SDMS Document ID
2002724

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION VIII

03 MAY -6 PM 1:34
EPA REGION VIII
HEARING CLERK

IN THE MATTER OF:

The Burlington Northern and Santa Fe Railway Company - Libby Railyard, Montana
Libby Asbestos Site
Libby, Montana

The Burlington Northern and Santa Fe Railway Company,

Respondent

ADMINISTRATIVE ORDER ON CONSENT FOR REMOVAL ACTION

U.S. EPA Region VIII
CERCLA Docket No. CERCLA-08-2003-0004

Proceeding Under Sections 104, 106(a), 107 and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. §§ 9604, 9606(a), 9607 and 9622

[TABLE OF CONTENTS]

I. JURISDICTION AND GENERAL PROVISIONS 3
II. PARTIES BOUND 3
III. DEFINITIONS 4
IV. FINDINGS OF FACT 5
V. CONCLUSIONS OF LAW AND DETERMINATIONS 6
VI. ORDER 7
VII. DESIGNATION OF CONTRACTOR, PROJECT COORDINATOR, AND ON-SCENE COORDINATOR 7
VIII. WORK TO BE PERFORMED 8
IX. SITE ACCESS 11
X. ACCESS TO INFORMATION 11
XI. RECORD RETENTION 12
XII. COMPLIANCE WITH OTHER LAWS 12
XIII. EMERGENCY RESPONSE AND NOTIFICATION OF RELEASES 13
XIV. AUTHORITY OF ON-SCENE COORDINATOR 13
XV. PAYMENT OF RESPONSE COSTS 13
XVI. DISPUTE RESOLUTION 15
XVII. FORCE MAJEURE 16
XVIII. STIPULATED PENALTIES 17
XIX. COVENANT NOT TO SUE BY EPA 19
XX. RESERVATIONS OF RIGHTS BY EPA 20
XXI. COVENANT NOT TO SUE BY RESPONDENT 21
XXII. OTHER CLAIMS 22
XXIII. CONTRIBUTION PROTECTION 22
XXIV. INDEMNIFICATION 22
XXV. INSURANCE 23
XXVI. MODIFICATIONS 23
XXVII. ADDITIONAL REMOVAL ACTION 24
XXVIII. NOTICE OF COMPLETION OF WORK 24
XXIX. SEVERABILITY/INTEGRATION/APPENDICES 25
XXX. EFFECTIVE DATE 25

I. JURISDICTION AND GENERAL PROVISIONS

1. This Administrative Order on Consent ("Order") is entered into voluntarily by the United States Environmental Protection Agency ("EPA") and The Burlington Northern and Santa Fe Railway Company ("Respondent"). This Order provides for the performance of a removal action by Respondent and the reimbursement of certain response costs incurred by the United States at or in connection with the Respondent's property in Libby, Montana (the "Property").

2. This Order is issued under the authority vested in the President of the United States by Sections 104, 106(a), 107 and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9604, 9606(a), 9607 and 9622, as amended ("CERCLA").

3. EPA has notified the State of Montana (the "State") of this action pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a).

4. EPA and Respondent recognize that this Order has been negotiated in good faith and that the actions undertaken by Respondent in accordance with this Order do not constitute an admission of any liability. Respondent has raised defenses to the assertions of liability, which are being considered by EPA. Nevertheless, Respondent is agreeing to proceed with the Work under this Order due to weather constraints with respect to the timing of the Work and in consideration of EPA's acknowledgment that the Work conducted pursuant to this Order and Future Response Costs reimbursed pursuant to this Order may be used as consideration, in whole or in part, towards a future de minimis or other settlement of Respondent's potential liability for the Libby Asbestos site (as listed October 23, 2002 on the National Priorities List) generally. Respondent does not admit, and retains the right to assert any defenses and controvert in any subsequent proceedings, other than proceedings to implement or enforce this Order, the validity of the findings of facts, conclusions of law, and determinations in Sections IV and V of this Order. Respondent agrees to comply with and be bound by the terms of this Order and further agrees that it will not contest the basis or validity of this Order or its terms.

II. PARTIES BOUND

5. This Order applies to and is binding upon EPA and upon Respondent and its successors and assigns. Any change in ownership or corporate status of Respondent including, but not limited to, any transfer of assets or real or personal property shall not alter Respondent's responsibilities under this Order.

6. Respondent shall ensure that its contractors, subcontractors, and representatives receive a copy of this Order and comply with this Order. Respondent shall be responsible for any noncompliance with this Order.

III. DEFINITIONS

7. Unless otherwise expressly provided herein, terms used in this Order which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Order or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

a. "Action Memorandum" shall mean the EPA Action Memorandum relating to the Site signed on May 2, 2002 by the Acting Assistant Administrator, Office of Solid Waste and Emergency Response, and all attachments thereto. The "Action Memorandum" is attached as Appendix A.

b. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601, *et seq.*

c. "Day" shall mean a calendar day. In computing any period of time under this Order, where the last day would fall on a Saturday, Sunday, or Federal holiday, the period shall run until the close of business of the next working day.

d. "Effective Date" shall be the effective date of this Order as provided in Section XXX.

e. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

f. "MDEQ" shall mean the Montana Department of Environmental Quality and any successor departments or agencies of the State.

g. "Future Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States incurs in overseeing sampling and performing sample analysis pursuant to this Order, verifying the Work, or otherwise implementing, overseeing, or enforcing this Order, including but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, Paragraph 32 (emergency response), Paragraph 62 (work takeover), and the costs of analyzing Respondent's samples in EPA's or EPA's contractor's labs."

h. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

i. "National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

j. "Order" shall mean this Administrative Order on Consent and all appendices attached hereto (listed in Section XXIX). In the event of conflict between this Order and any appendix, this Order shall control.

k. "Paragraph" shall mean a portion of this Order identified by an Arabic numeral.

l. "Parties" shall mean EPA and Respondent.

m. "Property" shall mean The Burlington Northern and Santa Fe Railway Company property located in Libby, Montana and more particularly described in Appendix B.

n. "RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901, *et seq.* (also known as the Resource Conservation and Recovery Act).

o. "Respondent" shall mean The Burlington Northern and Santa Fe Railway Company and its predecessors.

p. "Section" shall mean a portion of this Order identified by a Roman numeral.

q. "Site" for purposes of this Order shall consist of the Property.

r. "State" shall mean the State of Montana.

s. "Waste Material" shall mean 1) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); 2) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); and 3) any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27).

t. "Work" shall mean all activities Respondent is required to perform under this Order, as set forth in the Workplan.

u. "Workplan" shall mean the work plan for implementation of the removal action, as set forth in Appendix C to this Order, and any modifications made thereto in accordance with this Order.

IV. FINDINGS OF FACT

8. The Site, i.e., The Burlington Northern and Santa Fe Railway Company railyard and property, is located north of the town of Libby, MT and south of the Kootenai River. The Site

encompasses approximately 20 acres and is located in Section 7, Township 30 N, Range 31 W of Lincoln County. A total of six railroad tracks trending east-west are present along with associated buildings and siding platforms.

9. Vermiculite mining at Zonolite Mountain (the "mine") was commenced by the Universal Zonolite Company in the 1920s. In 1963, W.R. Grace purchased Zonolite mountain and continued operations until 1990. The processed ore was trucked down the Rainy Creek Road to a Screening Plant, which separated the milled ore into various sizes. Subsequently, the screened ore was moved by conveyor belt across the Kootenai River to a loading facility owned and operated by W.R. Grace, where it was loaded by W.R. Grace employees into rail cars and shipped either to the W.R. Grace Export/Expansion Plant (Libby) or across the country by rail.

10. Sampling shows that asbestos, a hazardous substance, is present in soil, raw ore, ore-concentrate and other soil-like materials at various locations in and around the community of Libby including the Site. The potential harm caused by the asbestos on the Site is geographically divisible from the potential harm caused by asbestos off the Site. Visible unexpanded vermiculite has been found along Respondent's tracks and rail yard in Libby. All vermiculate found on the Property originated from W.R. Grace's mine on Zonolite mountain

11. The Acting Assistant Administrator, Office of Solid Waste and Emergency Response has determined that the presence of the asbestos at the Site may present an imminent and substantial endangerment in the Action Memorandum.

12. Respondent owns The Burlington Northern and Santa Fe Railway Company rail yard, herein referred to as the Property. Respondent recently implemented its own investigations regarding asbestos. A total of twenty-two surface soil samples collected in November, 2001 by Respondent along the railroad tracks and its railyard ranged from trace to less than 1% fibrous amphibole asbestos by weight. In addition, visible unexpanded vermiculite remained at Track #1, Track #2 and Track #3.

V. CONCLUSIONS OF LAW AND DETERMINATIONS

13. Based on the Findings of Fact set forth above, and the Administrative Record supporting this removal action, EPA has determined that:

a. The Site is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

b. The contamination found at the Site, as identified in the Findings of Fact above, includes a "hazardous substance" as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

c. Respondent is a "person" as defined by Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

d. Respondent is a responsible party under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and is jointly and severally liable for performance of response actions and for response costs incurred and to be incurred at the Site.

i. Respondent is the "owner" and/or "operator" of the Site, which is a facility, as defined by Section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and within the meaning of Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1).

ii. Respondent was the "owner" and/or "operator" of the Site, which is a facility, at the time of disposal of hazardous substances at the facility, as defined by Section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and within the meaning of Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2).

e. The conditions described in the Findings of Fact above constitute an actual or threatened "release" of a hazardous substance from a facility as defined by Section 101(22) of CERCLA, 42 U.S.C.§ 9601(22).

f. The removal action required by this Order is necessary to protect the public health, welfare, or the environment and, if carried out in compliance with the terms of this Order, will be considered consistent with the NCP, as provided in Section 300.700(c)(3)(ii) of the NCP.

VI. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, Determinations, and the Administrative Record for this Site, it is hereby Ordered that Respondent shall comply with all provisions of this Order, including, but not limited to, all attachments to this Order and all documents incorporated by reference into this Order. The Respondent agrees to comply with all provisions of this Order.

VII. DESIGNATION OF CONTRACTOR, PROJECT COORDINATOR, AND ON-SCENE COORDINATOR

14. Respondent shall perform the removal action or retain one or more contractors to perform the Work and shall notify EPA of the name(s) and qualifications of such contractor(s) within 5 days of the Effective Date. Respondent shall also notify EPA of the name(s) and qualification(s) of any other contractor(s) or subcontractor(s) retained to perform the Work at least 5 days prior to commencement of such Work. EPA retains the right to disapprove of any or all of the contractors and/or subcontractors retained by Respondent. If EPA disapproves of a

selected contractor, Respondent shall retain a different contractor and shall notify EPA of that contractor's name and qualifications within 10 days of EPA's disapproval.

15. Within 5 days after the Effective Date, Respondent shall designate a Project Coordinator who shall be responsible for administration of all actions by Respondent required by this Order and shall submit to EPA the designated Project Coordinator's name, address, telephone number, and qualifications. To the greatest extent possible, the Project Coordinator shall be present on Site or readily available during Site work. EPA retains the right to disapprove of the designated Project Coordinator. If EPA disapproves of the designated Project Coordinator, Respondent shall retain a different Project Coordinator and shall notify EPA of that person's name, address, telephone number, and qualifications within 10 days following EPA's disapproval. Receipt by Respondent's Project Coordinator of any notice or communication from EPA relating to this Order shall constitute receipt by Respondent.

