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VIA E-MAIL

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Re: MMGL LLC's Notice of Intent to Comply and Description of Sufficient Cause Defenses to Unilateral Administrative Order for Remedial Design for the River Mile 3.5 East Project Area of the Portland Harbor Superfund Site

Dear Stephanie and Eva:

Pursuant to Sections 44 and 45 of the U.S. Environmental Protection Agency ("EPA") Unilateral Administrative Order for Remedial Design ("RD") for the River Mile 3.5 East ("RM 3.5E") Project Area of the Portland Harbor Superfund Site ("Site") as modified by Amendment No. 1 ("UAO"), MMGL LLC ("MMGL") provides the following notice of intent to comply and description of sufficient cause defenses to the UAO.

I. NOTICE OF INTENT TO COMPLY

MMGL provides this notice of intent to comply with the UAO. As discussed below, MMGL intends to comply with the UAO by contributing funds toward the performance of work by Schnitzer Steel Industries, Inc. ("Schnitzer Steel") in accordance with a separate funding arrangement between MMGL and Schnitzer Steel. This notice is provided under duress due to the threat of EPA enforcement as described in Part I.A below, under protest of the factors

identified in Parts I.A and I.B, in reliance on EPA's assurances as summarized in Part I.C, and while reserving the sufficient cause defenses in Part II.

A. Contrary to EPA Guidance, EPA Did Not Provide a Reasonable Opportunity for MMGL to Negotiate a Settlement

MMGL was very surprised by EPA's decision to include MMGL in the UAO. EPA contacted MMGL regarding RD in this project area in April 2019, when it invited MMGL and several other parties to a meeting to discuss RD work in the B8 area. MMGL attended that meeting on April 17, 2019, where it informed EPA that it is not equipped to be a performing party but is willing to discuss being a potential funding party for RD work in the upstream portion of B8, which was subsequently designated RM 3.5E. MMGL heard nothing further from EPA, nor was MMGL invited to participate in any further meetings or discussions with EPA.

Eleven months later, on March 2, 2020, MMGL received EPA's letter, demanding that Schnitzer Steel and MMGL agree within one week to commit to sign an ASAOC consistent with EPA's model to perform RD work at the Site. MMGL subsequently requested and received EPA's newly-revised ASAOC and Statement of Work ("SOW") for RM 3.5E on March 9, 2020. On March 23, 2020, MMGL requested additional time to review and consider EPA's request given EPA's failure to communicate with MMGL over the preceding eleven months and increasing uncertainty triggered by the rapidly-spready coronavirus. On March 26, 2020, EPA denied MMGL's request for an extension and forwarded the UAO naming MMGL and Schnitzer Steel as the only respondents. On April 27, following a conference with Schnitzer Steel and MMGL on April 10, EPA issued an Amendment No. 1, making only modest changes to the UAO that do not address most of the issues raised, and setting a deadline of today for a notice of intent to comply.

As MMGL explained at the April 17, 2019 meeting with EPA, in my March 9, 2020 letter, in my March 23 letter, at the April 10 conference, and again in MMGL's April 15 Statement of Position, MMGL is not equipped to perform the RD work. MMGL is a small, family-owned property ownership company with only two employees. MMGL could not responsibly enter into an ASAOC with EPA purporting to commit to perform all such RD work when it knows it is not capable of fulfilling those obligations by itself. However, as MMGL has consistently stated, it has at all times been willing to discuss arrangements for contributing funding toward the performance of RD work in the RM 3.5E Project Area. Unfortunately, EPA ignored MMGL's April 17, 2019 offer and ceased all communications with MMGL until forwarding its March 2, 2020 demand that MMGL agree on one week's notice to sign an ASAOC.

EPA Guidance notes that "EPA prefers to obtain private-party response action through the negotiation of settlement agreements with parties willing to do the work." EPA Guidance on CERCLA Section 106(a) Unilateral Administrative Orders for Remedial Designs and Remedial Actions, OSWER Directive No. 9833.0-1a (March 7, 1990) ("EPA Enforcement Guidance"). Therefore, UAOs should generally only be issued "[w]hen viable private parties exist and are not willing to reach a timely settlement to undertake work under a consent order or decree…" *Id.* EPA failed to follow this guidance here. In ignoring MMGL's offer to contribute funding for eleven months and demanding an agreement to execute an ASAOC requiring RD performance

on one week's notice, EPA failed to provide any reasonable opportunity for MMGL to negotiate a settlement.

