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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 9

In The Matter Of:	)	
South Bay Asbestos Area Site	)	
Mr. George A. Maciel	)	
George Maciel Trucking, Inc.,	)	
Respondents.	)	U.S. EPA
	)	Docket No. 91-24
Proceeding Under Section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. section 9606(a))	)	

ADMINISTRATIVE ORDER
FOR REMEDIAL DESIGN AND REMEDIAL ACTION

I. INTRODUCTION AND JURISDICTION

This Order directs Respondents, Mr. George A. Maciel and George Maciel Trucking, Inc., to design and implement a portion of the remedial actions described in the Record of Decision for the South Bay Asbestos Area Superfund site, dated September 29, 1989, for the property identified as Area 4 in Section VI of this Order. This Order is issued to Respondents by the United States Environmental Protection Agency ("EPA") under the authority vested in the President of the United States by Sections 104(e) and 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. Sections 9604(e) and 9606(a). This authority was delegated to the Administrator of EPA on January 23, 1987, by Executive Order

12580 (52 Fed. Reg. 2926, January 29, 1987), redelegated to EPA Regional Administrators on September 13, 1987 by EPA Delegation No. 14-14-B, and was further delegated to the Director, Hazardous Waste Management Division, EPA Region 9 by Order R1290.43, dated October 26, 1988.

II. FINDINGS OF FACT

1. The South Bay Asbestos Area Superfund site ("SBAA Site" or "Site") encompasses approximately 550 acres and is located at the northern end of Santa Clara Valley and at the southernmost end of San Francisco Bay (Attachment 1, Figure 1). The SBAA Site is located in the community of Alviso, which is the northernmost section of the City of San Jose, California (Attachment 1, Figure 2). The Site contains numerous truck and industrial yards within its boundaries. This Order specifically addresses the property designated for the purposes of this Order as Area 4, located at 1252 State Street, San Jose, California (Attachment 2, Figure 3) and is identified in the records of the Santa Clara County Tax Assessor as Parcel # 015-12-079.

2. The property (hereinafter referred to as "Area 4") is currently owned by George A. Maciel, who has owned this property since 1978.

3. George A. Maciel, Inc. operates a trucking business at Area 4, which consists of the hauling of a variety of materials. The trucking business requires the movement of trucks and other vehicular traffic over unpaved soils at Area 4. In response to inquiries from an EPA representative in February 1990, George A.

Maciel's legal representative indicated that the business owned more than forty trucks and that the frequency of vehicular traffic at Area 4 exceeded several dozen vehicle-trips per day. As the soils in Area 4 are contaminated with asbestos, the level of vehicular traffic through Area 4 may generate releases of dust into the air which contain a significant amount of asbestos fibers.

4. In October 1984, pursuant to section 105 of CERCLA, 42 U.S.C. Section 9605, EPA placed the SBAA Site on the National Priorities List, set forth at 40 C.F.R. Part 300, Appendix B (48 Fed. Reg. 40658).

5. From approximately June 1986 to approximately January 1989, EPA undertook a Remedial Investigation and Feasibility Study ("RI/FS") to determine the nature and extent of contamination at the Site, and to provide the necessary information to select the final remedial action at the Site, pursuant to CERCLA and the National Contingency Plan, 40 C.F.R. Part 300 ("NCP").

6. Pursuant to section 117 of CERCLA, 42 U.S.C. Section 9617, on June 7, 1989, EPA published notice of the completion of the Feasibility Study and of the availability of the proposed plan for the final remedial action, and provided opportunity for public comment on the proposed final remedial action.

7. The decision by EPA selecting the final remedial action to be implemented at the Site is embodied in a final Record of Decision ("ROD"), executed on September 29, 1989. The State of California has reviewed the ROD and did not have any comments on

the technical nature of the remedy selected by EPA. The Record of Decision is attached to this Order as Attachment 1 and is incorporated by reference. The Record of Decision is supported by an administrative record that contains the documents and information upon which EPA based the selection of the response action. The administrative record was available for public review during the period for public comment on the proposed remedial action. The administrative record is located at the San Jose Public Library, Alviso Branch, the Family Health Foundation, Community Health Education office in Alviso, and in EPA's Region 9 office.

8. Based on the September 29, 1989 ROD, the final remedy selected for the Site consists of (1) paving asbestos contaminated truck and industrial yards; (2) monthly wet sweeping of Alviso streets; (3) removal of asbestos waste debris; (4) verifying adequacy of cover material and placing deed restrictions on landfills; and (5) establishing routine maintenance controls for the remediation. A complete description of the final remedy for this Site is contained in the September 29, 1989 ROD.

9. The hazardous substance of primary concern found at the Site is asbestos. Asbestos has been designated by EPA as a known human carcinogen. EPA sampling has detected asbestos in the air, soils, and groundwater at the Site.

10. The current land uses of the Site consist of a mix of agricultural, light industrial, commercial and residential uses. Actual or threatened releases from this Site, if not addressed by implementing the response action selected in the ROD, may present

an imminent and substantial endangerment to the public health, welfare or the environment. EPA has determined that remediation is appropriate based on the following facts:

(a) Asbestos is a known human carcinogen with no known threshold level of exposure below which the risk of developing cancer is reduced to zero;

(b) Asbestos is present in soils in Area 4 and other areas in the SBAA Site, at concentrations greater than 1 area percent, as measured by Polarized Light Microscopy (PLM), and were found as high as 3.1% at Area 4;

(c) Business operations at Area 4 require frequent vehicular traffic over contaminated soils as described in paragraph 3 of this Section. The ROD identifies inhalation of airborne asbestos from the physical distubance of soils as the exposure pathway representing the most significant risk to human health. See Attachment 1, p. 13; and

(d) Based on EPA's risk assessment for this site, the risk of human exposure to airborne asbestos at levels found in the vicinity of Area 4 exceeds the threshold of risk warranting remediation under the NCP.

