SDMS Document ID
2002772

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

IN THE MATTER OF: Libby Asbestos Site Libby, Montana	ADMINISTRATIVE ORDER ON CONSENT FOR REMOVAL ACTION
W.R. Grace & Co.- Conn., Kootenai Development Corporation,	U.S. EPA Region 8 CERCLA Docket No. ____
Respondents	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	6
V.	CONCLUSIONS OF LAW AND DETERMINATIONS	8
VI.	ORDER	9
VII.	DESIGNATION OF CONTRACTOR, PROJECT COORDINATOR, AND ON-SCENE COORDINATOR	9
VIII.	WORK TO BE PERFORMED	10
IX.	SITE ACCESS	14
X.	ACCESS TO INFORMATION	14
XI.	RECORD RETENTION	15
XII.	COMPLIANCE WITH OTHER LAWS	16
XIII.	EMERGENCY RESPONSE AND NOTIFICATION OF RELEASES	16
XIV.	AUTHORITY OF ON-SCENE COORDINATOR	17
XV.	PAYMENT OF RESPONSE COSTS	17
XVI.	DISPUTE RESOLUTION	18
XVII.	FORCE MAJEURE	19
XVIII.	STIPULATED PENALTIES	20
XIX.	COVENANT NOT TO SUE BY EPA	22
XX.	RESERVATIONS OF RIGHTS BY EPA	22
XXI.	COVENANT NOT TO SUE BY RESPONDENTS	23
XXII.	OTHER CLAIMS	24
XXIII.	CONTRIBUTION PROTECTION	24
XXIV.	INDEMNIFICATION	24
XXV.	INSURANCE	25
XXVI.	MODIFICATIONS	25
XXVII	NOTICE OF COMPLETION OF WORK	26
XXVIII	SEVERABILITY/INTEGRATION/APPENDICES	26
XXIX.	EFFECTIVE DATE	26

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 W.R. Grace & Co.-Conn., and Kootenai Development Corporation ("Respondents"). This Order provides for the performance of a removal action by Respondents and the reimbursement of certain response costs incurred by the United States at or in connection with the work to be performed by Respondents at a property called the "Flyway", located just outside Libby, Montana. The Flyway is a part of the "Libby Asbestos Site" or the "Site."

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 Respondents recognize that this Order has been negotiated in good faith and that the actions undertaken by Respondents in accordance with this Order do not constitute an admission of any liability. Respondents do not admit, and retain the right to 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. In addition, in agreeing to comply with Section XV (Payment of Response Costs) by reimbursing EPA's indirect costs, Respondents retain the right to controvert in any other proceedings other than proceedings to implement or enforce this Order, the validity of EPA's indirect cost methodology and the accuracy of accounting for indirect costs. Respondents agree to comply with and be bound by the terms of this Order and further agree that they 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 Respondents and their successors and assigns. Any change in ownership or corporate status of a Respondent including, but not limited to, any transfer of assets or real or personal property shall not alter such Respondent's responsibilities under this Order.

6. Respondents are jointly and severally liable for carrying out all activities required by this Order. In the event of the insolvency or other failure of any one or more Respondents to implement the requirements of this Order, the remaining Respondents shall complete all such requirements.

7. Respondents shall ensure that their contractors, subcontractors, and representatives receive a copy of this Order and comply with this Order. Respondents shall be responsible for any noncompliance with this Order.

III. DEFINITIONS

8. 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 appendix attached hereto and incorporated hereunder, the following definitions shall apply:

a. "Action Memorandums" shall mean the EPA Action Memorandums relating to the Site signed on May 23, 2000 and August 17, 2001, and all attachments thereto. The Action Memorandums can be found in the Libby Asbestos Site Administrative Record.

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 XXIX.

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 reviewing or developing plans, reports and other items 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, the costs incurred pursuant to Paragraph 50 (costs and attorneys fees and any monies paid to secure access, including the amount of just compensation), Paragraph 61 (emergency response) and Paragraph 84 (work takeover).

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 XXVIII). 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 Respondents.

m. "Property or "Flyway" shall mean the Flyway, a portion of W.R. Grace's Screening Plant located near the intersection of Rainy Creek Road and Highway 37 identified in the Statement of Work , but excluding any portions currently owned by parties other than the Respondents.

n. "QAPP" shall mean Quality Assurance Project Plan.

o. "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).

p. "Respondents" shall mean W.R. Grace & Co.-Conn., and Kootenai Development Corporation.

