2. How Can I Find Out More Information About The Status Of A Site And If It's Safe For Reuse?

The vast majority of federal Superfund sites are protective of human health and the environment for certain types of reuse activities after they are cleaned up. And many are protective for reuse during cleanup. However, not all site cleanups are protective for all uses. Superfund cleanups may be designed to accommodate specific uses. For example, a property cleaned to accommodate commercial/industrial uses may be protective for uses such as manufacturing, shopping or office complexes. In addition, a large number of federal Superfund sites, or portions of the sites, are suitable for revitalization during the cleanup so that the property can be used in a timely manner.

Portions of the Industri-plex site in Woburn, MA, have been redeveloped as public road extensions, a Residence Inn, a Target retail store, and a multi-modal Regional Transportation Center.

Fact sheets describing a site's history, current cleanup status, and who to contact for more information are available on EPA's Web site at http://cfpub.epa.gov/supercpad/cursites/srchsites.cfm.

EPA also offers many tools to help facilitate the reuse of a federal Superfund site including:

- comfort/status letters[4]
- site-specific reuse fact sheets and
- Ready for Reuse ("RfR") Determinations

Some EPA regional offices have or are developing prospective purchaser inquiry procedures and will schedule conference calls or meetings with prospective purchasers to discuss whether the proposed use of the site is compatible with an ongoing cleanup, any current or future property restrictions on the site, resolution of potential liens, and other matters.

3. How Do I Identify All Of The Parties I Have To Deal With To Buy The Site Or Property Within The Site And What Is EPA's Role?

There is no simple solution to identify all parties associated with a federal Superfund site. As with the purchase of any property, negotiations to buy a federal Superfund site begin with the current owner who can be identified through title or tax records. In almost all instances, EPA does not own the site being cleaned up. Generally, EPA's involvement relates to addressing the following questions:

1. What is the current status of a site's cleanup and what are EPA's future anticipated actions?
2. Is the proposed redevelopment compatible with a site's cleanup and with the existing and potential future property restrictions? **Note:** EPA does not offer guarantees of compatibility.
3. Is the prospective purchaser aware of the applicable landowner liability protections under CERCLA?
4. How can EPA work with the prospective purchaser to settle or resolve any EPA liens?[5]

EPA is willing to work with prospective purchasers to clarify issues, including the existence and satisfaction of EPA liens and property use restrictions.

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[4] A comfort/status letter is a letter intended to combat the stigma and concerns about liability associated with contaminated sites by clarifying the cleanup status and likelihood of EPA involvement at a site.

[5] See Question 8 below for more information regarding EPA liens.

4. If I Buy The Property, Will I Be Responsible For Past Or Future Cleanup Costs?

In most cases a prospective purchaser will not be responsible for past or future federal Superfund cleanup costs for existing contamination that is present on the property when the site is purchased. New purchasers are protected from owner or operator liability under the federal Superfund law so long as the new purchaser meets the definition of a "bona fide prospective purchaser" ("BFPP") under 42 U.S.C. § 9601(40). This BFPP provision states that a purchaser who acquires a federal Superfund site or other contaminated property after January 11, 2002, and who complies with eight statutory criteria will not incur federal Superfund liability as an owner of the property. (See exhibit "Eight Criteria for Managing Liability as a BFPP" on the following page.)

Once contaminated with coal tar and creosote, the Reilly Tar & Chemical site in St. Louis Park, Minnesota now boasts a park, a residential development, and a pond that provides wildlife habitats.

A new purchaser must achieve and maintain BFPP status for as long as potential liability exists to remain protected from federal Superfund liability for the existing contamination at the site. Potential liability exists for as long as hazardous substances remain on the property and/or the statute of limitations on cost recovery actions is in effect. Although a BFPP is not personally liable, the property itself could be subject to a lien as a result of EPA incurring costs to clean up the site.[6]

Ten Criteria for All Appropriate Inquiry

- Inquiry by environmental professional
- Interviews with past/present owners
- Review of historical sources of information
- Search for recorded cleanup liens
- Review of federal, state and local records
- Visual inspection
- Specialized knowledge of BFPP
- Relationship of purchase price to value of property
- Commonly known/reasonably ascertainable information
- Obviousness of presence of contamination

Some of the criteria for obtaining BFPP status must be satisfied prior to acquiring a site. Other criteria for maintaining BFPP status are ongoing obligations that must be met after purchase of the site. One example of a threshold criterion that must be satisfied prior to purchase is that a BFPP must perform 'all appropriate inquiries' ("AAI") concerning environmental conditions at the site. The Final Rule for AAI, which sets forth standards for satisfying the criterion, is effective on November 1, 2006. Information on how to comply with this regulation is available on EPA's Web site at http://www.epa.gov/brownfields/regneg.htm. (See exhibit "Ten Criteria for All Appropriate Inquiry" on this page.)

It is important to note that new purchasers could become liable for environmental contamination if they interfere with the existing remedy, exacerbate existing contamination, or cause a new release of hazardous substances. EPA is willing to discuss potential liability issues, including qualifications for BFPP status, with prospective purchasers and their lenders. Please note that EPA cannot give prospective purchasers legal advice. Legal advice must be sought from private legal counsel, but EPA can explain the available liability protections.

[6] *See* Question 8 below for more information regarding liens.

As previously stated, a purchaser who achieves and maintains BFPP status is not responsible for existing contamination, but may nonetheless want to voluntarily clean up a site, rather than wait for the potentially responsible party or the government to do it.

When appropriate, EPA will enter into an agreement with a BFPP willing to perform a cleanup action at a site. EPA is currently developing a model work agreement for BFPPs.

There are many reasons why a BFPP would want to perform the cleanup:

- **faster cleanup:** a BFPP may be able to clean up a site more quickly
- **better coordination:** a BFPP may be better able to coordinate cleanup activities into its reuse and/or redevelopment plans
- **purchasing incentives:** a BFPP may be able to negotiate a lower purchase price from the seller by undertaking cleanup work that the seller would otherwise be responsible for
- **windfall lien settlements:** a BFPP may be able to settle a windfall lien (see Question 8) by agreeing to perform all or part of a necessary cleanup and/or
- **cost recovery:** a BFPP may be entitled to cost recovery from responsible parties under appropriate circumstances

Eight Criteria for Managing Liability as a BFPP

- All disposal of hazardous substances occurred before acquisition.
- The person made all appropriate inquiries about the property before acquisition.
- The person provided all legally required notices with respect to discovery or release of any hazardous substances at the facility.
- The person exercises appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to prevent releases.
- The person provides full cooperation and access to EPA.
- The person complies with land restrictions in connection with the response action and does not impede the effectiveness of institutional controls.
- The person complies with requests for information and subpoenas.
- The person is not potentially liable or affiliated with a potentially responsible party ("PRP").

5. Do I Need A Document From EPA Confirming I Have BFPP Status?

No, the BFPP provision is designed to be self-implementing which means that a prospective purchaser may achieve, and then after the purchase maintain, BFPP status without obtaining approval or oversight from EPA. In appropriate circumstances, however, EPA may issue a status/comfort letter to prospective purchasers or their lenders to describe: the cleanup status of a site; anticipated future cleanup actions, if any; the available liability protection provisions; the site-specific reasonable steps a purchaser should take with respect to the appropriate care criteria; and the status of any EPA liens.

EPA strongly recommends that prospective purchasers contact the appropriate EPA Regional office prior to purchase of a federal Superfund site to discuss the cleanup status of the site and other site-related issues. For EPA Regional contact information, go to http://www.epa.gov/superfund/programs/recycle/contact.htm. In addition, EPA strongly encourages prospective purchasers to contact the state environmental protection agency where the site is located to discuss potential state issues such as liability and additional cleanup.

6. As The Property Owner, Will I Be Responsible For Ongoing Or Future Cleanup Actions At The Site?

No, a property owner with BFPP status will generally not be responsible for the ongoing or future cleanup actions, beyond resolving any applicable liens.[7] However, certain responsibilities associated with BFPP status may involve actions to prevent or mitigate releases. For example, in certain circumstances, BFPPs may need to take reasonable steps to stop continuing releases, prevent threatened future releases, and prevent or limit human, environmental, or natural resource exposure to earlier hazardous substance releases. This could include actions such as erecting or maintaining perimeter fences, removing drums, or creating containment berms, to fulfill appropriate care obligations. For general information about appropriate care and reasonable steps to prevent releases, go to http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-ref.pdf.

7. Are There Limitations On What I Can Do At The Site, And If So How Can I Find Out Whether Any Property Restrictions Are In Effect And What They are?

There may be limits on uses of the site or properties within the site. The statutory criteria for maintaining BFPP status include not impeding the integrity or effectiveness of institutional controls ("ICs") and complying with all land use restrictions. Accordingly, prospective purchasers must determine whether any temporary, permanent, or future use restrictions are or will be placed on the site during cleanup (EPA calls these use restrictions 'institutional controls') and how they may affect their plans for the site property. Prospective purchasers must also determine if engineered controls, such as a clay cap or monitoring wells, limit what they can do at the site property.

Davie Landfill in Broward County, Florida has been redeveloped into Vista View Park, which includes walking, horseback riding, and bike trails; a picnic area; and a catch-and-release fishing

Prospective purchasers can find out whether any restrictions apply to the site property by contacting EPA's Regional office, the state environmental agency and/or the local government, and by talking to the current owner. Prospective purchasers can also find out this information by performing all appropriate inquiries as described in Question 4 above and at http://www.epa.gov/brownfields/regneg.htm. By learning whether any restrictions apply to the site property, and what they are, prospective purchasers can determine how their plans for the site property are affected.

Enforcement of property restrictions established as part of a cleanup (e.g., restricting site property for commercial uses only) is normally overseen by the state or local government. EPA (or the state) may also conduct periodic reviews to examine how the cleanup is functioning (typically every five years) and whether it remains protective.

To ensure that BFPPs maintain their liability protections, it is important that all the property restrictions are followed and that the BFPP's use of the site does not adversely affect or impede the cleanup. In addition, BFPPs may be asked to implement appropriate property restrictions after they purchase the site property, so EPA encourages them to inquire about property restrictions before they purchase the site. A BFPP may purchase a site before EPA has made a final cleanup decision and, therefore, EPA may be unable to predict what property restrictions are appropriate and will need to be implemented in the future.

[7] See Question 8 for a discussion on liens.

8. Does EPA use liens That Could Affect Me If I Acquire A Site Or Property Within A site And how can I resolve Or settle An EPA lien?

EPA uses two types of liens that may affect site property: Superfund Liens and Windfall Liens. A "Superfund Lien" entitles EPA to recover cleanup costs that the Agency incurred from the property owner. A "Windfall Lien" is potentially applicable to a site property if the owner is a BFPP. The Windfall Lien is designed to prevent an entity from realizing an unfair windfall from the purchase of a property that has been cleaned up using taxpayer dollars. EPA's potential cost recovery under a Windfall Lien is limited to the increase in fair market value of the property attributable to cleanup or the United States' unrecovered response costs, whichever is less. BFPPs should contact their EPA Regional office regarding the existence of a lien or EPA's future intentions to perfect a lien on the property.

The MDI Site in Houston, Texas is located two miles east of downtown and is near an environmental justice community. EPA and the Department of Justice worked with the bankruptcy trustee to ensure that the purchaser of the site committed to perform the on-site cleanup work. This was the first settlement through which a BFPP agreed to perform the cleanup work at a Superfund site.

Both of these liens can be released or waived upon satisfaction before the purchase of the site. The satisfaction amount may be negotiated with EPA and would be embodied in a settlement agreement. EPA may seek cash consideration, performance of work, or a combination of such consideration in connection with the lien releases and waivers. Because EPA liens affect the total value of the property, lien settlement negotiations may need to include EPA, the current property owner, and the BFPP. Often the liens can be resolved or settled concurrently because both the Superfund Lien and the Windfall Lien draw from the same available equity in a property. In addition, EPA may also issue a status/comfort letter to prospective purchasers or their lenders to describe the status of any EPA liens.

EPA has issued guidance, a model settlement document, and a sample comfort/status letter on Windfall Liens that can be found on EPA's Web site at
http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-windfall-lien.pdf.

A FAQs fact sheet on Windfall Liens is available on EPA's Web site at
http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-windfall-lien-faq.pdf.

9. Could I Encounter Problems When I Try To Get Financing To Buy Site Property Or Borrow For Improvements And How Can EPA Help?

Changes to the federal Superfund law addressed many lender concerns, but prospective purchasers might still experience problems. In the past, lenders were reluctant to provide financing for the purchase of federal Superfund sites because of concerns about:

- lender liability
- potential liability of the owner affecting the owner's ability to repay the loan and
- the impact of the contamination on the value of the site property that secures the loan

These concerns are diminishing for several reasons. A 1996 amendment to the federal Superfund law protects lenders from federal Superfund liability when the lenders comply with certain statutory requirements. In particular, the lenders may not participate in the management of the facility.

The Town of Londonderry, New Hampshire has experienced an upsurge in economic activity with the redevelopment of the Tinkham Garage site.

Use of environmental insurance policies has increasingly alleviated lenders' concerns about financial risks at federal Superfund sites. The passage of time and increased reuse of brownfields and federal Superfund sites are demonstrating to lenders the significant financial value that these properties have and the potentially low risks of financing their purchase and redevelopment.

In addition, the 2002 amendments to the federal Superfund law which provide for BFPP status for new buyers may provide assurance to lenders because borrowers will not be liable and their ability to repay the lender will not be affected.

EPA has many tools to help alleviate lenders' concerns about financing contaminated properties, including guidance documents, comfort/status letters, BFPP work agreements, and Ready for Reuse Determinations. EPA's willingness to work with buyers and their lenders makes the acquisition of federal Superfund properties more feasible than ever before.

10. What Can EPA Do To help a prospective purchaser decide, And convince lenders, tenants, And others, that buying And re-using A Superfund Site Is A good idea?

EPA has tools that can be used to demonstrate that buying or using a federal Superfund site can be a good opportunity. Some of these tools include:

- **BFPP 'Doing Work' Agreements** - EPA may enter into a settlement agreement with a BFPP who wishes to perform part or all of a cleanup. The agreement provides for EPA oversight and may satisfy part or all of any windfall lien.
- **Lien Settlements** - EPA is willing to enter into negotiations and settlement agreements to resolve lien issues and facilitate reuse.
- **Status/Comfort Letters** - EPA may issue status letters or comfort letters that address the following:
    - status of the site
    - future anticipated actions at the site
    - available liability protections

The Town of Arlington, Tennessee acquired the Arlington Blending & Packaging site in 2004 after EPA issued a comfort letter and Ready for Reuse Determination. Today the site is an active neighborhood park.

  - reasonable steps that a purchaser should take to stop any on-going releases and prevent future releases at sites where EPA has enough information about the site to make suggestions as to such steps and
  - the status of EPA liens

- **Ready for Reuse Determinations** - EPA may also issue a Ready for Reuse Determination to affirm that the site's conditions are protective of human health and the environment for specified uses.
- **Discussions** - EPA Regional staff are often willing to talk with or meet with a prospective purchaser, sellers, lenders, and other stakeholders to discuss the issues critical to the successful purchase and reuse of a federal Superfund site. Providing examples of other federal Superfund sites that were successfully redeveloped and are now in reuse can also reassure local citizens and stakeholders of revitalization opportunities.
- **Partial Deletions** – While total cleanup of a site may take many years, many sites on the National Priorities List include portions that have been cleaned up and may be available for productive use. These portions may be partially deleted from the National Priorities List if EPA makes a determination that no further response work is required, the state concurs, and necessary institutional controls are in place. Any person, including individuals, businesses, entities, states, local governments, and other Federal agencies, may submit a petition requesting a partial deletion. A partial deletion of a portion of a site from the National Priorities List can help to increase the site's marketability. **Please note:** EPA Superfund liens may still apply to the deleted parcel. For more information on partial deletions visit http://www.epa.gov/superfund/action/postconstruction/deletion.htm.
- **Site Reuse Fact Sheets** – The Superfund Redevelopment Initiative Web site at http://www.epa.gov/superfund/programs/recycle/ provides summary information about federal Superfund sites that have been reused. Detailed fact sheets for some sites are also available and may include data on economic impacts and environmental and social benefits resulting from the reuse of federal Superfund sites.

Information about many of these tools can also be found on EPA's Cleanup Enforcement Web site at http://www.epa.gov/compliance/cleanup/redevelop/landowner.html.

Disclaimer: This document is provided solely as general information to highlight certain aspects of a more comprehensive program. It does not provide legal advice, have any legally binding effect, or expressly or implicitly create, expand, or limit any legal rights, obligations, responsibilities, expectations, or benefits for any person. This document is not intended as a substitute for reading the statute or the guidances described above. It is the prospective purchaser's sole responsibility to ensure that its proposed use does not interfere with or impede the site's remedy or protectiveness. EPA does not offer any guarantees or warranties as to the compatibility of a proposed use with the cleanup remedy. It is also the purchaser's sole responsibility to maintain liability protection status as a bona fide prospective purchaser.

Appendix C

CERCLA Liability and Local Government Acquisitions and Other Activities

United States Environmental Protection Agency
Office of Enforcement and Compliance Assurance
March 2011
EPA-330-F-11-003

United States Environmental Protection Agency

CERCLA Liability and Local Government Acquisitions and Other Activities

Office of Site Remediation Enforcement

Local governments can play an important role in facilitating the cleanup and redevelopment of properties contaminated by hazardous substances. In particular, by acquiring contaminated properties, local governments have an opportunity to evaluate and assess public safety needs and promote redevelopment projects that will protect and improve the health, environment, and economic well-being of their communities.

One impediment to local government acquisition of contaminated property is concern about potential liability for the cleanup costs under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, also known as "Superfund" or "CERCLA," 42 U.S.C. §§ 9601-9675.

This fact sheet addresses CERCLA liability issues for local governments and summarizes key statutory provisions and requirements.[1] It is intended to assist local governments by identifying CERCLA liability issues and protections that may be applicable to local governments as they consider involvement at contaminated properties.

The U.S. Environmental Protection Agency (EPA) recommends that local governments refer to the statutory language of CERCLA, the regulations at 40 C.F.R. Part 300 (known as the "National Contingency Plan"), and relevant EPA guidance (referenced at the end of this document) for more detail. EPA's Regional offices[2] also may be able to provide information and assistance to local governments considering acquisition of contaminated properties. EPA also encourages local governments to consult with their state environmental protection agency and legal counsel prior to taking any action to acquire, cleanup, or redevelop contaminated property.

What is CERCLA?

CERCLA outlines EPA's authority for cleaning up properties contaminated with hazardous substances regardless of whether the properties are in use or abandoned. Additionally, CERCLA establishes a strict liability system for determining who can be held liable for the costs of cleaning up contaminated properties. CERCLA also provides EPA with robust enforcement

[1] A local government also may have obligations and/or be potentially liable under other environmental statutes such as the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992 (RCRA) or state laws.

[2] For contact information, see http://www.epa.gov/aboutepa/postal.html#regional.

authorities to compel cleanups and recover EPA's response and enforcement costs incurred at these properties. Properties addressed under CERCLA authorities are commonly known as "Superfund sites."

CERCLA also includes authority for EPA to provide grant funding for the assessment and cleanup of brownfield sites. CERCLA § 101(39)(A) defines a brownfield site as "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant." Many of the properties that local governments may be interested in acquiring may qualify as brownfield sites.

For more general information about, and an overview of, CERCLA, please see EPA's website at http://www.epa.gov/superfund/policy/cercla.htm.

What are the various ways local governments become involved at contaminated properties?

Local governments may become involved with contaminated properties in a number of ways, many of which present opportunities to facilitate cleanup or redevelopment. The ways include:

- Providing incentives to promote redevelopment (*i.e.*, zoning, tax increment financing, etc.);
- Responding to an emergency on the property;
- Transferring of tax liens;
- Collaborating with the current property owner;
- Leasing of the property by the municipality;
- Acquiring the property and "simultaneously" transferring it to a third party;
- Acquiring the property with subsequent transfer to a third party;
- Acquiring the property and managing it through a "land bank"; or
- Acquiring the property for long-term use.

Can a local government be liable under CERCLA?

Yes. CERCLA is a strict liability statute that holds potentially responsible parties (PRPs) jointly and severally liable, without regard to fault, for cleanup costs incurred in response to the release or threatened release of hazardous substances. Under CERCLA § 107, a person, including a local government, may be considered a PRP[3] if the person:

- Is the current owner or operator of the contaminated property;
- Owned or operated the property at the time of the disposal of the hazardous substance;
- Arranged for the hazardous substances to be disposed of or treated, or transported for disposal or treatment; or
- Transported the hazardous substances to the property.

[3] According to CERCLA, federally recognized tribes are not included as PRPs.

A local government that falls into one of the classes of PRPs described above may be potentially liable under CERCLA. Fortunately, CERCLA includes liability exemptions, affirmative defenses, and protections that may apply to local governments. Additionally, EPA has enforcement discretion guidance and site-specific tools that may address concerns about potential CERCLA liability.

Is a local government liable under CERCLA if it responds to an emergency on a contaminated property?

Local units of government, especially fire, health, and public safety departments, are often the first responders to emergencies and other dangerous situations at contaminated properties in their communities. So as not to interfere with these activities, CERCLA § 107(d)(2) provides that state or local governments will not be liable for "costs or damages as a result of actions taken in response to an emergency created by a release or threatened release of a hazardous substance by or from property owned by another party." *Note: This protection does not apply in cases where the local government is grossly negligent or intentionally engages in misconduct*. CERCLA § 107(d)(2). *Negligence and intentional misconduct are fact-specific determinations*.

In addition, CERCLA § 123 authorizes EPA to reimburse local governments for the costs of temporary emergency measures taken in response to releases within their jurisdiction. These temporary measures must be "necessary to prevent or mitigate injury to human health or the environment associated with the release or threatened release of any hazardous substance, pollutant, or contaminant." This reimbursement is to give financial assistance to government entities that do not have a budget allocated for emergency response and cannot otherwise provide adequate response measure. The amount of the reimbursement may not exceed $25,000 for a single response.

For more information on CERCLA § 123 reimbursements, please see EPA's website at http://www.epa.gov/ceppo/web/content/lawsregs/lgrover.htm.

What CERCLA liability protections are available to local governments if they acquire contaminated property?

CERCLA contains liability exemptions, affirmative defenses, and protections which may apply to a local government when it:

- Acquires contaminated property involuntarily by virtue of its function as a sovereign, CERCLA § 101(20)(D);
- Qualifies for a third party defense or innocent landowner liability protection, CERCLA §§ 107(b)(3), 101(35)(A);
- Qualifies as a bona fide prospective purchaser (BFPP) when it acquires the contaminated property, CERCLA §§ 101(40), 107(r)(1); or
- Is conducting or has completed a cleanup of a contaminated property in compliance with a state cleanup program, CERCLA § 128(b).

Each of these is discussed below in further detail.

Key CERCLA Provisions ● – *Could apply to local governments* ○ – *Could apply to local governments under certain circumstances*	**Methods of Property Acquisition**							
	Tax Foreclosure	**Bankruptcy**	**Escheat**	**Eminent Domain**	**Purchase**	**Inheritance or Bequest**	**Abandonment**	**Gift/Donation**
Involuntary Acquisition *§ 101(20)(D)*	●	●	●	○			●	
Bona Fide Prospective Purchaser Protection *§§ 101(40) and 107(r)(1)*	●	●	●	●	●	●	●	●
Third Party and Innocent Landowner Defenses *§§ 107(b)(3) and 101(35)(A)*			●	●	○	●		
Enforcement Bar *§ 128(b)*	●	●	●	●	●	●	●	●

The method or type of property acquisition by a local government will play a critical role in the application of liability exemptions, affirmative defenses, or protections. Although most often applied in the purchase and gift/donation context, BFPP status is available for the majority of property acquisitions. *Note: In cases where it is unclear whether the involuntary acquisition exemption, affirmative defenses, or liability protections are sufficient, EPA encourages the local government to achieve and maintain BFPP status to increase certainty that it will not be liable under CERCLA.*

What is the meaning of "involuntary acquisition"?

CERCLA § 101(20)(D)[4] provides that a unit of state or local government will not be considered an owner or operator of contaminated property (and thus is exempt from potential CERCLA liability as a PRP) if the state or local government acquired ownership or control involuntarily. This provision includes a non-exhaustive list of examples of involuntary acquisitions, including obtaining property through bankruptcy, tax delinquency, abandonment, or "other circumstances in which the government entity involuntarily acquires title by virtue of its function as sovereign." However, it is important to note that this exemption will not apply to any state or local government that caused or contributed to the release or threatened release of a hazardous substance from the facility.

For purposes of EPA enforcement, EPA considers an involuntary acquisition or transfer to include situations "in which the government's interest in, and ultimate ownership of, a specific asset exists only because the conduct of a non-governmental party…gives rise to a statutory or common law right to property on behalf of the government."[5] Moreover, EPA acknowledges that tax foreclosure and other acquisitions by government entities often require some affirmative or volitional act by the local government.[6] Therefore, a government entity does not have to be completely passive during the acquisition in order for the acquisition of property to be considered involuntary under CERCLA.[7] Instead, EPA considers an acquisition to be involuntary if the government's interest in, and ultimate ownership of, the property exists only because the actions of a non-governmental party give rise to the government's legal right to control or take title to the property. For example, although a local government might be required to engage in certain discretionary or volitional actions to acquire title to a property through tax delinquency foreclosure or abandonment per state statute, EPA would consider the acquisition involuntary.[8]

For more information on state and local government involuntary acquisition, please see EPA's website at http://www.epa.gov/compliance/cleanup/revitalization/local-acquis.html.

How does a local government become a bona fide prospective purchaser (BFPP)?

A local government, whose potential liability is based solely on the fact that it knowingly purchased a contaminated property and is, therefore, considered the current owner or operator, will not be liable under CERCLA if it achieves and maintains BFPP status. BFPP status may be

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[4] CERCLA § 101(35)(A)(ii) also discusses involuntary acquisitions for a unit of state or local government in the context of the innocent landowner defense pursuant to CERCLA § 101(35)(A).

[5] Municipal Immunity from CERCLA Liability for Property Acquired through Involuntary State Action (EPA/OSRE/OSWER, 10/20/1995) at 3.

[6] *Id*. at 4.

[7] *Id*.

[8] *Id*.

achieved even when the buyer has knowledge of the contamination on the property at the time of purchase. Moreover, EPA encourages local governments to achieve and maintain BFPP status in cases where it is unclear whether involuntary acquisition, affirmative defenses, or other liability protections may be sufficient to avoid CERCLA liability.

CERCLA §§ 101(40) and 107(r)(1) provide that a BFPP is a person or tenant of a person who acquired the property after January 11, 2002 and meets the following threshold criteria:

- All Appropriate Inquiries (AAI) were performed prior to purchase of the property pursuant to CERCLA § 101(35)(B);
- All disposal of hazardous substances occurred before the party acquired the property; and
- The party has "no affiliation" with a liable or potentially liable party.

CERCLA §§ 101(40)(C)-(G) provide additional criteria for maintaining BFPP status. These continuing obligations that must be met after acquisition of the property include:

- Complying with land use restrictions and not impeding the effectiveness of the institutional controls;
- Taking "reasonable steps" to prevent the release of hazardous substances. These obligations are site-specific, but may include preventing threatened future releases and/or limiting exposure to earlier hazardous substance releases. Institutional controls, discussed further below, may play a critical role in complying with reasonable steps;
- Providing full cooperation, assistance and access;
- Complying with information requests and administrative subpoenas; and
- Providing legally-required notices.

To remain protected from CERCLA liability for the existing contamination while it owns the property, a local government must maintain its BFPP status for as long as the potential for liability exists. Potential liability exists for as long as contamination remains on the property and/or the statute of limitations on CERCLA cost recovery actions is not in effect. It is important to note that a local government may become liable for any new contamination that may occur, even if the statute of limitations has run on existing contamination.

Although a BFPP is not liable for the cost of cleaning up the property, the property itself could be subject to a "windfall lien"[9] if EPA has spent money cleaning up the property after the BFPP acquires it and EPA's cleanup efforts have increased the fair market value of the property. CERCLA § 107(r)(2). The windfall lien is limited to the lesser of EPA's unrecovered response costs or the increase in fair market value attributable to EPA's cleanup. EPA may be able to file a windfall lien on the property if:

- EPA spent money cleaning up the property before acquisition by a BFPP if certain requirements are met (*i.e.*, where there are substantial unreimbursed costs);
- EPA's response action results in a significant increase in the property's fair market value;
- There are no viable, liable parties from whom EPA could recover its costs; and

[9] CERCLA contains two sections which discuss the ability of the federal government to impose liens. This fact sheet addresses the windfall provision of CERCLA § 107(r), but will not discuss liens provided under CERCLA § 107(l).

- A response action occurs while the property is owned by a person who is exempt (other than a BFPP) from CERCLA liability.

Whether EPA will perfect a windfall lien and prevent a potential windfall in such instances will be determined by site-specific circumstances and the equities of the particular situation.

For more information on AAI, please see EPA's website at http://www.epa.gov/brownfields/aai/index.htm. For more information on the BFPP liability protection and/or windfall liens, please see EPA's website at http://www.epa.gov/compliance/cleanup/revitalization/bfpp.html.

What are the requirements for the third party defense or innocent landowner defense?

CERCLA § 107(b)(3) provides a "third party" affirmative defense to CERCLA liability for any owner, including local governments, that can prove, by the preponderance of the evidence, that the contamination was caused solely by the act or omission of a third party whose act or omission did not occur "in connection with a contractual relationship." Moreover, an entity asserting the CERCLA § 107(b)(3) defense must show that: a) it exercised due care with respect to the contamination; and b) it took precautions against foreseeable acts or omissions, and the consequences thereof by the third party that caused the contamination.

Congress enacted the Brownfields Amendments[10] and expanded the third party defense by creating exclusions to the definition of a contractual relationship. Previously, the deed transferring title between a PRP and the new landowner was a "contractual relationship" that prevented the new landowner from raising the traditional CERCLA § 107(b)(3) third party defense. To promote redevelopment and provide more certainty, Congress also clarified the "innocent landowner defense," which requires an entity to meet the criteria set forth in CERCLA § 101(35), in addition to the requirements of CERCLA § 107(b)(3). CERCLA § 101(35)(A) distinguishes three types of innocent landowners:

- Purchasers who acquire property without knowledge of contamination, CERCLA § 101(35)(A)(i);
- Governments "which acquired the facility by escheat, or through any other involuntary transfers or acquisition, or through the exercise of eminent domain authority by purchase or condemnation," CERCLA § 101(35)(A)(ii); and
- Inheritors of contaminated property, CERCLA § 101(35)(A)(iii).

For more information on qualifying for the innocent landowner defense where the purchaser acquired property without knowledge of the contamination, please see EPA's *Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchasers, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability* (Common Elements Guidance) available at http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf.

[10] Small Business Liability Relief and Brownfields Revitalization Act (Pub. L. No. 107-118)(hereinafter the "Brownfields Amendments").

How do state response programs interact with CERCLA's enforcement bar?

Many states have established state-specific response programs (for example, State Superfund, brownfields, and voluntary cleanup programs). These programs play a critical role in assessing and cleaning up the vast majority of our nation's brownfields and other lower-risk sites. EPA supports state response programs through:

- Grant funding to establish and enhance state programs; and
- Non-binding Memoranda of Agreement with individual states that provide general enforcement assurances to encourage assessments and cleanups pursuant to a state response program.

CERCLA § 128(b) protects local governments and other parties from EPA enforcement, subject to specific exceptions, when they comply with a state response program and are conducting or have completed a cleanup of an eligible response site, as defined by CERCLA § 101(41). This protection is known as the "enforcement bar." EPA has entered into non-binding Memoranda of Agreement with over 20 states which clarify EPA enforcement intentions under CERCLA at sites addressed in compliance with state response programs. It is important to note that while CERCLA § 128(b) may prohibit EPA from taking an enforcement action; it does not preclude third party litigation.

For more information about state voluntary cleanup programs and Memoranda of Agreement, please see EPA's website at http://www.epa.gov/compliance/cleanup/revitalization/state.html.

What should a local government do if it obtains contaminated property from a land bank or redevelopment authority?

EPA recognizes the importance and increased use of land banks and redevelopment agencies as a tool to address abandoned or vacant properties, promote smart growth, improve existing land use practices, and support local community development. In an effort to make greater use of these tools, an increasing number of states and local governments are passing legislation creating land banks or redevelopment authorities to acquire, redevelop, and reuse abandoned properties.

While many abandoned properties that are of interest to land banks and redevelopment authorities are not likely to be contaminated, local governments should be aware that contamination and potential CERCLA liability may exist. A local government may increase the likelihood that the land bank or redevelopment authority is eligible for CERCLA liability protection by ensuring that the land bank or redevelopment authority conducts AAI prior to acquiring the property. Not only is AAI a critical requirement for obtaining most CERCLA landowner liability protections, but it also aids local governments in making informed property acquisition decisions. When acquiring abandoned contaminated properties, EPA encourages local governments to obtain BFPP status prior to acquisition if it is unclear whether other exemptions, affirmative defenses, or liability protections may apply.

How does CERCLA liability affect eligibility for federal brownfields grant funding?

EPA brownfields grant money is available to eligible entities as defined by CERCLA § 104(k)(1). However, these funds cannot be used to pay response costs at a brownfield site for which the grantee is potentially liable under CERCLA § 107. If an applicant for brownfields grant money may be potentially liable at the site for which they are seeking funds, they must document that they qualify for one of CERCLA's liability protections. Therefore, one benefit of being covered by a CERCLA liability protection is that it enables certain non-liable entities to be potentially eligible for federal brownfields grant funding. If a local government intends to protect itself against CERCLA liability and compete for federal brownfields grant funding, it is advisable for the local government to evaluate whether it is eligible for a grant or become eligible through a liability protection before acquiring a brownfield site.

TYPES OF BROWNFIELDS FUNDING OPPORTUNITIES

CERCLA §§ 104(k)(4) and (6) authorize EPA's Brownfields Program to provide funding in a variety of ways:

- Assessment Grants
- Cleanup Grants
- Revolving Loan Fund Grants
- Job Training Grants
- Training, Research, and Technical Assistance Grants
- Targeted Brownfields Assessments
- Area-Wide Planning Pilot Program

For more information about obtaining an EPA brownfields grant, grant guidelines, and discussions about the various types of grants that are available, please see EPA's website at http://www.epa.gov/brownfields/grant_info/index.htm.

What protections exist when municipal solid waste is disposed of at a contaminated property?

Prior to the Brownfield Amendments, entities that disposed of municipal solid waste at contaminated properties argued that they should not be liable for the cleanup of contamination that was originally and primarily caused by industrial polluters. To address this issue, the Brownfield Amendments included CERCLA § 107(p) to create a qualified exemption from CERCLA liability for certain residential, small business, and non-profit generators of municipal waste at sites on CERCLA's National Priorities List. However, this exemption does not apply to municipalities who owned or operated a site.

For more information on the municipal solid waste exemption and EPA's guidance on the exemption, please see EPA's website at http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-msw-exempt.pdf.

What steps might a local government take at a contaminated property to protect human health and the environment and ensure the integrity of a cleanup?

When contamination remains on a property during or after cleanup activities, institutional controls may be used alone or in combination with engineered controls to ensure protection of human health and the environment. Generally, institutional controls are designed to limit land or resource use (*e.g.*, prohibitions on residential use or extraction of ground water) and to ensure the integrity of engineered controls (*e.g.*, restrictions on excavating soils on or in the vicinity of a landfill cap).

As with engineered controls, institutional controls must be maintained, monitored, and evaluated for as long as contamination remains on the property at levels that do not allow for unrestricted use and unlimited exposure.

WHAT IS AN INSTITUTIONAL CONTROL?

An institutional control is a legal or administrative restriction on the use of, or access to, a contaminated property to protect:

1) the health of both humans and the environment; and
2) ongoing cleanup activities and to ensure viability of the engineered controls.

There are four categories of institutional controls:

- Proprietary Controls (*e.g.*, easement, real covenant, statutory covenant)
- Governmental Controls (*e.g.*, zoning, building permit, land use ordinance)
- Enforcement and Permit Tools (*e.g.*, consent decree, permit, order)
- Informational Devices (*e.g.*, deed notice, government advisory, state registry)

Whether or not a local government asserts BFPP status, it may play a key role in implementing, monitoring, and enforcing certain institutional controls – particularly for those it has the legal authority to implement or enforce. A local government also may work proactively with developers, prospective buyers and tenants, and other parties to ensure that institutional control requirements are understood and properly integrated into the planning and future reuse of the property.

If institutional controls are already in place on a particular property, it is important for local governments to understand the obligations the institutional controls impose and to consider how those obligations might be viewed by future owners, developers and property users. In some situations, EPA or the state may be willing to modify existing institutional controls to facilitate the appropriate reuse of the property as long as the engineered controls component of the cleanup will not be compromised and remains protective of human health and the environment.

For more information about institutional controls issues, please see EPA's website at http://www.epa.gov/superfund/policy/ic/index.htm.

CERCLA Liability and Local Government Acquisition of Contaminated Property: Key Documents		
Local Government Issue	**CERCLA Provision**	**Relevant EPA Documents or Guidance (if any)**
Involuntary Acquisition	§ 101(20)(D)	• Policy on Interpreting CERCLA Provisions Addressing Lenders and Involuntary Acquisitions by Government Entities (EPA/OSRE, 6/30/1997) • Policy on CERCLA Enforcement Against Lenders and Government Entities that Acquire Property Involuntarily (EPA/DOJ, 9/22/2005) • Municipal Immunity from CERCLA Liability for Property Acquired through Involuntary State Action (EPA/OSRE/OSWER, 10/20/1995) • Fact Sheet: The Effect of Superfund on Involuntary Acquisitions of Contaminated Property by Government Entities (EPA/OSRE, 12/31/1995)
Third Party and Innocent Landowner Defenses	§§ 107(b)(3), 101(35)(A)(ii)	• Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchasers, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability ("Common Elements") (EPA/OSRE, 3/6/2003)
Bona Fide Prospective Purchaser	§ 101(40) and § 107(r)	• Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchasers, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability ("Common Elements") (EPA/OSRE, 3/6/2003) • Issuance of CERCLA Model Agreement and Order on Consent for Removal Action by a Bona Fide Prospective Purchaser (OSRE/USDOJ, 11/27/2006) • Enforcement Discretion Guidance Regarding the Applicability of the Bona Fide Prospective Purchaser Definition in CERCLA § 101(40) to Tenants (OSRE/OSWER, 1/19/2009) • Enforcement Discretion Guidance Regarding the Applicability of the Bona Fide Prospective Purchaser Definition in CERCLA Section 101(40) to Tenants: Frequently Asked Questions (OSRE, 11/1/2009)
Windfall Liens	§ 107(r)	• Interim Enforcement Discretion Policy concerning Windfall Liens Under Section 107(r) of CERCLA (EPA/DOJ, 7/16/2003) • Windfall Lien Guidance: Frequently Asked Questions (OSRE, 4/1/2008) • Windfall Lien Administrative Procedures (OSRE, 1/8/2008)

Local Government Issue	CERCLA Provision	Relevant EPA Documents or Guidance (if any)
Brownfield Grants	§ 104(k)(4) and (6)	• Brownfields Assessment Pilot/Grants at http://epa.gov/brownfields/assessment_grants.htm • Revolving Loan Fund Pilot/Grants at http://epa.gov/brownfields/rlflst.htm • Cleanup Grants at http://epa.gov/brownfields/cleanup_grants.htm • Area-Wide Planning Pilot Program at http://www.epa.gov/brownfields/areawide_grants.htm • Brownfield Grant Guidelines Frequently Asked Questions at http://www.epa.gov/brownfields/proposal_guides/faqpguid.htm
Institutional Controls	§§ 101(40)(F), 107(q)(1)(A)(V)	• Institutional Controls: A Citizen's Guide to Understanding Institutional Controls at Superfund, Brownfields, Federal Facilities, Underground Storage Tank, and Resource Conservation and Recovery Act Cleanups (EPA/OSWER, 2/2005) • Institutional Controls: A Guide to Implementing, Maintaining, and Enforcing Institutional Controls at Contaminated Sites (EPA Interim Final Draft 11/2010) • Institutional Controls: A Site Manager's Guide to Identifying, Evaluating and Selecting Institutional Controls at Superfund and RCRA Corrective Action Cleanups (EPA/OSWER, 9/2000)
State Voluntary Cleanups and Memoranda of Agreement	§§ 101(41), 128	• To see state-specific voluntary cleanup programs Memoranda of Agreement, please see http://www.epa.gov/brownfields/state_tribal/moa_mou.htm

Contact Information

If you have any questions about this fact sheet, please contact Cecilia De Robertis of EPA's Office of Site Remediation Enforcement at 202-564-5132 or derobertis.cecilia@epa.gov.

Disclaimer: This document is provided solely as general information to highlight certain aspects of a more comprehensive program. It does not provide legal advice, have any legally binding effect, or expressly or implicitly create, expand, or limit any legal rights, obligations, responsibilities, expectations, or benefits for any person. This document is not intended as a substitute for reading the statute or the guidance documents described in this document. It is the local government's sole responsibility to ensure that it obtains and retains liability protections. EPA does not offer any guarantees or warranties for or related to acquisition of a contaminated property or formerly contaminated property. It is also the local government's sole responsibility to maintain liability protection status as a contiguous property owner, bona fide prospective purchaser, or innocent land owner.

Appendix D

Brownfields Enforcement and Land Revitalization Policy and Guidance Documents

Appendix D

Brownfields Enforcement and Land Revitalization Policy and Guidance Documents

The following documents are available on the cleanup enforcement website at **http://www.epa.gov/compliance/cleanup/revitalization/index.html.**

ALL APPROPRIATE INQUIRIES

Standards and Practices for All Appropriate Inquiries; Final Rule, November 1, 2005

Final rule detailing the standards and practices for all appropriate inquiries (AAI). The rule establishes specific regulatory requirements and standards for conducting AAI into the previous ownership and uses of a property for the purposes of meeting the AAI provisions necessary to qualify for certain landowner liability protections under Superfund. The standards and practices also will be applicable to persons conducting site characterization and assessments with the use of grants awarded by EPA.

To access online: **http://www.epa.gov/brownfields/aai/index.htm**.

BONA FIDE PROSPECTIVE PURCHASER (BFPP)

Enforcement Discretion Guidance Regarding the Applicability of the Bona Fide Prospective Purchaser Definition in CERCLA 101(40) to Tenants, January 14, 2009

Provides guidance on how EPA intends to exercise its enforcement discretion with regard to the bona fide prospective purchaser provision. Specifically, it recognizes the important role that leasehold interests play in facilitating the cleanup and reuse of brownfields and other contaminated properties.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/bfpp-tenant-mem.pdf**

Interim Guidance Regarding Criteria Landowners Must Meet in Order to Quality for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability ("Common Elements"), March 6, 2003

Provides general information regarding the common elements of the landowner liability protections contained in the 2002 Brownfields Amendments to Superfund. These common elements include the requirements of "all appropriate inquiry" (AAI), demonstrating no affiliation with a liable party, and continuing obligations.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf**

"Common Elements" Guidance Reference Sheet, March 6, 2003

Highlights the main points made in EPA's March 2003 "Common Elements" guidance document concerning the conditional liability provided to bona fide prospective purchasers, contiguous property owners, and innocent landowners by the 2002 Brownfield Amendments. The document focuses on the shared factors required to qualify for the above Superfund liability protections.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-ref.pdf**

Issuance of CERCLA Model Agreement and Order on Consent for Removal Action by a Bona Fide Prospective Purchaser, November 27, 2006

Provides a model agreement and order on consent for those bona fide prospective purchasers (BFPP) who are required to perform a removal action. This model addresses those situations where there is a federal interest or where the work is complex or significant in extent, such as where EPA will oversee the removal action or where the removal work will exceed the "reasonable steps to prevent releases" obligation upon which BFPP status depends.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/bfpp-ra-mem.pdf**

Bona Fide Prospective Purchases and the New Amendments to CERCLA, May 31, 2002

Describes when EPA will consider providing a bona fide prospective purchaser (BFPP) with a liability limitation despite having knowledge of contamination pursuant to changes made to the Superfund statute by the 2002 Brownfield Amendments. The Amendments list certain requirements that must be met to achieve BFPP status, dispense with the prior need for Prospective Purchaser Agreements (PPA) (except in limited circumstances), and provide for EPA's recovery of any windfall that a purchaser may receive.

To access online: **http://www.epa.gov/compliance/resources/ policies/cleanup/superfund/bonf-pp-cercla-mem.pdf**

BROWNFIELDS GRANTS

Regional Determinations Regarding Which Sites are Not "Eligible Response Sites" under CERCLA Section 101(41)(C)(i), as Added by the Small Business Liability Relief and Brownfields Revitalization Act, March 6, 2003

Provides background information on the definition of an eligible response site, how the regions make a determination of whether a site fits this definition, and what the implications of this determination are. This document also provides the regions with guidance for making these determinations in conjunction with future site assessment decisions and for sites with past site assessment determinations.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/reg-determ-small-bus-mem.pdf**

COMFORT LETTERS

Interim Enforcement Discretion Policy Concerning "Windfall Liens" Under Section 107(r) of CERCLA, July 16, 2003

Discusses EPA and the Department of Justice's (DOJ) interim policy implementation of the new CERCLA 107(r) windfall lien provision contained in the 2002 Brownfields Amendments. This document lists the factors that EPA will use to determine whether to file a lien, in addition to discussing how EPA will settle the liens and the possibility of EPA issuing comfort letters to or making agreements with bona fide prospective purchaser (BFPPs).

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-windfall-lien.pdf**

Interim Guidance Regarding Criteria Landowners Must Meet in Order to Quality for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability ("Common Elements"), March 6, 2003

Provides general information regarding the common elements of the landowner liability protections contained in the 2002 Brownfields Amendments to Superfund. These common elements guidance includes a discussion of the reasonable steps letter.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf**

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-ref.pdf**

Comfort/Status Letters for RCRA Brownfields Properties, February 5, 2001

Addresses the use of comfort/status letters at Resource Conservation and Recovery Act (RCRA) properties, where the letters may facilitate the cleanup and reuse of brownfield sites, where there exists a real probability or perception that EPA may initiate a cleanup, or where there is no other adequate mechanism to assuage a party's concerns. This document also includes four sample letters.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/rcra/comfort-rcra-brwn-mem.pdf**

Policy on the Issuance of Comfort/Status Letters, November 8, 1996

Discusses EPA's policy on the use of comfort/status letters to provide the recipient party with any releasable information that EPA has pertaining to a property, as well as interpret what the information means and the likelihood or current plans for EPA to undertake any Superfund action. A letter is used in order to facilitate the cleanup and redevelopment of a brownfield site if there is a realistic perception or probability of incurring liability or if there is no other mechanism available to address the recipient's concerns. This document also contains four sample comfort/status letters.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/comfort-let-mem.pdf**

CONTAMINATED AQUIFERS

Final Policy Toward Owners of Property Containing Contaminated Aquifers, May 24, 1995

Details EPA's position concerning owners of property that contains an aquifer that has become contaminated as a result of subsurface migration. In certain circumstances, EPA will not take enforcement action against a landowner whose property has become contaminated through subsurface migration through no fault of their own, their agent, or their employee. In addition, EPA may consider de minimis settlements which would protect the landowner from contribution suits.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/contamin-aqui-rpt.pdf**

CONTIGUOUS PROPERTY OWNERS

Memorandum transmitting Model CERCLA Section 107(q)(3) Contiguous Property Owner Assurance Letter, November 9, 2009

This memorandum discusses and transmits a model contiguous property owner assurance letter to be used in accordance with a January 2004 interim guidance regarding contiguous property owners.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/cpo-assure-mod-ltr-mem.pdf**

Contiguous Property Owner Guidance Reference Sheet, February 5, 2004

The reference sheet summarizes the important points and requirements of the January 13, 2004 guidance document "Interim Enforcement Discretion Guidance Regarding Contiguous Property Owners," which addresses liability limitations.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/contig-prop-faq.pdf**

Interim Enforcement Discretion Guidance Regarding Contiguous Property Owners, January 13, 2004

Addresses the addition of liability protection to contiguous property owners to Superfund by the 2002 Brownfields Amendments. The document discusses the criteria property owners need to meet, how the Amendments apply to current and former owners, the relationship between the Amendments and EPA's Residential Homeowner Policy and Contaminated Aquifers Policy, and mechanisms that EPA may use to resolve landowner liability concerns.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/contig-prop.pdf**

Interim Guidance Regarding Criteria Landowners Must Meet in Order to Quality for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability ("Common Elements"), March 6, 2003

Provides general information regarding the common elements of the landowner liability protections contained in the 2002 Brownfields Amendments to Superfund. These common elements include the requirements of "all appropriate inquiry" (AAI), demonstrating no affiliation with a liable party, and continuing obligations.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf**

"Common Elements" Guidance Reference Sheet, March 6, 2003

Highlights the main points made in EPA's March 2003 "Common Elements" guidance document concerning the conditional liability provided to bona fide prospective purchasers, contiguous property owners, and innocent landowners by the 2002 Brownfield Amendments. The document focuses on the shared factors required to qualify for the above Superfund liability protections.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-ref.pdf**

DE MICROMIS

Revised Settlement Policy and Contribution Waiver Language Regarding Exempt De Micromis and Non-Exempt De Micromis Parties, November 6, 2002

Provides a revision to EPA and DOJ's policy regarding settlements with de micromis parties at Superfund sites in light of the codification of this policy in the 2002 Brownfields Amendments. This document also revises the model contribution waiver language that has been used in CERCLA agreements to waive private contribution claims against parties that contributed only very small amounts of waste. In addition, this document contains five attachments of model language.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/wv-exmpt-dmicro-mem.pdf**

ENVIRONMENTALLY RESPONSIBLE, REDEVELOPMENT & REUSE

Environmentally Responsible, Redevelopment & Reuse ("ER3") Frequently Asked Questions and Answers, December 31, 2005

Provides a list of frequently asked questions and answers regarding EPA's Environmentally Responsible, Redevelopment and Reuse (ER3) Initiative. This program seeks to encourage redevelopment in a sustainable way that prevents future environmental hazards through incentives, assistance, and education.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/er3-faqs-05.pdf**

INNOCENT LANDOWNERS

Interim Guidance Regarding Criteria Landowners Must Meet in Order to Quality for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability ("Common Elements"), March 6, 2003

Provides general information regarding the common elements of the landowner liability protections contained in the 2002 Brownfields Amendments to Superfund. These common elements include the requirements of "all appropriate inquiry" (AAI), demonstrating no affiliation with a liable party, and continuing obligations.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf**

"Common Elements" Guidance Reference Sheet, March 6, 2003

Highlights the main points made in EPA's March 2003 "Common Elements" guidance document concerning the conditional liability provided to bona fide prospective purchasers, contiguous property owners, and innocent landowners by the 2002 Brownfield Amendments. The document focuses on the shared factors required to qualify for the above Superfund liability protections.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-ref.pdf**

INVOLUNTARY ACQUISITION

CERCLA Liability and Local Government Acquisitions and Other Activities, March 2011

This fact sheet is intended to be a resource for local governments concerned about incurring potential CERCLA liability as a result of activities to facilitate cleanup and redevelopment of contaminated properties. Among other topics, this document addresses involuntary acquisition issues.

To access online: **http://www.epa.gov/oecaerth/cleanup/revitalization/local-acquis.html**.

Municipal Immunity from CERCLA Liability for Property Acquired through Involuntary State Action, October 20, 1995

Sets forth EPA and DOJ policy regarding the government's enforcement of Superfund against lenders and against governmental entities that acquire property involuntarily.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/immunity-cercla-mem.pdf**

Policy on CERCLA Enforcement Against Lenders and Government Entities that Acquire Property Involuntarily, updated version of September 22, 1995 memorandum, October 23, 1995

Provides EPA and DOJ's policy to adhere to the 1992 "Lender Liability Rule" as official enforcement policy in order to appropriately contend with those lenders and governmental entities who have acquired contaminated property involuntarily.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/cercla-enfinvol-mem.pdf**

Policy on Interpreting CERCLA Provisions Addressing Lenders and Involuntary Acquisitions by Government Entities, June 30, 1997

Sets forth EPA's policy on lender and governmental entity involuntary acquisition of contaminated property in light of the amendments to Superfund as a result of the passage of the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996. In addition, this document discusses how these amendments affect EPA's application of the Lender Liability Rule.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/lendr-aquis-mem.pdf**

The Effect of Superfund on Involuntary Acquisitions of Contaminated Property by Government Entities, December 31, 1995

Sets forth EPA's policy on Superfund enforcement against government entities that involuntarily acquire contaminated property. Also describes some types of government actions that EPA believes qualify for a liability exemption or a defense to Superfund liability.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/fs-involacquprty-rpt.pdf**

MUNICIPAL SOLID WASTE

Interim Guidance on the Municipal Solid Waste Exemption Under CERCLA Section 107(p), August 20, 2003

Discusses the qualified liability exemption added to Superfund by the 2002 Brownfields Amendments and provided to certain residential, small business and non-profit generators of municipal solid waste (MSW) at sites on the National Priorities List (NPL). This document discusses the criteria to qualify for this exemption, the provisions in the Amendments meant to deter litigation against exempt parties, and the interaction between this exemption and existing policies.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-msw-exempt.pdf**

PROSPECTIVE PURCHASER AGREEMENTS AND PROSPECTIVE LESSEE AGREEMENTS

Prospective Purchaser Agreements and Other Tools to Facilitate Cleanup and Reuse of RCRA Sites, April 8, 2003

Discusses three useful tools for EPA to overcome obstacles in cleanup and reuse of Resource Conservation and Recovery Act (RCRA) sites:

- Prospective Purchaser Agreements (PPA),
- the February 2003 "Final Guidance on Corrective Action Activities at RCRA Facilities," and
- comfort/status letters. This document also includes the factors used by EPA to evaluate a request for a PPA.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/rcra/memoppa.pdf**

Guidance on Agreements with Prospective Purchasers of Contaminated Property, May 24, 1995

Provides guidance to prospective purchasers of contaminated Superfund property, specifically concerning the expanded circumstances by which purchasers can enter into covenants not to sue with EPA. This document also provides a model agreement.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/prosper-cont-mem.pdf**

READY FOR REUSE DETERMINATION

Guidance for Preparing Superfund Ready for Reuse (RfR) Determinations, February 12, 2004

Provides guidance to EPA employees in preparing Ready for Reuse Determinations (RfR) in order to encourage the reuse of Superfund sites by informing the real estate market of the status of the site subject to the determination. RfR is an environmental status report that documents a technical determination by EPA, in consultation with the States, Tribes, and local governments, that all or a portion of a Superfund site can support specified types of uses and remain protective of human health and the environment.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/rfr-deter-mpt.pdf**

RESIDENTIAL PROPERTIES

Policy Towards Owners of Residential Property at Superfund Sites, July 3, 1991

Sets forth EPA's policy to not require an owner of residential property to undertake response actions or pay cleanup costs, unless the owner has caused the contamination. This policy does not apply when the owner fails to cooperate with EPA or a state's response actions, meet CERCLA obligations, or uses the property inconsistently with a residential use depiction.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/policy-owner-rpt.pdf**

SUPPLEMENTAL ENVIRONMENTAL PROJECTS

Brownfields Sites and Supplemental Environmental Projects (SEPs), November 30, 2006

Provides background information on the use of supplemental environmental projects (SEPs), in addition to questions and answers on the complementary role of SEPs at brownfield sites. This document supersedes the 1998 guidance document "Using Supplemental Environmental Projects to Facilitate Brownfields Redevelopment."

To access online:
http://www.epa.gov/compliance/resources/publications/cleanup/brownfields/brownfield-seps.pdf

Transmittal of "Supplemental Environmental Projects: Green Building on Contaminated Properties," July 24, 2004

Contains a fact sheet on supplemental environmental projects to promote redevelopment on contaminated properties. EPA issued this fact sheet to improve the environmental performance of redevelopment that follows clean up at any contaminated property.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/brownfields/sep-redev-fs.pdf**

WINDFALL LIENS

Interim Enforcement Discretion Policy Concerning "Windfall Liens" Under Section 107(r) of CERCLA, July 16, 2003

Discusses EPA and the Department of Justice's (DOJ) interim policy implementation of the new CERCLA 107(r) windfall lien provision contained in the 2002 Brownfields Amendments. This document lists the factors that EPA will use to determine whether to file a lien, in addition to discussing how EPA will settle the liens and the possibility of EPA issuing comfort letters to or making agreements with bona fide prospective purchaser (BFPPs).

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-windfall-lien.pdf**

"Windfall Liens" Guidance Frequently Asked Questions, July 16, 2003

Provides questions and answers regarding Superfund's windfall lien section, including what properties it applies to, the factors that EPA uses to determine whether EPA will file a windfall lien, and how the windfall lien interacts with a § 107(l) lien.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-windfall-lien-faq.pdf**

Appendix E

Contact Information

Appendix E
Contact Information

HEADQUARTERS

U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, N.W., Washington, DC 20460-0001

Office of Site Remediation Enforcement:
http://www.epa.gov/compliance/cleanup/revitalization/index.html

Office of Brownfields and Land Revitalization:
http://www.epa.gov/brownfields/

Office of Superfund Remediation and Technology Innovation:
http://www.epa.gov/superfund/partners/osrti/index.htm

Office of Resource Conservation and Recovery
http://www.epa.gov/osw/hazard/index.htm

Office of Underground Storage Tanks:
http://www.epa.gov/oust/

Federal Facilities Restoration and Reuse Office
http://www.epa.gov/fedfac/

REGIONAL CONTACTS

Regional Brownfields Coordinators: http://epa.gov/brownfields/corcntct.htm

All Appropriate Inquiries Final Rule

What is "All Appropriate Inquiries"?

"All appropriate inquiries" is the process of evaluating a property's environmental conditions and assessing potential liability for any contamination.

Why is EPA Establishing Standards for Conducting All Appropriate Inquiries?

The 2002 Brownfields Amendments to CERCLA require EPA to promulgate regulations establishing standards and practices for conducting all appropriate inquiries.

Stakeholder Collaboration

A Negotiated Rulemaking Committee consisting of 25 diverse stakeholders developed the proposed rule. Following publication of the proposed rule, EPA provided for a three month public comment period. EPA received over 400 comments from interested parties. Based upon a review and analysis of issues raised by commenters, EPA developed the final rule.

When is the Rule Effective?

The final rule is effective on November 1, 2006—one year after being published in the Federal Register. Until November 1, 2006, both the standards and practices included in the final regulation and the current interim standards established by Congress for all appropriate inquiries (ASTM E1527-00) will satisfy the statutory requirements for the conduct of all appropriate inquiries.

Who is Affected?

The final All Appropriate Inquiries requirements are applicable to any party who may potentially claim protection from CERCLA liability as an innocent landowner, a bona fide prospective purchaser, or a contiguous property owner. Parties who receive grants under the EPA's Brownfields Grant program to assess and characterize properties must comply with the All Appropriate Inquiries standards.

When Must All Appropriate Inquiries be Conducted?

All appropriate inquiries must be conducted or updated within one year prior to the date of acquisition of a property. If all appropriate inquiries are conducted more than 180 days prior to the acquisition date, certain aspects of the inquiries must be updated.

What Specific Activities Does the Rule Require?

Many of the inquiry's activities must be conducted by, or under the supervision or responsible charge of, an individual who qualifies as an environmental professional as defined in the final rule.

The inquiry of the environmental professional must include:

- interviews with past and present owners, operators and occupants;
- reviews of historical sources of information;
- reviews of federal, state, tribal and local government records;
- visual inspections of the facility and adjoining properties;
- commonly known or reasonably ascertainable information; and
- degree of obviousness of the presence or likely presence of contamination at the property and the ability to detect the contamination.

Additional inquiries that must be conducted by or for the prospective landowner or grantee include:

- searches for environmental cleanup liens;
- assessments of any specialized knowledge or experience of the prospective landowner (or grantee);
- an assessment of the relationship of the purchase price to the fair market value of the property, if the property was not contaminated; and
- commonly known or reasonably ascertainable information.

How Does the Final AAI Rule Differ From the Interim Standard?

The final All Appropriate Inquiries rule does not differ significantly from the ASTM E1527-00 standard. The rule includes all the main activities that previously were performed as part of environmental due diligence such as site reconnaissance, records review, interviews, and documentation of recognized environmental conditions. The final rule, however, enhances the inquiries by extending the scope of a few of the environmental due diligence activities. In addition, the final rule requires that significant data gaps or uncertainties be documented.

Under the final All Appropriate Inquiries rule, interviewing the subject property's current owner or occupants is mandatory. The ASTM E1527-00 standard only required that the environmental professional make a reasonable attempt to conduct such interviews. In addition, the final rule includes provisions for interviewing past owners and occupants of the subject property, if necessary to meet the objectives and performance factors. Under the ASTM E1527-00 standard, the environmental professional had to inquire about past uses of the subject property when interviewing the current property owner.

The final rule also requires an interview with an owner of a neighboring property if the subject property is abandoned. The ASTM E1527-00 standard included such interviews at the environmental professional's discretion.

The final rule does not specify who is responsible for performing record searches, including searches for use limitations and environmental cleanup liens. The ASTM E1527-00 standard specified that these record searches are the responsibility of the user and required that the results be reported to the environmental professional.

Unlike the ASTM E1527-00 standard, the final rule requires the examination of tribal and local government records and more extensive documentation of data gaps.

The final rule includes specific documentation requirements if the subject property cannot be visually inspected. The ASTM E1527-00 standard did not include such requirements.

Who Qualifies as an Environmental Professional?

To ensure the quality of all appropriate inquiries, the final rule includes specific educational and experience requirements for an environmental professional.

The final rule defines an environmental professional as someone who possesses sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding conditions indicative of releases or threatened releases on, at, in, or to a property, sufficient to meet the objectives and performance factors of the rule, and has: (1) a state or tribal issued certification or license and three years of relevant full-time work experience; **or** (2) a Baccalaureate degree or higher in science or engineering and five years of relevant full-time work experience; **or** (3) ten years of relevant full-time work experience.

For more information on the environmental professional definition, please see EPA's Fact Sheet on the Definition of an Environmental Professional.

Will There Be an Updated ASTM Phase I Site Assessment Standard?

Yes. ASTM International updated its E1527-00 standard, "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process." EPA establishes that the revised ASTM E1527-05 standard is consistent with the requirements of the final rule for all appropriate inquiries and may be used to comply with the provisions of the rule.

Contact Information

Patricia Overmeyer

U.S. EPA's Office of Brownfields Cleanup and Redevelopment

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Overmeyer.Patricia@epa.gov

Also, please see the U.S. EPA's web site at www.epa.gov/brownfields for additional information.

Federal Register

Tuesday,
November 1, 2005

Part III

Environmental Protection Agency

40 CFR Part 312

Standards and Practices for All Appropriate Inquiries; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 312

[SFUND–2004–0001; FRL–7989–7]

RIN 2050–AF04

Standards and Practices for All Appropriate Inquiries

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) today is establishing federal standards and practices for conducting all appropriate inquiries as required under sections 101(35)(B)(ii) and (iii) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Today's final rule establishes specific regulatory requirements and standards for conducting all appropriate inquiries into the previous ownership and uses of a property for the purposes of meeting the all appropriate inquiries provisions necessary to qualify for certain landowner liability protections under CERCLA. The standards and practices also will be applicable to persons conducting site characterization and assessments with the use of grants awarded under CERCLA section 104(k)(2)(B).

DATES: This final rule is effective November 1, 2006.

ADDRESSES: EPA established a docket for this action under Docket ID No. SFUND–2004–0001. All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket*. Although listed in the index, some information is not publicly available, i.e., information labeled Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the EPA Docket Center, EPA West Building, Room B102, 1301 Constitution Ave., NW., Washington, DC. This docket facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OSWER Docket is (202) 566–0276.

FOR FURTHER INFORMATION CONTACT: For further information on specific aspects of today's rule, contact Patricia Overmeyer of EPA's Office of Brownfields Cleanup and Redevelopment at (202) 566–2774 or at *overmeyer.patricia@epa.gov*. Mail inquiries may be directed to the Office of Brownfields Cleanup and Redevelopment (5105T), 1200 Pennsylvania Ave. NW., Washington, DC 20460.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Who Potentially May be Affected by Today's Rule?

This regulation may affect most directly those persons and businesses purchasing commercial property or any property that will be used for commercial or public purposes and who may, after purchasing the property, seek to claim protection from CERCLA liability for releases or threatened releases of hazardous substances. Under section101(35)(B) of CERCLA, as amended by the Small Business Liability Relief and Brownfields Revitalization Act (Pub. L. 107–118, 115 stat. 2356, ''the Brownfields Amendments'') such persons and businesses are required to conduct all appropriate inquiries prior to or on the date on which the property is acquired. Prospective landowners who do not conduct all appropriate inquiries prior to or on the date of obtaining ownership of the property may lose their ability to claim protection from CERCLA liability as an innocent landowner, bona fide prospective purchaser, or contiguous property owner.

In addition, today's rule will affect any party who receives a brownfields grant awarded under CERCLA section 104(k)(2)(B) and uses the grant money to conduct site characterization or assessment activities. This includes state, local and tribal governments that receive brownfields site assessment grants for the purpose of conducting site characterization and assessment activities. Such parties are required under CERCLA section 104(k)(2)(B)(ii) to conduct such activities in compliance with the standards and practices established by EPA for the conduct of all appropriate inquiries. EPA notes that today's rule also may affect other parties who apply for brownfields grants under the provisions of CERCLA section 104(k), since such parties may have to qualify as a bona fide prospective purchaser to ensure compliance with the statutory prohibitions on the use of grant funds under Section 104(k)(4)(B)(I). Any party seeking liability protection as a bona fide prospective purchaser, including eligible brownfields grantees, must conduct all appropriate inquiries prior to or on the date of acquiring a property.

The background document, ''Economic Impacts Analysis for the Proposed All Appropriate Inquiries Final Regulation'' and the Addendum to this document provide a comprehensive analysis of all potentially impacted entities. These documents are available in the docket established for today's rule. A summary of potentially affected businesses is provided in the table below.

Our aim in the table below is to provide a guide for readers regarding entities likely to be directly regulated or indirectly affected by today's action. This action, however, may affect other entities not listed in the table. To determine whether you or your business is regulated or affected by this action, you should examine the regulatory language amending CERCLA. This language is found at the end of this **Federal Register** notice. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding section entitled **FOR FURTHER INFORMATION CONTACT.**

Industry category	NAICS code
Manufacturing	31–33
Wholesale Trade	42
Retail Trade	44–45
Finance and Insurance	52
Real Estate	531
Professional, Scientific and Technical Services	541
Accommodation and Food Services	72
Repair and Maintenance	811
Personal and Laundry Services	812
State, Local and Tribal Government	N/A

B. How Can I Get Copies of This Document and Other Related Information?

1. *Docket*. EPA established an official public docket for this action under Docket ID No. SFUND–2004–0001. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to today's action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Documents in the official public docket are listed in the index list in EPA's electronic public docket and comment system, EDOCKET. Documents may be available either electronically or in hard copy. Electronic documents may be viewed through EDOCKET. Hard copy

documents may be viewed at the EPA Docket Center, EPA West, Room B102, 1301 Constitution Avenue, NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OSWER Docket is (202) 566–0276.

2. *Electronic Access.* You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr.*

An electronic version of the public docket also is available through EPA's electronic public docket and comment system, EDOCKET. You may use EDOCKET at *http://www.epa.gov/edocket/* to view public comments, access the index listing of the contents of the public docket, and access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the appropriate docket identification number.

Certain types of information will not be placed in EDOCKET. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. Docket materials that are not available electronically may be viewed at the docket facility identified above.

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V. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Act
D. Unfunded Mandates Reform Act
E. Executive Order 13132: Federalism
F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments
G. Executive Order 13045: Protection of Children from Environmental Risks and Safety Risks
H. Executive Order 13211: Actions that Significantly Affect Energy Supply, Distribution or Use
I. National Technology Transfer Advancement Act
J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations
K. Congressional Review Act

I. Statutory Authority

These regulations are promulgated under the authority of Section 101(35)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601), as amended, most importantly by the Small Business Liability Relief and Brownfields Revitalization Act.

II. Background

A. What is the Intent of Today's Rule?

On August 26, 2004, EPA published a notice of proposed rulemaking outlining proposed standards and practices for the conduct of ''all appropriate inquiries.'' This regulatory action was initiated in response to legislative amendments to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). On January 11, 2002, President Bush signed the Small Business Liability Relief and Brownfields Revitalization Act (Pub. L. 107–118, 115 Stat. 2356, ''the Brownfields Amendments''). The Brownfields Amendments amend CERCLA by providing funds to assess and clean up brownfields sites, clarifying CERCLA liability provisions for certain landowners, and providing funding to enhance state and tribal cleanup programs. The intent of today's rule is to finalize regulations setting federal standards and practices for the conduct of all appropriate inquiries, a key provision of the Brownfields Amendments. Subtitle B of Title II of the Brownfields Amendments revises CERCLA section 101(35), clarifying the requirements necessary to establish the innocent landowner defense. In addition, the Brownfields Amendments add protections from CERCLA liability for bona fide prospective purchasers and contiguous property owners who meet certain statutory requirements.

Each of the CERCLA liability provisions for innocent landowners, bona fide prospective purchasers, and contiguous property owners, requires that, among other requirements, persons claiming the liability protections conduct all appropriate inquiries into prior ownership and use of a property prior to or on the date a person acquires a property. The law requires EPA to develop regulations establishing standards and practices for how to conduct all appropriate inquiries. Congress included in the Brownfields Amendments a list of criteria that the Agency must address in the regulations establishing standards and practices for conducting all appropriate inquiries

section 101(35)(2)(B)(ii) and (iii). The Brownfields Amendments also require that parties receiving a federal brownfields grant awarded under CERCLA section 104(k)(2)(B) to conduct site characterizations and assessments must conduct these activities in accordance with the standards and practices for all appropriate inquiries.

The regulations established today only address the all appropriate inquiries provisions of CERCLA sections 101(35)(B)(i)(I) and 101(35)(B)(ii) and (iii). Today's rule does not address the requirements of CERCLA section 101(35)(B)(i)(II) for what constitutes ''reasonable steps.''

B. What is ''All Appropriate Inquiries?''

An essential step in real property transactions may be evaluating a property for potential environmental contamination and assessing potential liability for contamination present at the property. The process for assessing properties for the presence or potential presence of environmental contamination often is referred to as ''environmental due diligence,'' or ''environmental site assessment.'' The Comprehensive Environmental Response Compensation and Liability Act (CERCLA) or Superfund, provides for a similar, but legally distinct, process referred to as ''all appropriate inquiries.''

Under CERCLA, persons may be held strictly liable for cleaning up hazardous substances at properties that they either currently own or operate or owned or operated at the time of disposal. Strict liability in the context of CERCLA means that a potentially responsible party may be liable for environmental contamination based solely on property ownership and without regard to fault or negligence.

In 1986, the Superfund Amendments and Reauthorization Act (Pub. L. No. 99–499, 100 stat. 1613, ''SARA'') amended CERCLA by creating an ''innocent landowner'' defense to CERCLA liability. The new section 101(35)(B) of CERCLA provided a defense to CERCLA liability, for those persons who could demonstrate, among other requirements, that they ''did not know and had no reason to know'' prior to purchasing a property that any hazardous substance that is the subject of a release or threatened release was disposed of on, in, or at the property. Such persons, to demonstrate that they had ''no reason to know'' must have undertaken, prior to, or on the date of acquisition of the property, ''all appropriate inquiries'' into the previous ownership and uses of the property consistent with good commercial or customary standards and practices. The 2002 Brownfields Amendments added potential liability protections for ''contiguous property owners'' and ''bona fide prospective purchasers'' who also must demonstrate they conducted all appropriate inquiries, among other requirements, to benefit from the liability protection.

C. What Were the Previous Standards for All Appropriate Inquiries?

As part of the Brownfields Amendments to CERCLA, Congress established interim standards for the conduct of all appropriate inquiries. The federal interim standards established by Congress became effective on January 11, 2002. In the case of properties purchased after May 31, 1997, the interim standards include the procedures of the ASTM Standard E1527–97 (entitled ''Standard Practice for Environmental Site Assessments: Phase 1 Environmental Site Assessment Process''). In the case of persons who purchased property prior to May 31, 1997 and who are seeking to establish an innocent landowner defense or qualify as a contiguous property owner, CERCLA provides that such persons must establish, among other statutory requirements, that at the time they acquired the property, they did not know and had no reason to know of releases or threatened releases to the property. To establish they did not know and had no reason to know of releases or threatened releases, persons who purchased property prior to May 31, 1997 must demonstrate that they carried out all appropriate inquiries into the previous ownership and uses of the property in accordance with generally accepted good commercial and customary standards and practices.

In the case of property acquired by a non-governmental entity or non-commercial entity for residential or other similar uses, the current interim standards for all appropriate inquiries may not be applicable. For those cases, the Brownfields Amendments to CERCLA establish that a ''facility inspection and title search that reveal no basis for further investigation shall be considered to satisfy the requirements' for all appropriate inquiries. In addition, such properties are not within the scope of today's rule.

The interim standards remain in effect only until the effective date of today's rule which promulgates federal regulations establishing standards and practices for conducting all appropriate inquiries.

On May 9, 2003, EPA published a final rule (68 FR 24888) clarifying that for the purposes of achieving the all appropriate inquiries standards of CERCLA section 101(35)(B), and until the effective date of today's regulation, persons who purchase property on or after May 31, 1997 could use either the procedures provided in ASTM E1527–2000, entitled ''Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process,'' or the earlier standard cited by Congress in the Brownfields Amendments, ASTM E1527–97.

Today's notice is a final rule and as such replaces the current interim standards for all appropriate inquiries established by Congress in the Brownfields Amendments and clarified by EPA in the May 9, 2003 final rule. Since the Agency is promulgating a final rule establishing federal regulations containing the standards and practices for conducting all appropriate inquiries, the interim standard will no longer be the operative standard for conducting all appropriate inquiries upon November 1, 2006, the effective date of today's rule. Until November 1, 2006, both the standards and practices included in today's final regulation and the current interim standards established by Congress for all appropriate inquiries will be recognized by EPA as satisfying the statutory requirements for the conduct of all appropriate inquiries under section 101(35)(B) of CERCLA.

D. What are the Liability Protections Established Under the Brownfields Amendments?

The Brownfields Amendments provide important liability protections for landowners who qualify as contiguous property owners, bona fide prospective purchasers, or innocent landowners. To meet the statutory requirements for any of these landowner liability protections, a landowner must meet certain threshold requirements and satisfy certain continuing obligations. To qualify as a bona fide prospective purchaser, contiguous property owner, or innocent landowner, a person must perform ''all appropriate inquiries'' on or before the date on which the person acquired the property. Bona fide prospective purchasers and contiguous property owners also must demonstrate that they are not potentially liable or affiliated with any other person that is potentially liable for response costs at the property. In the case of contiguous property owners, the landowner claiming to be a contiguous property owner also must demonstrate that he did not cause, contribute, or consent to any release or threatened release of hazardous substances. To meet the statutory requirements for a bona fide

prospective purchaser, a property owner must have acquired a property subsequent to any disposal activities involving hazardous substances at the property.

Continuing obligations required under the statute include complying with land use restrictions and not impeding the effectiveness or integrity of institutional controls; taking ''reasonable steps'' with respect to hazardous substances affecting a landowner's property to prevent releases; providing cooperation, assistance and access to EPA, a state, or other party conducting response actions or natural resource restoration at the property; complying with CERCLA information requests and administrative subpoenas; and providing legally required notices. For a more detailed discussion of these threshold and continuing requirements please see EPA, Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability (Common Elements, 2003). A copy of this document is available in the docket for today's rule.

EPA notes that, as explained below, persons conducting all appropriate inquiries in compliance with today's final rule are not entitled to the CERCLA liability protections provided for innocent landowners, bona fide prospective purchasers, and contiguous property owners, unless they also comply with all of the continuing obligations established under the statute. As explained below, compliance with today's final rule is only one requirement necessary for CERCLA liability protection. We also note that the requirements of today's rule apply to prospective property owners who are seeking protection from liability under the federal Superfund Law (CERCLA). Prospective property owners wishing to establish protection from, or a defense to, liability under state superfund or other related laws must comply with the all criteria established under state laws, including any criteria for conducting site assessments or all appropriate inquiries established under applicable state statutes or regulations.

1. Bona Fide Prospective Purchaser

The Brownfields Amendments added a new bona fide prospective purchaser provision at CERCLA section 107(r). The provision provides protection from CERCLA liability, and limits EPA's recourse for unrecovered response costs to a lien on property for the lesser of the unrecovered response costs or increase in fair market value attributable to EPA's response action. To meet the statutory requirements for a bona fide prospective purchaser, a person must meet the requirements set forth in CERCLA sections 101(40) and 107(r). A bona fide prospective purchaser must have bought property after January 11, 2002 (the date of enactment of the Brownfields Amendments). A bona fide prospective purchaser may purchase property with knowledge of contamination after performing all appropriate inquiries, provided the property owner meets or complies with all of the other statutory requirements set forth in CERCLA section 101(40). Conducting all appropriate inquiries *alone* does not provide a landowner with protection against CERCLA liability. Landowners who want to qualify as bona fide prospective purchasers must comply with all of the statutory requirements. The statutory requirements include, without limitation, that the landowner must:

- Have acquired a property after all disposal of hazardous substances at the property ceased;
- Provide all legally required notices with respect to the discovery or release of any hazardous substances at the property;
- Exercise appropriate care by taking reasonable steps to stop continuing releases, prevent any threatened future release, and prevent or limit human, environmental, or natural resources exposure to any previously released hazardous substance;
- Provide full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restorations;
- Comply with land use restrictions established or relied on in connection with a response action;
- Not impede the effectiveness or integrity of any institutional controls;
- Comply with any CERCLA request for information or administrative subpoena; and
- Not be potentially liable, or affiliated with any other person who is potentially liable for response costs for addressing releases at the property.

Persons claiming to be bona fide prospective purchasers should keep in mind that failure to identify an environmental condition or identify a release or threatened release of a hazardous substance on, at, in or to a property during the conduct of all appropriate inquiries does not relieve a landowner from complying with the other post-acquisition statutory requirements for obtaining the liability protections. Landowners must comply with all the statutory requirements to obtain the liability protection. For example, an inability to identify a release or threatened release during the conduct of all appropriate inquiries does not negate the landowner's responsibilities under the statute to take reasonable steps to stop a release, prevent a threatened release, and prevent exposure to any previous release once any release is identified. Compliance with the other statutory requirements for the bona fide prospective purchaser liability protection is not contingent upon the findings of all appropriate inquiries.

2. Contiguous Property Owner

The Brownfields Amendments added a new contiguous property owner provision at CERCLA section 107(q). This provision excludes from the definition of ''owner'' or ''operator'' under CERCLA section 107(a)(1) and (2) a person who owns property that is ''contiguous to, or otherwise similarly situated with respect to, and that is or may be contaminated by a release or threatened release of a hazardous substance from'' property owned by someone else. To qualify as a contiguous property owner, a landowner must have no knowledge or reason to know of contamination at the time of acquisition, have conducted all appropriate inquiries, and meet all of the criteria set forth in CERCLA section 107(q)(1)(A), which include, without limitation:

- Not causing, contributing, or consenting to the release or threatened release;
- Not being potentially liable nor affiliated with any other person who is potentially liable for response costs at the property;
- Taking reasonable steps to stop continuing releases, prevent any threatened release, and prevent or limit human, environmental, or natural resource exposure to any hazardous substances released on or from the landowner's property;
- Providing full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restorations;
- Complying with land use restrictions established or relied on in connection with a response action;
- Not impeding the effectiveness or integrity of any institutional controls;
- Complying with any CERCLA request for information or administrative subpoena;
- Providing all legally required notices with respect to discovery or release of any hazardous substances at the property.

The contiguous property owner liability protection ''protects parties that

are essentially victims of pollution incidents caused by their neighbor's actions.'' S. Rep. No. 107–2, at 10 (2001). Contiguous property owners must perform all appropriate inquiries prior to purchasing property. However, performing all appropriate inquiries in accordance with the regulatory requirements alone is not sufficient to assert the liability protections afforded under CERCLA. Property owners must fully comply with all of the statutory requirements to be afforded the contiguous property owner liability protection. Persons who know, or have reason to know, that the property is or could be contaminated at the time of acquisition of a property cannot qualify for the liability protection as a contiguous property owner, but may be entitled to bona fide prospective purchaser status.

Persons claiming to be contiguous property owners should keep in mind that failure to identify an environmental condition or identify a release or threatened release of a hazardous substance on, at, in or to a property during the conduct of all appropriate inquiries, does not relieve a landowner from complying with the other statutory requirements for obtaining the contiguous landowner liability limitation. Landowners must comply with all the statutory requirements to qualify for the liability protections. For example, an inability to identify a release or threatened release during the conduct of all appropriate inquiries does not negate the landowner's responsibilities under the statute to take reasonable steps to stop the release, prevent a threatened release, and prevent exposure to previous releases once a release is identified. None of the other statutory requirements for the contiguous property owner liability protection is contingent upon the results of the conduct of all appropriate inquiries.

3. Innocent Landowner

The Brownfields Amendments also clarify the innocent landowner defense. To qualify as an innocent landowner, a person must conduct all appropriate inquiries and meet all of the statutory requirements. The requirements include, without limitation:

- Having no knowledge or reason to know that any hazardous substance which is the subject of a release or threatened release was disposed of on, in, or at the facility;
- Providing full cooperation, assistance and access to persons authorized to conduct response actions at the property;
- Complying with any land use restrictions and not impeding the effectiveness or integrity of any institutional controls;
- Taking reasonable steps to stop continuing releases, prevent any threatened release, and prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substances;

To successfully assert an innocent landowner liability defense, a property owner must demonstrate compliance with CERCLA section 107(b)(3) as well. Such persons must establish, by a preponderance of the evidence:

- That the release or threat of release of hazardous substances and the resulting damages were caused by an act or omission of a third party with whom the person does not have employment, agency, or a contractual relationship;
- The person exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances;
- Took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.

Like contiguous property owners, innocent landowners must perform all appropriate inquiries prior to or on the date of acquisition of a property and cannot know, or have reason to know, of contamination to qualify for this landowner liability protection. Persons claiming to be innocent landowners also should keep in mind that failure to identify an environmental condition or identify a release or threatened release of a hazardous substance on, at, in or to a property during the conduct of all appropriate inquiries, does not relieve or exempt a landowner from complying with the other statutory requirements for asserting the innocent landowner defense. Landowners must comply with all the statutory requirements to obtain the defense. For example, an inability to identify a release or threatened release during the conduct of all appropriate inquiries does not negate the landowner's responsibilities under the statute to take reasonable steps to stop the release, prevent a threatened release, and prevent exposure to a previous release. Compliance with the other statutory requirements for the innocent landowner defense is not contingent upon the results of an all appropriate inquiries investigation.

E. What Criteria Did Congress Establish for the All Appropriate Inquiries Standard?

Congress included in the Brownfields Amendments a list of criteria that the Agency must include in the regulations establishing standards and practices for conducting all appropriate inquiries. In addition to providing these criteria in the statute, Congress instructed EPA to develop regulations establishing standards and practices for conducting all appropriate inquiries in accordance with generally accepted good commercial and customary standards and practices. The criteria are set forth in CERCLA section 101(35)(2)(B)(iii) and include:

- The results of an inquiry by an environmental professional.
- Interviews with past and present owners, operators, and occupants of the facility for the purpose of gathering information regarding the potential for contamination at the facility.
- Reviews of historical sources, such as chain of title documents, aerial photographs, building department records, and land use records, to determine previous uses and occupancies of the real property since the property was first developed.
- Searches for recorded environmental cleanup liens against the facility that are filed under federal, state, or local law.
- Reviews of federal, state, and local government records, waste disposal records, underground storage tank records, and hazardous waste handling, generation, treatment, disposal, and spill records, concerning contamination at or near the facility.
- Visual inspections of the facility and of adjoining properties.
- Specialized knowledge or experience on the part of the defendant.
- The relationship of the purchase price to the value of the property, if the property was not contaminated.
- Commonly known or reasonably ascertainable information about the property.
- The degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation.

III. Summary of Comments and Changes From Proposed Rule to Final Rule

EPA received over 400 public comments in response to the August 26, 2004 proposed rule. Comments were received from environmental consultants with experience in performing site assessments, trade

associations, state government agencies, environmental interest groups, and other public interest associations. Commenters generally supported the purpose and goals of the proposed rule. Many commenters complimented the Agency on its decision to develop the proposed rule using the negotiated rulemaking process. However, commenters had differing views on certain aspects of the proposed rule. In particular, the Agency received widely differing views on the proposed definition of ''environmental professional.'' Although many commenters supported the definition as proposed, other commenters raised concerns regarding the stringency of the proposed qualifications. A significant number of commenters applauded the proposed definition of an environmental professional and stated that it may increase the rigor and caliber of environmental site investigations. Commenters who would not qualify as an environmental professional under the proposed definition raised concerns with regard to the specific qualifications proposed.

EPA received a significant number of comments regarding the statutory requirements for qualifying for the CERCLA liability protections. Several commenters also raised concerns with regard to the performance-based approach to the all appropriate inquiries investigation included in the proposed rule. Commenters were concerned that the proposed performance-based approach would make it more difficult to qualify for the CERCLA liability protections than an approach that requires strict adherence to prescriptive data gathering requirements that do not allow for the application of professional judgment. However, the vast majority of commenters who commented on the performance-based nature of the proposed rule supported the proposed approach.

Other commenters raised concerns with regard to the proposed rule's requirements to identify and comment upon the significance of ''data gaps'' where the lack of information may affect the ability of an environmental professional to render an opinion regarding conditions at a property that are indicative of releases or threatened releases of hazardous substances. Commenters were concerned that if any data gaps exist potential contamination would not be identified, allowing property owners to escape liability for contamination. Other commenters supported the proposed requirement to identify data gaps, or missing information, that may affect the environmental professional's ability to render an opinion regarding the environmental conditions at a property and comment on their significance in this regard and stated that the requirement would lend credibility to the inquiry's final report.

We received many comments on the proposed provision to compare the purchase price of a property to the fair market value of the property (if the property were not contaminated). One concern raised is that commenters believe that the exact market value of a property is difficult to determine. Some commenters took exception to the fact that EPA did not propose that prospective landowners have to conduct formal real estate appraisals of the property to determine fair market value. Although this provision has been a statutory requirement for the conduct of all appropriate inquiries since 1986, some commenters thought the requirement should not be included within the scope of all appropriate inquiries. Other commenters stated that the environmental professional should not be required to undertake the comparison.

We received some comments on the results of the economic impact analysis that was conducted to assess the potential costs and impacts of the proposed rule. Many commenters generally agreed with the Agency's conclusion that the average incremental cost increase associated with the requirements in the proposed rule over the current industry standard would be minimal. However, some commenters asserted that EPA underestimated the incremental costs associated with the proposed rule. Although a few commenters mentioned particular activities included as requirements in the proposed rule that would increase the burdens and costs associated with conducting all appropriate inquiries, most of these commenters did not provide specific reasons for claimed cost increases over baseline activities. Some commenters simply stated that the proposed requirements would result in an increase in the price of phase I environmental site assessments. We provide a summary of the comments received on the economic impact analysis for the proposed rule, our responses to issues raised by commenters, and the results of some additional analyses conducted based on some of the issues raised, in an addendum to the economic impact analysis, which is provided in the docket for today's final rule.

In section IV of this preamble, we discuss the requirements of the final rule, including a summary of the provisions included in the August 26, 2004 proposed rule, the significant comments raised in response to the proposed provisions, and a summary of our rationale for the final rule requirements. Generally, the final rule closely resembles the provisions included in the proposed rule. We adopted relatively minor changes in response to public comments. For example, we received a number of comments urging EPA to modify the proposed definition of environmental professional to allow individuals who have significant experience in conducting environmental site assessments, but do not have a Baccalaureate degree, to qualify as environmental professionals. We were convinced by the arguments presented in many of these public comments. Therefore, the definition of an environmental professional included in today's final rule allows individuals with ten years of relevant full time experience to qualify as an environmental professional for the purpose of overseeing and performing all appropriate inquiries.

With respect to the proposed requirements governing the use of previously-conducted environmental site assessments for a particular property, we agreed with commenters who pointed out the proposed rule was unclear. In today's final rule, we modify the proposed rule language to allow for the use of information contained in previously-conducted assessments, even if the information was collected more than a year prior to the date on which the subject property is acquired. The final rule does require that all aspects of a site assessment, or all appropriate inquiries investigation, completed more than one year prior to the date of acquisition of the subject property be updated to reflect current conditions and current property-specific information. In the case of all appropriate inquiries investigations completed less than one year prior to the date of acquisition of the subject property but more than 180 days before the acquisition date, the final rule retains the requirements of the proposed rule that only certain aspects of the all appropriate inquiries must be updated.

In the case of the requirement to search for institutional controls that was included in the proposed requirements to review federal, state, tribal and local government records, we agreed with commenters who pointed out that searching for institutional controls associated with properties located within a half mile of the subject property is overly burdensome and without sufficient benefit to the purpose of the investigation. The final rule

requires that the search for institutional controls be confined to the subject property only.

We adopted one other change in the final rule, based upon public comments. In the proposed rule, we delineated responsibilities for particular aspects of the all appropriate inquiries investigation between the environmental professional and the prospective landowner of the subject property (or grantee). We defined the inquiry of the environmental professional to include: interviews with past and present owners, operators and occupants; reviews of historical sources of information; reviews of federal state tribal and local government records; visual inspections of the facility and adjoining property; commonly known or reasonably ascertainable information; and degree of obviousness of the presence or likely presence of contamination at the property and the ability to detect the contamination by appropriate investigation. We also defined ''additional inquiries'' that must be conducted by the prospective landowner or grantee (or an individual on the prospective landowner's or grantee's behalf). These ''additional inquiries'' include: specialized knowledge or experience of the prospective landowner (or grantee); the relationship of the purchase price to the fair market value of the property, if the property was not contaminated; and commonly known or reasonably ascertainable information. The requirement to search for environmental cleanup liens was proposed to be the responsibility of the prospective landowner (or grantee), if the search is not conducted by the environmental professional. The proposed rule required the prospective landowner (or grantee) to provide all information collected as part of the ''additional inquiries'' to the environmental professional.

The final rule retains the proposed delineation of responsibilities. However, based upon the input provided in public comments, the final rule does not require the prospective landowner (or grantee) to provide the information collected as part of the ''additional inquiries'' to the environmental professional. Although we continue to believe that the information collected or held by the prospective landowner (or grantee) should be provided to the environmental professional overseeing the other aspects of the all appropriate inquiries, we agree with commenters who asserted that prospective landowners and grantees should not be required to provide this information to the environmental professional. Commenters argued that property owners (and grantees) may want to hold some information (*e.g.*, the purchase price of the property) confidential. CERCLA liability rests with the owner or operator of a property and not with an environmental professional hired by the prospective landowner and who is not involved with the ownership or operation of the property. Since it ultimately is up to the owner or operator of a property to defend his or herself against any claims to liability, we agree with commenters that asserted that the regulations should not require that prospective landowners (or grantees) provide information collected to comply with the ''additional inquiries'' provisions to the environmental professional. Should the required information not be provided to the environmental professional, the environmental professional should assess the impact that the lack of such information may have on his or her ability to render an opinion with regard to conditions indicative of releases or threatened releases of hazardous substances on, at, in or to the property. If the lack of information does impact the ability of the environmental professional to render an opinion with regard to the environmental conditions of the property, the environmental professional should note the missing information as a data gap in the written report. We discuss each of the requirements of the final rule in Section IV of this preamble.

IV. Detailed Description of Today's Rule

A. What Is the Purpose and Scope of the Rule?

The purpose of today's rule is to establish federal standards and practices for the conduct of all appropriate inquiries. Such inquiries must be conducted by persons seeking any of the landowner liability protections under CERCLA prior to acquiring a property (as outlined in Section II.D. of this preamble). In addition, persons receiving federal brownfields grants under the authorities of CERCLA section 104(k)(2)(B) to conduct site characterizations and assessments must conduct such activities in compliance with the all appropriate inquiries regulations.

In the case of persons claiming one of the CERCLA landowner liability protections, the scope of today's rule includes the conduct of all appropriate inquiries for the purpose of identifying releases and threatened releases of hazardous substances on, at, in or to the property that would be the subject of a response action for which a liability protection would be needed and such a property is owned by the person asserting protection from liability. CERCLA liability is limited to releases and threatened releases of hazardous substances which cause the incurrence of response costs. Therefore, in the case of all appropriate inquiries conducted for the purpose of qualifying for protection from CERCLA liability (CERCLA section 107), the scope of the inquiries is to identify releases and threatened releases of hazardous substances which cause or threaten to cause the incurrence of response costs.

In the case of persons receiving Federal brownfields grants to conduct site characterizations and assessments, the scope of the all appropriate inquiries standards and practices may be broader. The Brownfields Amendments include a definition of a ''brownfield site'' that includes properties contaminated or potentially contaminated with substances not included in the definition of ''hazardous substance'' in CERCLA section 101(14). Brownfields sites include properties contaminated with (or potentially contaminated with) hazardous substances, petroleum and petroleum products, controlled substances, and pollutants and contaminants (as defined in CERCLA section 101(33)). Therefore, in the case of persons receiving federal brownfields grant monies to conduct site assessment and characterization activities at brownfields sites, the scope of the all appropriate inquiries may include these other substances, as outlined in § 312.1(c)(2), to ensure that persons receiving brownfields grants can appropriately and fully assess the properties as required. It is not the case that every recipient of a brownfields assessment grant has to include within the scope of the all appropriate inquiries petroleum and petroleum products, controlled substances and CERCLA pollutants and contaminants (as defined in CERCLA section 101(33)). However, in those cases where the terms and conditions of the grant or the cooperative agreement with the grantee designate a broader scope to the investigation (beyond CERCLA hazardous substances), then the scope of the all appropriate inquiries should include the additional substances or contaminants.

The scope of today's rule does not include property purchased by a non-governmental entity or non-commercial entity for ''residential use or other similar uses * * * [where] a facility inspection and title search * * * reveal no basis for further investigation.'' (Pub. L. 107–118 § 223). CERCLA section

101(35)(B)(v) states that in those cases, title search and facility inspection that reveal no basis for further investigation shall satisfy the requirements for all appropriate inquiries.

We note that today's rule does not affect the existing CERCLA liability protections for state and local governments that acquire ownership to properties involuntarily in their functions as sovereigns, pursuant to CERCLA sections 101(20)(D) and 101(35)(A)(ii). Involuntary acquisition of properties by state and local governments fall under those CERCLA provisions and EPA's policy guidance on those provisions, not under the all appropriate inquiry provisions of CERCLA section 101(35)(B).

B. To Whom Is the Rule Applicable?

Today's rule applies to any person who may seek the landowner liability protections of CERCLA as an innocent landowner, contiguous property owner, or bona fide prospective purchaser. The statutory requirements to obtain each of these landowner liability protections include the conduct of all appropriate inquiries. In addition, the rule applies to individuals receiving Federal grant monies under CERCLA section 104(k)(2)(B) to conduct site characterization and assessment activities. Persons receiving such grant monies must conduct the site characterization and assessment in compliance with the all appropriate inquiries regulatory requirements.

C. Does the Final Rule Include Any New Reporting or Disclosure Obligations?

The final rule does not include any new reporting or disclosure obligations. The rule only applies to those property owners who may seek the landowner liability protections provided under CERCLA for innocent landowners, contiguous property owners or bona fide prospective purchasers. The documentation requirements included in this rule are primarily intended to enhance the inquiries by requiring the environmental professional to record the results of the inquiries and his or her conclusions regarding conditions indicative of releases and threatened releases on, at, in, or to the property and to provide a record of the environmental professional's inquiry. Today's rule contains no new requirements to notify or submit information to EPA or any other government entity.

Although today's rule does not include any new disclosure requirements, CERCLA section 103 does require persons in charge of vessels and facilities, including on-shore and off-shore facilities, to notify the National Response Center of any release of a hazardous substance from the vessel or facility in a quantity equal to or greater than a ''reportable quantity,'' as defined in CERCLA section 102(b). Today's rule includes no changes to this reporting requirement nor any changes to any other reporting or disclosure requirements under federal, tribal, or state law.

D. What Are the Final Documentation Requirements?

The proposed rule required that the environmental professional, on behalf of the property owner, document the results of the all appropriate inquiries in a written report. As explained in the preamble to the proposed rule, the property owner could use this report to document the results of the inquiries. Such a report can be similar in nature to the type of report previously provided under generally accepted commercial practices. We proposed no requirements regarding the length, structure, or specific format of the written report. In addition, the proposed rule did not require that a written report of any kind be submitted to EPA or any other government agency, or that a written report be maintained on-site at the subject property for any length of time.

Today's final rule retains the requirements, as proposed, for documenting the results of the all appropriate inquiries investigation conducted under the supervision or responsible charge of an environmental professional. As noted above, the primary purpose of the documentation requirement is to enhance the inquiry of the environmental professional by requiring that the environmental professional record the results of the inquiries and his or her conclusions. The written report may allow any person claiming one of the CERCLA landowner liability protections to offer documentation in support of his or her claim that all appropriate inquiries were conducted in compliance with the federal regulations.[1] The Agency notes that while today's final regulation does not require parties conducting all appropriate inquiries to retain the written report or any other documentation discovered, consulted, or created in the course of conducting the inquiries, the retention of such documentation and records may be helpful should the property owner need to assert protection from CERCLA liability after purchasing a property.

The final rule requires that a written report documenting the results of the all appropriate inquiries include an opinion of an environmental professional as to whether the all appropriate inquiries conducted identified conditions indicative of releases or threatened releases of hazardous substances on, at, in or to the subject property. The rule also requires that the report identify data gaps in the information collected that affect the ability of the environmental professional to render such an opinion and that the environmental professional comment on the significance of the data gaps.

Several commenters raised issues with regard to the proposed requirement that the environmental professional document and comment on the significance of data gaps that affect the ability of the environmental professional to identify conditions indicative of releases or threatened releases of hazardous substances on at, in, or to the subject property. Some commenters stated that the need to identify data gaps will make it difficult to determine when an all appropriate inquiries investigation is complete and therefore the requirement would act as a disincentive to the development of potentially contaminated properties. Other commenters asserted that the fact that the regulations recognize data gaps creates a loophole that would result in property owners claiming to be protected from CERCLA liability after conducting an incomplete investigation that includes significant data gaps. These commenters raised concerns that CERCLA liability protection could be claimed by property owners simply because they conducted an all appropriate inquiries investigation, even in those cases where releases on, at, in, or to the property were missed during the investigation. Other commenters stated their support for the requirements to document data gaps, as proposed. A summary of EPA's response to these comments and the requirements for documenting data gaps included in the final rule is provided below in Section IV.N.

The final rule, at § 312.21(d), retains the proposed requirement that the environmental professional who conducts or oversees the all appropriate inquiries sign the written report. There are two purposes for the requirement to include a signature in the report. First, the individual signing the report must declare, on the signature page, that he or she meets the definition of an

[1] Nothing in this regulation or preamble is intended to suggest that any particular documentation prepared in conducting all appropriate inquiries will be admissible in court in any litigation where a party raises one of the liability protections, or will in any way alter the judicial rules of evidence.

environmental professional, as provided in § 312.10. In addition, the rule requires that the environmental professional declare that: [I, We] have developed and performed the all appropriate inquiries in conformance with the standards and practices set forth in 40 CFR part 312.

Some commenters raised concerns about whether the proposed rule would require the environmental professional to certify the all appropriate inquiries report and its findings. Today's final rule does not require the environmental professional to ''certify'' the results of the all appropriate inquiries when signing the report. The two statements or declarations mentioned above and required to be included in the final written report documenting the conduct of all appropriate inquiries are meant to document that an individual meeting the qualifications of an environmental professional was involved in the conduct of the all appropriate inquiries and that the activities performed by, or under the supervision or responsible charge of, the environmental professional were performed in conformance with the regulations. Reports signed by individuals holding a Professional Engineer (P.E.) or Professional Geologist (P.G.) license, need not include the individual's professional seal.

A few commenters requested that EPA include specific requirements for the content of a final report in the final rule. Given that the type and extent of information available on a particular property may vary greatly with its size, type, past uses, and location, and the type and extent of information necessary for an environmental professional to render an opinion regarding conditions indicative of releases or threatened releases of hazardous substances associated with any property may vary, we decided not to include in the final rule specific requirements governing the content of all reports.

The provisions of the final rule allow for the property owner (or grantee) and any environmental professional engaged in the conduct of all appropriate inquiries for a specific property to design and develop the format and content of a written report that will meet the prospective landowner's (or grantee's) objectives and information needs in addition to providing documentation that all appropriate inquiries were completed prior to the acquisition of the property, should the landowner (or grantee) need to assert protection from liability after purchasing a property.

E. What Are the Qualifications for an Environmental Professional?

Proposed Rule

In the Brownfields Amendments, Congress required that all appropriate inquiries include ''the results of an inquiry by an environmental professional'' (CERCLA section 101(35)(B)(iii)(I)). The proposed rule included minimal qualifications for persons managing or overseeing all appropriate inquiries. The intent of setting minimum professional qualifications, is to ensure that all inquiries are conducted at a high level of professional ability and ensure the overall quality of both the inquiries conducted and the conclusions or opinions rendered with regard to conditions indicative of the presence of a release or threatened release on, at, in, or to a property, based upon the results of all inquiries. The proposed rule required that an environmental professional conducting or overseeing all appropriate inquiries possess sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding the presence of releases or threatened releases of hazardous substances to the surface or subsurface of a property. In addition, the proposed rule included minimum qualifications, including minimum levels of education and experience, that characterize the type of professional who is best qualified to oversee and direct the development of comprehensive inquiries and provide the landowner with sound conclusions and opinions regarding the potential for releases or threatened releases to be present at the property. The proposed rule allowed for individuals not meeting the proposed definition of an environmental professional to contribute to and participate in the all appropriate inquiries on the condition that such individuals are conducting inquiries activities under the supervision or responsible charge of an individual that meets the regulatory definition of an environmental professional.

The proposed rule required that the final review of the all appropriate inquiries and the conclusions that follow from the inquiries rest with an individual who qualifies as an environmental professional, as defined in proposed section § 312.10 of the proposed rule. The proposed rule also required that in signing the report, the environmental professional must document that he or she meets the definition of an ''environmental professional'' included in the regulations.

The proposed definition first and foremost required that, to qualify as an environmental professional, a person must ''possess sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding the presence of releases or threatened releases * * * to the surface or subsurface of a property, sufficient to meet the objectives and performance factors'' that are provided in the proposed regulation. The proposed definition of an environmental professional included individuals who possess the following combinations of education and experience.

- Hold a current Professional Engineer's (P.E.) or Professional Geologist's (P.G.) license or registration from a state, tribe, or U.S. territory and have the equivalent of three (3) years of full-time relevant experience; or
- Be licensed or certified by the federal government, a state, tribe, or U.S. territory to perform environmental inquiries as defined in § 312.21 and have the equivalent of three (3) years of full-time relevant experience; or
- Have a Baccalaureate or higher degree from an accredited institution of higher education in a relevant discipline of engineering, environmental science, or earth science and the equivalent of five (5) years of full-time relevant experience; or
- As of the date of the promulgation of the final rule, have a Baccalaureate or higher degree from an accredited institution of higher education and the equivalent of ten (10) years of full-time relevant experience.

Public Comments

We received a significant number of public comments on the proposed definition of environmental professional. Many commenters supported the definition of environmental professional as proposed. However, a significant number of commenters raised concerns with regard to the proposed educational requirements. Commenters pointed out that the proposed minimum qualifications for an environmental professional did not allow for individuals with many years of relevant experience in conducting environmental site assessments to qualify as environmental professionals, if such individuals do not have college degrees. The proposed rule only allowed for persons with a Baccalaureate degree or higher in specific disciplines of science and engineering, and a specific number of years of experience, to qualify as an

environmental professional, unless an individual was otherwise licensed as an environmental professional by a state, tribe or the federal government. Some commenters questioned the Agency's reasoning for restricting the degree requirements to only certain types of science or engineering. Commenters requested that EPA provide more specific definitions of the types of science and engineering degrees that would be necessary to qualify as an environmental professional.

Commenters also asserted that the proposed ''grandfather clause'' allowing for individuals having a Baccalaureate degree (or higher) and who accumulated ten years of full time relevant experience on or before the promulgation date of the final rule to qualify as an environmental professional was too stringent and provided too small of a window of opportunity for individuals not otherwise meeting the proposed definition of environmental professional to qualify.

Some commenters stated that the definition of environmental professional should not be restricted to those individuals licensed as P.E.s or P.G.s. A few commenters stated that a licensed professional is no more qualified to perform all appropriate inquiries investigations than other individuals with a significant number of years of experience in conducting such activities. Other commenters asserted that only licensed P.E.s and P.G.s are qualified to supervise all appropriate inquiries activities.

EPA also received comments from independent professional certification organizations and members of these organizations, including the Academy of Certified Hazardous Materials Managers, requesting that their organizations' certification programs be named in the regulatory definition of an environmental professional.

Final Rule

After careful consideration of the issues raised by commenters regarding the proposed definition of environmental professional, we made a few modifications to the proposed definition to reduce the potential burden that the proposed definition may have placed upon individuals who have significant experience in conducting environmental site assessments but do not meet the proposed educational, or college degree, requirements. We agree with those commenters who asserted that individuals with a significant number of years of experience in performing environmental site assessments, or all appropriate inquiries investigations, should qualify as environmental professionals for the purpose of conducting all appropriate inquiries, even in cases where such individuals do not have a college degree. Therefore, in the final rule, persons with ten or more years of full-time relevant experience in conducting environmental site assessments and related activities may qualify as environmental professionals, without having received a college degree.

