

Metachem Task Force Meeting Notes March 21, 2003

Task Force Members Present: Jeff Bross, John Deming, Dick Fleming, Judy McKinney-Cherry, Pam Meitner, Bill Quillen, Shirley Price, Phil Reese, Mike McCabe consultant to the task force, Matt Lintner (environmental attorney) and Brian Jefferis intern to the task force

DNREC: Steve Karlsen and Lynn Krueger

Others: Jim Bryant (Peace), Shawn Garvin (EPA), Jennifer Klecan (Office of the Controller General), Andrea Kreiner (Governor's Office), Jeff Montgomery (News Journal), Alan Muller (Green Delaware), William Prickett (Prickett, Jones Law Office), and Albert Telsey (Environmental Attorney)

Task Force Members Absent: Bob Chou and Mike Parkowski

Chairman Bill Quillen called the meeting to order at 9:40 a.m.

A moment of silence was observed for the American soldiers killed in Iraq.

The tour of the Metachem facility on Monday (March 17) was most interesting. The staff were impressive. The tour brought into focus conditions at the site.

Chairman Quillen introduced Al Telsey, an environmental attorney from New Jersey who authored a book on Delaware environmental law. Mr. Telsey submitted a proposal to the task force early in the process to share his expertise, but the proposal could not be considered due to an lack of funding. Mr. Telsey's letter will be shared with the task force.

Chairman Quillen asked that the March 28 meeting be publicized as much as possible. He asked the task force to be diligent in their attendance and to ask individuals (from the public) to attend if they have information to share or want to comment about a specific point under the task force's purview. The meeting will begin at 9:30 a.m. with a brief presentation by Marj Crofts on chronic violators. The task force will continue discussing policy options. At 11:15 a.m., the public will be provided with an opportunity to express their recommendations and comments regarding Metachem. The meeting will take place in conference room B, 391 Lukens Drive, New Castle. Written public comments will be posted on the web.

Consultant's Report

Mike McCabe noted that the Executive Order establishing the task force has been posted on the web. The order directs the task force to prepare a report for the Governor by April 15, 2003. The report will include information about the conditions that led to the

Metachem situation and whether it could have been avoided; corrective actions necessary to prevent this situation from happening again and a process for identifying other high-risk Delaware industrial facilities, which if closed or abandoned, would leave the State (and/or Federal government) with the costs for environmental clean-up. The task force will develop processes and policies to mitigate or avoid similar liabilities in the future.

The Mission Statement was reviewed. It was determined that one addition would be made (*in italics*). The revised Mission Statement is as follows:

Determine what environmental, operational, regulatory, business and financial factors played a determining role in the Metachem situation;

Identify and recommend the corrective actions necessary to prevent this situation from happening again; and

Establish a process for identifying other Delaware industrial facilities which if closed or abandoned according to state and federal bankruptcy laws, *or otherwise* could impose upon the State and/or the federal government the costs of environmental clean-up.

Scope of work **does not** include:

Review of other facilities

Assessment of blame, liability, or civil or criminal responsibility vis-à-vis any individual or non-governmental entity

Review of existing remediation at Metachem

We are preparing a draft history and chronology of Metachem (a narrative). The document is now in draft form and is twenty pages in length. Federal bankruptcy laws cover what is abandoned (a comprehensive qualifier). A number of optional recommendations will provide a broader solution base.

As the task force reviews information about the problems at Metachem, it is admittedly somewhat unique. Metachem is an ailing facility and the problems included finances and management. Standard Chlorine was rescued by Metachem who was their “white knight”. The state was unaware of the transfer of ownership. The purchase possibly produced a better “condition” than if it was still owned by Standard Chlorine.

An ISRA type law in Delaware would require the review of permits before a transfer in ownership could take place. Perhaps that would have forced a due diligence report which may have prevented the sale.

Pam Meitner did not agree that something was missing in the due diligence report completed at the time of sale by Environmental Strategies. She doubts it was inadequate and feels nothing would have “come to light” had another inspection company performed a due diligence inspection. Pam felt that nothing would have been revealed that would have prevented the sale.

Mike McCabe said that in a discussion with Frank Romanelli, if Charter Oaks knew there was more environmental liability existing at the time of purchase, they would have walked away from the deal. Mike found the due diligence report to be woefully inadequate. They did not review DNREC records or speak with any staff. To set an estimated cost of between \$24,000 and \$105,000 to fix the problems at Standard Chlorine was absurd. Frank Romanelli and David Swayze said in one of our previous meetings that the absence of “findings” in the content of the due diligence report was a factor in the purchase.

Discussion ensued regarding the due diligence report, and the absence of communication between the purchaser and DNREC. The seller had more resources so perhaps we were better off. In the intervening period, over \$40 million was invested by Metachem. Metachem was a stand-alone business with no back up. It will be impossible to prevent bankruptcy or closure, our best effort can only protect.