16. EPA has designated Paul Peronard and Duc Nguyen of the Emergency Response Branch, Region 8, as its On-Scene Coordinators ("OSC"). Except as otherwise provided in this Order, Respondent shall direct all submissions required by this Order to the OSC at Mail Code: 8EPR-ER, U.S. Environmental Protection Agency, 999 18th Street, Suite 300, Denver, CO 80202.

17. EPA and Respondent shall have the right, subject to Paragraph 15, to change their respective designated OSC or Project Coordinator. If feasible, Respondent shall notify EPA 5 days before such a change is made. The initial notification may be made orally, but shall be promptly followed by a written notice.

VIII. WORK TO BE PERFORMED

18. Respondent shall perform all actions necessary to implement the Work. Respondent shall not commence any Work except in conformance with the terms of this Order.

19. Quality Assurance and Sampling.

a. All sampling and analyses performed pursuant to this Order shall conform to EPA direction, approval, and guidance regarding sampling, quality assurance/quality control ("QA/QC"), data validation, and chain of custody procedures. Respondent shall ensure that the laboratory used to perform the analyses participates in a QA/QC program that complies with the appropriate EPA guidance. Respondent shall follow, as appropriate, "Quality Assurance/Quality Control Guidance for Removal Activities: Sampling QA/QC Plan and Data Validation Procedures" (OSWER Directive No. 9360.4-01, April 1, 1990), as guidance for QA/QC and sampling. Respondent shall only use laboratories that have a documented Quality System that complies with ANSI/ASQC E-4 1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs" (American National Standard, January 5, 1995), and "EPA Requirements for Quality Management Plans (QA/R-2)

(EPA/240/B-01/002, March 2001)," or equivalent documentation as determined by EPA. EPA may consider laboratories accredited under the National Environmental Laboratory Accreditation Program ("NELAP") as meeting the Quality System requirements.

b. Upon request by EPA, Respondent shall have such a laboratory analyze samples submitted by EPA for QA monitoring. Respondent shall provide to EPA the QA/QC procedures followed by all sampling teams and laboratories performing data collection and/or analysis.

c. Upon request by EPA, Respondent shall allow EPA or its authorized representatives to take split and/or duplicate samples. Respondent shall notify EPA not less than two (2) days in advance of any sample collection activity, unless shorter notice is agreed to by EPA. EPA shall have the right to take any additional samples that EPA deems necessary. Upon request, EPA shall allow Respondent to take split or duplicate samples of any samples it takes as part of its oversight of Respondent's implementation of the Work.

20. Post-Removal Site Control. In accordance with the Work Plan schedule, or as otherwise directed by EPA, Respondent shall submit a proposal for post-removal site control consistent with Section 300.415(*l*) of the NCP and OSWER Directive No. 9360.2-02. Upon EPA approval, Respondent shall implement such controls and shall provide EPA with documentation of all post-removal site control arrangements.

21. Reporting.

a. Respondent shall submit a written progress report to EPA regarding actions undertaken pursuant to this Order every week (removal activities) and every month (post-removal activities) after the Effective date of this Order until termination of this Order, unless otherwise directed in writing by the OSC. These reports shall describe all significant developments during the preceding period, including the actions performed and any problems encountered, analytical data received during the reporting period, and the developments anticipated during the next reporting period, including a schedule of actions to be performed, anticipated problems, and planned resolutions of past or anticipated problems.

b. Respondent shall submit 3 copies of all plans, reports or other submissions required by this Order or any approved work plan.

c. Final Report. Within 45 days after completion of all Work required by this Order, Respondent shall submit for EPA review and approval a final report summarizing the actions taken to comply with this Order. The final report shall conform, at a minimum, with the requirements set forth in Section 300.165 of the NCP entitled "OSC Reports." The final report shall include a listing of quantities and types of materials removed off-Site or handled on-Site, a discussion of removal and disposal options considered for those materials, a listing of the ultimate destination(s) of those materials, a presentation of the analytical results of all sampling and

analyses performed, and accompanying appendices containing all relevant documentation generated during the removal action (*e.g.*, manifests, invoices, bills, contracts, and permits). The final report shall also include the following certification signed by a person who supervised or directed the preparation of that report:

"Under penalty of law, I certify that to the best of my knowledge, after appropriate inquiries of all relevant persons involved in the preparation of the report, the information submitted is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

d. Respondent shall, at least 30 days prior to the conveyance of any interest in real property at the Site, give written notice to the transferee that the property is subject to this Order and written notice to EPA of the proposed conveyance, including the name and address of the transferee. Respondent also agrees to require that their successors comply with the immediately proceeding sentence and Sections IX (Site Access) and X (Access to Information).

22. Off-Site Shipments.

a. Respondent shall, prior to any shipment of Waste Material from the Site to a out-of-state or in-State waste management facility, provide written notification of such shipment of Waste Material to the appropriate state environmental official in the receiving facility's state and to the On-Scene Coordinator. However, this notification requirement shall not apply to any off-Site shipments when the total volume of all such shipments will not exceed 10 cubic yards.

i. Respondent shall include in the written notification the following information: 1) the name and location of the facility to which the Waste Material is to be shipped; 2) the type and quantity of the Waste Material to be shipped; 3) the expected schedule for the shipment of the Waste Material; and 4) the method of transportation. Respondent shall notify the state in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in another state.

ii. The identity of the receiving facility and state will be determined by Respondent following the award of the contract for the removal action. Respondent shall provide the information required by Paragraph 21(a) and 21(b) as soon as practicable after the award of the contract and before the Waste Material is actually shipped.

b. Before shipping any hazardous substances, pollutants, or contaminants from the Site to an off-site location, Respondent shall obtain EPA's certification that the proposed receiving facility is operating in compliance with the requirements of CERCLA Section 121(d)(3), 42 U.S.C. § 9621(d)(3), and 40 C.F.R. § 300.440. Respondent shall only send hazardous

substances, pollutants, or contaminants from the Site to an off-site facility that complies with the requirements of the statutory provision and regulation cited in the preceding sentence.