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

r. "Site" shall mean the Libby Asbestos Superfund Site, located in and around Libby Montana, including those areas in which vermiculite was handled, processed or on which amphibole asbestos otherwise came to be located.

s. "Special Account" shall mean the Libby Asbestos Site Future Response Costs Special Account, within the EPA Hazardous Trust Fund.

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

u. "Statement of Work" or "SOW" shall mean the statement of work for implementation of the removal action, as set forth in Appendix A to this Order, and any modifications made thereto in accordance with this Order. The Statement of Work consists of the Flyway Property Final Removal Action Work Plan, the 2002 Addendum to the Flyway Property Final Removal Action Work Plan and a second addendum which will be finalized prior to the Effective Date of this Order.

v. "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).

w. "Work" shall mean all activities Respondents are required to perform under this Order.

IV. FINDINGS OF FACT

9. In the late 1800s, gold miners discovered a significant body of vermiculite ore in an area located in the mountains about seven miles northeast of the town of Libby, Montana (the "Mine").

10. From 1963 to 1990 Grace-Conn. (known as W.R. Grace & Co. from 1963 to 1988) mined and beneficiated (through milling) vermiculite ore at the Mine, separating some non-vermiculite materials from the vermiculite ore. The beneficiated vermiculite ore was known as "vermiculite concentrate."

11. One of the minerals found in the vermiculite deposits near Libby is tremolite, which is a form of asbestos in the amphibole family. There is also non-asbestiform tremolite in the Libby vermiculite deposit.

12. Libby vermiculite ore deposits contain measurable quantities of amphibole asbestos.

13. While much of the asbestos in the Libby vermiculite deposit was removed from the vermiculite in the mining, milling and screening process, the vermiculite concentrate (processed but unexpanded vermiculite) that was transported to expanding plants had an asbestos content of from trace to 5%.

14. From 1963 until 1990, Grace-Conn. operated a Screening Plant, a processing plant at which vermiculite concentrate was separated into different grades through a mechanical screening process.

15. Prior to the mid-1970s, the Screening Plant was located at the Mine Site.

16. After the mid-1970s, the Screening Plant was located down Rainy Creek Road from the Mine Site, at the intersection of Highway 37 and Rainy Creek Road on the bank of the Kootenai River, about four miles from Libby, partially located on the Flyway.

17. Prior to the construction of the new Screening Plant at that location, the property at the intersection of Highway 37 and Rainy Creek Road was used as a holding point for vermiculite concentrate trucked from the Screening Plant at the mine.

18. From 1963 to 1990, W.R. Grace & Co.-Conn. transported, screened, and sized vermiculite concentrate from the property at the intersection of Highway 37 and Rainy Creek Road across the Kootenai River by conveyer belt to a rail loading station where it was placed in bulk in rail hopper cars for distribution to customers and processing facilities in other states.

19. In the operation of the Screening Plant, there were occasionally spills, processing errors, or lack of demand for certain size grades of vermiculite concentrate.

20. At various times between 1963 and 1990, the vermiculite concentrate that had spilled, vermiculite concentrate that was affected by processing errors, or vermiculite concentrate of a grade for which there was no immediate demand was placed in various outdoor locations on the grounds of the Screening Plant where it was open to the environment.

21. Varying amounts of asbestos remain on the surface and subsurface at the Flyway.

22. In 1990, Grace-Conn. ceased vermiculite mining and processing operations in Libby.

23. In the mid-1990s, Grace-Conn. sold several of the properties associated with its former vermiculite operations in and near Libby.

24. In 1994 Grace-Conn. sold to Kootenai Development Corporation ("KDC") an approximately 20-acre parcel which is the Flyway.

25. KDC was aware of the presence of asbestos at the Mine Site at the time it purchased that property in the mid-1990s.

26. KDC moved vermiculite concentrate material from outdoor, uncovered piles that remained on the Property from its original location to other locations on the Flyway.

27. In 2000 Grace purchased a controlling interest in KDC.

28. On April 2, 2001, Respondents each filed voluntary chapter 11 Bankruptcy cases in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") entitled W. R. Grace & Co., et al, jointly administered under Case No. 01-01139 (the "Bankruptcy Cases") and have been operating their businesses as debtors in possession under chapter 11 of the Bankruptcy Code since that time.