In addition, we agreed with commenters who pointed out that the requirement that environmental professionals hold specific types of science or engineering degrees was too limiting. In the final rule, persons with any science or engineering degree (regardless of specific discipline in science or engineering) can qualify as an environmental professional, if they also meet the other required qualifications, including the requirement to have five (5) years of full-time relevant experience.

We also agree with commenters who asserted that the proposed grandfather clause was too restrictive. As mentioned above, we agree with commenters who pointed out that individuals with a significant number of years of experience in conducting environmental site assessments or all appropriate inquiries investigations should be able to qualify as environmental professionals, for the purpose of carrying out the provisions of today's rulemaking. In addition, we agree with commenters who stated that the ability for experienced professionals to qualify as an environmental professional should not be limited to those who meet the threshold qualifications on the effective date of the final rule. Therefore, the proposed grandfather clause is not included within the definition of environmental professional in the final rule. As explained above, in today's final rule, individuals with ten or more years of full-time relevant experience in conducting environmental site assessments and related investigations will qualify as environmental professionals for the purposes of this rulemaking.

The final rule retains the provision recognizing as environmental professionals those individuals who are licensed by any tribal or state government as a P.E. or P.G., and have three years of full-time relevant experience in conducting all appropriate inquiries. We continue to contend that such individuals have sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding conditions indicative of releases or threatened releases on, at, in, or to a property, including the presence of releases to the surface or subsurface of the property, sufficient to meet the objectives and performance factors provided in the regulation. The rigor of the tribal- and state-licensed P.E. and P.G. certification processes, including the educational and training requirements, as well as the examination requirements, paired with the requirement to have three years of relevant professional experience conducting all appropriate inquiries will ensure that all appropriate inquiries are conducted under the supervision or responsible charge of an individual well qualified to oversee the collection and interpretation of site-specific information and render informed opinions and conclusions regarding the environmental conditions at a property, including opinions and conclusions regarding conditions indicative of releases or threatened releases of hazardous substances and other contaminants on, at, in, or to the property. The Agency's decision to recognize tribal and state-licensed P.E.s and P.G.s reflects the fact that tribal governments and state legislatures hold such professionals responsible (legally and ethically) for safeguarding public safety, public health, and the environment. To become a P.E. or P.G. requires that an applicant have a combination of accredited college education followed by approved professional training and experience. Once a publicly-appointed review board approves a candidate's credentials, the candidate is permitted to take a rigorous exam. The candidate must pass the examination to earn a license, and perform ethically to maintain it. After a state or tribe grants a license to an individual, and as a condition of maintaining the license, many states require P.E.s and P.G.s to maintain proficiency by participating in approved continuing education and professional development programs. In addition, tribal and state licensing boards can investigate complaints of negligence or incompetence on the part of licensed professionals, and may impose fines and other disciplinary actions such as cease and desist orders or license revocation.

Although the final rule recognizes tribal and state-licensed P.E. and P.G.s and other such government licensed environmental professionals with three years of experience to be environmental professionals, the rule does not restrict the definition of an environmental professional to these licensed individuals. The definition of an

environmental professional also includes individuals who hold a Baccalaureate or higher degree from an accredited institution of higher education in engineering or science and have the equivalent of five (5) years of full-time relevant experience in conducting environmental site assessments, or all appropriate inquiries. In addition, individuals with ten years of full-time relevant experience in conducting environmental site assessments, or all appropriate inquiries qualify as environmental professionals for the purpose of conducting all appropriate inquiries. Individuals with these qualifications most likely will possess sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding conditions indicative of releases or threatened releases on, at, in, or to a property, sufficient to meet the objectives and performance factors included in § 312.20(e) and (f).

In addition to the qualifications for environmental professionals mentioned above, EPA is retaining the proposed provision to include within the definition of an environmental professional individuals who are licensed to perform environmental site assessments or all appropriate inquiries by the Federal government (e.g., the Bureau of Indian Affairs) or under a state or tribal certification program, provided that these individuals also have three years of full-time relevant experience. We contend that individuals licensed by state and tribal governments, or by any department or agency within the federal government, to perform all appropriate inquiries or environmental site assessments, should be allowed to qualify as an environmental professional under today's regulation. State and tribal agencies may best determine the qualifications defining individuals who ''possess sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding conditions indicative of releases or threatened releases on, at, in, or to a property, sufficient to meet the rule's objectives and performance factors'' within any particular state or tribal jurisdiction.

In response to requests from members of independent certification organizations that EPA recognize in the regulation those organizations whose certification requirements meet the environmental professional qualifications included in the final rule, we point out that today's final rule does not reference any private party professional certification standards. Such an approach would require that EPA review the certification requirements of each organization to determine whether or not each organization's certification requirements meet or exceed the regulatory qualifications for an environmental professional. Given that there may be many such organizations and given that each organization may review and change its certification qualifications on a frequent or periodic basis, we conclude that such a undertaking is not practicable. EPA does not have the necessary resources to review the procedures of each private certification organization and review and approve each organization's certification qualifications. Therefore, the final rule includes within the regulatory definition of an environmental professional, general performance-based standards or qualifications for determining who may meet the definition of an environmental professional for the purposes of conducting all appropriate inquiries. These standards include education and experience qualifications, as summarized below. The final rule does not recognize, or reference, any private organization's certification program within the context of the regulatory language. However, the Agency notes that any individual with a certification from a private certification organization where the organization's certification qualifications include the same or more stringent education and experience requirements as those included in today's final regulation will meet the definition of an environmental professional for the purposes of this regulation.

Based upon the input received from the public commenters, EPA determined that the definition of environmental professional included in today's final rule establishes a balance between the merits of setting a high standard of excellence for the conduct of all appropriate inquiries through the establishment of stringent qualifications for environmental professionals and the need to ensure that experienced and highly competent individuals currently conducting all appropriate inquiries are not displaced.

Summary of Final Rule's Definition of Environmental Professional

In summary, the definition of environmental professional included in today's final rule includes individuals who possess the following qualifications:

- Hold a current Professional Engineer's or Professional Geologist's license or registration from a state, tribe, or U.S. territory and have the equivalent of three (3) years of full-time relevant experience; or
- Be licensed or certified by the federal government, a state, tribe, or U.S. territory to perform environmental inquiries as defined in § 312.21 and have the equivalent of three (3) years of full-time relevant experience; or
- Have a Baccalaureate or higher degree from an accredited institution of higher education in science or engineering and the equivalent of five (5) years of full-time relevant experience; or
- Have the equivalent of ten (10) years of full-time relevant experience.

The definition of ''relevant experience'' is ''participation in the performance of environmental site assessments that may include environmental analyses, investigations, and remediation which involve the understanding of surface and subsurface environmental conditions and the processes used to evaluate these conditions and for which professional judgment was used to develop opinions regarding conditions indicative of releases or threatened releases * * * to the subject property.''

The final rule retains the proposed requirement that environmental professionals remain current in their field by participating in continuing education or other activities and be able to demonstrate such efforts.

The final rule also retains the allowance for individuals not meeting the definition of an environmental professional to contribute to and participate in the all appropriate inquiries on the condition that such individuals are conducting inquiries activities under the supervision or responsible charge of an individual that meets the regulatory definition of an environmental professional. This provision allows for a team of individuals working for the same firm or organization (e.g., individuals working for the same government agency) to share the workload for conducting all appropriate inquiries for a single property, provided that one member of the team meets the definition of an environmental professional and reviews the results and conclusions of the inquiries and signs the final report.

The final rule requires that the final review of the all appropriate inquiries and the conclusions that follow from the inquiries rest with an individual who qualifies as an environmental professional, as defined in § 312.10. The final rule also requires that in signing

the report, the environmental professional must document that he or she meets the definition of an ''environmental professional'' included in the regulations.

F. References

Proposed Rule

In the proposed rule, the Agency reserved a reference section and stated in the preamble that we may include references to applicable voluntary consensus standards developed by standards' developing organizations that are not inconsistent with the final regulatory requirements for all appropriate inquiries or otherwise impractical. The Agency requested comments regarding available commercially accepted voluntary consensus standards that may be applicable to and compliant with the proposed federal standards for all appropriate inquiries.

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, section 12(d) (15 U.S.C. 272 note), directs agencies to use technical standards that are developed or adopted by voluntary consensus standards bodies, unless their use would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. When developing the proposed rule, EPA considered using an existing voluntary consensus standard developed by ASTM International as the federal standard for all appropriate inquiries. This standard is known as the ASTM E1527–2000 standard (entitled ''Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process''). In the preamble to the proposed rule, we acknowledged the prevalent use of the ASTM E1527–2000 standard and the fact that it generally is recognized as good and customary commercial practice. However, when we proposed the federal standards for all appropriate inquiries, EPA determined that the ASTM E1527–2000 standard is inconsistent with applicable law. As a result, EPA chose not to reference the ASTM E1527–2000 standard because it was inconsistent with applicable law.

Public Comments

We received relatively few comments citing available and applicable voluntary consensus standards for conducting all appropriate inquiries. Several commenters did argue that the interim standard cited in the statute, the ASTM E1527–97 Environmental Site Assessments: Phase I Environmental Site Assessment Process, or the updated ASTM E1527–2000, is sufficient to meet the statutory criteria. A few commenters stated a preference for the ASTM E1527–2000 standard over the requirements included in the proposed rule. ASTM International is a standards development organization whose committees develop voluntary consensus standards for a variety of materials, products, systems and services. ASTM International is the only standards development organization that submitted a comment requesting that the Agency consider its standard, the ASTM E1527–2000 Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process, as an equivalent standard to the federal regulations.

Final Rule

Since publication of the proposed rule, ASTM International and its E50 committee, the committee responsible for the development of the ASTM E1527–2000 Phase I Environmental Site Assessment Process, has reviewed and updated the ''2000'' version of the E1527 standard to address EPA's concerns regarding the differences between the ASTM E1527–2000 standard and the criteria established by Congress in the Brownfields Amendments to CERCLA. These activities were conducted within the normal review and updating process that ASTM International undertakes for each standard over a five-year cycle.

In today's final rule, EPA is referencing the standards and practices developed by ASTM International and known as Standard E1527–05 (entitled ''Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process'') and recognizing the E1527–05 standard as consistent with today's final rule. The Agency determined that this voluntary consensus standard is consistent with today's final rule and is compliant with the statutory criteria for all appropriate inquiries. Persons conducting all appropriate inquiries may use the procedures included in the ASTM E1527–05 standard to comply with today's final rule.

It is the Agency's intent to allow for the use of applicable and compliant voluntary consensus standards when possible to facilitate implementation of the final regulations and avoid disruption to parties using voluntary consensus standards that are found to be fully compliant with the federal regulations.

G. What Is Included in ''All Appropriate Inquiries?''

Proposed Rule

The proposed regulations for conducting all appropriate inquiries outlined the standards and practices for conducting the activities included in each of the statutory criterion established by Congress in the Brownfields Amendments. These criteria are set forth in CERCLA section 101(35)(B)(iii) and are:

- The results of an inquiry by an environmental professional (proposed § 312.21).
- Interviews with past and present owners, operators, and occupants of the facility for the purpose of gathering information regarding the potential for contamination at the facility (proposed § 312.23).
- Reviews of historical sources, such as chain of title documents, aerial photographs, building department records, and land use records, to determine previous uses and occupancies of the real property since the property was first developed (proposed § 312.24).
- Searches for recorded environmental cleanup liens against the facility that are filed under Federal, State, or local law (proposed § 312.25).
- Reviews of Federal, State, and local government records, waste disposal records, underground storage tank records, and hazardous waste handling, generation, treatment, disposal, and spill records, concerning contamination at or near the facility (proposed § 312.26).
- Visual inspections of the facility and of adjoining properties (proposed § 312.27).
- Specialized knowledge or experience on the part of the defendant (proposed § 312.28).
- The relationship of the purchase price to the value of the property, if the property was not contaminated (proposed § 312.29).
- Commonly known or reasonably ascertainable information about the property (proposed § 312.30).
- The degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation (proposed § 312.31).

Public Comments

We received a few comments addressing the statutory criteria and the

inclusion of certain particular criteria within the scope of the proposed rule. Some commenters requested that EPA not include in the final rule the criterion to consider the relationship of the purchase price of the property to the fair market value of the property, if the property is not contaminated. In addition, a few commenters stated the final rule should not include within the scope of the all appropriate inquiries the specialized knowledge or experience on the part of the prospective landowner.

The Agency notes that both criteria that commenters requested be removed from the scope of the all appropriate inquiries regulations are criteria specifically required by Congress to be included in the regulations. In addition, both criteria have been part of the all appropriate inquiries provisions under the CERCLA innocent landowner defense since 1986. The proposed rule included no changes from the previous statutory provisions.

Final Rule

The final rule retains provisions addressing each of the statutory criteria for the conduct of all appropriate inquiries included in CERCLA section 101(35)(B)(iii).

H. Who Is Responsible for Conducting the All Appropriate Inquiries?

The Brownfields Amendments to CERCLA require persons claiming any of the landowner liability protections to conduct all appropriate inquiries into the past uses and ownership of the subject property. The criteria included in the Brownfields Amendments for the regulatory standards for all appropriate inquiries require that the inquiries include an inquiry by an environmental professional. The statute does not require that all criteria or inquiries be conducted by an environmental professional.

Proposed Rule

The proposed rule required that many, but not all, of the inquiries activities be conducted by, or under the supervision or responsible charge of, an individual meeting the qualifications of the proposed definition of an environmental professional. The proposed rule also provided that several of the activities included in the inquiries could be conducted either by the prospective landowner or grantee, and not have to be conducted under the supervision or responsible charge of the environmental professional. The proposed rule required that the results of all activities conducted by the prospective landowner or grantee, and not conducted by or under the supervision or responsible charge of the environmental professional, be provided to the environmental professional to ensure that such information could be fully considered when the environmental professional develops an opinion, based on the inquiry activities, as to whether conditions at the property are indicative of a release or threatened release of a hazardous substance (or other contaminant) on, at, in, or to the property.

The proposed rule allowed for the following activities to be the responsibility of, or conducted by, the prospective landowner or grantee and not necessarily be conducted by the environmental professional, provided the results of such inquiries or activities are provided to an environmental professional overseeing the all appropriate inquiries:

- Searches for environmental cleanup liens against the subject property that are filed or recorded under federal, tribal, state, or local law, as required by proposed § 312.25.
- Assessments of any specialized knowledge or experience on the part of the landowner, as required by § 312.28.
- An assessment of the relationship of the purchase price to the fair market value of the subject property, if the property was not contaminated, as required by § 312.29.
- An assessment of commonly known or reasonably ascertainable information about the subject property, as required by § 312.30.

The proposed rule required that all other required inquiries and activities, beyond those listed above to be conducted by, or under the supervision or responsible charge of, an environmental professional.

Public Comments

Several commenters asserted that the mandatory nature of the proposed provision requiring the prospective landowner to provide information regarding the four criteria listed above to the environmental professional is problematic. Particularly with regard to the requirement to provide ''specialized knowledge or experience of the defendant,'' commenters pointed out difficulties in a prospective landowner being able to document such knowledge and experience sufficiently. Also, with regard to the information related to the ''relationship of the purchase price to the fair market value of the property, if the property was not contaminated,'' many commenters pointed out that prospective landowners may not want to divulge information regarding the price paid for a property. Commenters pointed out that the requirement to consider ''commonly known or reasonably ascertainable information'' about a property is implicit to all aspects of the all appropriate inquiries requirements. In addition, commenters stated that CERCLA liability lies solely with the owners and operators of a vessel or property. A decision on the part of a prospective landowner to not furnish an environmental professional with certain information related to any of the statutory criteria can only affect the property owner's ability to claim a liability protection provided under the statute. In addition, the statute does not mandate that information deemed to be the responsibility of the prospective landowner and not part of the ''inquiry of the environment professional'' be provided to the environmental professional or even be part of the inquiry of the environmental professional. Some of the statutory criteria are inherently the responsibility of the prospective landowner.

Final Rule

We agree with the commenters who asserted that the results and information related to the criteria identified as being the responsibility of the prospective landowner should not, as a matter of law, have to be provided to the environmental professional. The statute does not mandate that a prospective landowner provide all information to an environmental professional. Given that the burden of potential CERCLA liability ultimately falls upon the property owner or operator, a prospective landowner's decision not to provide the results of an inquiry or related information to an environmental professional he or she hired to undertake other aspects of the all appropriate inquiries investigation can only affect the liability of the property owner. In addition, we believe that the environmental professional may be able to develop an opinion with regard to conditions indicative of releases or threatened releases on, at, in, or to a property based upon the results of the criteria identified to be part of the ''inquiry of an environmental professional.'' Any information not furnished to the environmental professional by the prospective landowner that may affect the environmental professional's ability to render such an opinion may be identified by the environmental professional as a ''data gap.'' The provisions of the final rule (as did the proposed rule) then require that the environmental professional comment on the significance of the data gap or missing information on his or her ability to render such an opinion, in light of all

other information collected and all other data sources consulted.

As a result of our consideration of the issues raised by commenters, today's final rule modifies the requirements of § 312.22 ''additional inquiries'' by stating (in paragraph (a)) that ''persons * * * may provide the information associated with such inquiries [i.e., the information for which the prospective landowner or brownfields grantee is responsible] to the environmental professional * * *.'' The proposed rule provided that such information ''must be provided'' to the environmental professional. Although we expect that most prospective landowners and grantees will furnish available information or knowledge about a property to an environmental professional he or she hired when such information could assist the environmental professional in ascertaining the environmental conditions at a property, we affirm that compliance with the statutory criteria does not require that such information be disclosed. Ultimately, CERCLA liability rests with the owner or operator of a facility or property owner and it is the information held by the property owner or operator that may be reviewed in a court of law when determining an owner or operator's liability status, regardless of whether all information was disclosed to an environmental professional during the conduct of all appropriate inquiries.

I. When Must All Appropriate Inquiries Be Conducted?

CERCLA section 101(40)(B)(i), as amended, requires bona fide prospective purchasers to conduct all appropriate inquiries into ''previous ownerships and uses of the facility.'' In the case of contiguous property owners, CERCLA section 107(q)(1)(A)(viii) requires that a person claiming to be a contiguous property owner conduct all appropriate inquiries ''at the time at which the person acquired the property.'' In the case of innocent landowners, section 101(35)(B)(i)(I) of CERCLA requires that the property owner conduct all appropriate inquiries ''on or before the date on which the defendant acquired the facility.''

Proposed Rule

Other than to specify that all appropriate inquiries must be conducted on or prior to the date a person acquires a property, the statute is silent regarding how close to the actual date of acquisition the inquiries must be completed. The proposed rule required that all appropriate inquiries be conducted or updated within one year prior to taking title to a property. The proposed rule provided that prospective landowners could use information collected as part of previous inquiries for the same property, if the inquiries were completed or updated within one year prior to the date the property is acquired. The proposed rule required that certain information collected as part of a previous all appropriate inquiries be updated if it was collected more than 180 days prior to the date a person purchased the property. In addition, in the preamble to the proposed rule, Agency defined the date of acquisition of a property as the date on which the prospective landowner acquires title to the property.

Public Comments

Commenters generally agreed with the proposed provision to define the date of acquisition of a property as the date on which a person acquires title to the property. A few commenters stated that the requirement for an all appropriate inquiries investigation to be completed within a year of the date of acquisition of the property is too stringent and may not allow sufficient time for some property transactions to be completed. Some commenters also asserted that the proposed requirement to update certain aspects of the all appropriate inquiries investigation, if the investigation was conducted more than 180 days prior to the date of the acquisition of the property was too stringent.

Final Rule

The Agency continues to believe that the event that most closely reflects the Congressional intent of the date on which the defendant acquired the property is the date on which a person received title to the property. As explained in the preamble to the proposed rule, the Agency considered other dates, such as the date a prospective landowner signs a purchase or sale agreement. However, it could be burdensome to require a prospective landowner to have completed the all appropriate inquiries prior to having an agreement with a seller to complete a sales transaction. In fact, the time period between the date on which a sales agreement is signed and the date on which the title to the property is actually transferred to the prospective landowner may be the most convenient time for the prospective landowner to obtain access to the property and undertake the all appropriate inquiries. In addition, requiring that all appropriate inquiries be completed on some date prior to the date of title transfer could result in requiring prospective landowners to undertake all appropriate inquiries so early in the property acquisition process as to require the inquiries to be completed prior to the prospective landowner making a final decision on whether to actually acquire the property.

To increase the potential that the information collected for the all appropriate inquiries accurately reflects the proposed objectives and performance factors, as well as to increase the potential that opinions and judgments regarding the environmental conditions at a property that are included in an all appropriate inquiries report are based on current and relevant information, the Agency is retaining the proposed provision that all appropriate inquiries be conducted within one year prior to the prospective landowner acquiring the property. Today's final rule includes regulatory language at § 312.20(a) clarifying that all appropriate inquiries must be conducted within one year prior to the date on which a person acquires a property.

All appropriate inquiries may include information collected for previous inquiries that were conducted or updated within one year prior to the acquisition date of the property. In addition, as explained in more detail below, the final rule retains the requirement that several of the components of the inquiries be updated within 180 days prior to the date the property is purchased. Today's final rule includes a definition of the ''date of acquisition,'' or purchase date, of a property (i.e., the date the landowner obtains title to the property).

Although commenters may be correct in their assertions that some property transactions may take more than a year to close, we continue to believe that it is important for the all appropriate inquiries investigation to be completed within one year prior to the date the property is acquired. We point out that the final regulation, as did the proposed regulation, allows for information from an older investigation to be used in a current investigation. However, if the prior all appropriate inquiries investigation was completed more than a year prior to the property acquisition date, all parts of the investigation must be reviewed and updated for the all appropriate inquiries to be complete. We believe that a year is sufficient time for conditions at a property to change. In particular, in cases where there is a release or threatened release at a property, significant changes to the environmental conditions of a property could occur during the course of a year. In addition, depending upon the uses and ownership of a property during the

course of a one-year time period, overall conditions at a property could change and new evidence of a release or threatened release could appear. Therefore, today's final rule requires that all appropriate inquiries completed for a particular property more than one year prior to the date of acquisition of that property, be updated in their entirety. As summarized below, the final rule does allow for the use of information contained in previous inquiries, even when the inquiries were completed more than a year prior to the property acquisition date, as long as all information was updated within a year and includes any changes that may have occurred during the interim.

J. Can a Prospective Landowner Use Information Collected for Previous Inquiries Completed for the Same Property?

Proposed Rule

The proposed rule allowed parties conducting all appropriate inquiries to use the results of and information from previous inquiries completed for the same property, under certain conditions. First, the previous inquiries must have been conducted in compliance with the proposed rule and with CERCLA sections 101(35)(B), 101(40)(B) and 107(q)(A)(viii). In addition, the information in the previous inquiries must have been collected or updated within one year prior to the date of acquisition of the property. Certain types of information collected more than 180 days prior to the current date of acquisition must be updated for the current all appropriate inquiries. Also, the information required under some specific criterion (e.g., relationship of purchase price to property value, specialized knowledge on part of defendant) must be collected specifically for the current transaction.

Public Comments

A significant number of commenters pointed out that the regulatory language in proposed § 312.20(b)(1) of the proposed rule precludes the use of information contained in assessments or the results of all appropriate inquiries conducted more than a year prior to the date of acquisition of a property. Commenters pointed out that since the language in the proposed rule stated that previously collected information had to have been collected ''in compliance with the requirements of * * * 40 CFR Part 312,'' any information included in all appropriate inquiries reports completed prior to the promulgation of the final rule could not be used, since compliance with the regulation could not be achieved prior to its publication.

Final Rule

It is not the Agency's intent to disallow the use of information contained in previous inquiries, if the environmental professional and the prospective landowner find the previously collected information to be accurate and valid. However, EPA continues to believe that information collected as part of a prior all appropriate inquiries investigation for the same property should be updated to reflect current environmental conditions at the property and to include any specific information or specialized knowledge held by the prospective landowner. The regulatory language in today's final rule (at § 312.20(c)(1)) allows for the use of information collected as part of prior all appropriate inquiries investigation for the same property provided that the prior information was collected ''during the conduct of all appropriate inquiries in compliance with CERCLA sections 101(35)(B), 101(40)(B) and 107(q)(A)(viii).'' We have deleted the proposed language that would have required the previously conducted investigation to have been done in compliance with the final regulation. This allows for the use of information collected as part of previous all appropriate inquiries, as long as the information was collected in compliance with the statutory provisions for all appropriate inquiries. For property purchased on or after May 31, 1997, therefore, any information collected as part of an assessment in compliance with the ASTM E1527–97 standard or the ASTM E1527–2000 standard may be used as part of a current all appropriate inquiries investigation. For property purchased before May 31, 1997, information from assessments completed and in compliance with the statutory provisions at CERCLA section 101(35)(B)(iv)(I) may be used as part of a current all appropriate inquiries investigation. However, this prior information may only be used if updated in accordance with §§ 312.20(b) and (c) of today's rule.

The final rule continues to recognize that there is value in using previously collected information when such information was collected in accordance with the statutory provisions and good customary business practices, particularly when the use of such previously-collected information will reduce the need to undertake duplicative efforts.

The final rule also retains the requirement that certain aspects of the all appropriate inquiries investigation be updated if the investigation was completed more than 180 days prior to the date of acquisition of the property (or the date on which the prospective landowner takes title to the property) to ensure that an all appropriate inquiries investigation accurately reflects the current environmental conditions at a property. To increase the potential that information collected about the conditions of a property is accurate, as well as increase the potential that opinions and judgments regarding the environmental conditions at a property that are included in an all appropriate inquiries report are based on current and relevant information, the final rule requires that many of the components of the previous inquiries be updated within 180 days prior to the date of acquisition of the property. The components of the all appropriate inquiries that must be updated within 180 days prior to the date on which the property is acquired are:

- Interviews with past and present owners, operators, and occupants (§ 312.23);
- Searches for recorded environmental cleanup liens (§ 312.25);
- Reviews of federal, tribal, state, and local government records (§ 312.26);
- Visual inspections of the facility and of adjoining properties (§ 312.27); and
- The declaration by the environmental professional (§ 312.21(d)).

Also, the final rule retains the proposed requirement that in all cases where a prospective landowner is using previously collected information, the all appropriate inquiries for the current purchase must be updated to include a summary of any relevant changes to the conditions of the property and any specialized knowledge of the prospective landowner.

In today's final rule, we continue to recognize that it is not sufficient to wholly adopt previously conducted all appropriate inquiries for the same property without any review. Certain aspects of the all appropriate inquiries investigation are specific to the current prospective landowner and the current purchase transaction. Therefore, the final rule requires that each all appropriate inquiries investigation include current information related to:

- Any relevant specialized knowledge held by the current prospective landowner and the environmental professional responsible for overseeing and signing the all appropriate inquiries report (i.e., requirements of § 312.28);

• The relationship of the current purchase price to the value of the property, if the property were not contaminated (i.e., requirements of § 312.29); and

• Commonly known or reasonably ascertainable information about the property.

K. Can All Appropriate Inquiries Be Conducted by One Party and Transferred to Another Party?

Proposed Rule

The proposed rule allowed for all appropriate inquiries to be conducted by one party and transferred to another party, provided that certain conditions are met. Under certain circumstances, the prospective landowner, or a grantee, may use a report of all appropriate inquiries conducted for the property by or for another party, including the seller of the property or another party. For example, there are situations where the federal government or a state government agency may conduct the all appropriate inquiries on behalf of the local government for a property being purchased by a local government, such as the ''targeted brownfields assessments'' conducted on behalf of local governments by EPA. This situation also may occur when a state government covers the cost of the all appropriate inquiries for a property owned by a local government or actually conducts the all appropriate inquiries itself when the local government does not have access to appropriate staff or capital resources. A local government may conduct all appropriate inquiries for a third party in its community, such as a private prospective landowner. In addition, local redevelopment agencies may locate a contaminated property, conduct all appropriate inquiries, acquire the property, and then sell the property to a private developer.

The proposed rule allowed for a person acquiring a property, or a grantee, to use the results of an all appropriate inquiries report conducted by or for another party, if the report meets the proposed rule's objectives and performance factors and the person who is seeking to use the previously-collected information or report reviews all information collected and updates the contents of the report as required by § 312.20(c) and necessary to accurately reflect current conditions at the property. In addition, the proposed rule required that the prospective landowner, or grantee, update the inquiries and the report to include any commonly known and reasonably ascertainable information, relevant specialized knowledge held by the prospective landowner and the environmental professional, and the relationship of the purchase price to the value of the property, if it were not contaminated.

Public Comments

Commenters generally supported the proposed provision allowing for all appropriate inquiries investigations conducted by or for one party to be used by another party.

Final Rule

For the reasons discussed in the preamble to the proposed rule and summarized above, the final rule retains the provision allowing that all appropriate inquiries investigations may be conducted by or for one party and used by another party. In all cases, the all appropriate inquiries investigation must be updated to include commonly known and reasonably ascertainable information and any relevant specialized knowledge held by the prospective landowner and environmental professional. In addition, the evaluation of the relationship between the purchase price and the fair market value of the property must reflect the current sale of the property. In all other aspects of the investigation, the all appropriate inquiries must be in compliance with the provisions of the final regulation.

L. What Are the Objectives and Performance Factors for the All Appropriate Inquiries Requirements?

Proposed Rule

As explained in the preamble to the proposed rule, when developing the proposed standards, EPA and the Negotiated Rulemaking Committee structured the proposal around the statutory criteria established by Congress in section 101(35)(B)(iii) of CERCLA. As development of the proposed rule progressed, it became apparent that the purposes and objectives for the individual criterion and the types of information that must be collected to meet the objectives of each criterion often overlapped. For example, in developing standards addressing the criterion requiring a review of historical information, a search for recorded environmental cleanup liens, and a review of government records, the Committee concluded that the objectives of each criterion or activity were similar, which could lead to the collection of the same information to fulfill each of the criterion's objectives. For example, a chain of title document is historic information that may include information on environmental cleanup liens, as well as information on past owners of the property indicating that previous owners managed hazardous substances on the property.

To avoid requiring duplicative efforts, but to ensure that the proposed regulations included standards and practices that result in a comprehensive assessment of the environmental conditions at a property, the proposed all appropriate inquiries standards were structured around a concise set of objectives and performance factors. The proposed objectives and performance factors applied to the standards comprehensively. In conducting the inquiries collectively, the landowner and the environmental professional must seek to achieve the objectives and performance factors and use the objectives and standards as guidelines in implementing, in total, all of the other proposed regulatory standards and practices.

Public Comments

Commenters overwhelmingly supported the proposed approach of structuring the all appropriate inquiries standards around a definitive set of performance factors and objectives. Commenters stated that the establishment of performance factors will improve the quality of environmental site assessments because the performance factors allow for the application of professional judgement and provide flexibility.

A few commenters did not support the proposed approach of structuring the regulations around a set of performance factors and objectives. These commenters asserted that the objectives and performance factors made the regulation too vague and open-ended. In addition, the commenters stated that they want the regulation to be centered around a ''checklist'' of activities, each of which should be required to be completed independently and without consideration of a comprehensive performance approach. Commenters who argued for a checklist approach said that such an approach would ensure that the environmental professional only would have to undertake a finite list of activities and it would be easier (in the commenter's opinion) for property owners to obtain liability protection if the list of activities could be completed without regard to performance goals or an overall objective. These commenters also expressed concern that, if the regulations are based on performance factors that the all appropriate inquiries investigation would not have an

endpoint at which prospective landowners could stop looking for evidence of releases or threatened releases. The commenters believed that under a checklist approach liability protection would be awarded upon completion of all activities on the checklist.

Final Rule

We are retaining the proposed performance factors and objectives in the final rule. We continue to believe, as did many commenters, that basing the regulations on a set of overall performance factors and specific objectives lends clarity and flexibility to the standards. Such an approach also allows for the application of professional judgment and expertise to account for site-specific circumstances. The primary objective of an all appropriate inquiries investigation is to identify conditions indicative of releases and threatened releases of hazardous substances on, at, in, or to the subject property. In the case of recipients of brownfields grants, the objective may be expanded to include petroleum and petroleum products, pollutants, contaminants, and controlled substances, depending upon the scope of the grantee's cooperative agreement.

The performance factors are meant to guide the individual aspects of the investigation toward meeting both the statutory criteria for all appropriate inquiries and the regulatory objectives of (1) collecting necessary information about the uses and ownerships of a property and (2) identifying, through the collection of this information, conditions indicative of releases and threatened releases on, at, in, or to the subject property. By establishing a concise set of objectives and setting some boundaries on the information collection activities through the establishment of performance factors, we believe that the final rule fulfills the statutory objectives, provides for a comprehensive assessment of the environmental conditions at the property, and avoids the conduct of duplicative investigations and data collection efforts.

EPA disagrees with the commenters who argued that the proposed approach of establishing overall objectives and performance factors for the all appropriate inquiries standards would result in an approach that is too vague and open-ended. In fact, by establishing clear objectives and setting parameters to the investigation through a set of performance factors that include gathering information that is publicly available, obtainable from its source within reasonable time and cost constraints, and which can practicably be reviewed, the approach taken in the final rule provides reasonable goals and endpoints to the information collection requirements. The proposed objectives provide a discrete list of the types of information that must be collected as part of the all appropriate inquiries investigation. In addition, the performance factors set boundaries around the efforts that must be taken and the cost burdens that must be incurred to obtain the required information. The fact that the rule is framed within a primary objective, to ''identify conditions indicative of releases and threatened releases of hazardous substances,'' actually reduces the open-ended nature of the investigation and establishes an overall goal for the inquiries.

Commenters who advocated that a checklist approach (or an approach not based upon overall objectives and performance factors) is superior because they believe that it would better provide for a stopping point in the investigation may have misunderstood the statutory requirements that must be met to obtain a defense to CERCLA liability. These commenters may have incorrectly assumed that the completion of the all appropriate inquiries investigation is all that is required to obtain liability protection. The conduct of all appropriate inquiries is only one requirement for obtaining relief from CERCLA liability. Prospective landowners must conduct all appropriate inquiries prior to acquiring a property to qualify for a defense to CERCLA liability as an innocent landowner, bona fide prospective purchaser or contiguous landowner. However, once a property is acquired, the property owner must comply with all of the other statutory criteria necessary to qualify for the liability protections. In particular, landowners must undertake ''reasonable steps'' to ''stop any continuing releases.'' Therefore, the final rule's objective of identifying conditions indicative of releases and threatened releases of hazardous substances on, at, in, or to a property links appropriately with the statutory criteria requiring the landowner to address such releases to qualify for the liability protections.

Conducting the inquiries merely in compliance with a checklist and without the purpose of meeting an overall objective could result in an inability to recognize the value of certain types of information or in chasing down multiple sources of information that may not have added value for meeting the overall objective of the investigation. A lack of information or an inability to obtain information that may affect the ability of an environmental professional to determine whether or not there are conditions indicative of a release or threatened release of a hazardous substance (or other contaminant) on, at, in or to a property can have significant consequences regarding a prospective landowner's ultimate ability to claim protection from CERCLA liability. Failure to identify a release during the conduct of all appropriate inquiries does not relieve the property owner from the responsibility to take reasonable steps and address the release. Even if the Agency agreed with the commenters and adopted a ''checklist'' approach for the regulation, simply conducting the checklist of activities and ending the investigation after each activity is conducted would not result in protection from CERCLA liability (as commenters claimed).

The final rule also establishes that in those cases where certain information included in the list of regulatory objectives (§ 312.20(e)) cannot be found or obtained within the parameters of the performance factors, such data gaps must be identified and the significance of the missing information with regard to the environmental professional's ability to render an opinion on the presence of conditions indicative of releases and threatened releases be documented. Exhaustive and costly efforts do not have to be made to access all available sources of data and find every piece of data and information about a property. Nor does the rule require that duplicative information be sought from multiple sources. The inquiries and the overall investigation must be undertaken to meet the data collection objectives and primarily determine the environmental conditions of the property. Structuring the standards around such objectives will render the results of the investigation more valuable to a landowner in his or her efforts to comply with the post acquisition continuing obligations for obtaining the CERCLA liability protections than an approach framed around a mere checklist of activities.

In retaining the proposed objectives and performance factors, the final rule allows that an all appropriate inquiries investigation need not address each of the regulatory criterion in any particular sequence. In addition, information relevant to more than one criterion need not be collected twice, and a single source of information may satisfy the requirements of more than one criterion and more than one objective. However, the information required to achieve each

of the objectives and performance factors must be obtained for the all appropriate inquiries investigation to be complete. Although compliance with the all appropriate inquiries requirements ultimately will be determined in court, the final rule allows the prospective landowner or grantee and environmental professional to determine the best process and sequence for collecting and analyzing all required information. The sequence of activities and the sources of information used to collect any required information is left to the judgment and expertise of the environmental professional, provided that the overall objectives and the performance factors established for the final rule are met.

In performing the inquiries, including but not limited to conducting interviews, collecting historical data and government records, and inspecting the subject property and adjoining properties, all parties undertaking all appropriate inquiries must be attentive to the fact that the primary objectives of the regulation are to identify the following types of information about the subject property:

- Current and past property uses and occupancies;
- Current and past uses of hazardous substances;
- Waste management and disposal activities that could have caused releases or threatened releases of hazardous substances;
- Current and past corrective actions and response activities undertaken to address past and on-going releases of hazardous substances;
- Engineering controls;
- Institutional controls; and
- Properties adjoining or located nearby the subject property that have environmental conditions that could have resulted in conditions indicative of releases or threatened releases of hazardous substances on, at, in, or to the subject property.

EPA notes that in the case of brownfields grantees, the scope of each of the activities listed above may be broader if the grant or cooperative agreement includes within its scope the assessment of a property for conditions indicative of releases or threatened releases of petroleum and petroleum products, controlled substances, or other contaminants.

The final performance factors for achieving the objectives set forth above are set forth in § 312.20(e) and require the persons conducting the inquiries to: (1) Gather the information that is required for each standard and practice that is publicly available, obtainable from its source within reasonable time and cost constraints, and which can practicably be reviewed, and (2) review and evaluate the thoroughness and reliability of the information gathered in complying with each standard and practice, taking into account information gathered in the course of complying with the other standards and practices of this subpart. In complying with § 312.20(f)(2), if the environmental professional or person conducting the inquiries determines through such review and evaluation that the information is either not thorough or not reliable, then further inquiries should be made to ensure that the information gathered is both thorough and reliable. The performance factors are provided as guidelines to be followed in conjunction with the final objectives for the all appropriate inquiries.

M. What Are Institutional Controls?

The final rule requires the identification of institutional controls placed on the subject property. As defined in § 312.10, institutional controls are non-engineered instruments, such as administrative and legal controls, that among other things, can help to minimize the potential for human exposure to contamination, and protect the integrity of a remedy by limiting land or resource use. For example, an institutional control might prohibit the drilling of a drinking water well in a contaminated aquifer or disturbing contaminated soils. Institutional controls also may be referred to as land use controls, activity and use limitations, etc., depending on the program under which a response action is conducted or a release is addressed.

Institutional controls are typically used whenever contamination precludes unlimited use and unrestricted exposure at the property. Thus, institutional controls may be needed both before and after completion of the remedial action or may be employed in place of a remedial action. Institutional controls often must remain in place for an indefinite duration and, therefore, generally need to survive changes in property ownership (i.e., run with the land) to be legally and practically effective. Some common examples of institutional controls include zoning restrictions, building or excavation permits, well drilling prohibitions, easements and covenants.

The importance of identifying institutional controls during all appropriate inquiries is twofold. First, institutional controls are usually necessary and important components of a remedy. Failure to abide by an institutional control may put people at risk of harmful exposure to hazardous substances. Second, an owner wishing to maintain protections from CERCLA liability as an innocent landowner, contiguous property owner, or bona fide prospective purchaser must fulfill ongoing obligations to: (1) Comply with any land use restrictions established or relied on in connection with a response action and (2) not impede the effectiveness or integrity of any institutional control employed in connection with a response action. For a more detailed discussion of these requirements please see EPA, Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability (Common Elements, 2003).

Those persons conducting all appropriate inquiries may identify institutional controls through several of the standards and practices set forth in this rule. As noted, implementation of institutional controls may be accomplished through the use of several administrative and legal mechanisms, such as zoning restrictions, building permit requirements, easements, covenants, etc. For example, an easement implementing an institutional control might be identified through the review of chain of title documents under § 312.24(a). Furthermore, interviews with past and present owners, operators, or occupants pursuant to § 312.23; and reviews of federal, tribal, state, and local government records under § 312.26, may identify an institutional control or refer a person to the appropriate source to find an institutional control. For example, a review of federal Superfund records, including Records of Decision and Action Memoranda, as well as other information contained in the CERCLIS database, may indicate that zoning was selected as an institutional control or an interview with a current operator may reveal an institutional control as part of an operating permit.

The final rule requires that all appropriate inquiries include a search for institutional controls placed upon the subject property as part of the requirements for reviewing federal, state, tribal, and local government records. A discussion of these requirements is provided in section IV.S below.

N. How Must Data Gaps Be Addressed in the Conduct of All Appropriate Inquiries?

Proposed Rule

The proposed rule required environmental professionals, prospective landowners, and brownfields grant recipients to identify data gaps that affect their ability to identify conditions indicative of releases or threatened releases of hazardous substances (and, in the case of grant recipients, pollutants, contaminants, petroleum and petroleum products, and controlled substances). The proposed rule also required these persons to identify the sources of information consulted to address, or fill, the data gaps and then comment upon the significance of the data gaps with regard to the ability to identify conditions indicative of releases or threatened releases of hazardous substances on, at, in or to the subject property. The proposed rule defined a data gap as a lack of or an inability to obtain information required by the standards and practices listed in the proposed regulation, despite good faith efforts by the environmental professional or the prospective landowner or grant recipient to gather such information.

Public Comments

Some commenters raised concerns that the proposed definition of a data gap may result in difficulties in determining when an all appropriate inquiries investigation is complete. These commenters stated that the need to identify and comment on the significance of data gaps may render it difficult to complete an investigation, that could potentially affect a property owner's ability to claim protection from CERCLA liability. Other commenters asserted that because an investigation could be considered complete despite the existence of a data gap, a regulatory loophole exists (in the opinion of the commenters) that will result in the property owner's being able to claim protection from CERCLA liability even when the all appropriate inquiries investigation results in a failure to identify a release or threatened release at a property.

Some commenters stated that the proposed requirement to identify data gaps, or missing information, that may affect the environmental professional's ability to render an opinion regarding the environmental conditions at a property and comment on their significance in this regard will lend credibility to the inquiry's final report.

Final Rule

We are retaining the proposed definition of data gap and the proposed requirements for identifying and commenting on the significance of data gaps. For the purposes of today's final rule, a ''data gap'' is a lack of or inability to obtain information required by the standards and practices listed in the regulation, despite good faith efforts by the environmental professional or the prospective landowner (or grant recipient) to gather such information pursuant to the objectives for all appropriate inquiries. In today's final rule, § 312.20(g) requires environmental professionals, prospective landowners, and grant recipients to identify data gaps that affect their ability to identify conditions indicative of releases or threatened releases of hazardous substances (and in the case of grant recipients pollutants, contaminants, petroleum and petroleum products, and controlled substances). The final rule requires such persons to identify the sources of information consulted to address the data gaps and comment upon the significance of the data gaps with regard to the ability to identify conditions indicative of releases or threatened releases. Section 312.21(c)(2) also requires that the inquiries report include comments regarding the significance of any data gaps on the environmental professional's ability to provide an opinion as to whether the inquiries have identified conditions indicative of releases or threatened releases.

In response to issues raised by commenters, we point out that the final regulation, as did the proposal, requires that environmental professionals document and comment on the significance of only those data gaps that ''affect the ability of the environmental professional to identify conditions indicative of releases or threatened releases of hazardous substances * * * on, at, in, or to the subject property.'' If certain information included within the objectives and performance factors for the final rule cannot be found and the lack of certain information, in light of all other information that was collected about the property, has no bearing on the environmental professional's ability to render an opinion regarding the environmental conditions at the property, the final rule does not require the lack of such information to be documented in the final report. Given the restriction on the type of data gaps that must be documented, and given that the documentation is restricted to instances where the lack of information hinders the ability of the environmental professional to render an opinion regarding the environmental conditions at the property, we disagree with the commenters who assert that the requirement is overly burdensome or will result in the inability to complete the required investigations.

Commenters who asserted that the requirement to document data gaps would result in a ''loophole'' that would allow property owners to claim protection from CERCLA liability after conducting an incomplete all appropriate inquiries investigation may have misunderstood the scope of the rule and the statutory requirements for obtaining the liability protections. As explained in detail in Section II of this preamble, the conduct of all appropriate inquiries is only one requirement necessary for obtaining protection from CERCLA liability. The mere fact that a prospective landowner conducted all appropriate inquiries does not provide an individual with protection from CERCLA liability. To qualify as a bona fide prospective purchaser, innocent landowner or a contiguous property owner, a person must, in addition to conducting all appropriate inquiries prior to acquiring a property, comply with all of the other statutory requirements. These criteria are summarized in section II.D. of this preamble. The all appropriate inquiries investigation may provide a prospective landowner with necessary information to comply with the other post-acquisition statutory requirements for obtaining liability protections. The conduct of an incomplete all appropriate inquiries investigation, or the failure to detect a release during the conduct of all appropriate inquiries, does not exempt a landowner from his or her post-acquisition continuing obligations under other provisions of the statute. Failure to comply with any of the statutory requirements may be problematic in a claim for protection from liability.

The final rule retains the requirement to identify data gaps, address them when possible, and document their significance. Prospective landowners may wish to consider the potential significance of any data gaps, that may exist after conducting the pre-acquisition all appropriate inquiries in assessing their obligations to fulfill the additional statutory requirements after purchasing a property.

If a person properly conducts all appropriate inquiries pursuant to this rule, including the requirements concerning data gaps at §§ 312.10, 312.20(g) and 312.21(c)(2), the person may fulfill the all appropriate inquiries requirements of CERCLA sections

107(q), 107(r), and 101(35), even when there are data gaps in the inquiries. However, as explained further in this preamble, fulfilling the all appropriate inquiries requirements does not, by itself, provide a person with a protection from or defense to CERCLA liability. Failure to identify a release or threatened release during the conduct of all appropriate inquiries does not negate the landowner's continuing responsibilities under the statute, including the requirements to take reasonable steps to stop the release, prevent a threatened release, and prevent exposure to the release or threatened release once the landowner has acquired a property. Also, if an existing institutional control or land use restriction is not identified during the conduct of all appropriate inquiries prior to the acquisition of a property, a landowner is not exempt from complying with the institutional control or land use restriction after acquiring the property. None of the other statutory requirements for the liability protections is satisfied by the results of the all appropriate inquiries.

We emphasize that the mere fact that a prospective landowner conducted all appropriate inquiries does not provide an individual with a defense to or limitation from CERCLA liability. To qualify as a bona fide prospective purchaser, innocent landowner or a contiguous property owner, a person must, in addition to conducting all appropriate inquiries prior to acquiring a property, comply with all of the other statutory requirements. These criteria are summarized in section II.D. of this preamble. The all appropriate inquiries investigation may provide a prospective landowner with necessary information to comply with the other post-acquisition statutory requirements for obtaining liability protections. The failure to detect a release during the conduct of all appropriate inquiries does not exempt a landowner from his or her post-acquisition continuing obligations under other provisions of the statute.

Section 312.20(g) of the final rule points out that one way to address data gaps may be to conduct sampling and analysis. The final regulation does not require that sampling and analysis be conducted to comply with the all appropriate inquiries requirements. The regulation only notes that sampling and analysis may be conducted, where appropriate, to obtain information to address data gaps. The Agency notes that sampling and analysis may be valuable in determining the possible presence and extent of potential contamination at a property. Such information may be valuable for determining how a landowner may best fulfill his or her post-acquisition continuing obligations required under the statute for obtaining protection from CERCLA liability.

O. Do Small Quantities of Hazardous Substances That Do Not Pose Threats to Human Health and the Environment Have To Be Identified in the Inquiries?

Proposed Rule

The environmental professional should identify and evaluate all evidence of releases or threatened releases on, at, in or to the subject property, in accordance with generally accepted good commercial and customary standards and practices. However, the proposed rule provided that the environmental professional need not specifically identify, in the written report prepared pursuant to § 312.21(c), extremely small quantities or amounts of contaminants, so long as the contaminants generally would not pose a threat to human health or the environment.

Public Comments

EPA received no significant comment on the proposed provision on the identification of extremely small quantities of contamination.

Final Rule

The final retains the provision that the environmental professional need not specifically identify, in the written report prepared pursuant to § 312.21(c), extremely small quantities or amounts of contaminants, so long as the contaminants generally would not pose a threat to human health or the environment.

P. What Are the Requirements for Interviewing Past and Present Owners, Operators, and Occupants?

Proposed Rule

CERCLA section 101(35)(B)(iii)(II) requires EPA to include in the standards and practices for all appropriate inquiries ''interviews with past and present owners, operators, and occupants of the facility for the purpose of gathering information regarding the potential for contamination at the facility.'' The Agency proposed that the inquiry of the environmental professional include interviews with the current owner(s) and occupant(s) of the subject property. In addition, the proposed rule required that interviews be conducted with current and past facility managers with relevant knowledge of the property, as well as past owners, occupants, or operators, and employees of current and past occupants of the property, as necessary, to meet the proposed objectives and performance factors. In the case of abandoned properties, the Agency proposed that the inquiry of the environmental professional include interviewing one or more owners or occupants of neighboring or nearby properties to obtain information on current and past uses of the property and other information necessary to meet the objectives and performance factors.

Public Comments

Several commenters asserted that the requirement to interview current and past owners and occupants of a property may be burdensome. Commenters gave several reasons for asserting that interviews may be burdensome. Some commenters said it is difficult to locate current and past owners and occupants. Other commenters questioned the accuracy of any information that would be provided by a current or past owner or occupant. One commenter expressed concern that the requirement to conduct interviews of current and past owners and occupants of a property could result in the environmental professional divulging information regarding the sale of the property against the prospective landowner's wishes.

In the case of the proposed interview requirements for abandoned properties, some commenters opposed the requirement to interview at least one owner or occupant of a neighboring property. Commenters stated that the proposed requirement was unreasonable and that it is impractical to attempt to find and contact neighboring property owners and occupants. Some commenters said that neighboring property owners and occupants can not be relied upon to provide accurate information about a property.

Final Rule

The requirements for conducting interviews of past and present owners, operators, and occupants of the subject property are included in § 312.23. The final rule identifies these interviews as being within the scope of the inquiry of the environmental professional. Therefore, all interviews must be conducted by the environmental professional or by someone under the supervision or responsible charge of the environmental professional. The intent is that an individual meeting the definition of an environmental professional (§ 312.10) must oversee the conduct of, or review and approve the results of, the interviews to ensure the interviews are conducted in compliance with the objectives and performance

factors (§ 312.20). This is to ensure that the information obtained from the interviews provides sufficient information, in conjunction with the results of all other inquiries, to allow the environmental professional to render an opinion with regard to conditions at the property that may be indicative of releases or threatened releases of hazardous substances (and pollutants, contaminants, petroleum and petroleum products, and controlled substances, if applicable).

The final rule requires the environmental professional's inquiry to include interviewing the current owner and occupant of the subject property. In addition, the rule provides that the inquiry of the environmental professional include interviews of additional individuals, including current and past facility managers with relevant knowledge of the property, past owners, occupants, or operators of the subject property, or employees of current and past occupants of the subject property, as necessary to meet the rule's objectives and in accordance with the performance factors. A primary purpose of the interviews portion of the all appropriate inquiries is to obtain information regarding the current and past ownership and uses of the property, and obtain information regarding the potential environmental conditions of the property. The final rule does not prescribe particular questions that must be asked during the interview. The type and content of any questions asked during interviews will depend upon the site-specific conditions and circumstances and the extent of the environmental professional's (or other individual's under the supervision or responsible charge of the environmental professional) knowledge of the property prior to conducting the interviews. Therefore, the final rule does not include specific questions for the interviews, but requires that the interviews be conducted in a manner that achieves the objectives and performance factors. Interviews with current and past owners and occupants may provide opportunities to collect information about a property that was not previously recorded nor well documented and may provide valuable perspectives on how to find or interpret information required to complete other aspects of the all appropriate inquiries. Information gathered during the interview portion of the all appropriate inquiries may in turn provide valuable information for the on-site visual inspection. Persons conducting the interviews of current and past owners and occupants may want to spend some time during the interviews requesting information on the locations of operations or units used to store or manage hazardous substances on the property.

In the case of properties where there may be more than one owner or occupant, or many owners or occupants, the final rule requires the inquiry to include interviews of major occupants and those occupants that are using, storing, treating, handling or disposing (or are likely to have used, stored, treated, handled or disposed) of hazardous substances (or pollutants, contaminants, petroleum and petroleum products, and controlled substances, as applicable) on the property. The rule does not specify the number of owners and occupants to be interviewed. The environmental professional must perform this function in the manner that best fulfills the objectives and performance factors for the inquiries in § 312.20(e) and (f). Environmental professionals may use their professional judgment to determine the specific occupants to be interviewed and the total number of occupants to be interviewed in seeking to comply with the objectives and performance factors for the inquiries. Interviews must be conducted with individuals most likely to be knowledgeable about the current and past uses of the property, particularly with regard to current and past uses of hazardous substances on the property.

In response to commenters who asserted that the proposed interview requirements are burdensome, we point out that the statutory criteria in CERCLA section 101(35)(B)(iii) include ''interviews with past and present owners, operators, and occupants of the facility for the purpose of gathering information regarding the potential for contamination at the facility.'' EPA asserts that it was clearly congressional intent that the all appropriate inquiries investigation include the conduct of interviews with current and past owners and occupants. We also assert that current and past owners and occupants of a property may be excellent sources of information regarding past and on-going uses of the property as well as the types of waste management activities that were undertaken at the property. Given that the ASTM E1527 Phase 1 Environmental Site Assessment Process, the interim standard for the conduct of all appropriate inquiries, includes requirements for conducting interviews with the current owners and occupants of a property and provides that other owners and occupants are good additional sources of information about property uses and potential contamination at a property, we disagree with commenters who asserted that the proposed and final requirements for conducting interviews will be overly burdensome.

In the case of abandoned properties, the final rule requires the inquiry of the environmental professional to include interviews with one or more owners or occupants of neighboring or nearby properties. In the case of abandoned properties, it most likely will be difficult to identify or interview current or past owners and occupants of the property. Therefore, the final rule requires that at least one owner or occupant of a neighboring property be interviewed to obtain information regarding past owners or uses of the property in cases where the subject property is abandoned and no current owner is available to be interviewed. The final rule defines an abandoned property as a ''property that can be presumed to be deserted, or an intent to relinquish possession or control can be inferred from the general disrepair or lack of activity thereon such that a reasonable person could believe that there was an intent on the part of the current owner to surrender rights to the property.'' As is the case with interviews conducted with current and past owners and occupants of the property, interview questions should be developed prior to the conduct of the interviews, and tailored to gather information to achieve the rule's objectives and performance factors. The final rule contains no specific requirements with regard to the type or content of questions that must be asked during the interviews.

EPA disagrees with commenters who stated that it will be difficult to locate and contact neighboring property owners and occupants. The final rule, as did the proposed rule, requires that the environmental professional only locate and interview one neighboring property owner or occupant and only in those cases where no owner or occupant of the subject property can be identified. An environmental professional should be able to locate one owner or occupant of a neighboring property when conducting the on-site visual inspection of the property. If the environmental professional cannot easily locate an owner and occupant of a neighboring property, he or she may enlist the assistance of local government officials in identifying a neighboring property owner or occupant. As is the case with information ascertained from any interview, the environmental professional must apply his or her judgment when drawing conclusions

based on the information provided in interviews with neighboring property owners and occupants and should attempt to verify any information provided by reviewing other available sources of information.

Q. What Are the Requirements for Reviews of Historical Sources of Information?

Proposed Rule

Historical documents and records may contain information regarding past ownership and uses of a property that may be essential to assessing the potential for environmental conditions indicative of releases or threatened releases of hazardous substances to be present at the property. Historical documents and records, among others, may include chain of title documents, land use records, aerial photographs of the property, fire insurance maps, and records held at local historical societies. The proposed rule required that the inquiry of the environmental professional include a review of historical documents and records for the subject property that document the ownership and use of the property for a period of time as far back in the history of the property as it can be shown that the property contained structures, or from the time the property was first used for residential, agricultural, commercial, industrial, or governmental purposes.

Public Comments

Some commenters raised concerns regarding the proposed requirements to review historical records covering ''a period of time as far back in the history of the subject property as it can be shown that the property contained structures or from the time the property was first used for residential, agricultural, commercial, industrial, or governmental purposes.'' Commenters said that the proposed historical scope of the records search is too extensive. Some commenters requested that in the final rule EPA adopt the provisions for historical records searches provided in the ASTM E1527–2000 standard. Several commenters requested that EPA explicitly require as part of the review of historical records a review of chain of title documents. The commenters asserted that a review of chain of title documents is the only reliable way to identify previous owners of a property.

Final Rule

The statutory criteria in the Brownfields Amendments require that reviews of historical sources of information be conducted to ''determine previous uses and occupancies of the real property since the property was first developed.'' The final rule requires (as did the proposed rule) that historical records on the subject property be searched for information on the property covering a time period as far back in history as there is documentation that the property contained structures or was placed into use of some form. This provision follows the statutory language. In addition, the final rule requires that historical documents and information be reviewed to obtain necessary information for meeting the objectives and performance factors in § 312.20(e) and (f). If a search of historical sources of information results in an inability of the environmental professional to document previous uses and occupancies of the property as far back in history as it can be shown that the property contained structures or was placed into use of some form, and such information is not acquired elsewhere during the investigation then it must be documented as a data gap to the inquiries. The requirements of §§ 312.20(g) and 312.21(c)(2) are applicable to all instances in the all appropriate inquiries that result in data gaps.

Despite the concerns raised by some commenters regarding the scope of the historical records review, we assert that the scope of the requirements in the final rule (as did the scope of the proposed requirements) reflects the statutory language provided in CERCLA section 101(35)(B)(iii). The statutory criterion provide that all appropriate inquiries include ''reviews of historical sources * * * to determine previous uses and occupancies of the real property since the property was first developed.'' We point out that the final rule does allow the environmental professional to exercise his or her professional judgment ''in context of the facts available at the time of the inquiry as to how far back in time it is necessary to search historical records.'' We believe that this provides sufficient flexibility to allow for any circumstances where, due to the availability of other information about a property an environmental professional may conclude that a comprehensive search of historical records is not necessary to meet the objectives and performance factors.

In response to commenters that requested that EPA adopt the provisions of the ASTM E1527–2000 standard for conducting searches of historical records, we assert that the scope of the historical records search in today's final rule is very similar to the scope of ASTM E1527 standard. The ASTM E1527 standard, at section 7.3.1, requires that historical sources of information be searched to identify ''all obvious uses of the property* * *from the present, back to the property's obvious first developed use, or back to 1940, whichever is earlier.'' Given that the language of both the ASTM E1527 standard and the requirements in the final rule for conducting historical records searches is very similar, we conclude that the intent is the same and the final rule represents no change from current good customary business practice. In addition, the final rule provides for sufficient flexibility both within the application of the performance factors to the historical records search requirements and in allowing the environmental professional to apply his or her judgment ''in the context of the facts available at the time of the inquiry.''

The final rule does not require that any specific type of historic information be collected. In particular, the rule does not require that persons obtain a chain of title document for the property. The rule allows for the environmental professional to use professional judgment when determining what types of historical documentation may provide the most useful information about a property's ownership, uses, and potential environmental conditions when seeking to comply with the objectives and performance factors for the inquiries. Although we agree with commenters that chain of title documents may serve as an important source of information regarding past ownership of a property, it may not be the only source of this information. To the extent that chain of title documents are otherwise obtained for other purposes during the conduct of a property sale or transaction, we believe that these documents can easily be made available to the environmental professional by the prospective landowner. Given that the final rule requires that historical records be searched for information on previous uses and ownership of a property for as far back in the history of property as can be shown that the property contained structures or was first used for residential, agricultural, commercial, industrial or governmental purposes, if chain of title documents are the best and most easily attainable source of this information, we assume that such documents will be obtained and used by the environmental professional.

Given the wide variety of property types and locations to which the final rule could apply, any list of specific documents could result in undue burdens on many prospective

landowners and grantees due to difficulties in collecting any specific document for any particular property or property location. Therefore, the final requirements for reviewing historical documents allow the prospective landowner or grantee and the environmental professional to use their judgment, in accordance with generally accepted good commercial and customary standards and practices, in locating the best available sources of historical information and reviewing such sources for information necessary to comply with the rule's objectives and performance factors.

As explained in section IV.J of this preamble, the prospective landowner, grantee, or environmental professional may make use of previously collected information about a property when conducting all appropriate inquiries. The collection of historical information about a property may be a particular case where previously collected information may be valuable, as well as easily accessible. In addition, nothing in the rule prohibits a person from using secondary sources (*e.g.*, a previously conducted title search) when gathering information about historical ownership and usage of a property. As explained in section IV.J, information must be updated if it was last collected more than 180 days prior to the date of acquisition of the property.

R. What Are the Requirements for Searching for Recorded Environmental Cleanup Liens?

For purposes of this rule, recorded environmental cleanup liens are encumbrances on property for the recovery of incurred cleanup costs on the part of a state, tribal or federal government agency or other third party. Recorded environmental cleanup liens often provide an indication that environmental conditions either currently exist or previously existed on a property that may include the release or threatened release of a hazardous substance. The existence of an environmental cleanup lien should be viewed as an indicator of potential environmental concerns and as a basis for further investigation into the potential existence of on-going or continued releases or threatened releases of hazardous substances on, at, in, or to the subject property.

Proposed Rule

The proposed rule required that prospective landowners and grantees, or environmental professionals on their behalf, search for environmental cleanup liens that are recorded under federal, tribal, state, or local law. Environmental cleanup liens that are not recorded by government entities or agencies are not addressed by the language of the statute (the statute speaks only of ''recorded liens''); therefore, the proposed rule required that only a search for recorded environmental liens be included in the all appropriate inquiries investigation.

Public Comments

Some commenters asked that EPA state more clearly that the responsibility for searching for environmental cleanup liens rests with the prospective landowner and not the environmental professional. A few commenters requested that the Agency provide some guidance on where to find recorded environmental cleanup liens.

Final Rule

EPA is finalizing the proposed requirements to search for recorded environmental cleanup liens without changes. The all appropriate inquiries investigation must include a search for recorded environmental cleanup liens. The final rule allows that the search for recorded environmental cleanup liens be performed either by the prospective landowner or grantee, or through the inquiry of the environmental professional. The search for such liens may not necessarily require the expertise of an environmental professional and therefore may be more efficiently or more cost-effectively performed by the prospective landowner or grantee, or his or her agent. Such liens may be included as part of the chain of title documents or may be recorded in some other manner or format by state or local government agencies. If such information is collected by the prospective landowner or grantee, or other agent who is not under the supervision or responsible charge of the environmental professional, the final rule allows for, but does not require, the information that is collected by or on the behalf of the prospective landowner or grantee to be provided to the environmental professional. If the information is provided to the environmental professional, he or she can then make use of such information during the conduct of the all appropriate inquiries and when rendering conclusions or opinions regarding the environmental conditions of the property. If such information is not provided to the environmental professional and the lack of such information affects the ability of the environmental professional to identify conditions indicative of releases or threatened releases of hazardous substances on, at, in or to the property, the lack of information should be noted as a data gap (per the requirements of § 312.21(b)(2)).

Although some commenters requested that EPA be more explicit in the final rule in requiring that the search for recorded environmental cleanup liens be conducted by the prospective landowner (or grantee), we believe that the decision of who conducts the search may be best left up to the judgment of the prospective landowner or grantee and environmental professional. The final rule provides in § 312.22 that the search for recorded environmental cleanup liens can fall outside the inquiries conducted by the environmental professional. The search for recorded environmental cleanup liens is not included as part of the requirements governing the results of an inquiry by an environmental professional (§ 312.21). Therefore, the search may be conducted by the prospective landowner or grantee, his or her attorney or agent, or the environmental professional.

We offer one caution about the conclusion that might be drawn if no recorded environmental cleanup liens are found. If EPA is conducting a cleanup at site at the time it is transferred or acquired, EPA is able to record a lien post acquisition. For example, one type of lien, often referred to as a windfall lien, has no statute of limitations and arises at the time EPA first spends Superfund money. States and localities may have similar mechanisms. Therefore, even if a recorded environmental cleanup lien is not found during the conduct of the all appropriate inquiries investigation, one may be recorded at a later date if EPA is undertaking a cleanup or response action at the property.

With regard to commenters who requested that EPA provide guidance on where to search for environmental cleanup liens, we advise that prospective landowners and grantees to seek the advice of a local realtor, real estate attorney, title company, or other real estate professional. Environmental cleanup liens may be recorded as part of the land title records or as part of other state or local government land or real estate records. Recorded environmental cleanup liens may be recorded in different places, depending upon the particular state and particular locality in which the property is located.

S. What Are the Requirements for Reviewing Federal, State, Tribal, and Local Government Records?

Federal, tribal, state and local government records may contain

information regarding environmental conditions at a property. In particular, government records, or data bases of such information, may include information on previously reported releases of hazardous substances, pollutants, contaminants, petroleum and petroleum products and controlled substances. Government records and available databases can provide valuable information on remedial actions and emergency response activities that may have been conducted at a particular property. Government records also may include information on institutional controls related to a particular property. For example, in the case of NPL sites, EPA Superfund records, including Action Memoranda and Records of Decision, may have information on institutional controls in place at such properties. Government records also may include information on activities or property uses that could cause releases or threatened releases to be present at a property.

Proposed Rule

The proposed rule required that federal, state, tribal and local government records be searched for information necessary to achieve the objectives and performance factors, including information regarding the use and occupancy of and the environmental conditions at the subject property and conditions of nearby or adjoining properties that could have a impact upon the environmental conditions of the subject property. The proposed rule included requirements to search federal, tribal, state, and local government records for information indicative of environmental conditions at the subject property.

The proposed rule also included requirements to review government records, or data bases of information contained in government records, for information about nearby and adjoining properties. Reviews of such records may provide valuable information regarding the potential impact to the subject property from hazardous substances and petroleum contamination migrating from contiguous or nearby properties. The proposed rule included required minimum search distances for government records searches of nearby properties.

To account for property-specific and regionally-specific conditions that can influence the appropriateness of the proposed search distances for any given type of record and property, the proposed rule allowed the environmental professional to adjust the applicable search distances when searching for information about off-site properties by applying professional judgment. For example, appropriate search distances for properties located in rural settings may differ from appropriate search distances for urban settings. In addition, ground water flow direction, depth to ground water, arid weather conditions, the types of facilities located on nearby properties, and other factors may influence the degree of impact to a property from off-site sources. Therefore, the proposed rule allowed the environmental professional to adjust any or all of the proposed minimum search distances for any of the record types, based upon professional judgment and the consideration of site-specific conditions or circumstances when seeking to achieve the proposed objectives and performance factors for the required inquiries.

Public Comments

The Agency received a variety of comments in which commenters expressed concerns about the applicability or adequacy of specific types of government records included in the proposed rule (e.g., CERCLIS records, information on RCRA facilities, ERNS). A few commenters raised concerns about the availability of tribal records. Several commenters raised concerns regarding the availability of government records on institutional controls. Commenters also pointed out that, given the lack of available databases and other information on institutional controls, it may be particularly difficult to search for institutional controls associated with adjoining and nearby properties.

Final Rule

We are finalizing the requirements for reviewing federal, state, tribal, and local government data bases as proposed, with one exception. The final rule requires that government records and available lists for institutional and engineering controls be searched only for information on such controls at the subject property. All appropriate inquiries investigations do not have to include searches for institutional and engineering controls in place at nearby and adjoining properties. We made this change because we agree with commenters who pointed out that information on institutional and engineering controls may be difficult to find as there are no available national sources of this information. Only a few states have available lists of institutional controls. In addition, the information that may be inferred from knowledge of institutional and engineering controls that are in place at adjoining and nearby properties, i.e., that there was a response action, a remedial action, or corrective action taken at the site, can be inferred from information obtained from other sources (e.g., CERCLIS, RCRIS, state records of response actions).

It is important that prospective landowners obtain information on institutional and engineering controls in place at the property being acquired. It also may be important to locate information on such controls in place at nearby properties. To obtain the liability protections afforded under CERCLA (i.e., innocent landowner, contiguous property owner, bona fide prospective purchaser), the statute requires, as part of the ''continuing obligations,'' that the property owner comply with all land use restrictions and not impede the effectiveness of institutional controls. Therefore, it is important that information on institutional and engineering controls be obtained by prospective landowners, even though information about such controls may not have been routinely obtained as part of due diligence practices prior to today's final rule (we note that the current interim standard does include provisions for searching for ''activity and use limitations'').

Routine ''chain of title'' reports may not always contain information labeled as institutional or engineering controls. However, title companies may include, as part of the chain of title reports ''restrictions of record on title'' when such restrictions are recorded because of underlying environmental conditions at a property. Therefore, when requesting information on ''institutional controls'' or ''engineering controls'' about a property, prospective landowners, grantees, and environmental professionals may want to request information on ''restrictions of record on title'' as well, in case any available information on institutional or engineering controls is so labeled in the chain of title records. In addition to chain of title records, information on institutional controls and engineering controls may be recorded in local land records. Also, some states are beginning to create registries to track information on institutional and engineering controls. Therefore, prospective landowners and grantees should consider consulting these other sources of information in addition to chain of title records for information on institutional and engineering controls.

In response to the commenters who pointed out particular shortcomings with specific sources of information (e.g., CERCLIS, RCRIS, ERNS) we point out that the requirement to review government records explicitly provides

that the reviews be conducted in compliance with the objectives and performance standards. If a particular source of information cannot be accessed within a reasonable time frame or within reasonable costs, then the information should be sought from other sources. In addition, if a particular source of information will only provide information that can more easily or readily be found elsewhere, the particular source does not have to be obtained or consulted. If application of the objectives and performance standards to the requirement to review government records results in an inability to provide necessary information (or information identified as necessary in the objectives for the final rule), then the lack of information should be documented as a data gap in the final report. In addition, the environment professional should comment on the significance the lack of any information has on his or her ability to identify conditions at the property that are indicative of releases or threatened releases of hazardous substances (in compliance with § 312.21(c)(2)).

In response to commenters who pointed out that it may be difficult to obtain or gain access to tribal government records, we point out that such records need only be searched for and reviewed in those instances where the subject property is located on or near tribal-owned lands. In these cases, it is important to attempt, within the scope of the rule's objectives and performance factors, to review such records. When such records are not available, necessary information should be sought from other sources. When no information is available and the objectives and performance factors of the final rule cannot be met and the result is a lack of information that may affect the environmental professional's ability to render an opinion regarding the environmental conditions of a property, the lack of information must be documented as a data gap in compliance with § 312.21(c)(2).

The final rule requires that the following types of government records or data bases of government records be reviewed to obtain information on the subject property and nearby properties necessary to meet the rule's objectives and performance standards:

1. Government records of reported releases or threatened releases at the subject property, including previously conducted site investigation reports.

2. Government records of activities, conditions, or incidents likely to cause or contribute to releases or threatened releases, including records documenting regulatory permits that were issued to current or previous owners or operators at the property for waste management activities and government records that identify the subject property as the location of landfills, storage tanks, or as the location for generating and handling activities for hazardous substances, pollutants, contaminants, petroleum and petroleum products, or controlled substances.

3. CERCLIS records—EPA's Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS) database contains general information on sites across the nation and in the U.S. territories that have been assessed by EPA, including sites listed on the National Priorities List (NPL). CERCLIS includes information on facility location, status, contaminants, institutional controls, and actions taken at particular sites. CERCLIS also contains information on sites being assessed under the Superfund Program, hazardous waste sites and potential hazardous waste sites.

4. Government-maintained records of public risks—the all appropriate inquiries government records search should include a search for available records documenting public health threats or concerns caused by, or related to, activities currently or previously conducted at the site.

5. Emergency Response Notification System (ERNS) records—ERNS is EPA's data base of oil and hazardous substance spill reports. The data base can be searched for information on reported spills of oil and hazardous substances by state.

6. Government registries, or publicly available lists of engineering controls, institutional controls, and land use restrictions. The all appropriate inquiries government records search must include a search for registries or publicly available lists of recorded engineering and institutional controls and recorded land use restrictions. Such records may be useful in identifying past releases on, at, in, or to the subject property or identifying continuing environmental conditions at the property.

The final rule requires that government records be searched to identify information relative to the objectives and in accordance with the performance factors on: (1) Adjoining and nearby properties for which there are governmental records of reported releases or threatened releases (e.g., properties currently listed on the National Priorities List (NPL), properties subject to corrective action orders under the Resource Conservation and Recovery Act (RCRA), properties with reported releases from leaking underground storage tanks); (2) adjoining and nearby properties previously identified or regulated by a government entity due to environmental conditions at a site (e.g., properties previously listed on the NPL, former CERCLIS sites with notices of no further response actions planned (NFRAP)); and (3) adjoining and nearby properties that have government-issued permits to conduct waste management activities (e.g., facilities permitted to manage RCRA hazardous wastes).

In the case of government records searches for nearby properties, the final rule includes minimum search distances (e.g., properties located either within one mile or one-half mile of the subject property) for obtaining and reviewing records or data bases concerning activities and facilities located on nearby properties. The search distances are based upon our best judgment regarding the potential impacts that incidents or circumstances at an adjoining property may have on the subject property. With the exception of the required searches for institutional and engineering controls, the search distances finalized in today's rule are the search distances that were proposed in the proposed rule. For example, government records identifying properties listed on the NPL must be searched to obtain information on NPL sites located within one mile of the subject property. NPL sites located beyond one mile of a property most likely will have little or no impact on the environmental conditions at the subject property. In the case of two types of records, records of hazardous waste handler and generator records and permits, records of registered storage tanks, the final requirements specify that such records only be searched for information specific to the subject property and adjoining properties (the rule contains no requirement to search for these two types of government records for other nearby properties). The final rule requires that available lists of institutional controls and engineering controls only be searched for information on the subject property.

In the case of all the government records listed above and in the final rule in § 312.26, the requirements of this criterion may be met by searching data bases containing the same government records mentioned in the list above that are accessible and available through government entities or private sources. The review of actual records is not necessary, provided that the same information contained in the government records and required to

meet the requirements of this criterion and achieve the objectives and performance factors for these regulations is attainable by searching available data bases.

The final rule allows the environmental professional to adjust the search distances for reviewing government records of nearby properties based upon his or her professional judgment. Environmental professionals may consider one or more of the following factors when determining an alternative appropriate search distance:

- The nature and extent of a release;
- Geologic, hydrogeologic, or topographic conditions of the subject property and surrounding environment;
- Land use or development densities;
- The property type;
- Existing or past uses of surrounding properties;
- Potential migration pathways (e.g., groundwater flow direction, prevalent wind direction); or
- Other relevant factors.

The final rule requires environmental professionals to document the rationale for making any modifications to the required minimum search distances included in § 312.26 of the regulation.

T. What Are the Requirements for Visual Inspections of the Subject Property and Adjoining Properties?

Proposed Rule

The proposed rule required that an on-site visual inspection of the subject property be conducted as part of the all appropriate inquiries investigations, with one limited exception. The proposed on-site visual inspection requirements included requirements to inspect any facilities and improvements on the property as well as all areas where hazardous substances are or may have been used, stored, treated, handled, or disposed. In addition, the proposed rule included requirements to visually inspect adjoining properties. The proposal required that inspections of adjoining properties be conducted from the property line, public right-of-way, or other vantage point.

The proposed rule included a limited exception from the requirement to conduct the visual inspection ''on-site.'' The proposed exception provided that in unusual circumstances where an on-site visual inspection cannot be performed because of physical limitations, remote and inaccessible location, or another inability to obtain access to the property, provided good faith efforts are taken to obtain such access and access to the property could not be obtained, a visual inspection could be conducted from an off-site vantage point (e.g., property-line, airplane, public right-of-way). To qualify for the exception from the requirement to conduct the inspection on site, the proposed rule required that the environmental professional document the good faith efforts undertaken to gain access to the property and explain why such efforts were unsuccessful. The proposed rule also required that the environmental professional document what other sources of information were consulted to obtain information regarding the potential environmental conditions at the property and the significance of the failure to conduct the inspection on site on his or her ability to identify conditions indicative of releases or threatened releases of hazardous substances on, at, in, or to the subject property.

In the preamble to the proposed rule, EPA recommended that an environmental professional conduct the on-site visual inspection.

Public Comments

A few commenters stated that EPA should not recommend, as we did in the preamble to the proposed rule, that an individual meeting the definition of environmental professional conduct the on-site visual inspection. These commenters stated that anyone under the responsible charge or supervision of an environmental professional should be able to conduct the on-site visual inspection. Commenters stated, that by recommending in the preamble that the environmental professional conduct the on-site visual inspection, the Agency was effectively requiring an environmental professional to conduct the visual inspection. Other commenters expressed support for the Agency's recommendation.

A few other commenters thought the proposed exception from the requirement to conduct the visual inspection on site was ''broad'' and ''would increase the likelihood of inspections not being performed and contamination not being detected.'' These commenters expressed a concern that any exception from the requirement to conduct an on-site visual inspection could open the door to abuse and result in properties being transferred without being inspected. Commenters raised concerns that owners of uninspected properties could obtain liability protection by claiming to have fulfilled the requirements of all appropriate inquiries without knowledge of on-going releases at a property.

Final Rule

The final rule, at § 312.27, retains the proposed requirement that a visual on-site inspection be conducted of the subject property. The final visual on-site inspection requirements include requirements to inspect the facilities and any improvements on the property, as well as visually inspect areas on the property where hazardous substances may currently be or in the past may have been used, stored, treated, handled, or disposed of. We continue to assert that, and commenters agreed, that every all appropriate inquiries investigation must include an on-site visual inspection of the property. The on-site inspection of a property most likely will be an excellent source of information regarding indications of environmental conditions on a property. The final rule requires that a visual on-site inspection of the subject property be conducted in all but a few very limited cases. In addition, the final rule retains the proposed requirement that in those cases where physical limitations restrict the portions of the property that may be visually inspected, that the physical limitations encountered during the visual on-site inspection (e.g., weather conditions, physical obstructions) must be documented.

We note that persons conducting all appropriate inquiries with monies provided in a grant awarded under CERCLA section 104(k)(2)(B) must, depending on the terms and conditions of the grant or cooperative agreement, include within the scope of the on-site visual inspection an inspection of the facilities, improvements, and other areas of the property where pollutants, contaminants, petroleum and petroleum products, or controlled substances may currently be or in the past may have been used, stored, treated, handled, or disposed.

The visual on-site inspection of a property during the conduct of all appropriate inquiries may be the most important aspect of the inquiries and the primary source of information regarding the environmental conditions on the property. In all cases, every effort must be made to conduct an on-site visual inspection of a property when conducting all appropriate inquiries.

We understand that a prospective landowner, grantee, or environmental professional, in some limited circumstances, may not be able to obtain on-site access to a property. Extreme and prolonged weather conditions and remote locations can impede access to a property. A prospective landowner, grantee or environmental professional also could be unable to gain on-site

access to a property if the owner refuses to provide access to the party, even after the party exercises all good faith efforts to gain access to the property (e.g., seeking assistance from state government officials). Such circumstances may arise in cases where a local government becomes a last resort purchaser of a potentially-contaminated property that has little economic value. The unique nature of such transactions may result in a local government facing an uncooperative or recalcitrant property owner. Unlike commercial property transactions between private parties, where the parties' economic and legal liability interests and the ability to abandon the transaction can work in favor of the purchasing party's ability to gain access to a property prior to acquisition, property transactions between a private party and a local government may not afford the local government the same leverage, even if it is in the public interest to attain ownership of the property. This situation may occur when the local government seeks to assess, clean up, and revitalize an area, but the owner of the property is unreachable, unavailable, or otherwise unwilling to provide access to the property. In such limited circumstances, the public benefit attained from a government entity gaining ownership of a property may outweigh the need to gain on-site access to the property prior to the transfer of ownership.

The final rule requires, in unusual circumstances, that the prospective landowner or grantee make good faith efforts to gain access to the property. However, the mere refusal of a property owner to allow the prospective property owner or grantee to have access to the property does *not* constitute an unusual circumstance, absent the making of good faith efforts to otherwise gain access. The final rule, at § 312.10, defines ''good faith'' as ''the absence of any intention to seek an unfair advantage or to defraud another party; an honest and sincere intention to fulfill one's obligations in the conduct or transaction concerned.''

In those unusual circumstances where a prospective landowner, a grantee, or an environmental professional, after undertaking good faith efforts, cannot gain access to a property and therefore cannot conduct an on-site visual inspection, the final rule requires that the property be visually inspected, or observed, by another method, such as through the use of aerial photography, or be inspected, or observed, from the nearest accessible vantage point, such as the property line or a public road that runs through or along the property. In addition, the rule requires that the all appropriate inquiries report include documentation of efforts undertaken by the prospective landowner, grantee, or the environmental professional to obtain on-site access to the subject property and include an explanation of why good faith efforts to gain access to subject property were unsuccessful. The all appropriate inquiries report must include documentation of other sources of information that were consulted to obtain information necessary to achieve the objectives and performance factors. This documentation should include comments, from the environmental professional who signs the report, regarding any significant limitations on the ability of the environmental professional to identify conditions indicative of releases or threatened releases on, at, in, or to the subject property, that may arise due to the inability of the prospective landowner, grantee, or environmental professional to obtain on-site access to the property.

In those limited cases where an on-site visual inspection cannot be conducted prior to the date a property is acquired, we remind prospective landowners that protection from CERCLA liability depends upon the prospective landowner complying with all of the post-acquisition continuing obligations provided in the statute. Therefore, to ensure that adequate information is attained about a property to ensure that the property owner can fulfill these obligations, we recommend that once a property is purchased, the property owner conduct an on-site visual inspection of the property once the property is acquired, if it could not be conducted prior to acquisition. Such an inspection may provide important information necessary for the property owner to fully comply with the other statutory provisions, including on-going obligations, governing the CERCLA liability protections.

We disagree with the commenters who argued that the exception from the requirement to conduct the visual inspection on-site is ''broad.'' We point out that the exception is limited to the requirement that the visual inspection be conducted on-site. In all cases where the exception applies, the visual inspection must still be conducted from another vantage point. In addition, the exception is limited to only those circumstances where all good faith efforts are made to gain access the property. The final rule requires that all good faith efforts to gain access be documented and requires that the environmental professional comment on the consequences that the inability to gain access to the property may have on his or her ability to render an opinion on property conditions that may be indicative of releases or threatened releases on, at, in, or to the property. The exception is very limited in scope and the documentation requirements should limit the use of the exception as well as provide the prospective landowner with useful information for determining the potential need for further investigations of the property after acquisition.

The final rule also requires that the all appropriate inquiries investigation include visual inspections of properties that adjoin the subject property. Visual inspections of adjoining properties may provide excellent information on the potential for the subject property to be affected by contamination migrating from adjoining properties. Visual inspections of adjoining properties may be conducted from the subject property's property line, one or more public rights-of-way, or other vantage point (e.g., via aerial photography). Where practicable, a visual on-site inspection is recommended and may provide greater specificity of information. The visual inspections of adjoining properties must include observing areas where hazardous substances currently may be, or previously may have been, stored, treated, handled, or disposed. Visual inspections of adjoining properties otherwise also must be conducted to achieve the objectives and performance goals for all the appropriate inquiries. Physical limitations to the visual inspections of adjoining properties should be noted.

As explained in the preamble to the proposed rule, EPA and the Negotiated Rulemaking Committee considered, when developing the proposed rule, requiring that all activities in the all appropriate inquiries investigation to be conducted by persons meeting the proposed definition of an environmental professional. Requiring that an environmental professional conduct all activities could ensure that all data collection and investigations are conducted in a manner and to a degree of specificity that allows the environmental professional to make best use of all information in forming opinions and conclusions regarding the environmental conditions at a property. However, after careful review of the specific activities included in the statutory criteria and conducting an assessment of the costs and burdens of such a requirement, EPA and the Committee concluded that it is not necessary for each and every regulatory requirement to be conducted by an environmental professional. As outlined

in section IV.H of this preamble, today's final rule, as did the proposed rule, allows for certain aspects of the inquiries to be conducted solely by the prospective landowner or grantee, while providing that all other aspects be conducted under the supervision or responsible charge of the environmental professional. Among the activities required to be conducted under the supervision or responsible charge of an environmental professional is the on-site visual inspection.

It continues to be EPA's recommendation that visual inspections of the subject property and adjoining properties be conducted by an individual who meets the regulatory definition of an environmental professional. Although many other aspects of the all appropriate inquiries may be conducted sufficiently and accurately by individuals other than an environmental professional (e.g., a research associate or librarian may be well qualified to search government records, an attorney may be well qualified to conduct a search for an environmental lien), EPA believes that an environmental professional is best qualified to conduct a visual inspection and locate and interpret information regarding the physical and geological characteristics of the property as well as information on the location and condition of equipment and other resources located on the property. EPA recognizes that other individuals who do not meet the regulatory definition of an environmental professional, particularly when these individuals are conducting such activities under the supervision or responsible charge of an environmental professional, may have the required skills and knowledge to conduct an adequate on-site visual inspection. However, EPA believes that the professional judgment of an individual meeting the definition of an environmental professional is important to ensuring that all circumstances at the property that are indicative of environmental conditions and potential releases or threatened releases are properly identified and analyzed. An environmental professional is best qualified for identifying such situations and conditions and rendering a judgment or opinion regarding the potential existence of conditions indicative of environmental concerns.

Although some commenters stated that EPA should not recommend that the visual inspection be conducted by a person meeting the definition of environmental professional, we point out that other commenters stated their support for our recommendation and some even stated that EPA should require in the regulation that the inspection be conducted by an environmental professional. We remain convinced that the on-site visual inspection of the property can be the single most important source of information regarding the environmental conditions of a property and that an individual meeting the regulatory definition of environmental professional is best able to interpret such observations of a property and ascertain the probability of conditions indicative of releases or threatened releases of hazardous substances being present at the property. In addition, we point out that the definition of environmental professional included in the final rule is less stringent than the proposed definition. Therefore, commenter concerns regarding any significant cost burdens associated with the environmental professional conducting the on-site visual inspection may be alleviated. We emphasize that EPA is recommending that the on-site visual inspection be conducted by an individual who meets the definition of environmental professional included in the final rule; it is not a requirement that the inspection be conducted by an environmental professional. The rule requires only that the inspection be conducted by an individual who is under the supervision or responsible charge of an individual meeting the definition of environmental professional. EPA agrees that if the final rule required that the on-site visual inspection be conducted by an individual meeting the definition of an environmental professional, the requirement could impose undue burdens in certain circumstances. In addition, there may be circumstances that in the best professional judgment of an environmental professional, another person under the responsible charge of the environmental professional may be more qualified to conduct the on-site inspection. To allow for flexibility and the application of professional judgment to specific circumstances, EPA continues to recommend that an environmental professional conduct the on-site inspection, but the Agency is not requiring that the inspection be conducted by an environmental professional.

U. What Are the Requirements for the Inclusion of Specialized Knowledge or Experience on the Part of the ''Defendant?''

Because the conduct of all appropriate inquiries is one element of a legal defense to CERCLA liability, the statute refers to the prospective landowner, or the user of the all appropriate inquiries investigation, as the ''defendant.'' This ensures that any information or special knowledge held by the prospective landowner with regard to a property and its conditions be included in the pre-acquisition inquiries and be considered, along with all information collected during the conduct of all appropriate inquiries, when an environmental professional renders a judgment or opinion regarding conditions indicative of environmental conditions indicative of releases or potential releases of hazardous substances on, at, in, or to the subject property. It is recommended that this information be revealed to the parties conducting the all appropriate inquiries so that any specialized knowledge may be taken into account during the conduct of the required aspects of the all appropriate inquiries.

Congress first added the innocent landowner defense to CERCLA in the Superfund Amendments and Reauthorization Act (SARA) of 1986. The Brownfields Amendments amended the innocent landowner defense and added to CERCLA the bona fide prospective purchaser and the contiguous property owner liability protections to CERCLA liability. The 1986 SARA amendments to CERCLA established that among other elements necessary for a defendant to successfully assert the innocent landowner defense, a defendant must demonstrate that he or she had, on or before the date of acquisition of the property in question, made all appropriate inquiries into previous ownership and uses of the property. Congress directed courts evaluating a defendant's showing of all appropriate inquiries to take into account, among other things, ''any specialized knowledge or experience on the part of the defendant.'' Nothing in today's rule changes the nature or intent of this requirement as it has existed in the statute since 1986.

Proposed Rule

The proposed rule retained, as part of the federal all appropriate inquiries requirements, the consideration of any specialized knowledge or experience of the prospective landowner (or grantee if the grantee is or will be the property owner). The proposed rule did not extend this requirement beyond what already was required under CERCLA and established through case law. The proposed rule required that all appropriate inquiries include the consideration of specialized knowledge held by the prospective landowner or grantee with regard to the subject property, the area surrounding the subject property, the conditions of

adjoining properties, as well as other experience relative to the inquiries that may be applicable to identifying conditions indicative of releases or threatened releases at the subject property. The proposed rule also required that the results of the inquiries take into account any specialized knowledge related to the property, surrounding areas, and adjoining properties held by the persons responsible for undertaking the inquiries, including any specialized knowledge on the part of the environmental professional.

Public Comments

EPA did not receive significant comment on the proposed requirements for considering the specialized knowledge or experience on the part of the defendant. A few commenters mentioned that the proposed requirements would result in the all appropriate inquiries investigations having to include interviews with all previous owners and occupants of the property. These commenters may have mistakenly interpreted the proposed provisions as requiring that the specialized knowledge of all current owners and occupants be considered as part of the all appropriate inquiries investigation. We clarify that only the specialized knowledge of the prospective landowner or grantee, and the environmental professional overseeing the conduct of the inquiries need be considered.

Final Rule

The final rule retains the proposed provisions governing the consideration of specialized knowledge or experience on the part of the prospective landowner (or grantee) and the environmental professional conducting the all appropriate inquiries investigation on the part of the prospective landowner or grantee.

As provided in the preamble to the proposed rule, existing case law related to the innocent landowner defense shows that courts appear to have interpreted the ''specialized knowledge'' factor to mean that the professional or personal experience of the defendant may be taken into account when analyzing whether the defendant made all appropriate inquiries. For example, in *Foster* v. *United States*, 922 F. Supp. 642 (D. D.C. 1996), the owner of a property formerly owned by the General Services Administration and contaminated by, among other things, lead, mercury and PCBs, brought an action against the United States and District of Columbia, prior owners or operators of the site. The plaintiff was a principal in Long & Foster companies and purchased the property through a general partnership, and received it by quitclaim deed. The innocent landowner defense requires a property owner to demonstrate that when he or she purchased a property, he or she did not know and had no reason to know of contamination at, on, in, or to the property. The court rejected the plaintiff's claim to the innocent landowner defense based in part on the plaintiff's specialized knowledge. The court found that his specialized knowledge included his position at Long & Foster, which did hundreds of millions of dollars of commercial real estate transactions, and his position as a partner in at least 15 commercial real estate partnerships. The partnership was involved as an investor in a number of real estate transactions, some of which involved industrial or commercial or mixed-use property. The court ruled that ''it cannot be said that [the partnership] is a group unknowledgeable or inexperienced in commercial real estate transactions.'' *Foster*, 922 F. Supp. at 656.

In *American National Bank and Trust Co. of Chicago* v. *Harcros Chemicals, Inc.*, 1997 WL 281295 (N.D. Ill. 1997), the plaintiff was a company ''involved in brownfields development, purchasing environmentally distressed properties at a discount, cleaning them up, and selling them for a profit.'' *American National Bank*,1997 WL 281295 at *4. As a counter-claim defendant, the company asserted it was an innocent landowner and therefore not liable pursuant to CERCLA. The court found that among other reasons the defense failed because the company possessed specialized knowledge. The court ruled that the company was an expert environmental firm and possessed knowledge that should have alerted it to the potential problems at the site.

The final rule requires that the specialized knowledge of prospective landowners and the persons responsible for undertaking the all appropriate inquiries, including grantees, be taken into account when conducting the all appropriate inquiries for the purposes of identifying conditions indicative of releases or threatened releases at a property. However, as evidenced by the case law cited above, the determination of whether or not the all appropriate inquiries standard is met with regard to specialized knowledge (as well as in regard to all the criteria) remains within the discretion of the courts.

V. What Are the Requirements for the Relationship of the Purchase Price to the Value of the Property, if the Property Was Not Contaminated?

Congress included in the statutory criteria for all appropriate inquiries a requirement to consider the relationship of the purchase price of a property to the value of the property, if the property was not contaminated. The criteria was retained in the criteria included in the Brownfields Amendments from the all appropriate inquiries provisions of the innocent landowner defense established by Congress in the 1986 amendments to CERCLA.

Proposed Rule

The proposed rule required that the prospective landowner or grantee consider whether or not the purchase price of the property reflects the fair market value of the property, assuming that the property is not contaminated. The proposed rule required that the prospective landowner or grantee consider whether any differential between the purchase price and the value of the property is due to the presence of releases or threatened releases of hazardous substances at the property. There may be many reasons that the price paid for a particular property is not an accurate reflection of the fair market value. The all appropriate inquiries investigation need only include a consideration of whether a significant difference between the price paid for a property and the fair market value of a property, if the property were not contaminated, is an indication that the property may be contaminated.

Public Comments

Many commenters asserted that an environmental professional should not be required to consider the relationship of the purchase price to the value of the property as part of the all appropriate inquiries investigation. Concerns raised by commenters include whether environmental professionals are qualified to assess the fair market value of a property. Some commenters thought that a requirement that prospective landowners or environmental professionals consider the relationship of the purchase price of property to the value of the property could violate federal or state laws governing property appraisals. Some commenters argued that the all appropriate inquiries investigation should not include the requirement to consider the relationship of the purchase price to the value of the property because the fair market value

is not always easily ascertainable. Other commenters requested that the preamble to the final rule include a recommendation that an appraisal be performed to determine a property's fair market value. In addition, commenters requested that in cases where an appraisal is conducted to determine the fair market value of a property, the rule should require that it meet the Uniform Standards of Professional Appraisal Practice. Still other commenters supported including the requirement in the final rule, but asked the Agency to require prospective landowners to obtain a property appraisal conducted by a trained or certified real estate appraiser. Some commenters stated that prospective landowners should not be required to divulge information on the price paid for a property to the environmental professional or other third party.

Final Rule

The final rule retains the requirement to consider the relationship of the purchase price to the fair market value of the property, if the property were not contaminated. The requirement is part of the statutory criteria established by Congress and has been part of the statutory provisions governing all appropriate inquiries, within the innocent landowner defense, since 1986. Today's rule does not change the previously existing provision. As did the proposed rule, today's final rule allows for this criterion to be conducted by the prospective landowner or the grantee or undertaken as part of the inquiry by an environmental professional. If an environmental professional is not qualified to consider the relationship of the purchase price to the value of the property, the prospective landowner or grantee may undertake the task or hire another third party to make the comparison of price and fair market value and consider whether any differential is due to potential environmental contamination.

If the relationship of the purchase price to the fair market value of the property, assuming the property is not contaminated, is determined by the prospective landowner or grantee, or other agent who is not under the supervision or responsible charge of the environmental professional, the final rule allows for, but does not require, the information that is collected and the determination made by or on the behalf of the prospective landowner to be provided to the environmental professional. If the information is provided to the environmental professional, he or she can then make use of such information during the conduct of the all appropriate inquiries and when rendering conclusions or opinions regarding the environmental conditions of the property. If the information is not provided to the environmental professional and the environmental professional determines that the lack of such information affects his or her ability to identify conditions indicative of releases or threatened releases of hazardous substances on, at, in, or to the property, then the environmental professional should identify the lack of information as a data gap and comment on its significance in the written report for the all appropriate inquiries investigation.

The rule does not require that a real estate appraisal be conducted to achieve compliance with this criterion. Although some commenters requested that the final rule require that a formal appraisal be conducted and we acknowledge that there may be potential value in conducting an appraisal, we determined that a formal appraisal is not necessary for the prospective landowner or grantee to make a general determination of whether the price paid for a property reflects its fair market value. In the case of many property transactions, a formal appraisal may be conducted for other purposes (*e.g.*, to establish the value of the property for the purposes of establishing the conditions of a mortgage or to provide information of relevance where a windfall lien may be filed). In cases where the results of a formal property appraisal are available, the appraisal results may serve as an excellent source of information on the fair market value of the property.

In cases where the results of a formal appraisal are not available, the determination of fair market value may be made by comparing the price paid for a particular property to prices paid for similar properties located in the same vicinity as the subject property, or by consulting a real estate expert familiar with properties in the general locality and who may be able to provide a comparability analysis. The objective is not to ascertain the exact value of the property, but to determine whether or not the purchase price paid for the property generally is reflective of its fair market value. Significant differences in the purchase price and fair market value of a property should be noted and the reasons for any differences also should be noted.

Although some commenters requested that EPA be more explicit in the final rule in requiring that the comparison of the purchase price to the fair market value of the property be conducted by the prospective landowner or grantee (and not the environmental professional), we believe that the decision of who conducts the comparison may be best left up to the judgment of the individual prospective landowner (or grantee) and environmental professional. The final rule provides in § 312.22 that the comparison of the purchase price to the fair market value of the property, if it were not contaminated, can fall outside the inquiries conducted by the environmental professional. The criteria to consider the relationship of the purchase price to the fair market value of the property, if it was not contaminated is not included as part of the requirements governing the ''results of an inquiry by an environmental professional'' (§ 312.21). Therefore, the requirement may be conducted by the prospective landowner or grantee, his or her attorney or agent, or the environmental professional. Given that a prospective landowner or grantee can conduct the comparison of the purchase price and the fair market value of the property or hire another agent other than the environmental professional to conduct this task, we conclude that commenter concerns regarding the prospective landowner (or grantee) having to divulge the price paid for a property to the environmental professional are unfounded.

W. What Are the Requirements for Commonly Known or Reasonably Ascertainable Information About the Property?

Commonly known or reasonably ascertainable information includes information about a property that generally is known to the public within the community where the property is located and can be easily sought and found from individuals familiar with the property or from easily attainable public sources of information. As mentioned above, the Brownfields Amendments to CERCLA amended the innocent landowner defense previously added to CERCLA in 1986. In addition, the Brownfields Amendments added to CERCLA the bona fide prospective purchaser and the contiguous property owner liability protections. The 1986 amendments to CERCLA established, that among other elements necessary for a defendant to successfully assert the innocent landowner defense, a defendant must take into account commonly known or reasonably ascertainable information about the property. Congress retained this criterion as part of the all appropriate inquiries requirements included in the Brownfields Amendments. Today's rule does not change the nature or intent of

this requirement as it has existed in the statute since 1986.

Proposed Rule

The proposed rule required that all appropriate inquiries include the collection and consideration of commonly known information about the potential environmental conditions at a property. The proposed rule required both the prospective landowner or grantee and the environmental professional obtain and consider commonly known or reasonably ascertainable information during the conduct of the all appropriate inquiries investigation. The proposed rule also provided a list of potential sources of such information.

Public Comments

A few commenters expressed concern that the requirement to consider commonly known or reasonably ascertainable information about a property renders the all appropriate inquiries requirements too vague and open-ended. Commenters stated that the requirement is broad and may result in the need to interview a large number of people and consult a wide variety of sources of information. One commenter expressed a preference that the federal standards include only a checklist of specific sources of information that must be consulted. A few commenters thought the list of potential sources of commonly known information included in the proposed rule was too broad.

Final Rule

The final rule retains the proposed provisions requiring that prospective landowners and environmental professionals consider commonly known or reasonably ascertainable information about a property when conducting all appropriate inquiries. This information may be ascertained from the owner or occupant of a property, members of the local community, including owners or occupants of neighboring properties to the subject property, local or state government officials, local media sources, and local libraries and historical societies. In many cases, this information may be incidental to other information collected during the inquiries, and separate or distinct efforts to collect the information may not be necessary. Information about a property, including its ownership and uses, that is commonly known or reasonably ascertainable within the community or neighborhood in which a property is located may be valuable to identifying conditions indicative of releases or threatened releases at the subject property. Such information, if not collected during the course of collecting other information necessary to complete the all appropriate inquiries investigation, may be obtained by interviewing community officials and other residents of the locality. For example, neighboring property owners and local community members may have information regarding undocumented uses of a property during periods when the property was idle or abandoned. Local community sources may be good (i.e., reasonably ascertainable) sources of commonly known information on uses of a property and activities conducted at a property, particularly in the case of abandoned properties.

The collection and use of commonly known information about a property may be done in connection with the collection of all other required information for the purposes of achieving the objectives and performance factors contained in § 312.20. Persons undertaking the all appropriate inquiries may collect commonly known or reasonably ascertainable information on the subject property from a variety of sources, including sources located in the community in which the property is located. The opinion provided by an environmental professional regarding the environmental conditions of a property and included in the all appropriate inquiries report should be based upon a balance of all information collected, including commonly known or reasonably ascertainable information about the property. The potential sources of commonly known or reasonably ascertainable information provided in the proposed rule and retained in the final rule are provided as suggestions for where such information may be found and the list provided is not meant as an exhaustive list of sources that must be consulted. Commonly known information may be collected from other sources and may be most easily collected during the conduct of other aspects of the all appropriate inquiries investigation (*e.g.*, interviews, reviews of historical sources of information, reviews of governmental records). The requirement is not meant to require exhaustive data collection efforts, as some commenters asserted. The intent of the requirement is to establish that a prospective landowner or grantee and an environmental professional conducting all appropriate inquiries on his or her behalf must make efforts to collect and consider information about a property that is commonly known within the local community or that can be reasonably ascertained.

There is some case law, related to the innocent landowner defense, that provides guidance on how a court may rule with regard to the need to consider commonly known or reasonably ascertainable information about the property. For example, in *Wickland Oil Terminals* v. *Asarco, Inc.*, 1988 WL 167247 (N.D. Cal. 1988), the court noted that Wickland was aware of potential water quality problems at the subject property due to large piles of mining slag stored at the property, even though Wickland argued that previous owners withheld such information, because the information was available from other sources consulted by Wickland prior to purchasing the property, including the Regional Water Quality Control Board and a consulting firm hired by Wickland. Such information was commonly known by local sources and therefore should have been considered by Wickland during its conduct of all appropriate inquiries.

In *Hemingway Transport Inc.* v. *Kahn*, 174 FR 148 (Bankr. D. Mass. 1994), the court ruled against an innocent landowner claim because it found ''that had [the defendants] exerted a modicum of effort they may easily have discovered information that at a minimum would have compelled them to inspect the property further * * * the [defendants] could have taken a few significant steps, literally, to minimize their liability and discover information about the property * * *'' The court noted that one action the defendants should have taken to collect available information about the property included phone calls to city officials to inquire about conditions at the property.

X. What Are the Requirements for ''The Degree of Obviousness of the Presence or Likely Presence of Contamination at the Property, and the Ability to Detect the Contamination by Appropriate Investigation?''

Proposed Rule

The proposed rule required that the inquiries conducted by a prospective landowner (or grantee) and environmental professional take into account all the information collected during the conduct of the all appropriate inquiries in considering the degree of obviousness of and ability to detect the presence of a release or threatened release of hazardous substances at, in, on, or to a property. In addition, the proposed rule required the environmental professional to provide an opinion regarding additional appropriate investigation, if any may be

necessary in his or her opinion to determine the environmental conditions of the property.

Public Comments

A few commenters asserted that the proposed requirements regarding the degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate inquiry were too open-ended. Also, a few commenters suggested that the final rule should include requirements to conduct sampling and analysis to meet the ''ability to detect contamination by appropriate investigation'' portion of the statutory criteria. However, commenters overwhelmingly agreed that the standards for all appropriate inquiries should not require sampling and analysis.

Final Rule

The final rule requires that persons conducting all appropriate inquiries consider all the information collected during the conduct of the inquiries in totality to ascertain the potential presence of a release or threatened release at the property. Persons conducting all appropriate inquiries, following the collection of all required information, must assess whether or not an obvious conclusion may be drawn that there are conditions indicative of a release or threatened release of hazardous substances (or other pollutants, contaminants, petroleum or petroleum products, and controlled substances) on, at, in, or to the property. In addition, the rule requires parties to consider whether or not the totality of information collected prior to acquiring the property indicates that the parties should be able to detect a release or threatened release on, at, in, or to the property. The final rule also retains the proposed requirement that the environmental professional include as part of the results of his or her inquiry an opinion regarding additional appropriate investigation, if any may be necessary.

We interpret the statutory criterion to require consideration of information already obtained during the conduct of all appropriate inquiries investigation and not as a requirement to collect additional information. We do not agree with commenters who asserted that the criterion is open-ended. In fact, we see this criterion as providing direction on how all of the information collected while carrying out the other criteria and regulatory requirements must be viewed comprehensively. After collecting and considering all the information required to comply with the rule's objectives and performance standards, all the information should be considered in total to determine whether or not there are indications of releases or threatened releases of hazardous substances on, at, in, or to the property. In addition, the environmental professional should provide an opinion regarding whether or not additional investigation is necessary to detect potential contamination at the site, if in his or her opinion there are conditions indicative of releases or threatened releases of hazardous substances.