IX. SITE ACCESS

23. If property where access is needed to implement this Order, is owned or controlled by Respondent, Respondent shall, commencing on the Effective Date, provide EPA ,the State, and their authorized representatives, including contractors, with access at all reasonable times to the Site, or such other property, for the purpose of conducting any activity related to this Order. Any such access will be subject to Respondent's Health and Safety Plan and Respondent's railroad safety rules.

24. Notwithstanding any provision of this Order, EPA and the State retain all of their access authorities and rights, as well as all of their rights to require land/water use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

X. ACCESS TO INFORMATION

25. Respondent shall provide to EPA, upon reasonable request, copies of all documents and information within their possession or control or that of their contractors or agents relating to activities at the Site or to the implementation of this Order, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Respondent shall also make available to EPA, for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

26. Respondent may assert business confidentiality claims covering part or all of the documents or information submitted to EPA under this Order to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA, or if EPA has notified Respondent that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such documents or information without further notice to Respondent.

27. Respondent may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Respondent asserts such a privilege in lieu of providing documents, Respondent shall provide EPA with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or

information; 4) the name and title of each addressee and recipient; 5) a description of the contents of the document, record, or information; and 6) the privilege asserted by Respondent. However, no documents, reports or other information created or generated pursuant to the requirements of this Order shall be withheld on the grounds that they are privileged.

28. No claim of confidentiality shall be made with respect to any data required to be submitted under this Order, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.

XI. RECORD RETENTION

29. Until 10 years after Respondent's receipt of EPA's notification pursuant to Section XXIX (Notice of Completion of Work), Respondent shall preserve and retain all non-identical copies of records and documents (including records or documents in electronic form) now in its possession or control or which come into its possession or control that directly relate to the implementation of this Order, regardless of any corporate retention policy to the contrary. Until 10 years after Respondent's receipt of EPA's notification pursuant to Section XXIX (Notice of Completion of Work), Respondent shall also instruct its contractors and agents to preserve all documents, records, and information of whatever kind, nature or description relating to performance of the Work.

30. At the conclusion of this document retention period, Respondent shall notify EPA at least 90 days prior to the destruction of any such records or documents, and, upon request by EPA, Respondent shall deliver any such records or documents to EPA. Respondent may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Respondent asserts such a privilege, Respondent shall provide EPA with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the subject of the document, record, or information; and 6) the privilege asserted by Respondent. However, no documents, reports or other information created or generated pursuant to the requirements of this Order shall be withheld on the grounds that they are privileged.

XII. COMPLIANCE WITH OTHER LAWS

31. Respondent shall perform all actions required pursuant to this Order in accordance with all applicable local, state, and federal laws and regulations except as provided in Section 121(e) of CERCLA, 42 U.S.C. § 6921(e), and 40 C.F.R. §§ 300.400(e) and 300.415(j). In accordance with 40 C.F.R. § 300.415(j), all on-Site actions required pursuant to this Order shall, to the extent practicable, as determined by EPA, considering the exigencies of the situation, attain applicable or relevant and appropriate requirements ("ARARs") under federal environmental or

state environmental or facility siting laws. Respondent shall identify ARARs in the Work Plan subject to EPA approval.

XIII. EMERGENCY RESPONSE AND NOTIFICATION OF RELEASES

32. In the event of any action or occurrence during performance of the Work which causes or threatens a release of Waste Material from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Respondent shall immediately take all appropriate action. Respondent shall take these actions in accordance with all applicable provisions of this Order, including, but not limited to, the Health and Safety Plan, in order to prevent, abate or minimize such release or endangerment caused or threatened by the release. Respondent shall also immediately notify the OSC or, in the event of his/her unavailability, the Regional Duty Officer, Emergency Response Branch, EPA Region 8, (800) 227-8914 of the incident or Site conditions. In the event that Respondent fails to take appropriate response action as required by this Paragraph, and EPA takes such action instead, Respondent shall reimburse EPA all costs of the response action not inconsistent with the NCP pursuant to Section XV (Payment of Response Costs).

33. In addition, in the event of any release of a hazardous substance from the Site, Respondent shall immediately notify the OSC at (800) 227-8914 and the National Response Center at (800) 424-8802. Respondent shall submit a written report to EPA within 7 days after each release, setting forth the events that occurred and the measures taken or to be taken to mitigate any release or endangerment caused or threatened by the release and to prevent the reoccurrence of such a release. This reporting requirement is in addition to, and not in lieu of, reporting under Section 103(c) of CERCLA, 42 U.S.C. § 9603(c), and Section 304 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11004, *et seq.*

XIV. AUTHORITY OF ON-SCENE COORDINATOR

34. The OSC shall be responsible for overseeing Respondent's implementation of this Order. The OSC shall have the authority vested in an OSC by the NCP, including the authority to halt, conduct, or direct any Work required by this Order, or to direct any other removal action undertaken at the Site. Absence of the OSC from the Site shall not be cause for stoppage of work unless specifically directed by the OSC.

