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We are writing to each of you to express our extreme dissatisfaction and disappointment with the proposed settlement of claims against PPG Industries, Inc. ("PPG") that rewards PPG for decades of stalling and obstruction in the cleanup of non-residential sites contaminated with Chromite ore processing residue ("COPR" of "Chromate Waste").

**Comments on March 16, 2009 NJDEP-PPG- Jersey City Consent Judgment**

It is understandable but deplorable that PPG is still trying to shirk its duty as a responsible party under RCRA law for dumping Chromate Waste, but how they are allowed by the New Jersey Department of Environmental Protection ("NJDEP") to avoid penalties for neglecting for nearly two decades sites contaminated with Chromate Waste ("Chromate Sites") such as the Group 10 non-residential sites is shocking.

No doubt some Council members and Administrators in Jersey City are willing to settle for any flawed agreement in order to show some progress in the Chromate cleanups, perhaps to serve their political ambitions, but I certainly expect, and the public is entitled, to better from the NJDEP.

Upon review of the 2009 NJDEP-PPG- Jersey City Consent Judgment, it is lamentable that the NJDEP is in such disarray that in order to promote the delayed cleanup of some of the remaining Chromate sites in Hudson and Essex Counties, NJDEP has to enter into such a poor bargain with PPG to privately subcontract the environmental regulatory review that is their duty, by hiring a Site Administrator and Technical Consultant. While the NJDEP is still replete with knowledgeable and dedicated environmental professionals, it is the lack of will in their political handlers that hobbles the agency and sobering to realize they are incapable of reviewing the site reports from the Chromate sites in a timely fashion or enforcing the deadlines and penalties outlined in the existing 1990 Consent Order.

In summary, the 2009 NJDEP-PPG- Jersey City Consent Judgment is predicated upon the ineffective regulatory and enforcement history and capacity of the NJDEP: the agency that should have reviewed the site reports generated by the 1990 Consent Decree and levied fines against PPG and the other responsible parties for non-compliance, long ago.

The 2009 Consent Judgment is fatally flawed, is too narrowly focused on the Garfield Avenue Chromate Site, is unenforceable without date-certain deadlines and penalties and should not be ratified. We look to better times and better administrations.

## **Background History**

In July 1990, PPG entered into a Consent Order (the "1990 Consent Order") with the New Jersey Department of Environmental Protection (NJDEP) that indicated Chromite ore processing waste ("COPR") was present at each of the sites listed in the Attachment One for non-residential sites and in Attachment Two for residential sites. The two adjacent Group 10 non-residential Chromate sites located at Linden Avenue (108) and Chapel Avenue (107) were listed on that attachment. These two sites, to this date – nineteen years after the entry into the 1990 Consent Order, have not been the subject of any enforcement action or any remedial investigation and have received only a cursory site investigation by the NJDEP and limited worker testing by NJDOH. The only remedial measures implemented with regard to these properties are simply band-aid type interim remedial measures ("IRMs") such as paving the Chromate soils on the access road to control dust generation and worker exposure, along with minor excavation of Chromate soils in the building foundation and the covering of Chromium discovered in the walls of the building at site 107. Worst of all, what has never been determined is the full extent of Chromium contamination in and around these trucking warehouses, where trucks run over open soil each summer, generating airborne dust or its impact on worker health.

In the 1990 Consent Order, the NJDEP found PPG strictly liable, jointly and severally for all costs of the cleanup and removal of the hazardous waste at these sites. The 1990 Consent Order was entered into after an opportunity for public comment and the creation of an April 17, 1990 Record of Decision ("ROD"). In the 1990 Consent Order, PPG agreed to implement the remedy selected in the 1990 ROD, implement Interim Remedial Measures ("IRMs") and conduct a remedial investigation and feasibility study ("RI/FS") and design and implement remedial actions selected by the NJDEP for all residential and non-residential sites listed in Attachments One and Two to the 1990 Consent Order. A copy of the 1990 Consent Order is attached.

By entering into the 1990 Consent Order, PPG agreed to pay a civil penalty of \$2.5 million and NJDEP's costs.

The 1990 Consent Order included a schedule for the implementation of IRMs and remedial investigations with deadlines contingent upon NJDEP review of the submission reports. While PPG submitted a draft remedial investigation scope of

work, field sampling-quality assurance plan and health and safety plan, the Group 10 non-residential sites have languished for the last nineteen years, neglected and unsafe. PPG was to submit quarterly progress reports along with financial assurance. The 1990 Consent Order contained stipulated penalties subject to force majeure that amounted to \$20,000 per day after 29 days of non-compliance with remedial actions at residential sites and \$10,000 per day after 29 days of non-compliance at Garfield Avenue and the other non-residential sites and even had penalties for not paying those stipulated penalties in a timely fashion. These penalties have been omitted from the 2009 Consent Judgment. Despite nineteen years of inaction with respect to the Group 10 non-residential sites, no penalties were assessed against PPG and in the proposed March 16<sup>th</sup> 2009 settlement and the ability of NJDEP to impose and collect all future stipulated penalties is purposely excised from the 1990 Consent Order.  
<http://www.ca3.uscourts.gov/opinarch/043702p.pdf>