29. Prior to EPA's involvement at the Site, the Flyway was totally accessible to the public.

30. The Flyway has been platted for residential development.

31. EPA's investigations have shown that human activities which disturb soils contaminated with amphibole asbestos result in exposures to airborne asbestos fibers. Thus,

people who have been, or may be in the future, involved in activities on the Flyway may be exposed to airborne asbestos fibers.

32. The State of Montana requested EPA to list the Libby Asbestos Site on the National Priorities List as Montana's top priority site pursuant to 42 U.S.C. § 9605(a)(8)(B) and 40 C.F.R. § 300.425(c)(2). See 67 Fed. Reg. 8836, 8839 (Feb. 26, 2002).

33. On October 24, 2002 EPA listed the Libby Asbestos Site on the National Priorities List. See 67 Fed. Reg. 65,315 (Oct. 24, 2002).

34. Test results indicated elevated levels of asbestos contamination at the Site. See Action Memoranda 5-23-00 and 8-17-01.

V. CONCLUSIONS OF LAW AND DETERMINATIONS

35. Based on the Findings of Fact set forth above, and the Administrative Record supporting this removal action (which includes both the original Administrative Record for the Libby Export and Screening Plants and the first supplement thereto), EPA has determined that:

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

b. The contamination found at the Flyway, 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. Each Respondent is a "person" as defined by Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

d. Each 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 action and for response costs incurred and to be incurred at the Site.

i. Respondent KDC is the "owner" and/or "operator" of the 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 W.R. Grace-Conn., was the "owner" and/or "operator" of the 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 the 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

36. Based upon the foregoing Findings of Fact, Conclusions of Law, Determinations, and the Administrative Record for this Site, it is hereby Ordered and Agreed that Respondents 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.

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

37. Respondents shall retain one or more contractors to perform the Work and shall notify EPA of the name(s) and qualifications of such contractor(s) within ten (10) days of the Effective Date. Respondents 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 five (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 Respondents. If EPA disapproves of a selected contractor, Respondents shall retain a different contractor and shall notify EPA of that contractor's name and qualifications within five (5)days of EPA's disapproval. Respondents' proposed contractor must demonstrate compliance 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), by submitting a copy of the proposed contractor's Quality Management Plan ("QMP"). The QMP should be prepared in accordance with "EPA Requirements for Quality Management Plans (QA/R-2)" (EPA/240/B0-1/002), or equivalent documentation as required by EPA.

38. Within ten (10) days after the Effective Date, Respondents shall designate a Project Coordinator who shall be responsible for administration of all actions by Respondents 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, Respondents shall retain a different Project Coordinator and shall notify EPA of that person's name, address, telephone number, and qualifications within five (5) days following EPA's disapproval. Receipt by Respondents' Project Coordinator of any notice or communication from EPA relating to this Order shall constitute receipt by all Respondents.

39. EPA has designated Jim Christiansen as its Remedial Project Manager (RPM) for the Site. Except as otherwise provided in this Order, Respondents shall direct all submissions required by this Order to Jim Christiansen at U.S. EPA Region 8, EPR-SR, 999 18th St., Suite 300, Denver, CO, 80202.

40. EPA and Respondents shall have the right, subject to Paragraph 38, to change their respective designated RPM or Project Coordinator. Respondents shall notify EPA five (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

41. Respondents shall perform, at a minimum, all actions necessary to implement the Statement of Work. The actions to be implemented generally include, but are not limited to, the following:

a. The development of a Work Plan based on the requirements of the Statement of Work.

b. Removal of soils contaminated with amphibole asbestos from areas within the Flyway that are defined by EPA.

c. Disposal of contaminated material on-Site at the former vermiculite mine.

d. Collection and analysis of samples as required by the Work Plan and this Order.