XV. PAYMENT OF RESPONSE COSTS

35. Payments for Future Response Costs.

a. Respondent shall pay EPA all Future Response Costs not inconsistent with the NCP. On a periodic basis, EPA will send Respondent a bill requiring payment that includes a SCORPIOS Report. Respondent shall make all payments within 45 days of receipt of each bill requiring payment, except as otherwise provided in Paragraph 37 of this Order.

b. Respondent shall make all payments required by this Paragraph electronically or by a certified or cashier's check or checks made payable to "EPA Hazardous Substance Superfund," referencing the name and address of the party(ies) making payment and EPA Site/Spill ID number # 08-BC. Respondent shall send the check(s) to:

Regular Mail:

Mellon Bank
Attn: Superfund Accounting
Lockbox 360859
Pittsburgh, PA 15251-6859

Federal Express, Airborne, etc.:

Environmental Protection Agency 360859
Mellon client Service Center Rm 670
500 Ross Street
Pittsburgh, PA 15262-0001

Wire transfers must be sent directly to the Federal Reserve Bank in New York City with the following information:

ABA = 021030004
TREAS NYC/CTR/
BNF=/AC-68011008

c. At the time of payment, Respondent shall send notice that payment has been made to: Cost Recovery Program Manager
EPA Region 8
999 18th Street, Suite 300
Denver, CO 80202.

d. The total amount to be paid by Respondent pursuant to Paragraph 35(a) shall be deposited in the Libby Asbestos Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

36. In the event that the payment for Future Response Costs is not made within 45 days of Respondent's receipt of a bill, Respondent shall pay Interest on the unpaid balance. The Interest on Past Response Costs shall begin to accrue on the Effective Date and shall continue to accrue until the date of payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to the United States by virtue of Respondent's failure to make timely payments under this Section, including but not limited to, payment of stipulated penalties pursuant to Section XVIII.

37. Respondent may dispute all or part of a bill for Future Response Costs submitted under this Order, if Respondent alleges that EPA has made an accounting error, or if Respondent alleges that a cost item is inconsistent with the NCP. If any dispute over costs is resolved before payment is due, the amount due will be adjusted as necessary. If the dispute is not resolved before payment is due, Respondent shall pay the full amount of the uncontested costs to EPA as specified in Paragraph 35 on or before the due date. Within the same time period, Respondent shall pay the full amount of the contested costs into an interest-bearing escrow account. Respondent shall simultaneously transmit a copy of both checks to the persons listed in Paragraph 35(c) above. Respondent shall ensure that the prevailing party or parties in the dispute shall receive the amount upon which they prevailed from the escrow funds plus interest within 10 days after the dispute is resolved.

XVI. DISPUTE RESOLUTION

38. The dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes between Respondent and EPA arising under or with respect to this Order and shall apply to all provisions of this Order. The fact that dispute resolution is not specifically referenced in the individual Sections of the Order is not intended to and shall not bar Respondent from invoking the procedures with respect to any disputed issue.

39. Any dispute which arises between Respondent and EPA under or with respect to this Order, shall in the first instance be the subject of informal negotiations between the Respondent and EPA. The period for informal negotiations shall not exceed 15 days from the time the dispute arises, unless such period is modified by written agreement of the Project Coordinators. The dispute shall be considered to have arisen when one party sends the other party a written Notice of Dispute. Informal negotiations shall immediately commence. The written Notice of Dispute shall be transmitted to the other parties within 15 days of the time that the dispute arises, or the right to informal or formal dispute resolution shall be considered waived. Any agreement reached by the parties pursuant to this Section shall be in writing and shall, upon signature by both parties, be incorporated into and become an enforceable part of this Order. In the event that the parties cannot resolve a dispute informally, the position advanced by EPA shall be binding unless formal dispute resolution is invoked under Paragraph 40.

40. Within 20 days after the conclusion of the informal negotiation period, Respondent may request a determination by EPA's Assistant Regional Administrator, Office of Ecosystems Protection & Remediation, Region 8, by submitting to EPA a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis or opinion supporting that position and any supporting documentation relied upon by the Respondent.

41. Within 20 days after receipt of Respondent's Statement of Position, the EPA will provide to Respondent its Statement of Position, including, but not limited to, any factual data,

analysis, or opinion supporting that position and all supporting documentation relied upon by the EPA.

42. An administrative record of the dispute shall be maintained by EPA and shall contain all Statements of Position, including supporting documentation, submitted pursuant to this Section. Where appropriate, the EPA Assistant Regional Administrator may allow submission of supplemental Statements of Position by the parties to the dispute.

43. The EPA Assistant Regional Administrator will issue a final administrative decision resolving the dispute, based on the administrative record described in Paragraph 42. EPA Assistant Regional Administrator's decision shall be incorporated into and become an enforceable part of this Order. This decision shall be binding upon the Respondent, subject to the provision for judicial review provided in Paragraph 44.

44. If the Respondent does not abide by EPA's final administrative decision, EPA reserves the right in its sole discretion to seek either stipulated or statutory penalties and/or to pursue any other enforcement option provided in CERCLA. If EPA seeks enforcement of this Consent Order or pursues any other enforcement option in court, Respondent may seek judicial review of EPA's final administrative decision based on the administrative record developed during the dispute resolution process. Such judicial review of the dispute shall be under the arbitrary and capricious standard.

45. While a matter is pending in dispute resolution, Respondent is not relieved of their obligations to perform other activities and submit deliverables. The invocation of dispute resolution does not stay the accrual of stipulated or statutory penalties under this Consent Order. Following resolution of the dispute, as provided by this Section, Respondent shall fulfill the requirement that was the subject of the dispute in accordance with the agreement reached or with EPA's decision, whichever occurs.

