilogram and the process by which a site specific criteria level will be derived are legally flawed. The interim action level seems to have been arbitrarily selected and the process of DEQ agreeing, in advance, to be bound by a subsequent number to be determined by non-governmental entities is not only inconsistent with the requirements of Parts 111 and 201 of NREPA, but also constitutes the illegal delegation of Executive Branch authority to private parties. The notion of treating the entire City of Midland (including the many residences located therein) as a single "site" and then essentially "defaulting" to a number that is more than ten times the DEQ established generic residential criteria is particularly troublesome legally, but other issues exist as well.

Third, the "dispute resolution" provisions purport to relieve DEQ of its legal duty to arrive at appropriate contaminate levels, which must be scientifically determined, and instead attempt to arrive at those levels through an adversarial proceeding in a court of law. Again, DEQ has a legal responsibility to determine appropriate contaminant levels and it can not delegate that duty elsewhere.

This is by no means an exhaustive list of the legal deficiencies contained in the CACO, but I wanted to give you a quick review and alert you immediately to the fact that, in my opinion, the document is fatally flawed and DEQ cannot legally bind itself in the manner the agreement contemplates. We will, of course, work with DEQ to assist in drafting a lawful agreement, but any such agreement will have to be profoundly different from the one I received.

Finally, in light of the serious legal deficiencies in the CACO and, in my view the impossibility of adequately addressing those deficiencies in the next week or so, I recommend that this document not be released for public comment until the legal issues are resolved.