The previous innocent landowner defense (added to CERCLA in 1986) required a court to consider the degree of obviousness of the presence or likely presence of contamination at a property, and the ability of the defendant (i.e., the landowner) to detect the contamination by appropriate investigation. Nothing in today's rule changes the nature or intent of this requirement as it has existed in the statute since 1986.

Case law relevant to this criterion indicates that defendants may not be able to claim an innocent landowner defense if a preponderance of evidence available to a prospective landowner prior to acquiring the property indicates that the defendant should have concluded that there is a high likelihood of contamination at the site. In some cases (e.g., *Hemingway Transport Inc.* v. *Kahn*, 174 F.R. 148 (Bankr. D. Mass. 1994), and *Foster* v. *United States*, 922 F. Supp. 642 (D.D.C. 1996), courts have ruled that if a defendant had done a bit more visual inspection or further investigation, based upon information available to the defendant prior to acquiring the property, it would have been obvious that the property was contaminated. In *Foster* v. *United States*, the court determined that the innocent landowner defense was not available based in part on the fact that the partnership presumed the site was free of contamination based upon cursory visual inspections despite evidence in the record that, at the time of the sale, the soil was visibly stained by PCB-contaminated oil. In addition, although the property was located in a run-down industrial area, the defendant did no investigation into the environmental conditions at the site prior to acquiring the property.

EPA also notes that in *U.S.* v. *Domenic Lombardi Realty, Inc.,* 290 F. Supp. 2d 198, 211 (D.R.I. 2003), the court held that the defendant did not qualify for the innocent landowner defense. The defendant could not show he had ''no reason to know'' of contamination at the property or that he had performed all appropriate inquiries in accordance with ''good commercial or customary practices.'' The court also found that the defendant had not performed even a minimal environmental assessment of the site despite having learned that the property had been used as an automobile scrapyard. The court noted the distinction between Phase I and Phase II environmental assessments and credited the testimony of the United States' expert who concluded that, under the circumstances of this case, the defendant should have conducted a Phase II assessment. *Id.* at 203–04.

With regard to the conduct of sampling and analysis, today's final rule does not require sampling and analysis as part of the all appropriate inquiries investigation. However, sampling and analysis may be valuable in determining the possible presence and extent of potential contamination at a property. In addition, the fact that the all appropriate inquiry standards do not require sampling and analysis does not prevent a court from concluding that, under the circumstances of a particular case, sampling and analysis should have been conducted to meet ''the degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation'' criterion and obtain protection from CERCLA liability. Prospective landowners should keep in mind that the conduct of all appropriate inquiries prior to acquiring a property is only one requirement that he or she must comply with to assert protection from CERCLA liability. The statute requires that persons, after acquiring a property, comply with continuing obligations to take reasonable steps to stop on-going releases at the property, prevent any threatened future releases, and prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substances (these criteria are summarized in detail in section II.D. of this preamble). In certain instances, depending upon site-specific circumstances and the totality of the information collected during the all appropriate inquiries prior to the property acquisition, it may be necessary to conduct sampling and analysis, either pre-or post-acquisition, to fully understand the conditions at a property, and fully comply with the statutory requirements for the CERCLA liability protections. In addition, sampling and analysis may help explain existing data gaps. Prospective landowners should be mindful of all the statutory requirements for obtaining the CERCLA liability protections when

considering whether or not to conduct sampling and analysis prior to or after acquiring a property. Today's final regulation does *not* require that sampling and analysis be conducted as part of the all appropriate inquiries investigation.

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735), the Agency must determine whether this regulatory action is ''significant'' and therefore subject to formal review by the Office of Management and Budget (OMB) and to the requirements of the Executive Order. The Executive Order defines ''significant regulatory action'' as one that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that today's final rule is a ''significant regulatory action'' because this rule contains novel policy issues, although it is not economically significant. As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations are documented in the docket for today's rule.

To estimate the economic effects of today's final rule, we conducted an evaluation of the potential effects of this rule on the universe of prospective landowners who may chose to comply with the provisions of today's final rule to obtain protection from CERCLA liability for potential releases and threatened releases of hazardous substances that may exist at properties they intend to purchase. The results of this analysis are included in the document titled ''Economic Impact Analysis for the Final All Appropriate Inquiries Regulation,'' which is included in the docket for today's final rule. Based upon the results of the Economic Impact Analysis (EIA), EPA has determined that this final rule will have an annual effect on the economy of less than $100 million. The annualized benefits associated with the final rule have not been monetized but are identified and summarized in the EIA for the all appropriate inquiries rule.[2]

1. Methodology

The value of any regulatory action is traditionally measured by the net change in social welfare that it generates. The EIA conducted in support of today's rule examines both costs and qualitative benefits in an effort to assess the overall net change in social welfare. The primary focus of the EIA document is on compliance costs and economic impacts. Below, EPA summarizes the analytical methodology and findings for the all appropriate inquiries rule. The information presented is derived from the EIA.

The all appropriate inquiries regulation potentially will apply to most commercial property transactions. The requirements will be applicable to any public or private party, who may potentially claim protection from CERCLA liability as an innocent landowner, a bona fide prospective purchaser, or a contiguous property owner. However, the conduct of all appropriate inquiries, also known as environmental due diligence or Phase I Environmental Site Assessment, is not new to the commercial property market. Prior to the Brownfields Amendments to CERCLA, commercial property transactions often included an assessment of the environmental conditions at properties prior to the closing of any real estate transaction whereby ownership was transferred for the purposes of confirming the conditions at the property or to establish an innocent landowner defense should environmental contamination be discovered after the property was acquired. The process most prevalently used for conducting all appropriate inquiries, or environmental site assessments, is the process developed by ASTM International (formerly known as the American Society for Testing and Materials) and entitled ''E1527, Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process.'' In addition, some properties, particularly in cases where the subject property is assumed not to be contaminated or was never used for industrial or commercial purposes, were assessed using a less rigorous process developed by ASTM International, sometimes referred to as a ''transaction screen'' and entitled ''E1528, Standard Practice for Environmental Site Assessments: Transaction Screen Process.''

Our first step in assessing the economic impacts of the rule was to establish a baseline to represent the relevant aspects to the commercial real estate market in the absence of any changes in regulations. Because under existing conditions almost all commercial property transactions are accompanied by either an environmental site assessment (ESA) conducted in accordance with ASTM E1527–2000 or a transaction screen as specified in ASTM E1528, it was assumed these practices would continue even in the absence of the all appropriate inquiries regulation. The numbers of each type of assessment were estimated on the basis of industry data for recent years, with recent growth rates in transactions assumed to continue for the 10-year period covered by the EIA. An adjustment in the relative numbers of ESAs and transaction screens was made to account for the fact that, under the rule, an ESA will provide more certain protection from liability. This adjustment was made by comparing shifts between the two procedures that occurred when the Brownfields Amendments established the ASTM E1527–2000 standard as the interim standard for all appropriate inquiries, and thus as one requirement for qualifying as an innocent landowner, bona fide prospective purchaser, or contiguous property owner.

We then considered the requirements included in the final rule and compared them to the requirements for environmental site assessments conducted under the ASTM E1527–2000 and ASTM E1528 standards.

When compared to the ASTM E1527–2000 standard (i.e., the baseline standard), today's final rule is expected to result in a reduced burden for the conduct of interviews in those cases where the subject property is abandoned; increased burden in those cases where past owners or occupants need to be interviewed; increased burden associated with documenting recorded environmental cleanup liens; increased burden for documenting the reasons for the price and fair market value of a property in those cases where the purchase price paid for the subject property is significantly below the fair

[2] The document titled ''The Economic Impact Analysis for the Final All Appropriate Inquiries Regulation'' includes (1) the EIA conducted for the proposed rulemaking and (2) the Addendum to the EIA. The cost estimates presented in the Addendum are the estimated costs of the final all appropriate inquiries regulation.

market value of the property; and increased burden for recording information about the degree of obviousness of contamination at a property.

To estimate the changes in costs resulting from the rule, we developed a costing model. This model estimates the total costs of conducting site assessments as the product of costs per assessment, numbers of assessments per year, and the number of years in the analysis. The costs per assessment, in turn, are calculated by dividing each assessment into individual labor activities, estimating the labor time associated with each, and assigning a per-hour labor cost to each activity on the basis of the labor category most appropriate to that activity. Labor times and categories are assumed to depend on the size and type of property being assessed, with the nationwide distribution of properties based on data from industry on environmental sites assessments and brownfield sites.[3] The estimates and assignments of categories are made based on the experience of professionals who have been involved in large numbers of site assessments, and who are therefore skilled in cost estimation for the relevant activities. Other costs, such as reproduction and the purchase of data, are added to the labor costs to form the estimates of total costs per assessment. These total costs, stratified by size and type of property, are then multiplied by estimated numbers of assessments of each size and type to generate our estimates of total annual costs. The model was tested by comparing its results to industry-wide estimates of average price of conducting assessments under baseline conditions, and generally found to agree. The difference between the estimated cost to comply with the final rule and the estimated cost in the baseline constitutes our estimate of the incremental regulatory costs.

The EIA provides a qualitative assessment of the benefits of the all appropriate inquiries rule. The benefits discussed are those that may be attributed to an increased level of certainty with regard to CERCLA liability provided to prospective purchasers of potentially contaminated properties, including brownfields, who comply with the provisions of the rule and the other statutory provisions associated with the liability protections. The basic premise for associating certain benefits to the rule is the expectation that the level of certainty provided by the liability protections may result in increased brownfields property transactions. However, it is difficult to predict how many additional transactions may occur that involve brownfields properties in direct response to the increased certainty of the liability protections. It also is difficult to obtain data on changes in behaviors and practices of prospective landowners in response to the liability protections. Therefore, EPA made no attempt to quantify potential benefits or compare the benefits to estimated incremental costs.

The Agency believes that increasing property transactions involving brownfields and other contaminated and potentially contaminated properties and improving information about environmental conditions at these properties may provide additional indirect benefits such as increased numbers of cleanups, reduced use of greenfields, potential increases in property values, and potential increases in quality of life measures (*e.g.*, decreases in urban blight, reductions in traffic, congestion, and reduced pollution due to mobile source emissions). However, as stated above, the benefits of the rule are considered only qualitatively, due to the difficulty of predicting how many additional brownfields and contaminated property transactions may occur in response to the increased certainty of liability protections provided by the rule, as well as the difficulty in getting data on changes in behaviors and practices in response to the availability of the liability protections. EPA is confident that the new liability protections afforded to prospective landowners, if they comply with the all appropriate inquiries provisions, will result in increased benefits. EPA is not able to quantify, with any significant level of confidence, the exact proportion of the benefits attributed only to the availability of the liability protections and the all appropriate inquiries regulations. For these reasons, the costs and benefits could not be directly compared.

2. Summary of Regulatory Costs in Proposed Rule

For a given property, the costs of compliance with the all appropriate inquiries rule relative to the baseline depend on whether that property would have been assessed, in absence of the all appropriate inquiries regulation, with an ASTM E1527–2000 assessment process or with the simpler ASTM E1528 transaction screen. EPA estimated the average incremental cost of the proposed rule relative to conducting an ASTM E1527–2000 to be between $41 and $47. For the small percentage of cases for which a transaction screen would have been preferred to the ASTM E1527–2000 in the baseline, but which would, as a result of the proposed rule, require an assessment in compliance with the all appropriate inquiries rule, the average incremental cost was estimated to be between $1,448 and $1,454. We estimated that approximately 97 percent of property transactions will bear only the incremental cost of the rule relative to the ASTM E1527–2000 process. Therefore, the weighted average incremental cost of the proposed rule, per transaction, was estimated to be fairly low, between $84 and $89.

3. Public Comments on EIA for Proposed Rule

EPA received a number of public comments on the EIA conducted to assess the potential costs and impacts of the proposed rule. We summarized the public comments received related to the cost and economic impacts in the document titled ''Addendum to Economic Impact Analysis for the Final All Appropriate Inquiries Regulation'' (Addendum to the EIA). This document is included in the docket for today's final rule. The Addendum to the EIA also summarizes EPA's responses to the comments received that addressed the estimated costs and economic impacts.

Many commenters generally agreed with EPA's conclusion that the average incremental cost increase per transaction associated with the requirements of the proposed rule would be minimal. Some commenters mentioned that the EIA conducted for the proposed rule underestimated the incremental costs associated with the proposed rule. However, only a few commenters provided an explanation as to why they thought our cost estimates were low or provided information regarding which particular activities would result in an incremental increase in the activities and costs associated with conducting an environmental site assessment, if conducted in compliance with the requirements of the proposed rule. Most commenters did not provide specific reasons for their claims of cost increases over the ASTM E1527–2000 standard. A few commenters suggested that the EIA for the proposed rule underestimated the level of effort necessary for locating and interviewing past owners or occupants, with one commenter providing an estimated level of effort of one to three hours for this task.

[3] The distribution of abandoned properties and properties with known owners, modeled as a range, is based on an estimate of vacant lands in urban areas and an estimate of abandoned Superfund sites.

4. Estimate of Costs Associated With the Final Rule

EPA made one revision to the analysis of cost impacts associated with the requirements of the proposed and final rule in response to specific issues raised by commenters. EPA agrees with the commenters who asserted that locating past owners or occupants of a property may be more time consuming than locating the current owners or occupants, as was assumed in the analysis of costs conducted for the proposed rule. Locating past owners or occupants could require as little as one 5-minute phone call (e.g., if the current owner has the contact information for the past owner) or it could require multiple phone calls that could take in excess of one hour. For the purpose of estimating the cost under the final rule, EPA estimates the incremental burden for locating past owners or occupants to be, on average, 0.5 hours per interview regardless of the property type or size. EPA did not account for this incremental burden in our analysis of the costs associated with the proposed rule. EPA also recognizes that in some cases the environmental professional will need to complete the full interview with the current owner before determining that it is necessary to interview a past owner. In other words, the environmental professional may need to complete the interview with the current owner, and then perform a more focused interview of a past owner to fill data gaps. EPA estimates that the incremental burden for interviewing past owners or occupants will be 0.5 hours for undeveloped and residential properties, one hour for commercial and industrial properties (of all sizes except large industrial), and 1.5 hours for large industrial properties. Therefore, EPA estimates that the total incremental level of effort for locating and interviewing past property owners or occupants will range from one hour to two hours depending on the property type or size.

The additional incremental hour burden, however, will not be incurred in the case of every site assessment. EPA expects that the interview with past owners or occupants will be conducted only for properties with a higher than average owner or occupant turnover rate. To derive the number of potentially affected properties, we assume that the environmental professional will interview only the current property owner if the owner was in the possession of the subject property for more than two years. We assume that after two years of owning a property, the current property owner should have a reasonably good knowledge of its condition. EPA estimates that 19 percent of Phase I ESAs conducted in a given year are conducted on properties that were sold at least once in the previous two years (for a detailed explanation on the derivation of this estimate, see the Addendum to the EIA). Using the assumption that 15 percent of all properties are abandoned properties (see Section 5.6.5.2 of EIA) which would not be affected by the requirement to interview past owners or occupants, we revised our original cost estimate to account for non-abandoned properties that were sold over the past two years. Therefore, for the purpose of our revised cost analysis, we estimate that 16 percent of properties will require an additional interview with past owners or occupants.

Except for the increase in the level of effort for the interview task for non-abandoned properties, all other parameters used in modeling our cost estimates are the same as presented in the EIA conducted for the proposed rule. To derive the incremental average cost per transaction and the total annual cost of the final rule, we employed the methodology explained in detailed in Chapters 7 and 8 of the EIA conducted for the proposed rule. Based on our analysis, the cost of a Phase I ESA under the final regulation will increase, on average, between $52 and $58. The estimated average cost for a Phase I ESA thus will range between $2,185 and $2,190.[4]

Using our revised incremental cost estimate for conducting interviews of past owners or occupants, we revised our estimated total annual cost of the final rule and our incremental total annual cost estimate. Our revised total annual cost estimate for all activities included in the all appropriate inquiries investigations conducted under the final rule is between $693.5 and $695.3 million (calculated using a discount rate of three percent). Our revised estimate of the incremental total annual cost of the final rule is between $29.7 million and $31.4 million. A more detailed explanation of our revised cost estimates, including an additional sensitivity analysis performed in response to the public comments, is included in the document titled ''Addendum to the Economic Impact Analysis for the Final All Appropriate Inquiries Regulation.'' This document is in the public docket for today's final rule.

B. Paperwork Reduction Act

The information collection requirements contained in this final rule were submitted for approval to the Office of Management and Budget under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The information collection requirements are not enforceable until OMB approves them. The Information Collection Request (ICR) document prepared by EPA has been assigned EPA ICR Number 2144.02.

Under the PRA, EPA is required to estimate the notification, reporting and recordkeeping costs and burdens associated with the requirements specified in today's rule. Today's rule will require persons wanting to assert one of the liability protections under CERCLA to conduct some activities that go beyond current customary and usual business practices (i.e., beyond ASTM E1527–2000) and therefore will impose an information collection burden under the provisions of the Paperwork Reduction Act. The information collection activities are associated with the activities mandated in section 101 (35)(B) of CERCLA for those persons wanting to claim protection from CERCLA liability. None of the information collection burdens associated with the provisions of today's rule include requirements to submit the collected information to EPA or any other government agency. Information collected by persons affected by today's rule may be useful to such persons if their potential liability under CERCLA for the release or threatened release of a hazardous substance is challenged in a court.

The activities associated with today's rule that go beyond current customary and usual business practices include interviews with neighboring property owners and/or occupants in those cases where the subject property is abandoned, documentation of all environmental cleanup liens in the Phase I Environmental Site Assessment report, discussion of the relationship of purchase price to value of the property in the report, and consideration and discussion of whether additional environmental investigation is warranted. Paperwork burdens are estimated to be 546,179 hours annually, with a total cost of $29,583,206 annually. The estimated average burden hours per response is estimated to be approximately one hour (or 25 hours per response, assuming a transition from a transaction screen). The estimated average cost burden per response is estimated to be either $67 or $1,479,

[4] We assumed that the environmental professionals will need to complete the full interview with the current owner before conducting an interview with the past owners or occupants. To the extent that this may not always be the case, the average incremental cost (and by extension, the average cost for an AAI Phase I ESA) is overestimated.

depending on whether, under baseline conditions, an ASTM E1527–2000 process or a transaction screen (ASTM E1528) would have been used.

Under the Paperwork Reduction Act, ''burden'' means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9. This ICR is approved by OMB, and the Agency will publish a technical amendment to 40 CFR part 9 in the **Federal Register** to display the OMB control number for the approved information collection requirements contained in this final rule.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 *et. seq.,* generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For the purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business that is defined by the Small Business Administration by category of business using the North American Industrial Classification System (NAICS) and codified at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

Since all non-residential property transactions could be affected by today's rule, if it is promulgated, large numbers of small entities could be affected to some degree. However, we estimate that the effects, on the whole, will not be significant for small entities. We estimate that, for the majority of small entities, the average incremental cost of today's rule relative to conducting an ASTM E1527–2000 Phase I Environmental Site Assessment will be between $52 and $58. When we annualize the incremental cost of $58 per property transaction over ten years at a seven percent discount rate, we estimate that the average annual cost increase per establishment per property transaction will be $8. Thus, the cost impact to small entities is estimated to not be significant. A more detailed summary of our analysis of the potential impacts of today's rule to small entities is included in ''Economic Impacts Analysis of the Final All Appropriate Inquiries Regulation.'' This document is included in the docket for today's rule.

After considering the economic impacts of today's final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. We estimate that, on average, 266,000 small entities may purchase commercial real estate in any given year and therefore could potentially be impacted by today's final rule. Though large numbers of small entities could be affected to some degree, we estimated that the effects, on the whole, would not be significant for small entities. We estimate that, for the majority of small entities, the average incremental cost of today's rule relative to conducting an ASTM E1527–2000 will be between $52 and $58. For the small percentage of cases for which a transaction screen would have been preferred to the ASTM E1527–2000 in the baseline, but which now will require an assessment in compliance with the rule, the average incremental cost of conducting an environmental site assessment will be between $1,459 and $1,465. When we annualize the incremental cost per property transaction over ten years at a seven percent discount rate, we estimate that for the majority of small entities the average annual cost increase per establishment per property transaction will be approximately $8. For the small percentage of entities transitioning from transaction screens to the all appropriate inquiries requirements of the final rule, the average annual cost increase per establishment per property transaction will be $209.[5]

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation of why that alternative was not adopted.

Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA, a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials to have meaningful and timely input in the development of regulatory proposals with significant federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Today's rule contains no federal mandates (under the regulatory provisions of Title II of the UMRA) for

[5] For a very small percentage of entities transitioning from transaction screens to the all appropriate inquiries requirements, the maximum increase per establishment per property transaction is estimated to be approximately $2,845. When we annualize this incremental cost per property transaction over ten years at a seven percent discount rate, we estimate that the maximum annual cost increase per establishment per property transaction will be $405. We estimate that approximately one fifth of one percent of the properties transitioning from a transaction screen to a Phase I ESA will have an impact of this magnitude each year.

state, local, or tribal governments or the private sector. The rule imposes no enforceable duty on any state, local, or tribal governments. EPA also determined that today's rule contains no regulatory requirements that might significantly or uniquely affect small governments. In addition, as discussed above, the private sector is not expected to incur costs of $100 million or more as a result of today's rule. Therefore, today's rule is not subject to the requirements of Sections 202 and 205 of UMRA.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.''

Today's rule does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. No state and local government bodies will incur compliance costs as a result of today's rulemaking. Therefore, Executive Order 13132 does not apply to this rule.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' Today's rule does not have tribal implications, as specified in Executive Order 13175. Today's rule does not significantly or uniquely affect the communities of Indian tribal governments, nor would it impose direct compliance costs on them. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045: Protection of Children From Environmental Risks and Safety Risks

Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children; and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

Today's rule is not subject to the Executive Order because it is not economically significant as defined in Executive Order 12866.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution or Use

Today's final rule is not a ''significant energy action'' as defined in Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not likely to have a significantly adverse effect on the supply, distribution, or use of energy. Further, we have concluded that this rule is not likely to have any adverse energy effects.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, section 12(d) (15 U.S.C. 272 note), directs EPA to use voluntary consensus standards in its regulatory activities, unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. Today's rule involves technical standards. Therefore, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272) apply.

Today's final rule is based upon a proposed rule that was developed with the assistance of a regulatory negotiation committee comprised of various affected stakeholder groups and modified slightly, based upon public comments received in response to the proposed rule. When developing the proposed rule, EPA considered using the existing standard developed by ASTM International as the federal standard for all appropriate inquiries. This standard is known as the ASTM E1527–2000 standard (''Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process''). However, when we proposed the federal standards for all appropriate inquiries, EPA determined that the ASTM E1527–2000 standard is inconsistent with applicable law.

In CERCLA section 101(35)(B), Congress included ten specific criteria to be used in promulgating the all appropriate inquiries rule. The 2000 version of the ASTM Phase I Environmental Site Assessment Process does not address all of the required criteria. For example, the ASTM International standard does not provide for interviews of past owners, operators, and occupants of a facility. The statute, however, states that the federally promulgated standard ''shall include * * * interviews with past and present owners, operators, and occupants of the facility for the purpose of gathering information regarding the potential for contamination at the facility.'' CERCLA section 101(35)(B)(iii)(II). In addition, as outlined in the preamble to the proposed rule (69 FR 52541) the ASTM E1527–2000 standard also does not meet other statutory requirements. As a result, use of the ASTM E1527–2000 standard would be inconsistent with applicable law.

In today's final rule, EPA is referencing the updated standards and practices developed by ASTM International and known as Standard E1527–05 (entitled ''Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process''). The Agency has determined that this voluntary consensus standard is consistent with today's final rule and is compliant with the statutory criteria for all appropriate inquiries. Persons conducting all appropriate inquiries may use the procedures included in the ASTM E1527–05 standard to comply with today's final rule.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898, ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (February 11, 1994), is designed to address the environmental and human health conditions of minority and low-income populations. EPA is committed to addressing environmental justice concerns and has assumed a leadership role in environmental justice initiatives to enhance environmental quality for all citizens of the United States. The Agency's goals are to ensure that no segment of the population, regardless of race, color, national origin, income, or net worth bears disproportionately high and adverse human health and environmental impacts as a result of EPA's policies, programs, and activities. Our goal is to ensure that all citizens live in clean and sustainable communities. In response to Executive Order 12898, and to concerns voiced by many groups outside the Agency, EPA's Office of Solid Waste and Emergency Response (OSWER) formed an Environmental Justice Task Force to analyze the array of environmental justice issues specific to waste programs and to develop an overall strategy to identify and address these issues (OSWER Directive No. 9200.3–17). EPA's brownfields program has a particular emphasis on addressing concerns specific to environmental justices communities. Many of the communities and neighborhoods that are most significantly impacted by brownfields are environmental justice communities. EPA's brownfields program targets such communities for assessment, cleanup, and revitalization. The brownfields program has a long history of working with environmental justice communities and advocates through our technical assistance and grant programs. In addition to the monies awarded to such communities in the form of assessment and cleanup grants, the brownfields program also works with environmental justice communities through our job training grants program. The job training grants provide money to government entities to facilitate the training of persons living in or near brownfields communities to attain skills for conducting site assessments and cleanups.

Given that environmental justice communities are significantly impacted by brownfields, and the federal standards for all appropriate inquiries may play a primary role in encouraging the assessment and cleanup of brownfields sites, EPA made it a priority to obtain input from representatives of environmental justice interest groups during the development of today's rulemaking. The Negotiated Rulemaking Committee tasked with developing the all appropriate inquiries proposed rule included three representatives from environmental justice advocacy groups. Each representative played a significant role in the negotiations and in the development of the proposed rule. Today's final rule includes no significant changes to the proposed rule and in particular, includes no changes that will significantly or disproportionately impact environmental justice communities.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective November 1, 2006.

List of Subjects in 40 CFR Part 312

Environmental protection, Administrative practice and procedure, Hazardous substances, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: October 21, 2005.

Stephen L. Johnson,

Administrator.

■ For reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended by revising part 312 as follows:

PART 312—INNOCENT LANDOWNERS, STANDARDS FOR CONDUCTING ALL APPROPRIATE INQUIRIES

Subpart A—Introduction

Sec.
312.1 Purpose, applicability, scope, and disclosure obligations.

Subpart B—Definitions and References

312.10 Definitions.
312.11 References.

Subpart C—Standards and Practices

312.20 All appropriate inquiries.
312.21 Results of inquiry by an environmental professional.
312.22 Additional inquiries.
312.23 Interviews with past and present owners, operators, and occupants.
312.24 Reviews of historical sources of information.
312.25 Searches for recorded environmental cleanup liens.
312.26 Reviews of federal, state, tribal and local government records.
312.27 Visual inspections of the facility and of adjoining properties.
312.28 Specialized knowledge or experience on the part of the defendant.
312.29 The relationship of the purchase price to the value of the property, if the property was not contaminated.
312.30 Commonly known or reasonably ascertainable information about the property.
312.31 The degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation.

Authority: Section 101(35)(B) of CERCLA, as amended, 42 U.S.C. 9601(35)(B).

PART 312—INNOCENT LANDOWNERS, STANDARDS FOR CONDUCTING ALL APPROPRIATE INQUIRIES

Subpart A—Introduction

§ 312.1 Purpose, applicability, scope and disclosure obligations.

(a) *Purpose.* The purpose of this section is to provide standards and practices for ''all appropriate inquiries'' for the purposes of CERCLA sections 101(35)(B)(i)(I) and 101(35)(B)(ii) and (iii).

(b) *Applicability.* The requirements of this part are applicable to:

(1) Persons seeking to establish:

(i) The innocent landowner defense pursuant to CERCLA sections 101(35) and 107(b)(3);

(ii) The bona fide prospective purchaser liability protection pursuant to CERCLA sections 101(40) and 107(r);

(iii) The contiguous property owner liability protection pursuant to CERCLA section 107(q); and

(2) persons conducting site characterization and assessments with the use of a grant awarded under CERCLA section 104(k)(2)(B).

(c) *Scope.* (1) Persons seeking to establish one of the liability protections under paragraph (b)(1) of this section must conduct investigations as required in this part, including an inquiry by an environmental professional, as required under § 312.21, and the additional inquiries defined in § 312.22, to identify

conditions indicative of releases or threatened releases, as defined in CERCLA section 101(22), of hazardous substances, as defined in CERCLA section 101(14).

(2) Persons identified in paragraph (b)(2) of this section must conduct investigations required in this part, including an inquiry by an environmental professional, as required under § 312.21, and the additional inquiries defined in § 312.22, to identify conditions indicative of releases and threatened releases of hazardous substances, as defined in CERCLA section 101(22), and as applicable per the terms and conditions of the grant or cooperative agreement, releases and threatened releases of:

(i) Pollutants and contaminants, as defined in CERCLA section 101(33);

(ii) Petroleum or petroleum products excluded from the definition of ''hazardous substance'' as defined in CERCLA section 101(14); and

(iii) Controlled substances, as defined in 21 U.S.C. 802.

(d) *Disclosure obligations.* None of the requirements of this part limits or expands disclosure obligations under any federal, state, tribal, or local law, including the requirements under CERCLA sections 101(40)(c) and 107(q)(1)(A)(vii) requiring persons, including environmental professionals, to provide all legally required notices with respect to the discovery of releases of hazardous substances. It is the obligation of each person, including environmental professionals, conducting the inquiry to determine his or her respective disclosure obligations under federal, state, tribal, and local law and to comply with such disclosure requirements.

Subpart B—Definitions and References

§ 312.10 Definitions.

(a) Terms used in this part and not defined below, but defined in either CERCLA or 40 CFR part 300 (the National Oil and Hazardous Substances Pollution Contingency Plan) shall have the definitions provided in CERCLA or 40 CFR part 300.

(b) When used in this part, the following terms have the meanings provided as follows:

Abandoned property means: property that can be presumed to be deserted, or an intent to relinquish possession or control can be inferred from the general disrepair or lack of activity thereon such that a reasonable person could believe that there was an intent on the part of the current owner to surrender rights to the property.

Adjoining properties means: any real property or properties the border of which is (are) shared in part or in whole with that of the subject property, or that would be shared in part or in whole with that of the subject property but for a street, road, or other public thoroughfare separating the properties.

Data gap means: a lack of or inability to obtain information required by the standards and practices listed in subpart C of this part despite good faith efforts by the environmental professional or persons identified under § 312.1(b), as appropriate, to gather such information pursuant to §§ 312.20(e)(1) and 312.20(e)(2).

Date of acquisition or purchase date means: the date on which a person acquires title to the property.

Environmental Professional means:

(1) a person who possesses sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding conditions indicative of releases or threatened releases (see § 312.1(c)) on, at, in, or to a property, sufficient to meet the objectives and performance factors in § 312.20(e) and (f).

(2) Such a person must:

(i) Hold a current Professional Engineer's or Professional Geologist's license or registration from a state, tribe, or U.S. territory (or the Commonwealth of Puerto Rico) and have the equivalent of three (3) years of full-time relevant experience; or

(ii) Be licensed or certified by the federal government, a state, tribe, or U.S. territory (or the Commonwealth of Puerto Rico) to perform environmental inquiries as defined in § 312.21 and have the equivalent of three (3) years of full-time relevant experience; or

(iii) Have a Baccalaureate or higher degree from an accredited institution of higher education in a discipline of engineering or science and the equivalent of five (5) years of full-time relevant experience; or

(iv) Have the equivalent of ten (10) years of full-time relevant experience.

(3) An environmental professional should remain current in his or her field through participation in continuing education or other activities.

(4) The definition of environmental professional provided above does not preempt state professional licensing or registration requirements such as those for a professional geologist, engineer, or site remediation professional. Before commencing work, a person should determine the applicability of state professional licensing or registration laws to the activities to be undertaken as part of the inquiry identified in § 312.21(b).

(5) A person who does not qualify as an environmental professional under the foregoing definition may assist in the conduct of all appropriate inquiries in accordance with this part if such person is under the supervision or responsible charge of a person meeting the definition of an environmental professional provided above when conducting such activities.

Relevant experience, as used in the definition of environmental professional in this section, means: participation in the performance of all appropriate inquiries investigations, environmental site assessments, or other site investigations that may include environmental analyses, investigations, and remediation which involve the understanding of surface and subsurface environmental conditions and the processes used to evaluate these conditions and for which professional judgment was used to develop opinions regarding conditions indicative of releases or threatened releases (see § 312.1(c)) to the subject property.

Good faith means: the absence of any intention to seek an unfair advantage or to defraud another party; an honest and sincere intention to fulfill one's obligations in the conduct or transaction concerned.

Institutional controls means: non-engineered instruments, such as administrative and/or legal controls, that help to minimize the potential for human exposure to contamination and/or protect the integrity of a remedy.

§ 312.11 References.

The following industry standards may be used to comply with the requirements set forth in §§ 312.23 through 312.31:

(a) The procedures of ASTM International Standard E1527–05 entitled ''Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process.''

(b) [Reserved]

Subpart C—Standards and Practices

§ 312.20 All appropriate inquiries.

(a) ''All appropriate inquiries'' pursuant to CERCLA section 101(35)(B) must be conducted within one year prior to the date of acquisition of the subject property and must include:

(1) An inquiry by an environmental professional (as defined in § 312.10), as provided in § 312.21;

(2) The collection of information pursuant to § 312.22 by persons identified under § 312.1(b); and

(3) Searches for recorded environmental cleanup liens, as required in § 312.25.

(b) Notwithstanding paragraph (a) of this section, the following components of the all appropriate inquiries must be conducted or updated within 180 days of and prior to the date of acquisition of the subject property:

(1) Interviews with past and present owners, operators, and occupants (see § 312.23);

(2) Searches for recorded environmental cleanup liens (see § 312.25);

(3) Reviews of federal, tribal, state, and local government records (see § 312.26);

(4) Visual inspections of the facility and of adjoining properties (see § 312.27); and

(5) The declaration by the environmental professional (see § 312.21(d)).

(c) All appropriate inquiries may include the results of and information contained in an inquiry previously conducted by, or on the behalf of, persons identified under § 312.1(b) and who are responsible for the inquiries for the subject property, provided:

(1) Such information was collected during the conduct of all appropriate inquiries in compliance with the requirements of CERCLA sections 101(35)(B), 101(40)(B) and 107(q)(A)(viii);

(2) Such information was collected or updated within one year prior to the date of acquisition of the subject property;

(3) Notwithstanding paragraph (b)(2) of this section, the following components of the inquiries were conducted or updated within 180 days of and prior to the date of acquisition of the subject property:

(i) Interviews with past and present owners, operators, and occupants (see § 312.23);

(ii) Searches for recorded environmental cleanup liens (see § 312.25);

(iii) Reviews of federal, tribal, state, and local government records (see § 312.26);

(iv) Visual inspections of the facility and of adjoining properties (see § 312.27); and

(v) The declaration by the environmental professional (see § 312.21(d)).

(4) Previously collected information is updated to include relevant changes in the conditions of the property and specialized knowledge, as outlined in § 312.28, of the persons conducting the all appropriate inquiries for the subject property, including persons identified in § 312.1(b) and the environmental professional, defined in § 312.10.

(d) All appropriate inquiries can include the results of report(s) specified in § 312.21(c), that have been prepared by or for other persons, provided that:

(1) The report(s) meets the objectives and performance factors of this regulation, as specified in paragraphs (e) and (f) of this section; and

(2) The person specified in § 312.1(b) and seeking to use the previously collected information reviews the information and conducts the additional inquiries pursuant to §§ 312.28, 312.29 and 312.30 and the all appropriate inquiries are updated in paragraph (b)(3) of this section, as necessary.

(e) *Objectives.* The standards and practices set forth in this part for All Appropriate Inquiries are intended to result in the identification of conditions indicative of releases and threatened releases of hazardous substances on, at, in, or to the subject property.

(1) In performing the all appropriate inquiries, as defined in this section and provided in the standards and practices set forth this subpart, the persons identified under § 312.1(b)(1) and the environmental professional, as defined in § 312.10, must seek to identify through the conduct of the standards and practices set forth in this subpart, the following types of information about the subject property:

(i) Current and past property uses and occupancies;

(ii) Current and past uses of hazardous substances;

(iii) Waste management and disposal activities that could have caused releases or threatened releases of hazardous substances;

(iv) Current and past corrective actions and response activities undertaken to address past and on-going releases of hazardous substances;

(v) Engineering controls;

(vi) Institutional controls; and

(vii) Properties adjoining or located nearby the subject property that have environmental conditions that could have resulted in conditions indicative of releases or threatened releases of hazardous substances to the subject property.

(2) In the case of persons identified in § 312.1(b)(2), the standards and practices for All Appropriate Inquiries set forth in this part are intended to result in the identification of conditions indicative of releases and threatened releases of hazardous substances, pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802) on, at, in, or to the subject property. In performing the all appropriate inquiries, as defined in this section and provided in the standards and practices set forth in this subpart, the persons identified under § 312.1(b) and the environmental professional, as defined in § 312.10, must seek to identify through the conduct of the standards and practices set forth in this subpart, the following types of information about the subject property:

(i) Current and past property uses and occupancies;

(ii) Current and past uses of hazardous substances, pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802);

(iii) Waste management and disposal activities;

(iv) Current and past corrective actions and response activities undertaken to address past and on-going releases of hazardous substances pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802);

(v) Engineering controls;

(vi) Institutional controls; and

(vii) Properties adjoining or located nearby the subject property that have environmental conditions that could have resulted in conditions indicative of releases or threatened releases of hazardous substances, pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802) to the subject property.

(f) *Performance factors.* In performing each of the standards and practices set forth in this subpart and to meet the objectives stated in paragraph (e) of this section, the persons identified under § 312.1(b) or the environmental professional as defined in § 312.10 (as appropriate to the particular standard and practice) must seek to:

(1) Gather the information that is required for each standard and practice listed in this subpart that is publicly available, obtainable from its source within reasonable time and cost constraints, and which can practicably be reviewed; and

(2) Review and evaluate the thoroughness and reliability of the information gathered in complying with each standard and practice listed in this subpart taking into account information gathered in the course of complying with the other standards and practices of this subpart.

(g) To the extent there are data gaps (as defined in § 312.10) in the information developed as part of the inquiries in paragraph (e) of this section that affect the ability of persons (including the environmental professional) conducting the all

appropriate inquiries to identify conditions indicative of releases or threatened releases in each area of inquiry under each standard and practice such persons should identify such data gaps, identify the sources of information consulted to address such data gaps, and comment upon the significance of such data gaps with regard to the ability to identify conditions indicative of releases or threatened releases of hazardous substances [and in the case of persons identified in § 312.1(b)(2), hazardous substances, pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802)] on, at, in, or to the subject property. Sampling and analysis may be conducted to develop information to address data gaps.

(h) Releases and threatened releases identified as part of the all appropriate inquiries should be noted in the report of the inquiries. These standards and practices however are not intended to require the identification in the written report prepared pursuant to § 312.21(c) of quantities or amounts, either individually or in the aggregate, of hazardous substances pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802) that because of said quantities and amounts, generally would not pose a threat to human health or the environment.

§ 312.21 Results of inquiry by an environmental professional.

(a) Persons identified under § 312.1(b) must undertake an inquiry, as defined in paragraph (b) of this section, by an environmental professional, or conducted under the supervision or responsible charge of, an environmental professional, as defined in § 312.10. Such inquiry is hereafter referred to as ''the inquiry of the environmental professional.''

(b) The inquiry of the environmental professional must include the requirements set forth in §§ 312.23 (interviews with past and present owners * * *), 312.24 (reviews of historical sources * * *), 312.26 (reviews of government records), 312.27 (visual inspections), 312.30 (commonly known or reasonably ascertainable information), and 312.31 (degree of obviousness of the presence * * * and the ability to detect the contamination * * *). In addition, the inquiry should take into account information provided to the environmental professional as a result of the additional inquiries conducted by persons identified in § 312.1(b) and in accordance with the requirements of § 312.22.

(c) The results of the inquiry by an environmental professional must be documented in a written report that, at a minimum, includes the following:

(1) An opinion as to whether the inquiry has identified conditions indicative of releases or threatened releases of hazardous substances [and in the case of inquiries conducted for persons identified in § 312.1(b)(2) conditions indicative of releases and threatened releases of pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802)] on, at, in, or to the subject property;

(2) An identification of data gaps (as defined in § 312.10) in the information developed as part of the inquiry that affect the ability of the environmental professional to identify conditions indicative of releases or threatened releases of hazardous substances [and in the case of inquiries conducted for persons identified in § 312.1(b)(2) conditions indicative of releases and threatened releases of pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802)] on, at, in, or to the subject property and comments regarding the significance of such data gaps on the environmental professional's ability to provide an opinion as to whether the inquiry has identified conditions indicative of releases or threatened releases on, at, in, or to the subject property. If there are data gaps such that the environmental professional cannot reach an opinion regarding the identification of conditions indicative of releases and threatened releases, such data gaps must be noted in the environmental professional's opinion in paragraph (c)(1) of this section; and

(3) The qualifications of the environmental professional(s).

(d) The environmental professional must place the following statements in the written document identified in paragraph (c) of this section and sign the document:

> ''[I, We] declare that, to the best of [my, our] professional knowledge and belief, [I, we] meet the definition of Environmental Professional as defined in § 312.10 of this part.''
>
> ''[I, We] have the specific qualifications based on education, training, and experience to assess a property of the nature, history, and setting of the subject property. [I, We] have developed and performed the all appropriate inquiries in conformance with the standards and practices set forth in 40 CFR Part 312.''

§ 312.22 Additional inquiries.

(a) Persons identified under § 312.1(b) must conduct the inquiries listed in paragraphs (a)(1) through (a)(4) below and may provide the information associated with such inquiries to the environmental professional responsible for conducting the activities listed in § 312.21:

(1) As required by § 312.25 and if not otherwise obtained by the environmental professional, environmental cleanup liens against the subject property that are filed or recorded under federal, tribal, state, or local law;

(2) As required by § 312.28, specialized knowledge or experience of the person identified in § 312.1(b);

(3) As required by § 312.29, the relationship of the purchase price to the fair market value of the subject property, if the property was not contaminated; and

(4) As required by § 312.30, and if not otherwise obtained by the environmental professional, commonly known or reasonably ascertainable information about the subject property.

§ 312.23 Interviews with past and present owners, operators, and occupants.

(a) Interviews with owners, operators, and occupants of the subject property must be conducted for the purposes of achieving the objectives and performance factors of § 312.20(e) and (f).

(b) The inquiry of the environmental professional must include interviewing the current owner and occupant of the subject property. If the property has multiple occupants, the inquiry of the environmental professional shall include interviewing major occupants, as well as those occupants likely to use, store, treat, handle or dispose of hazardous substances [and in the case of inquiries conducted for persons identified in § 312.1(b)(2) pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802)], or those who have likely done so in the past.

(c) The inquiry of the environmental professional also must include, to the extent necessary to achieve the objectives and performance factors of § 312.20(e) and (f), interviewing one or more of the following persons:

(1) Current and past facility managers with relevant knowledge of uses and physical characteristics of the property;

(2) Past owners, occupants, or operators of the subject property; or

(3) Employees of current and past occupants of the subject property.

(d) In the case of inquiries conducted at ''abandoned properties,'' as defined in § 312.10, where there is evidence of potential unauthorized uses of the subject property or evidence of

uncontrolled access to the subject property, the environmental professional's inquiry must include interviewing one or more (as necessary) owners or occupants of neighboring or nearby properties from which it appears possible to have observed uses of, or releases at, such abandoned properties for the purpose of gathering information necessary to achieve the objectives and performance factors of § 312.20(e) and (f).

§ 312.24 Reviews of historical sources of information.

(a) Historical documents and records must be reviewed for the purposes of achieving the objectives and performance factors of § 312.20(e) and (f). Historical documents and records may include, but are not limited to, aerial photographs, fire insurance maps, building department records, chain of title documents, and land use records.

(b) Historical documents and records reviewed must cover a period of time as far back in the history of the subject property as it can be shown that the property contained structures or from the time the property was first used for residential, agricultural, commercial, industrial, or governmental purposes. For the purpose of achieving the objectives and performance factors of § 312.20(e) and (f), the environmental professional may exercise professional judgment in context of the facts available at the time of the inquiry as to how far back in time it is necessary to search historical records.

§ 312.25 Searches for recorded environmental cleanup liens.

(a) All appropriate inquiries must include a search for the existence of environmental cleanup liens against the subject property that are filed or recorded under federal, tribal, state, or local law.

(b) All information collected regarding the existence of such environmental cleanup liens associated with the subject property by persons to whom this part is applicable per § 312.1(b) and not by an environmental professional, may be provided to the environmental professional or retained by the applicable party.

§ 312.26 Reviews of Federal, State, Tribal, and local government records.

(a) Federal, tribal, state, and local government records or data bases of government records of the subject property and adjoining properties must be reviewed for the purposes of achieving the objectives and performance factors of § 312.20(e) and (f).

(b) With regard to the subject property, the review of federal, tribal, and state government records or data bases of such government records and local government records and data bases of such records should include:

(1) Records of reported releases or threatened releases, including site investigation reports for the subject property;

(2) Records of activities, conditions, or incidents likely to cause or contribute to releases or threatened releases as defined in § 312.1(c), including landfill and other disposal unit location records and permits, storage tank records and permits, hazardous waste handler and generator records and permits, federal, tribal and state government listings of sites identified as priority cleanup sites, and spill reporting records;

(3) CERCLIS records;

(4) Public health records;

(5) Emergency Response Notification System records;

(6) Registries or publicly available lists of engineering controls; and

(7) Registries or publicly available lists of institutional controls, including environmental land use restrictions, applicable to the subject property.

(c) With regard to nearby or adjoining properties, the review of federal, tribal, state, and local government records or databases of government records should include the identification of the following:

(1) Properties for which there are government records of reported releases or threatened releases. Such records or databases containing such records and the associated distances from the subject property for which such information should be searched include the following:

(i) Records of NPL sites or tribal- and state-equivalent sites (one mile);

(ii) RCRA facilities subject to corrective action (one mile);

(iii) Records of federally-registered, or state-permitted or registered, hazardous waste sites identified for investigation or remediation, such as sites enrolled in state and tribal voluntary cleanup programs and tribal- and state-listed brownfields sites (one-half mile);

(iv) Records of leaking underground storage tanks (one-half mile); and

(2) Properties that previously were identified or regulated by a government entity due to environmental concerns at the property. Such records or databases containing such records and the associated distances from the subject property for which such information should be searched include the following:

(i) Records of delisted NPL sites (one-half mile);

(ii) Registries or publicly available lists of engineering controls (one-half mile); and

(iii) Records of former CERCLIS sites with no further remedial action notices (one-half mile).

(3) Properties for which there are records of federally-permitted, tribal-permitted or registered, or state-permitted or registered waste management activities. Such records or data bases that may contain such records include the following:

(i) Records of RCRA small quantity and large quantity generators (adjoining properties);

(ii) Records of federally-permitted, tribal-permitted, or state-permitted (or registered) landfills and solid waste management facilities (one-half mile); and

(iii) Records of registered storage tanks (adjoining property).

(4) A review of additional government records with regard to sites identified under paragraphs (c)(1) through (c)(3) of this section may be necessary in the judgment of the environmental professional for the purpose of achieving the objectives and performance factors of § 312.20(e) and (f).

(d) The search distance from the subject property boundary for reviewing government records or databases of government records listed in paragraph (c) of this section may be modified based upon the professional judgment of the environmental professional. The rationale for such modifications must be documented by the environmental professional. The environmental professional may consider one or more of the following factors in determining an alternate appropriate search distance:

(1) The nature and extent of a release;

(2) Geologic, hydrogeologic, or topographic conditions of the subject property and surrounding environment;

(3) Land use or development densities;

(4) The property type;

(5) Existing or past uses of surrounding properties;

(6) Potential migration pathways (e.g., groundwater flow direction, prevalent wind direction); or

(7) Other relevant factors.

§ 312.27 Visual inspections of the facility and of adjoining properties.

(a) For the purpose of achieving the objectives and performance factors of § 312.20(e) and (f), the inquiry of the environmental professional must include:

(1) A visual on-site inspection of the subject property and facilities and improvements on the subject property,

including a visual inspection of the areas where hazardous substances may be or may have been used, stored, treated, handled, or disposed. Physical limitations to the visual inspection must be noted.

(2) A visual inspection of adjoining properties, from the subject property line, public rights-of-way, or other vantage point (e.g., aerial photography), including a visual inspection of areas where hazardous substances may be or may have been stored, treated, handled or disposed. Physical limitations to the inspection of adjacent properties must be noted.

(b) Persons conducting site characterization and assessments using a grant awarded under CERCLA section 104(k)(2)(B) must include in the inquiries referenced in § 312.27(a) visual inspections of areas where hazardous substances, and may include, as applicable per the terms and conditions of the grant or cooperative agreement, pollutants and contaminants, petroleum and petroleum products, and controlled substances as defined in 21 U.S.C. 802 may be or may have been used, stored, treated, handled or disposed at the subject property and adjoining properties.

(c) Except as noted in this subsection, a visual on-site inspection of the subject property must be conducted. In the unusual circumstance where an on-site visual inspection of the subject property cannot be performed because of physical limitations, remote and inaccessible location, or other inability to obtain access to the property, provided good faith (as defined in § 312.10) efforts have been taken to obtain such access, an on-site inspection will not be required. The mere refusal of a voluntary seller to provide access to the subject property does not constitute an unusual circumstance. In such unusual circumstances, the inquiry of the environmental professional must include:

(1) Visually inspecting the subject property via another method (such as aerial imagery for large properties), or visually inspecting the subject property from the nearest accessible vantage point (such as the property line or public road for small properties);

(2) Documentation of efforts undertaken to obtain access and an explanation of why such efforts were unsuccessful; and

(3) Documentation of other sources of information regarding releases or threatened releases at the subject property that were consulted in accordance with § 312.20(e). Such documentation should include comments by the environmental professional on the significance of the failure to conduct a visual on-site inspection of the subject property with regard to the ability to identify conditions indicative of releases or threatened releases on, at, in, or to the subject property, if any.

§ 312.28 Specialized knowledge or experience on the part of the defendant.

(a) Persons to whom this part is applicable per § 312.1(b) must take into account, their specialized knowledge of the subject property, the area surrounding the subject property, the conditions of adjoining properties, and any other experience relevant to the inquiry, for the purpose of identifying conditions indicative of releases or threatened releases at the subject property, as defined in § 312.1(c).

(b) All appropriate inquiries, as outlined in § 312.20, are not complete unless the results of the inquiries take into account the relevant and applicable specialized knowledge and experience of the persons responsible for undertaking the inquiry (as described in § 312.1(b)).

§ 312.29 The relationship of the purchase price to the value of the property, if the property was not contaminated.

(a) Persons to whom this part is applicable per § 312.1(b) must consider whether the purchase price of the subject property reasonably reflects the fair market value of the property, if the property were not contaminated.

(b) Persons who conclude that the purchase price of the subject property does not reasonably reflect the fair market value of that property, if the property were not contaminated, must consider whether or not the differential in purchase price and fair market value is due to the presence of releases or threatened releases of hazardous substances.

(c) Persons conducting site characterization and assessments with the use of a grant awarded under CERCLA section 104(k)(2)(B) and who know that the purchase price of the subject property does not reasonably reflect the fair market value of that property, if the property were not contaminated, must consider whether or not the differential in purchase price and fair market value is due to the presence of releases or threatened releases of hazardous substances, pollutants, contaminants, petroleum and petroleum products, or controlled substances as defined in 21 U.S.C. 802.

§ 312.30 Commonly known or reasonably ascertainable information about the property.

(a) Throughout the inquiries, persons to whom this part is applicable per § 312.1(b) and environmental professionals conducting the inquiry must take into account commonly known or reasonably ascertainable information within the local community about the subject property and consider such information when seeking to identify conditions indicative of releases or threatened releases, as set forth in § 312.1(c), at the subject property.

(b) Commonly known information may include information obtained by the person to whom this part applies in § 312.1(b) or by the environmental professional about releases or threatened releases at the subject property that is incidental to the information obtained during the inquiry of the environmental professional.

(c) To the extent necessary to achieve the objectives and performance factors of § 312.20(e) and (f), persons to whom this part is applicable per § 312.1(b) and the environmental professional must gather information from varied sources whose input either individually or taken together may provide commonly known or reasonably ascertainable information about the subject property; the environmental professional may refer to one or more of the following sources of information:

(1) Current owners or occupants of neighboring properties or properties adjacent to the subject property;

(2) Local and state government officials who may have knowledge of, or information related to, the subject property;

(3) Others with knowledge of the subject property; and

(4) Other sources of information (e.g., newspapers, Web sites, community organizations, local libraries and historical societies).

§ 312.31 The degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation.

(a) Persons to whom this part is applicable per § 312.1(b) and environmental professionals conducting an inquiry of a property on behalf of such persons must take into account the information collected under § 312.23 through 312.30 in considering the degree of obviousness of the presence of releases or threatened releases at the subject property.

(b) Persons to whom this part is applicable per § 312.1(b) and

environmental professionals conducting an inquiry of a property on behalf of such persons must take into account the information collected under § 312.23 through 312.30 in considering the ability to detect contamination by appropriate investigation. The inquiry of the environmental professional should include an opinion regarding additional appropriate investigation, if any.

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November 27, 2006

U.S. ENVIRONMENTAL PROTECTION AGENCY U.S. DEPARTMENT OF JUSTICE

MEMORANDUM

SUBJECT: Issuance of CERCLA Model Agreement and Order on Consent for Removal Action by a Bona Fide Prospective Purchaser

FROM: Susan E. Bromm, Director /s/
Office of Site Remediation Enforcement
U.S. Environmental Protection Agency

Bruce S. Gelber, Chief /s/
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice

TO: Director, Office of Site Remediation and Restoration, Region I
Director, Emergency and Remedial Response Division, Region II
Director, Hazardous Site Cleanup Division, Region III
Director, Waste Management Division, Region IV
Directors, Superfund Division, Regions V, VI, VII and IX
Assistant Regional Administrator, Office of Ecosystems Protection and Remediation, Region VIII
Director, Office of Environmental Cleanup, Region X
Director, Office of Environmental Stewardship, Region I
Director, Environmental Accountability Division, Region IV
Regional Counsel, Regions II, III, V, VI, VII, IX, and X
Assistant Regional Administrator, Office of Enforcement, Compliance, and Environmental Justice, Region VIII
Deputy and Assistant Chiefs, Environmental Enforcement Section, U.S. Department of Justice
Chief, Deputy Chief, and Assistant Chiefs, Environmental Defense Section, U.S. Department of Justice

We are pleased to issue the CERCLA Model Agreement and Order on Consent for Removal Action by a *bona fide* prospective purchaser ("BFPP") (BFPP Removal Model Agreement). This model is part of EPA's continuing effort to promote land reuse and revitalization by addressing potential liability concerns associated with acquiring contaminated

properties. This model responds to requests from parties who enjoy liability protections provided for *bona fide* prospective purchasers by Sections 101(40) and 107(r) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601, *et seq*. as amended by the Brownfields Amendments, who will perform removal work at sites of federal interest that they own or intend to acquire, where EPA may advise on the extent of cleanup required and oversee the work, and where the removal work will exceed the "reasonable steps to prevent releases" obligation upon which their BFPP status depends.

In May 2002, EPA issued a policy stating that, in most cases, the Brownfields Amendments make agreements that provide a covenant not to sue (prospective purchaser agreements or PPAs) from the federal government unnecessary. *Bona Fide Prospective Purchasers and the New Amendments to CERCLA*, May 31, 2002 (BFPP Policy). EPA continues to believe that PPAs are no longer necessary in the vast majority of cases, because BFPPs may now purchase property with knowledge of contamination and not acquire CERCLA liability as long as they meet certain BFPP criteria. In the May 2002 BFPP Policy, the Agency recognized that, in limited instances, the public interest would be served by entering into PPAs or some other form of agreement with purchasers of contaminated property. One of the instances identified in the BFPP Policy as justifying a federal covenant not to sue was where a significant environmental benefit will be derived from the project in terms of cleanup. This model is intended to serve as the vehicle for providing a federal covenant not to sue and contribution protection for BFPPs who will perform removal work exceeding reasonable steps at a site of federal interest. The model offers an "existing contamination" covenant like that offered in the 1999 Model PPA, and includes appropriate provisions associated with the performance of removal work. In addition, it provides a release and waiver of any windfall lien. The model conforms to other recently issued models insofar as certain provisions have been standardized from model to model. It is unique, however, in that the settling party already has statutorily conferred liability protection as a BFPP.

The attached BFPP Removal Model Agreement is intended for removal sites where there is a federal interest and the work required is complex or significant in extent. For this reason, this Model includes provisions relating to, *e.g*., reimbursement of oversight costs, work takeover, and financial responsibility, designed to ensure that the work is completed in a timely and proper manner by the BFPP. Any determination to omit one or more of these provisions should be based on consideration of specific factors, including the nature and extent of the work, the risks presented by not including a specific provision in the agreement, the benefits of having the removal performed by the BFPP, and the benefits to the BFPP of cleaning up the site with EPA's direct oversight and involvement, including, *e.g*., any enhancement to the value or marketability of the site or property that would flow from a cleanup performed with EPA's oversight and involvement. Omissions from the model, other than designated optional provisions, should be discussed with Headquarters and Department of Justice prior to that omission being offered or agreed to.

For federal interest sites where BFPPs wish to satisfy their reasonable steps requirements but do not intend to undertake a removal action with EPA oversight, EPA may continue to provide comfort/status letters suggesting site-specific reasonable steps where appropriate. *Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability ("Common Elements")*, March 6, 2003. As stated in the Common Elements Guidance, such comfort/status letters are limited to sites with significant federal involvement such that the Agency has sufficient information to form a basis for suggesting reasonable steps.

In implementing this new model for removal work by BFPPs, Regions are asked to coordinate with EPA Headquarters and with the Department of Justice early in the process. Any Region settling with a BFPP for removal work at a property owned by that BFPP will be expected to consult with Headquarters on the settlement being proposed. In addition, any Region significantly deviating from this model for settlement with a BFPP, other than using the previously published Model for Waiver of the Windfall Lien, will be required to seek Headquarters' concurrence from the Director of Regional Support Dvision. The Department of Justice must approve and sign each of these settlements.

Please address any questions on this model to Helen Keplinger of the Regional Support Division at (202) 564-4221 or Tom Carroll of the Environmental Enforcement Section at (202) 514-4051. This model is available on EPA's Web site at http://www.epa.gov/compliance/resources/policies/cleanup/superfund/bfpp-ra-mem.pdf.

Attachments

cc: Earl Salo, Acting Associate General Counsel for Solid Waste and Emergency Response
Juliette McNeil, Director, Financial Management Division
Office of Regional Counsel Branch Chiefs, Regions I-X
CERCLA Settlement Lead Region Workgroup
David Lloyd, Director, Office of Brownfields Cleanup and Redevelopment

U.S. Environmental Protection Agency and
U.S. Department of Justice

AGREEMENT AND ORDER ON CONSENT FOR REMOVAL ACTION BY BONA FIDE PROSPECTIVE PURCHASER

Issued & Effective
November 27, 2006

This model and any internal procedures adopted for its implementation and use are intended as guidance for employees of the U.S. Environmental Protection Agency and the U.S. Department of Justice. They are not rules and do not create legal obligations. The extent to which EPA or DOJ applies them to a particular case will depend upon the facts of the case.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF: [Site Name]	)	
	)	[Docket No.]
	)	
PURSUANT TO THE COMPREHENSIVE	)	
ENVIRONMENTAL RESPONSE,	)	
COMPENSATION, AND LIABILITY ACT	)	
42 U.S.C. §§ 9604, 9606, 9607, 9622	)	
	)	
AGREEMENT AND ORDER ON	)	[Purchaser's Name]
CONSENT FOR REMOVAL ACTION BY	)	
BONA FIDE PROSPECTIVE PURCHASER	)	

I. INTRODUCTION

1. This Agreement and Order on Consent for Removal Action by Bona Fide Prospective Purchaser ("Agreement") is voluntarily entered into by and between the United States on behalf of the Environmental Protection Agency ("EPA") and [insert name of purchaser] ("Purchaser") (collectively, the "Parties") under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601, *et seq*. Under this Agreement, Purchaser agrees to perform a removal action at or in connection with the property located at [insert address or descriptive location of Site] in [City or Town, County, State] (the "Property"), [known as/part of] the "[insert name] Site" or the "Site."

II. JURISDICTION AND GENERAL PROVISIONS

2. This Agreement is issued pursuant to the authority vested in the President of the United States by Sections 104, 106, 107 and 122 of CERCLA, 42 U.S.C. §§ 9604, 9606, 9607 and 9622, and delegated to the Administrator of EPA by Executive Order No. 12580, January 23, 1987, 52 Federal Register 2923, and further delegated to the undersigned Regional official, and the authority of the Attorney General to compromise and settle claims of the United States.

3. The Parties agree that the United States District Court for the _____ District of _____will have jurisdiction pursuant to Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), for any enforcement action brought with respect to this Agreement.

4. EPA has notified the State [Commonwealth] of _____ (the "State") of this

action pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a).

5. The Purchaser represents that it is a bona fide prospective purchaser ("BFPP") as defined by Section 101(40) of CERCLA, 42 U.S.C. § 9601(40), that it has and will continue to comply with Section 101(40) during its ownership of the Property, and thus qualifies for the protection from liability under CERCLA set forth in Section 107(r)(1) of CERCLA, 42 U.S.C. § 9607(r)(1), with respect to the Property. In view, however, of the complex nature and significant extent of the Work to be performed in connection with the removal action at the Site, and the risk of claims under CERCLA being asserted against Purchaser notwithstanding Section 107(r)(1) as a consequence of Purchaser's activities at the Site pursuant to this Agreement, one of the purposes of this Agreement is to resolve, subject to the reservations and limitations contained in Section XVIII (Reservations of Rights by United States), any potential liability of Purchaser under CERCLA for the Existing Contamination as defined by Paragraph 10(g) below.

6. The resolution of this potential liability, in exchange for Purchaser's performance of the Work [insert, if applicable, "and reimbursement of certain response costs"] is in the public interest.

7. EPA and Purchaser recognize that this Agreement has been negotiated in good faith. Purchaser agrees to comply with and be bound by the terms of this Agreement and further agrees that it will not contest the basis or validity of this Agreement or its terms.

III. PARTIES BOUND

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

9. Purchaser shall ensure that its contractors, subcontractors, and representatives comply with this Agreement, and, where appropriate, receive a copy of this Agreement. Purchaser shall be responsible for any noncompliance with this Agreement.

IV. DEFINITIONS

10. Unless otherwise expressly provided herein, terms used in this Agreement which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations, including any amendments thereto.

    a. "Agreement" shall mean this Agreement and Order on Consent for Removal Action by Bona Fide Prospective Purchaser and all appendices attached hereto (listed in Section XXIV). In the event of conflict between this Agreement and any appendix, this Agreement shall control.

b. "BFPP" shall mean a bona fide prospective purchaser as described in Section 101(40) of CERCLA, 42 U.S.C. § 9601(40).

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

d. "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 under this Agreement, 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.

e. "Effective Date" shall be the effective date of this Agreement as provided in Section XXVI.

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

g. "Existing Contamination" shall mean:

   i. any hazardous substances, pollutants or contaminants present or existing on or under the Property as of the Effective Date;

   ii. any hazardous substances, pollutants or contaminants that migrated from the Property prior to the Effective Date; and

   iii. any hazardous substances, pollutants or contaminants presently at the Site that migrate onto or under or from the Property after the Effective Date.

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. "OSC" shall mean the On-Scene Coordinator as defined in 40 C.F.R. § 300.5.

k. "Oversight Costs" shall mean all direct and indirect costs incurred by EPA or the United States after the Effective Date in monitoring and supervising Purchaser's performance of the Work to determine whether such performance is consistent with the requirements of this Agreement, including costs incurred in reviewing plans, reports and other documents submitted pursuant to this Agreement, as well as costs incurred in overseeing implementation of the Work.

l. "Paragraph" shall mean a portion of this Agreement identified by an arabic numeral or a lower case letter.

m. "Parties" shall mean EPA and Purchaser.

n. "Property" shall mean that portion of the Site, encompassing approximately __ acres, which is described in Appendix _____ of this Agreement.

o. "Section" shall mean a portion of this Agreement identified by a Roman numeral.

p. "Purchaser" shall mean _____.

q. "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).

r. "Site" shall mean the [Site Name] encompassing approximately ____ acres, located at [address or description of location] in [name of city, county, and State], and depicted generally on the map attached as Appendix ____. The Site shall include the Property, and all areas to which hazardous substances and/or pollutants or contaminants have been deposited, stored, disposed of, placed, or otherwise come to be located [provide a more specific definition of the Site where possible; may also wish to include structures, USTs, etc., within Site description].

s. "SOW" shall mean the statement of work for implementation of the removal action as set forth in Appendix____ to this Agreement and any modifications made in accordance with this Agreement.

t. "Supervising Contractor" shall mean the principal contractor retained by Purchaser to supervise and direct the implementation of the Work agreed to in this Agreement and to sign and approve the Final Report submitted concerning such Work.

u. "United States" shall mean the United States of America, its departments, agencies, and instrumentalities.

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); (3) any "solid waste" under Section

1004(27) of RCRA, 42 U.S.C. § 6903(27); and (4) any "hazardous material" under [insert appropriate State statutory citation.]

w. "Work" shall mean all removal activities Purchaser is required to perform under this Agreement.

V. FINDINGS OF FACT

[NOTE: Because Findings of Fact are site-specific, no model language is provided. Facts should be presented concisely, accurately, and logically, and should be limited to those relevant to the performance of the removal action by Purchaser. Regions should include a discussion of the following points: identification of Purchaser; Purchaser's ownership status (*i.e.*, whether Purchaser has already acquired the Property or intends to do so in the future), site location and description; relevant site history and operations; any relevant past EPA and/or State activities and investigations; and conditions and data showing hazardous substances are present and releases or threats of releases exist. Regions may want to note any instance where the property that is the subject of this Agreement is part of an effort to reuse or revitalize an area that has been underutilized due to contamination. The Agreement need not contain a finding of endangerment if such a finding has been properly made and documented in an Action Memorandum (or Action Memorandum/Enforcement) (hereinafter referred to as an "Action Memorandum/ Enforcement") in accordance with the "Superfund Removal Procedures Action Memorandum Guidance" (OSWER Directive No. 9360.3-01, December 1990). If such a finding has not been made in an Action Memorandum/Enforcement, this Section should include a statement consistent with the administrative record that releases or threats of releases at the Site may present an imminent and substantial endangerment. If such a finding has been made in an Action Memorandum/Enforcement (and is not being made in the Agreement as well), the date of the signing of the Action Memorandum/Enforcement should be included as a finding.

VI. DETERMINATIONS

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

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

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

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

d. The conditions described in [Paragraphs ___ of] 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).

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

VII. AGREEMENT

12. In consideration of and in exchange for the United States' Covenant Not to Sue in Section XVII [and the Release and Waiver of Lien(s) in Section XXI,] Purchaser agrees to comply with all provisions of this Agreement, including, but not limited to, all attachments to this Agreement and all documents incorporated by reference into this Agreement.

VIII. WORK TO BE PERFORMED

13. Purchaser shall perform, at a minimum, all actions necessary to implement the SOW. The actions to be implemented generally include, but are not limited to, the following:

[NOTE: This Section should provide a brief description consistent with the [Action Memorandum/Enforcement] [SOW] and should provide sufficient detail to permit Purchaser to draft a Work Plan. Regions should ensure that the description is sufficiently broad and does not unintentionally limit removal actions in terms of hazardous substances to be addressed or to site boundaries if hazardous substances are present or migrate beyond boundaries to be addressed.]

Purchaser shall perform all actions required by this Agreement 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. § 9621(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 Agreement 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. [Purchaser shall identify ARARs in the Work Plan subject to EPA approval.]

14. Work Plan and Implementation.

a. Within __ days after the Effective Date, Purchaser shall submit to EPA for approval a draft Work Plan for performing the removal action generally described in Paragraph 13 above. The

draft Work Plan shall provide a description of, and an expeditious schedule for, the actions required by this Agreement.[1]

b. EPA may approve, disapprove, require revisions to, or modify the draft Work Plan in whole or in part. If EPA requires revisions, Purchaser shall submit a revised draft Work Plan within __ days of receipt of EPA's notification of the required revisions. Purchaser shall implement the Work Plan as approved or modified in writing by EPA in accordance with the schedule approved by EPA. Once approved, approved with modifications, or modified by EPA, the Work Plan, the schedule, and any subsequent modifications shall be incorporated into and become fully enforceable under this Agreement.

c. Purchaser shall not commence any Work except in conformance with the terms of this Agreement. Purchaser shall not commence implementation of the Work Plan developed hereunder until receiving written EPA approval or modification pursuant to Paragraph 14.b.

15. Health and Safety Plan. Within __ days after the Effective Date, Purchaser 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 Agreement. 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.[2] Purchaser shall incorporate all changes to the plan recommended by EPA and shall implement the plan during the pendency of the removal action.

16. Quality Assurance and Sampling.

a. All sampling and analyses performed pursuant to this Agreement shall conform to EPA direction, approval, and guidance regarding sampling, quality assurance/quality control ("QA/QC"), data validation, and chain of custody procedures. Purchaser shall ensure that the laboratory used to perform the analyses participates in a QA/QC program that complies with the appropriate EPA guidance. Purchaser 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

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[1] Regions should require preparation of a Quality Assurance Project Plan ("QAPP") as part of the Work Plan except in circumstances involving emergency or non-complex removal work. The QAPP should be prepared in accordance with "EPA Requirements for Quality Assurance Project Plans (QA/R-5)" (EPA/240/B-01/003, March 2001), and "EPA Guidance for Quality Assurance Project Plans (QA/G-5)" (EPA/600/R-98/018, February 1998).

[2] Regions may provide more detail, *e.g.*, SPCC, evacuation plans, etc.

QA/QC and sampling.[3] Purchaser shall only use laboratories that have a documented Quality System that complies with ANSI/ASQC E-4 1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs" (American National Standard, January 5, 1995), and "EPA Requirements for Quality Management Plans" (QA/R-2) (EPA/240/B-01/002, March 2001), or equivalent documentation as determined by EPA. EPA may consider laboratories accredited under the National Environmental Laboratory Accreditation Program ("NELAP") as meeting the Quality System requirements.

b. Upon request by EPA, Purchaser shall have a laboratory that meets the requirements of Paragraph 16.a above analyze samples submitted by EPA for QA monitoring. Purchaser 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, Purchaser shall allow EPA or its authorized representatives to take split and/or duplicate samples. Purchaser shall notify EPA not less than __ 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 Purchaser to take split or duplicate samples of any samples it takes as part of its oversight of Purchaser's implementation of the Work.

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

18. Reporting.

a. Purchaser shall submit a written progress report to EPA concerning actions undertaken pursuant to this Agreement every __th day after the date of receipt of EPA's approval of the Work Plan until completion of the Work, unless otherwise directed in writing by the OSC. These reports shall describe all significant developments during the preceding period, including the actions performed and any problems encountered, analytical data received during the reporting period, and the developments anticipated during the next reporting period, including a schedule of actions to be performed, anticipated problems, and planned resolutions of past or anticipated problems.[4]

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[3] Regions should also check with Regional QA officers for standard operating procedures for QA/QC and sampling of soil, air, ecology, waste and water.

[4] Regions should determine the frequency and content of these reports on a site-specific basis.

b. Purchaser shall submit __ copies of all plans, reports or other submissions required by this Agreement, [the SOW], or any approved work plan. Upon request by EPA, Purchaser shall submit such documents in electronic form to be specified by EPA.

19. Final Report. Within __ days after completion of all Work required by this Agreement, Purchaser shall submit for EPA review and approval in accordance with Section XXV(Notice of Completion) a final report summarizing the actions taken to comply with this Agreement. The final report shall conform, at a minimum, with the requirements set forth in Section 300.165 of the NCP entitled "OSC Reports."[5] The final report shall include a statement of actual costs incurred in complying with the Agreement, 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 the Supervising Contractor who supervised or directed the preparation of said 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."

20. Off-Site Shipments.

a. Purchaser 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 OSC. 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. Purchaser 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. Purchaser shall notify the state in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to

[5] For removals that are more extensive, Regions may require consideration of "Superfund Removal Procedures: Removal Response Reporting – POLREPS and OSC Reports" (OSWER Directive No. 9360.3-03, June 1, 1994). Regions should also insert an emergency response and notification of releases provision if not addressed by the Work Plan.

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 Purchaser following the award of the contract for the removal action. Purchaser shall provide the information required above 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, Purchaser 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. Purchaser 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. AUTHORITY OF THE ON-SCENE COORDINATOR

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

X. PAYMENT OF OVERSIGHT COSTS

[NOTE: Use the following three paragraphs if the Agreement calls for periodic billing of Oversight Costs. The language may be amended to require Purchaser to establish and maintain a private escrow account into which Oversight Cost payments shall be made and from which Oversight Cost payments shall be disbursed to EPA.]

22. Payment of Oversight Costs Upon Receipt of Periodic Bills.

a. Purchaser shall pay EPA all Oversight Costs not inconsistent with the NCP [if appropriate, insert "in an amount not to exceed ["$____" or "$____ per year"] following the Effective Date."]. On a periodic basis, EPA will send Purchaser a bill requiring payment that includes a [insert name of standard Regionally-prepared cost summary, which includes direct and indirect costs incurred by EPA and its contractors.] Purchaser shall make all payments required by this Paragraph by certified or cashier's check made payable to "EPA Hazardous Substance Superfund," referencing the name and address of Purchaser, the Site name, EPA Region and Site/Spill ID Number ____, and the EPA docket number for this action. Purchaser shall send each check to [insert appropriate Superfund lockbox number and address]. **[NOTE: Regions may substitute EFT payment instructions.]**

b. In the event that a payment for Oversight Costs is not made within 30 days of Purchaser's receipt of a bill, Purchaser shall pay Interest on the unpaid balance. Interest shall begin to accrue on the date of the bill and shall continue to accrue until the date of payment.

c. [The total amount to be paid by Purchaser pursuant to Paragraph 22 shall be deposited by EPA in the EPA Hazardous Substance Superfund.] [The total amount to be paid by Purchaser pursuant to Paragraph 22 shall be deposited by EPA in the [Site Name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.]

23. At the time of each payment, Purchaser shall send notice that such payment has been made to [insert names and mailing addresses of Regional Financial Management Officer and any other receiving officials at EPA].

24. Pursuant to Section XIII (Dispute Resolution), Purchaser may dispute all or part of a bill for Oversight Costs if Purchaser determines that EPA has made a mathematical error or included a cost item that is outside the definition of Oversight Costs, or if Purchaser believes EPA incurred excess costs as a direct result of an EPA action that was inconsistent with the NCP. If any dispute over costs is resolved before payment is due, the amount due will be adjusted as necessary. If the dispute is not resolved before payment is due, Purchaser shall pay the full amount of the uncontested costs to EPA as specified in Paragraph 22.a on or before the due date. Within the same time period, Purchaser shall pay the full amount of the contested costs into an interest-bearing escrow account. Purchaser shall simultaneously transmit a copy of both checks to the persons listed in Paragraph 23. Purchaser shall ensure that the prevailing party in the dispute receives the amount upon which it prevailed from the escrow funds plus any interest accrued within 20 calendar days after the dispute is resolved.

[NOTE: Use the following alternative Paragraphs 22-24 if the Agreement calls for a lump sum Oversight Cost payment. The language may be amended to require Purchaser to establish and maintain a private escrow account into which Oversight Cost payments shall be made and from which Oversight Cost payments shall be disbursed to EPA.]

22. <u>Payment of Sum Certain for Oversight Costs</u>.

a. Within 30 days after the Effective Date, Purchaser shall pay to EPA $ ____ for Oversight Costs. **[NOTE: The following language should be used if the payment amount is above $25,000. Regional attorneys should consult with the Comptroller's Office in the Region to determine if more specific EFT instructions should be included.]** Payment shall be made to EPA by Electronic Funds Transfer ("EFT") in accordance with current EFT procedures to be provided to Purchaser by EPA Region ____, and shall be accompanied by

a statement identifying the name and address of Purchaser, the Site name, the EPA Region and Site/Spill ID Number ____, and the EPA docket number for this action. **[NOTE: The following language may be used if the payment amount is below $25,000.]** Payment shall be made by certified or cashiers check made payable to "EPA Hazardous Substance Superfund." The check, or letter accompanying the check, shall identify the name and address of Purchaser, the Site name, the EPA Region and Site/Spill ID Number ____, and the EPA docket number for this action, and shall be sent to [insert appropriate Superfund lockbox number and address.]

b. In the event that payment of Oversight Costs is not made within 30 days after the Effective Date, Purchaser shall pay Interest on the unpaid balance. The Interest on Oversight Costs shall begin to accrue on the Effective Date and shall continue to accrue until the date of payment.

23. [The total amount to be paid by Purchaser pursuant to Paragraph 22 shall be deposited by EPA in the EPA Hazardous Substance Superfund.] [The total amount to be paid by Purchaser pursuant to Paragraph 22 shall be deposited by EPA in the [Site Name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to finance Oversight Costs.]

24. At the time of payment, Purchaser shall send notice that payment has been made to [insert names and mailing addresses of Regional Financial Officer and any other receiving officials at EPA.]

[NOTE: If the initial lump sum Oversight Cost payment is placed in a site-specific special account, the following language may be used to provide for return to Purchaser of any unused Oversight Costs. (Similar language may be used to provide for return of excess amounts from a private escrow account if one is used.)]

__. Return of Excess Sum Certain Oversight Cost Payment. After EPA issues its Notice of Completion pursuant to Section XXV and has performed a final accounting of Oversight Costs, EPA shall remit and return to Purchaser any unused amount of the funds paid by Purchaser pursuant to Paragraph 22 above.

[NOTE: The following paragraphs below may be used to supplement the amount received under the lump sum Oversight Cost payment method with additional Oversight Cost payments, if actual oversight costs exceed the EPA estimate upon which the sum certain payment was based. Two options are provided. Option 1 calls for payment of the actual amount of excess costs upon receipt of periodic bills. Option 2 calls for payment of pre-established additional amounts. Both options include the same dispute resolution provision.]

[Option 1:]

__. Payment of Additional Oversight Costs Upon Receipt of Periodic Bills. In the event that Oversight Costs exceed [$____], Purchaser shall pay EPA additional Oversight Costs not inconsistent with the NCP [if appropriate, insert, "in an amount not to exceed [$___ or ___%] [per year] following the Effective Date"] (hereinafter "Additional Oversight Costs"). If Additional Oversight Costs are incurred, EPA will send Purchaser one or more bills requiring payment [of the amount/percentage specified above], which includes a summary of the Additional Oversight Costs in the form of a [insert name of standard Regionally-prepared cost summary, which includes direct and indirect costs incurred by EPA and its contractors]. Purchaser shall make all payments within 30 days of receipt of each bill requiring payment, except as otherwise provided in Paragraph __ below (Resolution of Disputes Concerning Payment of Additional Oversight Costs). If payment is not made within 30 days of Purchaser's receipt of a bill, Purchaser shall pay Interest on the unpaid balance, which shall begin to accrue on the date of the bill and shall continue to accrue until the date of payment. Payment(s) shall be made in accordance with Paragraphs 22.a, 23 and 24 above.

[Option 2:]

__. Payment of Additional Oversight Costs in Set Amounts. Purchaser shall pay EPA additional Oversight Costs [in an amount not to exceed a total of $_____] (hereinafter "Additional Oversight Costs") in the following increments: i. If total Oversight Costs reach [$___,] Purchaser shall pay an additional [$___]; ii. If total Oversight Costs reach [$___,] Purchaser shall pay an additional [$___]." Upon the occurrence one or both of these events, EPA shall send Purchaser a bill requiring payment, which shall include a summary of the Additional Oversight Costs in the form of a [insert name of standard Regionally-prepared cost summary, which includes direct and indirect costs incurred by EPA and its contractors]. Purchaser shall make all payments within 30 days of receipt of a bill requiring payment, except as otherwise provided in Paragraph __ below (Resolution of Disputes Concerning Payment of Additional Oversight Costs). If payment is not made within 30 days of Purchaser's receipt of a bill, Purchaser shall pay Interest on the unpaid balance, which shall begin to accrue on the date of the bill and shall continue to accrue until the date of payment. Payment(s) shall be made in accordance with Paragraphs 22.a, 23, and 24 above.

[Dispute Resolution for use with either Option 1 or Option 2:]

__. Resolution of Disputes Concerning Payment of Additional Oversight Costs. Purchaser may dispute, pursuant to Section XIII (Dispute Resolution), all or part of a bill for Additional Oversight Costs if Purchaser determines that EPA has made a mathematical error or included a cost item that is outside the definition of Oversight Costs, or if Purchaser believes EPA incurred excess costs as a direct result of an EPA action that was inconsistent with the NCP. If any dispute over costs is resolved before payment is due, the amount due will be adjusted as necessary. If the dispute is not resolved before payment is due, Purchaser shall pay the full amount of the uncontested costs to EPA as specified in Paragraph 22.a (Payment of Sum Certain for Oversight Costs) on or before the due date. Within the same time period, Purchaser shall pay the full amount of the contested costs into an interest-bearing escrow account.

Purchaser shall simultaneously transmit a copy of both checks to the persons listed in Paragraph 24. Purchaser shall ensure that the prevailing party in the dispute receives the amount upon which it prevailed from the escrow funds plus any interest accrued within 20 calendar days after the dispute is resolved.

XI. ACCESS/NOTICE TO SUCCESSORS/INSTITUTIONAL CONTROLS

25. Purchaser agrees to provide EPA, its authorized officers, employees, representatives, and all other persons performing response actions under EPA oversight, an irrevocable right of access at all reasonable times to the Property and to any other property owned or controlled by Purchaser to which access is required for the implementation of response actions at the Site. EPA agrees to provide reasonable notice to Purchaser of the timing of response actions to be undertaken at the Property and other areas owned or controlled by Purchaser. Notwithstanding any provision of this Agreement, EPA retains all of its access authorities and rights, including enforcement authorities related thereto, under CERCLA, RCRA, and other authorities.

26. Purchaser shall submit to EPA for review and approval a notice to be filed with the Recorder's Office [or Registry of Deeds or other appropriate office], _____ County, State or Commonwealth of _____, which shall provide notice to all successors-in-title that the Property is part of the Site, [that EPA filed a lien under Section 107(r) of CERCLA, 42 U.S.C. § 9607(r), Instrument Number _____, on Date_____,] **[also insert reference to 107(*l*) lien if one has been filed]** [that EPA issued an Action Memorandum on _____ providing for the performance of a removal action at the Site that Purchaser will be performing,] and that EPA has released and waived its Section 107(r) lien on the Property in this Agreement in accordance with Section XXI (Release and Waiver of Lien). Purchaser shall record the notice(s) within _____days of EPA's approval of the notice(s). Purchaser shall provide EPA with a certified copy of the recorded notice(s) within _____ days of recording such notices(s).

27. Purchaser shall implement and comply with any land use restrictions and institutional controls on the Property in connection with a response action.[6]

28. For so long as Purchaser is an owner or operator of the Property, Purchaser shall require that assignees, successors in interest, and any lessees, sublessees and other parties with rights to use the Property shall provide access and cooperation to EPA, its authorized officers, employees, representatives, and all other persons performing response actions under EPA oversight. Purchaser shall require that assignees, successors in interest, and any lessees, sublessees, and other parties with rights to use the Property implement and comply with any land use

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[6] As part of the negotiation of this Agreement, EPA should require that the issue of institutional controls be resolved with EPA as the third-party beneficiary, with recognition of EPA's authority to enforce institutional controls. The RD/RA model CD provides relevant language.

restrictions and institutional controls on the Property in connection with a response action, and not contest EPA's authority to enforce any land use restrictions and institutional controls on the Property.

29. **[NOTE: Any requirement concerning institutional controls must survive property transfer, unless the particular institutional control is for a specifically limited period of time.]** Upon sale or other conveyance of the Property or any part thereof, Purchaser shall require that each grantee, transferee or other holder of an interest in the Property or any part thereof shall provide access and cooperation to EPA, its authorized officers, employees, representatives, and all other persons performing response actions under EPA oversight. Purchaser shall require that each grantee, transferee or other holder of an interest in the Property or any part thereof shall implement and comply with any land use restrictions and institutional controls on the Property in connection with a response action and not contest EPA's authority to enforce any land use restrictions and institutional controls on the Property.

30. Purchaser shall provide a copy of this Agreement to any current lessee, sublessee, and other party with rights to use the Property as of the Effective Date.

XII. RECORD RETENTION, DOCUMENTATION, AND AVAILABILITY OF INFORMATION

31. Purchaser shall preserve all documents and information relating to the Work, or relating to the hazardous substances, pollutants or contaminants found on or released from the Site, and shall submit them to EPA upon completion of the Work required by this Agreement, or earlier if requested by EPA.

32. Purchaser may assert a business confidentiality claim pursuant to 40 C.F.R. § 2.203(b) with respect to part or all of any information submitted to EPA pursuant to this Agreement, provided such claim is allowed by Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7). Analytical and other data specified in Section 104(e)(7)(F) of CERCLA shall not be claimed as confidential by Purchaser. EPA shall disclose information covered by a business confidentiality claim only to the extent permitted by, and by means of the procedures set forth at, 40 C.F.R. Part 2 Subpart B. If no such claim accompanies the information when it is received by EPA, EPA may make it available to the public without further notice to Purchaser.

XIII. DISPUTE RESOLUTION

33. Unless otherwise expressly provided for in this Agreement, the dispute resolution procedures of this Section shall be the exclusive mechanism for resolving disputes arising under this Agreement. EPA and Purchaser shall attempt to resolve any disagreements concerning this Agreement expeditiously and informally. If EPA contends that Purchaser is in violation of this Agreement, EPA shall notify Purchaser in writing, setting forth the basis for its position. Purchaser may dispute EPA's position pursuant to Paragraph 34.

34. If Purchaser disputes EPA's position with respect to Purchaser's compliance with this Agreement or objects to any EPA action taken pursuant to this Agreement, [if applicable, insert "including billings for Oversight Costs [or Additional Oversight Costs],"] Purchaser shall notify EPA in writing of its position unless the dispute has been resolved informally. EPA may reply, in writing, to Purchaser's position within ___ days of receipt of Purchaser's notice. EPA and Purchaser shall have___ days from EPA's receipt of Purchaser's written statement of position to resolve the dispute through formal negotiations (the "Negotiation Period"). The Negotiation Period may be extended at the sole discretion of EPA. Such extension may be granted orally but must be confirmed in writing.

35. 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 Agreement. If the Parties are unable to reach an agreement within the Negotiation Period, an EPA management official at the [insert Region-specific] level or higher will review the dispute on the basis of the parties' written statements of position and issue a written decision on the dispute to Purchaser. EPA's decision shall be incorporated into and become an enforceable part of this Agreement. Purchaser's obligations under this Agreement 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, Purchaser shall fulfill the requirement that was the subject of the dispute in accordance with the agreement reached or with EPA's decision, whichever occurs.

[NOTE: For non-time-critical removal actions, the Region may consider including non-binding mediation, which would occur after the exchange of written information, but prior to the final review by the Regional official.]

XIV. FORCE MAJEURE

36. Purchaser agrees to perform all requirements of this Agreement within the time limits established under this Agreement, unless the performance is delayed by a *force majeure*. For purposes of this Agreement, a *force majeure* is defined as any event arising from causes beyond the control of Purchaser, or of any entity controlled by Purchaser, including but not limited to its contractors and subcontractors, which delays or prevents performance of any obligation under this Agreement despite Purchaser's best efforts to fulfill the obligation. *Force majeure* does not include financial inability to complete the Work[,] [or] increased cost of performance [insert, if applicable, ", or a failure to attain performance standards/action levels set forth in the Action Memorandum."].

37. If any event occurs or has occurred that may delay the performance of any obligation under this Agreement, whether or not caused by a *force majeure* event, Purchaser shall notify EPA orally within [insert period of time] of when Purchaser first knew that the event might cause a delay. Within __ days thereafter, Purchaser 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; Purchaser's rationale for attributing such delay to a *force majeure* event if it intends to assert such a claim; and a statement as to whether, in the opinion of Purchaser, 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 Purchaser 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.

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

39. If Purchaser elects to invoke the dispute resolution procedures set forth in Section XIII (Dispute Resolution), Purchaser shall do so no later than 15 days after receipt of EPA's notice. In any such proceeding, Purchaser shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Purchaser complied with the requirements of Paragraphs 37 and 38 above. If

Purchaser carries this burden, the delay at issue shall be deemed not to be a violation by Purchaser of the affected obligation of this Agreement.

[__. STIPULATED PENALTIES]

[NOTE: Use of this Section is optional and will be left to Regional enforcement discretion.]

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

__. Stipulated Penalty Amounts - Work.

a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in Paragraph __b:

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

b. Compliance Milestones

[List violations or compliance milestones, including due dates for payments]

__. 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 18 and 19:

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

__. In the event that EPA assumes performance of a portion or all of the Work pursuant to Paragraph 49 of Section XVIII (Reservation of Rights by United States), Purchaser shall be liable for a stipulated penalty in the amount of $ _____.

__. 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 Purchaser of any deficiency; and 2) with respect to a decision by the EPA Management Official at the [insert Region-specific] level or higher, under Paragraph 35 of Section XIII (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 Agreement.

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

__. All penalties accruing under this Section shall be due and payable to EPA within 30 days of Purchaser's receipt from EPA of a demand for payment of the penalties, unless Purchaser invokes the dispute resolution procedures under Section XIII (Dispute Resolution). All payments to EPA under this Section shall be paid by certified or cashier's check(s) made payable to "EPA Hazardous Substances Superfund," shall be mailed to [insert Superfund Lockbox number and address], shall indicate that the payment is for stipulated penalties, and shall reference the name and address of Purchaser, the Site name, the EPA Region and Site/Spill ID Number ____, the EPA Docket Number_____. Copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to EPA as provided in Paragraph 69, and to [insert the names and mailing addresses of any other receiving officials at EPA].

__. The payment of penalties shall not alter in any way Purchaser's obligation to complete performance of the Work required under this Agreement.

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

__. If Purchaser fails to pay stipulated penalties when due, EPA may institute proceedings to collect the penalties, as well as Interest. Purchaser shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph __. Nothing in this Agreement 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 Purchaser's violation of this Agreement or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Section 106(b) of CERCLA, 42 U.S.C. § 9606(b), provided, however, that EPA shall not seek civil penalties pursuant to Section 106(b) for any violation for which a stipulated penalty is provided herein, except in the case of a willful violation of this

Agreement. 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 Agreement.]

XV. FINANCIAL RESPONSIBILITY

[NOTE: Regions may delete this section if the estimated cost of the Work is less than $50,000.]

40. The Parties agree and acknowledge that, in the event Purchaser ceases implementation of or otherwise fails to complete the Work in accordance with this Agreement, Purchaser shall ensure that EPA is held harmless from or reimbursed for all costs required for completion of the Work. For these purposes, Purchaser shall establish and maintain Financial Responsibility for the benefit of EPA in the amount of $[insert estimated cost of Work] (hereinafter "Estimated Cost of the Work") in one or more of the following forms, each of which must be satisfactory in form and substance to EPA:

    a. A surety bond unconditionally guaranteeing payment and/or performance of [Work];

    b. One or more irrevocable letters of credit, payable to or at the direction of EPA;

    c. A trust fund established for the benefit of EPA;

    d. A policy of insurance that provides EPA with acceptable rights as a beneficiary;

    e. A demonstration by Purchaser that it meets the financial test criteria of 40 C.F.R. § 264.143(f) with respect to the Estimated Cost of the Work, provided that all other requirements of 40 C.F.R. § 264.143(f) are satisfied;

    f. A written guarantee to fund or perform the Work executed in favor of EPA by one or more of the following: (i) a direct or indirect parent company of Purchaser, or (ii) a company that has a "substantial business relationship" (as defined in 40 C.F.R. § 264.141(h)) with Purchaser; provided, however, that any company providing such a guarantee must demonstrate to the satisfaction of EPA that it satisfies the financial test requirements of 40 C.F.R. § 264.143(f) with respect to the Estimated Cost of the Work that it proposes to guarantee hereunder; or

    g. [Insert any other method(s) appropriate to the particular case.]

41. [For subsections a, b, c, d, f, or g:] Purchaser has selected, and EPA has approved, as an initial Financial Responsibility mechanism a [insert type] pursuant to Paragraph 40(_) in the form attached hereto as Exhibit [ ]. Prior to beginning Work under this Agreement, Purchaser shall submit all executed and/or otherwise finalized instruments and other documents required in order to make the selected Financial Responsibility mechanism legally binding, in a form substantially identical to the documents attached hereto as Exhibit [ ], to the EPA Regional

Financial Management Officer in accordance with Section XXIX (Notices and Submissions) of this Agreement, [with a copy to [insert name, title, and address of Regional financial assurance specialist, if one exists in the relevant Region]] and to EPA as specified in Section XXIX. [For subsection e:] Purchaser has selected, and EPA has approved, as an initial Financial Responsibility mechanism a demonstration of satisfaction of financial test criteria pursuant to Paragraph 40(e) with respect to Purchaser.

42. The commencement of any Work Takeover pursuant to Paragraph 49 of this Agreement (Work Takeover) shall trigger EPA's right to receive the benefit of any Financial Responsibility mechanism(s) provided pursuant to Paragraph 40(a), (b), (c), (d), (f), or (g), and at such time EPA shall have immediate access to resources guaranteed under any such Financial Responsibility mechanism(s), whether in cash or in kind, as needed to complete the Work. In the event that the Financial Responsibility mechanism involves a demonstration of satisfaction of the financial test criteria pursuant to Paragraph 40(e), then, after the commencement by EPA of any Work Takeover pursuant to Paragraph 49 of this Agreement (Work Takeover), Purchaser shall immediately upon written demand from EPA deposit into an account specified by EPA a cash amount up to but not exceeding the Estimated Cost of the Work as of such date, as determined by EPA and notified to Purchaser.

43. If Purchaser desires to reduce the amount of any Financial Responsibility mechanism(s), change the form or terms of any Financial Responsibility mechanism(s), or release, cancel or discontinue any Financial Responsibility mechanism(s) because the Work has been fully and finally completed in accordance with this Agreement, Purchaser shall make this request to EPA in writing and EPA shall either approve or disapprove the request in writing.

XVI. CERTIFICATION

44. By entering into this agreement, Purchaser certifies that to the best of its knowledge and belief it has fully and accurately disclosed to EPA all information known to Purchaser and all information in the possession or control of its officers, directors, employees, contractors and agents which relates in any way to any Existing Contamination or any past or potential future release of hazardous substances, pollutants or contaminants at or from the Site and to its qualification for this Agreement. Purchaser also certifies that to the best of its knowledge and belief it has not caused or contributed to a release or threat of release of hazardous substances or pollutants or contaminants at the Site. If the United States determines that information provided by Purchaser is not materially accurate and complete, the Agreement, within the sole discretion of EPA, shall be null and void and EPA reserves all rights it may have.

XVII. COVENANT NOT TO SUE BY UNITED STATES

[NOTE: Use Paragraph 45, Alternative 1, if the Agreement calls for periodic billing of Oversight Costs with no initial lump-sum payment.]

45. **[Alternative 1]** In consideration of the actions that will be performed and the payments that will be made by Purchaser under the terms of this Agreement, and except as otherwise specifically provided in this Agreement, the United States covenants not to sue or to take administrative action against Purchaser pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for Existing Contamination. This covenant not to sue shall take effect upon the Effective Date and is conditioned upon the complete and satisfactory performance by Purchaser of all obligations under this Agreement [, including, but not limited to, payment of Oversight Costs [and Additional Oversight Costs] pursuant to Section X]. This covenant not to sue extends only to Purchaser and does not extend to any other person**.**

[NOTE: Use Paragraph 45, Alternative 2, if the Agreement calls for an initial lump-sum payment for Oversight Costs.]

45. **[Alternative 2]** In consideration of the actions that will be performed and the payments that will be made by Purchaser under the terms of this Agreement, and except as otherwise specifically provided in this Agreement, the United States covenants not to sue or to take administrative action against Purchaser pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for Existing Contamination. This covenant not to sue shall take effect upon receipt by EPA of Oversight Costs due under Paragraph 22 (Payment of Sum Certain for Oversight Costs). This covenant not to sue is conditioned upon the complete and satisfactory performance by Purchaser of all obligations under this Agreement [if Additional Oversight Cost payments are/may be due under Section X, insert ", including, but not limited to, payment of Additional Oversight Costs pursuant to Section X."]. This covenant not to sue extends only to Purchaser and does not extend to any other person**.**

XVIII. RESERVATION OF RIGHTS BY UNITED STATES

46. Except as specifically provided in this Agreement, 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 or the United States from seeking legal or equitable relief to enforce the terms of this Agreement, from taking other legal or equitable action as it deems appropriate and necessary.

47. The covenant not to sue set forth in Section XVII above does not pertain to any matters other than those expressly identified therein. The United States reserves, and this Agreement is without prejudice to, all rights against Purchaser with respect to all other matters, including, but not limited to:

    a. claims based on a failure by Purchaser to meet a requirement of this Agreement;

    b. criminal liability;

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

d. liability for violations of federal, state, or local law or regulations during or after implementation of the Work other than as provided in the Workplan, the Work, or otherwise ordered by EPA;

e. liability resulting from the release or threat of release of hazardous substances, pollutants or contaminants at or in connection with the Site after the Effective Date, not within the definition of Existing Contamination;

f. liability resulting from exacerbation of Existing Contamination by Purchaser, its successors, assigns, lessees, or sublessees; and

g. liability arising from the disposal, release or threat of release of Waste Materials outside of the Site.

48. With respect to any claim or cause of action asserted by the United States, Purchaser shall bear the burden of proving that the claim or cause of action, or any part thereof, is attributable solely to Existing Contamination and that Purchaser has complied with all of the requirements of 42 U.S.C. § 9601(40).

49. Work Takeover. In the event EPA determines that Purchaser has ceased implementation of any portion of the Work, is seriously or repeatedly deficient or late in its performance of the Work, or is implementing the Work in a manner which may cause an endangerment to human health or the environment, EPA may assume the performance of all or any portion of the Work as EPA determines necessary. Prior to taking over the Work, EPA will issue written notice to Purchaser specifying the grounds upon which such notice was issued and providing Purchaser with __ days within which to remedy the circumstances giving rise to EPA's issuance of the notice. Purchaser may invoke the procedures set forth in Section XIII (Dispute Resolution) to dispute EPA's determination that takeover of the Work is warranted under this Paragraph. After commencement and for the duration of any Work Takeover, EPA shall have immediate access to and benefit of any Financial Responsibility mechanism provided pursuant to Section XV (Financial Responsibility) of this Agreement. Notwithstanding any other provision of this Agreement, EPA retains all authority and reserves all rights to take any and all response actions authorized by law.

XIX. COVENANT NOT TO SUE BY PURCHASER

50. Purchaser covenants not to sue and agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to Existing Contamination, the Work, [Oversight Costs,] [Additional Oversight Costs] or this Agreement, 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, including any claim under the United States 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.

51. 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).

XX. CONTRIBUTION

52. Nothing in this Agreement precludes the United States or Purchaser from asserting any claims, causes of action, or demands for indemnification, contribution, or cost recovery against any person not a party to this Agreement, including any claim Purchaser may have pursuant to Section 107(a)(4)(B). Nothing herein diminishes the right of the United States, pursuant to Sections 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2) and (3), to pursue any such persons to obtain additional response costs or response actions and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2).

53. In the event of a suit or claim for contribution brought against Purchaser, notwithstanding the provisions of Section 107(r)(1) of CERCLA, 42 U.S.C. § 9607(r)(1), with respect to Existing Contamination (including any claim based on the contention that Purchaser is not a BFPP, or has lost its status as a BFPP as a result of response actions taken in compliance with this Agreement or at the direction of the OSC), the Parties agree that this Agreement shall then constitute an administrative settlement for purposes of Section 113(f)(2) of CERCLA, 42 U.S.C.§ 9613(f)(2), and that Purchaser would be entitled, from 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 Agreement. The "matters addressed" in this Agreement are all response actions taken or to be taken and all response costs incurred or to be incurred by the United States or by any other person with respect to Existing Contamination.

54. In the event Purchaser were found, in connection with any action or claim it may assert to recover costs incurred or to be incurred with respect to Existing Contamination, not to be a BFPP, or to have lost its status as a BFPP as a result of response actions taken in compliance with this Agreement or at the direction of the OSC, the Parties agree that this Agreement shall then constitute an administrative settlement within the meaning of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B), pursuant to which Purchaser has resolved its liability for

all response actions taken or to be taken and all response costs incurred or to be incurred by the United States or by any other person with respect to Existing Contamination.

55. Purchaser agrees that with respect to any suit or claim brought by it for matters related to this Agreement it will notify the United States in writing no later than 60 days prior to the initiation of such suit or claim.

56. Purchaser also agrees that with respect to any suit or claim for contribution brought against it for matters related to this Agreement it will notify the United States in writing within 10 days of service of the complaint on it.

XXI. RELEASE AND WAIVER OF LIEN(S)

57. Subject to the Reservation of Rights in Section XVIII of this Agreement, upon satisfactory completion of the Work specified in Section VIII (Work to be Performed) [and payment of Oversight Costs [or Additional Oversight Costs] due under Section X], EPA agrees to release and waive any lien it may have on the Property now and in the future under Section 107(r) of CERCLA, 42 U.S.C.§ 9607(r), for costs incurred or to be incurred by EPA in responding to the release or threat of release of Existing Contamination.

XXII. INDEMNIFICATION

58. Purchaser 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 Purchaser, its officers, directors, employees, agents, contractors, or subcontractors, in carrying out actions pursuant to this Agreement. In addition, Purchaser agrees to pay the United States all costs incurred by the United States, including but not limited to attorneys fees and other expenses of litigation, arising from or on account of claims made against the United States based on negligent or other wrongful acts or omissions of Purchaser, Purchaser's officers, directors, employees, agents, contractors, subcontractors and any persons acting on Purchaser's behalf or under Purchaser's control, in carrying out activities pursuant to this Agreement. The United States shall not be held out as a party to any contract entered into by or on behalf of Purchaser in carrying out activities pursuant to this Agreement. Neither Purchaser nor any such contractor shall be considered an agent of the United States.

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

60. Purchaser waives all claims against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States, arising from or on account of any contract, agreement, or arrangement between Purchaser 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, Purchaser 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 Purchaser and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays.

XXIII. MODIFICATION

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

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

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

XXIV. APPENDICES

64. The following appendices are attached to and incorporated into this Agreement.

[a. Appendix 1 shall mean ____]

XXV. NOTICE OF COMPLETION

65. When EPA determines, after EPA's review of the Final Report, that all Work has been fully performed in accordance with this Agreement, with the exception of any continuing obligations required by this Agreement, including [insert list of such obligations, *e.g.*, continued compliance with CERCLA Section 101(40) with respect to the Property in accordance with Paragraph 5 of this Agreement, post-removal site controls, record retention, compliance with institutional controls, etc.], EPA will provide written notice to Purchaser. If EPA determines that any such Work has not been completed in accordance with this Agreement, EPA will notify Purchaser, provide a list of the deficiencies, and require that Purchaser modify the Work Plan if appropriate in order to correct such deficiencies. Purchaser shall implement the modified and approved Work Plan and shall submit a modified Final Report in accordance with the EPA notice. Failure by Purchaser to implement the approved modified Work Plan shall be a violation of this Agreement.

XXVI. EFFECTIVE DATE

66. The effective date of this Agreement shall be the date upon which EPA issues written notice to Purchaser that EPA has fully executed the Agreement after review of and response to any public comments received.

XXVII. DISCLAIMER

67. This Agreement in no way constitutes a finding by EPA as to the risks to human health and the environment which may be posed by contamination at the Property or the Site nor constitutes any representation by EPA that the Property or the Site is fit for any particular purpose.

XXVIII. PAYMENT OF COSTS

68. If Purchaser fails to comply with the terms of this Agreement, it shall be liable for all litigation and other enforcement costs incurred by the United States to enforce this Agreement or otherwise obtain compliance.

XXIX. NOTICES AND SUBMISSIONS

69. Any notices, documents, information, reports, plans, approvals, disapprovals, or other correspondence required to be submitted from one party to another under this Agreement, shall be deemed submitted either when hand-delivered or as of the date of receipt by certified mail/return receipt requested, express mail, or facsimile.

Submissions to Purchaser shall be addressed to:

With copies to:

Submissions to U.S. EPA shall be addressed to:

With copies to:

XXX. PUBLIC COMMENT

70. This Agreement shall be subject to a thirty-day public comment period, after which EPA may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper or inadequate.

The undersigned representative of Purchaser certifies that it is fully authorized to enter into the terms and conditions of this Agreement and to bind the party it represents to this document.