XVII. FORCE MAJEURE

46. Respondent agrees to perform all requirements of this Order within the time limits established under this Order, unless the performance is delayed by a *force majeure*. For purposes of this Order, a *force majeure* is defined as any event arising from causes beyond the control of Respondent, or of any entity controlled by Respondent, including but not limited to its contractors and subcontractors, which delays or prevents performance of any obligation under this Order despite Respondent's best efforts to fulfill the obligation. *Force majeure* does not include financial inability to complete the Work or increased cost of performance.

47. If any event occurs or has occurred that may delay the performance of any obligation under this Order, whether or not caused by a *force majeure* event, Respondent shall notify EPA orally within 2 days of when Respondent first knew that the event might cause a delay. Within 10 days thereafter, Respondent shall provide to EPA in writing an explanation and description of the

reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; and Respondent's rationale for attributing such delay to a *force majeure* event if they intend to assert such a claim; and a statement as to whether, in the opinion of Respondent, such event may cause or contribute to an endangerment to public health, welfare or the environment. Failure to comply with the above requirements shall preclude Respondent from asserting any claim of *force majeure* for that event for the period of time of such failure to comply and for any additional delay caused by such failure.

48. If EPA agrees that the delay or anticipated delay is attributable to a *force majeure* event, the time for performance of the obligations under this Order that are affected by the *force majeure* event will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the *force majeure* event shall not, of itself, extend the time for performance of any other obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused by a *force majeure* event, EPA will notify Respondent in writing of its decision. If EPA agrees that the delay is attributable to a *force majeure* event, EPA will notify Respondent in writing of the length of the extension, if any, for performance of the obligations affected by the *force majeure* event.

XVIII. STIPULATED PENALTIES

49. Respondent shall be liable to EPA for stipulated penalties in the amounts set forth in Paragraphs 50 and 51 for failure to comply with the requirements of this Order specified below, unless excused under Section XVII (*Force Majeure*). "Compliance" by Respondent shall include completion of the activities under this Order or any work plan or other plan approved under this Order identified below in accordance with all applicable requirements of law, this Order, and any plans or other documents approved by EPA pursuant to this Order and within the specified time schedules established by and approved under this Order.

50. Stipulated Penalty Amounts - Work.

a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in Paragraph 50(b):

Penalty Per Violation Per Day	Period of Noncompliance
$500.00	1st through 14th day
$2000.00	15th through 30th day
$27,500.00	31st day and beyond

b. Compliance Milestones

Failure to begin the removal action by a date established in the Work plan;
Failure to provide EPA with air monitoring results within 48 hours of receipt;

Failure to provide EPA with soil sampling results within 2 weeks of receipt.

51. Stipulated Penalty Amounts - Reports. The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate reports pursuant to Paragraph 21:

Penalty Per Violation Per Day	Period of Noncompliance
$100.00	1st through 14th day
$750.00	15th through 30th day
$2000.00	31st day and beyond

52. In the event that EPA assumes performance of a portion or all of the Work pursuant to Paragraph 62 of Section XX, Respondent shall be liable for a stipulated penalty in the amount of $150,000.00.

53. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: 1) with respect to a deficient submission under Section VIII (Work to be Performed), during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notifies Respondent of any deficiency; and 2) with respect to a decision by the EPA Management Official at the Assistant Regional Administrator level or higher, under Paragraph 43 of Section XVI (Dispute Resolution), during the period, if any, beginning on the 21st day after the Negotiation Period begins until the date that the EPA management official issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Order.

54. Following EPA's determination that Respondent has failed to comply with a requirement of this Order, EPA may give Respondent written notification of the failure and describe the noncompliance. EPA may send Respondent a written demand for payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified Respondent of a violation.

55. All penalties accruing under this Section shall be due and payable to EPA within 45 days of Respondent's receipt from EPA of a demand for payment of the penalties, unless Respondent invokes the dispute resolution procedures under Section XVI (Dispute Resolution). All payments to EPA under this Section shall be paid by certified or cashier's check(s) made payable to "EPA Hazardous Substances Superfund," shall be mailed to:

Mellon Bank
Attn: Superfund Accounting
Lockbox 360859
Pittsburgh, PA 15251-6859,

shall indicate that the payment is for stipulated penalties, and shall reference the EPA Region and Site/Spill ID # 08-BC, the EPA Docket Number of this Order, and the name and address of the party making payment. Copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to EPA as provided in Paragraph 16.

56. The payment of penalties shall not alter in any way Respondent's obligation to complete performance of the Work required under this Order.

57. Penalties shall continue to accrue during any dispute resolution period, but need not be paid until 45 days after the dispute is resolved by agreement or by receipt of EPA's decision.

58. If Respondent fails to pay stipulated penalties when due, EPA may institute proceedings to collect the penalties, as well as Interest. Respondent shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 54. Nothing in this Order shall be construed as prohibiting, altering, or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Respondent's violation of this Order or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Sections 106(b) and 122(*l*) of CERCLA, 42 U.S.C. §§ 9606(b) and 9622(*l*), and punitive damages pursuant to Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3). Provided, however, that EPA shall not seek civil penalties pursuant to Section 106(b) or 122(*l*) of CERCLA or punitive damages pursuant to Section 107(c)(3) of CERCLA for any violation for which a stipulated penalty is provided herein, except in the case of a willful violation of this Order or in the event that EPA assumes performance of a portion or all of the Work pursuant to Section XX, Paragraph 62. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Order.