11. The ROD requires paving of areas where asbestos is found in surface soils in levels exceeding 1 area percent, as measured by (PLM), and which also receive or have the potential to receive heavy vehicular traffic. In order to determine which properties require the Paving Remedy, EPA conducted sampling and analysis of soils as described in the Final Sampling and Analysis

Summary Report (Attachment 2). The results of samples from Area 4 exceed 1 area percent asbestos by PLM and Area 4 receives and has the continuing potential to receive heavy vehicular traffic.

III. CONCLUSIONS OF LAW AND DETERMINATIONS

1. Area 4 is a "facility" as defined in Section 101(9) of CERCLA, 42 U.S.C. Section 9601(9).

2. Respondents are each a "person" as defined in Section 101(21) of CERCLA, 42 U.S.C. Section 9601(21).

3. Respondents are each a "liable party" as defined in Section 107(a) of CERCLA, 42 U.S.C. Section 9607(a), and each is subject to this Order under Section 106(a) of CERCLA, 42 U.S.C. Section 9606(a).

4. Asbestos is found at Area 4 and is a "hazardous substance" as defined in Section 101(14) of CERCLA, 42 U.S.C. Section 9601(14).

5. Asbestos has been released at Area 4 and is continuing to be released or threatened to be released from the soil into the air, which constitutes a "release", as defined in Section 101(22) of CERCLA, 42 U.S.C. Section 9601(22).

6. The release or threat of release of asbestos from the facility may present an imminent and substantial endangerment to the public health, welfare, or the environment.

7. The actions required by this Order are necessary to protect the public health, welfare, or the environment.

IV. NOTICE TO THE STATE

Prior to issuing this Order, EPA notified the State of California Environmental Protection Agency, Department of Toxic Substances Control of its intent to issue this Order.

V. ORDER

Based on the foregoing, Respondents are hereby ordered to comply with the following provisions, including but not limited to all attachments to this Order, all documents incorporated by reference into this Order, and all schedules and deadlines in this Order, attached to this Order, or incorporated by reference into this Order.

VI. DEFINITIONS

1. 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 the statute or its implementing regulations. Whenever terms listed below are used in this Order or in the documents attached to this Order or incorporated by reference into this Order, the following definitions shall apply:

2. "Area 4" shall mean the property identified as Number 4 in Figure 3 of Attachment 2 which is subject to the Remedial Design and Remedial Action requirements. Area 4 is located at 1252 State Street, San Jose, California, and is identified in the records of the Santa Clara County Tax Assessor as Parcel # 015-12-079.

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

4. "Day" shall mean a calendar day unless expressly stated to be a working day. "Working day" shall mean a day other than a Saturday, Sunday, or Federal holiday. In computing any period of time defined in "days" under this Order, where the last day would fall on a Saturday, Sunday, or Federal holiday, the period shall run until the end of the next working day.

5. "Deliverable" shall mean any plan, report, document, or any other item required of the Respondents under this Order.

6. "EPA" shall mean the United States Environmental Protection Agency.

7. "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. Section 9605, codified at 40 C.F.R. Part 300, including any amendments thereto.

8. "Operation and Maintenance" or "O&M" shall mean all activities required under the Operation and Maintenance Plan developed by Respondents pursuant to this Order as approved by EPA.

9. "Paragraph" shall mean a portion of this Order identified by an arabic numeral.

10. "Paving Remedy" shall mean the response actions consisting of applying asphalt, concrete, or other encapsulating material over all portions of Area 4 which were found by EPA to be contaminated with asbestos above the allowable limit of 1 area percent by PLM and which are subject to vehicular traffic.

11. "Performance Standards" shall mean those cleanup standards, standards of control, and other substantive requirements, criteria or limitations, identified in the Record of Decision and in Section X of this Order, that the Work required by this Order must attain and maintain. In particular, the Respondents shall take active measures to prevent releases of asbestos from Area 4 at any time during and subsequent to the construction of the Paving Remedy, including the design and construction of a pavement adequate to ensure complete encapsulation of asbestos-contaminated soil to prevent the release of asbestos to the air and the implementation of operations and maintenance measures to ensure the pavement continues to encapsulate the asbestos in the future.

12. "PLM" or Polarized Light Microscopy means the EPA- approved test method for analysis of bulk insulation samples and is the analytical test method required in the ROD and by this Order to determine the level of asbestos in soils at the truck and industrial yards at the SBAA Site. Identification of asbestos fibers is made by optical analysis of samples using a polarized light microscope.

13. "Record of Decision" or "ROD" shall mean the final EPA Record of Decision for the South Bay Asbestos Area Superfund Site, San Jose, California, signed on September 29, 1989, by the Regional Administrator, EPA Region 9, and all attachments thereto.

14. "Remedial Action" or "RA" shall mean those activities, including Operation and Maintenance, to be undertaken by Respondents to implement the final plans and specifications submitted by Respondents pursuant to the Remedial Design approved by EPA and required by Section X of this Order, including any additional activities required under Sections XI, XII, XIII, XIV and XV of this Order.

15. "Remedial Design" or "RD" shall mean those activities to be undertaken by Respondents to develop the plans and specifications for the Remedial Action required by Section X of this Order.