B. EPA's Decision to Include MMGL in the UAO is Unreasonable and Contrary to Guidance, Particularly Given EPA's Still-Unexplained Failure to Pursue Other More Significant Parties

As discussed in MMGL's letters of March 9 and March 23, during the April 10 conference, and again in MMGL's April 15 Statement of Position, MMGL is a property ownership company. It has never engaged in any industrial operations near RM 3.5E or at any other location.

MMGL currently owns only one property in the RM 3.5E area at 10400 N. Burgard Way (the "PEO Property"). The PEO Property has been vacant since the late 1990s. The only operation on the PEO Property during MMGL's ownership from 1972 to the late 1990s was an edible oil distribution facility that stored non-petroleum oils such as palm and coconut oil. From the late 1990's to 2019, the only activity on the PEO Property was source control environmental remediation under the oversight of the Oregon Department of Environmental Quality. While the "Findings of Fact" in the UAO identify certain sampling results for PAHs and other substances on or adjacent to the PEO Property, they also acknowledge that various industrial operations on the PEO Property preceded MMGL's ownership. Those prior operations included Northwest Oil Company's bulk petroleum storage and distribution facility that operated on the property from 1941 to 1943, portions of the United States' own "OSC Shipyard" operated by its contractor Oregon Shipbuilding Corporation during World War II from 1943 to 1947, American Metallic Chemical Company's electrolytic manganese dioxide production facility during the 1950s, and a petroleum transfer dock and pipeline operated by Time Oil Company and Bell Oil Company from the 1950s to the early 1970s. Those prior operations, not the edible oil facility, were the actual sources of the vast majority of any releases on or from the property.

While MMGL previously owned certain additional parcels in the RM 3.5E area, it never operated on any of them, and has not owned any of those additional parcels in more than a decade. Moreover, various other companies have engaged in, and continue to engage in, significant industrial operations on other properties near and adjacent to RM 3.5E, and other parcels near or adjacent to the RM 3.5E Project Area are currently owned by other parties not included in the UAO.

As discussed during the April 10 conference and in numerous prior submissions to EPA, by far the most significant industrial operation in the RM 3.5E area was the United States' own former OSC Shipyard, which was the largest industrial operation in the history of the City of Portland. Given the massive amounts of hazardous substances released from the OSC Shipyard into the RM 3.5E Project Area through its discharges of untreated storm water, process water and raw sewage and other releases, the United States itself bares far more responsibility than MMGL or any other party for conditions throughout the RM 3.5E Project Area.

EPA Guidance provides that "where there are multiple PRPs, the agency must consider the aggregate volume (percentage of total) and aggregate financial viability of all the PRPs to be named," and further states "when evaluating whether to name an individual PRP in an order, the

PRP's contribution to the site (volume and nature of substances) and financial viability should be considered." EPA Enforcement Guidance. The Guidance also provides that "[t]he agency should consider naming the largest manageable number of parties." *Id*. Other agency guidance also emphasizes the importance of this process and the need to avoid the appearance of bias, for example, stating "[w]e encourage you… to ensure that you avoid a bias, or even the appearance of a bias, toward issuing orders… we must continue to make reasonable efforts to identify all parties with CERCLA liability at a site and to arrange to compel cleanup from as many of them as practicable." EPA, Evaluation of, and Additional Guidance on, Issuance of Unilateral Administrative Orders (UAO) for RD/RA, OSWER Directive No. 9833.2c (June 20, 1991).

EPA failed to follow this Guidance in issuing the UAO. Instead, EPA focused its demands and ultimately issued its UAO exclusively to Schnitzer Steel and MMGL without pursuing any other responsible parties over the past several months. In fact, there is no indication that EPA even considered the United States' own substantial responsibility for conditions in this area or engaged in any assessment regarding the "aggregate volume," "the PRP's contributions to the site" or the "volume and nature of substances" for the United States or any of the various other parties with responsibility in this area. The UAO's Findings of Fact confirm that EPA has instead focused exclusively on Schnitzer Steel and MMGL, presenting a distorted and skewed version of the history of this area with only passing references to other parties and no discussion whatsoever of the United States' own substantial responsibility.

Had EPA conducted the appropriate inquiry under EPA Enforcement Guidance and made unbiased decisions based on the results, it would not have named MMGL in the UAO but would have focused instead on the various other parties with substantially greater responsibility for conditions in the RM 3.5E Project Area.

C. Flaws in the UAO and Proposed RD Work

MMGL shares Schnitzer Steel's serious concerns with various aspects of the UAO and RD work as required in the SOW. Most significantly:

- **EPA's failure to update the remedy prior to RD will cause substantial waste and disruption and endanger the success of the remedy.** The Site remedy should be updated based on the new data as detailed in the March 9, 2020 Petition for Modifications to the Portland Harbor Selected Remedy ("Petition") before, or concurrently with, the initial phase of RD work. In insisting that RD work be performed without updating the remedy, EPA is forcing respondents to design the wrong remedy based on data that is more than 16 years old.