IT IS SO AGREED:
BY:

_____
Name (Purchaser) Date

IT IS SO AGREED:
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BY:

_____
Regional Administrator Date
Region __

IT IS SO AGREED:
UNITED STATES DEPARTMENT OF JUSTICE
BY:

_____
Assistant Attorney General Date
Environment and Natural Resources Division
U.S. Department of Justice

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MAY 31 2002

MEMORANDUM

SUBJECT: Bona Fide Prospective Purchasers and the New Amendments to CERCLA

FROM: Barry Breen, Director
Office of Site Remediation Enforcement

TO: Superfund Senior Policy Managers (Region I - X)
Regional Counsels (Regions I - X)

I. Introduction

Since 1989, EPA has negotiated agreements that provide a covenant not to sue for certain prospective purchasers of contaminated property prior to their acquisition, in order to resolve the potential liability due to ownership of such property. These agreements are known as Prospective Purchaser Agreements ("PPAs")[1]. In January 2002, CERCLA was amended through enactment of Public Law 107-118, titled the Small Business Relief and Brownfield Revitalization Act ("Brownfields Amendments"). Among other things, the Brownfields Amendments provide a limitation on liability for persons who qualify as bona fide prospective purchasers ("BFPPs"). Congress' intent in enacting this provision was to remove certain liability barriers to purchases of property and encourage redevelopment.

EPA believes that, in most cases, the Brownfields Amendments make PPAs from the federal government unnecessary. The following discussion describes when, primarily because

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[1] The PPA guidance is available at OSRE's Web page at http://es.epa.gov/oeca/osre/ppa.html . This guidance is titled "Guidance on Settlements with Prospective purchasers of Contaminated Property," dated May 24, 1995, which superceded earlier guidance issued June 6, 1989. The model PPA agreement was last revised on September 30, 1999. Additional guidance documents on the subject of prospective purchasers include a checklist, issued October 1, 1999, of documents likely to be requested from a prospective purchaser seeking a PPA, and a clarification, issued January 10, 2001, of PPA guidance titled "Support of Regional Efforts to Negotiate Prospective Purchaser Agreements (PPAs) at Superfund Sites and Clarification of PPA Guidance." The guidance listed is not being replaced by this memorandum, but is rather being supplemented.

of significant public benefit, EPA will consider providing a prospective purchaser with a covenant not to sue now that the Brownfields Amendments are law.

II. Background

Subtitle B of the new Brownfields Amendments, through the addition of CERCLA section 107(r), provides a limitation on liability for a "bona fide prospective purchaser" whose potential liability is based solely on the purchaser's being an owner or operator of a facility, and provided that the purchaser does not impede the performance of a CERCLA action. New subsection 101(40) defines "bona fide prospective purchaser" as a person, or tenant of that person, who acquires ownership of a facility after the date of enactment of the Brownfields Amendments, January 11, 2002, and by a preponderance of the evidence establishes the following:

1. disposal at the facility occurred prior to acquisition;
2. the person made all appropriate inquiry into previous ownership and uses of the facility in accordance with generally accepted practices and in accordance with the new standards contained in section 101(35)(B);
3. the person provides all legally required notices with respect to hazardous substances found at the facility[2];
4. the person exercises "appropriate care" with respect to the hazardous substances found at the facility by taking "reasonable steps" to:
    a. stop any continuing releases;
    b. prevent any threatened future release;
    c. prevent or limit human, environmental or natural resource exposure to any previously released hazardous substance;
5. the person provides full cooperation and access to the facility to those authorized to conduct response;
6. the person is in compliance with any land use restrictions and does not impede the effectiveness or integrity of any institutional control;
7. the person complies with any information request or administrative subpoena under CERCLA; and
8. the person is not potentially liable for response costs at the facility or "affiliated" with any such person through
    a. direct or indirect familial relationship or
    b. any contractual, corporate or financial relationship (excluding relationships created by instruments conveying or financing title or by contracts for sale of goods or services).

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[2] This requirement is very site specific, and will depend on gaining an understanding of which hazardous substances if any are on the property, through making "all appropriate inquiry" into previous uses of the property. Once the nature of any contamination is more fully understood, then any required notices will be more evident.

The BFPP provisions represent a significant change in CERCLA. For the first time, a party may purchase property with knowledge of contamination and not acquire liability under CERCLA as long as that party meets the BFPP criteria[3]. The new Amendments should provide significant savings of time and transaction costs. Private parties will now be able to avoid the costs associated with negotiating PPAs, and the timing of the transaction will be within the control of the parties to the transaction and need not await federal government approval of the terms of a PPA.

A BFPP may be subject to a "windfall lien" under the newly added CERCLA Section 107(r), up to the amount of unrecovered response costs incurred by the United States at a facility for which the owner is not liable as a BFPP, and where the response action increases the fair market value of the facility. As to the amount and duration of any windfall lien, the Brownfields Amendments state that the amount is not to exceed the increase in fair market value attributable to the response action at the time of sale or other disposition of the property.[4] The windfall lien arises at the time response costs at the facility are incurred by the United States, and shall continue until the earlier of satisfaction of the lien by sale or other means, or, notwithstanding any statute of limitations under CERCLA Section 113, recovery of all response costs incurred at the facility.

III. Discussion

EPA's long-standing policy is not to become involved in purely private real estate transactions. The Brownfields Amendments reinforce the appropriateness of that policy. The Amendments provide a limitation on liability from CERCLA to persons who qualify as BFPPs thereby making a federal covenant not to sue under CERCLA unnecessary. In light of the new Amendments, effective as of the date of enactment, purchasers should no longer need PPAs with the federal government in order to complete the vast majority of real estate transactions involving contaminated property.

While EPA believes the necessity for PPAs has been largely addressed by congressional action, the Agency recognizes that in limited instances the public interest will be served by

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[3] CERCLA section 107(q) creates another category of person, a contiguous property owner, who will not be considered to be an owner or operator of a facility so long as that person makes all appropriate inquiry into previous uses of the property and does not discover that it is contaminated. If such person has knowledge of contamination at the time of acquisition, he may qualify as a bona fide prospective purchaser under CERCLA section 101(40), so long as he meets the other requirements of that section.

[4] Therefore, where the lien arises, the lien shall not exceed the increase in fair market value attributable to the response action.

entering into PPAs or some other form of agreement[5]. First, where there is likely to be a significant windfall lien and the purchaser needs to resolve the lien prior to purchasing the property (e.g. to secure financing), EPA may consider entering into an agreement with the purchaser.[6]

Second, there may be projects in which a PPA is necessary to ensure that the transaction will be completed and the project will provide substantial public benefits to, for example, the environment, a local community because of jobs created or revitalization of long blighted, under-utilized property, or promotion of environmental justice. In these limited circumstances, the following examples may provide some general guidelines on when such an agreement may be considered:

1. Significant environmental benefits will be derived from the project in terms of cleanup, reimbursement of EPA response costs, or new use, and there is a significant need for a PPA in order to accomplish the project's goals.

> Example: The purchasers are committing to perform significant cleanup as they develop the site for a new use and have concerns about facility "owner or operator" liability.
>
> Example: There has been no facility cleanup, no viable potentially responsible party exists who can be required to timely conduct the cleanup (the current owner may be in bankruptcy), and no potential developer is willing to undertake the entire cleanup in order to develop and use the facility, which, without a PPA, may sit idle for years.

2. The facility is currently involved in CERCLA litigation such that there is a very real possibility that a party who buys the facility would be sued by a third party.

> Example: The United States has an enforcement case under CERCLA Sections 106 and 107 pending against potentially responsible parties, and the primary defendants have sued an additional number of third party defendants, and/or there is a private party

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[5] EPA also recognizes that entering into an "agreement" is not necessary in every instance where a party acquiring contaminated property has concerns about managing liability risks. EPA issued its "Policy on the Issuance of EPA Comfort/Status Letters" on November 12, 1996, in an effort to help the public better understand the environmental status of certain properties and the likelihood that EPA would become involved there.

[6] In some cases, where a BFPP and the United States agree to resolve the United States' windfall lien claim in advance of the BFPP's purchase of the real property, such an agreement may be limited to a settlement of the Section 107(r)(2) lien claim. As stated above, Congress intended the new Section 107(r) to obviate the need for most PPAs and, therefore, settlement of the windfall lien claim may be limited to that one issue. It is EPA's present intent to discuss the windfall lien issue more fully in subsequent guidance.

contribution action ongoing, and a prospective purchaser has been threatened with contribution litigation.[7]

3. EPA will consider entering into a PPA or other settlement in unique, site-specific circumstances not otherwise addressed above when a significant public interest would be served by the transaction and it would not otherwise occur without issuance of a PPA.

IV. Conclusion

Subtitle B—Brownfields Liability Clarifications, of the Brownfields Amendments set out the limitations on liability that are now a part of CERCLA. It is the Agency's hope and expectation that most real estate transactions concerning acquisition of brownfields properties will now move forward with no need for EPA involvement. In those unusual circumstances discussed above, EPA remains committed to removing liability barriers to redevelopment of property where it may appropriately do so.

Case specific inquiries as well as general questions regarding this policy should be directed to Helen Keplinger in OSRE's Regional Support Division at (202) 564-4221.

This memorandum is intended solely for the guidance of employees of EPA and the Department of Justice and it creates no substantive rights for any persons. It is not a regulation and does not impose legal obligations. EPA will apply the guidance only to the extent appropriate based on the facts.

cc: Susan Bromm (OSRE)
Paul Connor (OSRE)
Mike Cook (OSWER)
Benjamin Fisherow (DOJ)
Henry Friedman (DOJ)
Linda Garczynski (OSWER)
Bruce Gelber (DOJ)
Bruce Kulpan (OSRE)
Steve Luftig (OSWER)
Earl Salo (OGC)
Alan Tenenbaum (DOJ)
Jack Winder (OSRE)
EPA Brownfields Liability Exemption Subgroup

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[7] A party may have acquired property and otherwise qualify as a BFPP before being threatened with contribution action, but there is no prohibition against EPA entering into a settlement with that party after his acquisition of the property.

EPA Brownfields Grants, CERCLA Liability, and All Appropriate Inquiries

To be eligible for an EPA brownfields grant to address contamination at brownfields properties, eligible entities must demonstrate that they are not liable under CERCLA for the contamination at the site. Accordingly, eligible entities who may be considered "potentially responsible parties" under CERCLA must demonstrate they meet one of the liability protections or defenses set forth in CERCLA by establishing that they are (1) an innocent landowner, (2) a contiguous property owner, (3) a bona fide prospective purchaser, or (4) a government entity that acquired the property involuntarily through bankruptcy, tax delinquency, or abandonment, or by exercising its power of eminent domain.

To claim protection from liability as an innocent landowner, contiguous property owner, or bona fide prospective purchaser, property owners, including state and local governments, must conduct all appropriate inquiries prior to acquiring the property.

What is CERCLA?

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), also known as "Superfund," was established to address abandoned hazardous waste sites. Among other things, CERCLA establishes a liability scheme for determining who can be held accountable for releases of hazardous substances. CERCLA also establishes the authority for EPA's Brownfields Program and sets forth which entities and properties are eligible for brownfields grants.

Can state and local governments be found liable for contamination at brownfields?

Yes. Under CERCLA, persons (including state and local governments) can be liable by virtue of property ownership, or by virtue of their actions with respect to a particular site. For sites from which there is a release or threatened release of hazardous substances, the categories of "potentially responsible parties" include any person or party who:

- Currently owns or operates the property, or owned or operated the property at the time of disposal of hazardous substances;
- Arranged for hazardous substances to be disposed of or transported to the site for disposal; or
- Transported hazardous substances to the site.

Applicants should note that CERCLA employs a "strict liability" scheme—that means it is without regard to fault. Accordingly, a person who owns a property from which there is a release of hazardous substances can be held liable just by virtue of ownership.

If I am applying for a brownfields grant, do I have to worry about CERCLA liability?

Yes. Brownfields grantees are prohibited from using grant money to pay response costs at a brownfield site for which the grantee is potentially liable under CERCLA.

Therefore, all brownfields grantees who may be potentially liable at the site for which they are seeking funds must demonstrate that they are not liable for the contamination that will be addressed by the grant, subgrant, or loan. Applicants who own or operate the property for which they are seeking funding, or who may have owned or operated the property at the time of disposal of hazardous substances, must demonstrate they fall within one of the liability protections.

Cleanup grant applicants in particular should take note of this prohibition. Because cleanup grantees are required to own a site to receive brownfields funding—and because owners of contaminated property are liable under CERCLA—cleanup grant applicants ***must*** demonstrate they meet one of the liability protections described above. Some grant applicants who do not own the property for which they are seeking funding, or who are not seeking site-specific grant funds, may not fall within one of the categories of "potentially responsible parties," and thus may not have to demonstrate they meet a liability protection.

Please contact your Regional Brownfields representative if you are not sure whether you will need to demonstrate a liability protection to be eligible for a grant.

Who may be protected from liability under CERCLA?

The CERCLA statute provides protection from liability for certain parties, provided they comply with specific criteria outlined in the statute. Parties provided protection from CERCLA liability include:

- Innocent landowners (CERCLA §101(35)(A))
- Contiguous property owners (CERCLA §107(q))
- Bona fide prospective purchasers (CERCLA §§101(40) and 107(r))
- Units of state or local government that acquire ownership or control involuntarily through bankruptcy, tax delinquency, or abandonment (CERCLA §101(20)(D))

Government entities that acquire property by eminent domain (CERCLA §101(35)(A)(ii))

- Not be affiliated with any liable party through any familial relationship or any contractual, corporate or financial relationship (other than a relationship created by the instrument by which title to the property is conveyed or financed).

NOTE: Property acquisition includes properties acquired by gifts and zero price transactions.

How can a state or local government demonstrate that it is not liable for contamination at a brownfield?

All state and local governments that may be potentially liable at a site for which they are applying for funding (including site-specific assessment grants, cleanup grants, or subgrants or loans from revolving loan funds), ***must*** demonstrate that they qualify for one of the CERCLA liability protections. All non-profit entities applying for brownfields cleanup grants also must make this demonstration.

Eastern Manufacturer Brewer, Maine, prior to cleanup (above) and after (right)

What are the conditions for attaining liability protection under CERCLA?

To be eligible for liability protection under CERCLA as an innocent landowner, contiguous property owner or bona fide prospective purchaser, prospective property owners must:

- Conduct All Appropriate Inquiries in compliance with 40 CFR Part 312, prior to acquiring the property;
- Comply with all Continuing Obligations after acquiring the property. (CERCLA §§101(40)(C – G) and §§107(q)(A)(iii – viii)); and

To demonstrate that it qualifies as an innocent landowner, contiguous landowner, or bona fide prospective purchaser, the applicant must:

- Conduct All Appropriate Inquires prior to acquiring the property, ***and***
- Comply with all Continuing Obligations after acquiring the property.

State and local governments that acquired a property involuntarily through bankruptcy, tax delinquency, or abandonment, or by exercising their power of eminent domain, do not have

to conduct all appropriate inquiries prior to acquiring the property, but must exercise "due care" after acquiring the property (CERCLA §101(35)(A) and §§107(b)(3)(a – b)). [Note: One threshold criteria for applicants seeking cleanup grant funding is that a Phase I must be conducted prior to application submission. Accordingly, although state and local governments that acquired property involuntarily are not required to conduct all appropriate inquiries for purposes of establishing a liability protection, they may have to conduct all appropriate inquiries anyway to be eligible for a cleanup grant.]

What is "All Appropriate Inquiries"?

"All Appropriate Inquiries," or AAI is the process of conducting due diligence or a Phase I Environmental Site Assessment to determine prior uses and ownership of a property and assess conditions at the property that may be indicative of releases or threatened releases of hazardous substances at, on, in, or to the property.

The standards and practices established as comprising "All Appropriate Inquiries" are set forth in regulations promulgated at 40 CFR Part 312.

EPA recognizes two ASTM International Standards as compliant with the AAI requirements: ASTM E1527-05 "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process" and E2247-08 "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process for Forestland or Rural Property."

When must All Appropriate Inquiries be conducted?

- All Appropriate Inquiries must be conducted or updated within one year ***prior to acquiring ownership of a property.***
- Certain aspects or provisions of All Appropriate Inquiries (i.e., interviews of current and past owners, the review of government records, the on-site visual inspection, and searches for environmental cleanup liens) must be conducted or updated ***within 180 days prior to acquiring ownership of a property.***

Who can perform All Appropriate Inquiries?

The individual who supervises or oversees the conduct of the AAI investigation and signs the final report required in the AAI regulation must meet the definition of an "Environmental Professional" provided in the AAI Final Rule (40 CFR §312.10).

A person that does not qualify as an "Environmental Professional" as defined in 40 CFR §312.10, may assist in the conduct of the investigation if he or she is under the responsible charge of a person meeting the definition.

What are "Continuing Obligations?"

After acquiring a property, to maintain the liability protections, landowners must comply with "continuing obligations" during their property ownership. The continuing obligations include:

1. Provide all legally required notices with respect to the discovery or release of a hazardous substance;
2. Exercise appropriate care with respect to the hazardous substances by taking reasonable steps to stop or prevent continuing or threatened future releases and exposures, and prevent or limit human and environmental exposure to previous releases;
3. Provide full cooperation, assistance, and access to persons authorized to conduct response actions or natural resource restoration;
4. Comply with land use restrictions and not impede the effectiveness of institutional controls; and
5. Comply with information requests and subpoenas.

Where can I get additional information?

For general information, see the EPA Brownfields website at: **www.epa.gov/brownfields**

For more information on the AAI requirements, see: **http://www.epa.gov/brownfields/regneg.htm**

For more information on continuing obligations, see:
http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf

Contact Patricia Overmeyer at: **Overmeyer.patricia@epa.gov**

Brownfields Fact Sheet
EPA Brownfields Grants,
CERCLA Liability,
and All Appropriate Inquiries

Solid Waste
and Emergency
Response (5105)

EPA 560-F-09-026
April 2009
www.epa.gov/brownfields

SEPARATOR

05-00003

LEGAL

ORMOND

NO DATE

LIS86-293

1 IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

2 ----------x

3 ARKANSAS DEPARTMENT OF POLLUTION)
CONTROL AND ECOLOGY,)

4)

PETITIONER,)

5)

VS.) NO-E-86-293

6)

HALLIE C. ORMOND, ARKWOOD, INC.,)

7 MOUNTAIN ENTERPRISES, INC.,)
C. C. GRISHAM, MARY JO GRISHAM)

8 and MASS MERCHANDISERS, INC.,)

)

9 RESPONDENTS,)

)

10 HALLIE C. ORMOND,)

)

11 THIRD-PARTY PLAINTIFF,)

)

12 McKESSON CORPORATION,)

)

13 THIRD-PARTY DEFENDANT.)

)

14 ----------x

15 ---o---

16 DEPOSITION

17 OF

18 C. C. "BUD" GRISHAM

19 ---o---

20 A P P E A R A N C E S:

21 ON BEHALF OF THE PETITIONER:

22 PHILLIP S. DEISCH, ESQUIRE
General Counsel

23 Arkansas Department of Pollution Control
and Ecology

24 8001 National Drive
Little Rock, Arkansas 72209

25

1 A P P E A R A N C E S, Continued:

2 ON BEHALF OF MASS MERCHANDISERS, INC. AND McKESSON CORPORATION:

3

DAVID ALLAN GATES, ESQUIRE
4 Mitchell, Williams, Selig & Tucker
1000 Savers Building
5 Little Rock, Arkansas 72201

6 ON BEHALF OF HALLIE C. ORMOND, ARKWOOD, INC., C. C. GRISHAM, MARY JO GRISHAM AND MARY BURK:

7

BILL F. DOSHIER, ESQUIRE
8 Doshier & Bowers
Post Office Box 1797
9 Harrison, Arkansas 72601
AND
10 DONALD ADAMS, ESQUIRE
Attorney at Law
11 Post Office Box 1912
Harrison, Arkansas 72601

12

ALSO PRESENT:

13

Doice Hughes
14 Bob Barker
Marsha Talley

15

16 ---o---

17

18 The deposition of C. C. Bud Grisham was
19 taken before me, Susan B. Whitson, Certified Court
20 Reporter and notary public within and for the County of
21 Pulaski, State of Arkansas, duly commissioned and acting,
22 on Monday, May 11, 1987 beginning at the hour of 10:00
23 a.m., at the office of Mitchell, Williams, Selig & Tucker,
24 1000 Savers Building, Little Rock, Pulaski County,
25 Arkansas.

1 Said deposition being taken in accordance
2 with the Federal Rules of Civil Procedure and pursuant to
3 provisions of the Arkansas Rules of Civil Procedure
4 at instance of counsel for Mass Merchandisers, Inc. and
5 McKesson Corporation, in the above-styled cause pending
6 in the Chancery Court of Boone County, Arkansas.
7 ---o---
8
9 THEREUPON, the following proceedings were had, to-wit:
10 S T I P U L A T I O N
11 IT IS HEREBY STIPULATED AND AGREED by and
12 between counsel for the parties that all forms and
13 formalities as to the taking, transcribing, transmitting,
14 signing and certification of said deposition in this
15 action are hereby waived; however, the right to object to
16 the testimony of the witness on the grounds of competency,
17 relevancy and materiality is hereby expressly reserved,
18 other than as to the form of questions as propounded to
19 the witness, and may be hereinafter asserted if and when
20 presented at the time of trial of this cause without the
21 necessity of noting same at the time of taking of said
22 deposition.
23 ---o---
24
25

1 P R O C E E D I N G S

2 THEREUPON,

3 C.C. "BUD" GRISHAM,

4 having been called for examination by counsel for defendant,

5 and having been first duly sworn by the undersigned notary

6 public, was examined and testified as follows:

7 DIRECT EXAMINATION

8 BY MR. GATES:

9 Q State your name for the record, please, sir.

10 A Bud Grisham.

11 Q What is your address?

12 A Number 3C, 3525 Turtle Creek Boulevard, Dallas, 75219.

13 Q Mr. Grisham, we've met before, but just for the record,

14 I would like to remind you I'm Allan Gates, I am an

15 attorney. I represent MMI and McKesson in connection with a

16 lawsuit that had been brought by the state. You are

17 familiar with that lawsuit, as I understand it, is that

18 correct?

19 A Yes.

20 Q And you understand that today you're here to answer

21 questions that we have about whatever facts you might know

22 about that litigation, is that correct?

23 A Yes.

24 Q All right. Now, if I ask you any question and you

25 don't understand it, please let me know. We need to be able

1 to rely on your questions, is that a fair enough deal?
2 A On my answers, yes.
3 Q Yes, and if you don't understand my questions, will you
4 make sure and ask me to clarify them or to rephrase them so
5 that we can be confident of your answers?
6 A (Indicated yes.)
7 Q Fine. And finally, in giving answers, you will need to
8 give an answer orally rather than just nod so that the court
9 reporter will have something to transcribe, okay?
10 A Oh, sure.
11 Q Fine. First, I would like you to testify -- excuse me,
12 tell us briefly your relationship to the other parties to
13 this litigation, specifically Hallie Ormond and Mary Jo
14 Grisham.
15 A Hallie Ormond is a friend.
16 Q All right. And that's your only relationship with Mr.
17 Ormond?
18 A Yes. I also have his power of attorney, if that's what
19 you meant.
20 Q All right.
21 A Did you mean a blood relationship? What are you --
22 Q Any type of relationship.
23 A That's it.
24 Q He was at one point your father-in-law, is that
25 correct?

A Yes, but he isn't now.

Q All right.

A I guess, or are you once a father-in-law, always a father-in-law?

MR. DOSHIER: I doubt it.

THE WITNESS: I don't know. With Hallie, you might be.

BY MR. GATES:

Q When did you get the power -- Hallie Ormond's power of attorney?

A Oh, a couple of years ago, I guess.

Q Let's try to get as specific as we can. Was it before this litigation was filed?

A Well, to be -- I would have to look it up. It was -- that particular day I'll have to look it up. I've had it for a year or two. It was basically when this started up. To give you a year date, I would say '85. I would be reasonably sure it was in '85.

Q Is it an unlimited power of attorney?

A Yes.

Q Does it have any termination date?

A No. I assume. I'm not sure about his death. I would have to read the fine print in that, but I assume it doesn't.

MR. DOSHIER: Goes to his death.

1 THE WITNESS: Goes to his death, okay.
2 BY MR. GATES:
3 Q Did you discuss with Mr. Ormond the reasons for the
4 power of attorney?
5 A Discuss with him?
6 Q Yes, sir.
7 A Well, he told me when to have his power of attorney,
8 so, yes, we discussed many reasons for why I would have his
9 power of attorney.
10 Q What reasons did he describe to you?
11 A Well, estate planning was the main one. That was the
12 main one. As to other reasons, the fact that his age, he is
13 about 82 now, would have been 80 at that time, and he
14 decided he couldn't carry on his business, you know,
15 efficiently, so he thought it would better if I did that.
16 Q Have you conveyed any assets under the power of
17 attorney?
18 A Have I conveyed any assets? Well, I've written a lot
19 of checks.
20 Q What types of checks?
21 A Let's see. Like that there, about four by eight.
22 Q Checks for what types of expenses?
23 A Legal expenses, personal expenses, nursing care,
24 doctors, medical.
25 Q Consulting fees?

A Consulting fees? I'll have to think on that. Attorney's fees, if that's a consulting fee.

Q Have you collected any type of a fee since you received the power of attorney?

A No, I have not.

Q Do you intend to charge any type of fee to Mr. Ormond?

A I haven't made up my mind about that.

Q Other than writing checks, have you conveyed any assets since you received your power of attorney, any of Mr. Ormond's assets?

A Yes.

Q What assets have you conveyed?

MR. DOSHIER: Let's go off the record here just a minute.

(THEREUPON, a short discussion was held off the record.)

MR. DOSHIER: Allan, of course, we didn't lay any ground rules for what the deposition was going to take, but generally, I was understanding that we were talking about issues that were relevant to the hearing coming up Friday. You seem to be going to explore another issue, which is related to some other lawsuit down the line, and I think we'll permit that generally, but on the details, we're going to object to that and I'm going to

tell him not to answer the details. I think it's going beyond the scope of this particular lawsuit.

MR. GATES: Well, as far as I'm concerned about our discussion, I thought we had a clear understanding that this hearing was likely to encompass potentially every issue that might come up and that we were not going to object on our side nor were you going to object on your side to discovery as being limited to this hearing.

The only thing that we were reserving the right was that this would not be our only opportunity to inquire of these particular witnesses. If you have an objection when we get to a particular point, I guess you'll just have to state it and we'll have to see where we are when we get there.

MR. DOSHIER: The point is I'm going to allow him to answer generally, but not specific questions on that issue.

MR. GATES: When you get to the point that you have an objection, I guess we'll have to deal with it.

MR. DOSHIER: Okay.

BY MR. GATES:

1 Q Back to my original question, Mr. Grisham. Other than
2 writing checks, as you've already described, what assets
3 have you conveyed of Mr. Ormond's since you got your power
4 of attorney?
5 MR. DOSHIER: And we object to that and don't
6 answer that question.
7 BY MR. GATES:
8 Q What types of assets have you conveyed in addition to
9 writing checks?
10 MR. DOSHIER: We object to that and don't
11 answer that question.
12 BY MR. GATES:
13 Q Have you conveyed any real property of Mr. Ormond's?
14 MR. DOSHIER: That's the same question, and
15 we object to it.
16 MR. GATES: We'll need to certify these, I
17 suspect.
18 MR. DOSHIER: Yeah, except for real estate
19 that's the subject matter of this litigation. You
20 can answer it as to that, in that regard.
21 BY MR. GATES:
22 Q Would you answer the question, please, sir?
23 A What is it?
24 Q Have you conveyed any real estate that is the subject
25 matter of this litigation?

A Yes.

MR. DOSHIER: No.

THE WITNESS: Yes, that's the subject matter.

MR. DOSHIER: Oh, yeah, he said subject matter, right.

THE WITNESS: Yeah, if I understand, Allan, you're talking about the treating plant site, right? Is that the question?

BY MR. GATES:

Q You are the witness. I've asked you about what you have conveyed. If you have conveyed the treating plant site, please describe the transaction.

A Is that your question, did I convey the treating plant site?

Q We'll start with that question, yes, sir.

A Did I convey the treating plant site?

Q Yes, sir.

A Hallie Ormond's power -- would you call them co-power of attorneys? Charlie Ormond and myself conveyed a tract of ground that included the treating plant site. It was 83-some-odd acres, which was the original land Hallie purchased up there anyhow. In fact, possibly --

Q Excuse me. Let me interrupt you. What was on the note that Mr. Doshier just wrote to you you were reading there?

MR. DOSHIER: That's our business.

BY MR. GATES:

Q Well, let me just ask you directly, and if you're going to object on any basis, fine, but what was on the note Mr. Doshier just wrote to you?

MR. DOSHIER: We object to that question.

MR. GATES: Are you instructing the witness not to answer?

MR. DOSHIER: Witness not answer.

MR. GATES: Now, I'm going to object to any communications with this witness while a question is pending and he is in mid-answer, Mr. Doshier. I'm entitled to get an answer from this witness without coaching in mid-question, and if we have to take other steps to get to that point, we'll have to do that.

MR. DOSHIER: Okay.

BY MR. GATES:

Q All right, sir. Now, we are talking about the transaction, and you've indicated that I believe you and Mr. Charlie Ormond jointly conveyed some property which includes the treating plant site?

A I'm a little unclear on that item, Allan. It was either that way or Hallie Ormond signed the deed, one of those two. Now, it's on public record, so, you know, go get

1 it out of the public record.

2 Q How much was paid for that site or that parcel by the

3 transferee?

4 A One dollar and other valuable considerations.

5 Q What was the other valuable consideration?

6 A The consideration, I suppose you would call it, of

7 being a friend of the family and that would be it.

8 Q This was a paper conveyance then? It was not an arm's

9 length purchase and sale for market value?

10 A Well, actually with the cloud over that treating plant

11 site, it has a negative market value at this point, so it

12 would be a little difficult to say whether it was sold at

13 market value or not.

14 Q Okay. But just so I understand this transaction, did

15 even the dollar actually change hands?

16 A Yes.

17 Q All right. And the transferee, as I understand it, is

18 one Mary Burk?

19 A Yes.

20 Q Do you know Ms. Burk?

21 A Yes.

22 Q Where does Ms. Burk reside?

23 A In -- her residence is Dallas, Texas.

24 Q And how do you know Ms. Burk?

25 A She is my sister.

Q Did you ask her to serve as the transferee of the property?

A No, I didn't ask her.

Q Who spoke to her about the property?

A She -- I don't know of anybody who spoke to her about it until she received the deed.

Q Okay. So she didn't even know that she was going to be the transferee until she got the deed?

A Yes, that's right.

Q Why did you select Ms. Burk as the transferee?

A Hallie Ormond did. He was doing some gifting and he decided that that would be a good person to gift that property to.

Q Did Ms. Burk know anything about the history of the site or the circumstances surrounding the treating plant's environmental issues?

A She would vaguely have known. I would say vaguely, yeah.

Q She was aware at least in general that there was a controversy about the environmental issues on the site?

A I can't speak for that. You would have to ask her.

Q Well, did she believe the site to be free of environmental concerns?

A You would have to ask her that question. I couldn't speak for her on that.

1 Q Did she know anything about the site other than what
2 you told her?
3 A Again, Allan, you would have to ask her what she knew
4 and didn't know. I wouldn't start to speak for her on that
5 matter.
6 Q Why did you and Mr. Charlie Ormond decide to transfer
7 the site out of Mr. Hallie Ormond's name?
8 A Well, you mean whether Hallie Ormond deeded it or not?
9 Is that what you mean? I'm not real sure who signed the
10 deed. I can't remember. That's not important.
11 Q Regardless of who actually executed it, it was clear
12 that you and Mr. Charlie Ormond were involved in the
13 decision to make the transfer?
14 A Oh, yeah.
15 Q Why did you make the transfer?
16 A Well, it was an estate planning. It was an estate
17 planning. We were working on Hallie's estate, and Charlie
18 Ormond has been helping me on that and so that just one of
19 the matters that we decided to deal with at that time.
20 Q What was the estate planning consideration in the
21 transfer of the property?
22 A The consideration?
23 Q What estate planning consideration did you have in mind
24 when you decided to --
25 A Well, it was just part of the general overall picture.

1 It was just -- we had a general plan of estate planning for
2 Hallie together with a CPA that we hired and other people,
3 and this just fell in place with the rest of it.
4 Q What portion of that estate plan did this play?
5 A What portion, did you say?
6 Q Yes, sir. What was the specific purpose of this
7 transaction?
8 A Portion. Do you mean what percentage?
9 Q Well, I understand that Mr. Doshier is likely to object
10 if I ask about the broader estate plan, is that correct, Mr.
11 Doshier?
12 MR. DOSHIER: Yes.
13 BY MR. GATES:
14 Q All right. So without that, he is allowing me to
15 inquire about this transfer of property. Now, I ask you,
16 what was the purpose of this transfer in connection with the
17 overall estate plan?
18 A There wasn't any separate purpose to it. It was just
19 all part of the overall plan.
20 Q So there was no valid purpose to this as far as the
21 estate planning was concerned?
22 A Well, of course, there was a valid purpose. It all --
23 Q What was that?
24 A -- had a valid purpose.
25 Q What was the valid purpose?

A Well, it's just like a jigsaw puzzle, Allan, when you are trying to put it all together, it's just one part of the puzzle, so it was a part of the dealing with Hallie's Ormond's estate plan.

Q What purpose did this play, however? What piece was this in your puzzle?

A Well, the purpose that it played is that it put his estate in good order.

Q What specific purpose did this transaction have in terms of contributing to making his estate in good order?

A Didn't I answer that?

Q No, sir. All you said is it does. Now, how did this transaction contribute towards putting his estate in good order?

A Well, one of the main things, as I'm sure you know about estate planning, one of the best things you can do is gifting, and so this fell in the area of gifting, which is -- was part of the plan for Hallie Ormond's estate planning.

Q I thought you just said that the property had a negative market value.

A Well, but it won't always have.

Q So this was just generosity to your sister that she was selected by Hallie for this gift?

A Yes, that's right.

1 Q There was no other consideration?
2 A No.
3 Q Had nothing to do with the litigation?
4 A No, had nothing to do with that.
5 Q Had nothing to do with defeating site access?
6 A Nothing.
7 Q Was there any discussion of how this transfer might
8 effect request for site access for environmental
9 investigation or remediation?
10 A Any discussion with who?
11 Q You, did you have discussion with anyone?
12 A No. No, I did not.
13 Q Did anyone else discuss to your knowledge, the idea of
14 how this transfer might effect site access?
15 A Not to my knowledge.
16 Q Have you ever testified in any other litigation?
17 A Yeah, one time I can think of years back.
18 Q What was that?
19 A 15 or 20 years ago.
20 Q What was the nature of that litigation?
21 A It was a -- nature of it? It was a bank lawsuit --
22 bank lawsuit against the estate -- against the estate of Tom
23 Bill Rogers, Sr.
24 Q What was the subject of your testimony?
25 A The subject of my testimony was what I knew about some

bank notes that Mr. Rogers had with a bank up in Oklahoma.

Q You previously testified that you were married to Mary Jo Grisham, I believe, is that correct?

A Just now you say?

Q Sometime earlier when we were getting started.

A I do testify to that. You hadn't asked me that before.

Q All right. When were you and Mary Jo Grisham married?

A It was in 1957.

Q Where did you reside after your marriage?

A Venezuela.

Q What was your employment there?

A I'm a petroleum engineer by education and worked -- yeah, worked for an oil company.

Q What oil company?

A Exxon. It was Creo was the subsidiary.

Q How long were you in Venezuela?

A I was there about three or four years.

Q What was your next employment after that?

A Hallie Ormond.

Q Where were you employed by Mr. Ormond?

A Yellville.

Q What was the nature of your employment?

A I was manager of a sawmill.

Q What was the name of the sawmill?

1 A It was H.C. Ormond Supply Company. He wasn't
2 incorporated, it was just a -- at that time.
3 Q It was a personal proprietorship of his?
4 A Yeah, something like that, he and his wife.
5 Q What types of products did H.C. Ormond Supply Company
6 sell?
7 A At that time?
8 Q (Indicated yes.)
9 A Railroad ties was the main thing that was sold from
10 where I worked.
11 Q What was the source of supply for those railroad ties?
12 A Local timber, Arkansas timber.
13 Q Who treated the timber?
14 A The timbers were treated at -- mostly at Leeds, Kansas
15 City, Missouri. Some down here in North Little Rock.
16 Q The ones that were treated in North Little Rock, were
17 those Koppers?
18 A Yeah, uh-huh, both plants, in fact, were Koppers.
19 Q Did Mr. Ormond engage in any treating at the time?
20 A Yes, uh-huh.
21 Q What treating facilities did he have at the time?
22 A He had a treating facility in Saint Joe, Arkansas.
23 Q What was the name of that facility?
24 A H.C. Ormond Supply Company.
25 Q Is that facility still in existence?

A No, huh-uh.

Q Where was it located?

A In Saint Joe, Arkansas.

Q Whereabouts in Saint Joe?

A The -- it's not very big, Allan.

Q I've been there.

A It's -- I guess you would call that the north edge of town, north edge of town.

Q Buildings are no longer in existence?

A No.

Q How long did Mr. Ormond operate that Saint Joe facility?

A I don't know when it started. That was before my time. I would make a guess at the early 50's, but -- and then he terminated it sometime in around, I would say, 1963, right in that area, '62, '63.

Q When you moved back in 1960, did Mr. Ormond have any other treating facilities besides the one in Saint Joe?

A Huh-uh, no.

Q Have you had any experience with creosote or pentachlorophenol treated wood prior to starting up with Mr. Ormond in 1960?

A No.

Q How long were you in Yellville?

A Oh, about maybe a year and a half.

Q What was your position or responsibility during that year and a half?

A General manager of the sawmill.

Q Were you cutting raw timber to be treated there?

A Most of it wasn't treated. I don't remember if any of it was treated other than the crossties, and they were treated at those plants I told you. The rest of it was flooring oak or -- like in this table.

Q Okay. Now, wait a minute. Did you say you did -- there were treated ties and that was the principal part of the business, crossties?

A Crossties, we produced them in the untreated form and shipped them on, sold them that way, and then the railroads would take them and contract with Koppers to treat them for them.

Q All right. You didn't do any treating on the site, though?

A No.

Q That's what I thought I understood you to say.

A No, we didn't.

Q What did you do after that year and a half?

A After that, well, I continued to work for Mr. Ormond in some capacity or other, buying land and various things. And then eventually -- then eventually I terminated my employment with Mr. Ormond or he fired me, however that

happened. And then just worked for myself after that.

Q Well, you've been -- let's back up and see if we can get a little more specific about dates and whats and what all the other things besides buying land involved.

A Yeah.

Q Now, as I understand it, you've already testified that in 1960, you left Venezuela and you went back to Yellville?

A Yes.

Q And you worked there for a year and a half running a sawmill?

A Uh-huh.

Q So about --

A Building it. It was a new one. We spent most of that time actually constructing it.

Q Okay. So sometime in mid-1962, I guess, somewhere in that range, '61, '62 --

A Yeah.

Q -- you left the sawmill and started doing something for Mr. Ormond, buying land was part of it.

A Uh-huh.

Q What else specifically did you do?

A Well, buying crossties around the country. We would go around to other sawmills and purchase these crossties, untreated crossties, haul them to a railroad and sell them to the railroad, and then they would ship them on to be

1 treated.

2 Q How long did you engage in this purchase of crossties

3 for Mr. Ormond?

4 A Probably -- I would say for maybe six months or so.

5 Q Was that immediately after you left Yellville?

6 A Yeah, uh-huh, immediately.

7 Q So about the end of 1962, you were no longer engaged in

8 that activity?

9 A Yeah, earlier than that, I believe. I think it was

10 about early '62 or the latter part of '61, maybe. I believe

11 in '62, I was in business for myself.

12 Q What was the nature of your self-employment?

13 A It was called Arkwood Treating Company.

14 Q Where was it located?

15 A Saint Joe, Arkansas.

16 Q Is this the same treating facility that you described a

17 few minutes ago?

18 A Yes, uh-huh.

19 Q Mr. Ormond operated it from the early 50's until '62 or

20 '63?

21 A Yeah, or -- yeah, late '61, possibly right in there.

22 Q And then, what, you purchased it?

23 A Let's see. Well, we leased the property from him and

24 purchased the business. That would be --

25 Q Purchased the inventory --

1 A Yeah.

2 Q -- equipment, rolling stock?

3 A Right.

4 Q But he owned the land and the fixtures?

5 A Yes.

6 Q Was Arkwood Treating Comppany incorporated?

7 A No, it was not.

8 Q Who else was involved in this business venture with

9 you?

10 A Mary Jo, my wife at that time. It was just Mary Jo and

11 Bud d/b/a, Arkwood Treating Company.

12 Q Did you register this d/b/a?

13 A We registered the trademark, the Arkwood Treating

14 Company name. I don't know about that question.

15 Q All right. How long did you operate this Saint Joe

16 facility?

17 A Oh, for just maybe a year.

18 Q What did you manufacture during that year?

19 A Fence posts mainly.

20 Q What treating --

21 A 99 percent of it was fence posts.

22 Q What treating materials did you use?

23 A Creosote.

24 Q Did you use any kind of pentachlorophenol?

25 A No.

1 Q Use any arsenic?
2 A No.
3 Q By arsenic, let me back up. I mean any of the
4 arsenical wood preservatives.
5 A Yeah.
6 Q You're familiar with them, aren't you, in general?
7 A Yes, yeah, the sauce treatments.
8 Q Yeah, CCA or SCA and so forth?
9 A I don't even think they are around or I haven't heard
10 of them.
11 Q All right. Was this a pressure treating process?
12 A Uh-huh.
13 Q Was this the first time you had operated a pressure
14 treatment process?
15 A Yes.
16 Q What was your role in the plant's operations?
17 A Well, I was the owner.
18 Q Did you actually go to the facility in the morning and
19 work there on a typical day?
20 A Yes, uh-huh.
21 Q How many employees did you have?
22 A We had about 15.
23 Q Were you familiar with how the process operated?
24 A Yes, uh-huh.
25 Q And you were generally the person on site responsible

1 for the day-to-day operations?

2 A Well, we had a general manager, and -- who answered to

3 me and he was there all the time. I was there part of the

4 time.

5 Q What was the general manager's responsibility as

6 opposed to yours?

7 A Well, he did the hiring and the firing and took care of

8 the sales and --

9 Q Who was the general manager?

10 A Ben Depriest.

11 Q Did your wife work at the site?

12 A No.

13 Q In any capacity?

14 A Huh-uh.

15 Q She was just a passive owner?

16 A Yes, uh-huh.

17 Q What was her percentage ownership?

18 A Well, we were sole proprietors. We didn't have a

19 formal partnership agreement. I would think it was 50

20 percent.

21 Q Was this Arkwood Treating Company a full-time endeavor

22 during that year or so?

23 A Well, yeah, that and sidelines kind of connected to it,

24 land purchasing and stuff like that, but it was all related,

25 yeah.

Q I get the impression that you buy and trade and sell land pretty much and have throughout your career, is that correct?

A Yeah, with Bob's help.

Q And I get the impression that for a good period of this time, you've also engaged off and on in the purchase or sale of timber, timberlands or timber for products, is that correct?

A Yeah, mainly so we would have supply for these mills.

Q Okay. When did you cease to operate this Saint Joe facility?

A '60 -- I would say it was early '63 when we really ceased -- moved all the inventory.

Q Where was the inventory moved?

A Well, we just sold most of it. We just sold it.

Q What was not sold, where did it go?

A We might have moved a few bundles possibly to Harrison. We had some land right there on the bypass by Harrison. It seemed like we stored some there.

Q Was any moved up to the Omaha site?

A None of the treated material.

Q How about the untreated material?

A Yeah, there's a possibility some untreated would have been.

Q What about the equipment, where did that go?

A The equipment, a lot of it went to Omaha and some of it was antique and just sold and disposed of.

Q Sold in antique shops?

A Well, yeah, kind of.

Q What -- I take it you just mean it was outmoded equipment? It was no longer useful?

A Yeah, we didn't move it to Omaha.

Q Sold it for scrap or junk?

A Yeah, old tanks, yeah.

Q All right. Did that location ever operate as a wood treating facility after you left it, to your knowledge?

A I don't remember ever seeing it used for that.

Q What use was it made -- what use was made of that land after you left it in --

A I notice there's a service station there.

Q What did you do after the Arkwood Treating Company facility shut down in Saint Joe?

A After it shut down, well, we were in the process of building -- Mr. Ormond elected to build this treating plant in Omaha, and I helped him with that, and then when it was constructed, well, I operated -- I leased that property from him and Mary Jo and I operated the treating facility there.

Q All right. Let me just back up to make sure I understand this. I get the impression that the Omaha facility, the treating equipment, the cylinders and so

1 forth, was essentially a replacement of the Saint Joe
2 facility, is that basically accurate?
3 A A replacement?
4 Q Yes, sir. That you continued in the wood treating
5 business but simply started up on a new site with newer
6 facility, newer equipment?
7 A Yeah, new equipment. Yeah, we didn't replace much of
8 the equipment there with Saint Joe equipment. Some, the
9 boiler, I think, was the main item. The rest of it was
10 purchased new or somewhere else.
11 Q But the Arkwood site constituted essentially a
12 continuation -- excuse me, the Omaha site constituted
13 essentially a continuation of the Arkwood Treating
14 business?
15 A Well, yeah, yeah, that would be right.
16 Q And then to the -- except for a limited volume of
17 treated material, everything that was usable in the way of
18 inventory, raw materials or equipment, you took up to Omaha
19 if it was usable, is that correct?
20 A Anything -- yeah, anything we could use, we did.
21 Q Okay. Were you involved in the design and construction
22 of the Omaha facility?
23 A I helped on some parts of it. Mr. Ormond took the lead
24 in that and it was his money, and so I helped where I
25 could.

Q What was your role in the design and construction of the facility?

A My role? Well, I was an advisor to Mr. Ormond.

Q Well, what specifically did you help with?

A Helped with the dirt work. We built a new road in there and I helped lay that out, sort of did the shade tree engineering on it, and -- or eyeball engineering. And that sort of ground preparation.

Q Did you help with any of the layout or oversight of the construction of the treating facility?

A I was there most of the time, yeah, I did have some other responsibilities, but I was there most of the time that was being built.

Q Did Mr. Ormond consult you in connection with the layout or construction supervision of the treating facility?

A Some parts of it, he did. The plumbing part, specifically, he did. The buildings and so forth, he did not.

Q Did any of the -- were there any buildings on the Omaha land where the Arkwood site is before this treating plant and so forth was constructed?

A No.

Q It was just vacant land?

A Yes.

Q When was the building constructed?

A I think it -- it completed sometime in '63, late '63, was the completion of it. Took about a year, year and a half to build it.

Q Did you continue the operation of the Saint Joe facility, as far as treating lumber while the Omaha facility was being built?

A Yeah, we did do -- there was a slight overlap, but not for very many months, because then at some point we moved, we were moving the Saint Joe, so all we maintained was the sales yard there. Those overlapped for maybe a year or so.

Q Did you have other people involved in the construction design of the Omaha treating facility?

A The design?

Q And construction, yes, sir.

A Well, we had a number of people working, laboring people, working on the construction. Design, I don't remember -- maybe where we bought some of the equipment, we did ask those people for advice about their particular piece of equipment, asked them to consult with us on how to install it.

Q I want to make sure I understand your answer. Are you saying that when you purchased a piece of equipment, you would ask the manufacturer for specifications regarding installation?

A Yes, uh-huh.

Q And then you would follow those specifications?

A Yeah, uh-huh.

Q All right. But other than asking specifications and suggestions from a supplier of equipment like that, were you and Mr. Ormond the only people involved in the design of the treatment facility at Arkwood?

A And Ben Depriest.

Q What was his role in the design of the facility?

A Well, he was the general manager I mentioned to you before, and he had a lot of practical knowledge. And so we would often consult with Ben about his ideas on any part of it.

Q Was he physically on site when the facility was being constructed?

A Yeah, in most -- after we had the dirt work completed, he was, yeah.

Q You mentioned that there were laborers. Were these just construction day laborers operating under the supervision of you, Mr. Ormond and Mr. Depriest?

A Yes, uh-huh.

Q Let me be sure I get the spelling for the court reporter. Mr. Depriest's last name, is that D-e-p-r-i-e-s-t?

A Yeah.

1 Q Where is Mr. Depriest now?
2 A Dead.
3 Q When did he pass away?
4 A In about '77 -- '76, '77.
5 Q Did you use any of the employees from the Saint Joe
6 site to help construct the Omaha site?
7 A Yes, there were two or three that moved up there. Not
8 many, most of them didn't want to leave Saint Joe, but two
9 or three did.
10 MR. ADAMS: Once you get to Saint Joe, you
11 never want to leave.
12 BY MR. GATES:
13 Q Who are the ones that did come with you?
14 A I can remember a Wayne Scott, Dallas Cunningham and
15 Jewel Surber, S-u-r-b-e-r.
16 Q When did the Omaha Arkwood site commence production?
17 A You mean of treated material?
18 Q Of treated material.
19 A Yeah, because we did have a post peeling operation up
20 there with untreated material for some time before the plant
21 started. The first scale operations I would say '63, '64
22 area. Probably full scale in '64.
23 Q Let me back up. You say there was a post peeling
24 operation before then?
25 A We had up in the Omaha area, just -- we peeled posts

there and then we would take them down to Saint Joe and treat them.

Q Now, that post peeling operation, was it on the same land that the treatment site was --

A No, not initially. No, it was north of Omaha.

Q A mile or so away?

A Yeah, a few miles away.

Q Okay. When was the post peeling operation relocated to the Omaha site that is the subject of this litigation?

A Soon after we did the dirt work, that would have probably been in maybe early '63 -- '62, '63.

Q Now, you had a post peeling operation, were actually peeling and taking the logs down to Saint Joe at the same time that you were constructing the treatment facility in Omaha?

A Yeah, we would have taken some of them to Saint Joe, and some of them we would have stored there to have on hand when we were ready to treat.

Q Do you recall when the -- and I may have asked you this, and I'll apologize, but do you recall when the post peeling operation in Omaha was moved onto the site that is the subject of this litigation?

A In '63.

Q Can you recall what part of the year roughly?

A No.

1 Q Just after the dirt work was completed, that was the
2 first thing you did?
3 A Well, sometime after the dirt work, then we were ready
4 to put that equipment there.
5 Q What was your role after the construction was completed
6 in connection with the operation of the business?
7 A I was the owner.
8 Q Was it still --
9 A Leased the land -- leased the property from Mr. Ormond,
10 did not own that or the buildings, but the Arkwood -- it
11 was C.C. and Mary Jo Grisham, d/b/a Arkwood Treating
12 Company.
13 Q Let me make sure I understand this. You continued to
14 do business in this same informal unwritten partnership that
15 you had with your wife?
16 A Right.
17 Q And that that business you operated on leased land from
18 Hallie C. Ormond, your father-in-law --
19 A Yeah.
20 Q -- and you owned the equipment, rolling stock and
21 inventory, is that correct?
22 A Yeah, that is correct.
23 Q All right. Now, I think I understood you to say that
24 Mr. Ormond was involved because it was his money?
25 A Uh-huh.

1 Q I wonder if you could tell me what did Mr. Ormond pay
2 for in the way of construction?
3 A He paid for everything, the buildings, the purchase of
4 land, he paid for the dirt work, paid for the buidlings,
5 paid the labor.
6 Q Okay. So the buildings and so forth that he put on
7 that land became the fixtures which were part of what you
8 were leasing, is that correct?
9 A Yes, uh-huh.
10 Q The building was his, the treating cylinder was his,
11 and so forth?
12 A Yes.
13 Q Well, then, the only things then that Arkwood, Inc.,
14 owned was the inventory, the raw materials, and the truly
15 movable rolling stock?
16 A Yes, and office equipment and various stuff like that.
17 Q Just the movable personal equipment -- personal
18 property?
19 A Uh-huh.
20 Q Not the fixtures or major installation of the treating
21 plant?
22 A Right. In fact, as I remember the lease, I think it
23 said anything we built there had to stay there, became his
24 property if we built it.
25 Q Okay. I asked you earlier what your role was and you

1 said as owner. I think what I was trying to get at also was
2 what you did in connection with this business.
3 A What I did?
4 Q Yes, sir.
5 A Well, Allan, I'm sure you know as owner, you do it all,
6 right? I swept the floor, and I went down and signed bank
7 notes, and waded around in the creosote, and I did a little
8 bit of all of it.
9 Q You had ultimate supervisory responsibility for the
10 entire operation?
11 A Yes, I had a general manager at all times, but they
12 answered to me, so the responsibility was mine.
13 Q Okay. Did you typically report to the site on a normal
14 workday?
15 A Yeah, the early years especially. Yeah, I maintained
16 an office there.
17 Q When you say -- excuse me, I didn't mean to interrupt
18 you, but when you say the early years, what years do you
19 have in mind when you say the early years?
20 A Well, '64, early' 65, and then it -- after we
21 incorporated, of course, it continued on that way, didn't
22 change my schedule, work schedule, any because of the
23 structure of the company.
24 Q Okay. So you -- even after '65 and the incorporation,
25 typically Omaha treating facility office was where you went

when you went to work?

A Well, it varied from year to year, but some years it was that way, other years I maintained an office in Harrison, and would be there most of the time and then just be in communications with -- by radio or telephone with the plant site.

Q Tell me the years that you were -- you had this office in Harrison and typically would be in communication with the site.

A '60 -- I would say '67 up until about 1970, I had an office in Harrison, and then I would just go to the plant every so often. Sometimes it would be every day of the week, and then I might be gone for several weeks.

Q Okay. Do you feel that during this period, 1967 to '70, you had a clear understanding of how the plant was being operated?

A Yes.

Q And I take it, except for this period, '67 to '70, you actually did have an office at the plant, and that's typically where you went every day?

A Yeah, yeah. Well, in all cases, I had an office there, but it wasn't my primary one. I always kept one there all through the years.

Q Throughout this period, did Mary Jo remain as passive partner?

1 A Yes, uh-huh.

2 Q She had no active duties as far as the operation or

3 management of the business?

4 A She kept books for the treating plant for a year or so.

5 That was about in 1964 or '65. She worked about one year.

6 Q Did she have any other active role or responsibility in

7 the management or operation of Arkwood besides that one year

8 she kept books?

9 A No, huh-uh.

10 Q Did she have personal knowledge of how the treatment

11 facility operated?

12 A I would say no.

13 Q Did she look to you principally to take care of

14 whatever issue came up with regard to the management or

15 supervision of the treating facility operation?

16 A Yes, yes.

17 Q What materials did you treat with at Omaha?

18 A What materials?

19 Q Yes, sir.

20 A All through the years?

21 Q Yes, sir.

22 A Creosote and penta, and, you know, the various mixtures

23 of same.

24 Q When you say the various mixtures, did you ever treat

25 products with both penta and creosote?

1 A Well, not mixed together, no, but --
2 Q I thought not.
3 A But, I mean, you would -- the creosote would have
4 various mixtures of another type oil in it, it was never
5 just pure creosote.
6 Q I understand.
7 A No more than penta was pure penta.
8 Q And these would just be the active ingredients that you
9 dissolve into a carrier well, is that correct?
10 A Yes, uh-huh.
11 Q And that would be your treating solution, your working
12 solution?
13 A Yes.
14 Q All right. I want to ask you what your relative mix of
15 penta versus creosote treatment was by volume. Could you
16 tell me that?
17 A You mean taking all the years?
18 Q Well, year by year, essentially. I realize that it's
19 going to be very difficult to recall things 23 years ago,
20 but I'm sure you must have a general impression of whether
21 you started out doing more penta than creosote or more
22 creosote than penta, and how that business proportion
23 shifted over the years.
24 A Uh-huh. Well, it was all together creosote the first
25 year or so, I would say '64, '65, maybe '67. I think the

first penta salesman came down the road in '67 or '68 and told us about this wonderful penta, and then we started treating some penta, though it wasn't a rapid changeover because the customers were very -- it was difficult to switch them, and some never would switch, but so it was more controlled by your sales, by your customer, that's what.

Q But at least prior to 1967 or '68, your production would have been entirely creosote?

A Yes, uh-huh.

Q And subsequent to that, how do you think your proportions changed over time up to the time of the sale of the facility?

A The sale in '73?

Q Yes, sir.

A Well, it went heavy to penta eventually. Let's see, if you took it year by year, I would make a guess that '69, I would say, it was probably still 60 percent creosote, 40 percent penta.

'70 would have maybe almost swung just the other way, and '71, '72 would have been much heavier to penta than creosote.

Q What proportion do you think it would have been in '71-72?

A I would think it would have been at least 75 percent penta.

1 Q Now, I thought I understood you to say that the
2 customers were slow to switch from creosote to penta?
3 A Yeah, pretty slow, yeah.
4 Q But then I thought I understood you to say that you had
5 fairly substantial volumes as early as '69.
6 A Well, what's the question?
7 Q Well, did you start using penta eariler than '68, '67,
8 that period you've indicated, or was it --
9 A No, that's about when -- that's about when we first
10 were introduced to penta.
11 Q All right. And within a year or two after you started
12 up, what do you think your percentage of penta production
13 was versus creosote?
14 A Within a year or two?
15 Q (Indicated yes.)
16 A Well, within a year or two, it was still heavy, heavy
17 creosote, heavy in creosote, and I don't think it went
18 beyond the 50/50 mark until probably maybe 1970.
19 Q Who were your plant managers during the period from
20 startup of operations at Omaha to the sale?
21 A Ben Depriest, Dallas Cunningham, Don Young and Bob
22 Barker.
23 Q Did they serve in that capacity in that order? Did
24 each one succeed the former?
25 A Ben Depriest was the first.

1 Q How long did he serve as your manager?
2 A From the time of operation started up there until 1968,
3 that area, '67, '68. Then Dallas Cunningham until probably
4 about middle of '69, and then Don Young for maybe three to
5 six months, and Bob Barker in 1970.
6 Q Mr. Barker served as your general manager continuously
7 until the sale to MMI?
8 A Yes.
9 Q All right, sir. Had Mr. Cunningham worked for you
10 before assuming the duties as general manager?
11 A Yeah, he was one of them you asked me if he moved up
12 from Saint Joe.
13 Q Right, I thought that was it. That's the same man?
14 A Yeah, uh-huh.
15 Q Okay. How about Mr. Young, have you had any experience
16 with him before?
17 A Yeah, he was an employee there for maybe two or three
18 years.
19 Q Did he not work out as general manager?
20 A Pardon?
21 Q You said --
22 A No, he said the pressure was too much for him.
23 Q Did he continue to work for you after --
24 A No, I don't -- he might have. I can't remember. I
25 don't know whether he did or not.

1 Q How many employees did you have at the facility?
2 A At the Arkwood facility in Omaha?
3 Q Yes, sir.
4 A Well, which year?
5 Q Well, basically, throughout, what did the employees
6 range from startup to --
7 A Well, probably -- okay, from startup, you know, during
8 the construction was probably maybe four or five, and then
9 on up when it was sold in '73, I would say about 15.
10 Q All right. I would like you to describe in general
11 what the responsibilities of those 15 or so employees were.
12 I realize some of them must have worked in the yard driving
13 lumber around and so forth, but if you can just kind of
14 categorize for me what the employees typically did, how
15 they --
16 A Forklift drivers, office manager, treating room
17 operator, peeler operator, post peeler operator, and
18 janitorial.
19 Q Who were the treating room operators?
20 A During those years, Dallas Cunningham. I believe
21 Carroll Roberts was. That's the two that jump to mind on
22 short notice. I'm sure there were others.
23 Q Were you familiar in detail with the treatment
24 operation at that treating facility?
25 A Yes, I was.

Q Tell me how that treatment process worked.

A They would open the cylinder door, run the posts in and close the cylinder door, pressure it up with air to whatever various times, 40 to 50 psi, then they would pump the treating solution, whether it was creosote or penta, into the tank with electric centrifugal pumps and bleed the air off a little at a time as they were doing that.

And then when the -- when the cylinder was full, when it wouldn't hold any more fluid, then they pinched off the valve that was letting the air out and started pressuring the fluid into the -- into the wood with steam pump, switched from the electric centrifugal pumps to the steam pumps, and then they would pressure in the amount of fluid that we wanted to leave that had been planned out to leave in there.

And then they would release the pressure and start the pumps in reverse and draw the fluid back out of the tank, put it back from whence it came, then draw a vacuum for 20 or 30 minutes usually, and sometimes a little longer, and then open the cylinder door and start the whole cycle over again.

Q Okay. When you say open the cylinder door, I take it then you draw the treated material out --

A Yeah.

Q -- of the cylinder --

A Uh-huh.

Q -- and stack it somewhere in the yard?

A Yeah, draw it out on the track and soon it would stack out on the yard. Often, it would sit there on the track for a while while we ran another off of another siding, cylinder full of this wood in there and close the door and do that all over again.

Q What type of excess treating liquids or wastes were generated by the process?

A What? I don't understand that question.

Q Were there any excess fluids or treating wastes generated by this process?

A Excess?

Q Yes, sir. Did you have wastes to clean up to dispose of as part of this process?

A Yes, uh-huh.

Q Tell me what those were.

A Well, a valve might leak, a valve might leak. When you open the cylinder door, some fluid would come out. Periodically during the year, the penta tanks especially, I remember, would have to be cleaned out, because they would fill up with dirt and emulsion around the heaters, that's on the penta side. I don't believe we ever had to clean the creosote once. What was your question again?

Q What did you do with these materials? The fluids and

emulsions, whatever you cleaned up or came out of the tank when you opened it, the cylinder, what did you do with these materials?

A Well, some of them we spread out on the yard, some of them we sold to farmers, some of them we -- especially that that dripped off the post, just would leave with the rainwater, runoff water, go down whatever hole it went down or on down off the yard, just run off with the runoff water. That's some of the things that were done with it.

Q All right. What else?

A Let's see, I said sold to people that wanted to treat their own posts. We sold them some of that. But now this, you used the word "excess." I'm still a little -- not sure what you mean by excess.

Q Well, you described these fluids, I'm not trying to trick you and I thought I wanted -- you know, make sure I used the phrase that would cover everything that wasn't pumped back in for re-use into the working solution tank.

A Uh-huh, yeah.

Q You described there was some that came out of the treating cylinders, sometimes you would clean out the tanks, sometimes you sold it, sometimes you spread it out on the yard.

A Yeah.

Q Is there anything else you did with the materials along

1 that line?

2 A Well, when we cleaned up the boiler room, we went

3 through various pipes, went down a hole with some of that.

4 Now, of course, a lot of this depended on what year frame

5 you are talking about, too. We might have done one thing in

6 1964 and another thing in 1970, so --

7 Q Yes, sir.

8 A -- you have to --

9 Q Let's talk about that hole. Was that a hole outside

10 the treating room itself right by the door there?

11 A Well, there was a hole there. There were a number of

12 holes on that yard.

13 Q Yes, sir. Well, let's --

14 A There was a hole there.

15 Q Let's talk about that particular hole right now.

16 A Uh-huh, yeah.

17 Q Is that the hole that when you cleaned out the boiler

18 room that materials were diverted down sometimes?

19 A For a few years, that is right. When we cleaned out

20 the boiler room, they would go down that hole.

21 Q All right. Now, if I understand it, that was just kind

22 of a little sink hole?

23 A Yeah, uh-huh.

24 Q Is that correct?

25 A Yeah, it was just a crack in the ground.

1 Q All right. And could you see an opening physically in
2 that hole?
3 A Yes, you could see a small fissure at the top, uh-huh.
4 Q All right. Now, I've seen some sink holes, and
5 sometimes there is just gravel or dirt in them and they just
6 look like a depression until they fill up with water and
7 they just keep draining out. This one actually had an
8 opening, I take it?
9 A At one time, you could see it like that, and another
10 time, it caved in and all you could see was just the
11 gravel.
12 Q I see. Now, as I understand it, there was actually a
13 conduit or an opening so that when you cleaned out the
14 boiler room, you could flush these materials through the
15 treating room wall into that hole, is that correct?
16 A Yes, that's correct.
17 Q All right. And that was standard operating procedure,
18 wasn't it, when you cleaned out the boiler room?
19 A Well, for a few years, that's right, for some -- some
20 short period of year until the hole filled up.
21 Q When do you think the last material was put down that
22 hole?
23 A Well, when I think it was?
24 Q Yes, sir.
25 A Probably about '80 or '81.

Q Well, sir, I thought you said you stopped putting material down there. That's all I'm trying to get at is --

A Yeah, well, it filled up, but the hole was still left open, and so I assume that some could have gotten down there. We changed our way of going with it out of the boiler room, but it was still left as an open hole.

Q Okay. Let me focus on when you changed your method, okay, as you just described it.

A Uh-huh.

Q When did the hole fill up and you changed your method?

A In that area of around -- I would say 1968.

Q What did you do with the residue or liquids from the washdown of the boiler room when you changed your method? You weren't draining them into the hole, the sink hole anymore. What did you do with them that was the change?

A Well, I can remember a couple of different things we did with it. One, we pumped them out on the ground, had a pump in there and we just pumped them out on the ground, and then there were some pipes or a pipe that would lead from it over -- over the railroad dump down into a pit by the railroad dump -- by the railroad on that elevation.

Q Was that a pipe that was installed when the treating facility was first constructed?

A There was -- yeah, there was a pipe installed at first for steam condensation out of the boiler, and that's the

1 pipe that we used at that time.

2 Q Well, that pipe had been installed from the very first

3 I just want to make sure I understand you. I'm sorry if

4 this is repetitious, but when that treating facility was

5 first constructed, that pipe that run across the yard to the

6 embankment up by the railroad tracks was installed for

7 release of steam condensation from the boiler?

8 A Well, not the first day the plant was built. Sometime

9 during that period, I'm sure before we built the scales

10 there, I think we ran that steam condensation just out on

11 the ground for a while, but sometime during those years, we

12 put those pipes in under -- in under the ground there

13 sometime in, say, 1964, '65 up until '68 or -9.

14 Q You mean it took four or five years to install that

15 pipe?

16 A No, that was when we choose to install it.

17 Q Well, I wonder if you could pin it down a little more

18 specifically when you installed that pipe?

19 A No, not specifically. I can give you that time frame.

20 I remember it was before we built the offices over on that

21 side. We used to have a -- that was just open ground, and

22 it seems to me like we dug those in there maybe in --

23 sometime between '65 and '68.

24 Q Was the pipe used for transmitting this washdown liquid

25 from the boiler room from the very start? Was that one of

your original purposes?

A No, no, as I remember that, that started in probably about '69, '70, right in there.

Q So it was about a year or two after the pipe was put in that you first started using it to transmit boiler room washdown?

A Uh-huh. Yeah, it was after this hole plugged up there and we couldn't get any more to go down that.

Q Was there any creosote in this washdown from the boiler room that you put down the hole?

A Yes, there would have been some.

Q And I take it there would have been at least in the last year or two possibly, some penta as well, is that correct?

A Which year?

Q The last year or two?

A What?

Q That you were putting material down the sink hole right in front of the --

A You mean '72 or '73?

Q Yes.

MR. DEISCH: Excuse me for interrupting. Sorry to be late.

MR. GATES: Do you want to take a break or not? I mean, we're going to need -- this can go

off the record.

(THEREUPON, a short discussion was held off the record.)

BY MR. GATES:

Q Mr. Grisham, before Mr. Deisch came in, you were talking about the installation of that pipe and when you shifted over. I think I understood you to say that the washdown liquids from the boiler room that you directed down the sink hole would have creosote in them.

A Yes.

Q At some level.

A Uh-huh.

Q I take it when you were treating with penta all of that washdown water would also have penta in it, is that correct?

A Yes, uh-huh.

Q Did you ever sample or attempt to determine what was in that water?

A No.

Q Was the washdown water the only thing that went down that sink hole right in front of the treating room door?

A Well, dirt and bark, just anything that might have accumulated in that sump of the boiler room was washed down there, soap, motor oil, you know, anything that might have been there when they hosed it down, went down that.

Q You mentioned that the waste or the washdown and materials were then pipes over the railroad embankment. How long did that process take place, from when to when?

A Over the bank?

Q Yes, sir.

A Well, I would say up until the last time I noticed any going over there was in the early 80's.

Q Okay. But was that the routine way of disposing of boiler room washdown and similar wastes during the period up to the sale from '69 or thereabouts when the pipes first started getting used through to the sale of assets to MMI?

A The washdown?

Q Yes, sir.

A Well, that and just pumping it out on the ground, and the third way would be once in a while the runoff water from a heavy rain would come in to the boiler room and pick up some of that and carry it on out the door.

Q Did you ever take any of the liquids from the treating room or the treating materials or treating wastes and use them just to hold down dust, spray across the yard?

A Yes, we did do that, too.

Q What type of equipment did you use for that?

A Barrels, I can remember putting it in barrels. Sometimes we would put buckets under the door as we would open to catch some of that and store it in barrels either

for sale or to spread for dust control. And seems like we had a tank during some of those years that would -- tank truck, had it on a truck, and we would drive up there and let that washdown go in that, out on the yard.

Q The tank truck would actually have a sprinkler on it that would apply it or some sort of valve that would apply it?

A Well, just a valve, just a valve.

Q So you just open it up and drive across the yard and apply the liquid for dust control?

A Yeah, I can remember a few times that happened.

Q Was the treatment facility, and by this I mean the treatment room, was it built specifically to be close to that sink hole?

A No, I don't even know if -- I don't even think we knew it was there at the time.

Q When was the hole and the drain design installed so that it -- the boiler room sump could be directed through the wall there into the sink hole?

A Oh, it has been about in '66, '67, something like that.

Q That wasn't part of the original design?

A No.

Q How did you get the material from the treatment room sump into the sink hole before that drainway was created?

A Well, that hole wasn't always there, it just showed up. I think we were shooting through a pole when it showed up is the first time we saw it.

Q Shooting for a pole?

A Yeah, anytime you did anything up there you had to dynamite to get it in. I think one of our charges opened that up.

Q And when was this?

A That would have been in maybe -- I would say '66, '67.

Q Well, now, let me back up. What did you do with the treating room washdown liquids and other wastes like that before you had the sink hole there to put it down?

A Just pumped it out, pumped it out on the ground, or pumped some of it. We would pump into barrels.

Q I gather that this business which you started out as an informal partnership with your wife was subsequently incorporated, is that correct?

A Yes.

Q All right. Could you tell me when it was incorporated?

A It was in mid-year of '65.

Q What was the purpose of the incorporation?

A Limit liabilities.

Q Just traditional corporate purposes?

A Yeah.

1 Q There was nothing specific that motivated it?
2 A No, nothing specific.
3 Q All right. What was the original distribution of
4 stock?
5 A The percentage?
6 Q Yes, sir.
7 A It was about -- more than 50 percent was Hallie
8 Ormond, and then it -- the balance was divided equally
9 between Mary Jo Grisham, myself, and Ina Ann Ormond or
10 Cunningham, whatever her name was at that time.
11 Q Ina Ann was Mary Jo's sister?
12 A Yeah, Hallie's daughter.
13 Q Why did Mr. Ormond have a majority interest in this
14 corporation?
15 A He put more money in it.
16 Q Was there an initial capitalization right at the
17 corporation?
18 A Yeah, uh-huh.
19 Q All right. How much money was then put in in the way
20 of capital?
21 A Capital? I don't remember.
22 Q Well, he didn't have any ownership -- well, let me back
23 up. Once you incorporated, I gather the corporation's
24 assets were whatever finances it held in the bank plus the
25 rolling stock, inventory and equipment? It never did own

1 the land or plant?

2 A No, I didn't.

3 Q All right. Did Mr. Ormond put in new funds at the date

4 of incorporation?

5 A Let's see. I just don't remember. I think the record

6 will speak for itself, but I don't know.

7 Q What record?

8 A Well, I suppose our tax returns or whatever, but I -- I

9 do not -- I don't remember about the money. I can sort of

10 remember what I put in, I think, but I can't remember what

11 Hallie put in.

12 Q I take it you and your wife had contributed, among

13 other things, the assets --

14 A Uh-huh.

15 Q -- at the Omaha site --

16 A Yeah.

17 Q -- as part of your contribution of the capital, is that

18 correct?

19 A That's correct, inventory and so forth.

20 Q Was Mr. Ormond familiar with the operation of that

21 site?

22 A Yes, uh-huh.

23 Q Did he participate in any of the management or

24 supervision?

25 A No, he didn't do that.

Q Did he visit the site?

A Very seldom.

Q But he was heavily involved, I gather, in the original design and construction?

A Yes.

Q So he knew how it was to be set up and operated?

A Well, I don't think he was concerning himself that much about how it was going to be operated after he built it. He built it the way he saw it, and, of course, many things had to be changed, but after he leased it, he wasn't concerned with how it would be operated. In fact, all the leases state that everybody would use their own ways, means and methods to operate the facility, so he had no control over that.

Q When you say leases, I gather you're talking about leases with Arkwood, Inc.?

A Well, yeah, he had leases with everybody that leased it. Mary Jo and Bud, when they were d/b/a, Arkwood, Inc., and MMI.

Q All right. Were these formal written leases in each instance?

A Yes.

Q All right. Was your lease as Mary Jo and Bud, d/b/a, Arkwood Treating Company, substantially similar to the lease Mr. Ormond had with MMI?

1 A It had similarities, but each one changed, you know, a
2 lot of years difference in there --
3 Q So the lease --
4 A -- so there were a lot of changes.
5 Q Is there still a copy of that lease around?
6 A I don't have it.
7 Q Do you know if anyone has a copy of that lease?
8 A The original one, d/b/a lease?
9 Q Or any copies of it, yes, sir, of that particular
10 lease.
11 A I don't know where that one is. I do have the Arkwood,
12 Inc. lease, but not that one.
13 Q All right. Was the Arkwood, Inc. lease substantially
14 similar to the MMI lease or the Mountain Enterprises lease?
15 A Well, it had some significant differences in it.
16 Q What were the significant differences?
17 A Let's see -- the amount of money was different and
18 even the form, I think, on the Arkwood side was tied to a
19 percentage of the gross sales, whereas Mass is with a flat,
20 weekly fee. That was very different, but also, the wordings
21 of the leases were -- were considerably different about who
22 would -- you know, how it would be cleaned up if it was left
23 in a mess, for one thing. That's a real significant
24 difference in those two leases.
25 Q Where is that lease physically located now?

A Well, I have copies. Which one now, Allan?

Q Any leases that you're talking about.

A Well, I have copies of the Arkwood, Inc. lease with Mr. Ormond and his wife, and I have copies of the lease between Mr. Ormond and his wife with Mass Merchandisers.

Q And when you say with Mass Merchandisers, I think technically that's Mountain Enterprises, isn't it?

A Mountain Enterprises, yeah.

Q Which was a wholly owned sub of Mass Merchandisers?

A Same difference, yeah.

MR. GATES: Okay. Do you have any objection with making that lease available to us, Bill? Your lease?

THE WITNESS: Well, you have one, don't you?

MR. GATES: We have the Mountain Enterprises lease, yes.

MR. DOSHIER: Do you have that with you?

THE WITNESS: I don't know. I don't think I do, but we'll certainly get it to you.

MR. GATES: Well, if you have it, it will save a trip. Why don't you take a look? It might save a second deposition.

THE WITNESS: I don't really think I do.

MR. DOSHIER: I don't.

THE WITNESS: I'm pretty sure I don't, Allan,

1 but we'll get it to you.

2 MR. DOSHIER: I don't know what it has to do

3 with this lawsuit. I think you're straying off

4 again, but I guess it's okay.

5 THE WITNESS: No, I don't -- I don't see it.

6 MR. GATES: All right. This may be a good

7 point to take a break and come back.

8 (THEREUPON, a lunch recess was held.)

9 MR. GATES: Okay, back on the record.

10 BY MR. GATES:

11 Q Okay. Before we broke for lunch, Mr. Grisham, we had

12 been talking about the incorporation of Arkwood, Inc., and,

13 if I could, just to make sure my general impression is

14 right, I would like to back up for a second and see if I can

15 summarize what we -- what you seemed to be telling me this

16 morning.

17 If I understand your testimony correctly, the Omaha

18 treating operation was essentially a continuation of the

19 Arkwood business that originally started at Saint Joe, is

20 that correct?

21 A Well, continuation, Allan, I don't know if I would use

22 those words, it was such a completely changed operation

23 at -- you know, a different structure to it, but if you're

24 talking about --

25 Q Excuse me, I meant --

1 A -- Mary Jo and I were sole proprietors at -- down there
2 in Saint Joe, and then when we moved to Omaha, we had this
3 same sort of business structure, well, then, that's true.
4 There's no way to correlate the two operations.
5 Q All right. The new operation was a continuation of
6 your business in the treating, wood treating, business?
7 A Yes, uh-huh.
8 Q And you retained the same basic customer base, I
9 assume?
10 A Retained? No, not necessarily. No, that wouldn't be
11 necessarily true, because of moving locations had something
12 to do with our customer base, and we acquired, you know, a
13 different customer base. The main reason we moved to Omaha
14 was to be on the railroad, and that opened up a different
15 market for us.
16 Q Okay.
17 A So I think the complexion of the customer base changed
18 pretty rapidly after we were up there.
19 Q Okay. Let me approach this from a different direction
20 then. From the time the Omaha facility started treatment
21 operations, the first year or two at least, you and Mary Jo
22 were the operators in a personal proprietorship, is that
23 correct?
24 A Yes, that's right.
25 Q The business that you operated, you and Mary Joe

1 operated, at Omaha as a personal proprietorship was
2 incorporated as Arkwood, Inc. sometime in 1965, is that
3 correct?
4 A Yes, right. That, with I think some other outlying
5 operations came into it at the time of incorporation, too,
6 at the time of incorporation. There was some other
7 operating yards involved that I believe Mr. Ormond owned at
8 that time, and we put them all together in a corporation.
9 So it did take in all of what was happening at Omaha plus
10 some other locations.
11 Q Could you describe to me, just briefly, what those
12 other locations and operations were?
13 A Yeah, they were what we call concentration yards. They
14 weren't treating plants, they were where we process the
15 material, and then it would end up at Omaha when it was
16 ready to be treated.
17 Q Did you process the timber in any fashion at any of
18 those other locations?
19 A Yeah, we did. We peeled it like sawmills, peelers,
20 different machinery that did just about everything to it
21 except treat it.
22 Q How many different locations did you have?
23 A At the time of incorporation?
24 Q Yes sir.
25 A Probably -- I guess we had maybe three or four others.

Q Did the ownership of stock change from the point of incorporation to the ultimate dissolution of Arkwood?

A Yes, ownership did.

Q What changes took place?

A Well, Mary Jo and I ended up with 100 percent of the stock, Jo's with 50 percent, and me with 50 percent, at the time that Mass acquired the company.

Q 1973?

A Yeah.

Q When you say "acquired the company," you're referring to the acquisition of assets contract on or around March of '73?

A Yeah, I'm referring to the pooling of interests where we received Mass Merchandisers' stock for our --

Q Well, I understand you are using certain terms. I want to make sure we get to the objective facts. We're talking about the contract that was, I believe, March the 23rd, '73. There's a lot of debate about exactly --

A Uh-huh.

Q -- what that transaction is going to be.

A I think you and I are talking about the same thing.

Q I understand that. Well, I want to make sure that I am. You'll recall, I think, that there was attached to our pleadings a contract, had an agreement and plan of reorganization, March 29th, 1973?

1 A Yeah, that was part of the aquisition, yes.

2 MR. DOSHIER: We want to make an objection

3 here, and let him go ahead and answer, but we want

4 the record to show that the parties dispute the

5 true meaning of that transaction. And if Mr.

6 Gates wants to call it one thing and Mr. Grisham

7 views it another way, we want the record to show

8 that he's not admitting to Mr. Gates' theory of

9 what that transaction was.

10 MR. GATES: Oh, I understand that.

11 BY MR. GATES:

12 Q I want to make sure that we are talking about the same

13 transaction, and whatever label you or your lawyers attach

14 to it, you're reserving rights to say whatever it is your

15 lawyers claim and --

16 A Uh-huh.

17 Q -- that you understand there may be a dispute within

18 MMI about the consequences of that overall transaction.

19 A Well, sure.

20 Q All right. Now, you said that's only part of the

21 transaction, and again, when I say that, I mean the

22 agreement and plan of reorganization document, which was

23 attached to our complaint that I'm holding in front of you.

24 A Uh-huh, yeah.

25 Q What other parts of that transaction did you have in

mind?

A Well, I didn't have any particular in mind. There were a number of different areas of that transaction from the first conversation about it right up until several years later.

Q Well --

A And I would say up until Arkwood was dissolved, which was in 1974.

Q Why don't you tell me what your understanding of that transaction was in detail, then, from start to finish?

MR. DOSHIER: I want to object to that, and I don't think I'm going to let him answer that. I don't see as that has anything to do with this issue here, Allan. That's a different lawsuit, and I know we're going far afield, but I do want to hold it to the lawsuits that are being filed, that have been filed, and this seems to go into the issue of liability and other issues that aren't involved in this lawsuit. How are they involved in this lawsuit?

MR. GATES: Well, as I understand it, they're involved directly in the lawsuit in that, as I understand it, there's a defense to the effect that any liabilities that Arkwood, Inc. may have are liabilities which you will contend MMI should

be responsible for, because of some aspect of this transaction. Now, if you are not going to assert that defense, then we certainly have no objection to leaving this area of inquiry alone, for now.

MR. DOSHIER: We're not necessarily going to assert the defense, but we're going to be here all day if you try to cover everything that's involved in all the lawsuits. I'll never get to the witnesses I want to depose.

MR. GATES: Are you going to assert at the hearing this Friday any defense to the relief requested on the basis that any portion of the liability of Arkwood, Inc. should be borne by MMI?

MR. DOSHIER: Portion of liability?

MR. ADAMS: We're going to assert at the hearing on Friday that the courts should not approve your going in there with this plan under a reservation that you may subsequently recover any part of your MMI's expenditures by going in there and doing the testing.

MR. GATES: And will one of your theories be that MMI is supposed to be responsible for Arkwood Inc.'s liabilities?

MR. ADAMS: That is correct.

MR. GATES: Well, then, this is directly relevant, because this is, as I understand it, the only basis for you to assert that MMI is --

MR. ADAMS: I don't believe so.

MR. GATES: -- responsible in any capacity.

MR. ADAMS: I don't think it's the only basis, but I think your question's too broad. Ask him specific questions about the transaction.

MR. GATES: Well, I was just trying to track the man's own wording.

BY MR. GATES:

Q You understand the transaction, or series of transactions, in fact, you were talking about, negotiations, the transactions ultimately involved that lead to the contract dated March 29, 1973, and then you said subsequent events leading all the way through to the dissolution of Arkwood, Inc. subsequently. Do you remember that testimony of yours?

A Similar to that.

Q All right. I want you to tell me your understanding of those transactions from day one to the finish.

THE WITNESS: What do you say, Bill?

MR. DOSHIER: Yeah, go ahead. I would like for him to ask you questions, though.

THE WITNESS: Ask me a question, Allan.

1 BY MR. GATES:

2 Q Tell me your understanding of those transactions as you

3 understood them to occur.

4 A Well, no, you've got to be a little bit more specific

5 than that. That's too general.

6 Q What was the first contact you had in connection with

7 the transaction?

8 A In 1972, Tommy Rogers, Jr. came to me, approached me

9 about an acquisition of Arkwood, Inc.

10 Q Tell me what happened next.

11 A Tommy Rogers asked me if we would be interested in

12 trading 100 percent of Arkwood's stock for a negotiated

13 amount of MMI stock.

14 Q What was your response?

15 A That I would be interested.

16 Q Tell me what happened next.

17 A We negotiated how many shares of MMI stock would be a

18 fair amount to trade for 100 percent of Arkwood stock.

19 Q What was the amount?

20 A 85,500 shares. It was pretty close.

21 Q 85,500 shares of MMI stock?

22 A Uh-huh.

23 Q For all of the stock --

24 A All of the outstanding shares of Arkwood stock, which

25 Mary Jo and I owned 100 percent of that at the time.

Q And this was the only the structure that you had negotiated up to that point, stock for stock swap?

A Yes, uh-huh.

Q What happened next?

A Gosh, what happened next? Well, let's see, the next thing, Bob and I were in negotiations to buy a company over in Oklahoma, and Tommy said to go ahead and buy that company. We would work out an agreement whereby if this stock trade didn't work, well, he would -- he would help us buy that company, Mass would. He's speaking with full authority of MMI, and so that was the next little item that came in there. He said go ahead and buy that company, because they were interested in quickly doubling or tripling the volume of business that Arkwood was doing.

Q What was the name of that company?

A Reese Tie Company.

Q Did you acquire the company?

A Yes, we did. Bob and I went over there to buy it and we made a deal with this guy, a pretty good size deal, and -- well, we went to lunch, and we were going to pick up the ticket, and Bob and I had gone all the way over there and didn't neither one of us have a dime, and we had already made the deal with him. I think it made Mr. Reese feel a little insecure about this deal, but so we did acquire that, and under an agreement that I had with MMI to Tommy

1 Rogers, Jr.

2 And anyway, we moved forward with doing several items
3 of business, because Tommy assured me the deal was going to
4 go through, but because of the corporate structure of
5 things, it would take so many months, and by the time the
6 different attorney mulled it around and changed it two or
7 three times, well, he -- but he wanted to get on with the --
8 he wanted to get on with the program. That's the kind of
9 guy he is, and so we did that. Also, he -- we needed some
10 more operating capital, so he arranged for that through
11 Mass.

12 Q Now, this was operating capital for Arkwood, Inc.?

13 A Yeah, uh-huh. In order to expand, do some expansion
14 that Tommy wanted to see in the overall planning of things,
15 he provided some more capital for us through Mass.

16 Q How much and when?

17 A Well, it was in 1972. As to how much, Allan, I would
18 say somewhere between 80- and 150,000. That was mainly for
19 inventory.

20 Are we going -- you want to keep on with this thing,
21 Bill?

22 MR. DOSHIER: I guess so. He's going to have
23 to come to Harrison tomorrow.

24 BY MR. GATES:

25 Q Were stock certificates issued in connection with this

addition of capital?

A Yes.

Q To whom were the stock certificates issues?

A Well, they got issued several times because they had them wrong, so which time?

Q Each time.

A Each time. All right, the first time we got down there to close them all and we had all these high powered attorneys, Joe Girard and Walter Davidson, they had them all -- everything all around twice as big a conference table as this --

MR. DOSHIER: Wait a minute. He asked you for the capital, for $80- or $150,000. Are you talking about that?

THE WITNESS: I thought he asked about stock certificates.

BY MR. GATES:

Q I asked if there were any stock certificates issued in connection with this addition of capital.

MR. DOSHIER: The $85- to $150,000?

THE WITNESS: Oh, no, none of that or the Reese deal either.

BY MR. GATES:

Q MMI gave $80- to $150,000 to Arkwood, Inc., is that correct?

1 A Yeah, they -- yeah, that is right.

2 Q And received no stock certificate?

3 A Huh-uh.

4 Q Was there a promissory note issued in connection with

5 this?

6 A I'm sure there was a letter or note or something to

7 that effect. Tommy, undoubtedly, had me write a letter.

8 Q So this was a loan?

9 A Yeah, uh-huh.

10 Q So MMI loaned Arkwood, in '72, this amount?

11 A Uh-huh.

12 Q All right. Subsequent to that, what happened next?

13 A What happened next? Well, I suppose Arkwood's board

14 met and approved it.

15 Q Approved what, sir?

16 A The Mass -- this transfer.

17 Q The stock swap?

18 A Yeah, uh-huh.

19 Q Approved it as a stock swap?

20 A However they approved it. However they approved it in

21 the meeting.

22 Q Well, now, as I understand it, this was Arkwood's board

23 you're talking about meeting.

24 A Uh-huh.

25 Q And I take it you were on the board?

1 A Yeah.
2 Q And Mary Jo was on the board?
3 A Uh-huh.
4 Q And I assume that was about it as far as the board was
5 concerned?
6 A Well, no, we had various board members.
7 Q Who else was on the board at that time?
8 A I don't remember. Bob probably was.
9 Q Was Mr. Barker at this meeting?
10 A I'm sure he was, yeah.
11 Q Now, what specific proposal is it that Arkwood's board
12 approved?
13 A Well, Tommy's proposition to us to acquire a company
14 and we -- in whatever form we did approve it at that board
15 meeting. That was one of the events that happened.
16 Q Did you have a written contract or a proposed contract
17 at that time?
18 A A letter of intent.
19 Q Do you still have a copy of that letter of intent?
20 A I haven't seen it. I don't know if I have it or not.
21 Q What was -- what did the letter of intent say?
22 A It said that Mary Jo and Bud -- I think it was worded
23 however we wanted the stock distributed, whether or not in
24 our children's name or so forth and so on, would received
25 85,500 shares of Mass stock for 100 percent of the Arkwood

1 stock. It was a small number, 600 shares or something,
2 whatever Arkwood's was.
3 Q Who signed the letter of intent?
4 A Tommy, and I guess I did, too.
5 Q Is this the proposal that you say Arkwood's board
6 approved?
7 A Yes, uh-huh.
8 Q What happened next?
9 A I would -- who would know if this sequence of events
10 follows in date order, but at some point, Mass, MMI's board,
11 met and approved the transation.
12 Q All right. Well, I understood you to be refusing to
13 answer any questions of simply describing the narrative as
14 you understood it, so I'm going to keep asking you specific
15 questions until you get comfortable describing the narrative
16 to me at any point you want to pick up and proceed, that's -
17 fine.
18 A Well, I think we're about there.
19 Q Well, would you continue with the next events that you
20 understood took place that are relevant to this
21 transaction?
22 A Well, at that time, we involved CPA's and attorneys.
23 Tommy and I turned it over then and went on about our
24 business of managing the companies.
25 Q And you don't know what happened next?

A Well, that's -- well, then, they -- it cultivated, you know, came to a head on an agreement eventually, and we had a closing, and then the Arkwood employees more or less became MMI employees, through the Mountain Enterprises, but that was just more or less a legal maneuver. We didn't ever have Mountain Enterprises' checks or Mountain Enterprises' structure. It just -- we were all of a sudden, Bob and I were MMI employees.

Q When you say there was a closing --

A Uh-huh.

Q -- I take it the closing was to close on this contract dated March 29, 1973, that we talked about before?

A That was part of it, yeah, and there were reams of closing documents, which your file there would not hold.

Q Ultimately that transaction was not closed as a stock swap, was it?

A I won't try to interpret that.

Q Who owned the stock the day after the closing of Arkwood, Inc.?

A Who owned it?

Q Yes, sir.

A I can't answer that. That's a legal question that I wouldn't start to answer. I know who owned the MMI stock.

Q The truth of the matter is, you and Mary Jo owned the Arkwood, Inc. stock for some substantial period of time

1 after that closing, is that not correct?
2 A I couldn't answer that.
3 Q You don't know whether you were a stockholder of
4 Arkwood, Inc. after the closing of that transaction?
5 A No, I wouldn't possibly know that, because part of the
6 deal was that we would turn over the minute book and all the
7 stock records and all the Arkwood records to MMI's
8 attorneys. I believe it was a Walker law firm at that time.
9 And they were to take it and dissolve it as they saw fit.
10 Now, I wasn't privy to whether it would be done that very
11 day or 20 years later. That was their decision. So they
12 took the --
13 Q Did you read the documents in connection with this
14 transaction?
15 A Yes, uh-huh.
16 Q Are the documents in connection with this transaction,
17 do they accurately reflect the rights and responsibilities
18 of the parties?
19 A No, I couldn't say that they do.
20 Q Okay. What's different about your understanding as
21 opposed to the written documents?
22 A I don't have any comment on that.
23 Q Yes, sir, I think I'm entitled to an answer to that.
24 If you believe there are differences, I'm entitled to know
25 what differences you believe there are.

A Well, you'll just have to give me a little time to think on that.

Q Take all the time you want.

A You mean days?

MR. DOSHIER: You are going into something outside what we consider to be the scope of this deposition anyway, Allan. I mean, we're allowing it, but I don't think that it's fair for you to expect this guy to come up with the answers to all your questions, and if he doesn't know them, I'm going to tell him to say, "I don't know them at this time." He'll just have to --

MR. GATES: Well, now that you're through coaching him, Bill, I will tell you that anytime you say to me that you are not going to assert a defense related to the nature of this transaction at this hearing, I'll be happy to defer this examination.

But so long as you are going to retain the right to assert any kind of defense based on the character of the transaction at the hearing coming up Friday, then I'm going to insist on pursuing it. And I'm going to ask the Judge if this gentleman refuses to answer or declines to answer, that that defense be stricken.

1 MR. DOSHIER: Go ahead and ask him.

2 BY MR. GATES:

3 Q Would you answer my previous question, please?

4 A What was it, Allan?

5 Q My previous question was, what differences do you

6 understand -- or what differences are there between the

7 rights and responsibilities as described in the written

8 documents and your understanding of what the transaction was

9 to be?

10 A I'm going to try to answer that from memory. I would

11 have to be looking at the documents. They're too

12 voluminous. They are voluminous. You haven't near seen all

13 of them, and it would just -- it wouldn't be fair to you or

14 me to try to answer that just off the cuff.

15 Q Can you think of one as you sit here today?

16 A One what?

17 Q One difference.

18 A One difference? Well, I can think of a difference in

19 my mind that the Mass attorneys didn't dissolve the Arkwood

20 corporation in the time frame that I had in mind that they

21 would do it. It was in retrospect, although back then it

22 didn't make much difference, we were just all busy trying

23 to make money for the company, but it seems funny to me that

24 it went maybe a year, year and a half, before they decided

25 to go ahead and dissolve it.

So, you know, you have agreements and then people sometimes change -- change the outline of it after it's already signed, and I'm certain that that happened. I think that happened a lot in this case.

Q What documents were changed after they were signed?

A Now, I --

MR. DOSHIER: He said agreements, not documents.

BY MR. GATES:

Q All right. What agreements were changed after they were signed?

A Well, not -- until I do a little homework on those documents -- when is that date, Allan, that agreement? It's something in '73, right?

Q It's in March of '73, yes, sir.

A Yeah, and it's 100-some-odd pages and there's probably another 100 pages of other documents and agreements, and I'm not going to try to recite those from memory.

Q Let me ask you a simpler question. You, indeed, executed the March 29, 1973 agreement, didn't you?

A Yes.

Q And Mary Jo did as well, didn't she?

A Right.

Q And do you -- did you understand yourself to be bound by the terms of the provisions of that agreement?

A Yes.

Q All right. Is there anything that you can tell me that relieves you from any responsibilities under that agreement?

A That relieves me from it?

Q Yes, sir.

A No, I can't tell you of any that relieves me from it or binds me to it.

MR. GATES: Well, we're going to reserve the right to see this man again on this -- given the way you've limited the examination and the way he has limited his answers.

THE WITNESS: Well, I think you all reserved that. This isn't going to be the final deposition of any of us, is that not right, Allan?

MR. GATES: It's certainly not going to be your last deposition, that's correct.

THE WITNESS: Didn't you and Bill discuss that we're --

MR. DOSHIER: Just let me and him find that out. You don't need to worry about that.

THE WITNESS: Let me get some water.

MR. GATES: Sure.

(THEREUPON, a short break was taken.)

BY MR. GATES:

1 Q Are you ready to proceed, Mr. Grisham?

2 A Sure.

3 Q Is Hallie C. Ormond competent, mentally competent at

4 this time?

5 A No.

6 Q When, in your opinion, did Hallie C. Ormond cease to be

7 mentally competent?

8 A About -- in my opinion, about three months ago.

9 Q Have you spoken with doctors regarding Mr. Ormond's

10 condition?

11 A Well, you got that letter, didn't you?

12 MR. DOSHIER: Just answer.

13 THE WITNESS: Yes, yes, I have.

14 BY MR. GATES:

15 Q Have you consulted with Mr. Ormond's doctors other than

16 in connection with getting the letter that was mailed to me

17 about his condition?

18 A Yes.

19 Q Have you inquired with his doctors about his mental

20 competence to conduct his own affairs or testify?

21 A Yes.

22 Q When did you first do so?

23 A Well, now, wait. Do what? So you had asked me to --

24 Q Inquire about Mr. Ormond's mental competence, of his

25 doctors.

1 A That, about three months ago.

2 Q What are the doctors' names that you've inquired of?

3 A Doctor Tom Bell.

4 Q Any others?

5 A Doctor Charles Ledbetter.

6 Q Any others?

7 A Doctor Joe Bell Wilson.

8 Q Any others?

9 A Doctor Tom Hoberock.

10 Q Would you spell that last name?

11 A Close. H-o-b-e-r-o-c-k.

12 Q Are there any other physicians you consulted regarding

13 Mr. Ormond's mental competence?

14 A Yeah, let me see. I believe I spoke once with Doctor

15 Don Vowell.

16 Q Are there any others?

17 A I believe that's it.

18 Q Have each of these physicians indicated that they

19 believe Mr. Ormond to be incompetent?

20 A Yes.

21 Q Have these inquiries all been within the last three

22 months?

23 A Yes.

24 Q To each of these physicians?

25 A Uh-huh.

Q You described previously the power of attorney that you held. Is that power of attorney exercisable solely by your signature? Excuse me, let me back up and ask that question differently.

You hold a power of attorney, which you can exercise on Hallie C. Ormond's behalf, is that correct?

A Yes.

Q Can you exercise that power of attorney acting by yourself?

A No, that's Charlie, Charlie Ormond, Charles L. Ormond. It takes both our signatures.

Q You can take no action on behalf of Hallie Ormond alone, is that what I understand your testimony to be?

A Well, now, on signatures, I think that's right. You asked me about signatures, but I think I can take actions --

Q Under the power of attorney on his behalf is what I'm getting at.

A Uh-huh. What is my power of attorney, Bill?

MR. DOSHIER: You can take it on non-signature items by yourself.

THE WITNESS: I can take it on non-signature items by myself.

BY MR. GATES:

Q Are you a signatory on the checking accounts or bank

1 accounts of any sort for Hallie C. Ormond?

2 A Yes, uh-huh.

3 Q Can you exercise that right without another signature?

4 A Yes.

5 Q On any account?

6 A Yes.

7 Q Are you paying Mr. Ormond's day-to-day bills?

8 A I pay some of them and he has a bookkeeper that pays

9 some.

10 Q And these are all out of his accounts?

11 A Yes.

12 Q His medical bills, are you paying those as well?

13 A Just now and then. Mostly his secretary takes care of

14 that.

15 Q All right. You have described earlier the operation of

16 the Omaha treating facility during the tenure prior to the

17 '73 sale. I would like to direct your attention now to the

18 period of time that MMI operated the facility.

19 A Uh-huh.

20 Q And I think you understand that to be from essentially

21 March of '73 until the end of 1984, is that correct?

22 A Well, in my mind, I usually say from the first of '73.

23 Q From 1973, some point in '73?

24 A Yeah, yeah.

25 Q To the end of '84, is that correct?

A Yes.

Q Did MMI's operation of that site differ in any significant respect from the way you knew the site to operate before MMI?

A Ask it again, Allan.

Q Did MMI's operation of that site differ in any significant respect from the way you knew the site to operate before MMI took over?

A Well, certainly it operated in a many fold times larger, because of the -- mainly because of the Reese Tie Company acquisition, that doubled the production we had available to sell, so all of a sudden we were able to operate at a much larger volume. So that was the significant -- significant thing as far as the rest of just the general day-to-day operation as we that managed it and worked for it, it was basically the same, just a bigger operation.

Q Did their -- excuse me. Did MMI engage in any different waste disposal practices than had been customary or common during the period prior to MMI's takeover?

A It was -- wait, no, it was all about the same, just more volume, more of it.

Q Have you initiated, pursued or made demand on any insurance policies?

A Yes, we've been trying to get our insurance company

1 to -- or yes.

2 Q What companies?

3 A Maryland Casualty and, I guess, maybe either

4 Transamerica or St. Paul. Seems like it was St. Paul.

5 Q What response has Maryland Casualty made to any

6 claims?

7 A All of them that we have approached about it tell us

8 they are not going to help us defend it.

9 Q Have you initiated litigation against any of the

10 insurance companies?

11 A Yes.

12 Q Which companies have you initiated litigation against?

13 A Maryland. We didn't file on St. Paul in that, did we?

14 MR. DOSHIER: (Indicated no.)

15 THE WITNESS: Maryland.

16 BY MR. GATES:

17 Q Where has litigation been commenced?

18 A San Antonio.

19 Q In whose behalf has that litigation been commenced?

20 A In mine, I think, isn't it, Bill?

21 MR. DOSHIER: Yeah.

22 THE WITNESS: Soon to be Hallie's, I guess.

23 MR. DOSHIER: Except it's you.

24 THE WITNESS: At the present time, it's just

25 mine.

BY MR. GATES:

Q Bud Grisham versus?

A Yeah.

Q Is Arkwood, Inc. a party to that litigation?

A I don't think it is. I don't remember seeing that on any of the documents.

Q Are you the insured party in the policies in question?

A Arkwood, Inc. was some and then, of course, Mary Jo and I would have been for that short a period, '64, just before Arkwood was incorporated. We always had CGL policies and --

Q But you are suing for the period in which you were personally responsible at the site as proprietors and any coverage you had for Arkwood, Inc., as well?

A I assume so. I couldn't tell you exactly for sure. Arkwood -- the time during Arkwood, I couldn't tell you about that little year or year and a half there, probably.

Q What's the status of that litigation?

A Oh, they've answered it, Maryland's answered it, and it's set for sometime in 1988, March, 1988, or something like that.

Q Have you initiated any investigations at the Omaha site?

A Yeah, I've been up there a lot myself.

Q Aside from --

A A few tests, you know. Done a few tests.

Q What tests have you done or had done?

A I've done a few tests on the spring and runoff water, and then visual tests.

Q What type of visual tests?

A Well, the kind you go up there and look at it and smell it.

Q Just simply visually inspect?

A Yeah.

Q All right. Who has conducted or been involved in the testing of the springs?

A What lab?

Q Anybody who has been involved.

A Well, let's see, Bill Doshier has been involved. Let's see, Morris Cramer, and then a lab -- what's the lab, Bill, Interplex?

MR. DOSHIER: Yeah, American Interplex.

THE WITNESS: American Interplex.

BY MR. GATES:

Q Who collected the sample?

A Bill Doshier collected some samples and Morris Cramer collected some samples.

Q Were you with them at the time?

A Yes, I was.

Q Have you received results of these samples?

A Some, some of them we have received.

Q What were the results of those samples?

A I think ran from -- some of it from .8 to 3.1 on the spring, and on the runoff, somewhere in that same neighborhood.

Q Let me back up. 3.1 on the spring?

A Uh-huh.

Q Is this the spring that comes out of a cave just on the left-hand side of the road as you head down it?

A Right.

Q The county road?

A Yeah.

Q Just past the gate?

A Right.

Q All right. And that was 3.1 parts per million?

A Right, we had one test like that. We have some that haven't got the results back yet.

Q 3.1 parts per million what?

A Penta, PCP.

Q Did you analyze for any creosote constituents?

A No, we didn't.

Q When are the other results due?

A Gosh, I don't know. I hope to get them within the next week or two, but can't count on those labs.

Q You mentioned a number .8. What sample was .8?

A I think that was on the runoff water.

Q Was that .8 parts per million penta?

A Yeah, uh-huh.

Q Where was that sample collected?

A I believe that one was down -- down by the gate.

MR. DOSHIER: I don't think you're right, but that's as best you can.

THE WITNESS: I don't think I am, either.

MR. DOSHIER: Do the best you can.

MR. GATES: Is this part of the information you said wasn't available on Friday?

MR. DOSHIER: No, no, that's the test he's waiting on.

BY MR. GATES:

Q How many samples did Mr. Doshier collect?

A Three or four.

Q One at the spring, one of runoff. What was the --

A Well, two -- I guess there were three.

Q Tell me each --

A Seems like there were two runoffs and one -- no, wait a minute. Yeah, that's right. Doshier collected one at the spring and two runoff, I believe, is correct.

Q When were these collected?

A Oh, it has been a couple of months ago.

Q Prior to the first of the year?

A No, since the first of the year.

Q Mr. Doshier refrigerate this sample?

A Yes, uh-huh.

Q What was the method of refrigeration?

A He had a styrofoam cooler with some ice in it.

Q What other samples have been collected?

A Morris Cramer collected -- let's see. I believe three samples.

Q Where were the samples collected?

A Two from the mouth of the spring where it comes out of the ground there, and one about 130, -40, yards down the ditch where the spring water runs.

Q 130 yards from the mouth of the spring?

A From measured on the road.

Q Along the roadside?

A Yeah.

Q This would be on the other side of the road, on the right-hand side of the road as you head down it, away from the highway?

A No, on the same side as the spring.

Q When were these samples collected?

A About a week ago.

Q Do you have any results back on any of these samples?

A No, huh-uh.

Q Any other samples that you've collected?

A That's all I remember.

Q Any other tests that you've done?

A Just the -- just the visual inspection of the area, site and the tunnel and so forth.

Q Are there any other tests that you've had done by anyone else?

A No.

Q What else have you asked Mr. Cramer to do besides collect these samples and have them analyzed?

MR. ADAMS: We're going to object to that and instruct him not to answer that. Mr. Cramer will appear as an expert witness in the case. His directions came from counsel, and you may depose him if you would like.

MR. GATES: Well, of course, the opportunity to depose him is going to be meaningless because he is not finished and will not be effectively available to us, but set that aside, I'm not really looking to do -- to attempt to determine work product at this point. What I'm instead attemping to do is determine the scope of the investigation which is the basis for the objection to the site access.

Now, you have asserted an objection to our request for site access that it would interfere

with your investigation. What I want to find out is what investigation has been commissioned.

MR. ADAMS: We have asked him to review this plan and be prepared to testify concerning it.

MR. GATES: All right. Is he going to review that on the plant site physically?

MR. ADAMS: I don't do his job for him, he don't do my job for me.

BY MR. GATES:

Q Has there been any other investigation of the site that you know of requested, Mr. Grisham?

A Tyson did one.

Q That you've requested, Mr. Grisham.

A Oh, that I've requested?

Q Yes, sir.