16. "Response Costs" shall mean all costs, including direct costs, indirect costs, and accrued interest incurred by the United States to perform or support response actions at the Site. Response costs include, but are not limited to, the costs of overseeing the Work, such as the costs of reviewing or developing plans, reports and other items pursuant to this Order, and costs associated with verifying the Work.

17. "Section" shall mean a portion of this Order identified by a roman numeral and including one or more paragraphs.

18. "SBAA Site" or "Site" shall mean the South Bay Asbestos Area Superfund site (SBAA) as identified in Figure 2 of Attachment 1.

19. "State" shall mean the State of California Environmental Protection Agency, Department of Toxic Substances Control acting on behalf of the State of California.

20. "Work" shall mean all response activities Respondents are required to perform under this Order, including but not limited to, Remedial Design, Remedial Action, and any activities required to be undertaken pursuant to Sections IX through XVI of this Order.

VII. NOTICE OF INTENT TO COMPLY

Respondents shall each provide, not later than ten (10) days after the effective date of this Order, written notice to the EPA Remedial Project Manager (RPM) stating each Respondent's intent to comply with the terms of this Order. If EPA determines that a Respondent does not unequivocally commit to perform the Work as provided by this Order, such Respondent shall be deemed to have violated this Order and to have failed or refused to comply with this Order. Respondents' written notice shall describe, using facts that exist on or prior to the effective date of this Order, any "sufficient cause" defenses asserted by Respondents under sections 106(b) and 107(c)(3) of CERCLA. The absence of a response by EPA to the notice required by this Section shall not be deemed to be acceptance of Respondents' assertions.

VIII. PARTIES BOUND

1. This Order shall apply to and be binding upon the Respondents, their directors, officers, employees, agents, successors, and assigns. No change in the ownership, corporate status, or other control of George A. Maciel Trucking, Inc. shall alter any of the Respondents' responsibilities under this Order.

2. Each Respondent shall provide a copy of this Order to any prospective owners or successors before a controlling interest in either Respondent's assets, property rights, or stock are transferred to the prospective owner or successor. To ensure compliance with this Order, Respondents shall provide a copy of this Order to each contractor, sub-contractor, laboratory, or consultant retained to perform any Work under this Order, within five days after the effective date of this Order or on the date such services are retained, whichever date occurs later. Respondents shall also provide a copy of this Order to each person representing Respondents with respect to the Site or the Work and shall condition all contracts and subcontracts entered into hereunder upon performance of the Work in conformity with the terms of this Order. With regard to the activities undertaken pursuant to this Order, each contractor and subcontractor shall be deemed to be related by contract to the Respondents within the meaning of section 107(b)(3) of CERCLA, 42 U.S.C. Section 9607(b)(3). Notwithstanding the terms of any contract, Respon-

dents are responsible for compliance with this Order and for ensuring that its contractors, subcontractors and agents comply with and perform any Work in accordance with this Order.

IX. NOTICE OF OBLIGATIONS TO SUCCESSORS-IN-TITLE

1. Within ten (10) days after the effective date of this Order, any Respondent who owns all or any portion of Area 4 shall (1) record a copy or copies of this Order in the appropriate governmental office where land ownership and transfer records are filed or recorded; (2) record a notice of obligation to provide access and related covenants; and (3) ensure that the recording of this Order is indexed to the titles of each and every property within Area 4 so as to provide notice to third parties of the issuance and terms of this Order with respect to those properties. Any Respondent who owns all or any portion of Area 4 shall, within fifteen (15) days after the effective date of this Order, send notice of full compliance with this Paragraph to EPA.

2. Not later than fifteen (15) days prior to any transfer of any real property interest in any property included within Area 4, Respondents who are transferring such property shall submit a true and correct copy of the transfer documents to EPA, and shall identify the transferee by name, principal business address and effective date of the transfer.

X. WORK TO BE PERFORMED

A. General Obligations

1. Respondents shall cooperate with EPA in providing information to the public regarding the Work. As requested by EPA, Respondents shall participate in the preparation of information for distribution to the public and in public meetings which may be held or sponsored by EPA to explain activities at or relating to the Site.

2. Respondents shall finance and perform, at their expense, the implementation of the work as required by this Order within the time periods specified.

3. All aspects of the Work shall be performed by qualified employees or contractors of Respondents. Within thirty (30) days after the effective date of this Order, Respondents shall select the employees or contractors which Respondents propose to use in carrying out the Work under this Order and notify EPA in writing of the name and qualifications of the employees or contractors. Respondents' selected employees or contractors shall have expertise in design and construction of pavement.

4. EPA will review and approve/disapprove of Respondents' selected employees or contractors according to the terms of Section X.A.4. and Section XV.1. and XV.5. of this Order. If EPA disapproves of the selection of employees or a contractor, Respondents shall submit to EPA within 30 days after notice of EPA's disapproval a new list of contractors, including primary support entities and staff, that would be acceptable to Respon-

dents. EPA will thereafter provide written notice to Respondents of the names of the contractors that are acceptable to EPA. Respondents may then select any approved contractor(s) from that list and shall notify EPA of the name(s) of the contractor(s) selected within fifteen (15) days of EPA's designation of approved contractors.

5. If at any time Respondents propose to use a different contractor, Respondents shall notify EPA and shall obtain approval from EPA before the new contractor performs any Work under this Order.

6. Unless otherwise directed by EPA, Respondents shall not perform any Work under this Section prior to EPA's approval of such Work.