- **The timing and sequence of tasks under the SOW creates a substantial risk of waste, inefficiency, delay and duplication of effort.** The SOW appears to require RD work to proceed lockstep with each task performed upon the completion of the last with no express provisions for a check-in or determinations as to the timing of subsequent work. Given site-specific factors in the RM 3.5E Project Area, RD work should be timed and sequenced to ensure that it does not need to be redone later due to uncontrolled sources or stale data. For example, EPA should modify the timing and phasing of the RD such that the work would

start with the sufficiency assessment, followed by a source sufficiency-focused sampling effort. Once EPA concludes that the sources are adequately assessed and that any source control measures have been identified with milestones and an implementation schedule, EPA can consider the optimal timing of field sampling in this area based on identified factors. Under the current SOW schedule, there is a substantial risk that field sampling and other aspects of the RD work will need to be redone at great expense and with additional delays.

- **Certain provisions of the UAO exceed EPA authority.** Section XII of the UAO purports to require respondents to pay EPA for its alleged response costs incurred in connection with the RD work, while Section XV purports to require respondents to provide financial assurance in the amount of EPA's estimate of the cost of the work obligations. While EPA can request such arrangements as part of a negotiated ASAOC, EPA does not have the authority under 42 U.S.C. §9606(a) to order a respondent to pay money or to secure financial assurance since such actions do not constitute acts of abatement. To seek monetary relief, EPA would need to pursue a judicial action for cost recovery under 42 U.S.C. §9607, and it is improper for EPA to attempt to use its abatement authority under 42 U.S.C. §9606(a) to sidestep the proper statutory requirements. In providing this notice of intent to comply, MMGL reserves its rights to request proper documentation of EPA's alleged oversight costs and to determine based on available information whether specific requests for reimbursement or financial assurance are valid and appropriate.

While MMGL is providing this notice of intent to comply, it strongly objects to these aspects of the UAO, SOW and RD work and is providing this notice under protest of these and other considerations.

D. <u>EPA's Assurances Regarding the UAO and RD Work</u>

At the April 10 conference and in other communications with MMGL and other parties, EPA has made various representations and has provided assurances regarding certain aspects of the RD work. In submitting this statement of intent to comply, MMGL is acting with Schnitzer Steel in reliance on these EPA assurances, which include the following:

- **Timing and sequencing of RD work.** During the April 10 conference, EPA assured Schnitzer Steel and MMGL that it has no interest in requiring unnecessary work and is committed to avoiding undue waste during the RD process. While EPA did not modify the SOW schedule to address the sequencing concerns discussed above, it assured Schnitzer Steel and MMGL that, if they agree to comply with the UAO, EPA will work with the companies during RD to establish a timing and phasing of the work that increases efficiency and avoids unnecessary duplication of effort. In submitting this statement, MMGL is relying on EPA's representations that it will work with respondents in RD to establish a plan for the timing and phasing of the RD work to minimize the risk of waste, duplication and delay.

- **Sediment bed elevations.** In its March 2 letter to the Pre-RD Group, EPA acknowledged that there are inconsistent statements in the ROD regarding maintaining pre-design sediment bed elevations and stated that it would make modifications to the SOW that EPA characterized as "allowing mitigation as part of the remedy to offset the effects of capping in the shallow and/or intermediate region within a sediment management area, if appropriate and in consultation with the Federal Emergency Management Agency." During the April 10 conference, EPA confirmed that this statement was intended to mean that EPA staff will have discretion during RD to require, or not require, dredging in areas to be capped depending on site specific factors. EPA also noted that a Site-wide flood assessment plan will be prepared. In submitting this statement, MMGL is relying on EPA's representation that it will reasonably consider requests not to require dredging in certain areas to be capped based on application of identified factors.

- **Data replacement.** In its March 2 letter to the Pre-RD Group, EPA also agreed that it may be reasonable during RD to replace some of the old data considered in the ROD with newer data and stated that the decision would be made on a site-specific basis. This position is also reflected in the current version of EPA's RD Guidelines. While data replacement in RD cannot fix the problems created by EPA's refusal to update the remedy, a coherent set of rules for data replacement is badly needed given the age of the data used in the 2017 ROD. During the April 10 conference, EPA stated that it will work with the performing parties in making these determinations. In submitting this statement, MMGL is relying on EPA's representation that data replacements will be established, and that EPA will work with respondents to identify and follow those rules in the RM 3.5E Project Area.