A No, there is nothing.

Q You are aware that your attorneys have asserted that you have an investigation underway at the site, and that this investigation of yours is a reason why site access should not be granted, aren't you?

MR. ADAMS: That's not correct. That's not what I said. That may have been what Mr. Doshier said. That's not what I said a few minutes ago.

MR. GATES: No, I understand that. It's what has been said in written pleadings.

MR. ADAMS: Okay. Fine.

THE WITNESS: What was the question?

BY MR. GATES:

Q Are you aware that your attorneys have asserted that you are conducting an investigation at the site and that the proposed RIFS, or site access that we want, would interfere with your investigation?

MR. DOSHIER: Just tell him the Cramer investigation is the only one we know about.

MR. GATES: I'm going to object to this blatant coaching and telling the witness what to answer. Now, I'm entitled to know what this man knows without you telling him what to say.

MR. DOSHIER: We object to that statement. We think you're entitled -- if this is discovery, you're entitled to discover the facts that we have in our possession.

MR. GATES: Discovery is to be --

MR. DOSHIER: You're tricking the witness into something, he doesn't understand your tricky questions. I'm just helping him understand --

MR. GATES: You're just helping him along, I understand. We're trying to get at the truth of what he knows, Mr. Doshier, not what you hope to subsequently come up with.

MR. DOSHIER: Do you want a truthful answer, because he didn't understand that question?

MR. GATES: I want to know what his knowledge is, and I'm entitled to know that, and I'm entitled to conduct this deposition and not have you interrupt in between the giving of the question and the telling of the answer by this witness.

MR. DOSHIER: I think you're trying to trick the witness --

MR. GATES: I'm not trying to trick him at all.

MR. DOSHIER: -- and use it on him later. You've been told --

MR. GATES: Now, back on the record, with the witness, if you don't mind.

BY MR. GATES:

Q Are you aware that your attorneys have asserted that you are conducting an investigation?

A I'm aware that they've contracted with Mr. Cramer to do some technical work. As to how it ties in with the legal answering of the motions and all, I leave that up to my attorneys.

Q Is there anything that you know of in the way of investigation under way other than Mr. Cramer's work?

A Just what I'm doing myself, just the investigation that I'm doing myself.

Q We'll get to that. Is there any other investigation, besides what you're doing yourself and what Mr. Cramer's doing, that you know of?

A Outside of myself, Mr. Cramer and my attorneys, I don't know of any other.

Q All right, sir. And I think I know what Mr. Cramer is up to. Let me ask you what you are up to. What investigation are you conducting?

A Well, I'm trying to at least follow the paper trail to verify what -- which I've long thought is that the site is rapidly cleaning itself up, just good, old mother nature is taking care of a lot of it since Mass decided to quit treating up there, and I've long suspected that, and so I'm doing everything I can to follow that trail.

Q What are you doing specifically to follow that trail?

A Well, as I say, a lot of paper trail, though there is a lot to learn by spending a lot of time up there, and to --

Q Tell me what you mean. Excuse me. I don't mean to interrupt, but you said it twice and I don't understand. I want to make sure I understand your testimony. You say you were following a paper trail. Tell me more specifically what you mean by that.

THE WITNESS: You want me to answer that,

Bill?

MR. DOSHIER: Yeah.

THE WITNESS: The -- well, the test results go back all through the paperwork to 1981, when Mass first was advised of this, and the tests that were taken at that time and the physical conditions of the site, and also the way people remember the site at that time, and so follow it on down through as to the condition it's in now, and some of it is in the form of -- you know, I've done some graphs and so forth, and just to establish what the tests are using test results that are public information or in the work plan or in various other places that you can -- that you can find them.

BY MR. GATES:

Q All right. Well, I want to make sure I understand the basis of any objection that your counsel have raised to this RIFS workplan being done or MMI being allowed on the site for that purpose.

Now, if I understand it you say you are examining test reports and the like and doing graphs --

A Yeah.

Q -- that's simply examining the records, isn't it, of this --

A Yeah, mostly comes from the records that's through there.

Q And determing what the changes in concentrations may have been, is that correct?

A Sure, that's all anybody has done. It's in that work plan.

Q And that is something that you do in the records, not out at the site itself, is that correct?

A Well, I spend a lot of time there.

Q I understand that, but at least as far as examining the records, there's nothing about site access that would interfere with your ability to do that, is there?

A Well, that's a very good possibility there might be.

Q All right. Tell me how it would interfere.

A Well, I might be forbidden to go on the site. That might be part of the ruling that came down.

Q If you are not forbidden to go on the site, how would your investigation or inquiry be impaired or interfered with?

A Well, your investigation, you might have your equipment right there where I want to put my equipment.

Q What equipment are you going to put in and where and why?

A I don't have that clearly ready to answer you today. That's still in the planning stage.

Q What equipment are you planning to put on the site?

A I don't have a plan for that today.

Q When do you expect to have one?

A You mean when?

Q Yes, sir.

A Well, here in a few days.

Q Who are you consulting with for purposes of developing this plan?

A Well, I'm basically using my own counsel and my attorneys.

Q What type of work do you plan to do with this equipment?

A I might drill a few holes.

Q Have you discussed this drilling that you propose to undertake with the EPA?

A No.

Q Have you entered into any agreement with EPA that you will not further alter the site?

A No. Wait, let me take that back. I believe I did tell them on the phone. What are you grinning about?

Q I thought you might recall that.

A Yeah, I think we told them that we weren't going to do anything, but we haven't signed any agreement with them.

Q So you just told them that, you're not necessarily --

MR. DOSHIER: Without letting them know.

THE WITNESS: Yeah, without letting them know. I think we did tell Ruth that we wouldn't go back up there without letting her know about it.

BY MR. GATES:

Q Do you intend to abide by that?

A Yes.

Q But you haven't discussed these plans that you just mentioned in your earlier testimony with EPA or Ruth Israli or anybody else?

A Yeah. Right, they're too changeable. They're in the planning stage in that there is no need to mention them until they are firm.

Q Do you propose to tell EPA about these before you undertake them?

A Yeah, sure.

Q If EPA objects, do you propose to follow through with them anyway?

A I'm going to go with my legal rights on that.

Q What do you understand your legal rights to be?

A I understand my legal rights are to retain attorneys and have them advise me as to what they are, and that if we can go do our testing without advising the EPA, well, certainly, we would do it within our legal rights.

Q So you would do so notwithstanding any oral agreement

you have with EPA?

A I don't think my attorneys would go along with that at all.

Q All right. So unless you have to, you won't tell EPA or get their approval

A No, I don't mind telling EPA at all. I would be happy to.

Q Do you intend to?

A Be happy to.

Q Do you intend to?

A Yes, I intend to.

Q When do you intend to tell them about these plans you have?

A When --

MR. GATES: Well, we're talking about a man who is saying he is going to develop this plan in a couple of days, I presume the day before the hearing, and he is playing cat and mouse games with me and I intend to pin him on this until I find out whether he is going to dishonor his express agreement with EPA and whether he is going to make up a plan come the day of the hearing and defeat my ability to engage in meaningful discovery with regard to whatever kind of proposal it is he has in mind.

MR. ADAMS: He has just got through responding to that. He will tell the EPA if he formulates a plan and is going back on there to do -- carry that plan out. He will abide by that.

MR. GATES: All right. He just said he would abide by his legal rights. If he could get away with it, he'll do what he pleases, I gather.

BY MR. GATES:

Q Is that correct, Mr. Grisham?

A Well, if she could read that back? I don't remember that wording.

Q What is it about the RIFS work plan that will interfere with your investigation other than there might be a piece of equipment in the way?

A Well, that work plan right there has a lot of things that interfere with me in it, a lot of misrepresentations and errors and outright lies, and naturally, that would interfere with anything that I might plan to do.

Q What misrepresentations do you believe are contained in it?

A Well, do you want me to read you some of them, or do you want to --

Q Yes, I want to know what your objections are to the plan, absolutely.

A Well, here is one I object to. It says, "H.C. Ormond commences operation as a simple proprietorship." That's an outright misrepresentation.

Q You and Mary Jo, I take it, commenced as a simple proprietorship instead?

A Yes, I told you that.

Q All right. What other errors or misrepresentations do you believe there are in it?

A Well, "use of sink hole for sludge disposal terminated 1971 to '72. Quantity of sludge decreased due to increased product cost and more efficient use of treating solutions."

Well, obviously, all of these that address the question of liability, Allan, I object to as being a part of a supposedly technical work plan, which is, you know, more slanted toward determining liability than it is actually getting the job done of finding out what to do up there on the site, so I would object to anything in there that is written that way.

Q Well, I would like you to be specific about the particular references that you object to. You had your opportunity to participate in this in a cooperative fashion, and you're the one who has chosen not to go that route. Now, if you have a specific actual objection, let's hear about it.

A I didn't have an opportunity to participate in this. I

was not allowed to see that until it was signed. I went to the EPA several times to look at the work in progress, and they would not allow me to see it. They said, "You can see it when it's signed by all parties." So I did not have the opportunity to participate in that.

Q Well, I think the record will reflect exactly what your opportunity was. What specific factual objections do you have?

A Well, I've given you a couple of them.

Q You've mentioned two, "Hallie C. Ormond commences operation as a proprietorship," and you say no, that's your responsibility, not Hallie's.

A Here's one that's in here. Says, "Under MMI management, several changes were made in plant operations and waste disposal. The sump drain line was improved to provide for more effecient re-use of oil. Air pressure - vacuum time was increased during treatment process to eliminate and reduce treated wood bleeding." I object to that.

Q You think those things did not happen?

A I certainly do not. I think that they happened at all.

MR. DOSHIER: This is it right here. Is that all it is there?

THE WITNESS: "During the early years of

operation, few precautions were taken to prevent secondary releases of wood treating solutions to the environment. The waste oil was --"

BY MR. GATES:

Q Excuse me. Let me back up. What precautions were taken?

A Let me finish reading this. "During the early years of operation, few precautions were taken to prevent secondary releases of wood treating solutions to the environment. The waste oil was disposed into a sink hole located near the treating cylinder room. Disposal into the sink hole was discontinued prior to 1971."

I think this one right here is one I already ready you, Allan.

Q Let me back up if you've finished. What is false about the statements you just read?

A Well, now, I've read you all these. You haven't asked me what's false about all of them. That's going to take us all day to go into that.

Q The ones you've just read. I think I have an idea about some of these others. I want to know what you think is false about the one you just read starting with early operations and ending with where we just finished up.

A Well, I certainly don't agree that few precautions were taken to prevent secondary releases of wood treating

solutions to the environment.

Q What precautions were taken?

A Why, every kind. You don't think I like to throw that expensive oil away, did you? So I naturally took every kind of precaution to not have lines break, to not let chemicals get away, creosote or penta or whatever it was, that we could save and dump back in the tank and re-use.

Q Just help me, specifically what precautions?

A I just did.

Q You said trying to keep lines from breaking. What else?

A Okay. There's one precaution.

Q What else?

A To put buckets under the cylinder door to catch the fluid that we could re-use or re-sell.

Q What else?

A Okay. Oh, we continually tried to improve on the treating operations. We experimented with the air and vacuum part of it to try to not have the fence posts leak more of this off than necessary.

Q Were you successful?

A Not very. Didn't work too much, but it probably helped some. Another precaution we took was to -- especially in the earlier years, we were able to do this to make sure that our fence posts were good and dry before we treated them.

Leave them out on these other yards drying before we brought them up to treat them.

Q Anything else?

A I'm sure there are, but I'm not thinking of, but I will think of them in due time.

Q Well, let's take some time now and I want you to think real hard and see if there's any other precaution that you can think of as we sit here now.

A (No response.)

Q Is there any other?

A Yes, I'm sure there are many areas.

Q What?

A (No response.)

Q There has been a long pause, Mr. Grisham. I'll repeat the question. What precautions?

A No, I heard your question, I'm thinking about them. We pick up out of the boiler room with a pump, and if ever just pure penta came -- it was separated say as from water through a leak in the pipe, we would pick that up and pump it back in the tanks.

MR. DOSHIER: We want to make an objection to you, Mr. Gates. I think you are badgering the witness. He -- some of these objections he says just shouldn't be in the work plan. That it -- no place in the work plan.

MR. GATES: I understand your objection. I want you to state it after the man has finished his answer. I don't want any more coaching of this witness in between questions and answers.

MR. DOSHIER: I don't care what you want. I have a right to object if I want to. He has told you he objects to it because it shouldn't be in the work plan, a plan that's endeavoring to go in there to determine what should be done to clean it up. These slanted liability questions, that's what his objection is, partially.

THE WITNESS: Let's see. I believe, Allan, I read you this one, but to be sure, "Under MMI management, several changes were made in plant operation and waste disposal. The sump drain line was improved to provide for more effecient re-use of oil. The air pressure vacuum time was increased during treatment process to eliminate reduce treated wood bleeding."

Now, I object to that. Do you want to question me about that?

BY MR. GATES:

Q On what grounds do you object to it as being --

A Well, it didn't happen. It didn't happen. We did experiment over all the years with this air pressure vacuum

time, but those posts bled just as bad after we had done all of our experimenting as they did on the first, and we never did perfect anything to stop that. It's true we did try, but we never did.

I object to this one where it says, "Quantity of sludge decreased due to increased product costs and more efficient use of treating solutions." I strongly object to that.

Q Did the quantity of sludge produced never decrease?

A Quantity of sludge didn't decrease in proportion to the amount of posts treated, you know. If you quit treating less posts, well, then, you would have less sludge, but in direct proportion to the amount treated, it stayed the same, and certainly, I was -- the idea of increased product cost, I don't think anybody was more conscious of product cost in 1964 and '68 and up through there than I was. It doesn't make sense that when I had the big corporation behind me, I would all of a sudden become more conscious of it. I was the same conscious of it all those times.

And here in another item in the work plan, it says, "Up to '73 -- up to 1973," as if that was some magic cutoff date. "Few precautions were taken to prevent secondary releases of wood treating solutions to the environment." I strongly object to that because it's not true and I think I've given you some of the answers to those precautions.

And the very idea that it magically changed on the

first day of 1973 is ridiculous.

Q Are there any other factual assertions that you contend are inaccurate or misrepresentations?

A Let me look here a second.

MR. GATES: Let the record reflect Mr. Doshier is coaching the witness, and unfortunately, we can't transcribe what he's saying. If you would speak up a little bit, Bill, you can resume testifying.

THE WITNESS: Well, what do you think I'm paying him for, Allan?

Here is one I strongly object to, "Pumping of wastes into the railroad ditch for sludge disposal terminated in 1973." That's not even close to right. And you tell me what part this plays in a technical work plan document. But I sure strongly object to Bud and Mary Jo Grisham sell their MMI stock for 2.2 million in 1976. There isn't anything right about it. They barely got our names spelled right and there's nothing right about the rest of it.

BY MR. GATES:

Q When did you sell your MMI stock?

A At various times from 1973 up through probably 1980.

Q What were the total gross sales prices you realized on

that stock?

A It was not 2.2 million.

Q How much more than 2.2 million was it?

MR. DOSHIER: We object to that question, and he is not going to answer it. It's not germaine to this issue.

THE WITNESS: The point is that we started out, Allan, is what I objected to about the work plan, and that sort of garbage in there is a lot of it.

MR. GATES: Are you instructing the witness not to answer the question?

MR. DOSHIER: That question, that particular question, what he got for his stock is not in issue in this case.

MR. GATES: Are you going to assert any limitation of the liability of Bud and Mary Jo as distributees to the extent of the amount they realized on their stock?

MR. DOSHIER: Not in this hearing Friday, we aren't.

THE WITNESS: Allan, there are, and you, of course, will hear more about it in the courtroom, I'm sure, but there are certainly more objections to this work plan about a lot of the testing that

they proposed to be done that I object to, testing for things that couldn't possibly be up there. Everybody -- it's well known that what we used is creosote and penta. Everybody on both sides agree to that, so we don't see any reason to be testing for Agent Orange, or to use a paraphrase, something. They --

BY MR. GATES:

Q Don't want to use the "D" word?

A No, better not, better not. Because, you know, it's all expensive, and as you have stated, MMI's operation of the treating plant did not cause any of the conditions complained of, and so naturally, I would be a little bit paranoid about anything you might put in here, because you expect me to pay for all of it.

Q I understand and I appreciate your clarification. I am -- I have been asking you about objections you had to the factual narrative, and I gather you've covered all of those?

A In the work plan?

Q Yes, sir.

A Yeah. Well, I've covered all that I can discover. There are many others, but we would have to pour through it a page at a time, and I don't believe you want to take the time to do it.

Q None that are significant enough that you can recall today?

A Well, let me go to the bathroom and I'll see if I can recall them.

MR. GATES: Fine. If Doshier goes with you, it might help your memory.

(THEREUPON, a short break was taken.)

MR. GATES: Bill, do you want to put that in your words or do you want me to repeat that or what? We have a stipulation for the record regarding the landowner, Mary Burk, who has not previously been joined as a party, and I think Mr. Doshier, on her behalf, is going to stipulate --

MR. DOSHIER: If I got that date. You got that deed handy?

MR. DEISCH: I got it here.

MR. DOSHIER: At a hearing Friday, Mary Burk will stipulate through her attorneys that she became the landowner of 82 acres of land in Boone County, Arkansas, on September 24, 1986, and that within that 82 acres of land is the site, Arkwood site involved in this case.

And that she enters her appearance in this case as a respondent and present landowner of the site, and -- what pleadings does she adopt, all of

them or just --

MR. GATES: I presume she would join the positions asserted by your other clients to the extent they are applicable.

MR. ADAMS: Yeah, by her predesessor entitled to the extent they are applicable.

MR. GATES: And she would agree to be bound as a party by whatever disposition the court makes from that point forward?

MR. ADAMS: Correct.

MR. DOSHIER: Right.

THE WITNESS: I thought of something, believe it or not.

BY MR. GATES:

Q Good.

A I want to look and see if I've already told you, though, Allan. I believe I more or less covered the ones that are, you know, so calculated, weaken our position when you get down to your real goal, and that is to make us pay for everything.

Let's see. An objection -- we're on the record and going?

Q Uh-huh.

A A real strong objection to the work plan --

Q Go ahead. I'm listening. It's more important that

she gets it. A real strong objection to the plan, yes, sir.

A Yeah, as I say, getting away from all of this stuff that you put in here about that points to the question of liability, I object to you using your engineers to twist the facts about it, because there is no question, now. One of the first things you -- first day I ever saw you is, we want to be sure and be the ones to hire the engineers, because, you know, they are going to do what -- who they are working for is who they are going to cater to.

When you were trying to get me to pay for part of Geraghty & Miller's plan, and I know you agree with that theory that many times it has been stated that -- by you and the McKesson people, that, one, we sure don't want to have EPA do it, because -- if we can hire the engineers, well, they are going to come up with a much more favorable solution to us, and I think you are right about that.

We've got a land dispute, I think I would rather hire the surveyor than have you hire the surveyor. And so there's no question in my mind that under this structure, this agreement you have with the EPA, that you're going to use those engineers to slant this question of liability.

And also under this plan, there's a doubling up of expense, if not tripling, because the EPA has to look over your shoulder, and make sure you don't do that. But just

because EPA is looking over your shoulder, doesn't completely satisfy me, so that is an objection I have to the very idea that my adversary would hire the engineers.

Q Any other objections?

A Yeah, if I can think of them. I assume that you will use these same engineers that you plan to use on this work plan will also be your expert witnesses, you'll use them as expert witnesses in any trial that you may have to determine this liability split, is that right? I would object to that.

Q I'm not a witness.

A Well, if that's a possibility. Seems to me that's a real possibility, and I object to that. Especially since you'll be asking me to pay the very engineers that would be used against me as expert witnesses. I think you can understand why I would object to that.

I object to the work plan because it's premature, the ranking is not even official yet, and seems to me you have your cart before the horse a little bit. And so naturally, I wouldn't want to agree to something that isn't even a matter of law yet.

Q Did you file any comments in response to the proposed ranking?

A We have recently.

Q Did you file them in the EPA administrative record in

response to the Notice of Proposed Rulemaking?

A No, we did not.

Q You didn't file anything of record?

A No, huh-uh.

Q All you've -- what is it that you have done then?

A Well, recently we contacted the EPA and asked them to update us on how this site was ranked, and we're doing an investigation. I don't know as I should say "we" as much as "me." And so, you know, I object to the approval of a work plan that's not even maybe covered by the law yet.

Q Anything else you object to?

A There are, but that's -- without really going through it and reading it --

Q Anything that you can recall, anything significant enough that you can recall as we sit here?

MR. DOSHIER: Of course, with that, again, is the basis of our objection. I've seen it happen so many times before, you give him a blanket statement like that and ask him if he can recall, and then if at the trial he comes up with something else, you say, "Well, you didn't mention that on deposition." Why don't you ask him the question you want him to answer and he'll answer it.

MR. GATES: Mr. Grisham, that's exactly -- I

mean, Mr. Doshier. I'm sorry. I confuse which one is testifying and which one is --

MR. DOSHIER: He's doing most of it.

MR. GATES: -- doing the objecting. The question I asked him was did he have objections. He answered yes, numerous ones, and now I'm entitled to know what they are. I'm doing exactly what you've asked me to do, which is to tell him to specify.

Now, if he cannot honestly remember, then I guess he'll have to face up to that on Friday or whenever it is he suddenly does remember. But I'm entitled to make dern sure he gives me every hard effort, and if it's just a question of time and effort, we'll make the time, and I'm sure he'll undertake the effort.

THE WITNESS: Well, frankly, Allan, I have no problem going through that a page at a time and lodging them. I don't really think we want to take the time to do that, do we?

BY MR. GATES:

Q Well, now, I'm perfectly happy to take the time, and if you've got significant objections, I want to know what they are.

A You're serious about doing this?

Q If we have to sit here from now until Friday, I want to know what objections you have.

A Well, I object, Allan, to page 2-5 here where they give as fairly true all through this sort of garbage, fairly inaccurate summation of how the site operation and practices mentioning air was forced into the cylinder at a pressure of 80 pounds per square inch, and so on. I object to that page as not being really accurate. You know, if you are trying to get close and close is good enough for everybody, well, then, some of it's close, but not accurate.

I object to 2-6, just the same way. It's just not, you know, where they say, "Once a week, treatment room washed down to remove any oil film or residue on the floor, and this wash water was led into a sump and then into a waste water holding tank."

I object to practice of burning excess waste oil in the railroad ditch was discontinued in 1973. I've seen it burned there in the 80's. "Increasing oil in PCP prices necessitated the more cost effective methods to be used to recover as much of the mixture as possible." I voice my objection to a similar --

I object to "The storage yard was terraced to preclude rainwater runon to process areas." Not the fact that maybe it was terraced, but certainly to the fact that it did what this says it did. It didn't do it. No way this is right.

It says, "In 1974, economic considerations prompted a return to treatment of wood products with creosote preservative mixture." And it states it again for whatever use it's supposed to be, "However, economic considerations, once again, prompted a return to treatment of wood products with the creosote treatment mixture."

Here on page 2-18, it says, "In that year, Mr. Barker estimated that 500 gallons of waste was generated." That year is '81.

Q What do you estimate the volume of waste was?

A Let me go through here and then we can go back and go over all of them if you want.

Now, I object to "Measurements of the wood chip pile were taken in late '85 after all operations had ceased. The sawdust pile had a surface area of approximately 2100 square feet, and average depth of six to nine inches. Result in a total volume of less than 60 cubic yards."

Potential impact from waste disposal activities may effect ground water supplies and surface water quality via Cricket Spring Channel, which discharges into Cricket Creek."

Page 2-25, "Grading the area around the drip pad to preclude rainfall runoff from entering the process area."

I object to them doing this plan, Allan, on the basis they may make things worse, too. They need to leave it

alone and let mother nature take care of it.

You've heard my objection to the doubling up of the engineering costs, the EPA having to -- which they told me was going to run about $3- or $400,000 for them to look over your shoulder to see that you don't cheat.

(THEREUPON, Grisham Exhibit One was marked for identification.)

THE WITNESS: Allan, I object that the ranking system that set up the -- which was the vehicle for this work plan to be in effect, had errors in it, had at least a 6,000 ton error in their calculations.

BY MR. GATES:

Q This was in EPA's calculation?

A Yeah, EPA's calculations, and which I'm not positive where they got their data from. It came backwards through the state or -- and Mass, and so I certainly didn't have any input in it. Nobody asked me what that measured. And so I object to that. And that's all that I think of right now, but I certainly reserve my memory rights in court or wherever to recall some more, very likely will.

Q Well, let me just make sure I understand it, because we have waited as you have patiently leafed through page by page the entire work plan. Having done so --

A Well, I didn't page by page, section by section, but it

seems an inconvenience to everybody to continue that process, and so obviously, I'm going to reserve my rights to --

Q You have no right to defer answering the questions, Mr. Grisham.

A Okay. Let's go on with them, then.

Q Are there any that you recall beyond those that you've already addressed?

A That's all that I recall at this moment.

Q All right. I want to go back and ask you some specifics about one or two of these. On page 2-18, there was a -- there is a sentence to the effect that Mr. Barker estimated wastes in the quantity of 500 gallons per year. Do you recall that statement you were objecting to?

A Uh-huh, yeah.

Q What is your objection to that statement?

A I object to it either that it's way short or way long. It's no -- that estimate could not be accurate.

Q Why would it be way short?

A Why would it be way short?

Q Yes, sir.

A Because just of human memory and I don't think people are going to remember those gallons like that when it wasn't a critical issue at the moment.

Q So you just don't think he could possibly recall one

way or the other, is that your position?

A Yes, that's right.

Q Do you believe more or less waste than that quantity was actually generated in 1981?

A Well, I believe that there was less probably.

Q All right, sir. And less each year, I presume, of operation prior to that?

A Just in proportion to whatever treatment was done.

Q On page 2-18 again, you objected to a sentence that had to do with measuring the size of the wood chip pile and the sawdust pile. What was your objection there?

A Just seemed too large from my memory. In my memory, it didn't seem to be that large.

Q I'm going to show you what the court reporter has marked as Grisham Deposition Exhibit Number One, and I will tell you this is just one of the drawings on the standard form done by Geraghty & Miller for purposes of generally describing the layout of the plant site.

A It's in there, isn't it?

Q I believe it came from that, or else another --

A I think I saw it in there.

Q Yeah. Does that more or less describe the layout of the property? I'm not asking you to adopt every last dot in total.

A Everything except this up here about these wood chips

and wood chip pile and all that.

Q Roughly the same shape as the site?

A Oh, yeah.

Q And the layout of the buildings is essentially as they once were?

A Uh-huh.

Q All right, sir. I would like you to mark on this site the location of any sink holes that you believe is on the site.

THE WITNESS: You want me to do that, Bill?

MR. DOSHIER: Yeah.

BY MR. GATES:

Q And if you would, just put a circle with a number around it so that we can refer to each one.

A (Witness complied.) Other than the ones you have, right?

Q Right. Go ahead and mark --

A The ones we know about -- that I know about, too?

Q The ones that was immediately outside the treatment room.

A Uh-huh.

Q Yeah, just go ahead and mark that with the next number.

A (Witness complied.)

MR. ADAMS: Let the record show he is using

a witness to help him ask questions.

MR. GATES: That's right. Let the record reflect that I am showing Grisham Deposition Exhibit Number One to Mr. Barker and asking him if his familiarity of the site jives with Mr. Grisham's.

BY MR. GATES:

Q Okay. Let me ask you about number six. As I understand it, each one of these numbers with a circle around it represents your best estimate at locating a sink hole in or around the site, is that correct?

A Yeah. Of course, they are all over it, but that's the ones I remember.

Q Yes, sir. Now, number six, you've indicated, and that is on the side of the railroad tracks across.

A Well, I was following -- here is my arrow.

Q All right. So it's your intent to show a sink hole in that railroad ditch itself?

A Uh-huh.

Q All right. And then number five is the sink hole down which materials were disposed for some period of time right outside the treatment room, is that correct?

A Yeah, for a few years there, yeah.

Q All right, sir. Was there any pouring or pumping of wastes down any of these other sink holes at any point

during the plant's operation to your knowledge?

A Yeah.

Q All right. Down which ones?

A Well, you say pumping or pouring. Some if it just ran down them.

Q Other than by rainwater runoff.

A Other than by rainwater runoff?

Q Yes, sir.

A Yeah, right here was one. Right there. (Indicating.)

Q Okay. Now, you are pointing at number one?

A Uh-huh.

Q What type of disposal into sink hole number one was there?

A Well, after '73, there was a tank that we would pick up with a forklift and bring it up here and perch it up here on the edge of that and open the valve and let it run off in there.

Q Who was involved in that as far as people at the yard?

A Well, the Arkwood employees who had been there.

Q Who?

A Who?

Q Yes, sir, names of those employees.

A Well, okay. Bud Grisham, Bob Barker.

Q Wait a minute. Let me make sure. Now, did you drive the forklift?

A Well, I -- anything that was done up there, I told them to do.

Q Okay. Let me get more specific, though, in terms of what role was. I want to know who was driving the forklift or operating the tank --

A Uh-huh.

Q -- to your knowledge. Who were the employees of Arkwood or MMI that ever did that?

A That drove the forklifts?

Q And disposed of materials directly into sink hole number one as you've described previously?

A I wouldn't specifically remember the forklift driver. All the men that worked there, except maybe one or two, drove the forklift. They would interchange their jobs. There wasn't just a forklift driver or a man that dumped the waste. It could have been any one of the employees there.

Q Do you recall ever seeing a specific person doing this?

A No, not specifically.

Q How often do you contend this occurred?

A You mean how often a year?

Q That will be fine, yes, sir.

A Oh, I would say probably -- now, when you say occurred, you know, it would depend on what all had happened in the tanks. A lot of times, it would just be 99 percent water,

1 but then it could have various concentrations of stuff in it
2 there, and I would say maybe three or four times a year.
3 Q Was that a routine place to dispose of waste? I mean,
4 was that the only place it was disposed of?
5 A Yeah. Oh, I don't know about the only.
6 Q For that particular kind of material?
7 A That particular kind? Yeah, there and right here,
8 right there.
9 Q That was in number two as well?
10 A Uh-huh, yeah.
11 Q Now, I want to make sure I understand you. The
12 forklift operator would take the tank up to number one or
13 number two sink hole --
14 A Uh-huh.
15 Q -- and open up the spiggot and let it run into those
16 sink holes?
17 A Yeah, or maybe open it on the ground here above and it
18 run down into it. It could have happened either way.
19 Q Did you ever see an operator take a tank and drain it
20 directly into sink hole number one?
21 A Yeah, sure, I've seen that.
22 Q Who?
23 A I don't remember the operator, I've just seen that
24 happen. That was a normal thing that happened for five or
25 six years, and so -- you know, it wasn't a big priority to

me when I drove down the road to pay much attention to something like that. I was a little more interested in the posts they were loading up on the truck to be sold. That was just part of the operation.

Q Same question as to sink hole number two, did you ever see any person take a tankful of material and drain it into sink hole number two?

A Yeah, sure, I've seen that.

Q Who did you see doing that?

A I didn't -- I can't recall the driver of the forklift. Wouldn't be any way I could recall that.

Q When did these events occur?

A When? You mean which years?

Q Yes, sir.

A Well, they occurred from '73 up to about, oh, '79, or so that I -- that I personally know of, and I couldn't speak beyond that, though I heard that they continued after that until --

Q From whom did you hear that?

A -- until '81.

Q From whom did you hear that?

A I've heard that from Roy Horne.

Q Who else?

A That's all that I can recall right now.

Q Okay. Have you talked to any of the former plant

1 employees?

2 A Yes, uh-huh.

3 Q All right. Who have you talked to since in the last

4 year and a half about operations at Arkwood?

5 A Well, I've talked to Bob.

6 Q Who else?

7 A I've talked to Roy Horne.

8 Q Who else?

9 A Employees. You want it restricted to employees or --

10 Q I would be happy to expand it to anything.

11 A Customers or truck drivers or --

12 Q That's fine.

13 A Let's see. It's going to take some -- I've talked to

14 so many people. It would be a little hard to separate them.

15 I've certainly spoken to Devoe Gregory in the last year and

16 a half. Mary Stanley, Ralph Scoggin. I guess this guy was

17 an employee, I can't remember. Anyway, he was connected

18 there, Dwight Cheek. Now, we're talking about employees all

19 time, right, not just MMI's?

20 Q Yes, sir.

21 A Arthur Archer, Lemand Bradford. That's all I recall

22 right now.

23 Q Okay. Now, you've distinguished between employees and

24 other people who may have familiarity with the site because

25 they live in the vicinity or --

A Well, or truck drivers or whatever that might not have. But I think all these would have been employees or close enough.

Q All right. Now, directing your attention out, is there anybody else in that other category, truck drivers, laborers or so forth, who you've talked to in the last year and half who have recollections about the site?

A Well, yeah, you know, you just talk to everybody. I can think of Peewee Widner. I guess I've talked to nearly everybody I've ever seen in Omaha, Arkansas, about it. You know, if you would run into them, that's pretty voluminous. It's pretty much a topic of discussion up there, so you can't go sit down and eat up there at the truck stop without talking to somebody.

Q Anyone in that category who has specific recollections of site appearance or site operations?

A I think I've probably named most of them.

MR. GATES: I don't have anything more at this time. I'm sure we'll be seeing you again about this after the hearing.

MR. DOSHIER: Yeah. Did you inquire earlier, Allan, as to site alteration?

MR. GATES: Why don't we do this off the record. I'll be happy -- if you all want it on the record, that's fine, but we can do this off

the record.

MR. ADAMS: I don't want to cover this area that's been covered by Allan this morning.

MR. GATES: Sure.

(WHEREUPON, a short break was taken.)

BY MR. DEISCH:

Q Mr. Grisham, Bud, can you tell me, generally, since the end of 1984, the number of site alterations have taken place on the Arkwood site, is that correct?

A Well, let's see, Bill, site alterations. I don't know if I would call it that in the way of moving dirt or that sort of thing, but we certainly have torn down equipment and moved it.

Q Okay. Well, that's what I wanted to inquire into. Could you, generally, summarize for me what equipment has been moved?

A Yeah, I can get pretty close. I guess MMI moved the first piece, which was a pentachlorophenol storage tank, a bulk storage tank, that they would store their dry penta when they started buying it in bulk form. I think they probably acquired that in the early 80's sometime, in that time frame, and --

Q This is all after the operations that --

A Well, it was after they quit treating operations all right. I'm not quite certain. Bob could tell you about

what the date of that removal was, whether it was after the lease expired or before. I don't quite remember about the lease.

It was after they quit treating, and they removed that, and whatever other equipment they had there. I don't know if there was inventory or equipment left there after lease date that they went back up and got or not, so, you know, they would have felt free to do it. I wouldn't have had any restrictions or Mr. Ormond wouldn't have kept them from doing that.

We weren't that ticky about the expiration of the lease date and removing the equipment, so -- and then, the landowner wanted that torn down, that equipment, so we tore down all -- basically, all the treating plant equipment, except one little piece out of the post peeler that's still sitting there, and all of that has been removed.

I went to -- when Mr. Ormond said he'd like to have that done, I went to Dallas and talked to the EPA about it to be sure it was all right to do that. And Lou Barinka told me that I certainly could move our equipment, and so, since that's what Mr. Ormond wanted done, I got busy and did it.

Q Okay. Let me ask you to go into a little bit more detail. There was a treating cylinder?

A Yeah.

Q Would that be part of the equipment that you tore down and removed?

A Yeah, uh-huh.

Q Can you give me a month or a more precise time when this was done?

A I can give you a guess.

Q That will do.

A About -- I'd say it's been a year ago. It would have been about May or -- been a little earlier than that in the year.

Q Okay. Was there sludges or waste oils in the treating cylinder at that time when you began to tear it down and remove it?

A No, it -- the cylinder didn't have anything in it. Some of the tanks did, but the cylinder did not have.

Q All right. Did you clear anything out -- did you dismantle the treating cylinder?

A We took some, you know, some connections loose. Some were already loose, some pipes were already loose from it, and then we took what few were connected to it, holding it down, and then we picked it up in one piece and loaded it on a truck.

Q When you say "we", who all was involved in this operation?

A Just contractors that I had contracted with that had

backhoes and cranes.

MR. DOSHIER: Let me interpose an objection here. Does this have anything to do with the lawsuit?

MR. DEISCH: It has to do with the condition of the site at present, and that's why I've inquired into it.

MR. GATES: I would think it also has to do with your objection to any prior notification of what Mr. Grisham has done, with or without notice, and whether the propriety of what he had done, I presume, would be relevant to the state's inquiry.

MR. DEISCH: Yes, I agree with that as well.

MR. DOSHIER: Well, all right, fine. I think you're probably getting into something that's not addressed in this case, but -- let's see, just answer his question as best you can.

BY MR. DEISCH:

Q All right. Were you in charge of this operation, then?

A Yes, uh-huh.

Q Okay. Did you do anything, again, with reference -- okay, there were also several tanks removed?

A Yeah.

Q Dismantled from their moorings, or whatever, and removed from the site?

A Yes, uh-huh.

Q Some of that has had some materials in them?

A Yes, they did.

Q What became of those materials?

MR. DOSHIER: Now, Phil, here again that's not a purpose of this depostition.

MR. DEISCH: If he dumped on site, I want to know.

MR. DOSHIER: Ask him the question.

BY MR. DEISCH:

Q What did you do with those materials?

A We -- the materials that would come out of the tanks, you know, you could just open the valves or dip them out, well, we sent them to another treating facility.

Q This product?

A Yeah, uh-huh, to be used to treat ties or whatever.

Q All right. Did you empty the tanks before you removed them from the site?

A Well, some of both, but we got as much out of it as we could on site there, and put it in barrels and shipped it on to a little old treatment plant there, if you can call it a plant.

Q Which one was that?

A The one in Omaha, the tie yard there that's got a treating bath and --

Q Okay. With reference then to these tanks and the treatment cylinders, would you -- did you decontaminate those in any way before they were moved off site?

A No, we just got what we could that would run out, you know, that we could get out of them, got the liquid out.

Q Did you sample them in any way to determine the extent of contamination on those tanks or treating cylinders?

A No, we did not.

Q What other materials were removed from the plant site?

A Well, we removed all of the electric motors and pumps, and buildings, concrete blocks and metal roofing, just about anything that was in the -- were in the buildings we moved.

Q Did you test any of those for contamination?

A No.

Q Did you attempt to decontaminate any of them?

A No, uh-huh.

Q Tell me what, in more specific terms if you can, what Mr. Barinka or other EPA people told you about this move.

A That's way back in the file. Well, let's see -- it was in Lou's office at 8:00 a.m. on 5-21.

Q 5-21-86?

A Yeah, yeah, 5-21-86, so that would kind of pin down when I moved it, because it was probably within a couple of months or so after that, and I was -- in my notes -- well, several things we were talking about, and I asked him if I could move my equipment and he said, "It's okay for Bud to move it, sell it, or otherwise dispose of any equipment", and that was it.

And then I called him again -- I don't believe I can turn to the note on that. I called him again from Harrison -- this was in his office in Dallas -- I called him again from Harrison a few weeks later to confirm that. He said, "Yeah, it's your equipment, and we don't have any restraints on that if you want to sell it or dispose of it any way you want to. Go ahead and do it."

Q Did you discuss the removal of that equipment with anyone at the state agency, prior to doing it?

A No, I don't believe so, sure don't. At that time, I thought the EPA had taken full control of the -- of that site, and the state had gotten out of the picture.

Q Where did the treatment cylinder go?

A It was sold to a fellow over in Oklahoma, I believe Antlers, Oklahoma. I'd have to look in the record to get his name, but he has a treating plant over there.

Q Okay. And can you give me generally -- well, what about the other tanks?

A Well, sold some of them. The boiler went up into Missouri, and I think somebody's using it for a heating system for their big warehouse up there. That was the big boiler.

Q Did you remove all of the equipment to another location and sell from there, or did you sell it -- did you move it directly from the Arkwood site to the purchaser's site?

A Yeah, I had it all sold before it left the site.

Q So you didn't marshall it to some other area --

A No.

Q -- and then sell it?

A No, uh-huh, I sold it all right there.

Q Were the purchasers aware of its prior use?

A Yes.

Q That it had been used for a wood treating process?

A Uh-huh, right. The fellow that bought most of it was -- had been in the treating business for a good many years.

Q And that's this --

A Antlers, Oklahoma, and I'll get that name for you if you want it, but Bob might help me out. Do you remember his name, Bob?

MR. BOB BARKER: Julian.

THE WITNESS: Julian is his last name.

BY MR. DEISCH:

Q Julian from Antlers, Oklahoma?

MR. BOB BARKER: JTL Lumber.

THE WITNESS: There it is, Robert Julian.

BY MR. DEISCH:

Q Robert Julian?

A Robert Julian.

Q JTL Lumber?

A Yeah, he got most of the pumps and air compressor and just various and sundry pipes and this, that and the other.

Q All right. Aside from the tearing down and the moving of that equipment that we've discussed, have you done -- there has been some dirt work down there at the plant site, hasn't there, or some bulldozer work since 1984?

A I don't think I had a bulldozer in there, Bill. I had a backhoe --

Q Okay.

A -- and I had him haul in some top dirt, I would call it that, and we placed it over where the treating room was. I could show you on the map, but I think you know where I'm talking about.

Q Yeah.

A This area right in here. (Indicating.)

Q Okay.

A The right in there. (Indicating.) We hauled top dirt and put over where the concrete, the sump was, and all that.

We filled that with top dirt and sowed fescue seed and fertilizer. It's the same as a bulldozer, I guess you would say. A front-end loader smoothed it out, but we didn't -- we didn't dig out any dirt or remove any dirt from this place and take it here. We brought dirt in and placed it over.

Q So other than the equipment, the treatment cylinder, the boiler, and the tanks, pumps --

A A little office building.

Q -- and the -- okay, the office building.

A You know, those big steel buildings was there, we sold it, removed it.

Q What was the purpose of this fill dirt that you brought in?

A Well, there was just such big -- one, it was a dangerous looking hole once you got the building moved away. It was -- stradled these tanks and cylinder and all. It was just this open concrete pit, and certainly would have been a danger to kids or animals or whatever was going through there, so it made more sense to fill it up and bring it up level with the rest of the ground, and I planted the grass so it wouldn't erode. There is a lot of water washes right down through that area, and soon to rut out fresh dirt.

Q You mentioned the Tysons at one point. May have -- let me put it the way you said they did, or they may have

performed some tests or sampling of the site.

A Yeah, they did.

Q They did?

A Probably you know, for different reasons than maybe other people would, but they did core drilling to see what was there. I suppose both the penta and -- because they had known from the start. We certainly didn't make any bones to them about the problem on the site, and so they drilled it, but part of that might have been for construction reasons, too, just to see where -- what the soil compaction was.

Q Did they ever report to you the results of their sampling or testing?

A Yeah, I got some -- I did have some documents from them. I don't know if it had all of the test results, but they used to send me some correspondence.

Q Have you provided that information to the state or EPA or any of the other parties?

A Unless it was done during those times we were having those talks. It seems like Tysons brought some of it down themselves or sent it when they had their attorney there at the meetings that we had.

Q Out at the department?

A Yeah, uh-huh. I don't remember ever sending any, but it's possible Tyson did. It wasn't any real extensive thing, it was mainly in the area where they were going to

build their -- they were going to put their feed mill pretty close to where the old treating plant was, and so they were -- it was right in there. They didn't go further up the yard.

Q On the sink hole which you've labeled on Grisham Deposition Exhibit Number One, sink hole number six, which is in the railroad ditch?

A Right.

Q Which I guess is the railroad ditch disposal area?

A Yeah.

Q When you first started using that for disposal, can you describe to me its physical appearance?

A Down in there?

Q Yeah.

A It was just a -- just a ditch, not contained like it is now, but just a kind of a dyke there on the railroad track side of things. It just looked like a big, long, bar ditch like you might see going out here toward Lonoke.

Q Well, it holds water now, is that correct?

A Yeah, it has been dammed up or a dyke built around it now, but at that time, it was just pretty much open.

Q And it didn't hold water? It wasn't --

A No.

Q -- an impoundment like there is now, since the --

A No, huh-uh, it was just open there, the way I remember

it.

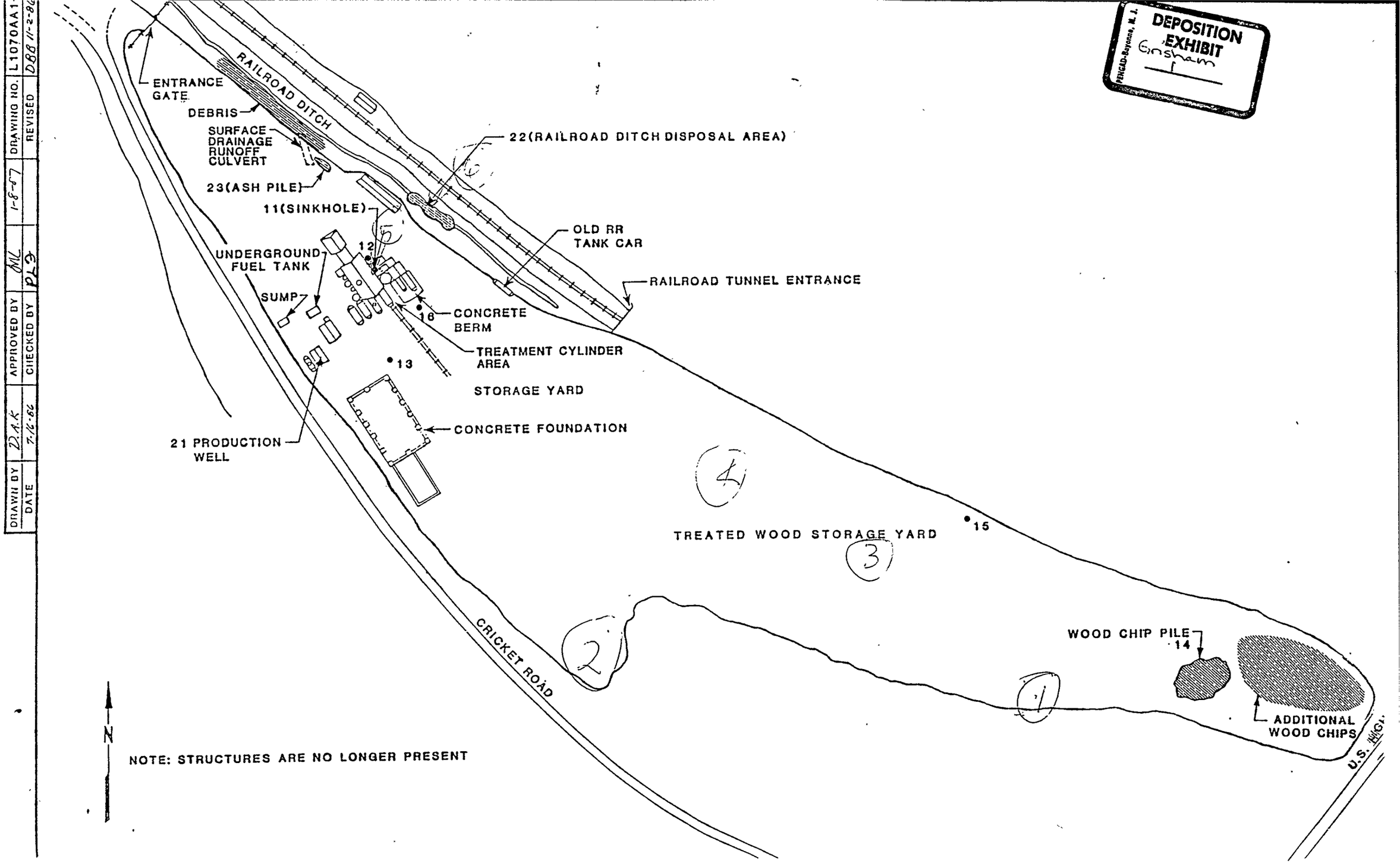
Q And the waste would --

A Just run off, yeah, and it would maybe sink there some, too, or it looked to me like it would, you know, at times. Maybe this is after the embankment was put there, which seemed like that was sometime in the 70's, but it did seem like it would sink. That's why I labeled it a sink hole. I don't know what technically it is, but it looked like one to me.

MR. DEISCH: That's all right. All right. That's all I have.

(Signature waived.)

(WHEREUPON, at 3:10 p.m., the taking of the above-entitled deposition was concluded.


DEPOSITION EXHIBIT
Ginsham
PRICED-Bayonne, N. J.
ENTRANCE GATE
DEBRIS
SURFACE DRAINAGE RUNOFF CULVERT
23(ASH PILE)
RAILROAD DITCH
22(RAILROAD DITCH DISPOSAL AREA)
11(SINKHOLE)
OLD RR TANK CAR
RAILROAD TUNNEL ENTRANCE
UNDERGROUND FUEL TANK
12
SUMP
16
CONCRETE BERM
TREATMENT CYLINDER AREA
13
STORAGE YARD
CONCRETE FOUNDATION
21 PRODUCTION WELL
TREATED WOOD STORAGE YARD
15
CRICKET ROAD
WOOD CHIP PILE
14
ADDITIONAL WOOD CHIPS
U.S. HIGH.
N
NOTE: STRUCTURES ARE NO LONGER PRESENT
DRAWN BY
DATE
APPROVED BY
CHECKED BY
DRAWING NO.
REVISED
L1070AA1-
DBB 11-2-86

GRISHAM DEPOSITION EXHIBIT ONE

1 C E R T I F I C A T E

2

3 STATE OF ARKANSAS)
) ss.:
4 COUNTY OF PULASKI)

5

6 I, SUSAN B. WHITSON, Certified Court Reporter
7 and notary public in and for the County of Pulaski, State
8 of Arkansas, duly commissioned and acting, do hereby
9 certify that the witness herein was by me first duly
10 sworn to testify the whole truth and nothing but the
11 truth prior to taking down in Stenotype the questions,
12 answers and proceedings during said deposition, and from
13 such recordation was thereafter reduced to print by means
14 of computer-assisted transcription, and the same fully,
15 truly and correctly reflects the proceedings had.
16 I FURTHER CERTIFY that all formalities with
17 regard to notice, issuance of commission, taking, signing
18 and returning are hereby waived; said deposition being
19 taken with the same force and effect as though all the
20 requirements of the rules and statutes had been complied
21 with.
22 I FURTHER CERTIFY that the above deposition
23 was given by the witness adn taken at the time and in
24 the place hereinabove set forth.
25 I FURTHER CERTIFY that I am not attorney

or counsel of any of the parties, nor am I relative or employee of any attorney or counsel or party connected with the action, and have no interest in the outcome or results of this litigation.

WHEREFORE, I have subscribed my signature and affixed my notarial seal as such notary public at the City of Little Rock, County of Pulaski, State of Arkansas, this the _____ day of _____, 1987.

_____
SUSAN B. WHITSON, CCR
NOTARY PUBLIC IN AND FOR
PULASKI COUNTY, ARKANSAS

My Commission Expires:
June 8, 1992.

---o---

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

NOV 8 1996

MEMORANDUM

SUBJECT: Policy on the Issuance of Comfort/Status Letters

FROM: Steven A. Herman, Assistant Administrator
Office of Enforcement and Compliance Assurance

TO: Regional Counsels, Regions 1-10
Brownfields Coordinators, Regions 1-10
Director, Office of Site Remediation and Restoration, Region I
Director, Emergency and Remedial Response Division, Region II
Director, Hazardous Waste Management Division, Regions III and IX
Director, Waste Management Division, Region IV
Director, Superfund Division, Regions V, VI, and VII
Assistant Regional Administrator, Office of Ecosystems Protection and Remediation, Region VIII
Director, Environmental Cleanup Office, Region X

This memorandum transmits the Office of Enforcement and Compliance Assurance's (OECA) *Policy on the Issuance of Comfort/Status Letters*. The attached policy contains four sample comfort/status letters and a general policy regarding their use for parties interested in brownfield cleanup and reuse. The sample letters are intended to address the most common inquiries received by EPA regarding brownfield properties. The letters provide a party any releasable information EPA has pertaining to a particular piece of property, what that information means, and the likelihood or current plans EPA has to take Federal Superfund action. The "comfort" comes from knowing what EPA knows about the property and what its intentions are in terms of a Superfund response. Comfort/status letters may be considered when they may facilitate the cleanup and redevelopment of brownfields, where there is a realistic perception or probability of incurring Superfund liability, and where there is no other mechanism available to adequately address a party's concerns.

Additional information on this policy and appropriate use of comfort/status letters is available from Elisabeth Freed at (202) 564-5117 or Lori Boughton at (202) 564-5106 in the Office of Site Remediation Enforcement.

Attachment

Recycled/Recyclable • Printed with Vegetable Oil Based Inks on 100% Recycled Paper (40% Postconsumer)

cc: Barry Breen, OSRE
Susan Bromm, OSRE
Linda Boornazian, OSRE
Sandra Connors, OSRE
Ken Patterson, OSRE
Greg Snyder, OSRE
Gwen Brown, OECA
Linda Garczynski, OSWER
Steve Luftig, OERR
Peter Rosenberg, OECA
Karen Brown, AO
Earl Salo, OGC
Bruce Gelber, DOJ
Lynne Jennings, Region I
Michael Mintzer, Region II
Heather Gray-Torres, Region III
Suzanne Bohan, Region VIII
David Ostrander, Region VIII
Mark Calhoon, Region XI
Bill Keener, Region XI
Bob Roberts, OSRE
Katherine Dawes, OSPS
Karen Kraus, OGC
Randy Hippen, OERR
Mike Fitzpatrick, OSW
Bob Brook, DOJ

Policy on the Issuance of Comfort/Status Letters

I. Introduction

The Environmental Protection Agency ("EPA" or "Agency") defines brownfields as **abandoned, idled, or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination.** A party interested in brownfield property ("properties" or "sites") is concerned primarily with whether or not the property has environmental contamination, and if it does, what are the potential associated liabilities and costs of cleaning up existing contamination. Equipped with this information, a party can make an informed decision regarding the purchase and/or development of the brownfield property.

EPA hopes to provide a measure of "comfort" by helping an interested party to better understand the potential for or actual EPA involvement at a brownfield property. This policy describes the most common situations about which parties inquire and the type of information or comfort EPA may provide to parties to assist them in assessing the probability of incurring liability under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund"). It is not EPA's intention to become involved in typical private real estate transactions. Rather, EPA intends to limit the use of such comfort to where it may facilitate the cleanup and redevelopment of brownfields, where there is the realistic perception or probability of incurring Superfund liability, and where there is no other mechanism available to adequately address the party's concerns. The policy contains four sample comfort/status letters which address the most common inquiries for information that EPA receives regarding contaminated or potentially contaminated properties.

II. Background

On January 25, 1995, EPA announced its Brownfields Action Agenda which outlined the Agency's activities and plans to encourage and facilitate the cleanup and reuse of brownfields. As part of this Agenda, the Office of Site Remediation Enforcement ("OSRE") focused on the identification of barriers to cleanup and reuse posed by federal environmental liability. In particular, OSRE concentrated its efforts on the liability barriers posed by Superfund's requirements to identify, assess, and cleanup the nation's high priority hazardous waste sites.

Uncertainty about potential contamination and/or Superfund liability may prevent otherwise interested parties from purchasing or redeveloping brownfields. To allay the fear of potential federal pursuit of parties for cleanup of brownfields, EPA may provide varying degrees of comfort by communicating EPA's intentions toward a particular piece of property. Comfort may range from a formal legal agreement containing a covenant not to sue which releases a party from liability for cleanup of existing contamination to Agency policy statements regarding the exercise of EPA's enforcement discretion as it relates to specific site circumstances or activities of a party.

Policy on the Issuance of Comfort/Status Letters

III. Policy Statement

This policy is designed primarily to assist parties who seek to cleanup and reuse brownfields. EPA headquarters and regional offices often receive requests from parties for some level of comfort that if they purchase, develop, or operate on brownfield property, EPA will not pursue them for the costs to clean up any contamination resulting from the previous use.[1] EPA believes that the majority of the concerns raised by these parties can be addressed through the dissemination of information known by EPA about a specific property and an explanation of what the information means to EPA. While the sample comfort/status letters do not account for every possible situation, EPA believes that the letters contained in this policy will address the most common requests for comfort. Facts and circumstances, however, will vary and information may be disseminated through different means including other written communication, public or individual meetings, or reference to public information repositories and EPA databases.

Comfort/status letters are provided solely for informational purposes and relate only to EPA's intent to exercise its response and enforcement authorities under Superfund at a property based upon the information presently known to EPA. EPA encourages the release of as much information as possible to enable the party to better understand the potential applicability of CERCLA to individual parcels of property and make informed decisions. For example, EPA may need to take Superfund action at the property if conditions at the property change, or if new information becomes available indicating that present conditions warrant a Superfund response. With the exception of sharing information already contained in EPA's files, the letters generally are not intended to express EPA's opinion as to possible contamination or extent of contamination at the property or provide any information on obligations associated with ownership or operation of the site. Additionally, the letters are not intended to limit or affect EPA's authority under CERCLA or any other law or provide a release from CERCLA liability.

Upon receiving a request from an interested party for information about their circumstances, regional offices may issue comfort/status letters, at their discretion, when there is a realistic perception or probability of incurring Superfund liability and such comfort will facilitate the cleanup and redevelopment of a brownfield property, and there is no other mechanism available to adequately address the party's concerns. EPA believes that these comfort/status letters are not necessary or appropriate for typical real estate transactions. With the information provided by EPA, the party inquiring about the property can decide whether the risk of EPA action is enough to forego involvement, whether to proceed as planned, whether additional investigation into site conditions is necessary, or whether further information from EPA or other agencies is needed. This policy is not intended to supersede EPA's "Policy

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The terms "purchase" and "operate" also may refer to lessees.

Against No Action Assurances."[2] Because these letters do not provide assurance of no action, approval of the Assistant Administrator of the Office of Enforcement and Compliance Assurance is not required.

EPA has developed four sample comfort/status letters to address the most common inquiries received regarding brownfield properties. The letters are structured with opening and closing paragraphs applicable to all scenarios falling under that category of letter. Regions may then choose and combine the applicable substantive paragraphs to tailor the sample letter to address a party's particular request. Directions also are found within the description of the letters and within the body of each letter. A brief summary of the sample letters is found below.

- 1) A "No Previous Federal Superfund Interest Letter" may be provided to parties when there is no historical evidence of federal Superfund program involvement with the property/site in question (i.e., site is not found in the CERCLA information system database, also known as the Comprehensive Environmental Response, Compensation, and Liability Information System or "CERCLIS");

- 2) A "No Current Federal Superfund Interest Letter" may be provided when the property/site either has been archived and is no longer part of the CERCLIS inventory of sites, has been deleted from the National Priorities List ("NPL"), or is situated near, but not within, the defined boundaries of a CERCLIS site;

- 3) A "Federal Interest Letter" may be provided at sites where EPA either plans to respond in some manner or already is responding at the site. This letter is intended to inform the recipient of the status of EPA's involvement at the property. Additionally, language is included to respond to requests regarding the applicability of Agency Superfund policy, regulation or CERCLA statutory provision to a party or particular set of circumstances; and,

- 4) A "State Action Letter" may be provided when the state has the lead for day-to-day activities and oversight of a response action (e.g., deferred sites.)

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[2]The Agency's "Policy Against No Action Assurances" issued November 16, 1984, reaffirms EPA's policy against giving definitive assurances outside the context of a formal enforcement proceeding that EPA will not proceed with a particular enforcement response. Consistent with that policy, EPA may only provide site-specific, no action assurances with the approval of the Assistant Administrator of the Office of Enforcement and Compliance Assurance.

Policy on the Issuance of Comfort/Status Letters

Sample letters are appended to this policy as Appendix A. The relationship between the sample letters is depicted in the table in Appendix B. Regions are encouraged to tailor the letters to fit region-specific protocols or site-specific conditions.

IV. Sample Comfort/Status Letters

• *No Previous Superfund Interest Letter* - This letter introduces and explains the purpose of CERCLIS and may be sent when the property described by the interested party is not located in active or archived CERCLIS records. The purpose of the letter is to inform the recipient that, to the best of EPA's knowledge, the property described in the request has never been addressed under EPA's Superfund program, nor are there current plans to do so. Regions, generally, should not interpret a request for a No Previous Superfund Interest Letter as notification that the site should be entered into CERCLIS.

Because EPA does not have any information about the property, the letter does not express any opinion as to possible contamination at the property or appropriate usage of the property. Additionally, EPA is not in a position to determine what obligations are associated with ownership or operation of the property under any present or future environmental or other federal, state or local statute, regulation or principle of common law. The interested party is encouraged to contact the appropriate state agency for further information regarding the state's intention toward the property. Regions are encouraged to check with other program offices to determine whether any enforcement action is planned or ongoing and, if so, coordinate within their region before deciding how and when to respond to the inquiry.

• *No Current Superfund Interest Letter* - The No Current Superfund Interest Letter is intended for properties a) that have been archived and removed from the CERCLIS inventory of Superfund sites; b) where either all or part of the NPL site has been deleted following EPA's deletion policies ("Deletion from the NPL" 40 CFR 300.425(e) or "Partial Deletion of Sites Listed on the National Priorities List" published in the *Federal Register* on November 1, 1995, 60 FR 55466); or, c) situated in the vicinity of but currently not considered part of the CERCLIS site (e.g., is adjacent to the site). The purpose of the letter is to let the recipient know that EPA's Superfund program does not anticipate taking any/additional response action (which could include enforcement action if the Potentially Responsible Party ("PRP") search and/or cost recovery has been completed), and the basis for its decision. The letter also refers the party to additional sources of information such as EPA's administrative record and the appropriate state agency.

The No Current Superfund Interest Letter is divided into three sections. Section I addresses archived properties and describes the conditions under which EPA archives a site, EPA's policy towards these sites, and the circumstances under which EPA would revisit an archived site. EPA archives a site when the site assessment event, removal event, or enforcement activity has been completed. EPA will archive a site if a) no contamination was

found at the site; b) the site, while contaminated, neither met the criteria for inclusion on the NPL nor required any EPA response action; or, c) contamination was removed quickly without the need to place the site on the NPL; and d) EPA has completed its cost recovery action for the site. CERCLIS is updated to reflect the archiving of the property. Regions should select one of the appropriate reasons, as described here and in the sample letter, for the decision to archive the property and add it to the opening and closing paragraphs (see letter for additional instructions.) This section of the letter provides comfort by conveying that EPA's expectation, based upon current information, is not to take further steps to list the site on the NPL or to take any other CERCLA response action.

Section II of the letter focuses on sites deleted from the NPL and properties located in the vicinity of a CERCLIS site. Paragraphs (a) and (b) of Section II addresses inquiries regarding full or partial deletions of NPL sites and is appropriate if 1) the portion of the Superfund site is marked for deletion in CERCLIS and the state concurs with EPA's decision to delete the portion of the site or 2) after consultation with the state and a thirty day public comment period, the entire site is marked for deletion in CERCLIS. (Refer to the sample letter for specific directions). A site or portion of a site is deleted from the NPL when "no further response is appropriate" (see 40 CFR 300.425(e)). No further response is appropriate when responsible parties or EPA has completed all response actions, or when a remedial investigation shows "no significant threat." Either EPA or a petition from any person may initiate the deletion process.

Paragraph (c) of Section II addresses a property that is in the vicinity of a CERCLIS site but currently is not affected by the release of hazardous substances (e.g., a site may be known as the Jones Industrial Park but the release affects only a portion of the industrial park property). Paragraph (c) is appropriate when EPA has sufficient information regarding the level and extent of contamination at a site to determine that the property is not part of the release. When a site is listed in CERCLIS, EPA generally delineates the release of hazardous substances as a geographical area and defines the site by reference to that area. Thus, the actual release is not limited to that property but either may extend beyond the property due to contaminant migration or may not occupy the full extent of the property.

Section III provides language when EPA has compiled an Administrative Record for the site. If the regional office has compiled an Administrative Record for the site, please add Section III to any of the above-mentioned scenarios.

Under the situations addressed in this letter, EPA is not in a position to provide any opinion on the appropriate use of the property or obligations associated with ownership or operation of the property under any present or future environmental or other federal law or regulation or principle of common law. The letter recommends that the interested party to contact the appropriate state agency for further information regarding the state's intention toward

the property. Before sending this letter, regions are encouraged to check with other program offices to determine whether any enforcement action is planned or ongoing and, if so, coordinate with the appropriate regional program offices before deciding how and when to respond to the inquiry.

• ***Federal Superfund Interest Letter*** - When a site is in the Superfund evaluation or response phase, the most important assistance EPA can provide an interested party may be information about current Superfund activities. When the site is found in CERCLIS site inventory, a regional office may issue a Federal Interest Letter to explain what actions have been taken by EPA toward the remediation of a particular site (e.g., site sampling, removal action). The letter also may indicate whether EPA anticipates further action at a site and the type of action anticipated. In addition to the opening paragraph, there are four parts to the Federal Interest Letter. Section I of the letter provides the recipient with the status of the property--whether the property is or may be part of CERCLIS/NPL site. Section II describes EPA's planned or ongoing activities (e.g., preliminary assessment, removal, or remedial design). Federal Interest Letters may be considered for sites in the CERCLIS site inventory, including those on the NPL or eligible for the NPL, sites undergoing a federal EPA removal action, undergoing federal EPA remedial action, or where EPA has incurred or will incur response costs.

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Section III of the Federal Interest Letter provides language regarding the application of an EPA Superfund policy, CERCLA statutory provision or regulation to a party's particular set of circumstances. As stated in the policy and of particular importance to Section III of the Federal Interest Letter is the limitation on issuing comfort/status letters to situations where the requesting party provides information showing that 1) a project found to be in the public interest (e.g., an economic redevelopment project) is hindered or the value of a property is affected by the potential for Superfund liability, and 2) there is no other mechanism available to adequately address the party's concerns other than a letter from EPA with a statement regarding the applicability of a specific Superfund policy, statutory provision or regulation. These criteria should be met before a region considers sending the party a Federal Interest Letter. In response to such requests, regions should evaluate the information provided and respond, as appropriate, with Section III of the Federal Interest Letter attaching a copy of the relevant policy or statutory/regulatory language to the letter.

Section IV provides language for the closing paragraph appropriate for all sections of the letter. This section of the letter also encourages the region to include pertinent fact sheets (or any other relevant information) and refers the party to the administrative record repository.

Policy on the Issuance of Comfort/Status Letters

• ***State Action Letter*** - The State Action Letter is intended to provide comfort at sites where EPA may have either no current Superfund involvement or a secondary role under the state's (or territory, commonwealth or tribe) lead of site activities. A state may participate in such activities as lead agency through a cooperative agreement ("CA") between the state and region. A state and region also may develop a Memorandum of Agreement ("MOA") in which the region and the state articulate the roles each will have regarding the cleanup of contaminated properties.

The State Action Letter seeks to advise parties that EPA does not intend to take federal action under CERCLA when the state has the primary role of overseeing cleanups pursuant to either state or federal requirements and, where appropriate, the parties performing the cleanup are working cooperatively under state direction. EPA, however, may consider taking action at a site if it receives new information about site conditions requiring federal action or the responding party and the state are unwilling or unable to ensure compliance with the negotiated agreement between the state and responding party or the state and EPA.

Regions may respond with a State Action Letter to two different types of inquiries. The first type of inquiry may be from a state requesting that EPA send a State Action Letter regarding a particular site. Whenever possible and appropriate, regions should seek to provide a letter responsive to the state's request. The second type of inquiry may be from an outside party. The region should prepare a State Action Letter for that party in consultation with the state, if appropriate.

The State Action Letter is appropriate to send to parties in the following situations: (a) the site is designated "state-lead" in CERCLIS; (b) the site is designated "deferred to state" in CERCLIS (see "Guidance on Deferral of NPL Listing Determinations While States Oversee Response Actions," OSWER Dir. 9375.6-11, May 3, 1995); (c) the site was designated "deferred to state" and is subsequently designated "archived" in CERCLIS; or, (d) the site listed in CERCLIS and is being addressed under a state voluntary cleanup program ("VCP") pursuant to an approved MOA between the region and state. For sites not listed in CERCLIS, but that are located in a state that has entered into a VCP MOA with the region (and the region believes that the site is being addressed pursuant to the state's VCP), the region should issue a No Previous Federal Interest Letter.

V. Use of this Policy

This policy is not a rule, and does not create any legal obligations. The extent to which EPA applies the policy will depend on the facts of each case. For further information concerning this policy or sample letters, please contact Elisabeth Freed at (202) 564-5117 or Lori Boughton at (202) 564-5106 in the Office of Site Remediation Enforcement.

Appendix A

Sample No Previous Superfund Interest Letter

Addressee

Re: [Insert name or description of property/site]

Dear **[Insert name of party]**:

I am writing in response to your letter dated --/--/-- concerning the property referenced above. My response is based upon the facts presently known to the U.S. Environmental Protection Agency ("EPA") and is provided solely for informational purposes.

The federal Superfund Program, established to cleanup hazardous waste sites, is administered by EPA in cooperation with individual states and local and tribal governments. Sites are discovered by citizens, businesses, and local, state or federal agencies. When a potential hazardous waste site is reported, EPA records the available information in its database, the Comprehensive Environmental Response, Compensation, and Liability Information System ("CERCLIS"). **[NOTE: if a region practices pre-CERCLIS screening procedures, please include language indicating that the procedures exists, whether or not the property is in the process of being "pre-screened", and what this means to the inquirer. Adjustments may be needed to the sample language contained in this letter.]** The fact that a site is listed in CERCLIS, however, does not mean that an EPA response action will occur at the site or that ownership or operation of the site is restricted or may be associated with liability. **The fact that a property is *not* listed in CERCLIS does mean that EPA is not currently planning to take any action under the federal Superfund program to evaluate the site for inclusion on the National Priorities List (NPL) or to conduct removal or remediation activities.**

The above-referenced property was not identified in a search of the active and archived records in the CERCLIS database. Please note that its absence from CERCLIS does not represent a finding that there are no environmental conditions at this property that require action or that are being addressed under another federal or state program. The absence of the property from CERCLIS means that, at this time, EPA is not aware of any information indicating that there has been a release or threat of release of hazardous substances at or from the facility that needs to be assessed by the federal Superfund program and that no such assessment has been performed by EPA in the past. I encourage you to contact **[insert name of state or local agency]** to determine if they have information regarding the property and its environmental condition. **[Regions also are encouraged to check with other program offices to determine whether EPA is addressing this site under another statute such as RCRA].**

If you would like more comprehensive information on current or historical CERCLIS data or to request an additional search, please contact the National Technical Information Service ("NTIS"), a publishing clearinghouse for government information. The address is: U.S. Department of Commerce, 5285 Port Royal Road, Springfield, VA 22161 (telephone: (703) 487-4650; fax: (703) 321-8547.) CERCLIS information is also available on the Internet at http:\\www.epa.gov\superfund\index.html#Products. Should you have any further questions about Superfund, please feel free to contact me at **[insert phone number/address.]**

Sincerely,

Regional Contact

cc: State contact

Policy on the Issuance of Comfort/Status Letters

Sample No Current Superfund Interest Letter

Addressee

Re: **[Insert name or description of property]**

Dear **[Insert name of party]**:

I am writing in response to your letter dated --/--/-- concerning the property referenced above. My response is based upon the facts presently known to the United States Environmental Protection Agency ("EPA") and is provided solely for informational purposes. For the reasons stated below, EPA does not presently contemplate additional Superfund action for this property.

In response to growing concern over health and environmental risks posed by hazardous waste sites, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (" CERCLA"), establishing the Superfund program to clean up these sites. The Superfund program is implemented by EPA in cooperation with individual states and local and tribal governments. Sites are discovered by citizens, businesses, and local, state, or federal agencies. After a potential hazardous waste site is reported to EPA, the available information is recorded in the Comprehensive Environmental Response and Liability Information System ("CERCLIS"), EPA's data management system for Superfund. Sites are added to CERCLIS when EPA believes that there may be contamination that warrants action under Superfund.

I. [FOR ARCHIVED SITES]

If, after an initial investigation, EPA determines that the contamination does not warrant Superfund action, or if an appropriate Superfund response action has been completed, EPA will archive that site from CERCLIS. This means that EPA believes no further federal response is appropriate. Archived sites may be returned to the CERCLIS site inventory if new information necessitating further Superfund consideration is discovered.

EPA has archived the above-referenced property from the CERCLIS site inventory because **[choose one of the following (a, b, or c) to complete the sentence]**

[a.] ,following site evaluation activities, EPA determined that either no contamination was found or conditions at the property did not warrant further federal Superfund involvement.

[b.] a federal removal action was completed and no further Superfund action is planned for this property.

[c.] environmental conditions at the property are subject to requirements of [RCRA, UST, OPA, etc.], however, no further interest under the federal Superfund program is warranted. For further information concerning these requirements, please contact [name and telephone number].

[Add to previous sentence] EPA, therefore, anticipates no need to take additional Superfund enforcement, investigatory, cost recovery, or cleanup action at this archived site unless new information warranting further Superfund consideration or conditions not previously known to EPA regarding the site are discovered. EPA will maintain a dialogue with the states and will

continue to refer archived sites to the states for their review and consideration. You may want to contact **[insert state contact, address and telephone number]** for further information.

II. [FOR PARTIAL OR FULL DELETIONS FROM NPL OR FOR A SITE BOUNDARY SITUATION]

CERCLIS does not describe sites in precise geographical terms primarily because the boundaries of the contamination and available information on those boundaries can be expected to change over time. Once enough information regarding the nature and extent of the release of the hazardous substances is gathered, EPA can more accurately delineate the boundaries of a site. **[Choose either (a), (b) or (c)].**

(a) [If the property was included in a partial deletion from the NPL]

The above-referenced property **[is/appears to be]** situated within the **[name of NPL site]** which is included on EPA's list of high priority hazardous waste CERCLIS sites known as the National Priorities List ("NPL"). EPA, however, has determined that no further investigatory or cleanup action is appropriate at the property under the federal Superfund program. With the **[insert State Agency]** concurrence, EPA has decided to delete the portion of the NPL site which contains the above-referenced property in accordance with the Agency's "Procedures for Partial Deletions at NPL Sites" (OERR Directive Number 9320.2-11, August 30, 1996).

(b) [If the property is contained within the NPL site or is defined as the NPL site and the site has been deleted from the NPL]

The identified property **[is/appears to be]** **[select one: situated within the defined geographical borders of the [name of NPL site] or defined as the [name of the NPL site]]** which is included on EPA's list of high priority hazardous waste CERCLIS sites known as the National Priorities List ("NPL"). EPA, however, has determined that no further investigatory or cleanup action is appropriate at the property. In consultation with the **[insert State Agency]**, EPA has decided to delete this property from the NPL in accordance with "Deletion from the NPL" 40CFR 300.425(e).

(c) [If the property is not part of the CERCLIS site but is nearby]

The above-referenced property is located **[near or adjacent to]** the **[name of CERCLIS Site]**. At this time, **[statement as to the status of the site at present time: e.g., preliminary assessment, site investigation, removal, remedial investigation or feasibility study is underway or is completed]**. Based upon available information, the property is not presently considered by EPA to be a part of the **[name of the CERCLIS site]**.

[Add to end of paragraph (a), (b), or (c)]

EPA, therefore, anticipates no need to take **[any/additional]** **[Superfund enforcement--include if PRP search and cost recovery are complete]** investigatory or cleanup action at this property unless new information warranting further Superfund consideration or conditions not previously known to EPA regarding the property are discovered. You may want to contact **[insert state agency information]** for further information. **[If appropriate, enclose a copy of the fact sheet on the CERCLIS site].**

III. [IF ADMINISTRATIVE RECORD HAS BEEN COMPILED]

EPA has compiled an administrative record for the **[name of CERCLIS or NPL Site]** which provides information on the nature and extent of the contamination found at the site. This record is available at EPA Region -- and at **[location nearby to the site]**.

If you have any additional questions, or wish to discuss this information, please feel free to contact **[insert EPA contact and address]**.

Sincerely yours,
Regional Contact

cc: State contact

Policy on the Issuance of Comfort/Status Letters

Sample Federal Superfund Interest Letter

Addressee

Re: **[insert name or description of property/site]**

Dear **[Insert name of party]**:

I am writing in response to your letter dated --/--/-- concerning the property referenced above. My response is based upon the facts presently known to the United States Environmental Protection Agency ("EPA") and is provided solely for informational purposes.

In response to growing concern over health and environmental risks posed by hazardous waste sites, Congress passed the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") and established the Superfund program to clean up these sites. The Superfund program is implemented by EPA in cooperation with individual states and local and tribal governments. Sites are discovered by citizens, businesses, and local, state and federal agencies. After a potential hazardous waste site is reported to EPA, the site-specific information is recorded in the Superfund database, the Comprehensive Environmental Response and Liability Information System ("CERCLIS"). Sites are added to CERCLIS when EPA believes that there may be contamination that warrants action under Superfund.

EPA initially screens a potential hazardous waste site to determine what type of action, if any, is necessary. The Superfund program may then perform a preliminary assessment and site investigation to determine whether contamination at a property is likely to require a federal cleanup response, an evaluation to determine if a short term response action to eliminate or reduce contamination is needed, and add the site to EPA's list of high priority hazardous waste sites known as the National Priorities List ("NPL").

EPA is examining **[and/or addressing]** the property referenced above in connection with the **[insert name of CERCLIS/NPL site]** under the authority of CERCLA. **[Insert appropriate paragraphs from Sections I and/or II below. Use III for requests regarding the applicability of a specific policy. Section IV represents the closing paragraph for all the Federal Superfund Interest letters].**

I. STATUS OF THE IDENTIFIED PROPERTY:

a. The above-referenced property is presently part of **[or is]** the **[insert name of site.]** **[Add paragraph from Section II for further information concerning the site.]**

b. The above-referenced property may be part of the **[insert name of site.]** **[Add paragraph from Section II for further information concerning the site.]**

II. STATUS OF EPA ACTIVITIES

a. The site has been placed in the Comprehensive Environmental Response, Compensation and Liability Information System ("CERCLIS") site inventory, but no studies or investigations have been performed to date. Accordingly, EPA has not developed sufficient information relating to the nature and extent of contamination to presently determine whether further federal action is appropriate under Superfund. Additionally, EPA has not yet determined which properties may be considered part of the site.

b. A Superfund site evaluation is planned at the **[insert name of site]** to investigate possible contamination, and where it may be located. Accordingly, EPA has not yet determined which properties may be considered part of the **[insert name of site.] [Add description of site evaluation activity or attach relevant documents, if available.]**

c. A Superfund site evaluation activity is underway at the **[insert name of site]** to investigate possible contamination, and where it may be located. Accordingly, EPA has not yet determined which properties may be considered part of the **[insert name of site.] [Add description of site evaluation activity or attach relevant documents, if available.]**

d. The **[insert name of site]** has been proposed to **[or placed on]** the Superfund National Priorities List ("NPL"). **[Refer to and/or attach Federal Register notice.]** The description of **[insert name of site]** contains EPA's preliminary evaluation of which properties are affected, although the actual borders of the Superfund site could change based on further information regarding the extent of contamination and appropriate remedy.

e. A Superfund Remedial Investigation/Feasibility Study ("RI/FS") is planned at **[insert name of site.] [Add description of RI/FS and ensuing activities or attach relevant documents, if available]**.

f. A Superfund Remedial Investigation/Feasibility Study ("RI/FS") is underway at **[insert name of site.] [Add description of RI/FS and ensuing activities or attach relevant documents, if available]**.

g. A Superfund Remedial Investigation/Feasibility Study ("RI/FS") has been completed at **[insert name of site.] [Add description of RI/FS and ensuing activities or attach relevant documents, if available]**.

h. EPA is planning a Superfund Remedial Design/Remedial Action ("RD/RA") at **[insert name of site.] [Insert pertinent information such as a description of the ROD and RD/RA, such as date of issuance of the ROD, schedule for cleanup; Fund lead or PRP implementation, cleanup progress to date; a schedule for future cleanup, especially a final completion date, cleanup levels to be achieved, and anticipated future land use of the Site, or attach relevant informational documents]**.

i. EPA has commenced a Superfund Remedial Design/Remedial Action ("RD/RA") at **[insert name of site.] [Insert pertinent information such as a description of the ROD and RD/RA, such as date of issuance of the ROD, schedule for cleanup; Fund lead or PRP implementation, cleanup progress to date; a schedule for future cleanup, especially a final completion date, cleanup levels to be achieved, and anticipated future land use of the Site, or attach relevant informational documents].**

j. Superfund Remedial Design/Remedial Action ("RD/RA") has been completed at **insert name of site.] [If possible provide information on cleanup achievements, whether it was PRP or Fund-lead, etc., or attach relevant informational documents, if available]** A Five-year Review will **[will not]** be necessary at **[insert name of site.] [Also, describe status with respect to deletion from the NPL.]**

k. A removal action is planned at **[insert name of site.] [provide information on cleanup achievements, whether it was PRP or Fund-lead, and contact number for On-Scene Coordinator, cost recovery staff, or ORC attorney, or attach relevant informational documents, if available.]**

l. A removal action is ongoing at **[insert name of site.] [provide information on cleanup achievements, whether it was PRP or Fund-lead, and contact number for On-Scene Coordinator, cost recovery staff, or ORC attorney, or attach relevant informational documents, if available.]**

m. A removal action has been completed at **[insert name of site.] [provide information on cleanup achievements, whether it was PRP or Fund-lead, and contact number for On-Scene Coordinator, cost recovery staff, or ORC attorney, or attach relevant informational documents, if available.]**

III. FOR PARTIES OR SITES COVERED BY AN EPA POLICY/STATUTE/REGULATION

Dear **[Insert name of party]**:

I am writing in response to your letter dated --/--/-- concerning the property referenced above. My response is based upon the facts presently known to the United States Environmental Protection Agency ("EPA").

As you may know, the above-referenced property is located within or near the **[insert name of CERCLIS site.]** EPA is currently taking **[insert description of any action that EPA is taking or plans to take and any contamination problem.]**

Policy on the Issuance of Comfort/Status Letters

[Choose either paragraph [a] or [b]]:

[a. For situations when a party provides information showing that 1) a project found to be in the public interest is hindered or the value of a property is affected by the potential for Superfund liability, and 2) there is no other mechanism available to adequately address the party's concerns]

The **[insert policy citation/statutory/regulatory provision]**, provides that EPA, in an exercise of its enforcement discretion, will not take an enforcement action against parties who meet the conditions and criteria described in the **[insert policy/statute/regulation]**. Based upon the information currently available to EPA, EPA believes that the **[policy/statutory/regulatory provision]** applies to **[you/your]** situation. I am enclosing a copy of the **[policy/statutory or regulatory provision and fact sheet, if appropriate]** for your review.

[b. For situations when a party does not provide information showing that 1) a project found to be in the public interest is hindered or the value of a property is affected by the potential for Superfund liability, and 2) there is no other mechanism available to adequately address the party's concerns, attach the appropriate policy/statutory or regulatory language and insert the following language]:

The **[insert policy citation/statutory/regulatory provision]**, provides that EPA, in an exercise of its enforcement discretion, will not take an enforcement action against parties who meet the conditions and criteria described in the **[insert policy/statute/regulation]**. **[EPA currently does not have enough information available to determine whether the [insert policy/statutory/regulatory citation] applies to your situation OR EPA, based upon the current information available, believes that you/your circumstances do not meet the criteria/provisions of the [policy/statute/regulation]**. I, however, have enclosed a copy of the **[policy/statutory or regulatory language]** for your own review and determination of its applicability to you **[or your situation]**.

IV. CLOSING PARAGRAPH

EPA hopes that the above information is useful to you. **[Optional--In addition, we have included a copy of our latest fact sheet for the (insert name of site.)]** Further, we direct your attention to the **[insert location of site local records repository]** at which EPA has placed a copy of the Administrative Record for this site. **[Include for section C letters only: This letter is provided solely for informational purposes and does not provide a release from CERCLA liability.]** If you have any questions, or wish to discuss this letter, please feel free to contact **[insert EPA contact and address]**.

Sincerely,

Regional Contact

Enclosure

Policy on the Issuance of Comfort/Status Letters

Sample State Action Letter

Addressee

Re: **[Insert name or description of site/property]**

Dear **[Insert name of party]**:

I am writing in response to your letter dated --/--/-- concerning the property referenced above. My response is based upon the facts presently known to the United States Environmental Protection Agency ("EPA") and is provided solely for informational purposes.

The problem of investigating, responding to, and cleaning property contaminated by hazardous substances is a complex one. In an effort to maximize resources and ensure timely responses, EPA and the states work together in responding to properties posing threats of environmental contamination. Although the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA", also known as "Superfund") is a federal law that establishes a federal program, the law also envisions and provides for state involvement at sites handled under the Superfund program. CERCLA explicitly describes scenarios under which a state may have a significant and prominent role in site activities.

I. [INSERT THIS SECTION FOR SITES DESIGNATED STATE-LEAD IN CERCLIS]

The site about which you have inquired, [site name], is a site that falls under the federal Superfund program, but has been designated a state-lead. A state-lead designation means that although the site remains in EPA's inventory of sites and may be on EPA's list of highest priority sites, the National Priorities List ("NPL"), implementing responsibilities to investigate and cleanup that site rest with the state of **[insert name of state]**. Specifically, **[insert name of state]** is responsible for the day-to-day activities at the site and will ultimately recommend the cleanup for the site. EPA's role is to review some of **[insert name of state]**'s milestone documents, if appropriate, provide technical assistance if needed, and, in most cases, approve the final cleanup method recommended by the state. The state and EPA work together closely, pursuant to the terms of a Memorandum of Agreement ("MOA") to ensure that site responses are conducted in a timely manner and that interested parties are included in site activities.

Because EPA's day-to-day role at the **[insert name of site]** is somewhat limited, you should check with the **[your state or state's environmental program]** for more detailed information on site activities. **[insert name of state]** is best able to provide you with detailed information about the site and public documents regarding site activity. **[Regions should include the state RPM name and number, or at least the state's applicable department name and number]**.

II. [INSERT THIS SECTION FOR SITES DESIGNATED "DEFERRED TO STATE AUTHORITIES" PURSUANT TO EPA'S SUPERFUND DEFERRAL POLICY]

The site about which you have inquired, **[site name]**, is a site that falls under the federal Superfund program, but for which EPA does not have the day-to-day responsibility. Specifically, the **[site name]** site is not proposed for or listed on the NPL. EPA has agreed not to propose or list the **[site name]** site on the NPL while the state of **[name of state]** addresses the environmental conditions at the property under its own state authorities. While the **[site name]**

cleanup is being conducted, EPA intends to act in accordance with "Guidance on Deferral of NPL Listing Determinations While States Oversee Response Actions" (OSWER Dir. 9375.6-11, May 3, 1995). A copy of this guidance is enclosed for your review and should help you to better understand EPA's role and intentions at sites for which activities are deferred to state authorities.

III. [INSERT FOR A SITE DESIGNATED 'DEFERRED" THAT NOW HAS BEEN ARCHIVED]

The conditions at the above-referenced property were addressed by **[name of state]** pursuant to EPA's "Guidance on Deferral of NPL Listing Determinations While States Oversee Response Actions" (OSWER Dir. 9375.6-11, May 3, 1995). Upon completion of cleanup activities at the **[site name]**, the property has been removed from EPA's inventory of hazardous waste sites, the Comprehensive Environmental Response, Compensation, and Liability Information System ("CERCLIS"). Consistent with EPA's state deferral guidance, EPA does not intend to further consider the property for listing on the NPL **[or to take additional Superfund enforcement, investigatory, cost recovery, or clean up action at the property]** unless EPA receives new information about site conditions that warrants reconsideration.

A copy of EPA's "Guidance on Deferral of NPL Listing Determinations While States Oversee Response Actions" is enclosed for your review, so that you may better understand the nature of EPA's role at the **[site name]**. For detailed information about site activities and conditions, you may wish to contact **[insert name of state or state's environmental department]**, the agency responsible for overseeing activities on the property.

IV. [INSERT FOR A SITE ADDRESSED UNDER A STATE VCP THAT HAS AN MOA IN PLACE]

The site about which you have inquired, **[site name]**, is a site contained in EPA's inventory of hazardous waste sites, the Comprehensive Environmental Response, Compensation, and Liability Information System. The **[site name]** site is not , however, proposed for or listed on EPA's list of highest priority sites, the National Priorities List ("NPL"). EPA and the state of **[insert name of state]** have agreed, pursuant to a memorandum of agreement ("MOA") between the two agencies, to place the site under the authorities of **[insert name of state]**'s Voluntary Cleanup Program. For specific details regarding the activities at **[site name]** or the MOA, you may wish to contact the **[state name or department responsible for implementing the MOA]**.

If you have any additional questions, or wish to discuss this information, please feel free to contact **[insert EPA contact and address]**.

Sincerely yours,

Regional Contact

cc: State contact

APPENDIX B

Use of Comfort Letters

Each of the sample comfort letters is intended to address a particular set of circumstances and provide whatever information is contained within EPA's databases. The sample letters do not address every possible scenario, but are based on the most commonly asked questions. To differentiate between the purposes of the letters and understand the relationship between them, the table below provides guidance on which letter to use to answer a request for information.

Question to be Answered	Recommended Letter if the Answer is Yes	Recommended Letter if the Answer is No
Is the site or property listed in CERCLIS?	Federal Interest Letter	No Previous Superfund Interest Letter or No Current Superfund Interest Letter
Has the site been archived from CERCLIS?	No Current Superfund Interest	Federal Interest Letter
Is the site or property contained (or undetermined) within the defined boundaries of a CERCLIS site?	Federal Interest Letter	No Previous Superfund Interest Letter or No Current Superfund Interest Letter
Has the site or property been addressed by EPA and deleted from the defined site boundary?	No Current Superfund Interest Letter	Federal Interest Letter
Is the site or property being addressed by a state voluntary cleanup program?	If a MOA is in place, No Previous Superfund Interest Letter for Non-CERCLIS sites, or State Action Letter for CERCLIS sites; in either case, in consultation with the state	If no MOA is in place, No Previous Superfund Interest Letter for non-CERCLIS sites, No Current Superfund Interest Letter for CERCLIS sites
Is EPA planning or currently performing a response action at the site?	Federal Interest Letter	No Previous Superfund Interest Letter for non-CERCLIS sites, No Current Superfund Interest Letter for CERCLIS sites
Is the party asking whether or asserting that the conditions at the site or activities of the party are addressed by a statutory provision or EPA policy? (Refer to federal interest criteria on page 6)	If the party meets the policy criteria (see page 6), Federal Interest Letter, Section III, paragraph (a) with a copy of the policy or statutory/regulatory language attached	If the party does not meet the policy criteria (see page 6), Federal Interest Letter, Section III, paragraph (b), with a copy of the policy or statutory/regulatory language attached
Is the site in CERCLIS but designated state-lead or deferred site?	State Action Letter, in consultation with the state	No Previous Superfund Interest Letter for Non-CERCLIS sites, Federal Interest Letter for CERCLIS sites

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR - 6 2003

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability ("Common Elements")

FROM: Susan E. Bromm, Director
Office of Site Remediation Enforcement

TO: Director, Office of Site Remediation and Restoration, Region I
Director, Emergency and Remedial Response Division, Region II
Director, Hazardous Site Cleanup Division, Region III
Director, Waste Management Division, Region IV
Directors, Superfund Division, Regions V, VI, VII and IX
Assistant Regional Administrator, Office of Ecosystems Protection and Remediation, Region VIII
Director, Office of Environmental Cleanup, Region X
Director, Office of Environmental Stewardship, Region I
Director, Environmental Accountability Division, Region IV
Regional Counsel, Regions II, III, V, VI, VII, IX, and X
Assistant Regional Administrator, Office of Enforcement, Compliance, and Environmental Justice, Region VIII

I. Introduction

The Small Business Liability Relief and Brownfields Revitalization Act, ("Brownfields Amendments"), Pub. L. No. 107-118, enacted in January 2002, amended the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), to provide important liability limitations for landowners that qualify as: (1) bona fide prospective purchasers, (2) contiguous property owners, or (3) innocent landowners (hereinafter, "landowner liability protections" or "landowner provisions").

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To meet the statutory criteria for a landowner liability protection, a landowner must meet certain threshold criteria and satisfy certain continuing obligations.[1] Many of the conditions are the same or similar under the three landowner provisions ("common elements"). This memorandum is intended to provide Environmental Protection Agency personnel with some general guidance on the common elements of the landowner liability protections. Specifically, this memorandum first discusses the threshold criteria of performing "all appropriate inquiry" and demonstrating no "affiliation" with a liable party. The memorandum then discusses the continuing obligations:

- compliance with land use restrictions and not impeding the effectiveness or integrity of institutional controls;
- taking "reasonable steps" with respect to hazardous substances affecting a landowner's property;
- providing cooperation, assistance and access;
- complying with information requests and administrative subpoenas; and
- providing legally required notices.

A chart summarizing the common elements applicable to bona fide prospective purchasers, contiguous property owners, and innocent landowners is attached to this memorandum (Attachment A). In addition, two documents relating to reasonable steps are attached to this memorandum: (1) a "Questions and Answers" document (Attachment B); and (2) a sample site-specific Comfort/Status Letter (Attachment C).

This memorandum addresses only some of the criteria a landowner must meet in order to qualify under the statute as a bona fide prospective purchaser, contiguous property owner, or innocent landowner (i.e., the common elements described above). Other criteria (e.g., the criterion that a contiguous property owner "did not cause, contribute, or consent to the release or threatened release," found in CERCLA § 107(q)(1)(A)(i), and the criterion that a bona fide prospective purchaser and innocent landowner purchase the property after all disposal of hazardous substances at the facility, found in CERCLA §§ 101(40)(A), 101(35)(A)), are not addressed in this memorandum. In addition, this guidance does not address obligations landowners may have under state statutory or common law.

This memorandum is an interim guidance issued in the exercise of EPA's enforcement discretion. As EPA gains more experience implementing the Brownfields Amendments, the Agency may revise this guidance. EPA welcomes comments on this guidance and its implementation. Comments may be submitted to the contacts identified at the end of this memorandum.

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[1] See CERCLA §§ 101(40)(B)-(H), 107(q)(1)(A), 101(35)(A)-(B).

II. Background

The bona fide prospective purchaser provision, CERCLA § 107(r), provides a new landowner liability protection and limits EPA's recourse for unrecovered response costs to a lien on property for the increase in fair market value attributable to EPA's response action. To qualify as a bona fide prospective purchaser, a person must meet the criteria set forth in CERCLA § 101(40), many of which are discussed in this memorandum. A purchaser of property must buy the property after January 11, 2002 (the date of enactment of the Brownfields Amendments), in order to qualify as a bona fide prospective purchaser. These parties may purchase property with knowledge of contamination after performing all appropriate inquiry, and still qualify for the landowner liability protection, provided they meet the other criteria set forth in CERCLA § 101(40).[2]

The new contiguous property owner provision, CERCLA § 107(q), excludes from the definition of "owner" or "operator" a person who owns property that is "contiguous" or otherwise similarly situated to, a facility that is the only source of contamination found on his property. To qualify as a contiguous property owner, a landowner must meet the criteria set forth in CERCLA § 107(q)(1)(A), many of which are common elements. This landowner provision "protects parties that are essentially victims of pollution incidents caused by their neighbor's actions." S. Rep. No. 107-2, at 10 (2001). Contiguous property owners must perform all appropriate inquiry prior to purchasing property. Persons who know, or have reason to know, prior to purchase, that the property is or could be contaminated, cannot qualify for the contiguous property owner liability protection.[3]

The Brownfields Amendments also clarified the CERCLA § 107(b)(3) innocent landowner affirmative defense. To qualify as an innocent landowner, a person must meet the criteria set forth in section 107(b)(3) and section 101(35). Many of the criteria in section 101(35) are common elements. CERCLA § 101(35)(A) distinguishes between three types of innocent landowners. Section 101(35)(A)(i) recognizes purchasers who acquire property without knowledge of the contamination. Section 101(35)(A)(ii) discusses governments acquiring contaminated property by escheat, other involuntary transfers or acquisitions, or the exercise of eminent domain authority by purchase or condemnation. Section 101(35)(A)(iii) covers inheritors of contaminated property. For purposes of this guidance, the term "innocent landowner" refers only to the unknowing purchasers as defined in section 101(35)(A)(i). Like

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[2] For a discussion of when EPA will consider providing a prospective purchaser with a covenant not to sue in light of the Brownfields Amendments, see "Bona Fide Prospective Purchasers and the New Amendments to CERCLA," B. Breen (May 31, 2001).

[3] CERCLA § 107(q)(1)(C) provides that a person who does not qualify as a contiguous property owner because he had, or had reason to have, knowledge that the property was or could be contaminated when he bought the property, may still qualify for a landowner liability protection as a bona fide prospective purchaser, as long as he meets the criteria set forth in CERCLA § 101(40).

contiguous property owners, persons desiring to qualify as innocent landowners must perform all appropriate inquiry prior to purchase and cannot know, or have reason to know, of contamination in order to have a viable defense as an innocent landowner.

III. Discussion

A party claiming to be a bona fide prospective purchaser, contiguous property owner, or section 101(35)(A)(i) innocent landowner bears the burden of proving that it meets the conditions of the applicable landowner liability protection.[4] Ultimately, courts will determine whether landowners in specific cases have met the conditions of the landowner liability protections and may provide interpretations of the statutory conditions. EPA offers some general guidance below regarding the common elements. This guidance is intended to be used by Agency personnel in exercising enforcement discretion. Evaluating whether a party meets these conditions will require careful, fact-specific analysis.

A. Threshold Criteria

To qualify as a bona fide prospective purchaser, contiguous property owner, or innocent landowner, a person must perform "all appropriate inquiry" before acquiring the property. Bona fide prospective purchasers and contiguous property owners must, in addition, demonstrate that they are not potentially liable or "affiliated" with any other person that is potentially liable for response costs at the property.

1. *All Appropriate Inquiry*

To meet the statutory criteria of a bona fide prospective purchaser, contiguous property owner, or innocent landowner, a person must perform "all appropriate inquiry" into the previous ownership and uses of property before acquisition of the property. CERCLA §§ 101(40)(B), 107(q)(1)(A)(viii), 101(35)(A)(i),(B)(i). Purchasers of property wishing to avail themselves of a landowner liability protection cannot perform all appropriate inquiry after purchasing contaminated property. As discussed above, bona fide prospective purchasers may acquire property with knowledge of contamination, after performing all appropriate inquiry, and maintain their protection from liability. In contrast, knowledge, or reason to know, of contamination prior to purchase defeats the contiguous property owner liability protection and the innocent landowner liability protection.

The Brownfields Amendments specify the all appropriate inquiry standard to be applied. The Brownfields Amendments state that purchasers of property before May 31, 1997 shall take into account such things as commonly known information about the property, the value of the property if clean, the ability of the defendant to detect contamination, and other similar criteria. CERCLA § 101(35)(B)(iv)(I). For property purchased on or after May 31, 1997, the procedures

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[4] CERCLA §§ 101(40), 107(q)(1)(B), 101(35).

of the American Society for Testing and Materials ("ASTM"), including the document known as Standard E1527 - 97, entitled "Standard Practice for Environmental Site Assessments: Phase 1 Environmental Site Assessment Process," are to be used. CERCLA § 101(35)(B)(iv)(II). The Brownfields Amendments require EPA, not later than January 2004, to promulgate a regulation containing standards and practices for all appropriate inquiry and set out criteria that must be addressed in EPA's regulation. CERCLA § 101(35)(B)(ii), (iii). The all appropriate inquiry standard will thus be the subject of future EPA regulation and guidance.

2. *Affiliation*

To meet the statutory criteria of a bona fide prospective purchaser or contiguous property owner, a party must not be potentially liable or affiliated with any other person who is potentially liable for response costs.[5] Neither the bona fide prospective purchaser/contiguous property owner provisions nor the legislative history define the phrase "affiliated with," but on its face the phrase has a broad definition, covering direct and indirect familial relationships, as well as many contractual, corporate, and financial relationships. It appears that Congress intended the affiliation language to prevent a potentially responsible party from contracting away its CERCLA liability through a transaction to a family member or related corporate entity. EPA recognizes that the potential breadth of the term "affiliation" could be taken to an extreme, and in exercising its enforcement discretion, EPA intends to be guided by Congress' intent of preventing transactions structured to avoid liability.

The innocent landowner provision does not contain this "affiliation" language. In order

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[5] The bona fide prospective purchaser provision provides, in pertinent part:

> NO AFFILIATION—The person is not—(i) potentially liable, or affiliated with any other person that is potentially liable, for response costs at a facility through— (I) any direct or indirect familial relationship; or (II) any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by the instruments by which title to the facility is conveyed or financed or by a contract for the sale of goods or services); or (ii) the result of a reorganization of a business entity that was potentially liable. CERCLA § 101(40)(H).

The contiguous property owner provision provides, in pertinent part:

> NOT CONSIDERED TO BE AN OWNER OR OPERATOR— . . . (ii) the person is not— (I) potentially liable, or affiliated with any other person that is potentially liable, for response costs at a facility through any direct or indirect familial relationship or any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by a contract for the sale of goods or services); or (II) the result of a reorganization of a business entity that was potentially liable[.] CERCLA § 107(q)(1)(A)(ii).

to meet the statutory criteria of the innocent landowner liability protection, however, a person must establish by a preponderance of the evidence that the act or omission that caused the release or threat of release of hazardous substances and the resulting damages were caused by a third party with whom the person does not have an employment, agency, or contractual relationship. Contractual relationship is defined in section 101(35)(A).

B. Continuing Obligations

Several of the conditions a landowner must meet in order to achieve and maintain a landowner liability protection are continuing obligations. This section discusses those continuing obligations: (1) complying with land use restrictions and institutional controls; (2) taking reasonable steps with respect to hazardous substance releases; (3) providing full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration; (4) complying with information requests and administrative subpoenas; and (5) providing legally required notices.

1. *Land Use Restrictions and Institutional Controls*

The bona fide prospective purchaser, contiguous property owner, and innocent landowner provisions all require compliance with the following ongoing obligations as a condition for maintaining a landowner liability protection:

- the person is in compliance with any land use restrictions established or relied on in connection with the response action and

- the person does not impede the effectiveness or integrity of any institutional control employed in connection with a response action.

CERCLA §§ 101(40)(F), 107(q)(1)(A)(V), 101(35)(A). Initially, there are two important points worth noting about these provisions. First, because institutional controls are often used to implement land use restrictions, failing to comply with a land use restriction may also impede the effectiveness or integrity of an institutional control, and vice versa. As explained below, however, these two provisions do set forth distinct requirements. Second, these are ongoing obligations and, therefore, EPA believes the statute requires bona fide prospective purchasers, contiguous property owners, and innocent landowners to comply with land use restrictions and to implement institutional controls even if the restrictions or institutional controls were not in place at the time the person purchased the property.

Institutional controls are administrative and legal controls that minimize the potential for human exposure to contamination and protect the integrity of remedies by limiting land or

resource use, providing information to modify behavior, or both.[6] For example, an institutional control might prohibit the drilling of a drinking water well in a contaminated aquifer or disturbing contaminated soils. EPA typically uses institutional controls whenever contamination precludes unlimited use and unrestricted exposure at the property. Institutional controls are often needed both before and after completion of the remedial action. Also, institutional controls may need to remain in place for an indefinite duration and, therefore, generally need to survive changes in property ownership (i.e., run with the land) to be legally and practically effective.

Generally, EPA places institutional controls into four categories:

(1) governmental controls (e.g., zoning);
(2) proprietary controls (e.g., covenants, easements);
(3) enforcement documents (e.g., orders, consent decrees); and
(4) informational devices (e.g., land record/deed notices).

Institutional controls often require a property owner to take steps to implement the controls, such as conveying a property interest (e.g., an easement or restrictive covenant) to another party such as a governmental entity, thus providing that party with the right to enforce a land use restriction; applying for a zoning change; or recording a notice in the land records.

Because institutional controls are tools used to limit exposure to contamination or protect a remedy by limiting land use, they are often used to implement or establish land use restrictions relied on in connection with the response action. However, the Brownfields Amendments require compliance with land use restrictions relied on in connection with the response action, even if those restrictions have not been properly implemented through the use of an enforceable institutional control. Generally, a land use restriction may be considered "relied on" when the restriction is identified as a component of the remedy. Land use restrictions relied on in connection with a response action may be documented in several places depending on the program under which the response action was conducted, including: a risk assessment; a remedy decision document; a remedy design document; a permit, order, or consent decree; under some state response programs, a statute (*e.g.*, no groundwater wells when relying on natural attenuation); or, in other documents developed in conjunction with a response action.

An institutional control may not serve the purpose of implementing a land use restriction for a variety of reasons, including: (1) the institutional control is never, or has yet to be, implemented; (2) the property owner or other persons using the property impede the effectiveness of the institutional controls in some way and the party responsible for enforcement of the institutional controls neglects to take sufficient measures to bring those persons into compliance; or (3) a court finds the controls to be unenforceable. For example, a chosen remedy might rely on an ordinance that prevents groundwater from being used as drinking water. If the local government failed to enact the ordinance, later changed the ordinance to allow for drinking

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[6] For additional information on institutional controls, see "Institutional Controls: A Site Manager's Guide to Identifying, Evaluating, and Selecting Institutional Controls at Superfund and RCRA Corrective Action Cleanups," September 2000, (OSWER Directive 9355.0-74FS-P).

water use, or failed to enforce the ordinance, a landowner is still required to comply with the groundwater use restriction identified as part of the remedy to maintain its landowner liability protection. Unless authorized by the regulatory agency responsible for overseeing the remedy, if the landowner fails to comply with a land use restriction relied on in connection with a response action, the owner will forfeit the liability protection and EPA may use its CERCLA authorities to order the owner to remedy the violation, or EPA may remedy the violation itself and seek cost recovery from the noncompliant landowner.