B. Remedial Design and Remedial Action for Paving Remedy

1. Within sixty (60) days after Respondents' obtain EPA's approval of Respondents' selected employees or contractor, Respondents shall submit to EPA a draft of the remedial design plans and specifications ("Remedial Design" or "RD") for construction of the Paving Remedy over all unpaved portions of Area 4 subject to vehicular traffic. The Remedial Design shall describe in detail the methods and materials to be used to construct the pavement and meet all requirements and Performance Standards in the ROD and in this Order, including measures to prevent the release of asbestos dust during construction. The Remedial Design shall include but is not limited to the following:

a) Plans, including but not limited to visual representations to scale of existing site conditions (e.g., driveways, existing pavement, parking areas, buildings, etc.) and areas to be newly paved to comply with this Order, with an estimate of total area in square feet to be paved;

b) The proposed pavement cross section indicating the type of material to be used for paving (e.g., asphalt or concrete), thickness, surface preparation, and design basis assumptions;

c) A detailed description of specific measures to be employed during construction to prevent the visible emissions of asbestos dust from Area 4, and measures to assure worker health and safety, in accordance with the requirements described in Paragraph C.8 of this Section;

d) A description of construction methods to be employed including types of equipment, methods for surface preparation, and methods for application of paving material;

e) A plan and schedule for O&M activities as described in Paragraph C.6 of this Section; and

f) A schedule for implementing the Remedial Action, which incorporates the deadlines set forth in Paragraphs B.1,B.3, and B.4 of this Section.

3. Within sixty (60) days of receipt of EPA's comments on the draft Remedial Design, Respondents shall submit a final RD that incorporates EPA's comments.

4. Within ninety (90) days of notification of EPA approval of the Remedial Design, the Respondents shall initiate physical construction of the Paving Remedy. Respondents shall provide EPA with thirty (30) days notice of the Respondents' intent to initiate construction.

5. Upon approval by EPA, the Remedial Design is incorporated into this Order and shall be an enforceable part of this Order.

6. During Remedial Action, Respondents shall take measures to prevent generation of visible dust emissions and to ensure worker health and safety.

7. Upon completion of the Remedial Action, Respondents shall implement the Operation and Maintenance (O&M) activities submitted in the Remedial Design and approved by EPA. O&M shall include, but not be limited to, the following:

a) Annual inspections of the pavement beginning one year after completion of Remedial Action, including identification of cracks, holes and any other observable changes to the original condition of the pavement, and of actions required to repair the pavement, if necessary;

b) Implementation of repairs, including repaving, if necessary;

c) Certification, submitted in writing to EPA within thirty (30) days of the inspection, that the inspection was conducted, what the condition of the pavement is, and what repairs are necessary and were or will be made.

C. General Requirements For the Work

1. The Work performed by Respondents pursuant to this Order shall, at a minimum, achieve Performance Standards.

2. Notwithstanding any action by EPA, Respondents remain fully responsible for achieving the Performance Standards. Nothing in this Order, or in EPA's approval of Respondents' submissions under this Order, shall be deemed to constitute a warranty or representation of any kind by EPA that full performance of the Work will achieve the Performance Standards. Respondents' compliance with such approved documents does not preclude EPA from seeking additional work to achieve the applicable Performance Standards.

3. The Paving Remedy shall extend to all areas subject to vehicular traffic or parking within Area 4.

4. The Paving Remedy shall be designed to standards capable of withstanding existing and predicted traffic uses, including types, weights, and frequencies of vehicles which use or may use the area. The thickness of the pavement material shall be four (4) inches at a minimum. Any proposed modifications to the specifications in this paragraph or elsewhere in this Section shall have adequate justification provided as part of the Remedial Design submittal for EPA review and approval.

5. The Paving Remedy shall have a minimum design life of ten (10) years utilizing commonly accepted engineering practices for paving such as those of the American Association of State Highway and Transportation Officials (AASHTO).

6. All materials and construction methods shall be in accordance with the State of California Department of Transportation (CALTRANS) Standard Specifications (January 1988), where appropriate.

7. Dust control measures may include, but are not limited to, soil wetting and selective use of equipment to minimize soil disturbance during construction.

8. The Remedial Design shall include measures to be taken during work to protect worker health and safety. The Remedial Design shall comply with the appropriate requirements of 29 C.F.R Section 1910.120 (as amended by 54 Fed. Reg. 9294, March 6, 1989; Occupational Safety Health Guidance for Hazardous Waste Site Activities (October 1985, DHHS NIOSH, Publication No. 85-115), the NCP requirements for worker health and safety (40 CFR Section 300.150) and any other applicable state or federal requirements.

9. All soils removed from Area 4 shall be disposed of or treated at a facility approved by EPA in accordance with Section 121(d)(3) of CERCLA, 42 U.S.C. Section 9621(d)(3); with the U.S. EPA "Revised Off-Site Policy," OSWER Directive 9834.11, November 13, 1987; and with all other applicable Federal, state, and local requirements.

10. Within thirty (30) days after Respondents conclude that the Work required by this Order has been fully performed, Respondents shall so notify EPA and schedule and conduct an inspection to be attended by Respondents and an EPA representative. The inspection shall be followed by a written report submitted by

Respondents within (30) days of the inspection, certifying that the Work has been completed in full satisfaction of the requirements of this Order. If, after completion of the inspection and receipt and review of the written report, EPA determines that the Work or any portion thereof has not been completed in accordance with this Order, EPA shall notify Respondents in writing of the activities that must be undertaken to complete the Work and shall set forth in the notice a schedule for performance of such activities. Respondents shall perform all activities described in the notice in accordance with the specifications and schedules established therein. Nothing in this Section shall limit EPA's right to perform periodic reviews pursuant to Section 121(c) of CERCLA, 42 U.S.C. Section 9621(c), or to take or require any action that in the judgment of EPA is appropriate at the Site, in accordance with 42 U.S.C. Sections 9604, 9606, or 9607.