Looking more globally, we could develop a system with a broader series of options covering numerous contingencies. Ultimately we need to protect and reduce the impact on the State. Mike McCabe passed out “Options for Discussion”. These are options only presented in an early draft stage. The list is not inclusive and they are not yet formal recommendations. Next week and in the early weeks in April we will attempt to achieve consensus on recommendations. The progress today is to introduce the viability of these options, and decide what additional research may be needed.

General comments on the “options” – We must develop facts and attempt to size the problem. What is the probability it will happen again? Define the universe, what problems within that universe are we addressing? The focus will be on small to medium facilities. Our charge to DNREC will be issues surrounding potential liability.

If insurance is purchased through AIG, they would do a site characterization to assess the risk. The addition of a third party would help. Establish a process to identify other Delaware facilities that may potentially be in the same situation.

It is very rare for gas stations to incur over \$500,000 or dry cleaners about \$1 million for remediation. There are twenty identified NPL sites in Delaware averaging \$25 million in clean-up costs. Nine sites are on the priority list.

Brownfields deal with smaller abandoned facilities. How many sites are in the HSCA program? How many of those sites are in the program due to bankruptcy? What is the more common problem? How much money does it take to clean up the average site? By using SIC codes, dollar sorts and toxicity as a filter we may gather a sense of exposure, probability and risk. Based on the data of dollars spent, our recommendation can be plugged into a solution. HSCA is for “orphaned” sites. The site-status is generally non-operating. Lots of HSCA funds were spent for Fox Pointe State Park, a ball park and other ad hoc expenditures.

We must look at more than just SIC codes. How do we reach out to a company? What capital and environmental investments have been made? Look at the business indicators. Is the industry growing or dying? Delaware Economic Development Office (DEDO) is focusing on industry from a business, not governmental, point of view. We care if the company is an environmental risk. How can we act on it? Institutional guidelines must be established so if something happened which posed a risk, the liability would be limited. The new Chronic Violator regulations will assist us.

Internal communication through the establishment a Focus Team is a great approach. Generic information creates a “snapshot” of the whole company and is important to solving problems. The problem with Metachem was the on-site chemicals.

Additional recommendations should be problem specific. A toxicity impact on the environment and citizens are priority concerns. The recommendation must meet specific needs without being too onerous. Do we develop a system that drives companies away from Delaware? The task force must keep in mind that the acceptance of the recommendations is the responsibility of the policy makers. Companies with environmental problems should be “flagged”; they may not indicate economic issues and therefore not appear on DEDO’s radar screen. DEDO has an “early warning” system. A process should be developed to add technical and financial expertise to address the problems.

Judy McKinney-Cherry (Director of DEDO) said that the last two companies who shut their doors had been in touch with DNREC. Unfortunately it was too late to mitigate. DEDO also works closely with the Department of Labor who has other indicators it shares with DEDO. The process is ad hoc now, but it is working. DEDO is the business advocate in government.

Should we involve the Secretary of State in the process? No. The Department of Labor should be added under the “administrative” option category. A Warren Notice is issued when a major layoff is announced. Federal law requires a 60 day notifications before employees are terminated (for companies with 100 or more staff).

Mike McCabe continued reviewing the options list. The creation of a focus team concept was discussed. What does the focus team do and what expertise does it bring? It can all

be done on a “trigger” and without notoriety. It would have been good if the spills at Metachem had triggered an overall investigation. Government’s effectiveness is limited by its subdivided “roles” that no one agency brings the entire problem/situation into focus. We need inter-agency coordination in government as well as internal communication within DNREC.

A tool for identifying what chemicals are located at which sites will help assess the probability of liability. The Above Ground Storage Tank regulations are a great tool for DNREC to utilize. DNREC could use some objective technical assistance (and DEDO too). Motiva is an example where this is being done. Although this is a recent development, it should be expanded and continued. Perhaps the first violation a company has is the most important, because it sends a “signal”. Compliance issues and aggressive enforcement are needed to address issues early. It may be beneficial to compile and analyze all DNREC enforcement actions and send them to the Governor and the Legislature biennially.

Texas is a model worth investigating. Meacham’s testing delay in the main stack flakers was attributed to arguments of protocol. EPA could assist by better defining speculative accumulation and what is product, what is waste. That might aid in producing a level playing field across states and consistent regulations; DNREC will then look to EPA for guidance. The sites should be prioritized according to inspection criteria and toxicity.

If an insurance approach is used, DNREC should use the due diligence and site characterization services of the insurance company to determine the “condition” of the company and the site. Insurance coverage is only valid for those items insured. The coverage may be limited. Insurance based due diligence is not a universally recognized term. DNREC needs better site characterization. There is no standard in the insurance industry concerning due diligence. If we require some form of due diligence, it must be carefully defined.