42. Work Plan and Implementation.

a. Within twenty (20) days after the Effective Date, Respondents shall submit to EPA for approval a draft Work Plan for performing the removal action generally described in Paragraph 41 above. The draft Work Plan shall be based upon and be consistent with the Statement of Work and shall provide a description of, and an expeditious schedule for, the actions required by this Order. Respondents shall prepare and submit a QAPP in accordance with "EPA Requirements for Quality Assurance Project Plans (QA/R-5)" (EPA/240/B-01/003, March 2001), "EPA Guidance for Quality Assurance Project Plans (QA/G-5)" (EPA/600/R-02/009, December 2002), "EPA Guidance for the Data Quality Objectives Process (QA/G-4)" (EPA/600/R-96/055, August 2000), and "EPA Guidance for Preparing Standard Operating Procedures (QA/G-6)" (EPA/240/B-01/004, March 2001). Other pertinent guidance documents that should be considered during the preparation of planning documents are available on the EPA Quality Systems website at: http://www.epa.gov/qualityl/qa_docs.html.

b. EPA may approve, disapprove, require revisions to, or modify the draft Work Plan in whole or in part. If EPA requires revisions, Respondents shall submit a revised draft Work Plan within five (5)days of receipt of EPA's notification of the required revisions. Respondents shall

implement the Work Plan as approved in writing by EPA in accordance with the schedule approved by EPA. Once approved, or approved with modifications, the Work Plan, the schedule, and any subsequent modifications shall be incorporated into and become fully enforceable under this Order.

c. Respondents shall not commence any Work except in conformance with the terms of this Order. Respondents shall not commence implementation of the Work Plan developed hereunder until receiving written EPA approval pursuant to Paragraph 42(b).

43. Health and Safety Plan. Within twenty (20) days after the Effective Date, Respondents shall submit for EPA review and comment a plan that ensures the protection of the public health and safety during performance of on-Site work under this Order. This plan shall be prepared in accordance with EPA's Standard Operating Safety Guide (PUB 9285.1-03, PB 92-963414, June 1992). In addition, the plan shall comply with all currently applicable Occupational Safety and Health Administration ("OSHA") regulations found at 29 C.F.R. Part 1910. If EPA determines that it is appropriate, the plan shall also include contingency planning. Respondents shall incorporate all changes to the plan recommended by EPA and shall implement the plan during the pendency of the removal action.

44. 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/or evaluation, and chain of custody procedures. Respondents shall ensure that the laboratory used to perform the analyses participates in a QA/QC program that complies with the appropriate EPA guidance and procedures specifically developed for the Libby project (i.e., standard operating procedures or proficiency evaluations). Respondents 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. Respondents 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 will only consider laboratories accredited under the National Environmental Laboratory Accreditation Program ("NVLAP"). Candidate laboratories must also agree to onsite laboratory audits performed by EPA or its representative at any time. The laboratory must perform corrective actions as recommended by EPA as a result of any audit and those corrective actions must be reviewed and approved by EPA before any samples taken pursuant to this Order and received during or after the audit may be submitted and analyzed at the candidate laboratory. Additionally, EPA may also require the candidate laboratories to demonstrate proficiencies in preparation and analysis methods and/or in identification and quantification of Libby amphibole through onsite evaluations and/or submission of performance evaluation samples or other reference materials. If necessary, EPA may make available to the

approved laboratory reference materials for use with "Analysis of Asbestos in Soil by PLM" SOP (SRC-LIBBY-03 Revision 0; March 3, 2003). At a minimum, sampling and analysis will comply with the following methods and standard operating procedures: SOP# CDM-LIBBY-05 (Rev 1); SOP# ISSI-LIBBY-01(Rev 7); EPA 2015 and TEM using AHERA counting rules using EPA modifications only. TEM analyses should be documented by hard copies of EDS spectra, diffraction patterns, and photographs of target amphibole particle, structures or fibers, whether asbestiform or not.

b. Upon request by EPA, Respondents shall have such a laboratory analyze samples submitted by EPA for QA monitoring. Respondents 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, Respondents shall allow EPA or its authorized representatives to take split and/or duplicate samples. Respondents shall notify EPA not less than three (3) 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 Respondents to take split or duplicate samples of any samples it takes as part of its oversight of Respondents' implementation of the Work.

45. Post-Removal Site Control. In accordance with the Work Plan schedule, or as otherwise directed by EPA, Respondents 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, Respondents shall implement such controls and shall provide EPA with documentation of all post-removal site control arrangements.