- **Dioxin/furan cleanup levels.** In its March 2 letter to the Pre-RD Group, EPA also agreed that the data used to establish the dioxin/furan cleanup levels in the ROD are limited. EPA acknowledged that this information was supplemented by Pre-RD data and stated that EPA in coordination with Oregon DEQ would fund the collection of additional upstream dioxin/furan data. In submitting this statement, MMGL is relying on EPA's representation that it will obtain the additional data on dioxins/furans and use that data to update the cleanup levels as appropriate.

- **Schedule Accommodations.** In its March 26, 2020, letter rejecting MMGL's request for an extension and again at the April 10 conference, EPA stated that it will consider "reasonable accommodations" in the event certain work deadlines cannot be met due to the COVID-19 public health crisis. Later that same day of April 10, EPA issued supplemental Interim Guidance on Site Field Work Decisions due to Impacts of COVID-19, which identified certain factors to be considered in deciding on the timing of field work and recognized that even non-field work may be impacted if needed materials become unavailable. While EPA declined to provide any extensions during the April 10 conference, it assured Schnitzer Steel and MMGL that, if they comply with the UAO, it will work with the respondents to address reasonable requests for extensions as circumstances arise. In the revised SOW attached to the modified UAO, EPA provided modest

extensions to certain initial work deadlines. In submitting this statement, MMGL is relying on EPA's representation that EPA will work with respondents in good faith moving forward to make "reasonable accommodations" in the event certain work deadlines cannot be met.

II. SUFFICIENT CAUSE DEFENSES

Paragraph 45 of the UAO purports to require respondents to "describe, using facts that exist on or prior to the Effective Date, any 'sufficient cause' defense[s] asserted by such Respondent under Sections 106(b) and 107(c)(3) of CERCLA, 42 U.S.C. §§ 9606(a) and 9607(c)(3)." EPA does not have the authority under Section 106 or any other law to order MMGL to disclose its position on current or potential future defenses. Nonetheless, MMGL provides the following summary while reserving its rights to raise any other facts or sufficient cause defenses in the future.

MMGL has sufficient cause not to comply with the UAO and certain specific portions of the UAO and related SOW for various reasons including:

- EPA's decision to include MMGL in the UAO without undertaking reasonable, unbiased efforts to assess the relative responsibility of parties for conditions in the RM 3.5E Project Area and to pursue other parties with greater responsibility was arbitrary and capricious;

- EPA is acting in an arbitrary and capricious manner in ordering RD work to commence at the Site without first updating the remedy based on new Site data before, or concurrently with, the initial stages of RD for the reasons discussed in the Petition, which MMGL incorporates into this notice;

- EPA is acting in an arbitrary and capricious manner in ordering RD work to commence at the Site since the remedy itself as described in the ROD is arbitrary and capricious for the reasons identified in the Petition;

- EPA is acting in an arbitrary and capricious manner in ordering RD work to commence in the RM 3.5E Project Area before upland and upstream sources are controlled and before the timing of future remedial action in this downstream portion of the Site is known without, at a minimum, establishing a process in the SOW for timing and sequencing the RD work to reduce the substantial risk that RD work may need to be re-done in the future, which would cause substantial waste, duplication of effort and delay in violation of the National Contingency Plan ("NCP");

- EPA acted in an arbitrary and capricious manner in issuing the UAO at this time since the agency failed to adequately consider the harm imposed by its decision to move forward with long-term RD work at this time without providing reasonable accommodations given the ongoing COVID-19 pandemic;

- The UAO is invalid since EPA has not made a sufficient finding that conditions in the RM 3.5E Project Area may pose an "imminent and substantial endangerment to the public health or welfare or the environment" as required by 42 U.S.C. Section 9606(a) to require the commencement of RD at this time through an enforcement order; and

- The UAO is invalid since it includes provisions that exceed EPA's statutory authority, including Section XII's cost reimbursement provisions and Section XV's financial assurance provisions.

Consistent with the factors and considerations outlined above, MMGL provides this notice of intent to comply with the UAO by contributing funds toward the performance of work. Nothing in this letter constitutes an admission of any factual allegation or legal conclusion in the UAO, nor does MMGL waive any rights or defenses by providing this notice and summary of sufficient cause defenses. Moreover, MMGL reiterates its position that EPA should update the remedy based on the new data as provided in the Petition to reduce needless waste and disruption, and to ensure that respondents are not forced to design the wrong Site remedy based on outdated data. MMGL also requests that EPA reconsider its position on the issues summarized above and modify its approach and the requirements of the UAO and SOW to advance the effective and efficient remediation of the Site.

Sincerely,

Greg A. Christianson