XI. FAILURE TO ATTAIN PERFORMANCE STANDARDS

1. In the event that EPA determines that Performance Standards have not been met, EPA may notify Respondents that additional response actions are necessary.

2. Unless otherwise stated by EPA, within thirty (30) days of receipt of notice from EPA that additional response activities are necessary to meet any applicable Performance Standards, Respondents shall submit for approval by EPA a work plan for the additional response activities. The plan shall conform to the applicable requirements of Sections X, XVII, and XVIII of this Order. Upon EPA's approval of the plan pursuant to Section XV,

Respondents shall implement the plan for additional response activities in accordance with the provisions and schedule contained therein.

XII. EPA PERIODIC REVIEW

Under Section 121(c) of CERCLA, 42 U.S.C. Section 9621(c), and applicable regulations, EPA may review conditions at Area 4 to assure that the Work performed pursuant to this Order adequately protects human health or the environment. Until such time as EPA certifies completion of the Work, Respondents shall conduct the requisite response actions as determined necessary by EPA in order to permit EPA to conduct the review under Section 121(c) of CERCLA. As a result of any review performed under this Section, Respondents may be required to perform additional Work or to modify Work previously performed.

XIII. ADDITIONAL RESPONSE ACTIONS

1. EPA may determine that in addition to the Work identified in this Order, additional response activities may be necessary to protect human health or the environment. If EPA determines that additional response activities are necessary, EPA may require Respondents to submit a work plan for additional response activities. EPA may also require Respondents to modify any plan, design, or other deliverable required by this Order.

2. Not later than thirty (30) days after receiving EPA's notice that additional response activities are required pursuant to this Section, Respondents shall submit a work plan for the

response activities to EPA for review and approval. Upon approval by EPA, the work plan is incorporated into this Order as a requirement of this Order and shall be an enforceable part of this Order. Upon approval of the work plan by EPA, Respondents shall implement the work plan according to the standards, specifications, and schedule in the approved work plan. Respondents shall notify EPA in writing of their intent to perform such additional response activities within seven (7) days after receipt of EPA's request for additional response activities.

XIV. ENDANGERMENT AND EMERGENCY RESPONSE

1. In the event of any action or occurrence during the performance of the Work which causes or threatens to cause a release of a hazardous substance or which may present an immediate threat to public health or welfare or the environment, Respondents shall immediately take appropriate action to prevent, abate, or minimize the threat, and shall immediately notify EPA's Remedial Project Manager (RPM) (See Section XIX). If the RPM is not available, Respondents shall notify the EPA Emergency Response Unit, Region 9 at (415) 744-1914. Respondents shall take such action in consultation with EPA's RPM and in accordance with all applicable provisions of this Order, including but not limited to the Health and Safety Plan and the Contingency Plan required by Section X of this Order. In the event that Respondents fail to take appropriate response action as required by

this Section, and EPA takes that action instead, Respondents shall be liable to EPA for all costs of the response action not inconsistent with the NCP.

2. Nothing in the preceding Paragraph shall be deemed to limit any authority of the United States to take, direct, or order all appropriate action to protect human health and the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances on, at, or from the Site.

XV. EPA REVIEW OF SUBMISSIONS

1. After review of any deliverable, plan, report or other item which is required to be submitted for review and approval pursuant to this Order, EPA may: (a) approve the submission; (b) approve the submission with modifications; (c) disapprove the submission and direct Respondents to re-submit the document after incorporating EPA's comments; or (d) disapprove the submission and assume responsibility for performing all or any part of the response action. As used in this Order, the terms "approval by EPA", "EPA approval", or a similar term means the action described in (a) or (b) of this Paragraph. EPA approval shall be in writing.

2. In the event of approval or approval with modifications by EPA, Respondents shall proceed to take any action required by the plan, report, or other item, as approved or modified by EPA.

3. Upon receipt of a notice of disapproval or a request for a modification, Respondents shall, within fourteen (14) days or such longer time as specified by EPA in its notice of disapproval or request for modification, correct the deficiencies and resubmit the plan, report, or other item for approval. Notwithstanding the notice of disapproval, or approval with modifications, Respondents shall proceed, at the direction of EPA, to take any action required by any portion of the submission which EPA has approved.

4. If any submission is not approved by EPA, Respondents shall be deemed to be in violation of this Order.

5. Notwithstanding any approvals which may be granted by the EPA, no warranty of any kind is provided by EPA with regard to the Work.

6. Any reports, plans, specifications, schedules, appendices, and attachments required or established by this Order are, upon approval by EPA, incorporated into this Order.

XVI. PROGRESS REPORTS

In addition to the other deliverables set forth in this Order, Respondents shall provide progress reports to EPA with respect to actions and activities undertaken pursuant to this Order. Two progress reports shall be submitted: one report thirty (30) days prior to the start of Remedial Action, and a second report within thirty days after completion of the paving remedy. At a minimum these progress reports shall: (1) describe the actions which have been taken to comply with this Order; (2)

describe all Work activities to be commenced or that have been completed; and (3) describe all problems encountered and any anticipated problems, any actual or anticipated delays, and solutions developed and implemented to address any actual or anticipated problems or delays.

XVII. QUALITY ASSURANCE, SAMPLING AND DATA ANALYSIS

If the Respondents conduct any sampling of Area 4, either on their own initiative or if required by EPA, the sampling shall be conducted in accordance with all applicable quality assurance and quality control requirements. Any sampling proposed by Respondents shall be submitted to EPA for review and approval.