46. Reporting.

a. Respondents shall submit a written progress report to EPA concerning actions undertaken pursuant to this Order every 10th working day after the date of receipt of EPA's approval of the Work Plan until termination of this Order, unless otherwise directed in writing by the RPM. 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. All data should be provided electronically in a format approved by EPA.

b. Respondents shall submit three (3) copies of all plans, reports or other submissions required by this Order, the Statement of Work, or any approved work plan. Upon request by EPA, Respondents shall submit such documents in electronic form.

c. Respondents who own or control property at the Site 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 and the State of the proposed conveyance, including the name and address of the transferee. Respondents who own or control

property at the Site also agree to require that their successors comply with the immediately proceeding sentence and Sections IX (Site Access) and X (Access to Information).

47. Final Report. Within thirty (30) days after completion of all Work required by this Order, Respondents 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 good faith estimate of total costs or a statement of actual costs incurred in complying with the Order, 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."

48. Off-Site Shipments.

a. Respondents shall, prior to any off-Site shipment of Waste Material from the Site to an out-of-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. Respondents 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. Respondents 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 Respondents following the award of the contract for the removal action. Respondents shall provide the information required by Paragraph 48(a) and 48(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, Respondents 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. Respondents 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

49. If the Flyway or a portion thereof, or any other property where access is needed to implement this Order, is owned or controlled by any of the Respondents, such Respondents shall, commencing on the Effective Date, provide EPA, the State, and their representatives, including contractors, with access at all reasonable times to the Flyway, or such other property, for the purpose of conducting any activity related to this Order.

50. Where any action under this Order is to be performed in areas owned by or in possession of someone other than Respondents, Respondents shall use their best efforts to obtain all necessary access agreements within twenty (20) days after the Effective Date, or as otherwise specified in writing by the RPM. Respondents shall immediately notify EPA if after using their best efforts they are unable to obtain such agreements. For purposes of this Paragraph, "best efforts" includes the payment of reasonable sums of money in consideration of access. Respondents shall describe in writing their efforts to obtain access. EPA may then assist Respondents in gaining access, to the extent necessary to effectuate the response actions described herein, using such means as EPA deems appropriate. Respondents shall reimburse EPA for all costs and attorney's fees incurred by the United States in obtaining such access, in accordance with the procedures in Section XV (Payment for Response Costs).

51. Respondents shall refrain from using the Flyway, or such other property, in any manner that would interfere with or adversely affect the implementation, integrity, or protectiveness of the response measures to be performed pursuant to this Order. Such measures may include any land use restrictions developed to restrict access to any contaminants left on the Flyway.

52. Notwithstanding any provision of this Order, EPA retains all of its access authorities and rights, as well as all of its rights to require land use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

X. ACCESS TO INFORMATION

53. Respondents shall provide to EPA and the State, upon 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. Respondents shall also make available to EPA and the State, for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

54. Respondents 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 Respondents 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 Respondents.

55. Respondents 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 Respondents assert such a privilege in lieu of providing documents, they 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 Respondents. 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.

56. No claim of confidentiality shall be made with respect to any data, 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

57. Until 10 years after Respondents' receipt of EPA's notification pursuant to Section XXVII (Notice of Completion of Work), each 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 relate in any manner to the performance of the Work or the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary. Until 10 years after Respondents' receipt of EPA's notification pursuant to Section XXVII (Notice of Completion of Work), Respondents shall also instruct their contractors and agents to preserve all documents, records, and information of whatever kind, nature or description relating to performance of the Work.

58. At the conclusion of this document retention period, Respondents shall notify EPA and the State at least 90 days prior to the destruction of any such records or documents, and, upon

request by EPA or the State, Respondents shall deliver any such records or documents to EPA or the State. Respondents 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 Respondents assert such a privilege, they 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 Respondents. 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.

59. Each Respondent hereby certifies individually that to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information (other than identical copies) relating to its potential liability regarding the Site since notification of potential liability by EPA or the State or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

XII. COMPLIANCE WITH OTHER LAWS

60. Respondents 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. Respondents shall identify ARARs in the Work Plan subject to EPA approval.

XIII. EMERGENCY RESPONSE AND NOTIFICATION OF RELEASES

61. 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, Respondents shall immediately take all appropriate action. Respondents 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. Respondents shall also immediately notify the RPM or, in the event of his/her unavailability, the Regional Duty Officer at (303) 293-1788 of the incident or Site conditions. In the event that Respondents fail to take appropriate response action as required by this Paragraph, and EPA takes such action instead, Respondents shall reimburse EPA all costs of the response action not inconsistent with the NCP pursuant to Section XV (Payment for Response Costs).