In April 1996 Allied Signal, Inc. (Allied) submitted a draft Alternative Remediation Standard (ARS) protocol to the Department for review. It was anticipated that the development of an ARS for the Allied sites would remove outstanding issues regarding the current cleanup criteria for COPR. But two decades after the Consent Order of 1990 and six years after the landmark case *Interfaith Community Organization v Honeywell (Allied/W. R. Grace)* of 2005 was won to force clean up a "heavily polluted area along the banks of the Hackensack River", Honeywell is still working on remedial investigations.  
<http://www.state.nj.us/dep/srp/siteinfo/chrome/update>

A Chromium Moratorium of March 2004 was imposed by the NJDEP reflecting community concern. Two years after the moratorium was lifted on February 8, 2007 by Lisa Jackson then NJDEP Commissioner, PPG still has not completed the remedial investigations, feasibility studies, risk assessments and remedial action work at the Group 10 non-residential sites and other Hudson County and Essex County Chromate Sites.  
<http://www.state.nj.us/dep/dsr/Chromium/crmorlift200702.pdf>

On May 9, 2005, the New Jersey Department of Environmental Protection and NJ Spill Compensation Fund filed a First Amended Complaint against PPG and others asserting Spill Act statutory claims and common law strict liability, nuisance, and negligence claims, arising out of the generation and disposal of Chromate waste at sites in Hudson and Essex counties, New Jersey, including the Group 10 PPG sites in Jersey City.

## Comments on 2009 NJDEP-PPG- Jersey City Consent Judgment

<http://www.nj.gov/oag/newsreleases09/pr20090219b-PPG-Consent-Judgment.pdf>

As recently as February 9, 2009 New Jersey Department of Environmental Protection (NJDEP) issued a draft Partial Consent Judgment of the 2005 suit between NJDEP, NJ Spill Compensation Fund, Honeywell, Occidental Chemical and PPG and Jersey City that purports to resolve the delays in cleaning up the PPG Chromate sites in Hudson and Essex Counties. In the earlier 1990 Consent Order there was a schedule of compliance (that unfortunately was based upon the NJDEP timely review of report submissions) and there were stipulated penalties rising to \$20,000 per day after 29 days of non-compliance. But two decades later, this recent 2009 Consent Judgment (to quote Woody Allen) is a travesty of a mockery of a sham and several steps backward compared to the 1990 Consent Order in the cleanup of Chromate Sites.

The travesty of Justice in this proposed 2009 Consent Judgment is that there are no enforced penalties for one hundred years of natural resources damages from environmental contamination or nearly two decades of non-compliance since the 1990 Consent Order.

Surely there should be penalties to PPG for delaying even the onset of Remedial Investigation at the Group 10 Chromate sites and other similarly neglected sites by PPG, Honeywell and Occidental

- On the face of the 2009 Consent Judgment, Honeywell and Occidental are named as parties to the suit, thus, any waiver of responsibility for PPG applies to these other polluters as well

What is needed is not the proposed 2009 Consent Judgment that is poorly constructed and unenforceable, but rigorous enforcement of the 1990 Consent Order and its penalties still in effect, along with an efficient mechanism for NJDEP to review site reports and plans.

The proposed 2009 Consent Judgment is a mockery of justice because it is substantially weaker than the 1990 Consent Order and actually affirmatively guts any realistic enforcement mechanism from the 1990 Consent Order. The proposed Consent Judgment is, for all practical purposes, unenforceable and tries to preclude future court actions by the NJDEP (that we believe is unconstitutional). The proposed 2009 Consent Judgment contains a number of provisions that appear to take any teeth out of the 1990 ACO.

- The proposed 2009 Consent Judgment contains a covenant not to sue for past releases. This covenant is purportedly conditioned, in part, upon PPG's future performance. How can the NJDEP give, in essence, a release with respect to work that has not yet been performed. This provision may be interpreted to give PPG a free hand to interpose more delays in the cleanup of sites other than Garfield Avenue, the only Chromate site specifically identified and addressed in the proposed Consent Judgment.