XVIII. COMPLIANCE WITH APPLICABLE LAWS

1. All activities by Respondents pursuant to this Order shall be performed in accordance with the requirements of all applicable federal, state, and local laws, regulations, and permitting requirements. EPA has determined that the response actions required by this Order, if performed in accordance with this Order, are consistent with the National Contingency Plan (NCP).

2. As provided in Section 121(e) of CERCLA and in the NCP, no permit shall be required for any portion of the Work conducted entirely on-site. Where any portion of the Work requires a federal or state permit or approval, Respondents shall submit timely applications and take all other actions necessary to obtain and to comply with all such permits or approvals.

3. This Order is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

4. Nothing in this Order shall be deemed to constitute a preauthorization of a CERCLA claim within the meaning of Sections 111 or 112 of CERCLA, 42 U.S.C. Section 9611 or 9612, or 40 C.F.R. Section 300.25(d).

XIX. REMEDIAL PROJECT MANAGER

1. All communications, whether written or oral, from Respondents to EPA shall be directed to EPA's Remedial Project Manager ("RPM") with a copy of any notifications required by this Order directed to EPA's Assistant Regional Counsel. Respondents shall submit to EPA two copies of all documents, including plans, reports, and other correspondence, which are developed pursuant to this Order, and shall send these documents by certified mail, return receipt requested. EPA's Remedial Project Manager is:

Eric Yunker, 75 Hawthorne Street (H-6-2), San Francisco, CA 94105, phone number: (415) 744-2217.

EPA's Assistant Regional Counsel is:

Allyn L. Stern, Office of Regional Counsel, 75 Hawthorne Street, San Francisco, CA 94105, phone number (415) 744-1376.

2. EPA may change its Remedial Project Manager or Assistant Regional Counsel.

3. EPA's RPM shall have the authority lawfully vested in a Remedial Project Manager (RPM) and in an On-Scene Coordinator (OSC) by the National Contingency Plan, 40 C.F.R. Part 300.

EPA's RPM shall have authority, consistent with the National Contingency Plan, to halt any work required by this Order, and to take any necessary response action.

4. Within ten (10) days after the effective date of this Order, Respondents shall designate a Project Coordinator to represent them regarding the Work addressed in this Order, and shall submit the name, address, and telephone number of the Project Coordinator to EPA. Respondents' Project Coordinator shall be responsible for ove
rseeing Respondents' implementation of this Order and for coordination of communication between EPA and Respondents.

XX. ACCESS TO SITE NOT OWNED BY RESPONDENTS

1. If Area 4, any other area that is to be used for access, property where documents required to be prepared or maintained by this Order are located, or other property subject to or affected by the clean up, is owned in whole or in part by parties other than those bound by this Order, Respondents shall obtain site access agreements from the present owner(s) within thirty (30) days of the effective date of this Order. Such agreements shall provide access for EPA, its contractors and oversight officials, the state and its contractors, and Respondents or Respondents' authorized representatives and contractors, and such agreements shall specify that Respondents are not EPA's representative with respect to liability associated with the Work conducted at Area 4. Copies of such agreements shall be provided to EPA prior to Respondents' initiation of field activities.

2. If access agreements are not obtained within the time referenced above, Respondents shall immediately notify EPA of their failure to obtain access. In its sole discretion, EPA may decide to perform those response actions with EPA contractors at the property in question or take other action with regard to access issues. If EPA decides to perform those tasks or activities, Respondents shall perform all other activities not requiring access to that property. Respondents shall integrate the results of any such tasks undertaken by EPA into its reports and deliverables.

XXI. SITE ACCESS AND DATA/DOCUMENT AVAILABILITY

1. Respondents shall allow EPA and its authorized representatives and contractors to enter and freely move about all property at Area 4 and other areas subject to or affected by the Work under this Order or where documents required to be prepared or maintained by this Order are located as deemed necessary by EPA, including such access for the purposes of inspecting conditions, activities, the results of activities, records, operating logs, and contracts related to the Site or Respondents and their representatives or contractors pursuant to this Order; reviewing the progress of Respondents in carrying out the terms of this Order; conducting tests if EPA or its authorized representatives or contractors deem necessary; using a camera, sound recording device or other documentary type equipment; and verifying the data submitted to EPA by Respondents. Respondents shall allow EPA and its authorized representatives to enter Area 4, to in-

spect and copy all records, files, photographs, documents, sampling and monitoring data, and other writings related to Work undertaken in carrying out this Order. Nothing herein shall be interpreted as limiting or affecting EPA's right of entry or inspection authority under federal law.

2. Under the provisions of Section 104(e) of CERCLA, 42 U.S.C. Section, 9604(e), EPA explicitly reserves the right to observe the Work of Respondents as it is performed.

3. Respondents may assert a claim of business confidentiality covering part or all of the information submitted to EPA pursuant to the terms of this Order under 40 C.F.R. section 2.203 only if such claim is not inconsistent with Section 104(e)(7) of CERCLA, 42 U.S.C. section 9604(e)(7), or other provisions of law. Any such claim shall be asserted in the manner described by 40 C.F.R. section 2.203(b) and substantiated by Respondents at the time the claim is made. Information determined by EPA to be confidential will be given the protection specified in 40 C.F.R. Part 2. If no such claim accompanies the information when it is submitted to EPA, it may be made available to the public by EPA or the state without further notice to the Respondents. Respondents shall not assert confidentiality claims with respect to any sampling or analytical data or reports generated under this Order or for documents that fall under Section 104(e)(7)(F) of CERCLA, 42 U.S.C. Section 9604(e)(7)(F).