62. In addition, in the event of any release of a hazardous substance from the Site, Respondents shall immediately notify the RPM at 303-293-1788 and the National Response Center at (800) 424-8802. Respondents 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

63. The RPM shall be responsible for overseeing Respondents' implementation of this Order. The RPM shall have the authority vested in an RPM 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 RPM from the Site shall not be cause for stoppage of work unless specifically directed by the RPM.

XV. PAYMENT FOR RESPONSE COSTS

64. Prepayment of Future Response Costs.

a. Within 15 days of the Effective Date, Respondents shall forward a payment of $40,000 to EPA, to be deposited by EPA in the Libby Asbestos Site Future Response Costs Special Account ("Special Account"), within the EPA Hazardous Substance Trust Fund. These funds will be retained and used by EPA to conduct or finance Future Response Costs, at or in connection with the Site. Payment shall be made by Electronic Funds Transfer ("EFT") and Respondent shall send the EFT(s) to the Federal Reserve Bank in New York City with the following information:

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

Reference the Libby Asbestos Site Future Response Costs Special Account
Libby Asbestos Site, #08-BC

b. At the time of payment, Respondents shall send notice that payment has been made to the United States in accordance with Paragraph 39 and in addition to:

Kelcey Land, 8ENF-T
U.S. EPA, Region 8
999 18th Street, Suite 300
Denver, CO 80202

c. In the event that EPA's payment of Future Response Costs reduces the funds in the Special Account to $10,000 or less at any time, Respondents agree, within five (5) days of EPA's

notice that the Special Account has reached $10,000 or less, to remit to EPA $10,000 for deposit in the Special Account in accordance with the payment procedure described in Paragraph 64.a. Notice of such remittance shall be made in accordance with Paragraph 64.b. Notwithstanding the foregoing, Respondents are not required to collectively contribute more than a total of $60,000 to the Special Account.

d. After EPA issues its written Notice of Completion in accordance with Paragraph XXVII and EPA has performed a final accounting of all direct and indirect costs relating to Future Response Costs, EPA shall transmit to Respondents a regionally prepared cost summary (now known as SCORPIOS) summarizing the Future Response Costs expenditures. EPA shall remit and return to Respondents the principal balance of any remaining Future Response Cost funds paid by Respondents, if any, from the Special Account. In the event that there were insufficient funds in the Special Account to pay Future Response Costs in full, EPA reserves the right to seek payment of all unpaid Future Response Costs from the Respondents and to file an administrative expense claim for such costs with the Bankruptcy Court. Respondents agree to raise all disputes that they may have concerning unpaid Future Response Costs, other than the priority of the United States' claim in the Bankruptcy Cases, in accordance with the procedures described in Section XVI below.

e. Respondents may contest payment of any Future Response Costs under this section using the procedures described in Section XVI if they determine that the United States has made an accounting error or they allege that a cost item that is included represents costs that are inconsistent with the NCP.

XVI. DISPUTE RESOLUTION

65. Unless otherwise expressly provided for in this Order, the dispute resolution procedures of this Section shall be the exclusive mechanism for resolving disputes arising under this Order. The Parties shall attempt to resolve any disagreements concerning this Order expeditiously and informally.

66. If Respondents object to any EPA action taken pursuant to this Order, including billings for Future Response Costs, they shall notify EPA in writing of their objection(s) within five (5) days of such action, unless the objection(s) has/have been resolved informally. EPA and Respondents shall have twenty (20) days from EPA's receipt of Respondents' written objection(s) to resolve the dispute through formal negotiations (the "Negotiation Period"). The Negotiation Period may be extended at the sole discretion of EPA.