XIX. COVENANT NOT TO SUE BY EPA

59. In consideration of the actions that will be performed and the payments that will be made by Respondent under the terms of this Order, and except as otherwise specifically provided in this Order, EPA covenants not to sue or to take administrative action against Respondent pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for performance of the Work, for the Site, and for recovery of Future Response Costs. This covenant not to sue shall take effect upon the Effective Date and is conditioned upon the complete and satisfactory performance by Respondent of all obligations under this Order, including, but not limited to, payment of Future Response Costs pursuant to Section XV. This covenant not to sue extends only to Respondent and does not extend to any other person.

XX. RESERVATIONS OF RIGHTS BY EPA

60. Except as specifically provided in this Order, nothing herein shall limit the power and authority of EPA or the United States to take, direct, or order all actions necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants or contaminants, or hazardous or solid waste on, at, or from the Site. Further, nothing herein shall prevent EPA from seeking legal or equitable relief to enforce the terms of this Order, from taking other legal or equitable action as it deems appropriate and necessary, or from requiring Respondent in the future to perform additional activities pursuant to CERCLA or any other applicable law.

61. The covenant not to sue set forth in Section XIX above does not pertain to any matters other than those expressly identified therein. EPA reserves, and this Order is without prejudice to, all rights against Respondent with respect to all other matters, including, but not limited to:

a. claims based on a failure by Respondent to meet a requirement of this Order;

b. liability for costs not included within the definition of Future Response Costs;

c. liability for performance of response action other than the Work;

d. criminal liability;

e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;

f. liability arising from the past, present, or future disposal, release or threat of release of Waste Materials outside of the Site;

g. liability arising from the past, present, or future disposal, release or threat of release of Waste Materials, other than amphibole asbestos, within the Site; and

h. liability for costs incurred or to be incurred by the Agency for Toxic Substances and Disease Registry related to the Site.

62. Work Takeover. In the event EPA determines that Respondent has ceased implementation of any portion of the Work, is seriously or repeatedly deficient or late in its performance of the Work, or is implementing the Work in a manner which may cause an endangerment to human health or the environment, EPA may assume the performance of all or any portion of the Work as EPA determines necessary. Respondent may invoke the procedures set forth in Section XVI (Dispute Resolution) to dispute EPA's determination that takeover of the Work is warranted under this Paragraph. Costs incurred by the United States in performing the

Work pursuant to this Paragraph shall be considered Future Response Costs that Respondent shall pay pursuant to Section XV (Payment of Response Costs). Notwithstanding any other provision of this Order, EPA retains all authority and reserves all rights to take any and all response actions authorized by law.

XXI. COVENANT NOT TO SUE BY RESPONDENT

63. Respondent covenants not to sue and agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Work, Future Response Costs, or this Order, including, but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the State Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Site.

Except as provided in Paragraph 65 (Waiver of Claims), these covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraphs 61 (b), (c), and (e) - (g), but only to the extent that Respondent's claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

64. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

65. Respondent agrees not to assert any claims and to waive all claims or causes of action that they may have for all matters relating to the Site, including for contribution, against any person where the person's liability to Respondent with respect to the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous substances at the Site, or having accepted for transport for disposal or treatment of hazardous substances at the Site, if

a. the materials contributed by such person to the Site containing hazardous substances did not exceed the greater of i) 0.002% of the total volume of waste at the Site, or ii) 110 gallons of liquid materials or 200 pounds of solid materials.

b. This waiver shall not apply to any claim or cause of action against any person meeting the above criteria if EPA has determined that the materials contributed to the Site by such person contributed or could contribute significantly to the costs of response at the Site. This waiver also shall not apply with respect to any defense, claim, or cause of action that a Respondent may have against any person if such person asserts a claim or cause of action relating to the Site against such Respondent.

XXII. OTHER CLAIMS

66. By issuance of this Order, the United States and EPA assume no liability for injuries or damages to persons or property resulting from any acts or omissions of Respondent. The United States or EPA shall not be deemed a party to any contract entered into by Respondent or its directors, officers, employees, agents, successors, representatives, assigns, contractors, or consultants in carrying out actions pursuant to this Order.

67. Except as expressly provided in Section XXI, Paragraph 65 of this Order (De Micromis Waivers) and Section XIX (Covenant Not to Sue by EPA), nothing in this Order constitutes a satisfaction of or release from any claim or cause of action against Respondent or any person not a party to this Order, for any liability such person may have under CERCLA, other statutes, or common law, including but not limited to any claims of the United States for costs, damages and interest under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607.

68. No action or decision by EPA pursuant to this Order shall give rise to any right to judicial review, except as set forth in Section 113(h) of CERCLA, 42 U.S.C. § 9613(h).

XXIII. CONTRIBUTION PROTECTION

69. The Parties agree that Respondent is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for "matters addressed" in this Order. The "matters addressed" in this Order are the Work and Future Response Costs. Except as provided in Section XXI, Paragraph 65, of this Order (De Micromis Waivers), nothing in this Order precludes the United States or Respondent from asserting any claims, causes of action, or demands against any persons not parties to this Order for indemnification, contribution, or cost recovery.

XXIV. INDEMNIFICATION

70. Respondent shall indemnify, save and hold harmless the United States, its officials, agents, contractors, subcontractors, employees and representatives from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Respondent, its officers, directors, employees, agents, contractors, or subcontractors, in carrying out actions pursuant to this Order. In addition, Respondent agrees to pay the United States all costs incurred by the United States, including but not limited to attorneys fees and other expenses

of litigation and settlement, arising from or on account of claims made against the United States based on negligent or other wrongful acts or omissions of Respondent, its officers, directors, employees, agents, contractors, subcontractors and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Order. The United States shall not be held out as a party to any contract entered into by or on behalf of Respondent in carrying out activities pursuant to this Order. Neither Respondent nor any such contractor shall be considered an agent of the United States.