- In the proposed 2009 Consent Judgment there is no date-certain schedule with no stipulated penalties for tardiness. This was present in the 1990 Consent Order. The only schedule in the proposed 2009 Consent Judgment is a “goal” (not a date-certain deadline) of cleaning up the Garfield Avenue Site within 5 years. There is no other timetable for cleanup of any of the other neglected Chromate Sites. The schedules for other Chromate sites, are to be determined later by a Site Administrator to be appointed later: including the Group 10 sites that were to have been cleaned up under the 1990 Consent Order and where no significant site investigation of remedial action has been complete since 1997. The communities affected by this Chromate contamination do not need another vague schedule contingent upon the quasi-regulatory Administrator doing his job and thereby releasing the PRP from any contingent liability for delays in cleanup. The Grace Period Rule should apply to PPG and the Chromate sites; as it does to all other NJDEP administered sites.
- While the Site Administrator is to hold regular meetings with the Plaintiffs in the Consent Judgment: PPG, the NJDEP, and Jersey City, no provision is made to hold regular community meetings or any meetings with affected property owners.
- The proposed 2009 Consent Judgment is not enforceable as it has no stated cleanup criteria and no presumed remedies and remedial goals for non-residential sites planned for future residential development such as in the Danforth Redevelopment Zone where over 2000 residential units are planned
- There is no enforcement mechanism in the proposed Consent Judgment. In fact the proposed 2009 Consent Judgment goes as far as exempting PPG from any penalties for inaction (in Paragraphs 15 & 16) except \$1 million payment into Jersey City Environmental Trust Fund and \$250,000 to Jersey City for its oversight. There is not even a payment for the millions of dollars NJDEP and similar State, County and other City government agencies have expended in oversight of these Chromate sites in the last twenty years. The penalty should be assessed on the money PPG saved at the expense of community health: for instance, say the interest PPG saved by stalling the Chromate cleanups for nineteen years on the \$198 million that PPG put aside for Chromium site cleanup in its 2006 annual report.
- The proposed 2009 Consent Judgment also will preclude future actions by the NJDEP and Jersey City. What happens when PPG does not clean up Chromate Sites in a timely fashion again or if a new site is found where no PRP will acknowledge responsibility.
- The proposed 2009 Consent Judgment provides for a waiver of conflicts of interest. However, political entities such as the State and local governments cannot waive any conflicts of interest (paragraph 46)

The sham of the proposed 2009 Consent Judgment is that the previous 1990 Consent Order and the cleanup criteria were developed with local community and medical involvement in local hearings. It is outrageous that this proposed 2009 Consent Judgment is flying under the radar with only a 30-day comment period, no updated progress reports since 2007, no updated master maps of the

Chromate Sites for community education and no local hearings for community comment. <http://www.state.nj.us/dep/srp/siteinfo/chrome/>  
Neither does the proposed 2009 Consent Judgment provide any funding for identifying the health impact of the Chromate contamination on the communities affected by the dumping of Chromate waste nor any funding to assess the effect of Chromate on workers that have been exposed at the neglected non-residential sites for the last nineteen years.

The NJDEP should order PPG and other Chromate PRPs (1) to eliminate completely and permanently the endangerment to health and the environment from Chromium-bearing wastes at and around the Garfield Avenue site and other Chromate waste production facilities; (2) to identify and permanently remediate soil, as well as structures, at all sites where Chromium wastes, originating at the Garfield Avenue plant and other waste production sites, continues to pose an imminent and substantial endangerment; (3) to remediate and restore all water resources, including groundwater, damaged and/or endangered by the Chromium wastes that originated at the Garfield Avenue and other waste production sites; and (4) to remediate an appropriate share of "orphan" sites in the area for which it is unclear whether the Garfield Avenue site or another site was the source of the waste now posing an endangerment. (5) Prepare a master map of the Hudson and Essex County Chromate sites, a master list of sites with addresses and PRPs and their remedial investigation and cleanup status and provide for quarterly community meeting and comments on rate of cleanup and the damages caused by delayed Chromate cleanup (6) enforce a date-certain schedule for compliance subject to force majeure; and (7) order PPG and similar PRPs to pay the cost of governmental oversight and penalties for nineteen years of non-compliance on such sites as the Group 10 Hudson Chromate Sites; (8) order PPG and other Chromate PRPs to provide funding to assess the effect of Chromate on workers that have been exposed at the neglected non-residential sites for the last nineteen years.

In sum, the proposed Consent Judgment between NJDEP, PPG and Jersey City represents a complete dereliction and abdication of responsibility by the New Jersey Department of Environmental Protection and should not be signed. Approval of the proposed Consent Judgment will be substantially prejudicial to human health and the environment by giving PPG a free hand to continually delay the full investigation and remediation of the Chromate Sites that have not been addressed in the past nineteen years. The proposed Consent Judgment is simply an unacceptable compromise of the public interest because it is easier than enforcing PPG's legal obligations and sends the message that polluters can escape or substantially curtail their liability for improper actions simply by being as obstructive as possible.

Yours Sincerely

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Third Party Defendants 2009 settlement

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Attendees at the March 16<sup>th</sup> 2009 meeting

PPG: Steve Faeth, John Leggeteria, Mark  
DEP: Tom Coizzi, Kerry Pflugh  
AG: Anna Lascurain, Rick Engle  
City, William Matsikoudis, Assistant Corp Counsel Aurelio Vincitore,  
Deputy Mayor Kabili Tayari  
Land Owner Chis Dagget and his attorney Kevin Coakley

Proposed Site Administrator Mike McCabe will be there as well.

This is to confirm that we are meeting tomorrow at 3 pm at City Hall to discuss the proposed state court consent decree.

Nancy Marks" [nmarks@nrdc.org](mailto:nmarks@nrdc.org)  
Albert Huang (another NRDC attorney)  
Maggie Ens (NRDC member)  
Joe Morris (ICO)  
Rev. Will Ashley (ICO)  
Rev. Geoff Curtiss (ICO)  
John Bee (environmental consultant)