67. 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. If the Parties are unable to reach an agreement within the Negotiation Period, an EPA management official at the Assistant Regional Administrator level or higher will issue a written decision on the dispute to Respondents. EPA's decision shall be incorporated into and become an enforceable part of this Order. Respondents' obligations under this Order shall not be tolled by

submission of any objection for dispute resolution under this Section. Following resolution of the dispute, as provided by this Section, Respondents 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

68. Respondents agree 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 Respondents, or of any entity controlled by Respondents, including but not limited to their contractors and subcontractors, which delays or prevents performance of any obligation under this Order despite Respondents' best efforts to fulfill the obligation. *Force* majeure includes the onset of significant winter weather conditions in the Libby area that delay or prevent the performance of the Work required under this Order. Force *majeure* does not include financial inability to complete the Work or increased cost of performance set forth in the Word Plan.

69. 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, Respondents shall notify EPA orally within two (2) days of when Respondents first knew that the event might cause a delay. Within three (3) days thereafter, Respondents 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; Respondents' 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 Respondents, 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 Respondents 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.

70. 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 Respondents in writing of its decision. If EPA agrees that the delay is attributable to a *force majeure* event, EPA will notify Respondents in writing of the length of the extension, if any, for performance of the obligations affected by the *force majeure* event.

XVIII. STIPULATED PENALTIES

71. Respondents shall be liable to EPA for stipulated penalties in the amounts set forth in Paragraphs 72 and 73 for failure to comply with the requirements of this Order specified below, unless excused under Section XVII (*Force Majeure*). "Compliance" by Respondents 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, the Statement of Work 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.

72. Stipulated Penalty Amounts - Work.

a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in Paragraph 72(b):

Penalty Per Violation Per Day	Period of Noncompliance
$ 500	1st through 14th day
$1000	15th through 30th day
$27,500	31st day and beyond

b. Compliance Milestones
Timely submission of Work Plan as required by this Order.
Timely completion of the Work as required by this Order

73. Stipulated Penalty Amounts - Reports. The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate reports or other written documents pursuant to Paragraphs 46, 47, 48, and 62:

Penalty Per Violation Per Day	Period of Noncompliance
$50	1st through 14th day
$100	15th through 30th day
$27,500	31st day and beyond

74. In the event that EPA assumes performance of a portion or all of the Work pursuant to Paragraph 84 of Section XX, Respondents shall be liable for a stipulated penalty in the amount of $250,000.

75. 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 Respondents 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 67

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.

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

77. All penalties accruing under this Section shall be due and payable to EPA within 30 days of Respondents' receipt from EPA of a demand for payment of the penalties, unless Respondents invoke the dispute resolution procedures under Section XVI (Dispute Resolution). Payment shall be made by Electronic Funds Transfer ("EFT") and Respondent shall send the EFT(s) to the Federal Reserve Bank in New York City with the following information:

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

and shall indicate that the payment is for stipulated penalties, and shall reference the EPA Region and Site/Spill ID Number 08-BC, the EPA Docket Number set forth in the caption of this Order, and the name and address of the party(ies) 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 39, and to:

Kelcey Land, ENF-T
U.S. EPA
999 18th St., Suite 300
Denver, CO 80202

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

79. Penalties shall continue to accrue during any dispute resolution period, but need not be paid until 15 days after the dispute is resolved by agreement or by receipt of EPA's decision.

80. If Respondents fail to pay stipulated penalties when due, EPA may institute proceedings to collect the penalties, as well as Interest. Respondents shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 77. 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 Respondents' 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 84. 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

81. In consideration of the actions that will be performed and the payments that will be made by Respondents 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 Respondents pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for performance of the Work 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 Respondents 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 Respondents and does not extend to any other person.

XX. RESERVATIONS OF RIGHTS BY EPA

82. 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 Respondents in the future to perform additional activities pursuant to CERCLA or any other applicable law.

83. 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 Respondents with respect to all other matters, including, but not limited to:

a. claims based on a failure by Respondents 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; and

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

84. Work Takeover. In the event EPA determines that Respondents have ceased implementation of any portion of the Work, are seriously or repeatedly deficient or late in their performance of the Work, or are 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. Respondents 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 Respondents 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 RESPONDENTS

85. Respondents covenant not to sue and agree 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 Flyway, 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 Flyway.

86. 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 83 (b), (c), and (e) - (g), but only to the extent that Respondents' claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

87. 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).

XXII. OTHER CLAIMS

88. 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 Respondents. The United States or EPA shall not be deemed a party to any contract entered into by Respondents or their directors, officers, employees, agents, successors, representatives, assigns, contractors, or consultants in carrying out actions pursuant to this Order.