In order to meet the statutory criteria of a bona fide prospective purchaser, contiguous property owner, or innocent landowner, a party may not impede the effectiveness or integrity of any institutional control employed in connection with a response action. See CERCLA §§ 101(40)(F)(ii), 107(q)(1)(A)(v)(II), 101(35)(A)(iii). Impeding the effectiveness or integrity of an institutional control does not require a physical disturbance or disruption of the land. A landowner could jeopardize the reliability of an institutional control through actions short of violating restrictions on land use. In fact, not all institutional controls actually restrict the use of land. For example, EPA and State programs often use notices to convey information regarding contamination on site rather than actually restricting the use. To do this, EPA or a State may require a notice to be placed in the land records. If a landowner removed the notice, the removal would impede the effectiveness of the institutional control. A similar requirement is for a landowner to give notice of any institutional controls on the property to a purchaser of the property. Failure to give this notice may impede the effectiveness of the control. Another example of impeding the effectiveness of an institutional control would be if a landowner applies for a zoning change or variance when the current designated use of the property was intended to act as an institutional control. Finally, EPA might also consider a landowner's refusal to assist in the implementation of an institutional control employed in connection with the response action, such as not recording a deed notice or not agreeing to an easement or covenant, to constitute a violation of the requirement not to impede the effectiveness or integrity of an institutional control.[7]

An owner may seek changes to land use restrictions and institutional controls relied on in connection with a response action by following procedures required by the regulatory agency responsible for overseeing the original response action. Certain restrictions and institutional controls may not need to remain in place in perpetuity. For example, changed site conditions, such as natural attenuation or additional cleanup, may alleviate the need for restrictions or institutional controls. If an owner believes changed site conditions warrant a change in land or resource use or is interested in performing additional response actions that would eliminate the need for particular restrictions and controls, the owner should review and follow the appropriate regulatory agency procedures prior to undertaking any action that may violate the requirements of this provision.

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[7] This may also constitute a violation of the ongoing obligation to provide full cooperation, assistance, and access. CERCLA §§ 101(40)(E), 107(q)(1)(A)(iv), 101(35)(A).

2. *Reasonable Steps*

a. Overview

Congress, in enacting the landowner liability protections, included the condition that bona fide prospective purchasers, contiguous property owners, and innocent landowners take "reasonable steps" with respect to hazardous substance releases to do all of the following:

- Stop continuing releases,
- Prevent threatened future releases, and
- Prevent or limit human, environmental, or natural resource exposure to earlier hazardous substance releases.

CERCLA §§ 101(40)(D), 107(q)(1)(A)(iii), 101(35)(B)(i)(II).[8] Congress included this condition as an incentive for certain owners of contaminated properties to avoid CERCLA liability by, among other things, acting responsibly where hazardous substances are present on their property. In adding this new requirement, Congress adopted an approach that is consonant with traditional common law principles and the existing CERCLA "due care" requirement.[9]

By making the landowner liability protections subject to the obligation to take "reasonable steps," EPA believes Congress intended to balance the desire to protect certain landowners from CERCLA liability with the need to ensure the protection of human health and the environment. In requiring reasonable steps from parties qualifying for landowner liability protections, EPA believes Congress did not intend to create, as a general matter, the same types of response obligations that exist for a CERCLA liable party (e.g., removal of contaminated soil,

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[8] CERCLA § 101(40)(D), the bona fide prospective purchaser reasonable steps provision, provides: "[t]he person exercises appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to— (i) stop any continuing release; (ii) prevent any threatened future release; and (iii) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance."

CERCLA § 107(q)(1)(A), the contiguous property owner reasonable steps provision, provides: "the person takes reasonable steps to— (I) stop any continuing release; (II) prevent any threatened future release; and (III) prevent or limit human, environmental, or natural resource exposure to any hazardous substance released on or from property owned by that person."

CERCLA § 101(35)(B)(II), the innocent landowner reasonable steps provision, provides: "the defendant took reasonable steps to— (aa) stop any continuing release; (bb) prevent any threatened future release; and (cc) prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substance."

[9] See innocent landowner provision, CERCLA § 107(b)(3)(a).

extraction and treatment of contaminated groundwater).[10] Indeed, the contiguous property owner provision's legislative history states that absent "exceptional circumstances . . . , these persons are not expected to conduct ground water investigations or install remediation systems, or undertake other response actions that would be more properly paid for by the responsible parties who caused the contamination." S. Rep. No. 107-2, at 11 (2001). In addition, the Brownfields Amendments provide that contiguous property owners are generally not required to conduct groundwater investigations or to install ground water remediation systems. CERCLA § 107(q)(1)(D).[11] Nevertheless, it seems clear that Congress also did not intend to allow a landowner to ignore the potential dangers associated with hazardous substances on its property.

Although the reasonable steps legal standard is the same for the three landowner provisions, the obligations may differ to some extent because of other differences among the three statutory provisions. For example, as noted earlier, one of the conditions is that a person claiming the status of a bona fide prospective purchaser, contiguous property owner, or innocent landowner must have "carried out all appropriate inquiries" into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices. CERCLA §§ 101(40)(B), 107(q)(1)(A)(viii), 101(35)(B). However, for a contiguous property owner or innocent landowner, knowledge of contamination defeats eligibility for the liability protection. A bona fide prospective purchaser may purchase with knowledge of the contamination and still be eligible for the liability protection. Thus, only the bona fide prospective purchaser could purchase a contaminated property that is, for example, on CERCLA's National Priorities List[12] or is undergoing active cleanup under an EPA or State

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[10] There could be unusual circumstances where the reasonable steps required of a bona fide prospective purchaser, contiguous property owner, or innocent landowner would be akin to the obligations of a potentially responsible party (e.g., the only remaining response action is institutional controls or monitoring, the benefit of the response action will inure primarily to the landowner, or the landowner is the only person in a position to prevent or limit an immediate hazard). This may be more likely to arise in the context of a bona fide prospective purchaser as the purchaser may buy the property with knowledge of the contamination.

[11] CERCLA § 107(q)(1)(D) provides:

> GROUND WATER. - With respect to a hazardous substance from one or more sources that are not on the property of a person that is a contiguous property owner that enters ground water beneath the property of the person solely as a result of subsurface migration in an aquifer, subparagraph (A)(iii) shall not require the person to conduct ground water investigations or to install ground water remediation systems, except in accordance with the policy of the Environmental Protection Agency concerning owners of property containing contaminated aquifers, dated May 24, 1995.

[12] The National Priorities List is "the list compiled by EPA pursuant to CERCLA § 105, of uncontrolled hazardous substance releases in the United States that are priorities for long-term remedial evaluation and response." 40 C.F.R. § 300.5 (2001).

cleanup program, and still maintain his liability protection.

The pre-purchase "appropriate inquiry" by the bona fide prospective purchaser will most likely inform the bona fide prospective purchaser as to the nature and extent of contamination on the property and what might be considered reasonable steps regarding the contamination - - how to stop continuing releases, prevent threatened future releases, and prevent or limit human, environmental, and natural resource exposures. Knowledge of contamination and the opportunity to plan prior to purchase should be factors in evaluating what are reasonable steps, and could result in greater reasonable steps obligations for a bona fide prospective purchaser.[13] Because the pre-purchase "appropriate inquiry" performed by a contiguous property owner or innocent landowner must result in no knowledge of the contamination for the landowner liability protection to apply, the context for evaluating reasonable steps for such parties is different. That is, reasonable steps in the context of a purchase by a bona fide prospective purchaser may differ from reasonable steps for the other protected landowner categories (who did not have knowledge or an opportunity to plan prior to purchase). Once a contiguous property owner or innocent landowner learns that contamination exists on his property, then he must take reasonable steps considering the available information about the property contamination.

The required reasonable steps relate only to responding to contamination for which the bona fide prospective purchaser, contiguous property owner, or innocent landowner is not responsible. Activities on the property subsequent to purchase that result in new contamination can give rise to full CERCLA liability. That is, more than reasonable steps will likely be required from the landowner if there is new hazardous substance contamination on the landowner's property for which the landowner is liable. See, e.g., CERCLA § 101(40)(A) (requiring a bona fide prospective purchaser to show "[a]ll disposal of hazardous substances at the facility occurred before the person acquired the facility").

As part of the third party defense that pre-dates the Brownfields Amendments and continues to be a distinct requirement for innocent landowners, CERCLA requires the exercise of "due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all the relevant facts and circumstances." CERCLA § 107(b)(3)(a). The due care language differs from the Brownfields Amendments' new reasonable steps language. However, the existing case law on due care provides a reference point for evaluating the reasonable steps requirement. When courts have examined the due care requirement in the context of the pre-existing innocent landowner defense, they have generally concluded that a landowner should take some positive or affirmative step(s) when confronted with hazardous substances on its property. Because the due care cases cited in Attachment B (see Section III.B.2.b "Questions and Answers," below) interpret the due care statutory language and not the reasonable steps statutory language, they are provided as a reference point for the reasonable steps analysis, but are not intended to define reasonable steps.

The reasonable steps determination will be a site-specific, fact-based inquiry. That

[13] As noted earlier, section 107(r)(2) provides EPA with a windfall lien on the property.

inquiry should take into account the different elements of the landowner liability protections and should reflect the balance that Congress sought between protecting certain landowners from CERCLA liability and assuring continued protection of human health and the environment. Although each site will have its own unique aspects involving individual site analysis, Attachment B provides some questions and answers intended as general guidance on the question of what actions may constitute reasonable steps.

b. Site-Specific Comfort/Status Letters Addressing Reasonable Steps

Consistent with its "Policy on the Issuance of Comfort/Status Letters," ("1997 Comfort/Status Letter Policy"), 62 Fed. Reg. 4,624 (1997), EPA may, in its discretion, provide a comfort/status letter addressing reasonable steps at a specific site, upon request. EPA anticipates that such letters will be limited to sites with significant federal involvement such that the Agency has sufficient information to form a basis for suggesting reasonable steps (e.g., the site is on the National Priorities List or EPA has conducted or is conducting a removal action on the site). In addition, as the 1997 Comfort/Status Letter Policy provides, "[i]t is not EPA's intent to become involved in typical real estate transactions. Rather, EPA intends to limit the use of . . . comfort to where it may facilitate the cleanup and redevelopment of brownfields, where there is the realistic perception or probability of incurring Superfund liability, and where there is no other mechanism available to adequately address the party's concerns." Id. In its discretion, a Region may conclude in a given case that it is not necessary to opine about reasonable steps because it is clear that the landowner does not or will not meet other elements of the relevant landowner liability protection. A sample reasonable steps comfort/status letter is attached to this memorandum (see Attachment C).

The 1997 Comfort/Status Letter Policy recognizes that, at some sites, the state has the lead for day-to-day activities and oversight of a response action, and the Policy includes a "Sample State Action Letter." For reasonable steps inquiries at such sites, Regions should handle responses consistent with the existing 1997 Comfort/Status Letter Policy. In addition, where appropriate, if EPA has had the lead at a site with respect to response actions (e.g., EPA has conducted a removal action at the site), but the state will be taking over the lead in the near future, EPA should coordinate with the state prior to issuing a comfort/status letter suggesting reasonable steps at the site.

3. *Cooperation, Assistance, and Access*

The Brownfields Amendments require that bona fide prospective purchasers, contiguous property owners, and innocent landowners provide full cooperation, assistance, and access to persons who are authorized to conduct response actions or natural resource restoration at the vessel or facility from which there has been a release or threatened release, including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action or natural resource restoration at the vessel or facility. CERCLA §§ 101(40)(E), 107(q)(1)(A)(iv), 101(35)(A).

4. *Compliance with Information Requests and Administrative Subpoenas*

The Brownfields Amendments require bona fide prospective purchasers and contiguous property owners to be in compliance with, or comply with, any request for information or administrative subpoena issued by the President under CERCLA. CERCLA §§ 101(40)(G), 107(q)(1)(A)(vi). In particular, EPA expects timely, accurate, and complete responses from all recipients of section 104(e) information requests. As an exercise of its enforcement discretion, EPA may consider a person who has made an inconsequential error in responding (e.g., the person sent the response to the wrong EPA address and missed the response deadline by a day), a bona fide prospective purchaser or contiguous property owner, as long as the landowner also meets the other conditions of the applicable landowner liability protection.

5. *Providing Legally Required Notices*

The Brownfields Amendments subject bona fide prospective purchasers and contiguous property owners to the same "notice" requirements. Both provisions mandate, in pertinent part, that "[t]he person provides all legally required notices with respect to the discovery or release of any hazardous substances at the facility." CERCLA §§ 101(40)(C), 107(q)(1)(A)(vii). EPA believes that Congress' intent in including this as an ongoing obligation was to ensure that EPA and other appropriate entities are made aware of hazardous substance releases in a timely manner.

"Legally required notices" may include those required under federal, state, and local laws. Examples of federal notices that may be required include, but are not limited to, those under: CERCLA § 103 (notification requirements regarding released substances); EPCRA § 304 ("emergency notification"); and RCRA § 9002 (notification provisions for underground storage tanks). The bona fide prospective purchaser and contiguous property owner have the burden of ascertaining what notices are legally required in a given instance and of complying with those notice requirements. Regions may require these landowners to self-certify that they *have provided* (in the case of contiguous property owners), or *will provide* within a certain number of days of purchasing the property (in the case of bona fide prospective purchasers), all legally required notices. Such self-certifications may be in the form of a letter signed by the landowner as long as the letter is sufficient to satisfy EPA that applicable notice requirements have been met. Like many of the other common elements discussed in this memorandum, providing legally required notices is an ongoing obligation of any landowner desiring to maintain its status as a bona fide prospective purchaser or contiguous property owner.

IV. Conclusion

Evaluating whether a landowner has met the criteria of a particular landowner provision will require careful, fact-specific analysis by the regions as part of their exercise of enforcement discretion. This memorandum is intended to provide EPA personnel with some general guidance on the common elements of the landowner liability protections. As EPA implements the Brownfields Amendments, it will be critical for the regions to share site-specific experiences and

information pertaining to the common elements amongst each other and with the Office of Site Remediation Enforcement, in order to ensure national consistency in the exercise of the Agency's enforcement discretion. EPA anticipates that its Landowner Liability Protection Subgroup, which is comprised of members from various headquarters offices, the Offices of Regional Counsel, the Office of General Counsel, and the Department of Justice, will remain intact for the foreseeable future and will be available to serve as a clearinghouse for information for the regions on the common elements.

Questions and comments regarding this memorandum or site-specific inquiries should be directed to Cate Tierney, in OSRE's Regional Support Division (202-564-4254, Tierney.Cate@EPA.gov), or Greg Madden, in OSRE's Policy & Program Evaluation Division (202-564-4229, Madden.Gregory@EPA.gov).

V. Disclaimer

This memorandum is intended solely for the guidance of employees of EPA and the Department of Justice and it creates no substantive rights for any persons. It is not a regulation and does not impose legal obligations. EPA will apply the guidance only to the extent appropriate based on the facts.

Attachments

cc: Jewell Harper (OSRE)
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EPA Brownfields Landowner Liability Protection Subgroup

Attachment A

Chart Summarizing Applicability of "Common Elements" to Bona Fide Prospective Purchasers, Contiguous Property Owners, and Section 101(35)(A)(i) Innocent Landowners

Common Element among the Brownfields Amendments Landowner Provisions	**Bona Fide Prospective Purchaser**	**Contiguous Property Owner**	**Section 101 (35)(A)(i) Innocent Landowner**
All Appropriate Inquiry			
No affiliation demonstration			
Compliance with land use restrictions and institutional controls			
Taking reasonable steps			
Cooperation, assistance, access			
Compliance with information requests and administrative subpoenas			
Providing legally required notices			

Although the innocent landowner provision does not contain this "affiliation" language, in order to meet the statutory criteria of the innocent landowner liability protection, a person must establish by a preponderance of the evidence that the act or omission that caused the release or threat of release of hazardous substances and the resulting damages were caused by a third party with whom the person does not have an employment, agency, or contractual relationship. CERCLA § 107(b)(3). Contractual relationship is defined in section 101(35)(A).

Compliance with information requests and administrative subpoenas is not specified as a statutory criterion for achieving and maintaining the section 101(35)(A)(i) innocent landowner liability protection. However, CERCLA requires compliance with administrative subpoenas from all persons, and timely, accurate, and complete responses from all recipients of EPA information requests.

Provision of legally required notices is not specified as a statutory criterion for achieving and maintaining the section 101(35)(A)(i) innocent landowner liability protection. These landowners may, however, have notice obligations under federal, state and local laws.

Attachment B

Reasonable Steps Questions and Answers

The "reasonable steps" required of a bona fide prospective purchaser, contiguous property owner, or section 101(35)(A)(i) innocent landowner under CERCLA §§ 101(40)(D), 107(q)(1)(A)(iii), and 101(35)(B)(i)(II), will be a site-specific, fact-based inquiry. Although each site will have its own unique aspects involving individual site analysis, below are some questions and answers intended to provide general guidance on the question of what actions may constitute reasonable steps. The answers provide a specific response to the question posed, without identifying additional actions that might be necessary as reasonable steps or actions that may be required under the other statutory conditions for each landowner provision (e.g., providing cooperation and access). In addition, the answers do not address actions that may be required under other federal statutes (e.g., the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq*.; the Clean Water Act, 33 U.S.C. § 1251, *et seq.*; and the Toxic Substances Control Act, 15 U.S.C. § 2601, *et seq.*), and do not address landowner obligations under state statutory or common law.[14]

Notification

Q1: If a person conducts "all appropriate inquiry" with respect to a property where EPA has conducted a removal action, discovers hazardous substance contamination on the property that is unknown to EPA, and then purchases the property, is notification to EPA or the state about the contamination a reasonable step?

A1: Yes. First, bona fide prospective purchasers may have an obligation to provide notice of the discovery or release of a hazardous substance under the legally required notice provision, CERCLA § 101(40)(C). Second, even if not squarely required by the notice conditions, providing notice of the contamination to appropriate governmental authorities would be a reasonable step in order to prevent a "threatened future release" and "prevent or limit . . . exposure." Congress specifically identified "notifying appropriate Federal, state, and local officials" as a typical reasonable step. S. Rep. No.107-2, at 11 (2001); see also, Bob's Beverage Inc. v. Acme, Inc., 169 F. Supp. 2d 695, 716 (N.D. Ohio 1999) (failure to timely notify EPA and Ohio EPA of groundwater contamination was factor in conclusion that party failed to exercise due care), *aff'd*, 264 F. 3d 692 (6th Cir. 2001). It should be noted that the bona fide prospective purchaser provision is the only one of the three landowner provisions where a person can purchase property with knowledge that it is contaminated and still qualify for the landowner liability protection.

[14] The Brownfields Amendments did not alter CERCLA § 114(a), which provides: "[n]othing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State."

Site Restrictions

Q2: Where a property owner discovers unauthorized dumping of hazardous substances on a portion of her property, are site access restrictions reasonable steps?

A2: Site restrictions are likely appropriate as a first step, once the dumping is known to the owner. Reasonable steps include preventing or limiting "human, environmental, or natural resource exposure" to hazardous substances. CERCLA §§ 101(40)(D)(iii), 107(q)(1)(A)(iii)(III), 101(35)(B)(i)(II)(cc). The legislative history for the contiguous property owner provision specifically notes that "erecting and maintaining signs or fences to prevent public exposure" may be typical reasonable steps. S. Rep. No. 107-2, at 11 (2001); see also, Idylwoods Assoc. v. Mader Capital, Inc., 915 F. Supp. 1290, 1301 (W.D.N.Y. 1996) (failure to restrict access by erecting signs or hiring security personnel was factor in evaluating due care), *aff'd on reh'g*, 956 F. Supp. 410, 419-20 (W.D.N.Y. 1997); New York v. Delmonte, No. 98-CV-0649E, 2000 WL 432838, *4 (W.D.N.Y. Mar. 31, 2000) (failure to limit access despite knowledge of trespassers was not due care).

Containing Releases or Threatened Releases

Q3: If a new property owner discovers some deteriorating 55 gallon drums containing unknown material among empty drums in an old warehouse on her property, would segregation of the drums and identification of the material in the drums constitute reasonable steps?

A3: Yes, segregation and identification of potential hazards would likely be appropriate first steps. Reasonable steps must be taken to "prevent any threatened future release." CERCLA §§ 101(40)(D)(ii), 107(q)(1)(A)(iii)(II), 101(35)(B)(i)(II)(bb). To the extent the drums have the potential to leak, segregation and containment (e.g., drum overpack) would prevent mishandling and releases to the environment. For storage and handling purposes, an identification of the potential hazards from the material will likely be necessary. Additional identification steps would likely be necessary for subsequent disposal or resale if the material had commercial value.

Q4: If a property owner discovers that the containment system for an on-site waste pile has been breached, do reasonable steps include repairing the breach?

A4: One of the reasonable steps obligations is to "stop any continuing release." CERCLA §§ 101(40)(D)(i), 107(q)(1)(A)(iii)(I), 101(35)(B)(i)(II)(aa). In general, the property owner should take actions to prevent contaminant migration where there is a breach from an existing containment system. Both Congress and the courts have identified maintenance of hazardous substance migration controls as relevant property owner obligations. For example, in discussing contiguous property owners' obligations for migrating groundwater plumes, Congress identified "maintaining any existing barrier or other elements of a response action on their property that

address the contaminated plume" as a typical reasonable step. S. Rep. No. 107-2, at 11 (2001); see also, Franklin County Convention Facilities Auth. v. American Premier Underwriters, Inc., 240 F.3d 534, 548 (6th Cir. 2001) (failure to promptly erect barrier that allowed migration was not due care); United States v. DiBiase Salem Realty Trust, No. Civ. A. 91-11028-MA, 1993 WL 729662, *7 (D. Mass. Nov. 19, 1993) (failure to reinforce waste pit berms was factor in concluding no due care), *aff'd*, 45 F.3d 541, 545 (1st Cir. 1995). In many instances, the current property owner will have responsibility for maintenance of the containment system. If the property owner has responsibility for maintenance of the system as part of her property purchase, then she should repair the breach. In other instances, someone other than the current landowner may have assumed that responsibility (e.g., a prior owner or other liable parties that signed a consent decree with EPA and/or a State). If someone other than the property owner has responsibility for maintenance of the containment system pursuant to a contract or other agreement, then the question is more complicated. At a minimum, the current owner should give notice to the person responsible for the containment system and to the government. Moreover, additional actions to prevent contaminant migration would likely be appropriate.

Q5: If a bona fide prospective purchaser buys property at a Superfund site where part of the approved remedy is an asphalt parking lot cap, but the entity or entities responsible for implementing the remedy (e.g., PRPs who signed a consent decree) are unable to repair the deteriorating cap (e.g., the PRPs are now defunct), should the bona fide prospective purchaser repair the deteriorating asphalt parking lot cap as reasonable steps?

A5: Taking "reasonable steps" includes steps to: "prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substances." CERCLA §§ 101(40)(D)(iii), 107(q)(1)(A)(iii)(III), 101(35)(B)(i)(II)(cc). In this instance, the current landowner may be in the best position to identify and quickly take steps to repair the asphalt cap and prevent additional exposures.

Remediation

Q6: If a property is underlain by contaminated groundwater emanating from a source on a contiguous or adjacent property, do reasonable steps include remediating the groundwater?

A6: Generally not. Absent exceptional circumstances, EPA will not look to a landowner whose property is not a source of a release to conduct groundwater investigations or install groundwater remediation systems. Since 1995, EPA's policy has been that, in the absence of exceptional circumstances, such a property owner did not have "to take any affirmative steps to investigate or prevent the activities that gave rise to the original release" in order to satisfy the innocent landowner due care requirement. See May 24, 1995 "Policy Toward Owners of Property Containing Contaminated Aquifers." ("1995 Contaminated Aquifers Policy"). In the Brownfields Amendments, Congress explicitly identified this policy in noting that reasonable

steps for a contiguous property owner "shall not require the person to conduct groundwater investigations or to install groundwater remediation systems," except in accordance with that policy. See CERCLA § 107(q)(1)(D). The policy does not apply "where the property contains a groundwater well, the existence or operation of which may affect the migration of contamination in the affected area." 1995 Contaminated Aquifers Policy, at 5. In such instances, a site-specific analysis should be used in order to determine reasonable steps. In some instances, reasonable steps may simply mean operation of the groundwater well consistent with the selected remedy. In other instances, more could be required.

Q7: If a protected landowner discovers a previously unknown release of a hazardous substance from a source on her property, must she remediate the release?

A7: Provided the landowner is not otherwise liable for the release from the source, she should take some affirmative steps to "stop the continuing release," but EPA would not, absent unusual circumstances, look to her for performance of complete remedial measures. However, notice to appropriate governmental officials and containment or other measures to mitigate the release would probably be considered appropriate. Compare Lincoln Properties, Ltd. v. Higgins, 823 F. Supp. 1528, 1543-44 (E.D. Calif. 1992) (sealing sewer lines and wells and subsequently destroying wells to protect against releases helped establish party exercised due care); Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1508 (11th Cir. 1996) (timely development of maintenance plan to remove tar seeps was factor in showing due care was exercised); New York v. Lashins Arcade Co., 91 F.3d 353 (2nd Cir. 1996) (instructing tenants not to discharge hazardous substances into waste and septic systems, making instructions part of tenancy requirements, and inspecting to assure compliance with this obligation, helped party establish due care); with Idylwoods Assoc. v. Mader Capital, Inc., 956 F. Supp. 410, 419-20 (W.D.N.Y. 1997) (property owner's decision to do nothing resulting in spread of contamination to neighboring creek was not due care); Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co., 14 F.3d 321, 325 (7th Cir. 1994) (party that "made no attempt to remove those substances or to take any other positive steps to reduce the threat posed" did not exercise due care). As noted earlier, if the release is the result of a disposal after the property owner's purchase, then she may be required to undertake full remedial measures as a CERCLA liable party. Also, if the source of the contamination is on the property, then the property owner will not qualify as a contiguous property owner but may still qualify as an innocent landowner or a bona fide prospective purchaser.

Site Investigation

Q8: If a landowner discovers contamination on her property, does the obligation to take reasonable steps require her to investigate the extent of the contamination?

A8: Generally, where the property owner is the first to discover the contamination, she should

take certain basic actions to assess the extent of contamination. Absent such an assessment, it will be very difficult to determine what reasonable steps will stop a continuing release, prevent a threatened future release, or prevent or limit exposure. While a full environmental investigation may not be required, doing nothing in the face of a known or suspected environmental hazard would likely be insufficient. See, e.g., United States v. DiBiase Salem Realty Trust, 1993 WL 729662, *7 (failure to investigate after becoming aware of dangerous sludge pits was factor in concluding party did not exercise due care), *aff'd*, 45 F.3d 541, 545 (1st Cir. 1995); United States v. A&N Cleaners and Launderers, Inc., 854 F. Supp. 229 (S.D.N.Y. 1994) (dictum) (failing to assess environmental threats after discovery of disposal would be part of due care analysis). Where the government is actively investigating the property, the need for investigation by the landowner may be lessened, but the landowner should be careful not to rely on the fact that the government has been notified of a hazard on her property as a shield to potential liability where she fails to conduct any investigation of a known hazard on her property. Compare New York v. Lashins Arcade Co., 91 F.3d 353, 361 (2nd Cir. 1996) (no obligation to investigate where RI/FS already commissioned) with DiBiase Salem Realty Trust, 1993 WL 729662, *7 (State Department of Environmental Quality knowledge of hazard did not remove owner's obligation to make some assessment of site conditions), *aff'd*, 45 F.3d 541, 545 (1st Cir. 1995).

Performance of EPA Approved Remedy

Q9: If a new purchaser agrees to assume the obligations of a prior owner PRP, as such obligations are defined in an order or consent decree issued or entered into by the prior owner and EPA, will compliance with those obligations satisfy the reasonable steps requirement?

A9: Yes, in most cases compliance with the obligations of an EPA order or consent decree will satisfy the reasonable steps requirement so long as the order or consent decree comprehensively addresses the obligations of the prior owner through completion of the remedy. It should be noted that not all orders or consent decrees identify obligations through completion of the remedy and some have open-ended cleanup obligations.

Attachment C

Sample Federal Superfund Interest Reasonable Steps Letter

The sample comfort/status letter below may be used in the exercise of enforcement discretion where EPA has sufficient information regarding the site to have assessed the hazardous substance contamination and has enough information about the property to make suggestions as to steps necessary to satisfy the "reasonable steps" requirement. In addition, like any comfort/status letter, the letters should be provided in accordance with EPA's "Comfort/Status Letter Policy." That is, they are not necessary or appropriate for purely private real estate transactions. Such letters may be issued when: (1) there is a realistic perception or probability of incurring Superfund liability, (2) such comfort will facilitate the cleanup and redevelopment of a brownfield property, (3) there is no other mechanism to adequately address the party's concerns, and (4) EPA has sufficient information about the property to provide a basis for suggesting reasonable steps.

[Insert Addressee]

Re: **[Insert Name or Description of Property]**

Dear **[insert name of requester]:**

I am writing in response to your letter dated **[insert date]** concerning the property referenced above. As you know, the **[insert name]** property is located within or near the **[insert name of CERCLIS site.]** EPA is currently **[insert description of action EPA is taking or plans to take and any contamination problem.]**

The **[bona fide prospective purchaser, contiguous property owner, or innocent landowner]** provision states that a person meeting the criteria of **[insert section]** is protected from CERCLA liability. **[For bona fide prospective purchaser only, it may be appropriate to insert following language: To the extent EPA's response action increases the fair market value of the property, EPA may have a windfall lien on the property. The windfall lien is limited to the increase in fair market value attributable to EPA's response action, capped by EPA's unrecovered response costs.]** (I am enclosing a copy of the relevant statutory provisions for your reference.) To qualify as a **[bona fide prospective purchaser, contiguous property owner, or section 101(35)(A)(i) innocent landowner]**, a person must (among other requirements) take "reasonable steps" with respect to stopping continuing releases, preventing threatened future releases, and preventing or limiting human, environmental, or natural resources exposure to earlier releases. You have asked what actions you must take, as the **[owner or prospective owner]** of the property, to satisfy the "reasonable steps" criterion.

As noted above, EPA has conducted a **[insert most recent/relevant action to "reasonable steps" inquiry taken by EPA]** at **[insert property name]** and has identified a

number of environmental concerns. Based on the information EPA has evaluated to date, EPA believes that, for an owner of the property, the following would be appropriate reasonable steps with respect to the hazardous substance contamination found at the property:

[insert paragraphs outlining reasonable steps with respect to each environmental concern]

This letter does not provide a release from CERCLA liability, but only provides information with respect to reasonable steps based on the information EPA has available to it. This letter is based on the nature and extent of contamination known to EPA at this time. If additional information regarding the nature and extent of hazardous substance contamination at **[insert property name]** becomes available, additional actions may be necessary to satisfy the reasonable steps criterion. In particular, if new areas of contamination are identified, you should ensure that reasonable steps are undertaken. As the property owner, you should ensure that you are aware of the condition of your property so that you are able to take reasonable steps with respect to any hazardous substance contamination at or on the property.

Please note that the **[bona fide prospective purchaser, contiguous property owner, or innocent landowner]** provision has a number of conditions in addition to those requiring the property owner to take reasonable steps. Taking reasonable steps and many of the other conditions are continuing obligations of the **[bona fide prospective purchaser, contiguous property owner, or section 101(35)(A)(i) innocent landowner]**. You will need to assess whether you satisfy each of the statutory conditions for the **[bona fide prospective purchaser, contiguous property owner, or innocent landowner]** provision and continue to meet the applicable conditions.

EPA hopes this information is useful to you. If you have any questions, or wish to discuss this letter, please feel free to contact **[insert EPA contact and address]**.

Sincerely,

[insert name of EPA contact]

U.S. Environmental Protection Agency

"COMMON ELEMENTS" GUIDANCE

REFERENCE SHEET

INTRODUCTION

This reference sheet highlights the main points made in EPA's March 6, 2003 guidance entitled *"Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for the Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability "Common Elements")*, available at:
http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf

The "Common Elements" are the statutory threshold criteria and ongoing obligations landowners must meet to qualify as a:

- bona fide prospective purchaser,
- contiguous property owner, or
- innocent landowner.

The 2002 Brownfields Amendments to the Superfund law provide conditional CERCLA liability protection to landowners who qualify as bona fide prospective purchasers, contiguous property owners or innocent landowners. For purposes of EPA's "Common Elements" Guidance and this reference sheet, "innocent landowner" refers only to unknowing purchasers as defined in CERCLA § 101(35)(A)(i).

Who are Bona Fide Prospective Purchasers (BFPPs)?

- Persons who meet the CERCLA § 101(40) criteria and the CERCLA § 107(r) criteria.
- Purchasers who buy property after January 11, 2002.
- BFPPs must perform all appropriate inquiry prior to purchase and may buy *knowing, or having reason to know*, of contamination on the property.

Who are Contiguous Property Owners (CPOs)?

- Persons who meet the CERCLA § 107(q)(1)(A) criteria.
- Owners of property that is *not* the source of the contamination. Such property is "contiguous" to, or otherwise similarly situated to, a facility that is the source of contamination found on their property.
- CPOs must perform all appropriate inquiry prior to purchase and buy *without*

knowing, or having reason to know, of contamination on the property.

Who are Innocent Landowners (ILOs)?

- Persons who meet the CERCLA § 107(b)(3) criteria (including due care) and the CERCLA § 101(35) criteria.
- ILO's must perform all appropriate inquiry prior to purchase and must buy *without knowing, or having reason to know*, of contamination on the property.

THE COMMON ELEMENTS

A person asserting BFPP, CPO or ILO status has to prove that it meets the applicable criteria.

THRESHOLD CRITERIA

To qualify as a BFPP, CPO, or ILO, a person must perform "all appropriate inquiry" before buying the property.

BFPPs and CPOs must *also* demonstrate that they are not potentially liable nor "affiliated" with any other person who is potentially liable for response costs at the property.

All Appropriate Inquiry

BFPPs, CPOs, and ILOs must perform "all appropriate inquiry" into the previous ownership and uses of property before buying the property.

Common Elements of the Brownfields Amendments Landowner Provisions

Threshold Criteria:
- all appropriate inquiry
- no affiliation with a liable party

Continuing Obligations:
- compliance with land use restrictions and institutional controls
- taking reasonable steps with respect to hazardous substances on property
- cooperation, assistance and access
- compliance with information requests and administrative subpoenas
- providing legally required notices

BFPPs may buy property with knowledge of contamination and maintain their protection from liability. The CPO and ILO liability protections, in contrast, do *not* apply if the purchaser knew, or had reason to know, of contamination prior to purchase.

EPA will publish regulations and guidance on the all appropriate inquiry standard in the future. For property purchased before May 1997, statutory factors are to be applied. CERCLA § 101(35)(B)(iv)(I). For property purchased after May 1997 and until EPA promulgates a regulation establishing the all appropriate inquiry standard, an ASTM Phase I report may satisfy the standard. CERCLA § 101(35)(B)(iv)(II). EPA is to promulgate a regulation establishing the all appropriate inquiry standard by 2004. CERCLA § 101(35)(B)(ii), (iii).

Affiliation
BFPPs or CPOs must not be potentially liable or affiliated with any other person who is potentially liable for the site response costs. "Affiliated with" includes direct and indirect familial relationships and many contractual, corporate, and financial relationships.

ILOs cannot have a contractual relationship with a liable party.

CONTINUING OBLIGATIONS CRITERIA

To maintain liability protection, landowners must meet the following continuing obligations during their property ownership.

Compliance with Land Use Restrictions and Institutional Controls
BFPPs, CPOs and ILO's must:

- be in compliance with any land use restrictions established or relied on in connection with the response action;
- not impede the effectiveness or integrity of any institutional control employed in connection with a response action.

EPA believes the Brownfields Amendments require BFPPs, CPOs and ILOs to:

- comply with land use restrictions and implement institutional controls even if the restrictions/controls were not in place at the time of purchase; and
- comply with land use restrictions relied on in connection with the response action even if restrictions haven't been implemented through an enforceable institutional control.

Reasonable Steps
BFPPs, CPOs and ILO's are required to take reasonable steps to:

- Stop continuing releases;
- Prevent threatened future releases; and
- Prevent or limit human, environmental, or natural resource exposure to earlier hazardous substance releases.

The reasonable steps requirement balances Congress' objectives of protecting certain landowners from CERCLA liability, and protecting human health and the environment.

As a general matter, EPA does not believe Congress intended BFPPs, CPOs and ILOs to have the same types of response obligations that CERCLA liable parties have (e.g., removal of contaminated soil, extraction and treatment of contaminated groundwater). The required reasonable steps relate only to responding to contamination for which the BFPP, CPO, or ILO is

not responsible. Activities on the property after purchase resulting in *new contamination* can give rise to full CERCLA liability. *See* Attachment B to EPA's guidance for more on reasonable steps in a "question and answer" format.

EPA may provide a comfort/status letter suggesting reasonable steps at a specific site. EPA intends to limit these letters to sites where EPA has sufficient information to form a basis for suggesting reasonable steps (e.g., the site is on the National Priorities List or EPA has conducted or is conducting a removal action on the site). Providing such a letter is a matter of Regional discretion. *See* Attachment C to EPA's guidance for a sample "reasonable steps" comfort/status letter.

Cooperation, Assistance, and Access

BFPPs, CPOs and ILOs must provide full cooperation, assistance, and access to persons authorized to conduct response actions or natural resource restoration, including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action or natural resource restoration.

Compliance with Information Requests and Administrative Subpoenas

BFPPs and CPOs must comply with CERCLA information requests and administrative subpoenas.

Provision of Legally Required Notices

BFPPs and CPOs must provide legally required notices related to the discovery or release of hazardous substances at the facility.

"Legally required notices" may include those required under federal, state, and local laws. Examples of federal notice requirements include: CERCLA § 103 (notification requirements regarding released substances); EPCRA § 304 ("emergency notification"); and RCRA § 9002 (underground storage tanks notification provisions).

Summary: Common Element among the Brownfields Amendments Landowner Provisions	**Bona Fide Prospective Purchaser**	**Contiguous Property Owner**	**Section 101 (35)(A)(i) Innocent Landowner**
All appropriate inquiry			
No affiliation demonstration			
Compliance with land use restrictions and institutional controls			
Taking reasonable steps			
Cooperation, assistance, access			
Compliance with information requests and administrative subpoenas			
Providing legally required notices			

Although the innocent landowner provision does not contain this "affiliation" language, in order to meet the statutory criteria of the innocent landowner liability protection, a person must establish by a preponderance of the evidence that the act or omission that caused the release or threat of release of hazardous substances and the resulting damages were caused by a third party with whom the person does not have an employment, agency, or contractual relationship. CERCLA § 107(b)(3). Contractual relationship is defined in section 101(35)(A).

Compliance with information requests and administrative subpoenas is not specified as a statutory criterion for achieving and maintaining the section 101(35)(A)(i) innocent landowner liability protection. However, CERCLA requires compliance with administrative subpoenas from all persons, and timely, accurate, and complete responses from all recipients of EPA information requests.

Provision of legally required notices is not specified as a statutory criterion for achieving and maintaining the section 101(35)(A)(i) innocent landowner liability protection. These landowners may, however, have independent notice obligations under federal, state and local laws.

QUESTIONS

Questions regarding this reference sheet or EPA's Common Elements Guidance should be directed to Cate Tierney in OSRE's Regional Support Division (202-564-4254, Tierney.Cate@EPA.gov), Greg Madden in OSRE's Policy & Program Evaluation Division (202-564-4229, Madden.Gregory@EPA.gov) or to the Landowner Liability Protection Subgroup contacts listed by Region below.

Landowner Liability Protection Subgroup Regional Contacts

Region 1:	Joanna Jerison	617-918-1781
Region 2:	Michael Mintzer	212-637-3168
	Paul Simon	212-637-3152
Region 3:	Joe Donovan	215-814-2483
	Leo Mullin	215-814-3172
	Heather Gray Torres	215-814-2696
Region 4:	Kathleen Wright	404-562-9574
Region 5:	Peter Felitti	312-886-5114
	Thomas Krueger	312-886-0562
	Larry Kyte	312-886-4245
Region 6:	Mark Peycke	214-665-2135
Region 7:	Denise Roberts	913-551-7559
Region 8:	Suzanne Bohan	303-312-6925
	Matthew Cohn	303-312-6853
	Nancy Mangone	303-312-6903
Region 9:	Bill Keener	415-972-3940
Region 10:	Cyndy Mackey	206-553-2569

This reference sheet is intended for employees of EPA and the Department of Justice and it creates no substantive rights for any persons. It is not a regulation and does not impose legal obligations. This reference sheet provides some highlights of EPA's "Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for the Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability" ("Common Elements"). It is not intended as a substitute for reading the statute or the guidance itself.

Sanchez.Carlos@epamail.epa.gov November 25, 2011 7:38 AM
To: "grish.org" <curt@grish.org>
Cc: Williams.Donald@epamail.epa.gov, Ghose.Shawn@epamail.epa.gov
Re: formal request

1 Attachment, 318 KB

Curt,
This letter is all we need to start the process to partially delete the Arkwood site from the National Priorities List (Superfund). We will keep you inform and provide update as the process moves forward. The first step involves EPA sending a letter to ADEQ requesting their approval to delete the site. CAS

Carlos A. Sanchez
Chief, AR/TX Section
Region 6, Superfund Division (6SF-RA)
sanchez.carlos@epa.gov
(214) 665-8507

From: "grish.org" <curt@grish.org>
To: Carlos Sanchez/R6/USEPA/US@EPA
Cc: "grish.org" <curt@grish.org>
Date: 11/23/2011 03:37 PM
Subject: formal request

Hi Carlos,

Here's a scan of the letter I'm putting in the mail to you today.

Please let me know if this letter in not complete for the purpose or if you need anything else to get the ball rolling.

If you wouldn't mind, please acknowledge receipt of the formal letter once you have received it via USPS.

Thank you and Happy Thanksgiving.

Curt

Carlos A. Sanchez
Chief, AR/TX Section
Region 6, Superfund Division (6SF-RA)
United States Environmental Protection Agency
1445 Ross Avenue
Dallas TX 75202-2733

RE: ARKWOOD, INC. SUPERFUND SITE
EPA ID: ARD084930148
Site ID: 0600124

Dear Mr. Sanchez,

I write as an interested party to request that the Arkwood, Inc. Superfund Site in Boone County, Arkansas (referenced above) be considered for partial deletion from the

County, Arkansas (referenced above) be considered for partial deletion from the Environmental Protection Agency's National Priorities List for Superfund sites.

The *Third Five-Year Review Report* prepared by Region 6 of the Environmental Protection Agency for the Arkwood, Inc. Superfund Site (dated July 2011) states in the *Executive Summary*:

> This is the third Five-Year Review for the Arkwood, Inc., site located in Boone County in Omaha, Arkansas. The results of this Five-Year Review indicate that the remedy is protective of human health and the environment. Soil remediation was completed in 1995 followed by placement of a topsoil cap and seeding. The vegetation is in good condition. The ground water treatment system, located immediately downgradient of the mouth of New Cricket Spring, is functioning as designed and is meeting treatment goals. Therefore, the remedy that was implemented for soil and ground water at the site continues to be protective of human health and the environment.

Based upon the information contained in the *Third Five-Year Review Report* for the Arkwood, Inc. Superfund Site, as well as upon information contained in other official documentation regarding this site, I hereby formally request that the Environmental Protection Agency take action to partially delete the Arkwood, Inc. Superfund Site from the National Priorities List and to act with all possible expeditiousness in doing so.

Sincerely,

Charles Curtis Grisham, Jr.
P.O. Box 31546
San Francisco, CA 94131

Dues

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS

UNITED STATES OF AMERICA, Plaintiff, v. HALLIE C. ORMOND, C.C. GRISHAM and MARY F. BURKE, Defendants.	)	CIVIL ACTION NO. 87-3034

****

CONSENT DECREE

Plaintiff, United States of America, on behalf of the Administrator of the United States Environmental Protection Agency (EPA), has filed a Complaint herein on April 28, 1987, 1987, which was amended to include Mary F. Burke on June 3, 1987. The Complaint and Amended Complaint allege that the defendants Hallie C. Ormond, C.C. Grisham and Mary F. Burke (defendants), have failed to provide access to property owned by defendant Burke and formerly owned by defendant Ormond, to the authorized representative of EPA for the purposes of completing a work plan for a Remedial Investigation/Feasibility Study (RI/FS). The Complaints seek access to the Site pursuant to Sections 104(e) and 106 of the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. §§ 9604(e) and 9606 (as amended) (CERCLA). The parties to this suit have consented to the entry of this Decree without trial of any issue, law or fact, and the parties hereby stipulate to this Court that in order to resolve the issues this Consent Decree should be entered.

695115

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED and DECREED as follows:

I. Jurisdiction

A. This Court has jurisdiction over the subject matter of this action and over the parties pursuant to Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), and 28 U.S.C. §§ 1345 and 1355.

II. Background

A. Defendant Mary F. Burke (Burke), is the owner of the real property comprising the site where the Arkwood Wood Treating Facility was located. For the purposes of this Consent Decree "the Arkwood Site" or "the Site" shall mean and refer to the land described and depicted in Exhibit A attached hereto. Defendant Hallie C. Ormond (Ormond) was the former owner of the Arkwood Site and defendant C.C. Grisham (Grisham) and Arkwood, Inc., owned and operated a wood treating facility located on the Arkwood Site.

B. Arkwood, Inc., was a pentachlorophenol (PCP) and creosote wood treating company and its stockholders and officers included Ormond during part and Grisham during all of its existence. Arkwood Inc., operated the wood treating facility from approximately 1965 until 1973. In 1973, Mass Merchandisers, Inc. (MMI), leased the Site from Ormond, and acquired and operated the wood treating facility at the Arkwood Site until December 31, 1984. Sampling and studies at the Site indicate that during the operation of facility, the Site became contaminated with PCP,

creosote, and wood treating oils and/or the derivatives of PCP, creosote, and wood treating oils.

III. Binding Effect

This Decree shall apply to and be binding on the above named parties and upon their agents, trustees, servants, employees, successors, heirs and assigns. The undersigned representatives of the plaintiff and the defendants certify that they are fully authorized to enter into the terms and conditions of this Decree and to execute and legally bind the parties.

IV. Definitions

The terms as used in this Consent Decree, to the extent applicable, are defined in Section 101 of CERCLA, 42 U.S.C. § 9601.

V. Site Access

A. The defendants shall permit the EPA or any authorized representatives of the EPA, including any contractors, subcontractors and consultants, upon proper identification, to enter, inspect, and conduct activities at the Site for the purposes of completing the RI/FS work plan, conducting the RI/FS and thereafter for the purposes of implementing, operating, maintaining or overseeing any response action at the Site as may be required.

B. Nothing in this paragraph is intended to limit in any manner the right of entry or inspection that the United States and the State of Arkansas, their agencies or departments may otherwise have by operation of any law.

C. No conveyance of title, easement or other interest in the property comprising the Arkwood site shall be made without a provision allowing for the access to the Site by EPA or its authorized representative and its contractors and subcontractors to conduct any response activity at the Site as specified above. All such conveyances of title, grants of easements or other conveyances of any interest in the Arkwood site shall contain a covenant to allow for such response work, to grant EPA or its authorized representatives including its contractors and subcontractors access to perform such work and to grant EPA and the State or any authorized representative thereof access to oversee and monitor such work.

D. At least sixty days prior to any voluntary conveyance of title, easement or other interest in the property comprising the Arkwood Site, defendant Burke shall notify the EPA, Region VI, at the address listed in subparagraph F of this Paragraph, by registered mail of her intent to convey any interest in the property, and of the provisions made allowing for the continued access to and operation of facilities installed pursuant to the RI/FS or a subsequent remedial action plan. The restrictions and obligations set forth herein shall run with the land and shall be binding upon any and all parties who acquire any interest in the Arkwood site.

E. The defendants shall not perform any response action at the Site without the express written approval of the EPA, Region VI. In addition, the defendants and their successors

and assigns shall not use any portion of the Site in any manner that would adversely affect the implementation of the RI/FS or subsequent response action at the site by the EPA, its authorized representative, or its contractors and consultants.

F. Within ten days of the effective date of this Consent Decree, defendant Burke shall record in the appropriate Registry of Deeds a copy of this Consent Decree as notice to third parties of this agreement. A copy of said recording shall be sent to CERCLA Enforcement Branch Chief, Arkwood Site, Environmental Protection Agency, Region VI, 1445 Ross Ave., Dallas, Texas 75202.

VI. Relief from Liability

This Consent Decree shall not be construed in any manner to relieve the defendants of any liability under Section 106 and 107 of CERCLA, Section 7003 of RCRA or any other State or Federal statute or regulation for contamination of the Arkwood site. The United States specifically reserves the right to seek other remedies or sanctions available to it under CERCLA. The defendants shall not be responsible for completing the RI/FS for the Site so long as the RI/FS is fully completed by MMI pursuant to its Administrative Order on Consent, Docket No. VI-6-86.

VII. Retention of Jurisdiction

The Court shall retain jurisdiction over this Consent Decree to ensure compliance with the provisions set forth in Paragraph V., and to award penalties in the event of non-compliance with this Consent Decree, until such time as the EPA

determines that the site requires no further response action. The plaintiff agrees to waive all penalties against the defendants for the violations of CERCLA as alleged in its Complaint which occurred prior to the date of filing of this Consent Decree.

THE PARTIES HEREBY ENTER INTO THIS CONSENT DECREE AND SUBMIT IT TO THIS COURT.

This Consent Decree approved and entered on this 11th day of July, 1988.

UNITED STATES DISTRICT COURT JUDGE

ROGER J. MARZULLA
Assistant Attorney General
Land and Natural Resources Division
U.S. Department of Justice

CRAIG E. JOHNSON
Trial Attorney
Environmental Enforcement Section
U.S. Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044

U. S. DISTRICT COURT
WESTERN DIST. ARKANSAS
FILED

JUL 12 1988

CHRIS R. JOHNSON, CLERK
By Nancy Watson
Deputy Clerk

This document entered on docket in compliance with Rule 58 and 79 (a), FRCP, on 7-12-88 by N. Watson

Steven L. Leifer by DHK

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ATTORNEYS FOR PLAINTIFF
UNITED STATES OF AMERICA

William F. Doshier

WILLIAM F. DOSHIER
Doshier & Bowers
P. O. Box 1797
Harrison, Arkansas 72601

EXHIBIT "A"

Part of the Northeast Quarter of the Southwest Quarter and part of the South Half of the Northwest Quarter and part of the Northwest Quarter of the Southeast Quarter of Section 27, Township 21 North, Range 21 West, Boone County, Arkansas, more particularly described to-wit: Commencing at a stone marking the Southeast corner of the Northeast Quarter of the Southwest Quarter of Said Section 27, thence North 86° 02' 53" West 946.17 feet, thence North 01° 28' 49" East 970.62 feet to the place of beginning said point being located on northerly right-of-way of county road, thence with said northerly right-of-way North 31° 53' 10" West 492.77 feet, thence North 33° 15' 00" West 345.29 feet, thence North 29° 35' 17" West 345.49 feet, thence North 34° 06' 52" West 118.66 feet, thence North 39° 10' 31" West 92.00 feet, thence North 43° 16' 58" West 107.38 feet, thence leaving said northerly right-of-way North 42° 42' 38" East 2.83 feet to the southerly right-of-way of Missouri Pacific Railroad, thence with said southerly right-of-way South 47° 17' 22" East 49.77 feet, thence South 48° 16' 00" East 318.53 feet, thence South 48° 19' 25" East 602.13 feet, thence South 49° 01' 52" East 95.36 feet, thence South 50° 04' 43" East 99.37 feet, thence South 51° 43' 07" East 98.58 feet, thence South 53° 45' 52" East 100.98 feet, thence South 55° 55' 22" East 103.00 feet, thence South 57° 46' 36" East 12.20 feet, thence South 32° 13' 24" West 135.00 feet, thence South 57° 46' 36" East 245.44 feet, thence North 32° 13' 24" East 106.15 feet to the North line of a deed dated February 22, 1961, and recorded in Deed Book 85, Pages 164-165 in the Circuit Clerk and Ex-officio Recorder Office in and for Boone County, Arkansas, thence along said North line South 56° 29' 35" East 1004.34 feet, thence leaving said North line South 23° 30' 25" West 154.07 feet to the approximate toe of slope of hill side, thence with said approximate toe of slope South 48° 18' 45" West 47.44 feet, thence South 80° 10' 42" West 100.89 feet, thence North 76° 14' 40" West 132.91 feet, thence North 68° 01' 53" West 282.88 feet, thence North 52° 56' 23" West 164.49 feet, thence North 63° 51' 10" West 200.07 feet, thence South 29° 26' 53" West 116.89 feet, thence South 03° 41' 49" West 144.76 feet to the northerly right-of-way of County Road, thence leaving said approximate toe of slope and following said northerly right-of-way of County Road North 46° 17' 18" West 70.92 feet, thence North 41° 56' 22" West 86.18 feet, thence North 36° 55' 21" West 86.29 feet, thence North 33° 04' 49" West 111.09 feet, thence North 31° 53' 10" West 289.85 feet to the place of beginning and containing 18.076 acres more or less and subject to existing easements and right-of-ways.

Filed for Record 5th Day of Aug. 19 88 at 3:35 o'clock P.M.
Helen Speer, Clerk
By: Blaine Adams, D.C.

EPA 540-R-98-016
OSWER Directive 9320.2-09A-P
PB98-963223
January 2000

Close Out Procedures for National Priorities List Sites

Office of Emergency and Remedial Response
U.S. Environmental Protection Agency

Washington, D.C. 20460

ABSTRACT

This guidance document describes the key principles and expectations, interspersed with "best practices" based on program experience, that should be consulted at the time to Close Out Superfund's National Priorities List Sites. The Close Out Procedures for National Priorities List Sites are organized into five principal areas: Remedial Action Completion, Construction Completion, Site Completion, Site Deletion and Partial Deletion. The purpose of the guidance is to briefly summarize key elements of the various close out options for actions at sites. EPA believes that consistent application of national policy and guidance is an important means by which we ensure reasonableness, predictability, and consistency in our decisions.

TO OBTAIN DOCUMENT

EPA employees can obtain additional copies of this guidance, or copies of documents referenced in the guidance, by calling the Superfund Document Center at 703-603-9232, or by sending an e-mail request to superfund.documentcenter@epa.gov. Non-EPA employees can obtain these documents by contacting the National Technical Information Service at 703-605-6000.

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1.0 INTRODUCTION

This guidance document is designed primarily for U.S. Environmental Protection Agency's (EPA's) Remedial Project Managers (RPMs). It describes the process for accomplishing remedial action completion, construction completion, site completion, and site deletion. The guidance applies only to those sites that are or were final on the National Priorities List (NPL). It supersedes the following documents:

- Office of Solid Waste and Emergency Response (OSWER) Directive 9320.2-3A, "Procedures for Completion and Deletion of National Priorities List Sites," April 1989,
- OSWER Directive 9320.2-3B, "Update to the Procedures for Completion and Deletion of National Priorities List Sites," Guidance Document Regarding the Performance of Five-Year Reviews," December 29, 1989,
- OERR Fact Sheet, "Remedial Action Report," June 1992,
- OSWER Directive 9320.2-3C, "Update No. 2 to Procedures for Completion and Deletion of NPL Sites," February 19, 1992,
- OSWER memorandum, "Documentation of Close Out Requirements at Sites Where There is a No Action Record of Decision," February 2, 1993,
- "Superfund Completion Care Package," 2nd Edition, May 1993,
- OSWER Directive 9320.2-06, "NPL Construction Completion Definition at Bioremediation and Soil Vapor Extraction Sites," June 21, 1993, and
- OSWER Directive 9320.2-09, "Close Out Procedures for National Priorities List Sites," August 1995.

1.1 Background

Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), requires EPA to maintain an NPL of uncontrolled hazardous waste sites that have released or pose a threat of release of hazardous substances into the environment. Pursuant to the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) (40 Code of Federal Regulations [CFR Part 300), sites on the NPL are eligible for Superfund-financed remedial actions (RAs).

Superfund addresses NPL sites through a combination of removal and remedial authority. Cleanup activities under removal authority achieve prompt risk reduction through emergency, time-critical, and non time-critical actions. In general, cleanup actions under removal authority are documented with an Action Memorandum or an Engineering Evaluation / Cost Assessment.

Cleanup activities under remedial authority are called remedial actions. A remedial investigation / feasibility study (RI/FS) at an NPL site determines the nature and extent of contamination, and identifies alternatives for the remedy. The Record of Decision (ROD) documents the remedial activities selected to achieve protectiveness. (For pre-SARA sites, detailed remedial activities sometimes may be described in other EPA reports such as a consent decree or an administrative order). Remedial actions (RAs) are intended to protect human health and the environment, and they may include any combination of treatment, containment, or removal of contaminated material, providing alternate water supplies, and imposing institutional controls that address site use.

1.2 Contents of the Guidance

A Superfund site may require several RAs to address all the site hazards. The process for Remedial Action completion is described in Chapter 2 of this guidance.

Once physical construction is complete at the entire site (through removal or remedial authority), the site achieves the **construction completion** milestone. EPA introduced the **construction completion** milestone to better communicate the successful completion of site construction activities. **Construction completion** marks the end of an important phase in the Superfund completion process. EPA Headquarters monitors and reports site progress toward the **construction completion** milestone. The process for **construction completion** is described in Chapter 3.

Site completion occurs when no further response is required at the site, **all cleanup goals have been**

achieved, and the site is deemed protective of human health and the environment. Once **site completion** is achieved, the site becomes a candidate for NPL deletion. Chapter 4 covers the site completion milestone.

When no further response is required at a site or a portion of the site, all cleanup goals have been achieved, and the site or portion of the site is deemed protective of human health and the environment, the site is eligible for **full or partial deletion** from the NPL. This stage, as dictated by the NCP, is known as site deletion. Essentially, this process entails documenting the response activities for the site, verifying and documenting that activities have been conducted and that the site is protective of human health and the environment, obtaining State concurrence, and offering the public an opportunity for notice and comment before the site is formally deleted from the NPL. The process is further described in Chapters 5 and 6.

This guidance provides detailed information on achieving the various milestones of the NPL site close out process, highlighting specific activities and the related reports that indicate each activity's completion. Appendices A through I provide examples of the reports discussed. Appendices J and K are reference materials to be used with this guidance.

OSWER Directive No. 9200.4-22A, "CERCLA Coordination With Natural Resource Trustees" dated July 31, 1997, requires that Trustees listed in the Regional Contingency Plans be notified of the completion of construction at each operable unit. The guidance also indicates that EPA will seek to consult with Trustees prior to deleting a site from the NPL. In response to the requirements of the "CERCLA Coordination With Natural Resource Trustees" guidance, appropriate language has been added to this document addressing the notification requirements.

This guidance replaces OSWER Directive 9320.2-09, "Close Out Procedures for National Priorities List Sites," August 1995. The effective date of this guidance is January 1, 2000.

1.3 Remedial Project Manager Role

The RPM has lead responsibility for ensuring the successful completion of cleanup activities at an NPL site and for guiding a site through each successive phase of the Superfund process. This guidance document emphasizes the role of the RPM during the final stages of site remediation. The RPM is responsible for applying EPA's criteria to a site to determine its eligibility for achieving each milestone. The RPM ensures that all statutory, regulatory, and policy requirements are met, both technically and procedurally. Each milestone is documented by a specific report. The RPM should carefully document all site activities for related reporting needs.

2.0 REMEDIAL ACTION COMPLETION

2.1 Introduction

This chapter describes the procedures for achieving Remedial Action (RA) Completion at an Operable Unit (OU), or portion, of a National Priorities List (NPL) site. Remedial actions can only be funded at sites that are final on the NPL. A RA is the implementation of the remedy selected in the Record of Decision (ROD). Typically, the ROD identifies an OU of the overall site cleanup plan.

During the remedial design (RD) and RA stages, an OU can be broken into phases to accelerate implementation of the OU. These phases enable adjustment of the internal steps required to complete each OU. Each phase becomes a separate RA sequence under the OU. For purposes of this chapter, the discussion will assume that each OU has one RA and, hence, one RA Completion. If the Region chooses to phase OU implementation, then there is a separate RA Completion for each phase of the OU.

2.2 Remedial Action (RA) Completion Definition

RA Completion for an OU is achieved when the designated Regional official (Branch Chief or above, as determined by the EPA Region) approves in writing the Interim or Final RA Report.

The submission and type (Interim or Final) of RA Report prepared varies depending on the type of remedy that was implemented. Exhibit 2-1 provides examples of RAs and indicates when RA Completion can be achieved.

EXHIBIT 2-1, Remedial Action Completion Examples

Example RA	RA is Complete
Excavation and off-site disposal of contamination.	After all wastes have been excavated, removed from the site to an approved location, site has been restored, cleanup goals have been achieved, and the Final RA Report is approved.
On-site treatment of wastes, other than ground water or surface water, to achieve cleanup goals (e.g., soil vapor extraction, bioremediation, incineration).	After cleanup goals have been achieved for the treated wastes, site has been restored, and the Final RA Report is approved.
Containment remedies.	After construction of the designed remedy is complete, cleanup goals have been achieved, and the Final RA Report is approved.
Ground water and surface water restoration remedies that involve active treatment to reduce contaminant concentrations to meet cleanup goals.	After construction of the treatment plant and monitoring system are completed, the plant / system is operating as intended (also called operational and functional, O&F), and the Interim RA Report is approved. (The Final RA Report is prepared when cleanup goals are achieved.)
Ground water and surface water restoration remedies that involve monitored natural attenuation to reduce contaminant concentrations to meet cleanup goals.	After the ROD is signed, any necessary RA is conducted, and the Interim RA Report is approved. (The Final RA Report is prepared when cleanup goals are achieved.)

Example RA	RA is Complete
Ground water and surface water restoration remedies where restoration is later determined to be technically impracticable (TI waiver).	RA completion has already been documented by an Interim RA Report, as above; however, the Region must later prepare a ROD Amendment to document the TI waiver.

2.2.1 Interim RA Report

The Interim RA Report for a given OU is used **only** for RAs that include ground- or surface-water restoration remedies, including monitored natural attenuation. Interim reports are used because of the long delay between construction of the treatment facility (or ROD signature for monitored natural attenuation) and achievement of cleanup goals. Criteria for EPA approval of the Interim RA Report are:

- The remedy includes ground water or surface water restoration, with active treatment or monitored natural attenuation, to reduce contaminant concentrations to meet cleanup goals (and cleanup goals have not been achieved);
- For active treatment, the construction of the treatment system is completed, and the system is operating as intended (operational & functional);
- For monitored natural attenuation, any necessary RA, such as monitoring wells, has been constructed;
- If the OU includes remedy components other than ground water, construction activities are complete and cleanup goals specified in the ROD have been achieved for these components;
- A contract final inspection or equivalent has been conducted; and
- The Interim RA Report contains the information described in Exhibit 2-3.

2.2.2 Final RA Report

Criteria for approval of the Final RA Report for a given OU are:

- All construction activities are complete, including site restoration and demobilization;
- All cleanup goals specified in the ROD have been achieved, including those for ground- and surface water restoration, if applicable;
- If containment, the remedy is operating as intended (operational & functional)
- A contract final inspection or equivalent has been conducted; and
- The Final RA Report contains the information described in Exhibit 2-3.

Note: When an Interim RA Report has already been prepared, the Interim RA report can simply be amended to create the Final RA Report. The amendment would add information on activities that occurred after the Interim RA Report was completed.

2.3 Relationship of RA Completion to Other Actions

This section describes other actions in the remedial pipeline that relate to RA Completion. Much of the language that follows comes from OSWER Publication 9200.3-141E, "Superfund / Oil Program Implementation Manual, Fiscal Year 99/00," (SPIM) and the National Contingency Plan (NCP). At the end of the section, the Response Actions are shown graphically in Exhibit 2-2.

2.3.1 Operational & Functional (O&F)

O&F activities are conducted after physical construction of the remedy is complete to ensure that it is functioning properly and operating as designed. O&F determinations are made for containment remedies (all media), ground water restoration, and surface water restoration, but not for monitored natural attenuation. The phase following construction of the remedy and before O&F is often referred to as shakedown, where the constructor makes minor modifications as necessary to ensure the remedy is operating as designed.

Formal O&F determinations are primarily made for Fund-financed projects because O&F governs when the Regions turn these projects over to the States for operation and maintenance. The term O&F is also sometimes applied to Potential Responsible Party (PRP) lead projects to signify the end of the

shakedown period. For Federal Facilities (FF) lead projects, a different determination, Operating Properly and Successfully, is made.

O&F Determination: A remedy becomes O&F either one year after construction is complete, or when the remedy is determined concurrently by EPA and the State to be functioning properly and is performing as designed, whichever is earlier. EPA may grant extensions to the one-year period in writing, as appropriate. At a minimum, the attainment of O&F is documented in the Interim or Final RA Report. It may also be documented by letter to the interested parties.

2.3.2 Long-Term Response Action (LTRA and PRP LR)

LTRA is defined as the Fund-financed operation of ground water and surface water restoration measures, including monitored natural attenuation, for the first ten years of operation. The Fund continues to pay 90 percent of the cost during this period, and the State funds the entire operation after ten years.

Regions have sometimes used the term LTRA inexactly to describe PRP-conducted ground water and surface water restoration measures, including monitored natural attenuation. PRP actions are covered by a separate action, PRP LR, where LR refers to Long-Term Response. Since PRP-lead PRP LR is a specific type of O&M, the ten-year time frame is not applicable.

The Federal Facilities program does not use LTRA or PRP LR. Their ground water and surface water restoration measures go from RA completion directly to O&M.

LTRA and PRP LR do not apply to ground water or surface water containment measures, ground water monitoring, ground water or surface water measures initiated for the primary purpose of providing a drinking water supply, bioremediation, or soil vapor extraction.

LTRA or PRP LR Start: LTRA or PRP LR begins on the date the designated Regional Official (Branch Chief or above) approves the Interim RA Report.

Fund-Financed LTRA Completion: LTRA is complete when cleanup goals are achieved, as documented in a Final RA Report, when a technical impracticability determination is made, or after ten years, whichever is earlier. LTRA transitions to O&M if cleanup goals have not been achieved within the ten-year period.

PRP LR Completion: PRP LR is complete when cleanup goals are achieved, as documented in a Final RA Report, or when a technical impracticability determination is made, whichever is earlier.

2.3.3 Operation and Maintenance (O&M)

O&M are the activities required to maintain the effectiveness and integrity of the remedy, and, in the case of Fund-financed measures to restore ground- or surface-waters, continued operation of such measures beyond the LTRA period until cleanup goals are achieved.

PRP-conducted groundwater and surface water restoration measures, including monitored natural attenuation, are technically defined as O&M. However, regions may use the action, PRP LR, to indicate that these activities are being performed at the site.

O&M Start: O&M starts when the RA is complete and the State or PRPs assume responsibility for all activities necessary to operate and/or maintain the long-term effectiveness or integrity of the actions selected in the ROD. This is the date the designated Regional official accepts the Final RA Report.

In the case of an LTRA that goes the full ten years without achieving cleanup goals, O&M starts upon LTRA completion.

For Federal Facility-lead ground water and surface water restorations, including monitored natural attenuation, O&M starts on the date the designated Regional Official approves the Interim RA Report.

O&M Completion: O&M completion may be indefinite, as in the case of a landfill cap, or completion may be accomplished when cleanup goals are achieved for ground water and surface water restoration. Where appropriate, the completion of O&M is defined as the date the performance

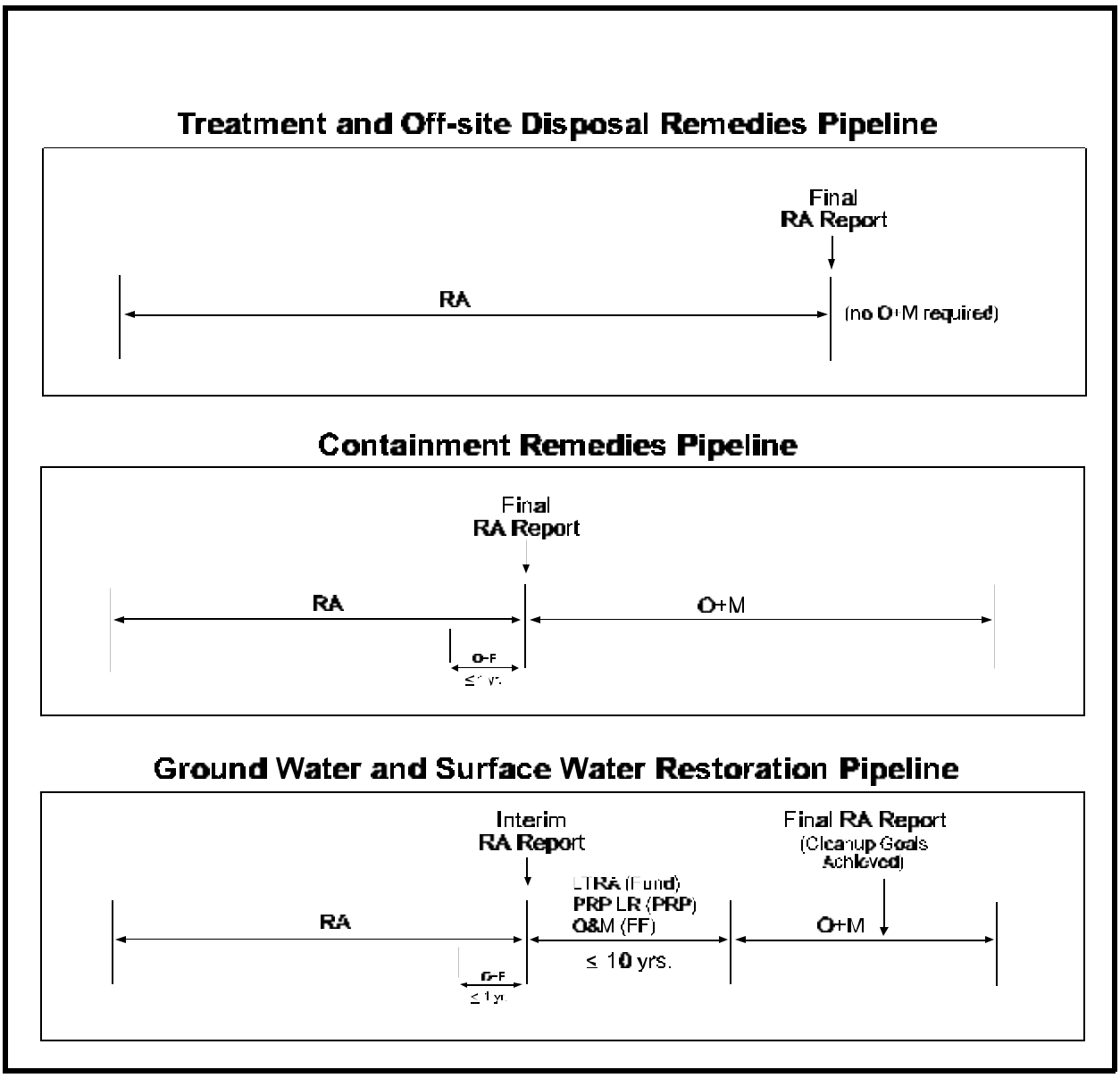
standards or conditions specified in the Cooperative Agreement that provides funds for the RA; Superfund State Contract; or CD is signed by EPA, the PRPs and Federal judge have been met with respect to O&M.

2.3.4 Cleanup Goals Achieved

Cleanup Goals Achieved is used for ground water and surface water restoration, including monitored natural attenuation remedies. These remedies have not yet achieved cleanup goals when RA is completed and the Interim RA Report is signed.

Cleanup Goals Achieved: Cleanup goals are achieved on the date the designated Regional Official approves in writing the Final RA Report. This report should update information previously provided in the Interim RA Report.

EXHIBIT 2-2, End-of-the-Pipeline Examples



2.4 Inspection Requirements for RA Completion

With any RA construction contract, regardless of lead or contracting party, normal construction industry practice is to conduct contract pre-final and final inspections prior to closing out the construction contract. These inspections are conducted to determine whether the construction has been completed in accordance with the contract design and specifications. The inspections are generally held
between the contracting party and the construction contractor, although others can be invited.

During the contract pre-final inspection, the contracting party's project manager and the construction contractor inspect all elements of work to see if the work is complete and ready for acceptance under the terms of the contract. Some minor defects may come to light as the inspection proceeds. The construction manager develops a "punch list" of all items that need correction or completion before the work can be accepted. A pre-final inspection report is prepared, including the punch list, completion dates for outstanding items, and a date for a final inspection.

If punch list items are minor, the pre-final inspection may automatically serve as the final inspection. Otherwise, a final inspection is conducted later to determine that punch list items are corrected and all work has been completed in accordance with the contract plans and specifications.

> The National Contingency Plan, Model Consent Decree, and Federal Facility Agreements may require other RA completion inspections. These inspections may be held concurrently with or separately from the contract pre-final and final inspection described above.

2.4.1 Fund-lead RA Completion Inspections

The NCP requires an additional inspection at Fund lead sites requiring operation and maintenance. An inspection is conducted jointly by EPA and the State at the end of all construction activities for that RA. If convenient, it can be conducted in conjunction with the contract pre-final or final inspection. After the inspection, EPA may share in the cost of operating the RA for up to one year to ensure that the remedy is O&F. See section 2.3.1.

2.4.2 Responsible Party-lead RA Completion Inspections

The Model RD / RA Consent Decree of July 1995 requires a pre-certification inspection upon completion of the RA. This inspection normally involves the Settling Defendants (PRPs), EPA, and the State. The purpose of this inspection is to determine if the RA has been fully performed in accordance with the terms of the Consent Decree.

After the pre-certification inspection, the Settling Defendants are also required to submit a written report to EPA for approval stating that the RA has been completed in full satisfaction of the requirements of the Consent Decree. This report, if it contains the proper information, can serve as the Final RA Report for the OU. For ground water and surface water restoration remedies, where an Interim RA Report is appropriate, EPA may have to prepare the interim report since it is normally not required in the Consent Decree.

2.4.3 Federal Facility-lead RA Completion Inspections

Federal Facility Agreements generally require an additional set of inspections to determine that all aspects of the remedy have been implemented in accordance with applicable enforcement documents and the ROD. Participants include the EPA, oversight contractor, and the State. The inspection can be done concurrently with the contract inspection described in Section 2.4.

2.5 Preparing the RA Report

The RA Report documents the cleanup activities that took place at a single OU under remedial authority. The RA Reports for a site can be used as the supporting documentation for development of the Final Closeout Report for the site, as described in Chapter 4.

The RA Report is a key document to gather historical cleanup information for analysis of Superfund remedies. It is the mechanism used to share information within EPA, and between EPA and other Federal agencies. The RA Report includes cost and performance data which, along with other information t, assists with future remedy selection decision-making, provides a means to compare technology performance, supports improved cost comparisons, and documents progress made at sites.

2.5.1 Submitting the RA Report

The RA Report should be completed as soon as possible after contract final inspection of the completed construction and determination that the remedy is O&F, if applicable. The RA Report may take some time to compile; however, the goal is to have the report submitted to the Region for approval within 90 days of the final inspection or O&F determination. In order not to delay the preparation of the report, estimated costs can be used to supplement the known actual costs when pending contractor claims have not been settled.

2.5.2 Who Prepares the RA Report

The RA Report is prepared by the party most familiar with the RA design and construction efforts, and associated project costs. Such familiarity provides the best opportunity to discuss the successes, difficulties, and lessons learned about the project. The contracting party for the RA (e.g., the PRPs, the Army Corps of Engineers, the State, EPA's contractor, or another Federal Agency) is most familiar with the RA. While the EPA RPM sometimes does prepare the RA Report, the contracting party generally should be tasked with that effort.

2.5.3 Contents of the RA Report

Exhibit 2-3, at the end of this chapter, presents the specific contents that should be included in the RA Report. Appendix A provides a sample RA Report.

2.6 RA Report Approval

Since the RA Report is ideally prepared by the contracting party, and not EPA, the report must be approved by EPA in order to achieve RA Completion for an OU. There is no EPA Headquarters (HQs) review or concurrence role for RA Reports.

Approval occurs when the designated Regional official (Branch Chief or above, as determined by the EPA Region) approves in writing the Interim or Final RA Report. The approval can be provided with an appropriate signature on the RA Report cover sheet or by letter to the originator of the RA Report.

2.7 RA Report Distribution

Once the RA Report is approved, the original is retained in the Regional site file, and a copy should be returned to the originator of the report. Upon RA Completion, the Region is also required to notify the appropriate Natural Resources Damages Trustees listed in the Regional Contingency Plans. The Region should provide a copy of the Interim or Final RA Report to the Trustees within one week of the completion and approval of the report.

A copy of the RA Report should also be sent to EPA HQs for extraction of useful technical information. Send the report electronically to the appropriate Regional Center in EPA HQs, Office of Emergency and Remedial Response.

2.8 Completion of the Last RA at a Site

As the RA Completion for the last OU at the site nears, the Region needs to plan ahead for achieving Construction Completion, which is described in Chapter 3. Often, Construction Completion for the **site** is achieved prior to RA Completion for the last OU. Reasons include:

- Due to the need to gather cost and performance information, the Interim or Final RA Report (document RA completion) is prepared up to 90 days after the contract final inspection or O&F determination. The Preliminary Closeout Report (for the site) can be prepared very soon after the contract final inspection and before O&F determination.
- For bioremediation and soil vapor extraction remedies, the RA Report is not prepared until cleanup goals are achieved, often several years after construction of the treatment system. The Preliminary Closeout Report for the site can be

prepared when the system is operating satisfactorily.

Even if Construction Completion has already been achieved, the Region must still ensure that a RA Report is prepared for the final Operable Unit.

EXHIBIT 2-3, RA Report Contents

SECTION	CONTENTS
I. Introduction	! Include a brief description of the location, size, environmental setting, and operational history of the site. ! Describe the operations and waste management practices that contributed to contamination of the site. ! Describe the regulatory and enforcement history of the site. ! Describe the major findings and results of site investigation activities. ! Describe prior removal and remedial activities at the site. ! Describe the other OUs designated at the site and introduce the OU for which the RA Report applies.
II. Operable Unit Background	! Summarize requirements specified in the ROD for the OU. Include information on the cleanup goals, institutional controls, monitoring requirements, operation and maintenance requirements, and other parameters applicable to the design, construction, operation, and performance of the RA. ! Provide additional information regarding the basis for determining the cleanup goals for the OU, including planned future land use. ! Summarize the remedial design, including any significant regulatory or technical considerations or events occurring during the preparation of the RD. ! Identify and briefly discuss any ROD amendments, explanation of significant differences, or technical impracticability waivers.
III. Construction Activities	! Provide a step-by-step summary description of the activities undertaken to construct and implement the RA (e.g., mobilization and site preparatory work; construction of the treatment system; associated site work, such as fencing and surface water collection and control; system operation and monitoring; and sampling activities). ! If a treatment remedy, refer reader to Appendix A for characteristics, site conditions, and operating parameters for the system.
IV. Chronology of Events	! Provide a tabular summary that lists the major events for the OU, and associated dates of those events, starting with ROD signature. ! Include significant milestones and dates, such as, remedial design submittal and approval; ROD amendments; mobilization and construction of the remedy; significant operational events such as treatment system / application start-up, monitoring and sampling events, system modifications, operational down time, variances or non-compliance situations, and final shut-down or cessation of operations; final sampling and confirmation-of-performance results; required inspections; demobilization; and completion or startup of post-construction operation & maintenance activities. ! If an Interim RA Report, indicate when cleanup goals are projected to be achieved for the ground or surface water restoration.

SECTION	CONTENTS
V. Performance Standards and Construction Quality Control	! Describe the overall performance of the technology in terms of comparison to cleanup goals. ! For treatment remedies, identify the quantity of material treated, the strategy used for collecting and analyzing samples, and the overall results from the sampling and analysis effort. ! Provide an explanation of the approved construction quality assurance and construction quality control requirements or cite the appropriate reference for this material. Explain any substantial problems or deviations. ! Provide an assessment of the performance data quality, including the overall quality of the analytical data, with a brief discussion of quality assurance and quality control (QA/QC) procedures followed, use of a quality assurance project plan (QAPP), comparison of analytical data with data quality objectives (DQOs). ! For PRP-funded projects, discuss EPA's oversight activities and results with regard to analytical data quality.
VI. Final Inspection and Certifications	! Report the results of the various RA contract inspections, and identify noted deficiencies. ! Briefly describe adherence to health and safety requirements while implementing the RA. Explain any substantial problems or deviations. ! If implemented, summarize details of the institutional controls (e.g., the type of institutional control, who will maintain the control, who will enforce the control). ! For RP-lead, describe results of pre-certification inspection. ! If applicable, certify that the remedy is operational and functional, along with the date this was achieved.
VII. Operation & Maintenance Activities	! Describe the general activities for post-construction operation and maintenance activities, such as monitoring, site maintenance, and closure activities. ! Identify potential problems or concerns with such activities. ! If an Interim RA Report, describe the future ground water or surface water restoration activities to meet cleanup goals.
VIII. Summary of Project Costs	! Provide the actual final costs and applicable year for the project. This is required for Fund-lead projects and should be provided whenever possible for PRP-lead projects. If actual costs are not available, provide estimated costs. ! Provide the costs previously estimated in the ROD for the selected remedy, including, as applicable, RA capital costs, RA operating costs, post-RA annual O&M costs, and number of years of O&M. Adjust the estimates to the same dollar basis year as the actual project costs, and provide the index used. ! Compare actual RA costs to the adjusted ROD estimates. If outside range of -30 to +50 percent, explain the reasons for differences. ! If the project is PRP-funded, include a summary of EPA oversight costs for RD and RA. ! For treatment remedies, calculate unit costs based on the sum of the actual RA capital and RA operating costs divided by the quantity of material treated. ! Refer reader to Appendix A for a detailed breakdown of RA and O&M costs.

SECTION	CONTENTS
IX. Observations and Lessons Learned	! Provide site-specific observations and lessons learned from the project, highlighting successes and problems encountered and how resolved.
X. Operable Unit Contact Information	! Provide contact information (names, addresses, phone numbers, and contract / reference data) for the major design and remediation contractors, EPA oversight contractors, and the respective RPM and project managers for EPA, the State, and the PRPs, as applicable.
Appendix A Cost and Performance Summary	! The specific parameters presented in Appendix A are in accordance with the "Guide to Documenting and Managing Cost and Performance Information for Remediation Projects," EPA 542-B-98-007. Regions are encouraged to use the recommended procedures outlined in this Guide for documenting cost and performance information as part of the RA Report. ! Identify the matrix characteristics and site conditions that most affected the cost and performance, the corresponding values measured for each characteristic or condition, and the procedures used for measuring those characteristics or conditions. These items include the soil type and particle size distribution, environmental setting, media properties, and quantity of materials treated. ! Identify the operating parameters specified by the remediation contractor that most affected the cost and performance, the corresponding values measured for each parameter, and the procedures used for measuring those parameters. These items include system throughput, pumping rate, flow rate, mixing rates, residence time, operating pressure and temperature, moisture content, and pH. ! Provide a detailed breakout of the actual RA capital costs, RA operating costs (costs to operate and maintain the treatment process), and estimated
Other Appendices	! Provide supplemental information in appendices to the RA Report. These could include a map of the site and operable unit, a schematic of the treatment system, supplemental performance information, and a list of references.

3.0 CONSTRUCTION COMPLETION

3.1 Background

In the first ten years of the Superfund program, outside audiences often measured Superfund's progress in cleaning up sites by the number of sites deleted from the NPL as compared to the number of sites on the National Priorities List (NPL). This measure, however, did not and still does not fully recognize the substantial construction and reduction of risk to human health and the environment that has occurred at NPL sites not yet eligible for deletion. In order to better measure Superfund's progress, the Superfund 30-Day Task Force Report recommended setting firm annual targets for completing remedial construction activities at sites on the NPL.

A construction completion site is a former toxic waste site where physical construction of all cleanup actions are complete, all immediate threats have been addressed, and all long-term threats are under control.

In a 1990 Federal Register Notice (FR), the Environmental Protection Agency (EPA) established the Construction Completion category on the NPL (FR Volume 55, No. 46, March 8, 1990).

> "The category would consist of: (a) sites awaiting deletion, (b) sites awaiting deletion but for which CERCLA section 121c requires reviews of the remedy no less often than five years after initiation, and (c) sites undergoing long-term response action(s). EPA believes the new category would communicate more clearly to the public the status of cleanup progress among sites on the National Priorities List."

A later Federal Register Notice (FR Volume 58, No. 29, March 2, 1993) introduced the Superfund Construction Completions List (CCL) ". . . to simplify its system of categorizing sites and to better communicate the successful completion of cleanup activities." A total of 155 sites were included in that list, which also clarified that determination of **construction completion** at a site has no legal or financial significance, as it does not relate to satisfying contractual or other requirements (e.g., cleanup contract, consent decree, cooperative or interagency agreement), nor to the eligibility of cost reimbursement from the Fund.

According to the FR, "The CCL is a compilation of sites presently or formerly on the NPL. Sites qualify for the CCL when:

(1) Any necessary physical construction is complete, whether or not final cleanup levels or other requirements have been achieved;
(2) EPA has determined that the response action should be limited to measures that do not involve construction; or
(3) The site qualifies for deletion from the NPL." *(Note: This item does not apply to sites deferred to RCRA or other authorities and deleted from the NPL prior to completing construction.)*

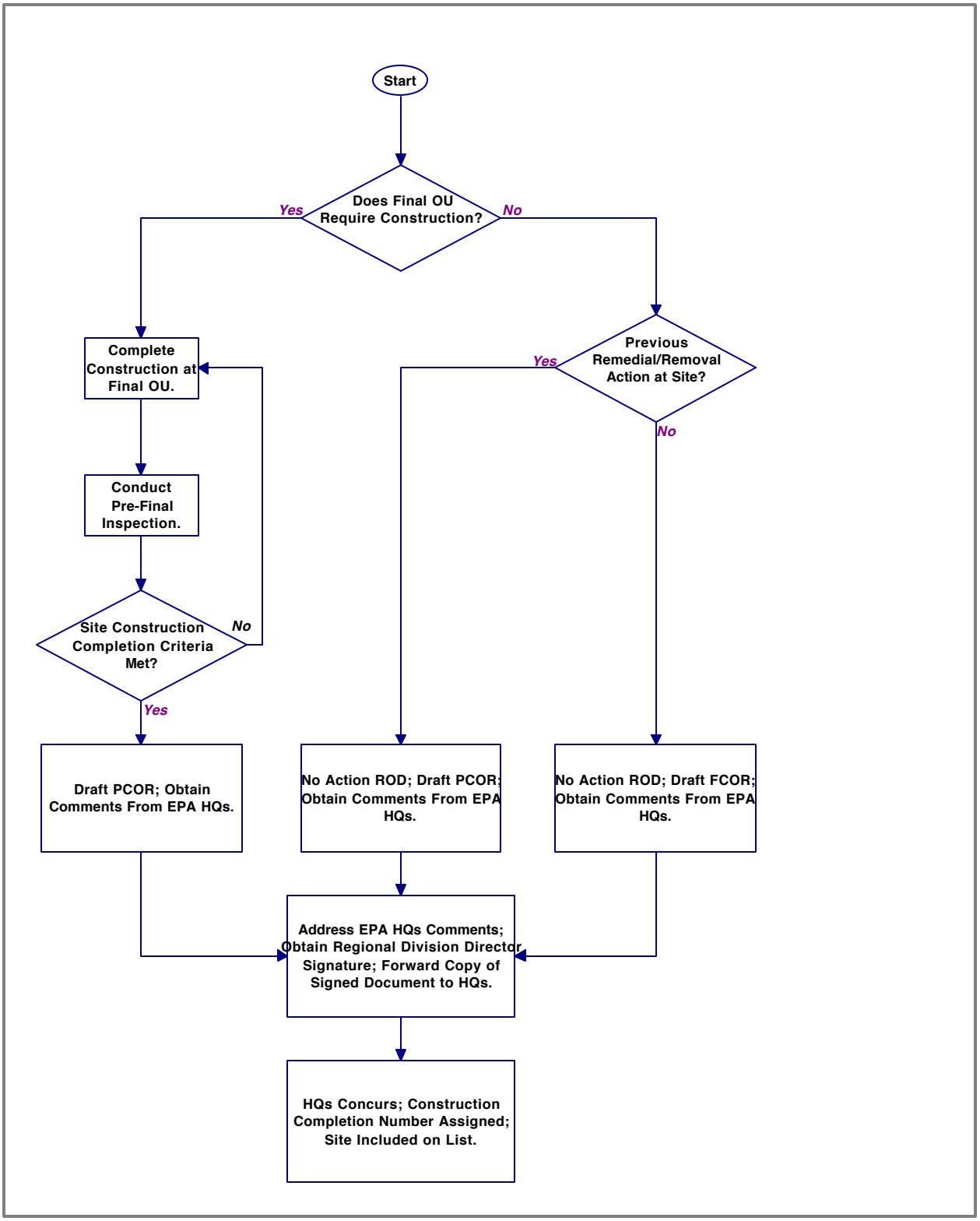
Only final NPL sites qualify for inclusion in the construction completion list. Final NPL sites qualify for inclusion in the construction completion list after completion of all construction work in all operable units of the site.

> The Region must carefully evaluate the status of all response actions at the site and anticipate the need for additional construction activities. If the Region believes that additional construction might be required in the future for the site, the site should not be placed on the Construction Completion List.

3.2 Construction Completion Process

The completion of the last response action (removal or remedial) at a site determines when it becomes eligible for **construction completion**. The construction completion process is illustrated in Exhibit 3-1.

EXHIBIT 3-1, Construction Completion Process



The following sections provide more detail on the most common candidates for the **construction completion** milestone and their reporting requirements. NPL sites that are fully addressed under removal authority can meet the **construction completion** and **site completion** criteria simultaneously. The preparation of a Final Close Out Report (FCOR) can be used to document this milestone. Most NPL sites however, are addressed under remedial authority. Sites addressed under remedial authority usually meet the **construction completion** criteria first, and upon reaching cleanup goals the site qualifies for site completion. This section addresses the following cases:

- Sites requiring Remedial Action (RA) in the final Operable Unit (OU),
- Sites requiring no RA in the final OU,
- Technology Considerations for Construction Completions, and
- Lead and Authority Considerations for Construction Completions.

3.3 Sites Requiring RA in the Final OU

This section presents the **construction completion** process for sites requiring physical construction in the final **operable unit**. At these sites the **construction completion** milestone is achieved when a **pre-final inspection** for the last RA has been conducted and a Preliminary Close Out Report (PCOR) has been signed.

3.3.1 Pre-Final Inspection

A **pre-final inspection** should be conducted for the site's final OU following the procedures outlined in Section 2.4, Inspection Requirements for RA Completion. Construction completion criteria are satisfied when only minor "punch list" items are identified in the inspection to finish the work in accordance with design plans and specifications. Minor "punch list" items are activities that are part of the contract but do not affect the functioning of the remedy. These items must be addressed by the construction contractor before the final inspection. Exhibit 3-2 provides examples of minor "punch list" items that will still allow a **construction completion** determination. Because Exhibit 3-2 is only a representative list, each site must be evaluated individually.

EXHIBIT 3-2,
Examples of Minor "Punch List" Items

- Revegetating landscape (except when integral remedy component)
- Removing construction debris
- Installing support equipment, such as security lighting
- Repairing poorly installed flashing on roof
- Repairing other minor defects in workmanship or construction
- Demobilization activities
- Installing additional monitoring wells
- Resurfacing roads

3.3.2 Preliminary Close Out Report

While much of the input can be provided by the contractor and through previous RA Reports, the PCOR is an EPA document that is prepared by the Remedial project Manager (RPM). Even before the pre-final inspection is conducted, the RPM can start drafting portions of the PCOR because much of the documentation is historical and not dependent on the outcome of the pre-final inspection.

The PCOR focuses on all OUs at the site, including a description of the releases at the site, site conditions, all construction activities (including removals), completion of construction, Five-year Reviews, and a detailed schedule of steps remaining for site completion. The PCOR should contain a status report by OU of the ROD, estimate of capital and annual O&M costs, and the construction contract award amount. This information should be provided for Fund-lead projects and whenever possible for PRP-lead projects. If the project is performed by a PRP, a summary of EPA estimated oversight costs for design and construction should be provided as well. The PCOR generally should be five to seven pages and contain the information shown in Exhibit 3-3. Appendix B has two examples of PCORs.

The RPM will often prepare the PCOR for the site before the RA Report for the final OU is completed. This sequence is typical because the RA report may take up to 90 days for the preparer (State, PRP, USACE, etc.) to submit and get approved, or the site may have a long period of operation before cleanup goals are achieved.

EPA Headquarters (HQs) has Regional Coordinators assigned to act as primary reviewers of the PCORs. These individuals will work closely with the RPM in performing completion activities and will review the PCOR. The RPM must send the draft PCOR to the appropriate EPA HQs Regional coordinator for review and comments prior to regional signature. After addressing HQs comments and obtaining the signature of the appropriate regional official, a copy of the signed report is forwarded to EPA HQs.

The **construction completion** milestone is achieved when the designated Regional official signs the PCOR or FCOR, a hard copy of the signed document is sent to EPA HQs, and EPA HQs concurs. EPA HQs tracks and reports overall construction completion progress.

EXHIBIT 3-3, Preliminary Close Out Report Summary

SECTION	CONTENTS
I. Introduction	! Include general statement indicating date of pre-final inspection and a statement that contractors or agencies have constructed the remedies in accordance with remedial design plans and specifications.
II. Summary Of Site Conditions	! Provide background summary of site location, site description, and NPL listing information. ! Describe any removal action activities at the site. ! Include remedies selected, date RA initiated, method used to implement RA (e.g., consent decree, contract, cooperative or other agreement), and date and description of pre-final inspections used to determine that construction is complete. ! If implemented, summarize details of the institutional controls (e.g., the type of institutional control, who will maintain the control, who will enforce the control). ! Describe redevelopment potential at the site, or any planned or ongoing redevelopment work.
III. Demonstration Of Cleanup Activity QA/QC	! Document that the construction quality assurance / quality control plan was implemented and that construction completion is consistent with the ROD and remedial design plans and specifications.
IV. Activities And Schedule For Site Completion	! Identify activities remaining in order to: - Assure effectiveness of the remedy (e.g., institutional controls, work plan for operation and maintenance), - Assure consistency with the NCP (e.g., joint EPA / State inspection, operational and functional determination), - Satisfy requirements for site completion (e.g., Final RA Report). ! Specify the organization responsible for implementation of each activity. ! Set dates for completion of the activities and elements required to satisfy NCP and procedural requirements for issuing a FCOR and reaching site completion.
V. Summary of Remediation Costs	! Report for each operable unit: - ROD estimate of capital costs and annual O&M costs, - Construction contract award amount.
VI. Five-Year Review	! State whether a five-year review is required, what type of review is required (statutory or policy), and when scheduled.

Sometimes a PCOR may not be needed because the site meets both **construction completion** and **site completion** criteria (See Chapter 4) simultaneously. In these cases, the RPM may elect to prepare a FCOR to satisfy both documentation requirements concurrently.

Upon completion of a PCOR or FCOR the appropriate Trustees listed in the Regional Contingency Plans will be notified of the construction completion determination. The Region will provide a copy of the report to the Trustees within one week of the completion of the report.

3.4 Sites Requiring No RA in the Final OU

At some NPL sites, EPA determines that no physical construction is necessary in the final OU to protect human health and the environment. There may or may not have been previous removal or RAs conducted at other OUs of the site.

These types of sites formerly qualified for construction completion with a statement in the certification page of the ROD that "EPA has determined that its response at this site is complete and no action / no physical construction is necessary at this site. Therefore, the site now qualifies for inclusion on the Construction Completion List." This guidance changes that policy in order to be consistent with documentation requirements. In addition, confusion was created by the term “No Action ROD” when removal or remedial construction work may have been done in other OUs of the site. **As of the effective date of this guidance, all sites qualifying for construction completion, including sites with No Action RODs in the final operable unit, must be documented via a Preliminary Close Out Report or Final Close Out Report.**

3.5 Technology Considerations for Construction Completions

This section includes special requirements for surface and ground water long-term restoration remedies, bioremediation, soil vapor extraction, contingency remedies, monitoring, and institutional controls.

3.5.1 Ground and Surface Water Restoration Remedies

Ground and surface water restoration remedies are undertaken to restore ground water or surface water quality. These actions require a continuous operation phase long after the system has been constructed, to achieve the cleanup levels specified in the ROD. **Construction completion** at these site is met when physical construction of the remedy (e.g., construction of the treatment plant, pumps, and extraction wells) is complete, the pre-final inspection has been conducted, the treatment system is operational, and any expected future adjustments are likely to be minimal in nature (e.g., well replacement). If substantial work is expected (e.g., installation of an additional extraction network or treatment components) because the system is currently experiencing problems or as a result of phased construction (see section below), the site does not qualify as a construction completion.

To document **construction completion,** the RPM prepares a PCOR. In this case, the PCOR's "Schedule for Site Completion" should include the Operational and Functional determination and the date when the remedy is expected to achieve the cleanup goals.

> Even though the site may be declared construction complete, the OU involving the long-term response action (LTRA or PRP LR) must still achieve cleanup goals specified in the ROD. An interim RA Report is prepared after the plant is operating as intended (operational & functional), and a Final RA Report is prepared when cleanup goals are achieved.

3.5.2 Phased Ground Water Cleanup Approach

In some situations, a phased ground water cleanup approach is employed at a site, often under an interim ROD. If an interim ROD has been used to initiate the ground water cleanup, it must be followed by a final ROD before the site qualifies as a **construction completion**.

Phasing a ground water remedy is actually a multi-phase construction project. The treatment plant and

a set of wells (a subset of what is expected to be used for the entire site) may be installed and operated for a period of time. The goal of this initial phase is to test and optimize system performance. Upon successful completion of this phase, a series of additional wells may be installed and tested in a consecutive manner according to the remedial design. Because further construction is expected after the initial treatment plant and wells are installed, construction completion would be achieved only after a final ROD has been signed and all additional work has been completed. At this point a PCOR could be prepared to document the construction completion.

3.5.3 In-situ Soil Vapor Extraction and Bioremediation Remedies

Bioremediation or in-situ soil vapor extraction (SVE) technologies resemble ground water restoration remedies in that little day-to-day activity, other than routine operation of the treatment facility, takes place once the treatment facility is built. Accordingly, the construction completion policy for ground and surface water restoration remedies also applies to certain applications of SVE, in-situ bioremediation, and ex-situ bioremediation. Technology descriptions follow:

In-situ Soil Vapor Extraction

In-situ SVE units are designed to physically remove volatile compounds from soil layers located above the water table. The process employs vapor extraction wells alone or in combination with air injection wells. Vacuum blowers induce air through the soil layers, which strip volatile compounds from the soil and carries them to the surface via extraction wells. Volatiles are controlled by adsorption to activated carbon, incineration, or condensation by refrigeration. SVE systems vary in size, but consist of several extraction wells and surface blower / collection units.

Since SVE is in-situ, construction activity is primarily limited to the installation of extraction wells, blowers, and collection unit. Like groundand surface water restoration, the typical SVE site requires minimal post-construction activity. An example is the installation of additional extraction wells should conditions change, wells become fouled, or to optimize performance.

In-situ Bioremediation

In-situ bioremediation uses additives to degrade organic contaminants in soils and aquifers. Additives are injected into the soil or aquifer under pressure through wells or spread on the surface for infiltration to the contaminated material. The type of additive used at a particular site varies, but generally consists of either an oxygen source, nutrients, or perhaps micro-organisms.

In-situ bioremediation is similar to ground and surface water restoration remedies, in that it generally requires minimal post-construction activity once the initial installation of injection wells and surface equipment is completed.

Ex-situ Bioremediation

Ex-situ bioremediation uses microorganisms to degrade organic contaminants in excavated soil, sludge, and solids. Several variations of ex-situ bioremediation exist, and the amount of post-construction activity varies from site to site. Two common applications of ex-situ bioremediation are: slurry-phase bioremediation, in which soils are mixed with water to form a slurry; and solid-phase bioremediation, in which soils are placed in a liner, tank or building and tilled with water and nutrients. Variations of the latter process are called land farming or composting.

Subject to the considerations below, physical construction at ex-situ bioremediation sites can be considered completed if the contaminated material is safely stored, and only routine activity such as tilling remains to be done. Should there be planned activities at the site beyond simple regrading and revegetation (i.e. covering residuals with a cap as an integral part in ensuring protectiveness), then construction would not be complete.

The many variations in applying SVE and bioremediation technologies to sites make establishment of specific criteria for determining construction completion difficult. Regions may only declare construction completion at SVE and bioremediation sites when the treatment unit has been constructed, is operating as designed, and **studies show that the technology will achieve cleanup goals**. Additional consideration should be given to ensuring protection against direct contact with contaminated soils during the treatment process. Safeguarding measures shall first be taken, such as stockpiling contaminated soils in an enclosed storage area, to ensure all pathways of exposure are eliminated.

Unlike many ground and surface water restoration remedies, in-situ SVE and bioremediation treatment units are generally constructed and operated by the same contractor. Therefore, a pre-final inspection may not be initiated upon completing the construction of the treatment unit. A thorough inspection analogous to the pre-final inspection shall be conducted and documented by the Region before preparing the PCOR.

Even though the site is declared a “construction completion,” the operable unit involving bioremediation or SVE remains classified as an ongoing remedial action. It would not be called an LTRA - that term is used exclusively for ground water and surface water restoration remedies. The OU remedial action will not be complete until cleanup goals specified in the ROD are achieved and a Final RA Report has been submitted and accepted by EPA.

3.5.4 RODs with Contingency Remedies

RODs sometimes incorporate contingency remedies when there is significant uncertainty about the ability of the selected option to meet cleanup goals. This is particularly true where an innovative treatment technology is selected for use at a site. In terms of the construction completion criteria, the issue of contingency remedies are of concern only where remediation may still be ongoing after the site is considered construction complete (e.g., ground water, SVE, and bioremediation). For example, where natural attenuation is selected as the ground water remedy, EPA may have included a more traditional pump and treat as the contingency remedy.

Sites that have contingency remedies identified may be considered construction complete only if the Region can demonstrate that use of the contingency remedy is not anticipated at the site. To make this determination, there must be adequate justification in the PCOR to support this claim. This documentation must include the results from the appropriate sampling data, modeling, etc., to support this determination, with the information clearly presented in the PCOR. This determination in no way affects any Potential Responsible Party (PRP) settlement documents. Making this determination does not preclude having to later invoke the contingency should it be required.

3.5.5 Monitoring and Institutional Controls

A site can be included in the CCL before monitoring activities begin or institutional controls are in place if those activities are included in the PCOR's "Schedule for Site Completion."

Monitoring results provide information about an RA's performance and the need for future actions. Monitoring may be appropriate at any stage of an RA, including operation and maintenance (O&M). Although monitoring may occasionally identify the need for future work, the need for monitoring does not prohibit listing a site as a **construction completion** if the site qualifies otherwise. Actual installation of monitoring wells may also be included in the "Schedule of Site Completion" if the number of monitoring wells is not significant or is considered part of O&M activities.

The term “Institutional Controls” refers to legal / administrative controls that are intended to affect human activities in such a way as to prevent or reduce exposure. Examples are: land and natural resource use restrictions, prohibitions on well drilling, building permits, well use advisories, and deed notices. Institutional controls usually supplement containment and treatment remedies to reduce potential threats to human health and the environment. In rare cases they may be the sole remedy. Since institutional controls do not require construction, they may be implemented after construction completion and should be shown in the “Schedule of Activities” section of the PCOR. However, they must be in place to achieve site completion.

3.6 Lead and Authority Considerations for Construction Completions

Some NPL site cleanups are addressed by parties other than EPA. Close out procedures for these sites are discussed below.

3.6.1 PRP Lead

The preamble to 40 CFR Part 300 states that inclusion of a site in the Construction Completion List does not have any legal significance and therefore, does not affect any enforcement agreement with the PRPs. **Construction completion** criteria for PRP sites are identical to those for Fund lead. The RPM, however, should carefully determine whether the activities performed by the PRP are in accordance with any applicable enforcement documents.

3.6.2 Federal Facilities

Construction completion procedures for Federal Facility sites are identical to those for Fund- and PRP-financed remedial actions.

3.6.3 State Lead

State-lead sites with no ROD and sites where the State assumes all responsibility for overseeing PRP response actions require State certification of construction completion. In these situations, EPA relies heavily on the State to determine the appropriate response. EPA includes these sites on the Construction Completion List based on a determination by the State that all response action is complete.

In most instances, the State prepares the PCOR and EPA concurs with this decision by signing the PCOR. The PCOR must include the Regional concurrence with the State's determination that no further response action is appropriate. If the State does not prepare an actual PCOR, then the State should send a certification letter to the Region that includes a detailed summary of all actions taken at the site. It should also include the following certification:

> "The State of _____ has determined this site is protective of human health and the environment. Therefore, all response action at this site is complete and no further construction is anticipated. The site meets the criteria for construction completion as described in EPA's "Close Out Procedures for National Priority List Sites.""