4. If Respondents claim that any documents referenced in Paragraph 3 of this Section are confidential information, they shall maintain an index of such documents for the period during which this Order is in effect. The index shall contain, for each document, the date, author, addressee, and subject of the document. Upon written request from EPA, Respondents shall submit a copy of the index to EPA.

XXII. RECORD PRESERVATION

1. Respondents shall provide to EPA upon request, copies of any and all documents and information within its possession or control or in possession or control of its divisions, employees, agents, accountants, contractors, or attorneys (other than documents or information privileged under the attorney-client or work product privileges) relating to activities at Area 4 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 for purposes of investigation, information gathering, or testimony, its employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

2. For a period of six (6) years following Respondents' completion of the Work pursuant to Section X.C.10. of this Order, Respondents shall preserve and retain all records and documents in their possession or control or in the possession or control of

their employees, agents, accountants, contractors or attorneys, that relate in any manner to the Work, environmental conditions at the Site, the causes of the environmental conditions at Area 4, Respondents' liability for those environmental conditions, Respondents' use or disposal of hazardous substances at the Site, or the implementation of this Order. At the conclusion of this document retention period, Respondents shall notify EPA at least ninety (90) days prior to the destruction of any such records or documents, and upon request by EPA, Respondents shall deliver any such records or documents to EPA.

3. Until six (6) years after Respondents' completion of the Work pursuant to Section X.C.10. of this Order, Respondents shall preserve, and shall instruct their contractors and agents to preserve, all documents, records, and information of whatever kind, nature or description relating to the performance of the Work. Upon the conclusion of this document retention period, Respondents shall notify EPA at least ninety (90) days prior to the destruction of any such records, documents or information, and, upon request of EPA, Respondents shall deliver all such documents, records and information to EPA.

4. Within thirty (30) days after the effective date of this Order, each Respondent shall submit a written certification to EPA's RPM stating whether or not Respondents have altered, mutilated, discarded, disposed of, or destroyed, since notification of potential liability by the United States or the State, any records, documents or other information relating to: 1) its

potential liability under CERCLA, 2) and its use of or disposal of hazardous substances with regard to the Site. Respondents shall not dispose of any such documents after the effective date of this Order without prior approval by EPA. Respondents shall, upon EPA's request and at no cost to EPA, deliver the documents or copies of the documents to EPA.

XXIII. DELAY IN PERFORMANCE

1. Any delay in performance of this Order that, in EPA's judgment, is not properly justified by Respondents under the terms of this Paragraph shall be considered a violation of this Order. Any delay in performance of this Order shall not affect Respondents' obligations to fully comply with all terms and conditions of this Order.

2. Respondents shall notify EPA of any delay or anticipated delay in performing any requirement of this Order. Such notification shall be made by telephone to EPA's RPM within twenty-four (24) hours after Respondents first knew or should have known that a delay might occur. Respondents shall adopt all reasonable measures to avoid or minimize any such delay. Within four (4) days after notifying EPA by telephone, Respondents shall provide written notification fully describing the nature of the delay, any asserted justification for delay, any reason why Respondents should not be held strictly accountable for failing to comply with any relevant requirements of this Order, the measures planned and taken to minimize the delay, and a schedule for implementing the measures that will be taken to mitigate the

effect of the delay. Increased costs or expenses associated with implementation of the activities called for in this Order are not a justification for any delay in performance.

XXIV. ASSURANCE OF ABILITY TO COMPLETE WORK

1. Respondents shall demonstrate their ability to complete the Work required by this Order and to pay all claims that arise from the performance of the Work by obtaining and presenting to EPA within thirty (30) days after the effective date of this Order, financial information which is sufficient to allow EPA to determine that Respondents have sufficient assets available to perform the Work. Respondents shall demonstrate financial assurance in an amount no less than the estimate of cost for the Remedial Design and Remedial Action (including Operation and Maintenance) for Area 4.

2. At least seven (7) days prior to commencing any Work at Area 4 pursuant to this Order, Respondents shall submit to EPA a certification that Respondents or their contractors and subcontractors have adequate insurance coverage or have indemnification for liabilities for injuries or damages to persons or property which may result from the activities to be conducted by or on behalf of Respondents pursuant to this Order. Respondents shall ensure that such insurance or indemnification is maintained for the duration of the Work required by this Order.

XXV. UNITED STATES NOT LIABLE

The United States, by issuance of this Order, assumes no liability for any injuries or damages to persons or property resulting entirely or partially from acts or omissions by Respondents, or their directors, officers, employees, agents, representatives, successors, assigns, contractors, or consultants in carrying out any action or activity pursuant to this Order. Neither EPA nor the United States may be deemed to be a party to any contract entered into by Respondents or their directors, officers, employees, agents, successors, assigns, contractors, or consultants in carrying out any action or activity pursuant to this Order. Respondents, their directors, officers, employees, agents, successors, assigns, contractors, and consultants shall not be considered agents of the United States.

XXVI. ENFORCEMENT AND RESERVATIONS

1. EPA reserves the right to bring an action against Respondents under Section 107 of CERCLA, 42 U.S.C. Section 9607, for recovery of any response costs incurred by the United States related to this Order and not reimbursed by Respondents. This reservation shall include but not be limited to past costs, direct costs, indirect costs, the costs of any response actions EPA takes under this Order, the costs of oversight, the costs of compiling the cost documentation to support oversight cost demand, as well as accrued interest as provided in Section 107(a) of CERCLA. In addition, EPA reserves the right to bring an ac-

tion against Respondents for civil penalties under Section 106(b) of CERCLA, 42 U.S.C. Section 9606(b), and for treble damages under Section 107(c)(3) of CERCLA, 42 U.S.C. Section 9607(c)(3).