71. The United States shall give Respondent notice of any claim for which the United States plans to seek indemnification pursuant to this Section and shall consult with Respondent prior to settling such claim.

72. Respondent waives all claims against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States, arising from or on account of any contract, agreement, or arrangement between Respondent and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays. In addition, Respondent shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between Respondent and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays.

XXV. INSURANCE

73. At least 7 days prior to commencing any on-Site work under this Order, Respondent shall secure, and shall maintain for the duration of this Order, comprehensive general liability insurance and automobile insurance with limits of two million dollars, combined single limit. Within the same time period, Respondent shall provide EPA with certificates of such insurance and a copy of each insurance policy. In addition, for the duration of the Order, Respondent shall satisfy, or shall ensure that its contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Respondent in furtherance of this Order. If Respondent demonstrates by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering some or all of the same risks but in an equal or lesser amount, then Respondent need provide only that portion of the insurance described above which is not maintained by such contractor or subcontractor.

XXVI. MODIFICATIONS

74. The OSC may make modifications to any plan or schedule in writing or by oral direction. Any oral modification will be memorialized in writing by EPA promptly, but shall have as its effective date the date of the OSC's oral direction. Any other requirements of this Order may be modified in writing by mutual agreement of the parties.

75. If Respondent seeks permission to deviate from any approved work plan or schedule, Respondent's Project Coordinator shall submit a written request to EPA for approval outlining the proposed modification and its basis. Respondent may not proceed with the requested deviation until receiving oral or written approval from the OSC pursuant to Paragraph 74.

76. No informal advice, guidance, suggestion, or comment by the OSC or other EPA representatives regarding reports, plans, specifications, schedules, or any other writing submitted by Respondent shall relieve Respondent of its obligation to obtain any formal approval required by this Order, or to comply with all requirements of this Order, unless it is formally modified.

XXVII. ADDITIONAL REMOVAL ACTION

77. If EPA determines that additional removal actions on the Site not included in an approved plan are necessary to protect public health, welfare, or the environment, EPA will notify Respondent of that determination. Unless otherwise stated by EPA, within 30 days of receipt of notice from EPA that additional removal actions are necessary to protect public health, welfare, or the environment, Respondent shall submit for approval by EPA a work plan for the additional removal actions. The plan shall conform to the applicable requirements of Section VIII (Work to Be Performed) of this Order. Upon EPA's approval of the plan pursuant to Section VIII, Respondent shall implement the plan for additional removal actions in accordance with the provisions and schedule contained therein. This Section does not alter or diminish the OSC's authority to make oral modifications to any plan or schedule pursuant to Section XXVII (Modifications). The foregoing notwithstanding, nothing in this Order shall require Respondent to take any action, conduct any investigation, or conduct any removal or remediation activities off-Site. In the event that EPA determines that additional removal actions are necessary off-Site, such additional removal actions shall not be subject to this Order.

XXVIII. NOTICE OF COMPLETION OF WORK

78. When EPA determines, after EPA's review of the Final Report, that all Work has been fully performed in accordance with this Order, with the exception of any continuing obligations required by this Order, including, post-removal site controls, if necessary, payment of Future Response Costs, or record retention, EPA will provide written notice to Respondent not later than 60 days from such determination. If EPA determines that any such Work has not been completed in accordance with this Order, EPA will notify Respondent, provide a list of the deficiencies, and require that Respondent modify the Work Plan if appropriate in order to correct such deficiencies. Respondent shall implement the modified and approved Work Plan and shall submit a modified Final Report in accordance with the EPA notice. Failure by Respondent to implement the approved modified Work Plan shall be a violation of this Order.

XXIX. SEVERABILITY/INTEGRATION/APPENDICES

79. If a court issues an order that invalidates any provision of this Order or finds that Respondent has sufficient cause not to comply with one or more provisions of this Order, Respondent shall remain bound to comply with all provisions of this Order not invalidated or determined to be subject to a sufficient cause defense by the court's order.

80. This Order and its appendices constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Order. The parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Order. The following appendices are attached to and incorporated into this Order:

- Appendix A, ~~August 17, 2001~~ May 2 2002 (RLS), Action Memorandum.
- Appendix B, Property description.
- Appendix C, Approved Workplan.

XXX. EFFECTIVE DATE

81. This Order shall be effective 5 days after the Order is signed by the Regional Administrator or his/her delegatee.

The undersigned representative of Respondent certifies that he is fully authorized to enter into the terms and conditions of this Order and to bind the party he represents to this document.

AGREED THIS 17 DAY OF April, 2003.

FOR THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

DAVID C. CLARK
Director, Environmental Remediation
The Burlington Northern and Santa Fe Railway Company
920 S.E. Quincy
Topeka, KS 66612-1116

APPROVED AS TO FORM

SENIOR GENERAL ATTORNEY

IT IS SO ORDERED AND AGREED THIS 5 DAY OF MAY, 2003.
FOR THE UNITED STATES OF AMERICA:

DOUGLAS SKIE
Director Preparedness, Assessment, and Emergency Response Program
Office of Office of Ecosystems Protection & Remediation
U.S. Environmental Protection Agency, Region 8
999 18th Street, Suite 300
Denver, CO 80202-2466

SHARON KERCHER
Director Technical Enforcement Program
Superfund and RCRA
Office of Enforcement, Compliance and Environmental Justice
EPA Region VIII
999 18th Street, Suite 300
Denver, CO 80202

MICHAEL T. RISNER
Director of Legal Enforcement
Office of Enforcement, Compliance and Environmental Justice
EPA Region VIII
999 18th Street, Suite 300
Denver, CO 80202