3.6.3 Removal Authority

Action under removal authority achieves prompt risk reduction through emergency, time-critical, and non-time critical actions. In general, cleanup actions under removal authority will not have a ROD as is normally the case for sites addressed under remedial authority. NPL sites addressed entirely under removal authority may reach the construction completion and site completion milestones simultaneously when:

- The RPM (or On-Scene Coordinator (OSC), as appropriate) documents in the final Pollution Report (POLREP) that the contractor is demobilized and has left the site. In the case of a potentially responsible party (PRP)-lead site, the POLREP documents that the PRP's contractor has completed the removal action specified in the Action Memorandum and fully met the terms of the applicable enforcement document.

In some instances, it will be appropriate to document the removal action with an On-Scene Coordinator Report. For information regarding POLREP and OSC Reports refer to Directive 9360.3-03, Superfund Removal Procedures, Removal Response Reporting: POLREP and OSC Reports," June 1994.

The RPM or OSC will prepare a PCOR or FCOR, as appropriate, to document the construction completion.

3.6.4 Resource Conservation and Recovery Act Deferral

The same notice that introduced the Construction Completion List (FR Volume 58, No. 29, March 2, 1993) also indicated that:

> " ... deleted sites will not qualify for the CCL if physical construction remains to be conducted under another statutory authority."

Further, EPA's "Deletion Policy for Resource Conservation and Recovery Act Facilities" (FR Notice 40 CFR Part 300 dated March 20, 1995), later amended to make the policy also applicable to Federal Facility sites (FR Notice 40 CFR Part 300 dated November 24, 1997) indicates the following:

> "EPA believes it is appropriate to delete sites from the NPL based upon deferral to RCRA under certain circumstances. Deletion of sites from the NPL to defer them to RCRA Subtitle C Corrective Action authorities would free CERCLA's oversight resources for use in situations where another authority is not available, as well as avoid possible duplication of effort and the need for an owner / operator to follow more than one set of regulatory procedures."

Based on the citations above, if a site is deleted from the NPL by means of deferral to RCRA prior to completion of construction, it does not qualify as a construction completion. Deferral of remediation to another authority generally means that "physical construction" originally identified using the CERCLA process will occur after site deletion. Since one of the goals in deleting a site from the NPL after deferral to another authority is to save CERCLA oversight costs, Regions should not routinely track these deleted sites. **Consequently, sites deleted from the NPL due to deferral of physical construction to another authority do not met the requirements for construction completion.**

3.6.5 Multiple Authorities Conducting Cleanup at the Same Site

Often, cleanup work under different authorities may be planned or under construction simultaneously. Operating facilities may have RCRA corrective action ongoing at one part of the site, while NPL work is occurring elsewhere. Similar situations may occur under other authorities. In situations where the physical construction identified under CERCLA authority for the NPL site is complete, but other non-CERCLA work remains, the site can qualify for construction completion if documentation requirements are met. An example is CERCLA physical construction completed at a nuclear production facility to address off-site ground water contamination with remaining work to be completed as a facility closure several years later under Nuclear Regulatory Commission authority. Any physical construction that has been identified through the CERCLA process must be finished before the site can be declared construction complete.

3.7 Additional Work at Construction Completion Sites

FR Volume 58, No. 29, March 2, 1993, "Notification of Policy Change; Categorization of Superfund Sites," addresses the issue of Routine Adjustments at construction completion sites. The notice indicates:

> "Also, routine adjustments and modifications to a constructed remedy can be expected, but do not affect a site's status on the CCL. Examples of adjustments or modifications include the drilling of additional extraction wells, modifications to unit processes at ground water treatment plants, and dismantling and removing on-site remediation facilities."

Other examples of routine adjustments include:

- maintaining a landfill cap (including landscaping, erosion control)
- Making service / repair / adjustments to SVE, bioremediation, ground water, or landfill gas collection treatment plants
- Clearing drainage system and settling ponds of debris (including repairs / replacement)
- Modifying the sampling and analysis scheme as part of monitoring a remedy (i.e. ground water monitoring, gas collection, stream discharge, leachate collection). These modifications may also entail physical equipment replacement, repairs, equipment location changes.

Unforseen circumstances may require additional work (e.g., implementing a new remedy, adding a new treatment train to an existing remedy, removing newly identified pockets of contamination, compromised remedies through acts of nature (floods, hurricanes, etc.) after the site has been declared a construction complete. The significance of the work performed would likely trigger a new (or amended) Action Memo, ROD, or ESD.

The Agency may change the construction completion categorization of sites where there is a significant change in site conditions that requires

extensive additional construction activity. In such cases the site may be removed from the Construction Completion List. Upon completion of the construction activity and compliance with the construction completion criteria the site will be restored to the list.

Should significant additional work be required at a site, the Region must notify the nearby community of the problem along with a strategy for rectifying the situation. This notice can be done through a fact sheet, news bulletin, or public notice. If a change in the remedy is warranted, then the public participation requirements outlined in the NCP would apply.

At construction completion sites in which unanticipated additional work is identified, the Region should notify EPA HQs (Construction Completion Coordinator) as soon as the problem is identified. Within 30 days of the notification, a fact sheet, no longer than two pages, should be sent to HQs with a detailed description of the additional work required at the site and the action planned or underway to address it. This fact sheet will serve as documentation of the additional work in the Regional and HQs files, and EPA HQs will decide, in consultation with the Region, if the site should remain on the Construction Completion List or be removed from the list.

3.8 Construction Completion Checklist

Construction completion activities vary according to site circumstances. For typical sites, however, achieving construction completion requires the RPM to:

- Assess site against construction completion criteria
- Conduct and document pre-final inspection for final operable unit
  - Complete pre-final inspection report
  - Document "punch-list" items
- Prepare Preliminary Close Out Report
  - Submit draft to EPA HQs for review
  - Address HQs comments and finalize PCOR
  - Submit PCOR to appropriate Regional official for signature
  - Mail or fax hardcopy of signed PCOR to HQs
  - Upon completion of a PCOR or FCOR notify the appropriate Trustees listed in the Regional Contingency Plans.

4.0 SITE COMPLETION

Site completion signifies the end of all response actions at National Priorities List (NPL) sites. **Site completion** means that the response actions at the site were successful and no further Superfund response is required to protect human health and the environment.

The Remedial Project Manager (RPM) applies the Environmental Protection Agency's (EPA) site completion criteria to a site to verify that it is eligible for site completion status. Site completion is documented by a Final Close Out Report (FCOR). This chapter explains the documentation required to demonstrate that site completion criteria have been met and site completion has been achieved. The site completion process is illustrated in Exhibit 4-1.

4.1 Site Completion Criteria

A site must meet all the criteria below to be eligible for **site completion**:

- Cleanup goals specified in all Records of Decision (ROD) or removals are met;
- Institutional Controls are in place;
- All Remedial Action (RA) Reports, On-Scene Coordinator (OSC) Reports, and Pollution Reports (POLREP) have been completed;
- All RODs, ROD Amendments, and Explanation of Significant Differences (ESD) have been completed;
- The site is protective of human health and the environment; and
- The only remaining activities, if any, at the site are operation and maintenance activities that are performed by the State, Federal Facility or responsible parties.

4.2 Site Completion Process

Only an FCOR satisfies the site completion requirements. The following section presents NPL **site completion** requirements for cleanup activities under removal and remedial authority.

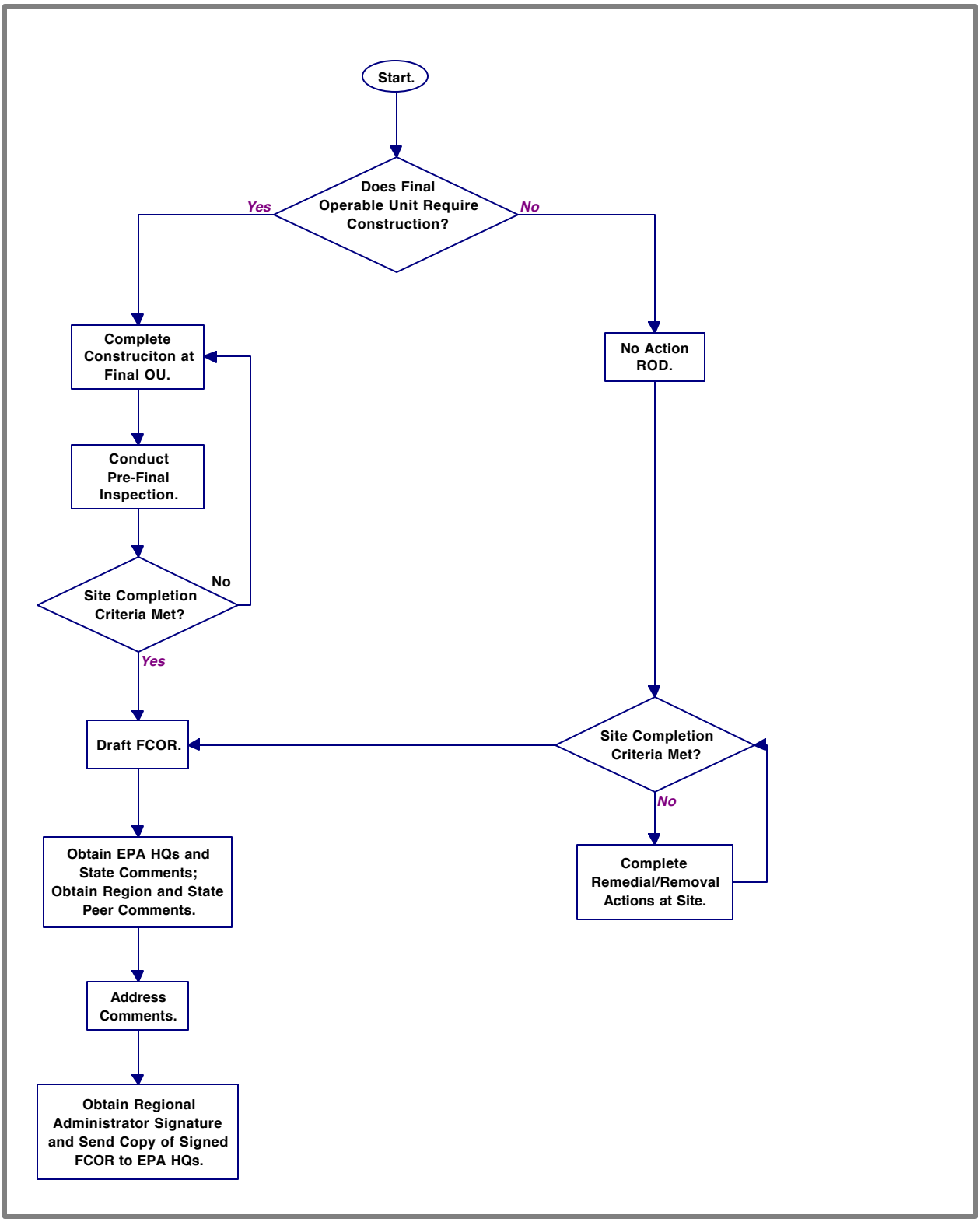
4.2.1 Removal Authority

Action under removal authority achieves prompt risk reduction through emergency, time-critical, and non-time critical actions. In general, cleanup actions under removal authority will not have a ROD as is normally the case for sites addressed under remedial authority. NPL sites addressed entirely under removal authority reach the construction completion and site completion milestones simultaneously when:

- The RPM or OSC, documents in the final POLREP that the contractor is demobilized and has left the site, or (in the case of a potentially responsible party (PRP)-lead site), that the PRP's contractor has completed the removal action specified in the Action Memorandum and fully met the terms of the applicable enforcement document.

In some instances, the removal action may have been documented with an On-Scene Coordinator Report. For information regarding POLREP and OSC Reports refer to Directive 9360.3-03, Superfund Removal Procedures, Removal Response Reporting: POLREP and OSC Reports," June 1994.

EXHIBIT 4-1, Site Completion Process



4.2.2 Remedial Authority

This section presents the site completion requirements for:

- Sites requiring remedial construction in the final Operable Unit (OU),
- Sites requiring no remedial construction in the final OU,
- Sites where no response action was required.

For the three situations identified above s**ite completion** is documented through a FCOR.

Sites Requiring Remedial Construction in the Final OU

The site is eligible for **site completion** when all remedial actions have been implemented and all **site completion** criteria are met. This means that all issues regarding **site completion** have been addressed (e.g., O&M assurances, cleanup concentrations, and implementation of institutional controls). S**ite completion** is documented through a FCOR.

Sites Requiring No Remedial Construction in the Final OU

This category includes sites where the ROD for the final OU requires no remedial construction activities. Sites with RODs requiring institutional controls, monitored natural attenuation, or monitoring for other than O&M purposes meet site completion requirements once the institutional controls are in place, monitored natural attenuation has reached the cleanup goals, and all monitoring requirements specified in the ROD are met. The site will then be eligible for **site completion** and **site deletion**. S**ite completion** is documented through a FCOR.

Sites where No Response Action Was Required

For no action sites the RPM prepares a FCOR (in an abbreviated form because there were no cleanup activities). The FCOR documentation needs to address the justification for no action at the site.

4.3 Final Close Out Report

The FCOR documents compliance with statutory requirements and provides a consolidated record of all removal and remedial activities for the entire site. Since it is the final record, the FCOR must be complete and be able to stand alone. The report does not signify that the terms of cooperative agreements, consent decrees, or administrative orders have been satisfied, nor does it signify resolution of contractual or other administrative issues for Superfund activities.

The FCOR describes how the cleanup was accomplished and provides the overall technical justification for **site completion**. Although the content and format of the report may vary depending on site circumstances, it should include the information presented in Exhibit 4-2. This information should be readily available from previous documents such as the RI/FS, the RODs, the RDs, and the RA reports. The FCOR should also identify issues that might be of continuing concern to EPA or the community and explain why these issues do not preclude the site from achieving site completion.

The FCOR should contain a status report by OU of cost expenditures to date and projected costs into the future (O&M costs). This information is required for Fund-lead projects and should be provided whenever possible for PRP-lead projects. If the project is performed by a PRP, a summary of EPA oversight costs for design and construction should be provided as well.

Usually the RPM prepares the FCOR, but may task the State to prepare it at State-lead sites. The report should normally be 10 to 15 pages, but may be longer for large sites with multiple OUs. To keep the report brief, detailed technical or cost information and data may be referenced or appended to the report. As Exhibit 4-1 shows, EPA Headquarters (HQs) and the State should have an opportunity to review and comment on the report prior to final signature.

EPA HQs has Regional Coordinators assigned to act as primary reviewers of the FCOR. These individuals will work closely with the RPM in performing completion activities and will review the draft FCOR. After addressing the HQs and State comments and obtaining the signature of the Regional

Administrator, a copy of the signed report is forwarded to EPA HQs. Appendix C presents a sample FCOR.

Upon completion of an FCOR the appropriate Trustees listed in the Regional Contingency Plans will be notified of the completion of the remedial action. The Region should provide a copy of the report to the Trustees within one week of the completion of the report.

EXHIBIT 4-2, Final Close Out Report Summary

SECTION	CONTENTS
I. Introduction	! General statement indicating that all response actions at the site have been successfully performed.
II. Summary Of Site Conditions	! Site background. ! Removal actions performed. ! Remedial investigation / feasibility study results. ! ROD findings. ! Design criteria. ! Cleanup activities performed. ! Community involvement activities performed. ! Describe redevelopment potential at the site, or any planned or ongoing redevelopment work.
III. Demonstration Of Cleanup Activity QA/QC	! QA/QC protocol followed. ! Sampling and analysis protocol followed. ! Results of on-site inspections.
IV. Monitoring Results	! Sufficient data to demonstrate cleanup levels specified in the ROD or Action Memoranda are achieved and implemented and remedies are performing to design specifications. ! Monitoring required at no action sites after the ROD is signed should be briefly documented in the FCOR.
V. Summary Of Operation And Maintenance	! Description of required O&M activities. ! Assurance that O&M plans are in place and are sufficient to maintain the protectiveness of the remedy. ! Assurance that all necessary institutional controls are in place. ! Assurance that O&M activities specified for the site will be performed by the State or the responsible party.
VI. Summary of Remediation Costs	! ROD estimate of capital costs and annual O&M costs. ! Construction contract award amount. ! Total remedial action construction cost (i.e., capital costs) at time of FCOR. ! Current estimated annual O&M costs.
VII. Protectiveness	! Assurance that the implemented remedy (or no action decision) achieves the degree of cleanup or protection specified in the ROD(s) for all pathways of exposure and that no further Superfund response is needed to protect human health and the environment. ! Assurance that all areas of concern described in the NPL listing have been adequately addressed.

VIII.Five-Year Review	! Statement explaining whether a five-year review is appropriate, and if so, the type of review (statutory or policy) and the schedule for the review. ! Summary of Five-Year reviews already completed.
IX. Bibliography	! Complete citations of all relevant reports.

4.4 Site Completion Checklist

Site completion activities vary according to site circumstances. For typical sites, however, achieving site completion requires the RPM to:

- **T** Verify site completion criteria
  - Cleanup activities are successfully implemented and cleanup goals/levels are met
  - Remedy is operational and functional
  - Institutional controls are in place
  - All removal and remedial activities are complete
  - Site is protective of human health and the environment
  - Assemble all site related reports (PCOR, RAs, OSC Reports, PolReps, etc.)
- **T** Prepare FCOR
  - Submit draft to HQs and appropriate State for review
  - Address comments and complete Final COR
  - Submit to Regional Administrator for Signature
  - Mail or fax signed copy of FCOR to HQs
  - Upon completion of FCOR notify the appropriate Trustees listed in the Regional Contingency Plans.

5.0 SITE DELETION

The National Priorities List (NPL) deletion process begins at most sites once the site completion milestone has been achieved. **Site deletion** requirements ensure that 1) the documentation of activities and decision making at the site is complete, 2) the activities conducted and documented are verified, and 3) the public has an opportunity for notice and comment before a site is formally deleted from the NPL.

The deletion process is dictated by the National Oil and Hazardous Substances Pollution Contingency Plan (NCP).

Deletion of a site from the NPL does not preclude eligibility for subsequent Fund-financed or responsible party actions. If future conditions warrant, the NCP (40 CFR 300.425(e)(3)) provides that Fund-financed remedial actions may be taken at sites deleted from the NPL. When there is a significant release from a site deleted from the NPL, the site may be restored to the NPL without rescoring the site. Additional enforcement actions also may be taken, depending on liability releases in the consent decree or administrative order. Deletion of a site does not affect cost recovery efforts under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) section 107.

This chapter focuses on the site deletion criteria, process, and documentation required to achieve this milestone. Site deletion criteria presented in this section also applies to partial deletions (see Chapter 6.0, Partial Deletion).

5.1 NPL Deletion Criteria

The NCP (40 CFR 300.425(e)) states that a site may be deleted from, or recategorized on, the NPL when no response / no further response is appropriate. The Environmental Protection Agency (EPA) must consult with the State in making this determination. To delete a site from the NPL, EPA must determine, in consultation with the State, that one of the following criteria has been met:

- Responsible or other parties have implemented all appropriate response actions required;
- All appropriate Fund-financed response under CERCLA has been implemented, and no further response action by responsible parties is appropriate; or
- The remedial investigation has shown that the release poses no significant threat to public health or the environment, and, therefore, taking of remedial measures is not appropriate.

If monitoring to determine the need for a future response action is ongoing at a site, deletion is premature. In this situation, it is impossible to know whether a site satisfies the NCP's deletion standard - "no further response is appropriate." At sites with ground and surface water restoration remedies cleanup goals must be attained before the site qualifies for deletion (see Chapter 4, Section 4.1, Site Completion Criteria) .

Section 300.5, defines response as removal, remedy, or remedial action. EPA interprets that to mean that the site may be deleted when all removals and remedial actions are completed. Operation and Maintenance (O&M) is not defined as a response by the NCP, therefore, a site in O&M can be deleted.

> The NCP (40 CFR 300.435 (f) states that:
> (f) Operation and maintenance. (1) Operation and maintenance (O&M) measures are initiated after the remedy has achieved the remedial action objectives and remediation goals in the ROD, and is determined to be operational and functional, except for ground- or surface-water restoration actions covered under § 300.435(f)(4). A state must provide its assurance to assume responsibility for O&M, including, where appropriate, requirements for maintaining institutional controls, under § 300.510(c).

Site deletion from the NPL has been separated from the Five-Year Review Program (56 FR 66601, December 24, 1991). This means that a site can be deleted from the NPL without having the first Five-year review completed. EPA has separate guidance addressing Five-Year Review requirements.

All deletion related actions will be coordinated with the appropriate Trustees listed in the Regional

Contingency Plans. Upon publication in the Federal Register (FR) of any Notice of Intent to Delete (NOID) or Final Notice of Deletion (NOD), the Region will send a copy of the notice to the Trustees within one week of publication.

5.2 NPL Deletion Through Resource Conservation and Recovery Act Deferral (RCRA)

EPA's "Deletion Policy for Resource RCRA Facilities" (FR Notice 40 CFR Part 300 dated March 20, 1995), later amended to make policy also applicable to Federal Facility sites (FR Notice 40 CFR Part 300 dated November 24, 1997) states that:

> "EPA believes it is appropriate to delete sites from the NPL based upon deferral to RCRA under certain circumstances. Deletion of sites from the NPL to defer them to RCRA Subtitle C corrective action authorities would free CERCLA's oversight resources for use in situations where another authority is not available, as well as avoid possible duplication of effort and the need for an owner / operator to follow more than one set of regulatory procedures."

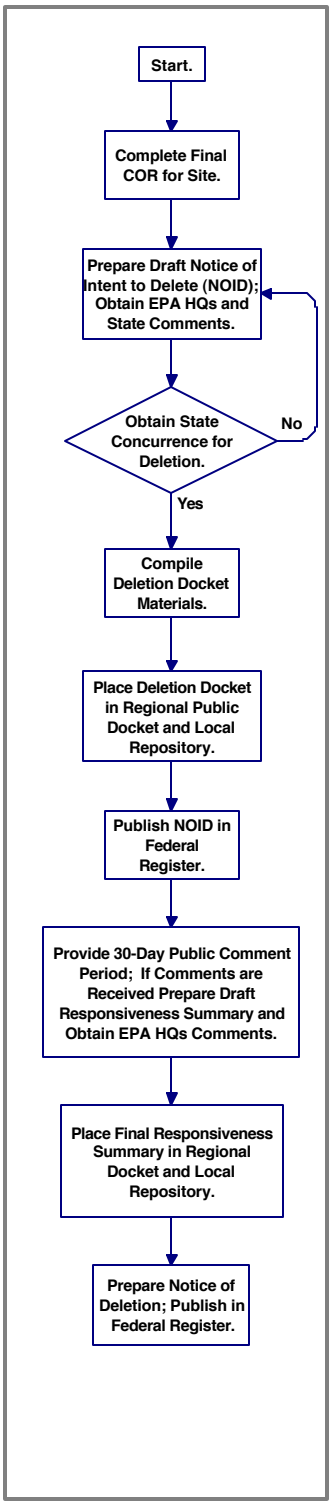
A site can de deleted from the NPL through a RCRA deferral action if it complies with the following criteria:

- The CERCLA site is currently being addressed by RCRA corrective action authorities under an existing enforceable order or permit containing corrective action provisions.
- Response under RCRA is progressing adequately.
- Deletion would not disrupt an ongoing CERCLA response action.

5.3 The Deletion Process

Usually the deletion process begins once the site achieves the **site completion** milestone. In general, the Region initiates the deletion process. A State or an individual may also initiate the process by specifically requesting the deletion of a site. Exhibit 5-1 shows the main steps in the typical deletion process.

EXHIBIT 5-1, Site Deletion Process



The deletion process is divided in three steps: process initiation, publication of the NOID, and preparation of a responsiveness summary (and publication of NOD).

5.3.1 Process Initiation

The Region initiates the deletion process by:

- Obtaining a letter of concurrence from the State,
- Compiling the deletion docket, and
- Preparing a Notice of Intent to Delete

5.3.2 State Concurrence

Early in the deletion process the Region consults with the State and requests their concurrence on EPA's intent to delete the site. A site can not be deleted from the NPL without the State concurrence. If the State agrees with the deletion they will provide a concurrence letter.

5.3.3 Deletion Docket

The Region prepares a deletion docket containing all pertinent information supporting the deletion recommendation. The deletion docket is not a continuation of the Administrative Record for the site. Documents in the Administrative Record can be referenced and do not have to be duplicated in the deletion docket (provided the Administrative Record is still available to the public). The deletion docket should be available to the public at the EPA Regional office public docket and at a local repository. The documents contained in the deletion docket will vary depending on the type of response (e.g., remedial action, removal action, no action) and the lead agency (e.g., Federal, State, or responsible party).

These documents can be included in the deletion docket as applicable:

- Remedial Investigation / Feasibility Study Report
- Record(s) of Decision (ROD) or equivalent for each operable unit, including any ROD amendments or Explanations of Significant Differences
- Consent Decree(s)
- Action Memoranda
- Community Relations Plans
- Superfund State Contract
- Cooperative agreements
- Agreements with potentially responsible parties
- Design plans and specifications
- Construction inspection reports
- On-Scene Coordinator or Pollution Reports
- Documentation of State concurrence letter on deletion
- Operation and Maintenance Plan
- Final Close Out Report
- Transcripts from public meetings
- Bibliography of Administrative Record

Regional program offices should work with their Superfund community involvement staff to ensure that complete copies of the deletion docket are placed in the appropriate Regional and local repositories. The public will have an opportunity to review this docket during the 30-day public comment period that follows publication of the Notice of Intent to Delete (NOID). Public meetings are optional.

5.3.4 Notice of Intent to Delete

The NOID informs the public of EPA's intention to delete a site from the NPL. The deletion docket must be complete before the Region publishes the NOID in the FR. The NOID contains general information about the site, EPA Regional staff and other contacts, and deletion criteria and procedures. It provides for a 30-day public comment period. Site-specific information needed to prepare the NOID should be available from the Final Close Out Report (FCOR); the NOID should contain the sections illustrated in Exhibit 5-2. Appendix D presents an example of a NOID. The draft NOID is sent to EPA Headquarters (HQs) for review and comments. After addressing HQs comments and obtaining the signature of the Regional Administrator, the NOID is published in the FR.

EXHIBIT 5-2, Notice of Intent to Delete Summary

SECTION	CONTENTS
I. Summary	! Announcement of intent to delete.
II. Dates	! Dates for 30-day public comment period and submission of comments.
III. Addresses	! Name, address, and phone number of a Regional contact where comments may be sent and location of the Regional Docket and local repository.
IV. Further Information Contact	! Name, address, and phone number of a Regional contact for further information or questions.
V. Supplementary Information	! Table of Contents
VI. Information	! Identification of site to be deleted, and summary of information in FCOR.
VII. NPL Deletion Criteria	! List of applicable NCP criteria (40 CFR 300.425(e)) and a statement indicating that EPA retains the ability to use Superfund authority at a deleted site if future conditions warrant such actions (40 CFR 300.425(e)(3)).
VIII. Deletion Procedures	! Brief description of procedures followed to delete sites from the NPL.
IX. Basis For Intended Site Deletion	! Brief description of the following items: - Site history (location, former use, type of contaminants, FR citation of proposed and final NPL listing, and site conditions resulting in listing). - All response actions taken including scope of Remedial Investigation, if applicable, general results, and conclusions regarding future performance of these actions. - Specific cleanup goals and criteria and results of all confirmatory sampling and analysis. - O&M procedures and site monitoring program. - Reasons for the need for future five-year reviews, when appropriate, and plans for performance of such reviews. - Major community involvement activities. - How site meets deletion criteria. - State concurrence to delete the site.

5.3.5 Publication of the Notice of Intent to Delete and the Local Notice

The Region prepares and publishes the NOID in strict accordance with the Federal Register publication requirements. EPA HQs staff will review these notices to ensure national consistency and completeness.

The Regional Superfund Community Involvement Coordinator (CIC) should also prepare and distribute a local notice regarding the NOID. This notice should be published in a local newspaper of general circulation. It should announce the Agency's intent to delete the site from the NPL and the 30-day public comment period. The local notice should also provide an address and telephone number for

submission of comments, and identify the location of the local repository. Appendix H presents a sample local notice.

The CIC coordinator should also prepare a press release and distribute it to the community, State, and local officials; all PRPs; appropriate Federal agencies (including the Agency for Toxic Substances and Disease Registry, the National Response Team, and the appropriate Trustees listed in the Regional Contingency Plans); Superfund enforcement personnel; the Office of Regional Counsel (ORC); and any local repositories. In addition, the ORC should inform the State Attorney General and other interested agencies (State or Federal courts and the U.S. Department of Justice) of the intended deletion of the site.

5.3.6 Responsiveness Summary and Notice of Deletion

The Region is responsible for preparing a responsiveness summary for all local and national comments received. The responsiveness summary should present all comments received during the public comment period paired with detailed responses to the comments. A draft of the responsiveness summary is sent to EPA Headquarters for review and comment. The Region must include a copy of the responsiveness summary, approved by the Regional Administrator, in the Regional docket and local repository.

The Notice of Deletion (NOD), which includes an effective date (the date of publication), the name of a Regional contact, supplemental site information and the responsiveness summary, is signed by the Regional Administrator and published in the Federal Register. The NOD states that all appropriate Fund-financed responses under CERCLA have been implemented and that no further response is appropriate. Appendix I presents a sample Notice of Deletion.

5.4 Streamlining the Deletion Process

A streamlined process to delete sites from the NPL has been proposed by a Region. The process has been reviewed by the Office of Regional Counsel and other EPA HQs staff and there is agreement that at selected sites the process may be used to streamline the deletion process.

To obtain more information the Regions must consult with the appropriate Regional Center in HQ before using the streamlined approach. This approach streamlines the deletion process by combining the NOID and NOD thereby reducing the amount of internal time needed to finalize the deletion. Under this process, sites would be deleted from the NPL using a direct final notice procedure. In a direct final deletion action EPA would publish both a NOID and NOD in the FR and declare that the NOD will become effective unless EPA receives adverse or critical comments during the 30-day public comment period. If no adverse or critical comments are received, the deletion would become effective without any further EPA action. This approach would only be appropriate at sites where no comments are expected.

5.5 Site Deletion Checklist

For a site to achieve deletion, the RPM must:

- **T** Apply NCP criteria to verify deletion eligibility
- **T** Obtain State concurrence for site deletion
- **T** Compile deletion docket
  - Distribute deletion docket to appropriate repositories
- **T** Complete NOID procedures
  - Prepare draft
  - Submit to EPA HQs and State for review and comment
  - Address HQ and State comments
  - Publish in Federal Register
  - Provide a 30-day comment period
  - Upon publication of the NOID notify the appropriate Trustees listed in the Regional Contingency Plans
- **T** Complete Responsiveness Summary
  - Prepare Responsiveness Summary
  - Submit to EPA HQs for review and comment
  - Obtain Regional Administrator Approval
  - Submit to Regional Docket and Local Repository
- **T** Draft NOD
- **T** Publish NOD in Federal Register
- **T** Upon publication of the NOD notify the appropriate Trustees listed in the Regional Contingency Plans

6.0 PARTIAL DELETION

The Partial Deletions Rule, which allows the Environmental Protection Agency (EPA) to delete portions of National Priorities List (NPL) sites, provided that deletion criteria are met, was published in the Federal Register (FR) on November 1, 1995. Previously, EPA's policy had been to delete only after cleanup of the entire site. However, deletion of entire sites does not communicate the successful cleanup of portions of those sites. Total site cleanup may take many years, while portions of the site may have been cleaned up and may be available for productive use. Such a portion may be a defined geographic unit of the site, perhaps as small as a residential unit, or may be a specific medium at the site, e.g., ground water, depending on the nature or extent of the release(s).

Any person, including individuals, business entities, States, local governments, and other Federal agencies may submit a petition requesting a partial deletion. A petition may consist of a simple written request from any interested party. The Office of Emergency and Remedial Response (OERR) Directive 9320.2-11, Procedures for Partial Deletions at NPL Sites, dated April 30, 1996, OERR Directive 9320.2-11, EPA 540/R-96/014, PB 96-963222, provides information about partial deletions. See Appendices H and I for examples of Notice of Intent of Partial Deletion (NOIPD) and Notice of Partial Deletion (NOPD).

The partial deletion process is dictated by the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). Deletion of a portion of a site from the NPL, however, does not preclude eligibility for subsequent Fund-financed or potentially responsible party actions. If future conditions warrant, the NCP (40 CFR 300.425(e)(3)) provides that Fund-financed remedial actions may be taken at portions of sites deleted from the NPL. When there is a significant release from a portion of a site deleted from the NPL, the portion of the site may be restored to the NPL, without rescoring the site under the Hazard Ranking System (HRS). Additional enforcement actions also may be taken, depending on liability releases in the consent decree or administrative order. Deletion of a portion of a site does not affect cost recovery efforts under CERCLA section 107.

All partial deletion related actions will be coordinated with the appropriate Trustees listed in the Regional Contingency Plans. Upon publication in the Federal Register of any NOIPD or the NOPD, the Region will send a copy of the notice to the Trustees within one week of publication.

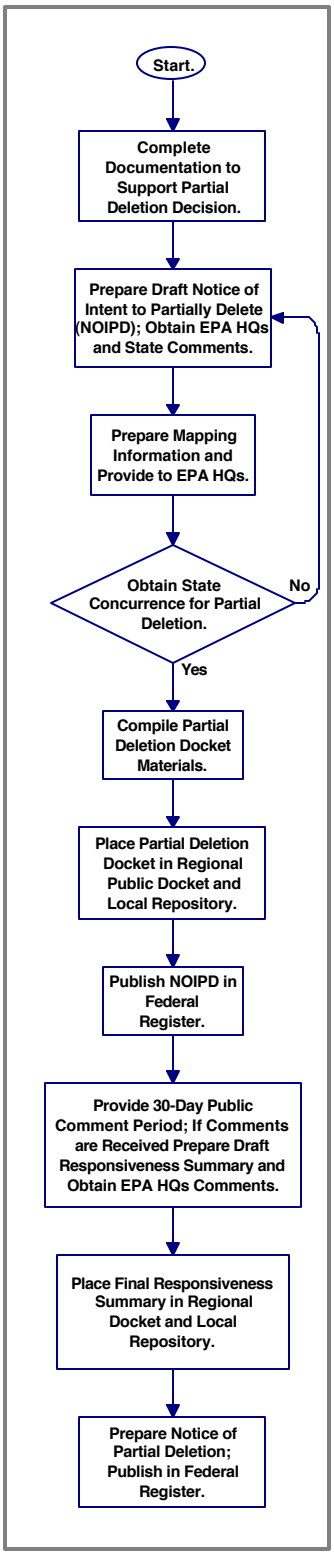
6.1 Partial Deletion Process

The NPL partial deletion process begins at most sites once a portion of the site has been cleaned up and site deletion criteria are met for that portion of the site. Requirements for the partial deletion area are the same as for the full deletion (see Section 5.3). Two differences are the mapping requirements for the partially deleted area and the documentation that supports the decision to partially delete. These will be discussed fully in Section 6.2. **Partial deletion** requirements ensure that 1) the documentation of activities and decision making at the portion of the site is complete, 2) the activities conducted and documented are verified, 3) the area of the site to be deleted is clearly and accurately defined / delineated, and 4) the public has an opportunity for notice and comment before the portion is formally deleted from the NPL.

In general, the Region initiates the partial deletion process. A State or an individual may also initiate the process by specifically requesting the partial deletion of a site. Exhibit 6-1 shows the main steps in the typical partial deletion process.

The partial deletion process is divided in five steps: process initiation, preparation of mapping data, publication of the NOIPD, and preparation of a responsiveness summary and publication of NOPD.

EXHIBIT 6-1, Partial Deletion Process



6.2 Special Partial Deletion Requirements

In order to accurately portray the portion of the site to be deleted, information about the area of the parcel or parcels to be deleted must be consistent and accurate. For this reason, it is important for HQs to obtain relevant locational information from the Regions for each partial deletion. This information will be centrally housed in the Superfund NPL Assessment Program (SNAP) database. The SNAP database tracks site information collected for the HRS packages at the time of listing. This information will also be maintained in other HQ Geographical Information Systems (GIS).

The Partial NPL Site Deletion Data Collection Form (see Appendix G) is designed to standardize partial site deletion information for input into SNAP and other HQ GIS systems. The primary source materials for completing this form are the NOIPD, site information supporting the decision to delete the portion of the site, and electronic locational data. Requirements for submitting electronic locational data are included in EPA's Locational Data Policy.

Partial deletion dictates strict mapping and tracking requirements. These mapping requirements will be applied to outline and precisely delineate the portion of the site to be deleted. This will foster a clearer public understanding of exactly what properties may or not be included in the NPL site. Precise mapping will accomplish this goal efficiently.

The mapping information will provide a national compilation of the total area that has been subject to the partial deletion policy and improve information on site locations. Approval for publication of the NOIPD will be given once the accuracy of the locational information is verified.

6.2.1 Mapping Requirements

The mapping requirements of a partial deletion package includes the following items:

- A map, in electronic GIS format, clearly showing the entire site and that portion to be deleted (including scale);
- Site coordinates (latitude and longitude) that delineate the boundary of parcel or parcels to be deleted.

- Landmarks, such as roads, water bodies, waste operations, or residential areas (these facilitate reading the map).
- Contacts for both the partial deletion decision and the electronic data.

The site map must be dated. The date is to reflect the delineation of the boundaries of the site as of the date prepared, including the portion to be deleted. Geographic coordinates of points describing a specific object (e.g., operable unit or portion of the site to be deleted) should be included. For additional information about mapping requirements see Appendix G.

Regions should also contact their Regional GIS coordinator to obtain assistance in developing and preparing the required mapping information. The following is a list of the Regional GIS Coordinators:

Region 1: Deborah Cohen, 617-565-3659
Region 2: Harvey Simon, 212-637-3594
Ildefonso Acosta, 212-637-4344
Region 3: Don Evans, 215-814-5370
Region 4: Rebecca Kemp, 404-562-8027
Region 5: Noel Kohl, 312-886-6224
Region 6: David Parrish, 214-665-8352
Region 7: Vickie Damm, 913-551-7247
Region 8: Karl Hermann, 303-312-6628
Region 9: Cheryl Henley, 415-744-1754
Region 10: Matt Gubitosa, 206-553-4059

The list of Regional GIS Coordinators can also be found on the intRAnet at:

http://intranet.epa.gov/oerrinet/regional/regions1-5.htm

6.2.2 Documentation to Support the Partial Deletion Decision

In a full deletion a Final Close Out Report (FCOR) is prepared to document site completion (see section 4.1 and 4.3). In the case of a partial deletion an FCOR will not yet exist. Therefore, another document will have to serve the same purpose as an FCOR for the portion(s) of the site that are being considered for deletion. These documents may be: Remedial Action Reports, No Action RODs, ESDs or ROD Amendments, Final Pollution Reports, or a memo to the file. Depending on the site circumstances any one of these documents can be used to document any of the following: that all work has been completed at a portion(s) of the site, including achieving cleanup goals; no further action is needed; or the RI/FS has determined that the portion(s) of the site is not contaminated and therefore warrants no response action. This document will be the basis for partially deleting a portion(s) of the site and will be part of the partial deletion docket.

6.3 Partial Deletion Checklist

For a site to achieve partial deletion, the RPM must:

- **T** Provide documentation that supports the basis for deletion (section 6.2.2)
- **T** Apply NCP criteria to verify deletion eligibility
- **T** Obtain State concurrence for partial site deletion
- **T** Compile partial deletion docket
  - Distribute partial deletion docket to appropriate repositories
- **T** Complete mapping requirements
  - Submit to EPA HQ for review and comment
- **T** Complete NOIPD procedures
  - Prepare draft NOIPD
  - Submit to EPA HQs for review and comment
  - Publish in Federal Register
  - Provide a 30-day comment period
  - Upon publication of the NOIPD notify the appropriate Trustees listed in the Regional Contingency Plans
- **T** Complete Responsiveness Summary
  - Prepare Responsiveness Summary
  - Submit to EPA HQs for review and comment
  - Obtain Regional Administrator Approval
  - Submit to Regional Docket and Local Repository
- **T** Draft Notice of NOPD
- **T** Publish NOPD in Federal Register
- **T** Upon publication of the NOPD notify the appropriate Trustees listed in the Regional Contingency Plans

6.4 When Can You Partially Delete

To help clarify when a site can have a partial deletion, three different sites are given as examples. These examples range from simple to more complex situations.

Example 1: At the Geneva Industries site in Houston, Texas, the source removal and soil removal actions were complete. The ground water pump and treat portion of the site would continue for a longer period of time. Institutional controls were put in place to prevent disturbance of a RCRA cap, slurry wall and ground water distribution lines. The surface of this site was partially deleted to allow site reuse.

Example 2: Another partially deleted site was the Lakewood Site in Lakewood, WA. In this case the clean up goals had been achieved for the soil OU. Therefore, the soil OU was partially deleted. This allowed reuse of this portion of the site. The ground water OU will remain on the NPL until clean up goals are achieved.

Example 3: A more complicated site was the Celanese Corporation Shelby Fiber Operations located at Shelby, NC. Three portions of the site were partially deleted. These consisted of the OU 1 outer tier groundwater extraction wells location area, OU 2 soil remediation area, and a nearby stream segment. In OU 1 groundwater samples showed that remediation levels had been achieved. The data also indicated that the inner tier wells were containing the remaining ground water contamination. At OU2 the soil remediation had been completed. The stream remediation area was examined and it was determined that it did not need any further remediation. Therefore, all three of these areas qualified for partial deletion.

For a site to be partially deleted all deletion criteria for the area that is being considered for deletion must be met.

6.5 Sites with Partial Deletions

The following is a list of sites that had a portion(s) of the site successfully partially deleted from the NPL through FY99. To obtain additional information about these sites please refer to the Federal Register Reference Number provided.

1) Bypass 601 Groundwater Contamination, Concord, NC, Region 4; *63FR 51530*, 09/28/1998
2) Celanese Corporation Shelby Fiber Operations, Shelby NC, Region 4; *63FR 19193,* 04/17/1998
3) Com Bay, Near Shore/Tide Flats, Tacoma, WA, Region 10; *61FR 55751,* 10/29/1996
4) General Electric/Shepherd Farm, East Flat Rock, NC, Region 4; *61FR 56477,* 11/01/1996
5) Geneva Industries, Houston, TX, Region 6; *62FR 16706,* 04/08/1997
6) Harbor Island, Seattle, WA, Region 10; *61FR 57594,* 07/08/1998
7) Hanford 100-Area (USDOE), WA, Region 10; *63FR 36861*, 07/08/1998
8) American Cyanamid, Boundbrook, NJ, Region 2; *63FR 71597,* 12/29/1998
9) Lakewood Site, Lakewood, WA, Region 10; *61FR 60197,* 11/27/1996
10) Para-Chem Southern, Inc., Greenville County, SC, Region 4; *62FR 65225,* 12/11/1997
11) Prewitt Abandoned Refinery, Prewitt, NM, Region 6; *63FR 4397,* 01/29/1998
12) Saegertown Industrial Area Site, Saegertown, PA, Region 3; *62FR 52032,* 10/06/1997
13) Sangamo Weston/Twelve mile Creek/Lake Hartwell, Pickens County, SC, Region 4; *63FR 51529,* 09/28/1998
14) South Andover Salvage Yards, Andover MN, Region 5; *63FR 57608,* 10/28/1998
15) Treasure Island Naval Station - Hunters Point Annex, San Francisco, CA, Region 9; *64FR 16351,* 04/05/98
16) Koppers Company, Inc., Morrisville, NC, Region 4; *62FR 46211,* 09/02/1997

OSWER Directive 9320.2-22
May 2011

Close Out Procedures for National Priorities List Sites

Office of Superfund Remediation and Technology Innovation
U.S. Environmental Protection Agency

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Acronyms

ARAR	Applicable or Relevant and Appropriate Requirement
ATSDR	The Agency for Toxic Substances and Disease Registry
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act of 1980
CFR	40 Code of Federal Regulations
CIC	Community Involvement Coordinator
DoD	Department of Defense
DQO	Data Quality Objective
EPA	U.S. Environmental Protection Agency
ESD	Explanation of Significant Differences
FCOR	Final Close Out Report
FDMS	Federal Docket Management System
FF	Federal Facility
FR	Federal Register
HQ	Headquarters
HRS	Hazard Ranking System
IC	Institutional Control
LTRA	Long Term Response Action
MCL	Maximum Contaminant Level
MCLG	Maximum Contaminant Level Goal
MNA	Monitored Natural Attenuation
NCP	National Oil and Hazardous Substances Pollution Contingency Plan
NOD	Notice of Deletion
NOID	Notice of Intent to Delete
NPL	National Priorities List
O&F	Operational & Functional
O&M	Operation and Maintenance
OSC	On-Scene Coordinator
OSWER	Office of Solid Waste and Emergency Response
OU	Operable Unit
PCOR	Preliminary Close Out Report
POLREP	Pollution Report
PRB	Permeable Reactive Barrier
PRP	Potential Responsible Party
QA/QC	Quality Assurance and Quality Control
QAPP	Quality Assurance Project Plan
RA	Remedial Action
RACR	Remedial Action Completion Report
RAO	Remedial Action Objective
RCRA	Resource Conservation and Recovery Act
RD	Remedial Design
RI/FS	Remedial Investigation/Feasibility Study
ROD	Record of Decision

RPM	Remedial Project Manager
SAA	Superfund Alternative Approach
SARA	Superfund Amendments and Reauthorization Act of 1986
SITREP	Situation Report
SPIM	Superfund Program Implementation Manual
SVE	Soil Vapor Extraction
USACE	U.S. Army Corps of Engineers

1.0 Introduction

This guidance document is designed primarily for U.S. Environmental Protection Agency (EPA's) Remedial Project Managers (RPMs). It describes a recommended process for accomplishing and documenting remedial action completion, construction completion, site completion, and site deletion. The guidance is intended for those sites that are or were final on the National Priorities List (NPL). Portions of this guidance also may assist in the management of sites with Superfund Alternative Approach (SAA) agreements in place. [1]

This guidance supersedes the following documents:

- OERR Directive 9320.2-11, *Procedures for Partial Deletions at NPL Sites*, April 30, 1996.
- OSWER Directive 9320.2-09A-P, *Close Out Procedures for National Priorities List Sites*, January 2000.
- OSWER Directive 9320.2-13*, Addendum to Policy for 'Close Out Procedures for National Priorities List Sites*,' December 6, 2005.

1.1 Background

Section 105(a)(8)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) as amended by the Superfund Amendments and Reauthorization Action of 1986 (SARA), requires that the statutory criteria provided by the Hazard Ranking System (HRS) be used to prepare a list of national priorities among the known releases or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States.[2] This list, which is Appendix B of the National Contingency Plan, is the NPL. Pursuant to the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) (40 Code of Federal Regulations [CFR] Part 300), sites on the NPL are eligible for Superfund-financed remedial actions (RAs).

Superfund often addresses NPL sites through a combination of removal and remedial authority. Cleanup activities under removal authority include actions developed to achieve prompt risk reduction through emergency, time-critical, and non time-critical actions. In general, cleanup actions under removal authority are selected in an Action Memorandum.

[1] For additional guidance on SAA sites, see *Revised Response Selection and Settlement Approach for Superfund Alternative Sites* (OSWER 9208.0-18; June 17, 2004).

[2] 40 CFR 300.425(c) provides two other mechanisms for listing a site on the NPL. The second mechanism allows the State to list one priority regardless of their HRS score. The third mechanism allows certain sites to be listed regardless of their HRS score, if all of the following conditions are met:

- The Agency for Toxic Substances and Disease Registry (ATSDR) of the U.S. Public Health Service has issued a health advisory that recommends dissociation from the release.
- EPA determines that the release poses a significant threat to public health.
- EPA anticipates that it will be more cost-effective to use its remedial authority than to use its removal authority to respond to the release.

Cleanup activities under remedial authority are called remedial actions. A remedial investigation/feasibility study (RI/FS) at an NPL site generally evaluates the nature and extent of contamination, and identifies potential alternatives for the remedy. The Record of Decision (ROD) generally documents the remedial activities selected to achieve protectiveness and meet Applicable or Relevant and Appropriate Requirements (ARARs). Consistent with CERCLA §121, RAs are required to protect human health and the environment, and they may include a combination of engineered response actions (such as treatment, containment, removal of contaminated material, and providing alternate water supplies). Institutional controls are often used to complement these engineering controls.

1.2 Contents of the Guidance

A Superfund site may require several response actions to address all the site hazards. The recommended process for remedial action completion is described in Chapter 2 of this guidance.

When physical construction is complete at the entire site (through removal and/or remedial authority), the site typically achieves the construction completion milestone. EPA Headquarters monitors and reports site progress towards the construction completion milestone. The recommended process for construction completion is described in Chapter 3.

Site completion typically occurs when it is determined that no further response is required at the site, all cleanup levels have been achieved, and the site is deemed protective of human health and the environment. The recommended process for site completion is described in Chapter 4.

Once the site completion milestone has been achieved, the site is typically eligible for deletion from the NPL. The deletion process generally includes EPA verification, in consultation with the state, that no further federal response is needed, and the opportunity for public notice and comment in the *Federal Register* before the site is deleted from the NPL. The NCP deletion criteria may also be applied to portions of the site. Consistent with the recommended site deletion process, these portions of a site may be partially deleted from the NPL. The recommended process for site deletion and partial deletion is described in Chapter 5.

This guidance provides recommended processes related to showing how the various milestones of the NPL site close out process are achieved, highlighting specific activities and the recommended documentation for each activity's completion.

OSWER Directive No. 9200.4-22A, *CERCLA Coordination With Natural Resource Trustees* dated July 31, 1997, calls for Trustees listed in the Regional Contingency Plans to be notified of the completion of construction at an NPL site. The guidance also indicates that EPA will seek to consult with Trustees prior to deleting a site or portion of a site from the NPL. Appropriate language is included in this document for addressing these notification requirements.

In addition, Section 126(a) of CERCLA provides that the governing body of an Indian tribe shall be afforded substantially the same treatment as a state regarding a number of actions, including consultation on remedial actions, and roles and responsibilities under the national contingency plan and submittal of priorities for remedial action. RPMs should consult with tribes, as appropriate and consistent with EPA tribal policy, throughout the recommended processes discussed in this guidance.

1.3 Role of the Remedial Project Manager

The EPA RPM typically has lead responsibility for ensuring the successful completion of cleanup activities at an NPL site and for guiding a site through each successive phase of the Superfund process. It is recommended that the RPM consider the recommendations contained in this guidance when evaluating whether each milestone at a site can be achieved. The RPM should review the recommendations in this guidance to assist in determining that all statutory and regulatory requirements have been met, and that all appropriate policies have been considered for each recommended step in the site completion process.

2.0 Remedial Action Completion

2.1 Introduction

This chapter describes the recommended procedures for achieving remedial action completion at a NPL site. For purposes of this guidance, the term "remedial action" (RA, or "RA project") refers to the actual construction or implementation of a discrete scope of activities supporting a Superfund site cleanup. Each RA project is generally designed to achieve progress toward specific remedial action objectives (RAOs) identified in a CERCLA remedy decision document (e.g., ROD, ROD amendment).

The guidelines and processes for RA completion described in this chapter are independent of any requirements for "Certification of Completion of the Remedial Action" that may exist under the terms of a consent decree. For example, the RA completion milestone does not necessarily signify that a PRP has fully performed an RA in accordance with the terms of a consent decree (see 2.4.2).

2.1.1 Relation to Operable Units

Throughout the site investigation phase, the lead and support agencies should first identify the type and optimal sequence of site activities, including whether the site may best be addressed as a series of separate operable units (OU). The NCP (40 CFR 300.5) defines an OU as a "discrete action that comprises an incremental step" in cleaning up a site. In practice, however, an operable unit now more commonly refers to a geographical area, a contaminated medium, or the chronological phase of a cleanup. The division of a site into OUs often serves to better inform stakeholders of the manner in which EPA expects to manage the cleanup of a site.

The RA project is the physical work carried out to address contamination at a particular OU. Rather than refer to the descriptive area or phase of a site, the terms "RA" or "RA project" are used synonymously to refer to the particular action implemented, such as sediment dredging or construction of a landfill cap.

A Superfund site may consist of one or more OUs, each of which may in turn be addressed by one or more RA projects. The number of OUs and planned projects at a site may increase or decrease over time as knowledge of site conditions change.

Both OUs and RA projects are used to sub-divide a site into a series of smaller components that allow for more effective management and implementation of cleanup activities. A distinct RA project corresponds to the "action" level in CERCLIS. It has a definite start and completion date as defined in the *Superfund Program Implementation Manual* (SPIM).

2.1.2 Utilizing Multiple RA Projects at a Site

The appropriate division of a site into discrete operable units and projects is based on the best professional judgment of the site manager and is often dependent on the size and

complexity of a site. Each RA should consist of an appropriate scope of activities, developed through sound engineering and project management analysis, which contribute to the efficient and effective achievement of an overall site cleanup strategy.

Some unique types of sites (for example, residential soil cleanups, excavation of mine waste, or sediment dredging) may require multiple RA projects to effectively carry out a single remedy. The approach to remediating these types of sites typically involves the removal of very large volumes of waste over an expansive geographic area and/or an exceptionally long period of time. In these situations, site managers may find that implementation of the remedy is best managed as a series of individual projects which may employ different delivery mechanisms.

Site managers should consider a variety of site-specific factors as well as programmatic constraints when determining how to divide implementation of a remedy into projects. For example, different parties may be funding or conducting actions at physically distinct portions of the site, a particular property owner may impede access thereby delaying work in some areas, or there may be large distances separating distinct waste areas. Site managers may also consider the impact of various contract mechanisms and durations when determining how to implement particularly large-scale remedies. The above considerations are merely examples of issues that could exist at a site; RPMs should fully consider the circumstances at their site to determine the most appropriate and efficient manner in which to manage the cleanup.

2.2 Remedial Action Completion Definition

Completion of a remedial action project is typically achieved when the designated Regional official (Branch Chief or above, as determined by the EPA Region) approves in writing the RA Report. The RA Report is often referred to as a Remediation Action Completion Report (RACR) at federal facilities.

The key factors to consider for achieving RA completion and submitting the RA Report vary depending on the type of remedy that was implemented. For purposes of this guidance, remedies are generally grouped into four categories:

- source remediation actions,
- source and groundwater containment actions,
- groundwater and surface water restoration actions, and
- institutional control (IC) actions.

The RA completion factors for each of these scenarios will be discussed separately in this chapter.

Exhibit 2-1 provides examples of RAs and indicates when it may be appropriate to achieve RA completion. Multiple technologies are increasingly being used to address both source

and groundwater contamination in parallel. In these situations, each remedial technology may have a unique goal. It is recommended that the RPM consult with HQ to ensure that the appropriate RA completion criteria are being considered.

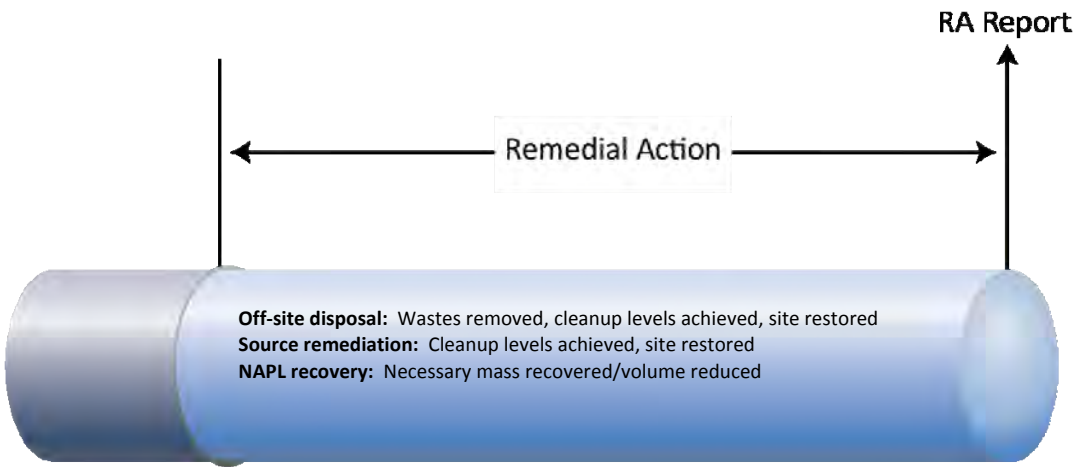
Exhibit 2-1
Remedial Action Completion Examples

Example RA	RA Complete Guidelines
Source Remediation Actions	
Source remediation (e.g., soil vapor extraction, in situ treatment of source material)	Cleanup levels have been achieved for the treated wastes and site has been restored.
Excavation and off-site disposal of contamination	All wastes that need to be addressed as part of the RA have been excavated, removed from the site to an approved location, cleanup levels have been achieved, and site has been restored.
NAPL remediation (destruction or recovery) with the goal of reducing the volume of source material, not restoring groundwater	Necessary contaminant mass removed or volume reduced.
Source and Groundwater Containment Actions	
Containment remedies (e.g., source control, landfill cap, groundwater containment in conjunction with a technical impracticability waiver)	Construction of the designed remedy is complete and data indicate that effective containment has been achieved (operational and functional, or O&F).
Extraction and treatment of groundwater to prevent plume migration	Construction of the treatment plant and monitoring system are complete, and data indicate that effective containment has been achieved (O&F).
Groundwater and Surface Water Restoration Actions	
Groundwater and surface water restoration remedies that involve ex situ treatment	Construction of the treatment plant and monitoring system are complete, and the remedy is operating as intended (O&F).
Groundwater restoration remedies that involve in situ treatment	Construction of the remedy and monitoring system are complete, injections of the appropriate reagent are underway, and the remedy is operating as intended (O&F).
Groundwater and surface water restoration remedies that involve monitored natural attenuation	The ROD is signed and any necessary RA is conducted (e.g., installation of sufficient monitoring well network to make the O&F determination).
Institutional Control Actions	
Implementation of an IC remedy	Institutional controls specified in the decision document are implemented.

2.2.1 RA Completion for Source Remediation Actions

For purposes of this guidance, source material is defined as material that includes or contains hazardous substances, pollutants, or contaminants that act as a reservoir for migration of contamination to groundwater, to surface water, to air, or acts as a source for direct exposure.[3] Source remediation generally refers to actions taken to reduce or eliminate the toxicity, mobility, or volume of contaminated source material, either through on-site treatment to appropriate cleanup levels or by physically removing it from the site. Examples include soil vapor extraction, in situ thermal treatment, and dredging of contaminated sediments. Exhibit 2-2 graphically depicts source remediation actions.

Exhibit 2-2
Source Remediation Actions Pipeline



For excavation and other active source remediation remedies, regions should consider the following factors prior to approval of the RA Report:

- Whether all construction activities are complete, including site restoration and demobilization;
- Whether all remedial action objectives and associated cleanup levels specified in the applicable ROD have been achieved;
- Whether a successful contract final inspection or equivalent has been conducted (see 2.4); and
- Whether the RA Report contains the information described in Exhibit 2-5.

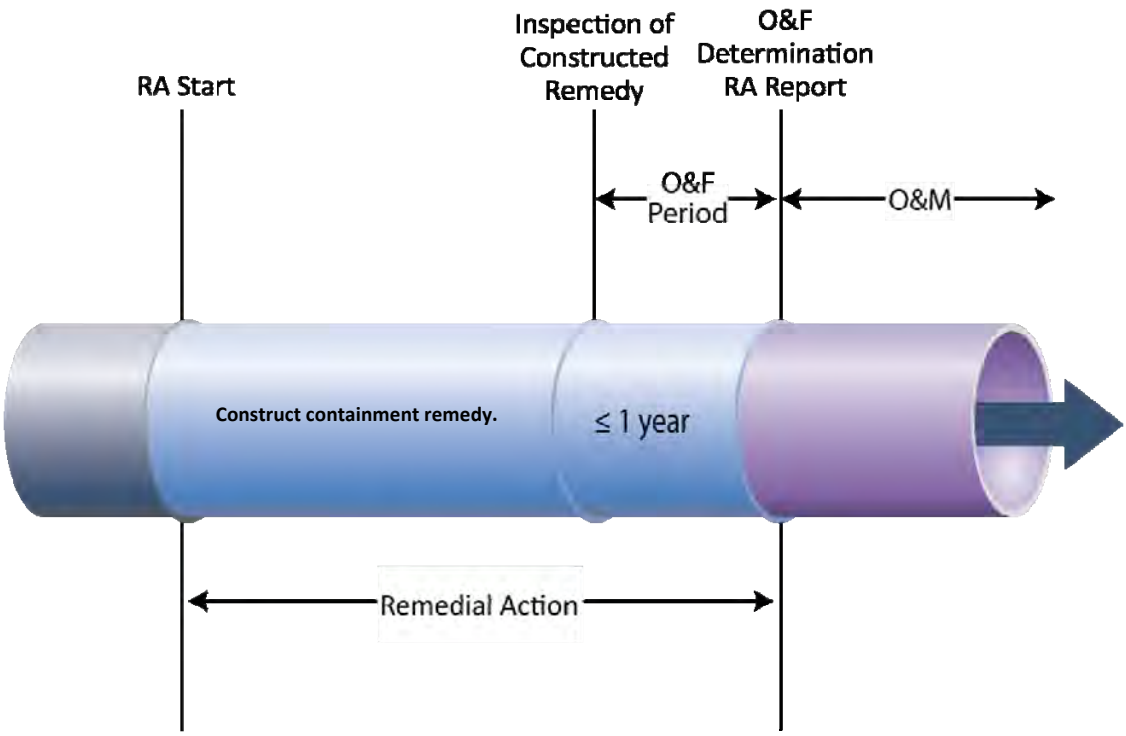
2.2.2 RA Completion for Source and Groundwater Containment Actions

Containment remedies may include, but are not limited to, permanent source control, a landfill cap, or physical measures to control the migration of a contaminated groundwater plume or surface water. Exhibit 2-3 graphically depicts source and groundwater containment actions. For containment remedies, regions should consider the following factors prior to approval of the RA Report:

[3] See also *A Guide to Principal Threat and Low Level Threat Wastes* (OSWER 9380.3-06FS; November 1991).

- Whether all construction activities are complete, including site restoration and demobilization;
- Whether all remedial action objectives in the applicable ROD have been achieved;
- Whether there is data to indicate that containment has been achieved, and the operational & functional (O&F) determination has been made (see 2.3.1);
- Whether a successful contract final inspection or equivalent has been conducted (see 2.4); and
- Whether the RA Report contains the information described in Exhibit 2-5.

Exhibit 2-3
Source and Groundwater Containment Actions Pipeline



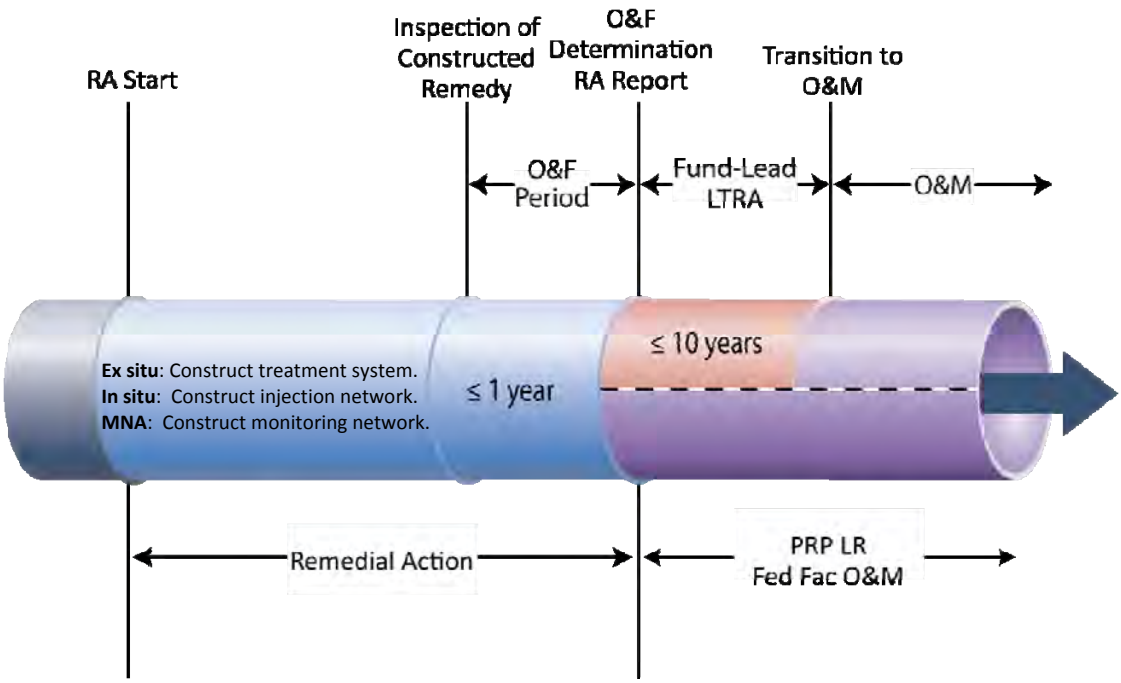
2.2.3 RA Completion for Groundwater and Surface Water Restoration Remedies

For purposes of this guidance, a restoration remedy is a remedial action with the objective of returning all or part of a surface water body or groundwater aquifer to the beneficial use specified in the ROD.[4] For groundwater currently or potentially used for drinking water purposes, these levels may be Maximum Contaminant Levels (MCLs) or non-zero Maximum Contaminant Level Goals (MCLGs) established under the Safe Drinking Water Act. The timing of the RA Report is generally unique for these remedies due to the duration of remediation, which may be substantially longer than for the other categories of remedies described above. For a restoration remedy, the RA Report is typically written when the

[4] See also *Transfer of Long Term Response Action (LTRA) Projects to States* (OSWER 9355.0-81FS-A; July 2003)

remedy has been constructed and is operating as intended, but prior to achieving the remedial action objectives specified in the ROD. Exhibit 2-4 graphically depicts groundwater and surface water restoration actions.

Exhibit 2-4
Groundwater and Surface Water Restoration Actions Pipeline



For groundwater and surface water restoration remedies, regions should consider the following factors prior to approval of the RA Report:

- Whether the construction of the treatment system is complete;
- For in situ restoration remedies, whether delivery of the appropriate reagent (e.g., oxidant or surfactants) is underway;
- Whether the monitoring well network is installed;
- Whether the remedy is operating as intended (O&F, see 2.3.1);
- Whether a successful contract final inspection or equivalent has been conducted (see 2.4); and
- Whether the RA Report contains the information described in Exhibit 2-5.

Previous guidance distinguished between Interim and Final RA Reports, where Interim RA Reports were used to document RA completion for groundwater and surface water restoration actions (a Final RA Report would then be issued when cleanup levels were achieved). Current guidance eliminates this distinction, now referring to all reports simply as "RA Reports". Rather than producing a Final RA Report, monitoring data demonstrating that cleanup levels have been achieved may be referenced in the Final Close Out Report (see Chapter 4).

2.2.4 RA Completion for Institutional Control Actions

EPA considers ICs to include "non-engineered instruments, such as administrative and legal controls, that help to minimize the potential for human exposure to contamination and/or protect the integrity of a response action."[5] ICs typically are designed to work by limiting land or resource use or by providing information that helps modify or guide human behavior at a site. Some common examples of ICs include zoning restrictions, building or excavation permits, well drilling prohibitions, easements, and covenants.

Institutional controls typically are selected to supplement an engineered remedy. In some instances, the party responsible for IC implementation is different from the party constructing the engineered remedy (e.g., the state and EPA's contractor, respectively). In such instances, the RA Report requirements are typically met when the engineered remedy has been implemented (see sections 2.2.1, 2.2.2, 2.2.3) and are not contingent on implementation of the ICs. A subsequent RA Report documenting the implementation of the ICs is typically not necessary.

There may be instances where ICs are an integral component of a single RA project, documented in the ROD as such and described in more detail in the Statement of Work, Consent Decree or other agreement. In these situations, it may be appropriate to ensure implementation of ICs prior to approval of the RA Report.

In limited cases when ICs are the sole remedy selected in a decision document, an RA Report is used to document completion.[6] In these limited cases, regions should consider the following factors prior to approval of the RA Report:

- Whether the ICs specified in the ROD (or ROD Amendment, ESD) are implemented;
- Whether a successful final inspection or equivalent has been conducted (see 2.4); and
- Whether the RA Report contains the information described in Exhibit 2-5.

2.3 Relationship of RA Completion to Other Actions

This section describes other actions in the remedial pipeline that often relate to RA completion. Detailed definitions, as well as additional guidance on tracking RAs and other related activities, may be found in the *Superfund Program Implementation Manual* (SPIM).

[5] *Institutional Controls: A Guide to Planning, Implementing, Maintaining, and Enforcing Institutional Controls at Contaminated Sites (Interim Final)* (EPA 540-R-09-001/OSWER 9355.0-89; November 2010). (PIME Guidance)

[6] Under the NCP, ICs are not to be used as the sole remedy unless active response measures are determined to be impracticable. See Section 2.3 of the PIME Guidance, cited above.

2.3.1 Operational & Functional (O&F)

O&F activities are generally conducted after physical construction of the remedy is complete to ensure that it is functioning properly and operating as designed. The phase following construction of the remedy and before O&F is often referred to as shakedown, where the constructor makes minor modifications as necessary to ensure the remedy is operating as designed. O&F determinations are generally made for containment remedies (all media), as well as groundwater and surface water restoration remedies (including monitored natural attenuation remedies). A separate O&F determination should be made for each remedial action at a site, and is not directly related to the site-wide construction completion determination (see Chapter 3).

For Fund-financed remedies, the O&F determination generally governs the schedule for transfer of a project from EPA to the state for operation and maintenance. O&F determinations may also be made at Potential Responsible Party (PRP) lead projects to signify the end of the shakedown period. A similar determination, Operating Properly and Successfully, is sometimes made at federal facility (FF) projects for purposes of property transfer under CERCLA section 120(h)3(B).[7]

According to the NCP (40 CFR 300.435(f)(2)), a remedy becomes O&F either one year after construction is complete, or when the remedy is determined concurrently by EPA and the state to be functioning properly and is performing as designed, whichever is earlier. EPA may grant extensions to the one-year period in writing, as appropriate. The specific criteria for determining O&F will vary for each remedy and site. For Fund-financed remedies, the Superfund State Contract or site-specific Cooperative Agreement provides an opportunity to describe the process and expectations for O&F prior to the initiation of the remedial action.

EPA and the state (and PRP, if appropriate) conduct a joint inspection at the conclusion of construction to determine that the remedy has been constructed properly. The joint inspection also typically marks the beginning of the O&F, or shakedown, period. Following the shakedown period, the O&F determination should be documented by a letter from EPA to the state (and PRP, if appropriate). The date of the O&F determination may be subsequently referenced in the RA Report; however the RA Report should not serve as the primary documentation for O&F due to the length of time it takes to prepare and approve the RA Report. This will help ensure timely transfer of O&M responsibilities to states for Fund-financed projects.

2.3.2 Long Term Response Action (LTRA and PRP LR)

For purposes of this guidance, LTRA refers to the Fund-financed operation of groundwater and surface water restoration measures, including monitored natural attenuation, for the first ten years of operation following the O&F determination or until cleanup levels are

[7] For additional information, see *Guidance for Evaluation of Federal Agency Determinations that Remedial Actions are Operating Properly and Successfully Under CERCLA Section 120(h)(3)* (Interim), August 1996.

achieved, whichever is earlier.[8] The Fund typically continues to pay 90 percent of the cost during this ten-year period (with the remaining 10 percent paid by the state as a required cost share), then the state becomes responsible for operation and maintenance (O&M) of 100 percent of the remedy.

The operation of PRP-lead restoration remedies following the RA is considered O&M, however EPA refers to these activities as "PRP LR" (for PRP long-term response) for tracking and reporting purposes. The ten-year time frame is not used for PRP LR. For federal facility-lead sites, groundwater and surface water restoration remedies transition from RA completion directly to O&M. Guidelines for the start and completion of LTRA and PRP LR activities may be found in the *Superfund Program Implementation Manual* (SPIM).

2.3.3 Operation and Maintenance (O&M)

O&M consists of the activities required to maintain the effectiveness and integrity of the remedy; in the case of Fund-financed measures to restore groundwater or surface water, O&M refers to the continued operation of such measures beyond the LTRA period until cleanup levels are achieved. Guidelines for the start and completion of O&M activities at Fund, PRP and federal facility-lead sites may be found in the *Superfund Program Implementation Manual* (SPIM).

2.4 Inspection Guidelines for RA Completion

EPA generally conducts contract pre-final and final inspections prior to closing out an RA construction contract, regardless of lead or contracting party. These inspections are conducted to determine whether the construction has been completed in accordance with the contract design and specifications. The inspections are generally held between the contracting party and the construction contractor, although others may be invited.

During the contract pre-final inspection, the contracting party's project manager and the construction contractor should inspect all elements of work to see if the work is substantively complete and ready for acceptance under the terms of the contract. Some minor defects may come to light as the inspection proceeds. The construction manager should develop a "punch list" of all items that need correction or completion before the work can be accepted. A pre-final inspection report should be prepared, including the punch list, completion dates for outstanding items, and a date for a final inspection.

If punch list items are minor, the pre-final inspection may automatically serve as the final inspection. Otherwise, a final inspection should be conducted later to determine that punch list items are corrected and all work has been completed in accordance with the contract plans and specifications.

[8] For additional information on LTRAs, see *Transfer of Long Term Response Action (LTRA) Projects to States* (OSWER 9355.0-81FS-A; July 2003).

An applicable consent decree, Federal Facility Agreement, Statement of Work or other agreement may recommend additional inspections depending upon site circumstances. These inspections may be held concurrently with or separately from the contract pre-final and final inspection described in this guidance.

2.4.1 Fund-lead RA Completion Inspections

The NCP refers to an additional inspection at Fund lead sites requiring LTRA and/or O&M. This inspection is typically conducted jointly by EPA and the state at the end of all construction activities for that RA project in order to initiate the shake down, or O&F, period. If convenient, it can be conducted in conjunction with the contract pre-final or final inspection (see Section 2.4). The results of this inspection should be clearly documented in order to support the initiation of the O&F period.

2.4.2 Responsible Party-lead RA Completion Inspections

The *Model RD/RA Consent Decree* (Section XIV, Certification of Completion) refers to a pre-certification inspection upon completion of the RA. This inspection may involve the Settling Defendants (PRPs), EPA, the state, and appropriate contractors. The purpose of this inspection is typically to determine if the remedial action has been fully performed, and the performance standards have been achieved in accordance with the terms of the consent decree.

After the pre-certification inspection, if the Settling Defendants still believe that the RA has been fully performed and the performance standards have been achieved, the final consent decree normally requires them to submit a written report to EPA for approval stating that "the Remedial Action has been completed in full satisfaction of the requirements of this Consent Decree." This report, if it contains the proper information, may also serve as the RA Report for the remedial action.[9]

2.4.3 Federal Facility-lead RA Completion Inspections

Federal Facility Agreements may include an additional set of inspections to determine that all aspects of the remedy have been implemented in accordance with applicable enforcement documents and the ROD. Participants may include representatives from the federal facility, the EPA, the state, and appropriate contractors. The inspection can be done concurrently with the contract inspection described in Section 2.4, where appropriate.

[9] Final RD/RA Consent Decrees (Section XIV, Certification of Completion) usually require use of a "Certification of Completion of the Remedial Action" for consent decrees that address the sole or final operable unit for the site in which the United States has decided to grant a site-wide covenant not to sue. The model states that this Certification may be used, consistent with regional practice, for non-final OU consent decrees but this is not typically the case.

2.5 Preparing the RA Report

The RA Report should document the cleanup activities that occurred in order to fully implement a remedial action project at a site. The collection of individual RA Reports for a site can be used as the supporting documentation for development of the Final Close Out Report, as described in Chapter 4.

The RA Report is typically prepared by the party most familiar with the RA construction efforts (e.g., construction or oversight contractor). Such familiarity should provide the best opportunity to describe the specific activities conducted as part of the remedial action, and should provide the necessary supporting information to document that the remedy has either met cleanup levels or has achieved O&F.

The RA Report should be completed as soon as possible after contract final inspection of the completed construction, and the determination that the remedy is O&F, if applicable. The RA Report may take some time to compile; however, the goal is to have the report submitted to the region for approval within 90 days of the final inspection. This is a recommended guideline; the applicable Consent Decree, Statement of Work, or Federal Facility Agreement may specify the report schedule for a given RA project.

Exhibit 2-5, at the end of this chapter, presents the recommended contents of the RA Report. As discussed in Section 2.2.2, the contents of the RA Report are dependent upon the nature of the activities that have occurred for that particular RA project. Some items previously recommended for RA Reports (including documentation of actual RA costs and analysis of lessons learned) are no longer recommended. These items may be included as an optional appendix to the report, or documented independently in the site file.

Additional guidance specific to the preparation of Remedial Action Completion Reports (RACRs) for Department of Defense facilities on the NPL is available in the January 19, 2006 document *Recommended Streamlined Site Close Out and NPL Deletion Process for DoD Facilities*.

2.6 RA Report Approval

Since the RA Report is not typically prepared by EPA, the report is approved by EPA in order to achieve RA completion. There is no formal EPA Headquarters review or concurrence role for RA Reports.

Approval occurs when the designated regional official (Branch Chief or above, as determined by the EPA Region) approves in writing the RA Report. The approval can be provided with an appropriate signature on the RA Report cover sheet, an internal approval memorandum from the RPM to the designated regional official, or by letter to the originator of the RA Report.

Exhibit 2-5
Recommended Remedial Action Report Contents

Section	Contents
I. Background	• Provide a brief description of the site (e.g., name, location). • Summarize requirements specified in the applicable ROD for the RA. Include information on the remedial action objectives, cleanup levels (and basis for determining the cleanup levels), institutional controls, monitoring requirements, operation and maintenance requirements, and other parameters applicable to the design, construction, operation, and performance of the RA. • Briefly summarize the remedial design (RD), including any significant regulatory or technical considerations or events that occurred during the preparation of the RD. • Identify and briefly discuss any ROD amendments, explanation of significant differences, or technical impracticability waivers.
II. Construction Activities	• Provide a step-by-step summary description of the activities undertaken to construct and implement the RA (e.g., mobilization and site preparatory work; construction of the treatment system; associated site work, such as fencing and surface water collection and control; system operation and monitoring; and sampling activities). • If a treatment remedy, refer reader to an appendix for a description of the major components of the treatment train and operating parameters for the system. • If implemented, summarize details of the institutional controls (e.g., the type of institutional control, who will maintain the control, who will enforce the control). • Summarize any significant problems or deviations that occurred during construction (an ESD or other documentation separate from the RA Report may also be appropriate).

Section	Contents
III. Chronology of Events	• Provide a tabular summary that lists the major events for the RA, and associated dates of those events, starting with ROD signature. • Include significant milestones and dates, such as RD submittal and approval; decision document modifications; mobilization and construction of the remedy; significant operational events such as treatment system / application start-up, monitoring and sampling events, system modifications, operational down time, variances or non-compliance situations, and final shut-down or cessation of operations; final sampling and confirmation-of-performance results; required inspections; demobilization; and completion or startup of post-construction operation & maintenance activities.
IV. Performance Standards and Construction Quality Control	• For treatment remedies, identify the quantity of material treated, the strategy used for collecting and analyzing samples, and the overall results from the sampling and analysis effort to confirm that cleanup levels have been achieved (where applicable). • For containment remedies, summarize the data to confirm that containment is occurring (basis for O&F determination) and that, if applicable, cleanup levels have been achieved. • For excavation remedies, identify the amount of material excavated, the strategy for temporary storage and sampling, (or direct load-out), a description of any on-site or off-site treatment prior to disposal, and the final disposal location. • Provide an explanation of the approved construction quality assurance and construction quality control requirements or cite the appropriate reference for this material. Explain any substantial problems or deviations. • Provide an assessment of the performance data quality, including the overall quality of the analytical data, with a brief discussion of quality assurance and quality control (QA/QC) procedures followed, use of a quality assurance project plan (QAPP), comparison of analytical data with data quality objectives (DQOs). • For PRP or federal facility-lead projects, discuss EPA's oversight activities and results with regard to analytical data quality and the review of confirmatory data.

Section	Contents
V. Final Inspection and Certifications	• Report the results of the various pre-final and final RA contract inspections. Note punch list items identified during the pre-final inspection and discuss how they were addressed prior to the final inspection. • Briefly describe adherence to health and safety requirements while implementing the RA. Explain any substantial problems or deviations. • For RP-lead, describe results of pre-certification inspection. • If applicable, certify that the remedy is operational and functional, along with the date this was achieved.
VI. Operation & Maintenance Activities	• Describe anticipated operation and maintenance activities, such as monitoring, site maintenance, and closure activities. • Identify potential problems or concerns with such activities. • If the remedy involves groundwater or surface water restoration, describe the future activities necessary to meet cleanup levels. • If ICs have not been implemented, describe activities that need to be completed to get the controls in place.
VII. Contact Information	• Provide contact information (names, addresses, phone numbers, and contract/reference data) for the major design and remediation contractors, EPA oversight contractors, and the respective RPM and project managers for EPA, the state, and the PRPs, as applicable.
Appendices	• Provide supplemental information in appendices to the RA Report, as appropriate. These could include a map of the site and operable unit, a schematic of the treatment system, as-built drawings, site restoration plan, supplemental performance information, documentation of the O&F determination, and a list of references.

2.7 RA Report Distribution

Once the RA Report is approved, the original is retained in the Regional site file, and a copy should be provided to the originator of the report and other appropriate parties (e.g., state, tribe and/or PRP). Upon RA Completion, the region should also notify the appropriate Natural Resources Damages Trustees listed in the Regional Contingency Plans (if there are trustees at the site).[10] The region should provide a copy of the RA Report to the Trustees within one week of the completion and approval of the report.

[10] For additional information, see *CERCLA Coordination With Natural Resource Trustees* (OSWER 9200.4-22A; July 31, 1997).

3.0 Construction Completion

3.1 Introduction

In the first ten years of the Superfund program, outside audiences often measured Superfund's progress in cleaning up sites by the number of sites deleted from the NPL. This measure, however, did not and still does not fully recognize the substantial construction work and reduction of risk to human health and the environment that has occurred at NPL sites not yet eligible for deletion.

In response, the NCP Preamble *Federal Register* notice (55 FR 8699, March 8, 1990) established a "construction completion" category of NPL sites to more clearly communicate to the public the status of cleanup progress among sites on the NPL. In a subsequent *Federal Register* notice (58 FR 12142, March 2, 1993) EPA formally introduced construction completions ". . . to simplify its system of categorizing sites and to better communicate the successful completion of cleanup activities."

For purposes of this guidance, a construction completion site is a CERCLA site where physical construction of all cleanup actions is complete, including actions to address all immediate threats and to bring all long-term threats under control. Only sites that are final on the NPL or deleted from the NPL may qualify for construction completion.

Determination of construction completion at a site has no legal or financial significance, as it does not relate to satisfying contractual or other requirements (e.g., cleanup contract, consent decree, cooperative or interagency agreement), nor does construction completion affect the eligibility of cost reimbursement from the Fund.

3.2 Construction Completion Process

Construction completion is a site-wide measure; therefore completion of the last response action at a site generally determines when a site becomes eligible. This section discusses the typical construction completion process for sites addressed under CERCLA remedial authority, which is the most common approach to cleanup of sites on the NPL. At these sites, the milestone is normally achieved when a pre-final inspection for the last RA has been conducted and a Preliminary Close Out Report (PCOR) has been signed. Later sections of this guidance will address unique scenarios for sites addressed under other, or multiple, authorities.

3.2.1 Pre-Final Inspection

A pre-final inspection should be conducted for the site's final RA following the recommended procedures outlined in Section 2.4, Inspection Guidelines for RA Completion. Construction completion criteria are normally satisfied when only minor "punch list" items are identified in the inspection to finish the work in accordance with design plans and

specifications. For purposes of this guidance, punch list items are activities that are part of the contract but do not affect the functionality of the remedy. These items are usually addressed by the construction contractor before the final inspection, but typically do not impact the construction completion determination. Exhibit 3-1 provides examples of potential punch list items. Exhibit 3-1 is only a representative list; each site is evaluated individually to determine eligibility for construction completion.

Exhibit 3-1
Examples of Minor Punch List Items

- Revegetating landscape (except when integral to the remedy)
- Removing construction debris
- Installing additional monitoring wells
- Installing support equipment, such as security lighting
- Repairing minor defects in workmanship or construction
- Demobilization activities
- Resurfacing roads

3.2.2 Preliminary Close Out Report

While much of the input can be provided by the contractor or through previous RA Reports, the PCOR is an EPA document that is typically prepared by the Remedial Project Manager (RPM). Even before the pre-final inspection is conducted, the RPM can start drafting portions of the PCOR because much of the documentation is historical and not generally dependent on the outcome of the pre-final inspection.

The PCOR should focus on all OUs at the site, including a description of the releases at the site, site conditions, all construction activities (including removals), completion of construction, Five-year Reviews, and a detailed schedule of steps remaining for site completion. The PCOR generally should be seven to nine pages and contain the information shown in Exhibit 3-2.

The RPM will often prepare the PCOR for the site before the RA Report for the final RA project is completed. This sequence is typical because the RA Report may take up to 90 days for the preparer (PRP, contractor, USACE, etc.) to submit and get approved, or the site may have a long period of operation before cleanup levels are achieved (e.g., soil vapor extraction, bioremediation).

EPA Headquarters (HQ) has Regional Coordinators assigned to act as primary reviewers of draft PCORs. These individuals will work closely with the RPM in assessing eligibility for construction completion and reviewing the draft document. The RPM sends the draft PCOR to the appropriate HQ Regional Coordinator for review and comment prior to regional signature. After addressing HQ comments and obtaining the signature of the Regional Superfund Division Director (or designee), a copy of the signed report is forwarded to EPA HQ for concurrence and tracking. If HQ concurs, the construction completion date normally corresponds to the date the regional official signed the PCOR.

Exhibit 3-2
Recommended Preliminary Close Out Report Outline

Section	Contents
I. Introduction	• Include general statement indicating date of pre-final inspection and a statement that contractors or agencies have constructed the remedies in accordance with remedial design plans and specifications.
II. Summary of Site Conditions	• Provide background summary of site location, site description, and NPL listing information. • Describe any removal action activities at the site. • Summarize remedies selected and remedial action objectives from all decision documents. • Include dates each RA was initiated and completed, method used to implement RA (e.g., consent decree, contract, cooperative or other agreement), and date and description of pre-final inspections used to determine that construction is complete. • If implemented, summarize details of the institutional controls (e.g., the type of ICs, who will maintain and enforce the controls).
III. Demonstration of Construction QA/QC	• Document that the construction quality assurance/quality control plan was implemented, and that construction completion is consistent with the ROD(s) and remedial design plans and specifications. • Summarize any significant deviations that occurred during construction (an ESD or other documentation separate from the PCOR may also be appropriate).
IV. Schedule of Activities For Site Completion	• Identify activities remaining in order to: » Assure effectiveness of the remedy (e.g., implement institutional controls, work plan for operation and maintenance), » Assure consistency with the NCP (e.g., joint EPA/state inspection, operational and functional determination), » Satisfy requirements for site completion (e.g., achieve groundwater cleanup goals). • Note the schedule for the first (or next) Five-Year Review and state whether the review is statutory or policy. • Specify the organization responsible for implementation of each activity. • Set estimated dates for completion of each activity.

Sometimes a PCOR may not be needed because the site meets both construction completion and site completion criteria (See Chapter 4) simultaneously. In these instances, the RPM may elect to prepare a Final Close Out Report (FCOR) to satisfy the purposes of both documents concurrently. For example, a site where the remedy involves only excavation and consolidation of contaminated soils under a cap may be eligible for both construction completion and site completion pending confirmatory sampling and a successful final inspection. At a site with a groundwater restoration remedy, an FCOR would likely not be appropriate at the time of construction completion due to the extended operation of the groundwater remedy prior to achieving final cleanup levels.

At some NPL sites, EPA determines that no physical construction is necessary in the final OU to protect human health and the environment. There may or may not have been previous removal or remedial actions conducted at other OUs of the site. All sites qualifying for construction completion, including sites with No Action RODs in the final operable unit, should be documented via a Preliminary Close Out Report or Final Close Out Report.

> The construction completion milestone is typically achieved when the Regional Superfund Division Director (or designee) signs the PCOR, a hard copy of the signed document is sent to EPA HQ, and EPA HQ concurs.

Upon completion of a PCOR or FCOR, the appropriate Trustees listed in the Regional Contingency Plans should be notified of the construction completion determination (if there are trustees at the site).[11] The region should provide a copy of the report to the Trustees within one week of the completion of the report. A copy should also be provided to the state, tribe and PRP, if applicable.

3.3 Technology Considerations for Construction Completions

This section includes considerations for specific types of remedies, including groundwater treatment remedies, in-situ groundwater and soil remedies, soil vapor extraction, monitoring, and institutional controls. This section also discusses some special considerations for interim remedies and contingency remedies. The information below only addresses a subset of the many technologies employed at NPL sites. In instances where other remedial technologies are used, site-specific circumstances should be evaluated to determine eligibility for construction completion.

The sections below provide information and recommendations for achieving construction completion for a given remedy, assuming the given remedy is the last action at a site prior to achieving construction completion. However, the official construction completion determination applies to the entire NPL site. The site-wide determination generally will not be made until each individual remedy at a given site meets the definition of construction completion.

[11] For additional information, see *CERCLA Coordination With Natural Resource Trustees* (OSWER 9200.4-22A; July 31, 1997)

3.3.1 Groundwater Treatment Remedies

Groundwater treatment remedies often involve extraction of groundwater followed by conveyance to an above-ground treatment system. Such remedies may be undertaken to restore groundwater quality to levels that allow for beneficial use (e.g., restoration to safe drinking water levels) or to prevent further migration of a contaminated plume. These actions typically involve a continuous operation phase long after the system has been constructed in order to achieve the cleanup levels specified in the ROD.

These sites may achieve construction completion when physical construction of the remedy (e.g., construction of the treatment plant, pumps, and extraction wells) is complete, the pre-final inspection has been conducted, the treatment system is operational, and any expected future adjustments are likely to be minimal in nature (e.g., well replacement). If additional, substantial work is expected (e.g., expansion of the extraction network or additional treatment components), then the site may not qualify for construction completion.

In instances where monitored natural attenuation (MNA) is being used to achieve groundwater remediation goals, the initial network of monitoring wells necessary to effectively evaluate MNA progress should be in place prior to construction completion.

For sites with a groundwater treatment remedy, the "Schedule of Activities for Site Completion" section of the PCOR should include the anticipated date of the Operational and Functional (O&F) determination and an estimated timeframe to achieve cleanup goals.

3.3.2 Soil Vapor Extraction Remedies

Soil vapor extraction (SVE) units are generally designed to physically remove volatile compounds from soil layers located above the water table. The process typically employs vapor extraction wells alone or in combination with air injection wells. Vacuum blowers are designed to induce air through the soil layers, which strip volatile compounds from the soil and carry them to the surface via extraction wells. Volatiles can be controlled by adsorption to activated carbon, incineration, or condensation by refrigeration. SVE systems vary in size, but typically consist of several extraction wells, blowers, and collection/treatment units.

For purposes of this guidance, SVE resembles groundwater treatment remedies in that little day-to-day activity, other than routine operation of the treatment facility, takes place once the treatment facility is built. These actions may require a continuous operation phase long after the system has been constructed in order to achieve the cleanup levels specified in the ROD. Accordingly, the construction completion policy for SVE remedies and groundwater treatment remedies are generally the same.

Since SVE is in situ, construction activity is primarily limited to the installation of extraction wells, blowers, and collection/treatment units. Construction completion at SVE sites may be achieved when the extraction network and treatment unit have been constructed, a successful pre-final inspection has been conducted, the treatment system is operational, and any expected future adjustments are likely to be minimal in nature (e.g., well replacement).

The "Schedule of Activities for Site Completion" section of the PCOR should include the anticipated date of the Operational and Functional (O&F) determination and an estimated timeframe to achieve cleanup goals.

3.3.3 In-situ Remedies for Groundwater or Soil

In-situ treatment remedies for groundwater or soil could include chemical oxidation or other types of chemical treatment, biological treatment, thermal treatment, air sparging, permeable reactive barriers, and other similar technologies. In-situ treatment remedies typically involve adding treatment agents to the subsurface. Treatment agents could include chemical agents (e.g., oxidants, or surfactants); agents to facilitate microbiological activity; heating agents (e.g., steam, or electric current); physical reactants (such as zero valent iron, oxygen or air); or other agents.

In 2005, EPA published a policy addendum (*Addendum to Policy for "Close Out Procedures for National Priorities List Sites"* OSWER 9320.2-13, December 6, 2005) to clarify the criteria to evaluate eligibility for construction completion for in situ groundwater remedies. Prior to construction completion, any treatability or pilot tests should be complete and implementation of the full-scale remedy should be underway. Full-scale in situ remedies are often implemented in phases across areas of the site (e.g., an initial round of injections in the source area is followed by data evaluation, then subsequent injections in a downgradient dissolved plume). In such instances, the criteria for construction completion generally apply to the initial phase of the full-scale remedy.

Generally, in situ treatment remedies may be considered construction complete when each of the following three activities has been completed and documented in a PCOR:

(1) Physical construction of at least the first phase of the full-scale remedy should be complete, including injection wells, metering systems or other components needed to place or control movement of treatment agents in the subsurface.

    If a pump and treat system is part of the remedy, physical construction of all components of the system should also be completed. If a permeable reactive barrier (PRB) is used, physical construction of all components of the barrier system, including reactive and non-reactive segments of the barrier, should be completed.

If no physical construction is needed for the full-scale remedy (e.g., existing injection wells from the pilot will be used), construction may be considered complete when final design of the full-scale remedy is completed. In this case, the final design report should specify the treatment agents to be used, the method for placing treatment agents in the subsurface, and the location and design of injection wells to be used for the full-scale remedy.

(2) At least one round of treatment/agent addition has been initiated for the full-scale remedy.
- If different agents are to be added in stages, at least one round of the first stage should have been initiated.
- For electrical resistive heating and thermal conductive heating, this typically would mean turning on the power for electrodes or heater elements.
- For steam enhanced extraction, this generally would mean commencement of steam generation.
- For in-situ chemical oxidation and surfactant/co-solvent flushing, this usually would mean initial agent addition.
- For phytoremediation, this typically means completing the initial planting (harvesting, if planned, does not typically need to occur prior to construction completion).
- For a permeable reactive barrier (PRB), the treatment agent (reactive barrier material) should have been placed during remedy construction.
- If Geoprobe^{tm} points (or similar) are to be used for injection of treatment agents, injection points needed for at least the first round of treatment should have been installed.

(3) The pre-final inspection indicates the remedy will perform as designed and any expected future adjustments are likely to be minimal in nature (e.g., replacement of existing injection wells).

3.3.4 Interim Remedies

Interim remedies are most commonly used to institute temporary measures to stabilize an area of a site and prevent further migration of contaminants while a final remedial solution is being developed.[12] An interim remedy may also be used to evaluate the performance of a remedial technology prior to establishing final cleanup levels. Interim remedies generally are limited in scope and address media or areas of a site that will be subsequently addressed by a final ROD.

If an interim remedy has been used to initiate cleanup at a site, it should be followed by a final ROD and implementation of the final remedy before the site qualifies as a construction completion.

[12] See also *A Guide to Preparing Superfund Proposed Plans, Records of Decision, and Other Remedy Selection Decision Documents* (EPA 540-R-98-031 / OSWER 9200.1-23.P; July 1999).

3.3.5 RODs with Contingency Remedies

RODs sometimes incorporate contingency remedies when there is uncertainty about the ability of the selected option to meet cleanup goals. Often this is particularly true where an innovative treatment technology is selected for use at a site. In terms of the construction completion criteria, the issue of contingency remedies may arise in situations where remediation may still be ongoing after the site is considered construction complete (e.g., groundwater restoration, SVE). For example, where natural attenuation is selected as the groundwater remedy, EPA may have included a more traditional pump and treat as the contingency remedy.

Sites that have contingency remedies identified in a ROD may be considered construction complete if the region has information to determine that use of the contingency remedy is not anticipated at the site, and the PCOR includes a statement to this effect. This determination in no way affects any Potential Responsible Party (PRP) settlement or other obligations. Making this determination does not preclude having to later invoke the contingency should it be required.

3.3.6 Groundwater Monitoring

Monitoring efforts generally are designed to provide information about remedy performance and progress toward achieving cleanup levels. Monitoring may be appropriate at any stage of remediation, including operation and maintenance (O&M) which continues after construction completion. Although monitoring occasionally may identify the need for future work, the need for monitoring does not preclude considering a site as a construction completion if the site qualifies otherwise.

In instances where monitored natural attenuation (MNA) is being used to achieve groundwater remediation goals, the initial network of monitoring wells necessary to effectively evaluate MNA progress should be in place prior to construction completion. Due to the dynamic nature of groundwater remedies, the installation of additional monitoring wells may continue after construction completion.

3.3.7 Institutional Controls

For purposes of this guidance, institutional controls are non-engineered instruments, such as administrative and legal controls, that help minimize the potential for human exposure to contamination and/or protect the integrity of a response action.[13] ICs typically are designed to work by limiting land or resource use or by providing information that helps modify or guide human behavior at a site. Some common examples of ICs include zoning restrictions, building or excavation permits, well drilling prohibitions, easements, and covenants.

[13] *Institutional Controls: A Guide to Planning, Implementing, Maintaining, and Enforcing Institutional Controls at Contaminated Sites* (Interim Final) (EPA 540-R-09-001 / OSWER 9355.0-89; November 2010). (PIME Guidance)

Since institutional controls do not require physical construction, a site can achieve the construction completion milestone before ICs are in place. The need for institutional controls should be documented in a decision document and the details regarding future implementation should be included in the "Schedule of Activities for Site Completion" section of the PCOR. However, ICs need to be implemented in order to achieve site completion (see Chapter 4).

3.4 Lead and Authority Considerations for Construction Completions

Some NPL site cleanups are addressed by parties other than EPA. Construction completion guidelines and procedures for these sites are discussed below.

3.4.1 PRP Lead Sites

A determination of construction completion at a site generally does not have any legal significance and therefore, should not affect any enforcement agreement or other obligations associated with the PRPs. Construction completion criteria for PRP sites are meant to be identical to those for Fund lead sites. The RPM, however, should carefully determine whether the activities performed by the PRP are in accordance with applicable enforcement documents.

3.4.2 Federal Facilities

Construction completion procedures for federal facility sites are identical to those for Fund- and PRP-financed remedial actions. The EPA RPM is generally responsible for developing the PCOR at federal facility sites. Due to the size and complexity of these sites, the PCOR is typically longer but generally should not exceed 20 pages.

3.4.3 State Lead Sites

Sites where the state is the lead agency for conducting and/or overseeing response actions typically call for state certification of construction completion. In these situations, EPA relies heavily on the state to determine the appropriate response actions at a site. (See Section 4.2.1. for guidelines to ensure all response actions have been appropriately documented in a decision document.)

In most instances, the state prepares the PCOR and EPA concurs with this decision by signing the PCOR. The PCOR should indicate regional concurrence with the state's determination that no further physical construction is anticipated.

If the state does not prepare an actual PCOR, then the state should send a certification letter to the region that includes a detailed summary of all actions taken at the site. The letter should also clearly state that no further construction is anticipated.

All sites qualifying for construction completion will be documented by a PCOR (or FCOR, as appropriate, see Section 3.2.2). If the state does not prepare the PCOR, then the EPA RPM prepares the document after regional concurrence with the state's certification letter.

3.4.4 NPL Sites Addressed Under Removal Authority

Actions under removal authority are generally intended to achieve prompt risk reduction through emergency, time critical, and non-time critical actions. In some rare instances, NPL sites may be addressed entirely under removal authority. In such instances, the site may achieve construction completion at the same time as site completion.

The RPM (or On-Scene Coordinator (OSC), as appropriate) should document in the final Pollution Report (POLREP) that the contractor has completed all removal actions and demobilized from the site.[14] The RPM or OSC should then prepare an FCOR to document the construction completion (and simultaneous site completion) for sites that were addressed entirely under removal authority. (See Section 4.2.1 for guidelines to ensure all response actions have been appropriately documented in a decision document.)

For sites addressed through a combination of remedial and removal authority, the process outlined in Section 3.2 (including a pre-final inspection, punch list items and the PCOR) is applicable. The PCOR should summarize all construction activities, whether conducted under removal or remedial authority.

3.4.5 Multiple Authorities Conducting Cleanup at the Same Site

Cleanup work under different authorities may be planned or under construction simultaneously at a site. For example, operating facilities may have RCRA corrective action ongoing at one part of the site, while CERCLA response work is occurring elsewhere. In situations where all physical construction identified under CERCLA authority for the NPL site is complete, but other non-CERCLA work remains, the site may qualify for construction completion if documentation guidelines are met. Any physical construction that has been identified through the CERCLA process should be finished before the site is declared construction complete.

3.5 Sites Deleted from the NPL

Initially, only final NPL sites qualified for construction completion. As a result, sites already deleted from the NPL would never qualify for construction completion if physical construction remained at the time of deletion. This included sites deleted from the NPL as a result of deferral of the remedy and associated physical construction to RCRA Subtitle C.

[14] For information regarding POLREPs refer to *Guidance for Preparing POLREPs/SITREPS* (OSWER No. 9360.3-03; December 2007).

In 2000, the Agency published a Notice of Policy Change in the *Federal Register* (65 FR 57810, September 26, 2000) which states that all sites that are on the NPL or have been deleted from the NPL may be eligible for construction completion "when all physical construction under all authorities is complete and all other applicable construction completion policy criteria have been satisfied." As a result, the construction completion milestone may follow deletion from the NPL at a small number of sites that have been deleted where, for example, cleanup was deferred to and carried out under RCRA Subtitle C.

3.6 Additional Work at Construction Completion Sites

Routine adjustments and modifications to a constructed remedy can be expected, particularly during O&M. Anticipating the need for these routine activities to occur does not preclude listing a site as a construction completion if the site qualifies otherwise.

Examples of routine adjustments or modifications may include the following:

- drilling of additional extraction wells as subsurface conditions evolve,
- replacement of injection wells for in-situ remedies,
- modifications to unit processes at groundwater treatment plants,
- dismantling and removing on-site remediation facilities,
- repair, replacement or relocation of equipment,
- cap maintenance (e.g., mowing, landscaping, erosion control),
- making repairs or adjustments to a treatment plant,
- clearing debris from a drainage system or settling pond,
- modifying the sampling and analysis scheme for the monitoring portion of a remedy.

The region should carefully evaluate the status of all response actions at the site and consider the need for additional construction activities. If the region believes that substantial construction might still be required in the future for the site (e.g., to address a potential new exposure pathway or expand an extraction network to a downgradient area), then the construction completion determination is likely premature. Similarly, if the region anticipates the need for an additional ROD, or a fundamental change that requires an amended ROD, then the construction completion determination may also be premature.

However, unforeseen circumstances may trigger the need for more substantial work after the site has been declared a construction complete. Examples may include adding a new treatment component to address a previously undetected contaminant, removing newly discovered pockets of contamination, or rebuilding a remedy following a natural disaster. In such situations where the need for the additional work is unforeseen, EPA HQ will decide, in consultation with the region, if the site should retain its construction completion status.

4.0 Site Completion

4.1 Introduction

For purposes of this guidance, site completion signifies the end of all response actions at a NPL site. The site completion designation generally means that the response actions at the site were completed and it is anticipated that no further Superfund response is necessary to protect human health and the environment.

It is recommended that the RPM apply EPA's site completion criteria discussed in this chapter to a site to help verify that it is eligible for site completion status. Site completion is typically documented by a FCOR. This chapter explains the recommended site completion criteria and the recommended documentation to demonstrate that the criteria have been met and that the site completion milestone has been achieved.

4.2 Site Completion Criteria

Typically, it is recommended that regions evaluate all the criteria discussed in this section when evaluating whether the site is eligible for site completion. Consistent with CERCLA, section 300.430 of the NCP states that the national goal of the Superfund Program is to select (and implement) remedies that are protective of human health and the environment, that maintain protection over time, and that minimize untreated waste. The recommended criteria are:

- All remedial decision documents have been completed and the selected remedy is consistent with CERCLA, the NCP, and EPA policy and guidance;
- All response actions have been completed and appropriately documented in the site file; and
- All institutional controls are in place.

4.2.1 All Remedial Decision Documents have been Completed and the Selected Remedy is Consistent with CERCLA, the NCP, and EPA Policy and Guidance

When evaluating site completion, it is recommended that all remedial activities taken at a site be documented in a remedial decision document. In addition, if cleanup actions were taken under another authority (for example, removal or state authority), it is recommended that these actions be evaluated in a CERCLA remedy decision document before site completion. In situations where site investigation activities conclude that site risks do not warrant a response action, this decision is generally documented in a no action or no further action ROD. At the time of site completion, all anticipated decision documents should be completed.

When reviewing the remedial decision documents and associated response actions, it is important to assess whether they adequately address all contamination and exposure pathways identified during the RI/FS or any subsequent site characterization. The remedial action objectives and cleanup levels selected in these documents are typically reviewed in light of CERCLA, the NCP, and current EPA policy and guidance. These reviews should provide assurance that the remedial action objectives (RAOs) and associated cleanup levels selected for the response actions identify clear expectations and objectives and are consistent with ARARs, as appropriate.

4.2.2 All Response Actions have been Completed and Appropriately Documented in the Site File

CERCLA and Section 300.5 of the NCP both define response as removal or remedial action, including enforcement related activities. As defined by the NCP, response actions may include a combination of engineering and/or institutional controls selected to address risks posed at the site. If waste is left in place, O&M activities may continue after all response actions have been completed. See 4.2.4 for additional definitions and information related to operation and maintenance activities.