89. Except as expressly provided in 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 Respondents 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.

90. 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

91. The Parties agree that Respondents are 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. Nothing in this Order precludes the United States or Respondents 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

92. Respondents 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 Respondents, their officers, directors, employees, agents, contractors, or subcontractors, in carrying out actions pursuant to this Order. In addition, Respondents agree 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 Respondents, their 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 Respondents in carrying out activities pursuant to this Order. Neither Respondents nor any such contractor shall be considered an agent of the United States.

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

94. Respondents waive 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 any one or more of Respondents 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, Respondents 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 any one or more of Respondents 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

95. At least 7 days prior to commencing any on-Site work under this Order, Respondents shall secure, and shall maintain for the duration of this Order, comprehensive general liability insurance and automobile insurance with limits of one million dollars, combined single limit. Within the same time period, Respondents shall provide EPA with certificates of such insurance and a copy of each insurance policy. In addition, for the duration of the Order, Respondents shall satisfy, or shall ensure that their 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 Respondents in furtherance of this Order. If Respondents demonstrate 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 Respondents need provide only that portion of the insurance described above which is not maintained by such contractor or subcontractor.

XXVI. MODIFICATIONS

96. The RPM may make modifications to any plan or schedule or Statement of Work 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 RPM's oral direction. Any other requirements of this Order may be modified in writing by mutual agreement of the parties.

97. If Respondents seek permission to deviate from any approved work plan or schedule or Statement of Work, Respondents' Project Coordinator shall submit a written request to EPA for approval outlining the proposed modification and its basis. Respondents may not proceed

with the requested deviation until receiving oral or written approval from the RPM pursuant to Paragraph 96.

98. No informal advice, guidance, suggestion, or comment by the RPM or other EPA representatives regarding reports, plans, specifications, schedules, or any other writing submitted by Respondents shall relieve Respondents of their 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. NOTICE OF COMPLETION OF WORK

99. 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, but not limited to, post-removal site controls, payment of Future Response Costs, or record retention, EPA will provide written notice to Respondents. If EPA determines that any such Work has not been completed in accordance with this Order, EPA will notify Respondents, provide a list of the deficiencies, and require that Respondents modify the Work Plan if appropriate in order to correct such deficiencies. Respondents shall implement the modified and approved Work Plan and shall submit a modified Final Report in accordance with the EPA notice. Failure by Respondents to implement the approved modified Work Plan shall be a violation of this Order.

XXVIII. SEVERABILITY/INTEGRATION/APPENDICES

100. If a court issues an order that invalidates any provision of this Order or finds that Respondents have sufficient cause not to comply with one or more provisions of this Order, Respondents 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.

101. This Order and its appendix 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 appendix is attached to and incorporated into this Order: the Statement of Work, which is comprised of the Flyway Property Final Removal Action Work Plan, the 2002 Addendum to the Flyway Property Final Removal Action Work Plan and the 2003 Addendum to the Flyway Property Final Removal Action Work Plan.

XXIX. EFFECTIVE DATE

102. This Order shall be effective only upon entry of an order of the Bankruptcy Court in the Respondents' pending Bankruptcy Cases authorizing the Respondents to enter into the Order and approving its terms and conditions. In the event the Bankruptcy Court does not approve this Order and authorize the Respondents to enter into such Order, the parties agree that this Order

shall be null and void and may not be used in any administrative or judicial proceedings and that the parties shall not be bound by the terms contained in this Order.

The undersigned representatives of Respondents certify that they are fully authorized to enter into the terms and conditions of this Order and to bind the parties they represent to this document only upon approval of the Bankruptcy Court as outlined herein.

Agreed this ___ day of July, 2003.

For Respondent W.R. Grace & Co. - Conn.

By _____

Title _____

For Respondent Kootenai Development Corporation.

By _____

Title _____

It is so ORDERED and Agreed this _____ day of July, 2003.

BY: _____ DATE:_____
Douglas Skie, Director
Office of Preliminary Assessment
and Emergency Response, EPR

BY: _____ DATE:_____
Sharon Kercher, Director
Technical Enforcement Program, ECEJ

BY: _____ DATE:_____
Michael Risner, Director
Legal Enforcement Program, ECEJ

Region 8
U.S. Environmental Protection Agency