There is a need to dovetail with the Chronic Violator’s regulations. Marj Crofts will give a brief presentation about the regulations at the next meeting. As part of the Consent Decree, in lieu of fines, funds were provided to supplement an environmental program. Check DNREC’s web site for the Environmental Navigator System. It can be accessed by the public to track company compliance with violations. The system is a source of information compiled on all companies and what they are doing to follow-up on violations. The system is a work-in-progress though, and will not be a complete resource until next year. Are companies hurt by disclosure?

The EPA has resources and in-house technical expertise to share. The EPA and the State can work on a plan to capture assets, keep the plant open and allow it to operate. In Metachem’s case, thirty days would have made a difference. How often does that

happen? Nothing like this has happened in Delaware prior to the Metachem bankruptcy and closure. Some areas of the plant would have benefited from another thirty days of

operation. During that thirty day period, the 43 million pounds of chemicals on site may have been removed, the columns and reactors cleared.

Chairman Quillen asked the task force to submit any ideas or additional information to Mike, Steve or Brian who will compile them for presentation to the task force. We started the process today from a general stand point and will continue the process next week.

Chairman Quillen introduced Al Telsey to the task force and asked him to share information with them. Al has been an environmental attorney for twenty years. His career began in the early '80s working as a county prosecutor in New Jersey. He went to the NJ Attorney General's office in the mid-80s and later that decade, worked in the private sector. He is now working for a New Jersey environmental law firm specializing in redevelopment and environmental issues. Mr. Telsey is the author of the Delaware Environmental Law Handbook, which is now being updated. The work of this task force may have an impact on Delaware law and regulations in the future. He would like to be part of shaping it. His approach is from a personal, human view with an obligation to do something. Preventive maintenance, inspections, enforcement, financial assurance and bankruptcy, are important items for consideration.

Presumption is that businesses are making a profit while maintaining environmental stewardship. The government has developed a menu of laws and regulations which direct companies to comply. It is hard to engage them in that stewardship. New Jersey has a Technical Assistance Program, OSHA also assists. These laws require a permitting process. Notification is a key concept of requirements to report.

It is important to check on the stewardship of companies with federal and state agencies. A holistic approach to facility-wide management in managing the media and disciplines of a company is the best approach. What is DNREC's attitude toward its regulated community with regard to compliance, enforcement, direction and focus? Why wasn't the EPA "watched dogged" by DNREC? A holistic approach should result in holistic compliance. After you engage in inspections, you may find something. Then enforce what you found and compel the company into environmental stewardships, but have the right attitude.

The 1986 spill caused environmental hazards and should have triggered compliance obligations. Where was the enforcement arm of DNREC? EPA did not foreclose or preclude DNREC from participating in concurrent enforcement of compliance timelines at any point during the past twelve years. Environmental stewardship can be better addressed while money is on the table. Clean-up should be completed before a transfer/sale takes place. Environmental stewardship, investigation and clean-up get funded first. Financial issues need to be resolved.

Connecticut and Illinois enacted a version of ISRA. The task force should see what version fits best for Delaware. Standard Chlorine was a major player in the chlora-

benzene business. The company had known environmental issues for twelve years. The EPA went to court on one of the air violations when the consent decree was drafted. Two mothers wrote letters and/or came to federal court. They were concerned about safety, and opposed the consent decree. Within months the downward spiral continued. Financial assurance offers protection and aggressive enforcement action. Let's not lose sight of the fact that tetra chlorabenzene is a raw product.

Mike McCabe shared that there has been some discussion about using the bankruptcy laws to protect the State's interests and in our opinion a number of proactive steps have been taken in bankruptcy court.

Meeting Information

April 4, Dover office. The task force will discuss draft recommendations and the draft final report.

April 11, Dover office. This may be the final meeting of the Governor's Task Force on Metachem. The task force will conclude its final recommendations and report.

Task Force Website

The web site for the Governor's Task Force on Metachem is up. This website is constantly evolving. Please check back often for updates.

<http://www.dnrec.state.de.us/DNREC2000/Divisions/AWM/do/metachemtaskforce.asp>

Chairman Quillen asked the task force members to send in their comments and ideas to Mike McCabe. This is the beginning of the report process. It is a challenging timetable with much to be done. We are trying to keep within the time frame set by the Governor.

The meeting adjourned at 12:05 p.m.

Respectfully submitted,

Karen Garrison
Administrative Specialist III, DNREC

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The minutes of this meeting are not intended to be a verbatim record of the topics that were presented or discussed. They are for the use of Task Force members and the public in supplementing their personal notes and recall of Task Force presentations.