2. Notwithstanding any other provision of this Order, at any time during the response action, EPA may perform its own studies, complete the response action (or any portion of the response action) as provided in CERCLA and the NCP, and seek reimbursement from Respondents for its costs, or seek any other appropriate relief.

3. Nothing in this Order shall preclude EPA from taking any additional enforcement actions, including modification of this Order or issuance of additional Orders, and/or additional remedial or removal actions as EPA may deem necessary, or from requiring Respondents in the future to perform additional activities pursuant to CERCLA, 42 U.S.C. Section 9606(a), et seq., or any other applicable law. Respondents shall be liable as provided in CERCLA Section 107(a), 42 U.S.C. Section 9607(a), for the costs of any such additional actions.

4. Notwithstanding any provision of this Order, the United States retains all of its information gathering, inspection and enforcement authorities and rights under CERCLA, RCRA and any other applicable statutes or regulations.

XXVII. CIVIL PENALTIES

1. Respondents shall be subject to civil penalties under Section 106(b) of CERCLA, 42 U.S.C. Section 9606(b), of not more than $25,000 for each day in which Respondents willfully violate,

or fail or refuse to comply with this Order without sufficient cause. In addition, failure to properly provide response action under this Order, or any portion hereof, without sufficient cause, may result in liability under Section 107(c)(3) of CERCLA, 42 U.S.C. Section 9607(c)(3), for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action.

2. Nothing in this Order shall constitute or be construed as a release from any claim, cause of action or demand in law or equity against any person for any liability it may have arising out of or relating in any way to the Site.

3. 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 by the court's order.

XXVIII. ADMINISTRATIVE RECORD

Upon request by EPA, Respondents must submit to EPA all documents related to the selection of the response action for possible inclusion in the administrative record file.

XXIX. EFFECTIVE DATE AND COMPUTATION OF TIME

This Order shall be effective 30 days after signature of this Order by the Director, Hazardous Waste Management Division. Unless otherwise specified in this Order, all times for performance of ordered activities shall be calculated from this effective date.

XXX. SECTION HEADINGS AND ATTACHMENTS

1. The section headings set forth in this Order and its Table of Contents are included for convenience of reference only and shall be disregarded in the construction and interpretation of any of the provisions of this Order.

2. The following attachments are appended to and incorporated into this Order:

"Attachment 1" is the ROD.

"Attachment 2" is the Final Sampling and Analysis Summary Report for the Remedial Design/Remedial Action at the Truckyards in the South Bay Asbestos Area, San Jose, California (July 29, 1991).

XXXI. OPPORTUNITY TO CONFER

Respondents may, within fourteen (14) days after the date this Order is signed, request a conference with EPA's Assistant Regional Counsel and Remedial Project Manager to discuss this Order. The purpose and scope of the conference shall be limited to issues involving the implementation of the response actions required by this Order and extent to which Respondents intend to comply with this Order. This conference is not an evidentiary

hearing, and does not constitute a proceeding to challenge this Order. It does not give Respondents a right to seek review of this Order, or to seek resolution of potential liability, and no official stenographic record of the conference will be made. At any conference held pursuant to a Respondent's request, a Respondent may appear in person or be represented by an attorney or other representative. Requests for a conference must be by telephone followed by written confirmation mailed that day to EPA's Assistant Regional Counsel.

So Ordered, this 30th day of September, 1991.

BY: _____
Jeffrey Zelikson
Director, Hazardous Waste Management Division
U.S. Environmental Protection Agency
Region 9

TABLE OF CONTENTS

Page

I. INTRODUCTION AND JURISDICTION.....1

II. FINDINGS OF FACT.....2

III. CONCLUSIONS OF LAW AND DETERMINATIONS.....6

IV. NOTICE TO THE STATE.....7

V. ORDER.....7

VI. DEFINITIONS.....7

VII. NOTICE OF INTENT TO COMPLY.....11

VIII. PARTIES BOUND.....12

IX. NOTICE OF OBLIGATIONS TO SUCCESSORS-IN-TITLE.....13

X. WORK TO BE PERFORMED.....14

A. General Obligations.....14
B. Remedial Design & Remedial Action for Paving Remedy.....15
C. General Requirements for the Work.....18

XI. FAILURE TO ATTAIN PERFORMANCE STANDARDS.....20

XII. EPA PERIODIC REVIEW 21

XIII. ADDITIONAL RESPONSE ACTIONS.....21

XIV. ENDANGERMENT AND EMERGENCY RESPONSE.....22

XV. EPA REVIEW OF SUBMISSIONS 23

XVI. PROGRESS REPORTS.....24

XVII. QUALITY ASSURANCE, SAMPLING AND DATA ANALYSIS.....25

XVIII. COMPLIANCE WITH APPLICABLE LAWS.....25

XIX. REMEDIAL PROJECT MANAGER.....26

XX. ACCESS TO SITE NOT OWNED BY RESPONDENT.....27

XXI. SITE ACCESS AND DATA/DOCUMENT AVAILABILITY.....28

XXII. RECORD PRESERVATION.....30
XXIII. DELAY IN PERFORMANCE.....32
XXIV. ASSURANCE OF ABILITY TO COMPLETE WORK.....33
XXV. UNITED STATES NOT LIABLE.....34
XXVI. ENFORCEMENT AND RESERVATIONS.....34
XXVII. CIVIL PENALTIES.....35
XXVIII. ADMINISTRATIVE RECORD.....36
XXIX. EFFECTIVE DATE AND COMPUTATION OF TIME.....37
XXX. SECTION HEADINGS AND ATTACHMENTS.....37
XXXI. OPPORTUNITY TO CONFER.....37