In order to determine that all response actions have been completed, it is encouraged that the regions have defensible and reportable data to verify that the cleanup levels associated with the response action have been achieved. This data, along with other remedial and removal action activities, are typically included in a report signifying completion of these activities. The data and report should be part of the post-decision document file or general site file kept at the region.

For removal actions, the completion of these activities is typically documented in Pollution Reports (POLREPs). The content of these reports can be found in the *Guidance for Preparing POLREPs/SITREPS* (EPA 540/F-94/018).

For remedial actions, the completions of these actions are typically documented in RA Reports. Chapter 3 provides details on the recommended content of these reports for different types of remedial action.

It is recommended that the content of these reports be summarized in the Final Close Out Report. In addition to the compilation of the reports described in this section, the FCOR typically summarizes all activities associated with restoration of groundwater or surface water, including a summary of monitoring data and an analysis that demonstrates that cleanup levels have been achieved.

Recommended contents for this report are summarized in Exhibit 4-3.

4.2.3 Institutional Controls are In Place

EPA considers ICs to include "non-engineered instruments, such as administrative and legal controls, that help to minimize the potential for human exposure to contamination and/or protect the integrity of a response action".[15]

Exhibit 4-1
Role of Institutional Controls

The NCP (40 CFR 300.430(a)(1)(iii) states that institutional controls should supplement engineering controls to prevent or limit exposure, but institutional controls normally "shall not substitute for active response measures."

Institutional controls (ICs) may be necessary to ensure protectiveness and/or to protect a remedy. If any cleanup options being evaluated leave waste in place, ICs should be considered to ensure that unacceptable risk from residual contamination does not occur. In order to achieve site completion, the appropriate institutional controls need to be implemented, and the requirement for the institutional controls needs to be in a decision document.

4.3 Role of Operation and Maintenance Activities in Achieving Site Completion

The NCP discussion of Operation and Maintenance (O&M) is provided in Exhibit 4-2. O&M is not defined as a response action by the NCP, and may continue after site completion and deletion.

Exhibit 4-2
NCP Definition for Operation and Maintenance

The NCP (40 CFR 300.435(f)) states that: Operation and maintenance (O&M) measures are initiated after the remedy has achieved the remedial action objectives and remediation goals in the ROD, and is determined to be operational and functional, except for groundwater or surface water restoration under §300.435(f)(4). A state must provide its assurance to assume responsibility for O&M, including, where appropriate, requirements for maintaining institutional controls, under §300.510(c).

[15] *Institutional Controls: A Guide to Planning, Implementing, Maintaining, and Enforcing Institutional Controls at Contaminated Sites (Interim Final)* (EPA 540-R-09-001/OSWER 9355.0-89; November 2010). (PIME Guidance)

O&M activities that continue after the site has achieved the remedial action objectives and cleanup goals generally relate to maintaining engineering and/or institutional controls at the sites where waste is left on site.

Any site with O&M activities being conducted in a continued effort to attain remedial action objectives or cleanup levels typically does not qualify for site completion until these objectives and levels are met. These activities typically include actions related to groundwater or surface water restoration.

4.4 Final Close Out Report

The FCOR typically documents compliance with statutory requirements and provides a consolidated record of all removal and remedial activities for the entire site. Since it is the final record, it is recommended that the FCOR be a complete and stand-alone document. The report typically does not signify that the terms of cooperative agreements, consent decrees, or administrative orders have been satisfied, nor does it signify resolution of contractual or other administrative issues for Superfund activities.

It is recommended that the FCOR describe how the cleanup was accomplished and provide the overall technical justification for site completion. Although the content and format of the report may vary depending on site circumstances, it is recommended that the report include information presented in Exhibit 4-3. This recommended information is typically readily available from the previous documents such as the POLREPs, RI/FS, RODs, RDs, RA reports and O&M reports.

Typically, the RPM prepares the FCOR, but may task the state to prepare it at state-lead sites. In addition, PRPs or federal facilities may be requested to provide data to support the justification for site completion. The report is typically 10 to 15 pages, but may be longer for larger sites. To keep the report brief, it is recommended that detailed technical information and data be referenced or appended to the report. The state should have an opportunity to review and comment on the report prior to final signature. In addition, the region must send the draft to EPA Headquarters (HQ) for review and comment.

Once all stakeholder comments are appropriately addressed, the document is signed by the Regional Administrator or other appropriate official.

Upon completion of an FCOR, the appropriate Trustees listed in the Regional Contingency Plans will be notified of the completion of the remedial actions (if there are trustees at the site).[16] The region should provide a copy of the report to the Trustees within one week of the completion of the report. A copy should also be provided to the state, tribe and PRP, if applicable.

[16] For additional information, see *CERCLA Coordination With Natural Resource Trustees* (OSWER 9200.4-22A; July 31, 1997)

Exhibit 4-3
Recommended Final Close Out Report Outline

Section	Contents
I. Introduction	• Include general statement indicating all response actions have been successfully completed.
II. Summary of Site Conditions	• Provide background summary of site location, site description, and NPL listing information. • Describe any removal action activities at the site. • Summarize remedies selected and specify remedial objectives from all decision documents. • Include dates each RA was initiated and completed, method used to implement RA (e.g., consent decree, contract, cooperative or other agreement), and date of RA Reports. • Summarize details of the institutional controls (e.g., where ICs are a part of the remedy, include a map or figure, the objective of the ICs, the type of ICs, implementation, who will maintain and enforce the controls). • Discuss any final inspection activities that were performed.
III. Monitoring Results	• For source actions, discuss confirmatory sampling results which indicate compliance with cleanup levels. • For source and groundwater containment actions, discuss sampling results which indicate the remedy is functioning as designed. • For monitoring required for no action remedies, discuss sampling results which indicate the no action decision is appropriate.
IV. Attainment of Groundwater Restoration Cleanup Levels (if applicable)	• Provide a summary of monitoring data and an analysis to demonstrate cleanup levels specified in the RODs or Action Memoranda are achieved. • Append actual monitoring data and analysis from monitoring report(s) in appropriate level of detail.
V. Summary of Operation and Maintenance Required	• Description of ongoing monitoring activities for all media and engineering controls where waste is left on site. • Description of all enforcement and maintenance activities for institutional controls.
VI. Demonstration of Cleanup Activity QA/QC	• Document construction quality assurance/quality control plan that was implemented. • Document that the operation and maintenance quality assurance/quality control plan was implemented. • Document the sampling and analysis protocol that was followed.

Section	Contents
VII. Five-year Review	• Statement explaining whether a five-year review is appropriate, and if so, the type of review (statutory or policy) and the schedule for the review. • If five-year reviews were performed and are now discontinued, explain why. • If a five-year review had been performed at the site, provide a summary of the last five-year review completed (protectiveness determination, any identified issues and recommendations). • If issues were raised in the last five-year review, briefly describe activities taken to address issues and implement recommendations, as appropriate.
VIII. Site Completion Criteria	• Statement that the implemented remedy achieves the degree of cleanup or protection specified in the ROD(s) for all pathways of exposure. • Statement that all selected remedial and removal actions remedial action objectives and associated cleanup goals are consistent with agency policy and guidance. • Statement that no further Superfund response is needed to protect human health and the environment.
IX. Bibliography	• Complete citation of relevant reports

5.0 Site Deletion and Partial Deletion

5.1 Introduction

This chapter focuses on the NCP deletion criteria, the recommended process and documentation, and publication requirements needed to achieve the site deletion or partial deletion milestone. The information presented in the following sections generally references site deletions but applies to both site deletions and partial deletions of media, OUs, or specific parcels. Any differences will be noted in the text.

Deletion of a site or portion of a site from the NPL does not preclude eligibility for subsequent Fund-financed or responsible party actions. If future conditions warrant, the NCP (40 CFR 300.425(e)(3)) provides that Fund-financed remedial actions may be taken at sites or portions of sites deleted from the NPL. When there is a significant release from a site or portion of a site deleted from the NPL, the site or portion of a site may be restored to the NPL without rescoring the site under the HRS. Additional enforcement actions also may be taken, depending on liability releases in the consent decree or administrative order. Deletion of a site or portion of a site does not affect cost recovery efforts under CERCLA Section 107.

Deletion

The NPL deletion process typically begins at most sites once it is determined that the site completion milestone has been achieved and documented (Chapter 4). For purposes of this guidance, site deletion requirements include 1) the documentation of activities and decision making at the site is complete, 2) the activities conducted and documented are verified, and 3) the public has an opportunity for notice and comment before the site is formally deleted from the NPL.

Partial Deletion

The Partial Deletion Rule, which allows the EPA to delete portions of NPL sites, provided that deletion criteria are met, was published in the *Federal Register* on November 1, 1995 (65 FR 55466). Previously, EPA's policy had been to delete sites only after cleanup of the entire site has been completed. However, waiting to delete an entire site does not communicate the successful cleanup of portions of the site. Total site cleanup may take many years, while portions of the site may have been cleaned up and may be available for productive use. Such a portion may be a defined geographic area of the site, or may be a specific medium at the site, e.g., surface soil, depending on the nature or extent of the release(s).

5.2 NPL Deletion Criteria

These criteria are applied to the site or the portion of the site proposed for deletion.

The NCP (40 CFR 300.425(e)) states that a site may be deleted from, or recategorized on, the NPL when no response or no further response is appropriate. The EPA must consult with the state in making this determination. To delete a site from the NPL, EPA must determine, in consultation with the state, that one of the following criteria have been met:

- Responsible or other parties have implemented all appropriate response actions required;
- All appropriate Fund-financed response under CERCLA has been implemented, and no further response action by responsible parties is appropriate; or
- The remedial investigation has shown that the release poses no significant threat to public health or the environment, and, therefore, taking of remedial measures is not appropriate.

Site deletion from the NPL has been separated from the Five Year Review process (56 FR 66601, December 24, 1991). This means that a site can be deleted from the NPL without having the first Five Year Review completed. Once a site is deleted and waste is left in place above levels that allows for unrestricted use and unlimited exposure, a Five Year Review will be conducted at the site no less than every five years. EPA has separate guidance addressing Five Year Review requirements (OSWER No. 9355.703B P, June 2001).

Chapter 4 outlines the expectations for the determination that all response actions have been implemented.

5.3 NPL Deletion Through Resource Conservation and Recovery Act (RCRA) Deferral

EPA's *Deletion Policy for Resource Conservation and Recovery Act (RCRA) Facilities* dated March 20, 1995 (60 FR 14661), was later amended on November 24, 1997 (62 FR 62523) to also make the policy applicable to federal facility sites. The policy states that:

> "EPA believes it is appropriate to delete sites from the NPL based upon deferral to RCRA under certain circumstances. Deletion of sites from the NPL to defer them to RCRA Subtitle C corrective action authorities would free CERCLA's oversight resources for use in situations where another authority is not available, as well as avoid possible duplication of effort and the need for an owner/operator to follow more than one set of regulatory procedures."

A site can be deleted from the NPL through a RCRA deferral action if the site complies with the following criteria:

- The CERCLA site is currently being addressed by RCRA corrective action authorities under an existing enforceable order or permit containing corrective action provisions;
- Response under RCRA is progressing adequately; and
- Deletion would not disrupt an ongoing CERCLA response action.

This Deletion Policy pertains to deletions based on deferral to state/federal RCRA programs only, not other entities. For sites deferred to RCRA, the site may not necessarily meet the construction completion or site completion milestone prior to deletion. Sites deferred to other entities, such as Underground Storage Tanks or state cleanup programs, should still meet all deletion criteria discussed in Section 5.1.

5.4 The Deletion Process

Deleting a site from the NPL requires a modification to the Code of Federal Regulations. To perform this task, the Administrative Procedure Act requires formal administrative rule-making procedures which include creating a docket, publishing notices in the *Federal Register*, and holding a formal public comment period.

For full deletion, the site deletion process typically begins once the site achieves the site completion milestone.

For partial deletion, any person, including individuals, business entities, states, local governments, and other federal agencies, may submit a petition requesting a partial deletion. A petition may consist of a simple written request from any interested party. Upon evaluation by the region, this written request may begin the partial deletion process.

5.4.1 State Concurrence

Early in the site deletion or partial deletion process, the region consults with the state and requests the state's concurrence on EPA's intent to delete the site. A site cannot be deleted from the NPL without the state's concurrence. If the state agrees with the deletion, the state will provide a concurrence letter, and the letter is placed in the deletion docket.

5.4.2 Deletion Docket

The region prepares a deletion docket containing all pertinent information supporting the deletion recommendation. The deletion docket is not a continuation of the Administrative Record for the site. Documents in the Administrative Record can be referenced and do not have to be duplicated in the deletion docket (provided the Administrative Record is still available to the public). In addition to containing the documentation supporting the deletion, the docket also contains copies of the *Federal Register* deletion notices, Responsiveness summary and public comments, as appropriate. The deletion docket should be available to the public at the EPA regional office public docket, a local repository, and online in the site Federal Docket Management System (FDMS).

The FDMS holds deletion docket documents electronically in the online docket for the site. NPL site dockets contain documents that support all rulemaking actions for the site (site listing, partial deletions and deletions). Site dockets are available for public viewing at www.regulations.gov. RPMs are encouraged to work with their regional deletion coordinators to ensure the deletion docket is properly uploaded into FDMS.

The documents contained in the deletion docket will vary depending on the type of response (i.e., remedial action, removal action, and no action) and the lead agency (e.g., federal, state, or responsible party).

At a minimum, the following documents are typically included in the deletion docket for a full site deletion:

- Final Close Out Report
- State Concurrence Letter
- Administrative Record Index

At a minimum, the following documents are typically included in the deletion docket for a partial deletion:

- No Action ROD or RA Report for the parcels being proposed for deletion
- A map clearly delineating the boundaries of the parcels proposed for deletion
- State Concurrence Letter
- Bibliography of the Administrative Record citing those documents pertinent to the parcels

The documents listed in Exhibit 5-1 are examples of what may also be included in the deletion docket as applicable. This is not an exhaustive list. The contents of the deletion docket, outside of those minimum requirements listed above, are at the discretion of the region preparing the deletion.

It is recommended that regional program offices work with their regional Superfund deletions coordinators and records management staff to ensure that complete copies of the documents in the deletion docket are developed and placed in the appropriate regional, local, and FDMS site repositories. The public will have an opportunity to review the docket during the 30 day public comment period that follows publication of the Notice of Intent to Delete (NOID). Public meetings are optional.

Deletion notices are published in the *Federal Register* by either using the two-step rulemaking process (see Section 5.3.3) or the direct final rulemaking process (see Section 5.3.4). Although deletion requirements are the same for both processes, the administrative steps are slightly different.

Exhibit 5-1
Example Deletion Docket Documents

- ✓ Consent Decree
- ✓ Action Memoranda
- ✓ Community Relations Plans
- ✓ Superfund State Contract
- ✓ Cooperative Agreements
- ✓ Agreements with Potentially Responsible Parties
- ✓ Design Plans and Specifications
- ✓ Construction Inspection Reports
- ✓ On Scene Coordinator or Pollution Reports
- ✓ Five-Year Reviews
- ✓ Operation and Maintenance Plans
- ✓ Preliminary Close Out Report
- ✓ Transcripts from Public Meetings
- ✓ Institutional Control Documentation
- ✓ Monitoring Reports

5.4.3 Two-step Rulemaking Process

Exhibit 5-2 shows the administrative steps in the two-step rulemaking process. The deletion process steps generally include the following:

- Notice of Intent to Delete (NOID) preparation
- Obtaining HQ concurrence
- Publishing the NOID and Local Notice
- Receiving comments and preparing a Responsiveness Summary (if needed)
- Preparing and Publishing the Notice of Deletion (NOD)

5.4.3.1 Notice of Intent to Delete (NOID) Preparation

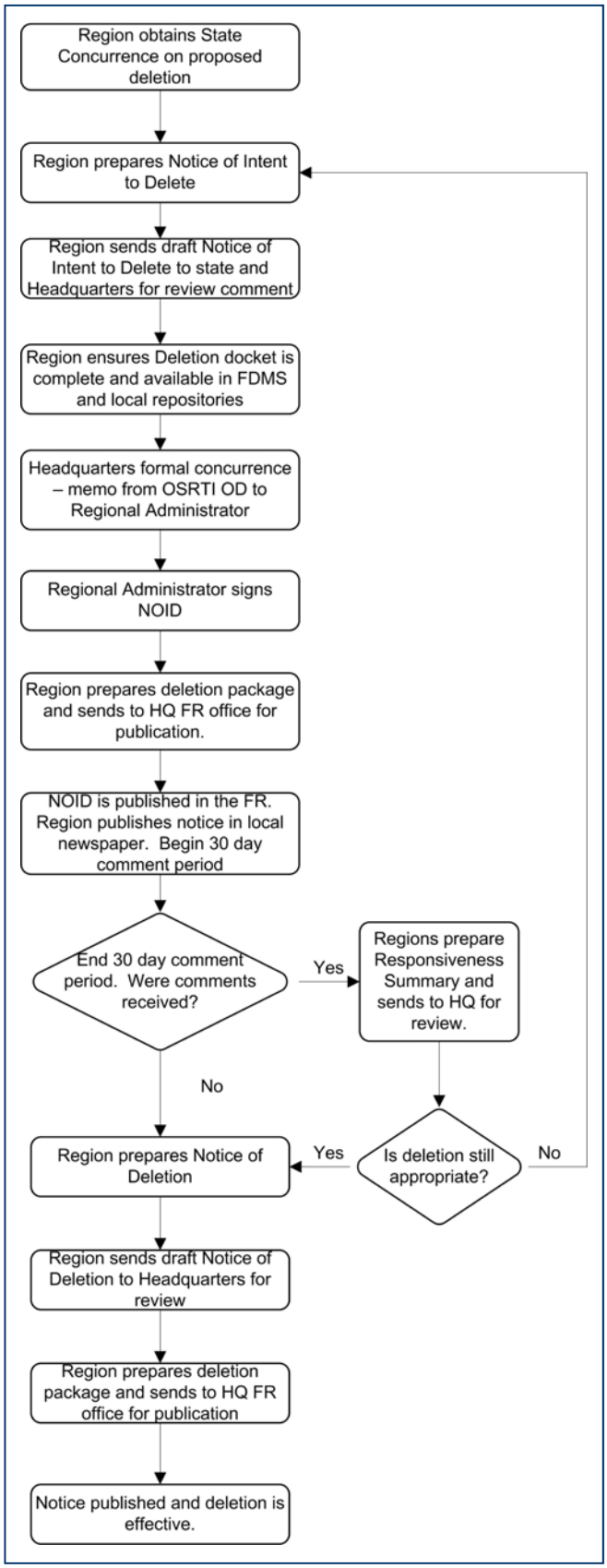
After consultation with the state, the region prepares the NOID.

The NOID contains EPA regional staff and other contacts, deletion criteria and procedures, and site specific information. It typically provides for a 30 day public comment period. Site specific information needed to prepare the NOID is generally obtained from the FCOR for full site deletions or the RA Report or no Action ROD for partial deletions. Templates for the site deletion and partial deletion NOIDs are available at the following website: http://www.epa.gov/superfund/cleanup/postconstruction/deletion.htm. The draft NOID is sent to EPA Headquarters for review and comment.

5.4.3.2 Headquarters Concurrence

The Regional Administrator is delegated authority to sign the NOID. Before the Regional Administrator can sign the document, the delegation requires formal Headquarters concurrence. After the region addresses Headquarters comments, the Office of Solid Waste and Emergency Response (OSWER) Assistant Administrator must concur with the deletion before the deletion process proceeds. This concurrence is delegated to the OSWER Superfund Office Director. The OSWER Superfund Office Director completes the "Headquarters Concurrence Checklist" to support the deletion concurrence.

Exhibit 5-2
Two-step Rulemaking Process



For full site deletions, the checklist includes the following:

- All NPL deletion criteria have been met.
- All institutional controls have been recorded in appropriate decision documents and have been implemented as recommended in the Institutional Control Implementation and Assurance Plan guidance.
- All program measures (Environmental Indicators, Five-Year Reviews, Sitewide Ready for Anticipated Use) support the decision to delete.
- State Concurrence letter is in the deletion docket.
- The Final Close Out Report has been completed.
- Deletion Docket is in local, regional and electronic (FDMS) repositories.
- NOID is consistent with templates and supports deletion.

For partial deletions, the checklist includes the following:

- All NPL deletion criteria have been met.
- All institutional controls have been recorded in appropriate decision documents and have been implemented as recommended in the Institutional Control Implementation and Assurance Plan guidance.
- State Concurrence letter is in the deletion docket.
- A map clearly delineating the parcels proposed for deletion is included.
- The no Action ROD or RA Report has been completed.
- Deletion Docket is in local, regional and electronic repositories.
- NOID is consistent with templates and supports deletion.

The directive entitled *CERCLA Delegation of Authority 14-17, National Priorities List Determinations, Headquarters Concurrence on Notice of Intent to Delete*, dated September 12, 2008, outlines the Headquarters concurrence process in more detail.

5.4.3.3 Publication of the Notice of Intent to Delete and the Local Notice

Upon receiving Headquarters concurrence, the Regional Administrator signs the NOID, and a deletion package is prepared in the region and sent to the Headquarters Federal Register Office for publication. The package contents are in Exhibit 5-3.

Exhibit 5-3
Federal Register Deletion Package Contents

- ✓ Original FR Notice
- ✓ Four hard copies
- ✓ *Federal Register* Typesetting Request – found in Webforms
- ✓ Disk or CD containing electronic version of FR notice in Microsoft Word

The regional Community Involvement Coordinator (CIC) typically prepares and distributes a local notice regarding the NOID that is published at the same time that the NOID is published in the *Federal Register*. It is recommended that this notice be published in a local newspaper of general circulation. It should announce the Agency's intent to delete the site or portion of the site from the NPL and the public comment period. The local notice should also provide contacts, methods for submission of comments, and locations of the deletion dockets. In addition to the local notice, the RPM or the CIC should notify the appropriate Trustees listed in the Regional Contingency Plans that EPA is planning to delete the site or portion of the site.[17]

5.4.3.4 Receiving Comments and Responsiveness Summary Preparation

If public comments are received during the comment period that oppose the deletion action (typically referred to as adverse comments), the region typically prepares a responsiveness summary. If comments are received during the comment period that are not considered adverse, it is at the region's discretion to determine what type of response may be appropriate. It is recommended that the responsiveness summary present comments received during the public comment period paired with detailed responses to the comments. A draft of the responsiveness summary is sent to EPA Headquarters for review and comment. Once Headquarters comments are addressed, the region includes a copy of the responsiveness summary, approved by the Regional Administrator, in the deletion dockets. A template for the responsiveness summary is available at the following website: http://www.epa.gov/superfund/cleanup/postconstruction/deletion.htm.

5.4.3.5 Notice of Deletion (NOD) Preparation and Publication

If, after responding to public comments, the deletion action is still appropriate, the region prepares a Notice of Deletion (NOD). Templates for the site deletion and partial deletion NODs are found at the following website http://www.epa.gov/superfund/cleanup/postconstruction/deletion.htm. The NOD includes an effective date (the date of publication), the name of a regional contact, supplemental site information and the responsiveness summary, as appropriate. A draft of the Notice of Deletion is sent to EPA Headquarters for review and comment. Once Headquarters comments are addressed, the Notice of Deletion is signed by the Regional Administrator and published in the *Federal Register* (see Exhibit 5-3 for deletion package materials).

5.4.4 Direct Final Rulemaking Process

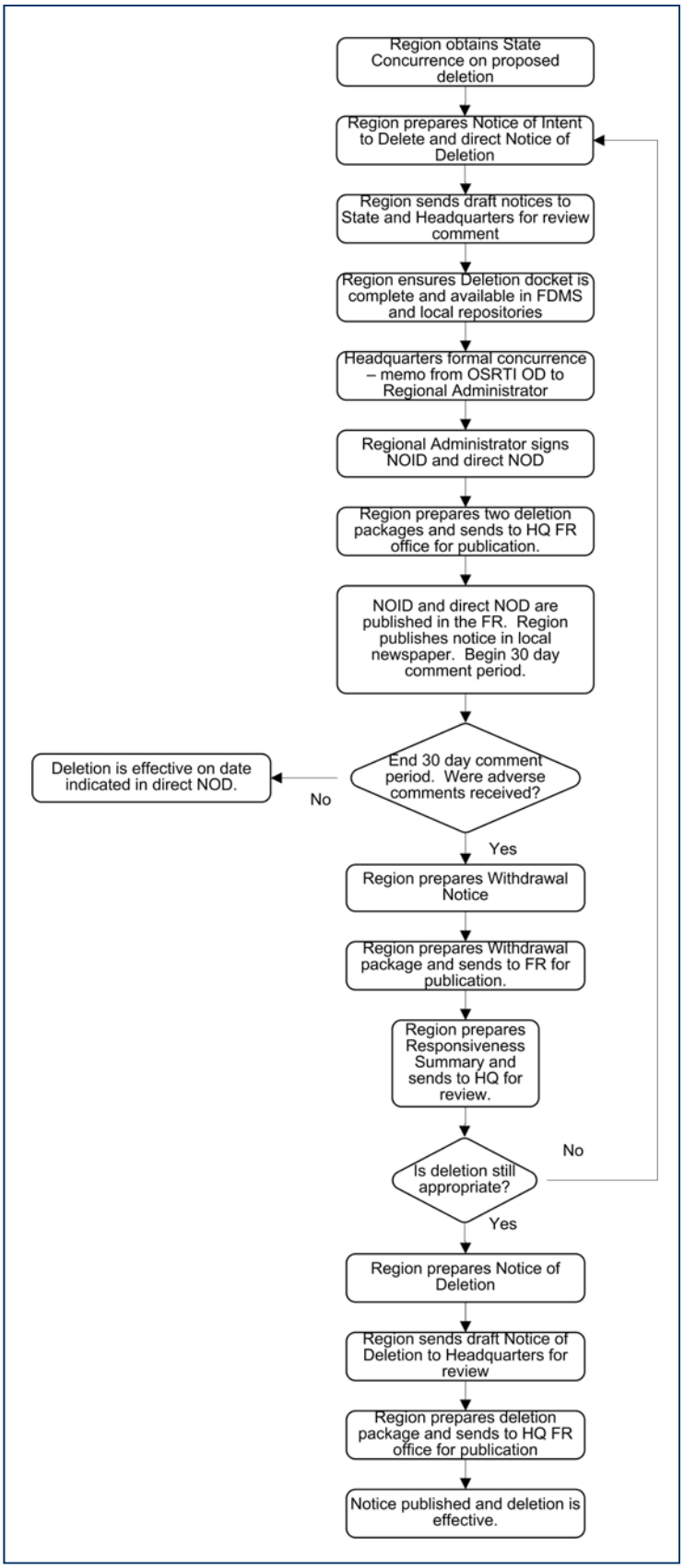
The direct final rulemaking process, also called the direct deletion process, is appropriate for sites where deletion is expected to be non-controversial, and EPA does not anticipate adverse comments during the comment period. If adverse comments are anticipated, it is recommended that the two-step final rulemaking process (Section 5.3.3) be utilized to ensure ample opportunity to address any adverse comments that are received.

[17] For additional information, see *CERCLA Coordination With Natural Resource Trustees* (OSWER 9200.4-22A; July 31, 1997)

Exhibit 5-4 shows the administrative steps in the direct deletion process. The direct deletion process steps generally include the following:

- Preparing the Notice of Intent to Delete (NOID) and the direct Notice of Deletion (NOD)
- Obtaining Headquarters concurrence, and
- Publishing the NOID, direct NOD and Local Notice
- If adverse comments are received:
  - Preparing and Publishing the *Federal Register* Withdrawal Notice
  - Receiving comments and preparing the Responsiveness Summary
  - Preparing and Publishing the Notice of Deletion

Exhibit 5-4
Direct Deletion Process



5.4.4.1 Direct Notice of Intent to Delete and Direct Notice of Deletion Preparation

After consultation with the state, the region prepares the NOID and the direct NOD.

The NOID primarily contains EPA regional staff and other contacts. It provides for a minimum 30 day public comment period. The NOID is published in the "Proposed Rules" section of the *Federal Register*. The NOID directs the reader to the NOD, published in the "Rules and Regulations" section of the same *Federal Register*, for deletion criteria and procedures, and site specific information.

The NOD contains all deletion criteria, explains the direct deletion process, and contains site specific information supporting the deletion. It indicates the effective date of deletion. The effective date is generally 30 days after the end of the minimum 30 day public comment period (i.e., typically 60 days after publication in the *Federal Register*). This allows sufficient time to withdraw the direct final notice of deletion in the event that unexpected adverse comments are received during the comment period.

Templates for the site deletion and partial deletion NOIDs and direct NODs are available at the following website:
http://www.epa.gov/superfund/cleanup/postconstruction/deletion.htm.

The draft NOID and NOD are sent to EPA Headquarters for review and comment.

5.4.4.2 Headquarters Concurrence

After the region addresses Headquarters comments, the Superfund Office Director completes the "Headquarters Concurrence Checklist". The OSWER Assistant Administrator must concur before the Regional Administrator signs the NOID and the NOD. The concurrence process is discussed in section 5.3.3.2.

5.4.4.3 Publication of the NOID, Direct NOD and the Local Notice

Once the Regional Administrator signs the Notice of Intent to Delete and the Notice of Deletion, a deletion package is prepared for each notice and sent to the Headquarters Federal Register Office for publication. The package contents are in Exhibit 5-3.

The CIC should also publish the local notice of the proposed deletion action in the newspaper of local circulation consistent with the two-step deletion process also described in section 5.3.3.3.

If no adverse comments are received during the comment period, the direct final deletion notice will become effective on the deletion date indicated in the direct NOD.

5.4.4.4 Withdrawal Notice Preparation and Publication

If adverse comments are received during the comment period, the region should issue a timely notice in the *Federal Register* withdrawing the direct final notice of deletion and informing the public that the deletion will not take effect. This withdrawal notice should be published in the *Federal Register* before the effective date of the direct NOD. The template for the Withdrawal Notice is available at the following website:
http://www.epa.gov/superfund/cleanup/postconstruction/deletion.htm.

The Withdrawal Notice is signed by the Regional Administrator. The region prepares a Withdrawal Notice package and sends it to the Headquarters Federal Register Office for publication. The package contents are in Exhibit 5-3.

5.4.4.5 Receiving Comments and Responsiveness Summary Preparation

A Responsiveness Summary is prepared consistent with the two-step deletion process (see 5.3.3.4).

5.4.4.6 Notice of Deletion Preparation and Publication

If the deletion action is still appropriate, a Notice of Deletion is prepared and published consistent with the two-step deletion process (see 5.3.3.5).

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

DEC - 6 2005

OSWER No. 9320.2-13

MEMORANDUM

SUBJECT: Addendum to Policy for "Close Out Procedures for National Priorities List Sites"

FROM: Michael B. Cook, Director
Office of Superfund Remediation and Technology Innovation

TO: Superfund National Policy Managers, Regions 1 - 10

Purpose

This document provides an addendum to the U.S. Environmental Protection Agency (EPA) guidance entitled: Close Out Procedures for National Priorities List Sites, EPA 540-R-98-016, OSWER Directive 9320.2-09A-P, January 2000. This memorandum clarifies the criteria Regions should use to evaluate site-wide construction completion for in-situ ground water restoration remedies at Superfund sites, for purposes of that guidance.

Background

For a site being cleaned up under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or "Superfund"), site-wide construction completion typically is achieved when physical construction of all cleanup actions are complete, all immediate threats have been addressed, and all long-term threats are under control for all portions of the site. The completion of the last response action at a site generally determines when it becomes eligible for construction completion status. This document provides definitions Regions should use for determining construction completion when the last response action is a ground water restoration remedy and an in-situ treatment technology is used for restoring ground water quality. For monitored natural attenuation response actions without any additional in-situ technology, guidelines previously established in the Close Out Procedures guidance for determining ground water restoration remedy construction completion eligibility should be utilized.

This document provides guidance to EPA staff. It also provides guidance to the public and to the regulated community on the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). The guidance is designed to describe EPA's national policy. The document does not, however, substitute for EPA's statutes or regulations, nor is it a regulation itself. Thus, it cannot impose legally-binding requirements on EPA, States, or the regulated community, and may not apply to a particular situation based upon the circumstances. EPA may change this guidance in the future, as appropriate.

Evaluating "Construction Complete" for In-Situ Remedies for Ground Water

In-situ treatment remedies for ground water could include chemical oxidation, other types of chemical treatment, biological treatment, thermal treatment (using steam or other heating methods), air sparging, permeable reactive barriers, and other methods. In-situ treatment remedies for ground water typically involve adding treatment agents to the subsurface. Treatment agents could include chemical agents (e.g., oxidants, or surfactants); agents to facilitate microbiological activity; heating agents (e.g., steam, or electric current); physical reactants (such as zero valent iron, oxygen or air); or other agents.

Generally, these in-situ treatment remedies for restoration of ground water may be considered construction complete when the following activities have been completed and completion of each activity has been documented in a construction completion site Preliminary Close-Out Report:

1. Physical construction for all portions of the final remedy should be complete.

Physical construction of all portions of the full-scale remedy should be complete, including injection wells, metering systems or other components needed to place or control movement of treatment agents in the subsurface.

If a permeable reactive barrier (PRB) is used, physical construction of all components of the barrier system, including reactive and non-reactive segments of the barrier, should be completed.

If a pump and treat system is part of the ground water restoration remedy, physical construction of all components of the pump and treat system should also be completed.

If no physical construction is needed for the full-scale remedy (e.g., existing injection wells or monitoring wells will be used), construction may be considered complete when final design of the full-scale remedy is completed. In this case, the final design report should specify the treatment agents to be used, the method for placing treatment agents in the subsurface, and the location and design of injection wells (or equivalent) to be used for the full-scale remedy. Also, any

treatability tests needed for design of the final remedy should have been completed.

2. At least one round of treatment/agent addition has been initiated, for the full-scale remedy.

If different agents are to be added in stages, at least one round of the first stage should have been completed.

- For electrical resistive heating and thermal conductive heating, this typically would mean turning on the power for electrodes or heater elements.
- For steam enhanced extraction, this normally would mean commencement of steam generation.
- For in-situ chemical oxidation and surfactant/co-solvent flushing, this usually would mean initial agent addition.
- For a permeable reactive barrier (PRB), the treatment agent (reactive barrier material) should have been placed during remedy construction.

If Geoprobe™ points (or similar) are to be used for injection of treatment agents, injection points needed for at least the first round of treatment should have been installed.

3. The pre-final inspection should have been conducted and should indicate the remedy will perform as designed and any expected future adjustments are likely to be minimal in nature.

Replacement of existing injection wells or installation of additional injection wells (or equivalent devices used to place treatments agents) generally may be considered to be adjustments that are minimal in nature.

If a contingency remedy was selected in the Record of Decision (ROD), the construction completion site Preliminary Close-Out Report should state that use of the contingency remedy is not anticipated at this site.

Conclusion

The information provided in this document should be used by remedial project managers when drafting Construction Completion site Preliminary Close-Out Reports beginning in Fiscal Year 2006. The criteria included should serve as a guide for the type of information to include with regard to in-situ ground water remedies when documenting site construction completion. If

you have questions regarding this policy, please contact me or have your staff contact Richard Jeng at (703) 603-8749 (jeng.richard@epa.gov).

cc: Eric Steinhaus, Superfund Lead Region Coordinator, US EPA Region 8
NARPM Co-Chairs
OSRTI Managers
Debbie Dietrich, OEM
Matt Hale, OSW
Cliff Rothenstein, OUST
James Woolford, OFFRO
Linda Garczynski, OBCR
Susan Bromm, OSRE
Scott Sherman, OGC
Ed Chu, OSWER
Carolyn Williams, OSRTI Documents Coordinator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VI
DALLAS, TEXAS

IN THE MATTER OF: MASS MERCHANDISERS, INC. REGARDING THE ARKWOOD, INC. SITE OMAHA, ARKANSAS Proceeding Under Section 106(a) of the Comprehensive Environ-Mental Response, Compensation, and Liability Act of 1980, as Amended by the Superfund Amend-ments and Reauthorization Act of 1986 (42 U.S.C. §9606(a))	§ § § § § § § § § § § § § § § § § §	FIRST AMENDMENT TO ADMINISTRATIVE ORDER ON CONSENT DOCKET NUMBER CERCLA VI-6-86

FIRST AMENDMENT TO
ADMINISTRATIVE ORDER ON CONSENT

I. JURISDICTION

This First Amendment to Administrative Order on Consent (hereinafter "First Amendment"), is issued to amend the Administrative Order on Consent (hereinafter "Consent Order"), Docket Number CERCLA VI-6-86, and is issued pursuant to the authority vested in the President of the United States by Section 104(e) and 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986 (CERCLA), 42 U.S.C. §9604(e) and 9606(a), and delegated to the Administrator of the United States Environmental Protection Agency ("EPA") on January 23, 1987 by Executive Order 12580, 52 Fed. Reg. 2923, and further delegated to the Assistant Administrator for Solid Waste and Emergency Response and the Regional

EXHIBIT 2

Administrators by EPA Delegation Number 14-6, signed on February 26, 1987, and Delegation Numbers 14-14 and 14-4-A, the latter of which was signed on April 16, 1984.

Respondent, Mass Merchandisers, Inc. ("MMI") agrees to the terms and conditions of this First Amendment. MMI consents to and will not contest EPA jurisdiction regarding this First Amendment.

II. STATEMENT OF PURPOSE

In entering into this First Amendment, the mutual objectives of MMI and EPA are to authorize MMI to enter at reasonable times the Arkwood Site as described in Section III. A. of the Consent Order, Docket Number CERCLA VI-6-86, and any other place or property to which a hazardous substance or pollutant or contaminant has been or may have been released from the Arkwood Site for the purpose of preparing the Remedial Investigation and Feasibility Study (RI/FS) in accordance with the RI/FS Work Plan submitted to EPA on December 19, 1986 and approved by EPA on December 29, 1986.

III. FINDINGS OF FACT

A. The Findings of Fact set forth in Section III of the Administrative Order on Consent are hereby incorporated by reference into this First Amendment as if set forth fully herein.

B. There is a reasonable basis to believe there may be a release or threat of release of a hazardous substance or pollutant or contaminant from the Arkwood Site.

IV. CONCLUSIONS OF LAW

The Conclusions of Law set forth in Section IV of the Consent Order are hereby incorporated by reference into this First Amendment as if set forth fully herein.

V. ACCESS

In consideration of the agreement by MMI set forth herein, Section IX of the Consent Order concerning Site Access is hereby amended by adding the following:

"A. Subject to the conditions which follow, EPA hereby designates MMI the representative of EPA pursuant to Section 104(e)(1) of CERCLA for the express, and limited, purpose of authorizing entry under Section 104(e)(3) and inspection and sampling under Section 104(e)(4) in order to perform those tasks under the approved RI/FS Work Plan requiring such entry, inspection and sampling.

"B. MMI agrees to indemnify and save and hold the United States Government, its agencies, departments, agents, and employees harmless from any and all claims and causes of action arising from or on account of acts or omissions of MMI, its officers, employees, receivers, trustees, agents, or assigns in carrying out any activities pursuant to this Designation.

"C. No agency, partnership or contractual relationship is created or is intended to be created by this Designation and such relationships are hereby specifically disclaimed."

VI. EFFECTIVE DATE

This First Amendment is made by mutual agreement of the parties as provided by Section XX of the Consent Order. The effective date of this First Amendment shall be the date upon which it is signed by EPA.

IT IS SO AGREED AND ORDERED:

BY: Frank Conner — 3-19-87
Mass Merchandisers, Inc., Title — Date
EXECUTIVE VICE PRESIDENT

BY: Stanley E. Phillips — 5. 1. 1987
U. S. Environmental Protection Agency — Date
Deputy Regional Administrator

Effective Date: 5-1-87

SEPARATOR

05-00003

LEGAL

ORMOND

05/07/1988

LIS86-293

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CSN: ..... Permit No. .....
Media: Air, Water, Solid, Hazardous
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VI
DALLAS, TEXAS

IN THE MATTER OF:	§	
MASS MERCHANDISERS, INC.	§	
REGARDING THE ARKWOOD, INC. SITE OMAHA, ARKANSAS	§	ADMINISTRATIVE ORDER ON CONSENT
Proceeding Under Section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. §9606(a))	§	DOCKET NUMBER CERCLA VI-6-86

ADMINISTRATIVE ORDER ON CONSENT

I. JURISDICTION

This Consent Order is issued pursuant to the authority vested in the President of the United States by Section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §9606(a), and delegated to the Administrator of the United States Environmental Protection Agency ("EPA") on August 14, 1981, by Executive Order 12316, 46 Fed. Reg. 42237, and further delegated to the Assistant Administrator for Solid Waste and Emergency Response and the Regional Administrators by EPA Delegation Nos. I4-14 and I4-14-A, the latter of which was signed on April 16, 1984.

Respondent, Mass Merchandisers, Inc. ("MMI") agrees to undertake all actions required by the terms and conditions of this Consent Order. MMI consents to and will not contest EPA jurisdiction regarding this Consent Order.

II. STATEMENT OF PURPOSE

In entering into this Consent Order, the mutual objectives of EPA and MMI are: (1) to determine fully the nature and extent of the threat to the public health or welfare or the environment caused by the release or threatened release of hazardous substances, pollutants or contaminants, including pentachlorophenol, from the Arkwood, Inc. site (Remedial Investigation), and (2) to evaluate alternatives for the appropriate extent of remedial action to prevent or mitigate the migration or release or threatened release of hazardous substances, pollutants, or contaminants from the Arkwood, Inc. site (Feasibility Study). The activities conducted pursuant to this Consent Order are subject to approval by EPA and shall be consistent with the National Contingency Plan, 40 CFR Part 300, 50 Fed. Reg. 47972 (November 20, 1985).

III. FINDINGS OF FACT

The following constitutes an outline of the facts upon which this Consent Order is based:

A. The Arkwood, Inc. site ("the Site") is located on a parcel of approximately twenty acres of land along the Missouri Pacific Cricket railroad siding, south of the town of Omaha, in Boone County, Arkansas. From approximately 1962 until late 1984, the site was the location of a pentachlorophenol (PCP) and creosote wood treating operation. The site is owned by Hallie C. Ormond ("Ormond"), who originally built the plant and commenced its operation. Subsequently, Ormond formed an Arkansas corporation, Arkwood, Inc., which operated the plant in corporate form under lease from Ormond individually as landowner. In 1974 MMI purchased the assets of Arkwood, Inc. and operated the plant until 1984. During the period of its operations, MMI leased the land and fixtures from Ormond.

B. Located on-site are: A millwork shop; PCP and creosote treatment process area; storage tanks for PCP and creosote; pressure treatment cylinder; building sump; a spill containment basin used to control process spills; railroad drainage ditch and cave (entrance now covered) used to dispose of process wastes; and a sawdust and woodchip pile.

C. MMI is an Indiana corporation with its principal place of business in Harrison, Boone County, Arkansas. MMI operated the wood treating plant at the Arkwood, Inc. site until 1984. During the period of its operation, MMI leased the land and fixtures from Ormond.

D. The Arkwood, Inc. site was proposed for addition to the National Priorities List in September, 1985. 50 Fed. Reg. 37950 (published September 18, 1985).

E. Approximately 660 persons live within three miles of the site and depend upon groundwater as a source of drinking water.

F. Limited site investigations have been performed by the Arkansas Department of Pollution Control and Ecology. These investigations have included the sampling and analysis for concentrations of PCP of springs, groundwater, run-off from the Site, streams and sediment. The results of these analyses report the following ranges of PCP:

Sample (Type)	Concentration Range of PCP (ppm or mg/kg)
Groundwater	*Less than 0.0005 to 5.6
Spring water	*Less than 0.00005 to 97
Runoff from site	0.0028 to 10.6
Sediment from disposal area	23,000 to 30,000
Surface water	0.00021 to 2.8

*The lower number represents the detection limit for the analytical procedure utilized, for an individual sample. Analysis of some samples resulted in no PCP detected at these limits.

These analyses indicate that there has been a past release of PCP into the environment and that there is a potential for future additional releases of PCP and other contaminants into the environment.

G. According to "Chemical, Physical and Biological Properties of Chemicals Present at Hazardous Waste Sites Disposal Sites" (EPA, 1985), PCP has been found to be embryotoxic and phytotoxic. Chronic exposure to PCP may result in chloracne, headaches, muscle weakness, weight loss, and liver and kidney damage.

H. The release of PCP and creosote into the environment may cause an imminent and substantial endangerment to health or the environment.

IV. CONCLUSIONS OF LAW

A. The Arkwood, Inc. site is a "facility" as defined in Section 101(9) of CERCLA, 42 U.S.C. §9601(9).

B. MMI is a "person" as defined in Section 101(21) of CERCLA, 42 U.S.C. §9601(21).

C. Wastes and constituents thereof generated and disposed of at the Site, including PCP and creosote, are "hazardous substances as defined in Section 101(14) of CERCLA, 42 U.S.C. §9601(14).

D. The past, present, and potential future migration of hazardous substances from the Site constitutes an actual or threatened "release" as defined in Section 101(22) of CERCLA, 42 U.S.C. of §9601(22).

E. MMI is one of the responsible parties under Section 107(a) of CERCLA, 42 U.S.C. §9607(a).

V. DETERMINATIONS

A. Based on the Findings of Fact and Conclusions of Law set out above, EPA has determined that:

1. The actual and/or threatened release of hazardous substances from the Site may present an imminent and substantial endangerment to the public health or welfare or the environment.

2. The actions required by this Administrative Order, including the preparation of a Remedial Investigation and Feasibility Study are necessary to assure adequate protection of the public health and welfare and the environment.

VI. WORK TO BE PERFORMED

All work performed pursuant to this Consent Order shall be under the direction and supervision of a qualified professional engineer or certified geologist with expertise in hazardous waste site investigation and cleanup. Prior to the initiation of site work, MMI shall notify EPA in writing regarding the name, title, and qualifications of such engineer or geologist and of any contractors and/or subcontractors to be used in carrying out the terms of this Consent Order.

Based on the foregoing, it is hereby AGREED TO AND ORDERED that the following work shall be performed:

A. Within 60 calendar days of the effective date of this Consent Order, MMI shall submit to EPA a plan for a complete Remedial Investigation and Feasibility Study (RI/FS Work Plan). This plan shall be developed in accordance with the EPA Remedial Investigation and Feasibility Study guidance documents entitled ("Guidance on Remedial Investigations Under CERCLA", (May 1985) and "Guidance on Feasibility Studies Under CERCLA", (April 1985)) which have been provided to MMI by EPA. As described in this guidance, the RI/FS Work Plan must include: (1) a sampling plan, (2) a health and safety plan, (3) a plan for satisfaction of permitting requirements, (4) a description of chain of custody procedures, and (5) a description of quality control and quality assurance procedures. An outline of the elements to be included in the RI/FS work plan, including deliverables, is attached to and incorporated in this Consent Order. The RI/FS Work Plan shall be subject to review, modification, and approval by EPA.

B. Within 30 calendar days after receipt of the RI/FS Work Plan by EPA, EPA shall review and provide comments on the Health and Safety Plan and notify MMI in writing of EPAs approval or disapproval of the remainder of the RI/FS work plan or any part thereof. In the event of any disapproval, EPA shall specify in writing both the deficiencies and any EPA recommended modifications regarding the RI/FS Work Plan.

C. Within 30 calendar days of the receipt of EPA notification of RI/FS Work Plan disapproval, MMI shall amend and submit to EPA a revised RI/FS Work Plan. In the event of subsequent disapproval of the RI/FS Work Plan, EPA retains the right to conduct a complete RI/FS pursuant to its authority under CERCLA and to seek cost recovery.

D. MMI shall implement the tasks detailed in the RI/FS Work Plan when and if the Plan is approved by EPA. Upon approval by EPA, the RI/FS Work Plan will be attached to and incorporated in this Consent Order. Work performed in implementation of the Plan shall be conducted in accordance with the EPA Remedial Investigation and Feasibility Study guidance documents listed in paragraph VI(A) above, and with the standards, specifications, and schedule contained in the RI/FS Work Plan.

E. Within fifteen calendar days of receiving written approval of the RI/FS Work Plan by EPA, MMI shall commence work called for in the RI/FS Work Plan.

F. MMI shall provide monthly written progress reports to EPA. These progress reports shall: (1) describe the actions which have been taken during the period covered by the report toward achieving compliance with this Consent Order, (2) include all results of sampling and tests and other data received by MMI in connection with activities under this Consent Order during the period of the report, and (3) include all plans and procedures completed subsequent to EPA approval of the RI/FS Work Plan, during the period covered by the report as well as such actions, data, and plans which are scheduled for the next month. These reports are to be submitted to EPA by the tenth day of each month following the effective date of this Consent Order.

G. MMI shall provide preliminary and final reports to EPA according to the schedule contained in the RI/FS Work Plan.

H. EPA shall review the preliminary and final reports, and within 30 calendar days of receipt by EPA of such reports, EPA shall notify MMI in writing of EPA's approval or disapproval of these reports or any part thereof. In the event of any disapproval, EPA shall specify in writing both the deficiencies and the reasons for such disapproval.

I. Within 30 calendar days of receipt of EPA notification of preliminary or final report disapproval, MMI shall amend and submit to EPA such revised reports. In the event of disapproval, EPA retains the right to amend such reports, to perform additional studies, and to conduct a complete Remedial Investigation and Feasibility Study pursuant to its authority under CERCLA and to seek cost recovery.

J. Documents, including reports, approvals, disapprovals, and other correspondence, to be submitted pursuant to this Consent Order, shall be sent by certified mail or other means of verified delivery to the following addresses or to such other addresses as MMI or EPA hereafter may designate in writing:

1) Documents (one copy of monthly reports, ten copies of final RI/FS reports, and three copies of the RI/FS Work Plan and other miscellaneous reports) to be submitted to EPA should be sent to:

Chief, Superfund Enforcement Section
US EPA, Region VI
1201 Elm Street
Dallas, Texas 75270

2) Documents to be submitted to MMI should be sent to:

Stewart Braznell
Mass Merchandisers, Inc.
P.O. Box 790
Harrison, Arkansas 72601

3) MMI will send to the State of Arkansas copies of all notices and submissions which MMI is required by this order to send to EPA. The copies for the State of Arkansas should be addressed to:

Deputy Director for Program Operations
Arkansas Department of Pollution Control
and Ecology
8001 National Drive
P. O. Box 9583
Little Rock, Arkansas 72209

or such other person as may be designated by ADPC&E.

K. EPA may determine that other tasks, including remedial investigatory work and/or engineering evaluation, are necessary as part of a Remedial Investigation and Feasibility Study in addition to EPA approved tasks and deliverables, including reports, which have been completed pursuant to this Consent Order. Subject to the "Dispute Resolution" Section (Section XII) of this Consent Order, MMI shall implement any additional tasks which EPA determines are necessary as part of a Remedial Investigation and Feasibility Study and which are in addition to the tasks detailed in the RI/FS Work Plan. The additional work shall be completed in accordance with the standards, specifications, and schedule determined or approved by EPA.

VII. DESIGNATED PROJECT COORDINATORS

On or before the effective date of this Consent Order, EPA and MMI shall each designate a Project Coordinator. Each Project Coordinator shall be responsible for overseeing the implementation of this Consent Order. The EPA Project Coordinator will be EPA's designated representative at the Site. To the maximum extent possible, communications between MMI and EPA concerning the activities performed pursuant to the terms and conditions of this Consent Order shall be directed through the Project Coordinators, except where otherwise required pursuant to paragraph VI(J).

EPA and MMI each have the right to change their respective Project Coordinator. Such a change shall be accomplished by notifying the other party in writing at least five calendar days prior to the change.

The EPA designated "On-Scene-Coordinator," who may be the EPA Project Coordinator, shall have the authority vested in the On-Scene-Coordinator by the National Contingency Plan; 40 C.F.R. Part 300, 50 Fed. Reg. 47972 (November 20, 1985). This includes the authority to halt, conduct, or direct any tasks required by this Consent Order and/or any response actions or portions thereof when conditions present an immediate risk to public health or welfare or the environment.

The absence of the EPA Project Coordinator from the Site shall not be cause for the stoppage of work.

VIII. QUALITY ASSURANCE

MMI shall use quality assurance, quality control, and chain of custody procedures in accordance with the EPA approved Quality Assurance and Quality Control Plan included in the RI/FS Work Plan throughout all sample collection and analysis activities. MMI shall consult with EPA in planning for, and prior to, all sampling and analysis as detailed in the RI/FS Work Plan. In order to provide quality assurance and maintain quality control regarding all samples collected pursuant to this Consent Order, MMI shall:

A. Use its best efforts to ensure that EPA personnel and/or EPA authorized representatives are allowed access to the laboratory(s) and personnel utilized by MMI for analyses.

B. Ensure that the laboratory(s) utilized by MMI for analyses perform such analyses according to EPA methods or methods deemed satisfactory to EPA and submit all protocols to be used for analyses in the appropriate reports in the RI/FS Work Plan

C. Ensure that laboratory(s) utilized by MMI for analyses participate in an EPA quality assurance/quality control program equivalent to that which is followed by EPA contract laboratories As part of such a program, and upon request by EPA, such laboratory(s) shall conduct an annual quality assurance performance audit consisting of analysis of samples provided by EPA to demonstrate the quality of each laboratory's analytical data.

IX. SITE ACCESS

The Site, as well as other potentially contaminated properties, are presently owned by parties other than those bound by this Consent Order. MMI will use its best efforts to obtain access agreements from Ormand (the site owner) as well as from the Missouri-Pacific Railroad within 30 days of the effective date of this Consent Order. MMI will use its best efforts to obtain similar access agreements with nearby property

owners as these agreements may become necessary to the progress of the RI/FS. Such agreement shall provide reasonable access to EPA and/or its authorized representatives. In the event that a site access agreement is not obtained within the time referenced above, MMI shall, within seven days of the expiration of this time period, notify EPA regarding both the lack of such agreement and the efforts to obtain it.

X. SAMPLING, ACCESS, AND DATA/DOCUMENT AVAILABILITY

MMI shall make the results of all sampling and/or tests or other data generated by MMI, or on MMI's behalf, with respect to the implementation of this Consent Order, available to EPA and shall submit these results in monthly progress reports as described in Section VI of this Consent Order. EPA will make available to MMI the results of sampling and/or tests or other data similarly generated by EPA.

At the request of EPA, MMI shall allow split or duplicate samples to be taken by EPA and/or its authorized representatives, of any samples collected by MMI pursuant to the implementation of this Consent Order. MMI shall notify EPA not less than 48 hours not including weekends and holidays in advance of any sample collection activity. EPA will afford MMI advance notice of any collection of samples by or on behalf of the Agency related to the Arkwood Site and allow MMI to take split or duplicate samples. The project coordinators may agree orally or in writing to a shorter notification period.

To the extent that permission is within MMI's control, EPA or any EPA authorized representative shall have the authority to enter and freely move about all property at the Site at all reasonable times for the purposes of, inter alia: inspecting records, operating logs, and contracts related to the Site; reviewing the progress of MMI in carrying out the terms of this Consent Order; conducting such tests as EPA or the Project Coordinator deem necessary; using a camera, sound recording, or other documentary type equipment; and verifying the data submitted to EPA by MMI. MMI shall permit such persons to inspect and copy all records, files, photographs, documents, and other writings, including all sampling and monitoring data, in any way pertaining to work undertaken pursuant to this Consent Order. All parties with access to the Site pursuant to this paragraph shall comply with all approved health and safety plans.

MMI may assert a confidentiality claim, if appropriate, covering part or all of the information requested by this Consent Order pursuant to 40 C.F.R. §2.203(b). Such an assertion shall be adequately substantiated when the assertion

is made. Analytical data shall not be claimed as confidential by MMI. Information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no such claim accompanies the information when it is submitted to EPA, it may be made available to the public by EPA without further notice to MMI.

Nothing contained in this Administrative Order is intended to waive, or in any way limit, the authority granted in Section 104 of CERCLA. All authority granted in Section 104 is specifically reserved.

XI. RECORD PRESERVATION

EPA and MMI agree that each shall preserve, during the pendency of this Consent Order and for a minimum of six (6) years after its termination, all records and documents in their possession or in the possession of their divisions, employees, agents, accountants, contractors, or attorneys which relate in any way to the Site, despite any document retention policy to the contrary After this six year period, MMI shall notify EPA within 30 calendar days prior to the destruction of any such documents. Upon request by EPA, MMI shall make available to EPA such records or copies of any such records. Additionally, if EPA requests that some or all documents be preserved for a longer period of time, MMI shall comply with that request.

XII. DISPUTE RESOLUTION

If MMI objects to any EPA notice of disapproval or decision made pursuant to this Consent Order, MMI shall notify EPA in writing of its objections within fourteen (14) days of receipt of the decision. EPA and MMI then have an additional fourteen (14) days from the receipt by EPA of the notification of objection to reach agreement. If agreement cannot be reached on any issue within this fourteen (14) day period, EPA shall provide a written statement of its decision to MMI. In the event MMI fails or declines to comply with a decision made by EPA pursuant to this paragraph, EPA may proceed to implement the decision in question or to complete the RI/FS and seek cost recovery pursuant to CERCLA. The penalties provided in paragraph XIII of this Consent Order shall not run during the dispute resolution. For purposes of penalty accrual under paragraph XIII, dispute resolution under this paragraph shall end when EPA provides a written statement of its decision to MMI.

XIII. DELAY IN PERFORMANCE/STIPULATED PENALTIES

Stipulated penalties shall accrue in the amount of $1,000.00 for the first week and $2,000.00 for each week, or part thereof, thereafter for failure to submit to EPA the RI/FS Work Plan, any monthly progress report, any deliverable required under the RI/FS

Work Plan or this Consent Order, the Remedial Investigation, or the Feasibility Study or comply with a schedule as required by the RI/FS Work Plan or this Consent Order.

If any event occurs which causes delay in the achievement of the requirements of this Consent Order, MMI shall have the burden of proving that the delay was caused by circumstances beyond the reasonable control of MMI which could not have been overcome by due diligence. MMI shall promptly notify EPA's Project Coordinator orally and shall, within seven (7) calendar days of oral notification to EPA, notify EPA in writing of the anticipated length and cause of the delay, the measures taken and/or to be taken to prevent or minimize the delay, and the timetable by which MMI intends to implement these measures. If the parties can agree that the delay or anticipated delay has been or will be caused by circumstances beyond the reasonable control of MMI, the time for performance hereunder shall be extended; in writing, for a period equal to the delay resulting from such circumstances. MMI shall adopt all reasonable measures to avoid or minimize delay. Failure of MMI to comply with the notice requirements of this paragraph shall constitute a waiver of MMI's right to request a waiver of the requirements of this Consent Order for the delay in question. Increased costs of performance of the terms of this Consent Order or changed economic circumstances shall not be considered circumstances beyond the control of MMI.

In the event that EPA and MMI cannot agree that any delay in the achievement of the requirements of this Consent Order, including the failure to submit any report or document, has been or will be caused by circumstances beyond the reasonable control of the Respondent, the dispute shall be resolved in accordance with the provisions of the "Dispute Resolution" Section (Section XII) of this Consent Order.

The stipulated penalties set forth in this Section do not preclude EPA from electing to pursue any other remedies or sanctions which may be available to EPA by reason of MMI's failure to comply with any of the requirements of this Consent Order. Such remedies and sanctions may include a suit for statutory penalties as authorized by Section 106 of CERCLA, a federally-funded response action, and a suit for reimbursement of costs incurred by the United States and the State of Arkansas.

XIV. RESERVATION OF RIGHTS

Notwithstanding compliance with the terms of this Consent Order, including the completion of an EPA approved Remedial Investigation and Feasibility Study, MMI is not released from liability, if any, for any actions beyond the terms of this

Consent Order taken by EPA respecting the Site. EPA reserves the right to take any enforcement action pursuant to CERCLA and/or any available legal authority, including the right to seek injunctive relief, monetary penalties, and punitive damages for any violation of law or this Consent Order.

MMI and EPA expressly reserve all rights and defenses that they may have, including EPA's right both to disapprove of work performed by MMI and to request that MMI perform tasks in addition to those detailed in the RI/FS Work Plan, as provided in this Consent Order. In the event that MMI declines to perform any additional and/or modified tasks, EPA will have the right to undertake any remedial investigation and/or feasibility study work. In addition, EPA reserves the right to undertake removal actions and/or remedial actions at any time. In either event, EPA reserves the right to seek reimbursement from MMI thereafter for such costs incurred by the United States or the State of Arkansas.

While MMI consents to and will not contest EPA's jurisdiction regarding this Consent Order, MMI neither admits nor denies any of the factual or legal determinations contained in this Consent Order. MMI reserves all rights and defenses which MMI may have regarding liability or responsibility in any subsequent proceedings regarding the Site, other than proceedings to enforce this Consent Order. EPA reserves the right to conduct a complete RI/FS pursuant to its authority under CERCLA and to seek cost recovery.

XV. REIMBURSEMENT OF COSTS

For each calendar year, EPA shall submit to MMI an itemized accounting of all response and oversight costs incurred by the U.S. Government with respect to this Consent Order. MMI shall, within 30 calendar days of receipt of that accounting, remit a check for the amount of those costs made payable to the Hazardous Substance Response Trust Fund. Checks should specifically reference the identity of the site and be addressed to:

U.S. Environmental Protection Agency
Superfund Accounting
P.O.Box 371003M
Pittsburgh, PA 15251
Attention: [Collection Officer for Superfund]

A copy of the transmittal letter should be sent to the Project Coordinator.

EPA reserves the right to bring an action against MMI pursuant to Section 107 of CERCLA for recovery of all response and oversight costs incurred by the United States and

the State of Arkansas related to this Consent Order and not reimbursed by MMI, as well as any other past and future costs incurred by the United States and the State of Arkansas in connection with response activities conducted pursuant to CERCLA at this site.

XVI. OTHER CLAIMS

Nothing in this Consent Order shall constitute or be construed as a release from any claim, cause of action or demand in law or equity against any person, firm, partnership, or corporation not a signatory to this Consent Order for any liability it may have arising out of or relating in any way to the generation, storage, treatment, handling, transportation, release, or disposal of any hazardous substances, hazardous wastes, pollutants, or contaminants found at, taken to, or taken from the Site.

This Consent Order does not constitute any decision on preauthorization of funds under Section 111(a)(2) of CERCLA.

XVII. OTHER APPLICABLE LAWS

All actions required to be taken pursuant to this Consent Order shall be undertaken in accordance with the requirements of all applicable local, state, and federal laws and regulations unless an exemption from such requirements is specifically provided in this Consent Order.

XVIII. INDEMNIFICATION OF THE UNITED STATES GOVERNMENT

MMI agrees to indemnify and save and hold the United States Government, its agencies, departments, agents, and employees, harmless from any and all claims or causes of action arising from or on account of acts or omissions of MMI, its officers, employees, receivers, trustees, agents, or assigns, in carrying out the activities pursuant to this Consent Order. EPA is not a party in any contract involving MMI at the Site.

XIX. PUBLIC COMMENT

Upon submittal to EPA of an approved Feasibility Study Final Report, EPA shall make both the Remedial Investigation Final Report and the Feasibility Study Final Report available to the public for review and comment for, at a minimum, a twenty-one (21) day period, pursuant to EPA's Community Relations Policy.

XX. EFFECTIVE DATE AND SUBSEQUENT MODIFICATION

In consideration of the communications between MMI and EPA prior to the issuance of this Consent Order concerning its terms, MMI agrees that there is no need for a settlement conference prior to the effective date of this Consent Order. Therefore, the effective date of this Consent Order shall be the date on which it is signed by EPA.

This Consent Order may be amended by mutual agreement of EPA and MMI. Such amendments shall be in writing and shall have as the effective date that date on which such amendments are signed by EPA.

Any reports, plans, specifications, schedules, and attachments required by this Consent Order are, upon approval by EPA, incorporated into this Consent Order. Any non-compliance with such EPA approved reports, plans, specifications, schedules, and attachments shall be considered a failure to achieve the requirements of this Consent Order and will subject MMI to the provisions included in the "Delay in Performance/Stipulated Penalties" Section (Section XIII) of this Consent Order.

No informal advice, guidance, suggestions, or comments by EPA regarding reports, plans, specifications, schedules, and any other writing submitted by MMI will be construed as relieving MMI of its obligation to obtain such formal approval as may be required by this Consent Order.

XXI. PARTIES BOUND

This Consent Order shall apply to and be binding upon MMI and EPA, their agents, successors, and assigns and upon all persons, contractors, and consultants acting under or for either MMI or EPA or both.

No change in ownership of the Site or in corporate or partnership status of MMI will in any way alter the status of MMI or in any way alter MMI's responsibility under this Consent Order. MMI will remain the Respondent under this Consent Order and will be responsible for carrying out all activities required of MMI under this Consent Order.

MMI shall provide a copy of this Consent Order to all contractors, sub-contractors, laboratories, and consultants retained to conduct any portion of the work performed pursuant to this Consent Order within 14 calendar days of the effective date of this Consent Order or date of such retention.

XXII. NOTICE TO THE STATE

EPA has notified the State of Arkansas pursuant to the requirements of Section 106(a) of CERCLA.

XXIII. TERMINATION AND SATISFACTION

The provisions of this Consent Order shall be deemed satisfied upon MMI's receipt of written notice from EPA that MMI has demonstrated, to the satisfaction of EPA, that all of the terms of this Consent Order, including any additional tasks which EPA has determined to be necessary under the terms of Section VI(K), have been completed.

IT IS SO AGREED AND ORDERED;

BY: [signature] Exec. V.P. Operations 5-12-86
Mass Merchandisers, Inc. Title Date

By: [signature]
U.S. Environmental Protection Agency 5-15-1986
Date

Effective Date: 5-15-86

MODEL STATEMENT OF WORK FOR CONDUCTING REMEDIAL INVESTIGATIONS

PURPOSE

The purpose of this remedial investigation is to determine the nature and extent of the problem at the site and to gather all necessary data to support the feasibility study. MMI will furnish all personnel, Materials, and services necessary for, or incidental to, performing the remedial investigation at Arkwood, Inc., an uncontrolled hazardous waste site.

SCOPE

The remedial investigation consists of seven tasks[1]:

Task 1 - Description of Current Situation
Task 2 - Plans and Management
Task 3 - Site Investigation
Task 4 - Site Investigation Analysis
Task 5 - Laboratory and Bench-Scale Studies
Task 6 - Reports
Task 7 - Community Relations Support

TASK 1 - DESCRIPTION OF CURRENT SITUATION

Describe the background information pertinent to the site and its problems and outline the purpose for remedial investigation at the site. The data gathered during any previous investigations or inspections and other relevant data should be used.

This task may be conducted concurrently with Task 2, development of the work plan.

a. Site Background

Prepare a summary of the Regional location, pertinent area boundary features, and general site physiography, hydrology, and geology.

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1 The Remedial Investigation guidance should be consulted for additional information on the tasks listed below.

Define the total area of the site and the general nature of the problem, including pertinent history relative to the use of the site for hazardous waste disposal.

b. Nature and Extent of Problem

Prepare a summary of the actual and potential on-site and off-site health and environmental effects. This may include, but is not limited to, the types, physical states, and amounts of the hazardous substances; the existence and conditions of drums, tanks, waste piles, underground disposal units, and lagoons; affected media and pathways of exposure; contaminated releases such as leachate or runoff; and any human exposure. Emphasis should be placed on describing the threat or potential threat to public health and the environment.

c. History of Response Actions

Prepare a summary of any previous response actions conducted by either local, State, Federal, or private parties, including the site inspection and other technical reports, and their results. This summary should address any enforcement activities undertaken to identify responsible parties, compel private cleanup, and recover costs. A list of reference documents and their location shall be included. The scope of the remedial investigation should be developed to address the problems and questions that have resulted from previous work at the site.

d. Site Visit

Conduct an initial site visit to become familiar with site topography, access routes, and proximity of receptors to possible contamination and collect data for preparation of the site safety plan. The visit should be used to verify the site information developed in this Task.

e. Define Boundary Conditions

Establish site boundary conditions to limit the areas of site investigations. The boundary conditions should be set so that subsequent investigations will cover the contaminated media in sufficient detail to support following activities (e.g., the feasibility study). The boundary conditions may also be used to identify boundaries for site access control and site security. [If not in existence, installation of a fence or other security measures should be considered.]

f. Site Map

Prepare a site map at a scale small enough to clearly show all water features, drainage patterns, wells, springs,

past disposal areas, tanks, buildings, utilities, paved areas, easements, rights-of-way, and other pertinent features. The site map and all topographical surveys should be of sufficient detail and accuracy to locate and report all existing and future work performed at the site. Permanent baseline monuments, bench marks, and reference grid tied into any existing reference system (i.e., State or USGS) must be included on the site map.

g. Site Office

Establish a temporary site office to support site work.

TASK 2 - PLANS AND MANAGEMENT

Prepare all necessary plans for the remedial investigation. The work plan should include a detailed discussion of the technical approach, personnel requirements, and schedules, as well as the following:

a. Sampling Plan

Prepare a Sampling Plan to address all field activities to obtain additional site data. The plan will contain a statement of sampling objectives; specification of equipment, analyses of interest, sample types, and sample locations and frequency; and schedule. Consider use of field screening techniques to screen out samples that do not require off-site laboratory analysis. The plan will also include a quality assurance and quality control plan with documentation requirements and estimates of costs and labor. The plan must address all levels of the investigation as well as all types of investigations conducted (e.g., waste characterization, hydrogeologic, soils and sediments, air and surface water). The plan will identify potential remedial technologies and associated data that may be needed to evaluate alternatives for the feasibility study.

b. Health and Safety Plan

Prepare a Health and Safety Plan to address hazards that the investigation activities may present to the investigation team and to the surrounding community. The plan should address all applicable regulatory requirements and detail personnel responsibilities, protective equipment, procedures and protocols, decontamination, training, and medical surveillance. The plan should identify problems or hazards that may be encountered and their solutions. Procedures for protecting third parties, such as

visitors or the surrounding community, will also be provided.

c. Data Management Plan

Develop and initiate a Data Management Plan to document and track investigation data and results. This plan should identify and set up laboratory and data documentation materials and procedures, project file requirements, and project-related progress documents.

TASK 3 - SITE INVESTIGATION

Conduct only those investigations necessary to characterize the site and its actual or potential hazard to public health and the environment. The investigations should result in data of adequate technical content to support the development and evaluation of remedial alternatives during the feasibility study. Investigation activities will focus on problem definition and data to support the screening of remedial technologies, alternative development and screening, and detailed evaluation of alternatives.

The site investigation activities will follow the plans set forth in Task 2. All sample analyses will be conducted at laboratories following EPA protocols or their equivalents. Strict chain-of-custody procedures will be followed and all samples will be located on the site map [and grid system] established under Tasks 1 and 2.

a. Waste Characteriziation

Conduct a sampling and analysis program to characterize all materials of interest at the site. These materials should include wastes found above or below ground in tanks, drums, lagoons, visually contaminated soils, piles, or other structures.

b. Hydrogeologic Investigation

Conduct a program to determine the presence and potential extent of ground water contamination and to evaluate the suitability of the site for on-site waste containment.

This study should identify all aquifers and aquitards in the vicinity of the facility and include the data (e.g., well log, permeability) necessary for this identification. Efforts should begin with a well inventory and a survey of previous hydrogeologic studies and other existing data. The survey should address the degree of hazard, the mobility of pollutants considered (from Waste Characterization), the soils' attenuation capacity and mechanisms, discharge/recharge areas, and regional flow directions and water quality. An accompanying sampling program should be developed to determine the horizontal and vertical distribution of contaminants and predict the long-term disposition of contaminants. This plan shall include the proposed locations of all soil, ground water and surface water sampling or testing. Additionally, any dye tracing procedures proposed to determine ground water flow direction or velocity must be described.

c. Soils and Sediments Investigation

Conduct a program to determine the location and extent of contamination of surface and subsurface soils and sediments. The areas to be examined shall include but not be limited to the drip tracks, main treatment facility including sump and tank areas, storage areas for treated products, and any former disposal pits, lagoons, or dumping grounds. This process may overlap with certain aspects of the hydrogeologic study (e.g., characteristics of soil strata are relevant to both the transport of contaminants by ground water and to the location of contaminants in the soil; cores from ground water monitoring wells may serve as soil samples). A survey of existing data on soils and sediments may be useful. The horizontal and vertical extent of contaminated soils and sediments should be determined. Information on local background levels, degree of hazard, location of samples, techniques utilized, and methods of analysis should be included. The investigation should identify the locations and probable quantities of subsurface wastes, such as buried drums, through the use of appropriate geophysical methods.

d. Surface Water Investigation

Conduct a program to determine the extent of contamination of local surface water bodies including Walnut Creek and Barren Creek. This process may overlap with the soils and sediments investigation; data from stream or spring sediments sampled may be relevant to surface water quality. A survey of existing data on surface water flow quantity and quality may be a useful first step, particularly information on local background levels.

e. Air Investigation

Conduct a program to determine the extent of atmospheric contamination. The program should address the tendency of substances (identified through Waste Characterization) to enter the atmosphere, local wind patterns, and the degree of hazard.

TASK 4 - SITE INVESTIGATION ANALYSIS

Prepare a thorough analysis and summary of all site investigations and their results. The objective of this task will be to ensure that the investigation data are sufficient in quality (e.g., QA/QC procedures have been followed) and quantity to support the feasibility study.

The results and data from all site investigations must be organized and presented logically so that the relationships between site investigations for each medium are apparent. Analyze all site investigation data and develop a summary of the type and extent of contamination at the site. The summary should describe the quantities and concentrations of specific chemicals at the site and ambient levels surrounding the site. Describe the number, locations, and types of nearby populations and activities and pathways that may result in an actual or potential threat to public health, welfare, or the environment.

An Endangerment Assessment shall be required. This report shall examine the public health risks at the Site and provide the framework for the development of design goals for remedial alternatives that are based on applicable or relevant and appropriate requirements of other laws, where applicable, or risk analysis where those requirements are not available. Guidance related to the requirements of such a report shall be provided by EPA.

TASK 5 - LABORATORY AND BENCH-SCALE STUDIES

The following applies when additional studies are necessary to fully evaluate remedial alternatives.

Conduct laboratory and/or bench-scale studies to determine the applicability of remedial technologies to site conditions and problems. Analyze the technologies, based on literature review, vendor contacts, and past experience to determine the testing requirements.

Develop a testing plan identifying the type(s) and goal(s) of the study(ies), the level of effort needed, and data management and interpretation guidelines for submission to EPA and State for review and approval.

Upon completion of the testing, evaluate the testing results to assess the technologies with respect to the site-specific questions identified in the test plan. Scale up those technologies selected based

on testing results.

Prepare a report summarizing the testing program and its results, both positive and negative.

TASK 6 - REPORTS

a. Progress Reporting Requirements

Monthly reports shall be prepared by the Respondents to describe the technical progress of the project. These reports should discuss the following items:

1. Identification of site and activity
2. Status of work at the site and progress to date
3. Percentage of completion and schedule status
4. Difficulties encountered during the reporting period
5. Actions being taken to rectify problems
6. Activities planned for the next month
7. Changes in personnel

The monthly progress report will list target and actual completion dates for each element of activity, including project completion, and will provide an explanation of any deviation from the milestones in the work plan.

b. Final Report

Prepare a final report covering the remedial investigation and submit copies to the EPA and the Arkansas Department of Pollution Control and Ecology. The report shall include the results of Tasks 1 through 5, and should include additional information in appendices. The report shall be structured to enable the reader to cross-reference with ease.

TASK 7 - COMMUNITY RELATIONS SUPPORT

MMI may be required to support EPA by providing personnel, services, materials, and equipment to undertake a community relations program. Although this may be a limited program, community relations must be integrated closely with all remedial response activities. The objectives of this effort are to achieve community understanding of the actions taken and to obtain community input and support prior to selection of the remedial alternative(s).

Community relations support should include, but may not be limited to, the following:

- Support EPA in the preparation of slide shows, exhibits, and other audio-visual materials designed to apprise the community of current or proposed actions.

- Establishment of a community information center.

- Preparation of reports and participation in public meetings, project review meetings, and other meetings as necessary to the normal progress of the work.

All community relations support must be consistent with Superfund community relations policy, as stated in the "Guidance for Implementing the Superfund Program" and Community Relations in Superfund -- A Handbook.

MODEL STATEMENT OF WORK FOR CONDUCTING FEASIBILITY STUDIES

PURPOSE

The purpose of this feasibility study is to develop and evaluate remedial alternatives for Arkwood, Inc. MMI will furnish the necessary personnel, materials, and services necessary to prepare the remedial action feasibility study, except as otherwise specified.

SCOPE

The feasibility study consists of eight tasks:

Task 8 - Description of Proposed Response
Task 9 - Preliminary Remedial Technologies
Task 10 - Development of Alternatives
Task 11 - Initial Screening of Alternatives
Task 12 - Evaluation of the Alternatives
Task 13 - Preliminary Report
Task 14 - Final Report
Task 15 - Additional Requirements.

A work plan that includes a detailed technical approach, personnel requirements, and schedules will be submitted for the proposed feasibility study.

TASK 8 - DESCRIPTION OF CURRENT SITUATION

Information on the site background, the nature and extent of the problem, and previous response activities presented in Task 1 of the remedial investigation may be incorporated by reference. Any changes to the original project scope described in the Task 1 description should be discussed and justified based on results of the remedial investigation.

Following this summary of the current situation, a site-specific statement of purpose for the response, based on the results of the remedial investigation, should be presented. The statement of purpose should identify the actual or potential exposure pathways that should be addressed by remedial alternatives.

TASK 9 - PRELIMINARY REMEDIAL TECHNOLOGIES

Based on the site-specific problems and statement of purpose identified in Task 8, develop a master list of potentially feasible technologies. These technologies will include both on-site and off-site remedies, depending on site problems. The master list will be screened based on site conditions, waste characteristics, and technical requirements, to eliminate or modify those technologies that may prove extremely difficult to implement, will require unreasonable time periods, or will rely on insufficiently developed technology.

TASK 10 - DEVELOPMENT OF ALTERNATIVES

Based on the results of the remedial investigation and consideration of preliminary remedial technologies (Task 9), develop a limited number of alternatives for source control or off-site remedial actions, or both, on the basis of objectives established for the response.

a. Establishment of Remedial Response Objectives

Establish site-specific objectives for the response. These objectives will be based on public health and environmental concerns, the description of the current situation (from Task 1), information gathered during the remedial investigation, section 300.68 of the National Contingency Plan (NCP), EPA's interim guidance, and the requirements of any other applicable EPA, Federal, and State environmental standards, guidance, and advisories as defined under EPA's CERCLA compliance policy. Objectives for source control measures should be developed to prevent or significantly minimize migration of contamination from the site. Objectives for management of migration measures should prevent or minimize impacts of contamination that has migrated from the site. Preliminary cleanup objectives will be developed in consultation with EPA and the State.

b. Identification of Remedial Alternatives

Develop alternatives to incorporate remedial technologies (from Task 9), response objectives, and other appropriate considerations into a comprehensive, site-specific approach. Alternatives developed should include the following (as appropriate):

- Alternatives for off-site treatment or disposal, as appropriate.
- Alternatives which attain applicable and/or relevant Federal public health or environmental standards.
- Alternatives which exceed applicable and/or relevant public health or environmental standards.
- Alternatives which do not attain applicable and/or relevant public health or environmental standards but will reduce the likelihood of present or future threat from the hazardous substances. This must include an alternative which closely approaches the level of protection provided by the applicable or relevant standards
- No action.

There may be overlap among the alternatives developed. Further, alternatives outside of these categories may also be developed, such as non-cleanup alternative (e.g., alternative water supply, relocation). The alternatives shall be developed in close consultation with EPA and the State. Document the rationale for excluding any technologies identified in Task 9 in the development of alternatives.

TASK 11 - INITIAL SCREENING OF ALTERNATIVES

The alternatives developed in Task 10 will be screened by the Respondents to eliminate those that are clearly infeasible or inappropriate, prior to undertaking detailed evaluations of the remaining alternatives.

Considerations to be Used in Initial Screening

Three broad considerations must be used as a basis for the initial screening: cost, public health, and the environment. More specifically, the following factors must be considered:

1. Environmental Protection. Only those alternatives that satisfy the response objectives and contribute substantially to the protection of public health, welfare, or the environment will be considered further. Source control alternatives will achieve adequate control the source of contamination. Additionally, alternatives which address the migration of contaminants will minimize or mitigate the threat of harm to public health, welfare, or the environment.

2. Environmental Effects. Alternatives posing significant adverse environmental effects will be excluded.

3. Technical Feasibility. Technologies that may prove extremely difficult to implement, will not achieve the remedial objectives in a reasonable time period, or will rely upon unproven technology should be modified or eliminated.

4. Cost. An alternative whose cost far exceeds that of other alternatives will usually be eliminated unless other significant benefits may also be realized. Total costs will include the cost of implementing the alternatives and the cost of operation and maintenance.

   The cost screening will be conducted only after the environmental and public health screenings have been performed.

TASK 12 - EVALUATION OF THE ALTERNATIVES

Evaluate the cost-effectiveness of alternative remedies that pass through the initial screening in Task 11. Alternative evaluation will be preceded by detailed development of the remaining alternatives.

a. Technical Analysis

The Technical Analysis will, as a minimum:

1. Describe appropriate treatment, storage, and disposal technologies.

2. Discuss how the alternative does (or does not) comply with specific requirements of other environmental programs. When an alternative does not comply, discuss how the alternative prevents or minimizes the migration of wastes and public health or environmental impacts and describe special design needs that could be implemented to achieve compliance.

3. Outline operation, maintenance, and monitoring requirements of the remedy.

4. Identify and review potential off-site disposal facilities to ensure compliance with applicable RCRA and other EPA environmental program requirements, both current and proposed. Potential disposal facilities should be evaluated to determine whether off-site management of site wastes could result in a potential for a future release from the disposal facility.

5. Identify temporary storage requirements, off-site disposal needs, and transportation plans.

6. Describe whether the alternative results in permanent treatment or destruction of the wastes, and, if not, the potential for future release to the environment.

7. Outline safety requirements for remedial implementation (including both on-site and off-site health and safety considerations).

8. Describe how the alternative could be phased into individual operable units. The description should include a discussion of how various operable units of the total remedy could be implemented individually or in groups, resulting in a significant improvement to the environment or savings in cost.

9. Describe how the alternative could be segmented into areas to allow implementation in differing phases.

10. Describe special engineering requirements or site preparation considerations regarding the remedy.

b. Environmental Analysis

Perform an Environmental Assessment (EA) for each alternative. The EA should focus on the site problems and pathways of contamination actually addressed by each alternative. The EA for each alternative will include, at a minimum, an evaluation of beneficial effects of the alternatives, adverse effects of the alternatives, and an analysis of measures to mitigate adverse effects. The no-action alternative will be fully evaluated to describe the current site situation and anticipated environmental conditions if no actions are taken. The no-action alternative will serve as the baseline for the analysis.

c. Public Health Analysis

Each alternative will be assessed in terms of the extent to which it mitigates long-term exposure to any residual contamination and protects public health both during and after completion of the remedial action. The assessment will describe the levels characteristics of contaminants on-site, potential exposure routes, and potentially affected population. The effect of "no action" should be described in terms of short-term effects (e.g., lagoon failure), long-term exposure to hazardous substances, and resulting public health impacts. Each remedial alternative will be evaluated to determine the level of exposure to contaminants and the reduction over time. The relative reduction in public health impacts for each alternative will be compared to the no-action level. For management of migration measures, the relative reduction in impact will be determined by comparing residual levels of each alternative with existing criteria, standards, or guidelines acceptable to EPA. For source control measures or when criteria, standards, or guidelines are not available, the comparison should be based on the relative effectiveness of technologies. The no-action alternative will serve as the baseline for the analysis.

d. Institutional Analysis

Each alternative will be evaluated based on relevant institutional needs. Specifically, regulatory requirements, permits, community relations, and participating agency coordination will be assessed.

e. Cost Analysis

Evaluate the cost of each feasible remedial action alternative (and for each phase or segment of the alternative). The cost will be presented as a present worth cost and will include the total cost of implementing the alternative and the annual operating and maintenance costs. Both monetary costs and associated non-monetary costs will be included. A distribution of costs over time will be provided.

f. Evaluation of Cost-Effective Alternatives

Alternatives will be compared using technical, environmental, and economic criteria. At a minimum, the following areas will be used to compare alternatives:

1. Present Worth of Total Costs. The net present value of capital and operating and maintenance costs also must be presented.

2. Health Information. For the no-action alternative, EPA prefers a quantitative statement including a range estimate of maximum individual risks. Where quantification is not possible, a qualitative analysis may suffice. For source control options, a quantitative risk assessment is not required. For management of migration measures, present a quantitative risk assessment including a range estimate of maximum individual risks.

3. Environmental Effects. Only the most important effects or impacts should be summarized. Reference can be made to supplemental information arrayed in a separate table, if necessary.

4. Technical Aspects of the Remedial Alternatives. The technical aspects of each remedial alternative relative to the others should be clearly delineated. Such information generally will be based on the professional opinion of the Engineer regarding the site and the technologies comprising the remedial alternative.

5. Information on the Extent to Which Remedial Alternatives Meet the Technical Requirements and Environmental Standards of Applicable Environmental Regulations. This information should be arrayed so that differences in how remedial alternatives satisfy such standards are readily apparent. The general types of standards that may be applicable at the site include:

   a. RCRA design and operating standards; and

   b. Drinking water standards and criteria.

6. Information on Community Effects. The type of information that should be provided is the extent to which implementation of a remedial alternative disrupts the community (e.g., traffic, temporary health risks, and relocation).

7. Other Factors. This category of information would include such things as institutional factors that may inhibit implementing a remedial alternative and any other site-specific factors identified in the course of the detailed analysis that may influence which alternative is eventually selected.

TASK 13 - PRELIMINARY REPORT

Prepare a preliminary report presenting the results of Tasks 8 through 13. Submit copies of the preliminary report to EPA and the State of Arkansas.

TASK 14 - FINAL REPORT

Prepare a final report for submission to EPA and the State. The report will include the results of Tasks 8 through 13, and should include any supplemental information in appendices.

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March 6, 1987

Ms. Helen Speer
Circuit Clerk
Boone County Courthouse
Harrison, Arkansas 72601

Re: Arkansas Department of Pollution Control and Ecology v. Hallie C. Ormond, et al; Case No. E-86-293

Dear Ms. Speer:

Enclosed, for filing, please find an original and two copies of the following:

1. Supplemental Response in Opposition to Motion for Approval of Remedial Investigation and Feasibility Study;

2. Supplemental Response to the Motion for Access to the Arkwood Site; and

3. Supplemental Response in Opposition to Motion to Compel Prior Notice of Site Alterations.

Please return a file-marked copy of each of the documents to me in the self-addressed, stamped envelope provided herewith.

Thanks for your assistance on this matter.

Yours very truly,

Michael S. McCrary

MSM/wk
Enclosures
cc: All Attorneys of Record
w/enclosures

Similarly, under Tab A, Chronology of Events at Arkwood Plant, Omaha, Arkansas, heading 1971-1972:

> Use of sinkhole for sludge disposal terminated. Pipe installed from treating building to railroad embankment for sludge disposal in railroad ditch. Quantity of sludge decreased due to increased product costs and more efficient use of treating solutions.

Finally, under Tab E, Item 3, the third paragraph reads:

> From 1962 to 1973, few precautions were taken to prevent secondary releases of wood treating solutions to the environment. The wastes generated at the site consisted of three major constituents: creosote, pentachlorophenol (PCP), and wood treating oil (used as a solvent for the treatment products).

MMI has attempted to hide unsupported and irrelevant allegations of liability of other parties in a massive technical report. Consequently, any order approving the RI/FS might also have the inadvertent effect of approving these unsupported and unproven statements.

Also, any order issued by the Court should not waive or preclude Ormond's right to challenge any actions at the site as inappropriate under State and Federal law, waive Ormond's rights to defend any allegations of liability, or waive Ormond's rights to defend any actions for recovery of costs incurred.

Additionally, the order should clearly state that any party has the right to conduct his own tests. Both the ADPC & E and the EPA have the right under State and Federal law to determine the appropriate remedy for the site, and the owner of the property also retains the right to conduct tests to determine whether there has been any environmental harm at the site, and, if so, how it can best be remedied. MMI has not cited any statute or case which supports its apparent attempt to abridge this fundamental property right.

Wherefore, Respondents pray that the Motion for Approval of Remedial Investigation and Feasibility Study be denied or in the

alternative that any limited approval be upon the terms set out hereinabove.

Respectfully submitted,

Arkwood, Inc., Hallie C. Ormond, C. C. Grisham, and Mary Jo Grisham

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P. O. Box 1797
Harrison, AR 72601

ARNOLD, GROBMYER & HALEY
P. O. Box 70
Little Rock, AR 72203

By: _____
Robert R. Ross

CERTIFICATE OF SERVICE

I, Robert R. Ross, do hereby certify that I have mailed a copy of the foregoing Supplemental Response in Opposition to Motion for Approval of Remedial Investigation and Feasibility Study to Allan Gates, Esq., Mitchell, Williams, Selig & Tucker, 1000 Savers Federal Building, Little Rock, Arkansas, 72201 and Mr. Phillip S. Deisch, Arkansas Department of Pollution Control and Ecology, P. O. Box 9583, Little Rock, Arkansas, 72209 on this the 6 day of March, 1987.

_____
Robert R. Ross

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY — PETITIONER

vs. NP. E-86-293

HALLIE C. ORMOND, ARKWOOD, INC., MOUNTAIN ENTERPRISES, INC., C. C. GRISHAM, MARY JO GRISHAM and MASS MERCHANDISERS, INC. — RESPONDENTS

HALLIE C. ORMOND — THIRD-PARTY PLAINTIFF

vs.

MCKESSON CORPORATION — THIRD-PARTY DEFENDANT

SUPPLEMENTAL RESPONSE TO THE
MOTION FOR ACCESS TO THE ARKWOOD SITE

Hallie C. Ormond, Arkwood, Inc., C. C. Grisham and Mary Jo Grisham ("Respondents"), without waiving any rights as may exist in various pending Motions to Dismiss, supplementally respond to Mass Merchandisers, Inc.'s ("MMI") Motion for Access to the Arkwood Site. MMI filed a motion for access to the property which is the subject of the case at bar and known in this proceeding as the Arkwood site.

Respondent Ormond does not have to grant access to another private party who has no rights to the land. MMI does not lease the land at this time, nor is it currently conducting any business operations on the property.

There is no statutory authority for the Court to grant access to a private party with no rights to the land. Ark. Stat. Ann. § 82-4705 (c) and Ark. Stat. Ann. § 82-4717 (b) allow any employee, agent or authorized representative of the director of the Arkansas Department of Pollution Control and Ecology to gain access to a site, but MMI is not an agent, employee, or authorized representative of the State.

Although access may not be required, the individual respondents in this proceeding are gratified that MMI wishes to try to determine exactly whether its operations caused any

environmental harm at the property and, if so, how MMI could remedy that harm. Consequently, Respondent Ormond would agree to permit MMI to come onto the property for the sole purpose of taking measurements, collecting samples and conducting tests pursuant to the Work Plan upon the following conditions, if there are no objections to the Plan by the State. Ormond would agree if Ormond is given prior notice of MMI's planned entry upon the land; is given access to the work papers, reports, data and results of any tests performed; is given access and the opportunity to interview the engineers or technicians who perform the tests on the same basis as MMI; is given a full release of liability for any damages or injuries to persons or property which may result from entry upon the property.

Consequently, no court order is necessary to allow MMI access to the Arkwood property. If any access order is granted, it should protect the owner from any impairment, damage or harm done to his property. Therefore, the above mentioned tests must take place in a reasonable time, place and manner with the proper notice give to Mr. Ormond.

Moreover, any order should not restrain the landowner and other individual respondents at the owner's behest from access to the property or from conducting tests on their own.

In a separate Opposition to MMI's Motion for Approval, the individual respondents discuss the need to take their own tests if considered necessary and the fact that permission for the RI/FS to go forward does not sanction the study as being the appropriate one for the site.

In addition, any order should reserve the respondents' right to seek appropriate relief for any damages caused by MMI pursuant to the Work Plan, and to seek appropriate relief should MMI or its agents' actions pursuant to the Work Plan result in any impairment or infringement of the owner's right to the use and enjoyment of his property. Any order should also state that the respondents are not liable for any damages caused by MMI as a result of its activities on the site.

No inference should be drawn from the permission agreed upon here that the RI/FS or any clean up is necessary.

Respondent Ormond's assent is given also because it would be in furtherance of the obligations MMI has under its lease with Ormond to clean the premises and leave it in an orderly and usable condition.

Pursuant to the terms set out above the Respondents agree to give Respondent MMI access to the property in question.

Respectfully submitted,

Arkwood, Inc., Hallie C. Ormond, C. C. Grisham, and Mary Jo Grisham

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P. O. Box 1797
Harrison, AR 72601

ARNOLD, GROBMYER & HALEY
P. O. Box 70
Little Rock, AR 72203

By: _____
Robert R. Ross

CERTIFICATE OF SERVICE

I, Robert R. Ross, do hereby certify that I have mailed a copy of the foregoing Supplemental Response to the Motion for Access to the Arkwood Site to Allan Gates, Esq., Mitchell, Williams, Selig & Tucker, 1000 Savers Federal Building, Little Rock, Arkansas, 72201 and Mr. Phillip S. Deisch, Arkansas Department of Pollution Control and Ecology, P. O. Box 9583, Little Rock, Arkansas, 72209 on this the 6th day of March, 1987.

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Robert R. Ross

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY — PETITIONER

vs. — NP. E-86-293

HALLIE C. ORMOND, ARKWOOD, INC., MOUNTAIN ENTERPRISES, INC., C. C. GRISHAM, MARY JO GRISHAM and MASS MERCHANDISERS, INC. — RESPONDENTS

HALLIE C. ORMOND — THIRD-PARTY PLAINTIFF

vs.

MCKESSON CORPORATION — THIRD-PARTY DEFENDANT

SUPPLEMENTAL RESPONSE IN OPPOSITION TO
MOTION TO COMPEL PRIOR NOTICE OF SITE ALTERATIONS

Hallie C. Ormond, Arkwood, Inc., C. C. Grisham and Mary Jo Grisham ("Respondents"), without waiving any rights as may exist in various pending Motions to Dismiss, supplementally respond in opposition to Mass Merchandisers, Inc.'s ("MMI") Motion to Compel Prior Notice of Site Alterations.

The order sought by MMI would drastically infringe upon property rights of the owner of the property in question. MMI's request for an order requiring Mr. Ormond and the other parties to give MMI prior notice before undertaking "any alterations of current conditions at the Arkwood site" could be construed as prohibiting him and his invitees from going onto the Arkwood property for any purpose whatsoever without first notifying MMI and presumably seeking its permission. MMI has not rights in this property, and there would be no legal basis or authority for such an order.

The order sought by MMI is also grossly over broad and vague. MMI asks for an order that would restrain Mr. Ormond and the other respondents from taking any action without notice to MMI which might "cause environmental harm or increase the ultimate expense of any investigation or remediation that may be required." There is no way to prejudge or predetermine what

actions might cause "environmental harm" or "increase the ultimate expense" of a study that has yet to take place.

The order sought by MMI is also unnecessary if MMI only wants access to the Arkwood property to perform the preliminary measurements, sample collections, and tests described in The Remedial Investigation and Feasibility Study ("RI/FS") which MMI has submitted to the Court. Mr. Ormond and the other Respondents are gratified that MMI apparently wishes to try to remedy any environmental harm which its operations might have caused at the Arkwood property. Mr. Ormond and the other Respondents do not intend to interfere with any reasonable efforts by MMI in this respect, under the condition set out in its Response to Motion for Access nor do they intend to take any actions on the property which might cause any environmental harm.

If any "notice" order is issued by the Court, then that order should be as narrow and specific as possible in order to minimize infringement of Mr. Ormond's property rights and to be capable of enforcement. In addition, any "notice" order should be two-edged. Mr. Ormond should be provided prior notice by MMI of all of MMI's intended activities on the property.

For all the reasons stated above, the Respondents pray that the Motion to Compel Prior Notice of Site Alterations be denied.

Respectfully submitted,

Arkwood, Inc., Hallie C. Ormond, C. C. Grisham, and Mary Jo Grisham

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By: _____
Robert R. Ross

CERTIFICATE OF SERVICE

I, Robert R. Ross, do hereby certify that I have mailed a copy of the foregoing Supplemental Response in Opposition to Motion to Compel Prior Notice of Site Alterations to Allan Gates, Esq., Mitchell, Williams, Selig & Tucker, 1000 Savers Federal Building, Little Rock, Arkansas, 72201 and Mr. Phillip S. Deisch, Arkansas Department of Pollution Control and Ecology, P. O. Box 9583, Little Rock, Arkansas, 72209 on this the 6th day of March, 1987.

Robert R. Ross

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

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vs. — NP. E-86-293

HALLIE C. ORMOND, ARKWOOD, INC., MOUNTAIN ENTERPRISES, INC., C. C. GRISHAM, MARY JO GRISHAM and MASS MERCHANDISERS, INC. — RESPONDENTS

HALLIE C. ORMOND — THIRD-PARTY PLAINTIFF

vs.

MCKESSON CORPORATION — THIRD-PARTY DEFENDANT

SUPPLEMENTAL RESPONSE IN
OPPOSITION TO MOTION FOR APPROVAL OF
REMEDIAL INVESTIGATION AND FEASIBILITY STUDY

Hallie C. Ormond, Arkwood, Inc., C. C. Grisham and Mary Jo Grisham ("Respondents"), without waiving any rights as may exist in various pending Motions to Dismiss, supplementally respond in opposition to Mass Merchandisers, Inc.'s ("MMI") Motion for Approval of Remedial Investigation and Feasibility Study. MMI's motion should not be granted for the following reasons.

The relief contemplated in the motion is both unnecessary and inappropriate. It is unnecessary because in other responses, Respondents Ormond, Grishams and Arkwood agree to a limited form of access for the purpose of conducting the RI/FS. It is inappropriate because this action is not the proper setting for determining the nature of any remedial action that might become necessary. Moreover, neither the United States Environmental Protection Agency ("EPA") nor the Arkansas Department of Pollution Control and Ecology ("ADPC & E") have requested any action from the Court concerning the RI/FS, and they have not joined in MMI's motion. This motion is one private party requesting the Court to take action severely abridging the rights of another private party.

There is no statutory authority under Arkansas law for issuing an order contemplated by the motion. The Water and Air

Pollution Control Act, Ark. Stat. Ann § 82-1901 et seq., and the Remedial Action Trust Fund Act, Ark. Stat. Ann § 82-4712 et seq. do not authorize a determination at this stage of whether any remedy proposed by MMI is indeed the proper remedy for the site; whether any costs incurred by MMI under the RI/FS are consistent with State and Federal law; and whether any of the costs are recoverable from any individual or other parties.

These and other complex issues can only be resolved in further extensive judicial and administrative evidentiary hearings. They cannot be resolved on the basis of the brief and summary motion submitted by MMI. While MMI's "approval" motion should be denied in its entirety, if the court should grant any of the relief sought by MMI, then the Court's order should not infer, suggest or conclude in any way that the Work Plan is appropriate for the site. Nor should the Court's order in any manner suggest that the court is determining any party's liability at the site.

There are statements in the Work Plan that are totally extraneous to the implementation of the study and constitute allegations of liability. For example, on page 2-6 of the Work Plan, the third full paragraph reads:

> During the early years of operation, few precautions were taken to prevent secondary releases of wood treating solutions to the environment. The waste oil was disposed into a sinkhole located near the treating cylinder room. Disposal to the sinkhole was discontinued prior to 1971.

The seventh full paragraph then begins:

> Under MMI management, several changes were made in plant operations and waste disposal. The sump drain line was improved to provide for more efficient reuse of oil. The air pressure/vacuum time was increased during treatment process to eliminate/reduce treated wood "bleeding". . . .

On page 2-94, under the heading of Community Relations Support, the second paragraph reads:

> To date, few community relations activities involving large groups have been conducted at the Arkwood site. The EPA, ADPC & E, and MMI representatives have been in contact with one another and with affected individuals. No public meetings have been held to date.

3-1-87

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VI
DALLAS, TEXAS

IN THE MATTER OF:	§	
	§	
MASS MERCHANDISERS, INC.	§	
	§	
	§	
REGARDING THE ARKWOOD, INC. SITE, OMAHA, ARKANSAS	§	ADMINISTRATIVE ORDER ON CONSENT
	§	
	§	
Proceeding under Section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9606(a))	§	DOCKET NUMBER CERCLA VI-6-86

MMI PROGRESS REPORT NO. 10
(Progress as of March 1, 1987)

1. Community Meeting. On February 2, 1987, representatives of EPA conducted a community meeting in the town of Omaha, Arkansas. The purpose of the meeting was to inform local residents about the Superfund process and the plans for the Arkwood site.

2. Site Access. On February 12, 1987, MMI filed a motion in the state court proceedings to compel the landowner to grant site access for the purpose of executing the RI/FS Work Plan. A copy of the motion is attached to this report. The landowner has filed a memorandum in opposition to the motion for site access, and a hearing on the motion for site access is scheduled for March 12, 1987.

3. Alterations to Site. In the past six months the landowner has undertaken a number of alterations to the Arkwood Site, including demolition of buildings, removal of equipment, and the placement of topsoil and grass seed in certain areas. While some of these activities may have been beneficial, others may increase the cost of study, invalidate prior data, or increase the cost of ultimate remediation. On February 12, 1987, MMI filed a motion in the state court proceedings to compel the landowner, C. C. Grisham and Mary Jo Grisham, to give thirty (30) days prior notice to MMI and the

state before undertaking any site alterations. A copy of MMI's motion and memorandum are attached to this report. The landowner, C. C. Grisham and Mary Jo Grisham, have filed memoranda in opposition to the motion. The hearing is scheduled for March 12 on MMI's motion.

4. Meeting with Region VI Staff. On February 17, 1987, representatives of MMI, MMI's contractor, EPA, and EPA's consultant met in Dallas to review the items in the RI/FS Work Plan that can be undertaken without site access.

5. Sample Test Results and Data. During the period covered by this report MMI has not received any sampling, tests, or other data in connection with activities under this Consent Order.

6. Plans and Procedures Completed. No plans or procedures of the type contemplated by Section VI(F)(2) of the Consent Order were completed during the period covered by this report.

7. Scheduled Activity for the Next Reporting Period. There are no consent administrative order deadlines for the next monthly reporting period.

Respectfully submitted,

MITCHELL, WILLIAMS, SELIG,
JACKSON & TUCKER
1000 Savers Federal Building
Little Rock, Arkansas 72201
(501) 376-3151

By _____
Allan Gates

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY — PETITIONER

VS. — NO. E-86-293

HALLIE C. ORMOND, ARKWOOD, INC., MOUNTAIN ENTERPRISES, INC., C. C. GRISHAM, MARY JO GRISHAM and MASS MERCHANDISERS, INC. — RESPONDENTS

2-27-87

HALLIE C. ORMOND — THIRD-PARTY PLAINTIFF

VS.

MCKESSON CORPORATION — THIRD-PARTY DEFENDANT

RESPONSE TO MOTION FOR ACCESS TO ARKWOOD SITE

Comes now HALLIE C. ORMOND and for his response to motion for access filed by Mass Merchandisers, Inc., states:

(1)

That he objects to the Motion For Access filed herein, and denies the material allegations set forth in said Motion;

(2)

That this Motion is not timely because there has been no determination by the Court on the Complaint filed herein that there is a hazard present and that testing and remedial work is necessary; and that this Motion should not be heard by the Court until after a hearing is held on the Complaint and Answers filed herein;

(3)

That he reserves the right to amend this response after further investigation of the allegations set out in said motion.

WHEREFORE, Hallie C. Ormond prays for orders of this Court dismissing the Motion For Access filed herein by Mass Merchandisers, Inc.

HALLIE C. ORMOND

By: Bill Doshier

DOSHIER and BOWERS
ATTORNEYS AT LAW
P. O. BOX 1797
HARRISON, AR 72601
(501) 741-6166

FILED FOR RECORD
1987 FEB 27 PM 4:47
HELEN SPEER, CLERK
BY _____ D.C.

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February, 1987, I served the foregoing Response by depositing a true copy in the United States mail, first-class postage prepaid, addressed to Mr. Phillip S. Deisch, Arkansas Department of Pollution Control and Ecology, P. O. Box 9583, Little Rock, Arkansas 72209 and Mr. Allen Gates, Mitchell, Williams, Selig & Tucker, 1000 Savers Federal Building, Little Rock, Arkansas 72201.

Bill Doshier
BILL F. DOSHIER

BRIEF SUPPORT STATEMENT

Rule 2C of the Uniform Rules provides that if a Respondent opposes a motion he shall file his response with a brief supporting statement.

Hallie C. Ormond opposes the relief sought herein. It is an attempt to secure access before there is any finding by the Court that the site is in violation of the Arkansas Statute as alleged in the Complaint.

Respectfully submitted,

By: Bill Doshier
DOSHIER and BOWERS
ATTORNEYS AT LAW
P. O. BOX 1797
HARRISON, AR 72601
(501) 741-6166

FILED FOR RECORD
1987 FEB 27 PM 4:47
HELEN SPEER, CLERK
BY _____ D.C.

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

ARKANSAS DEPARTMENT OF POLLUTION
CONTROL AND ECOLOGY — PETITIONER

VS. — NO. E-86-293

2-27-87

HALLIE C. ORMOND, ARKWOOD, INC.,
MOUNTAIN ENTERPRISES, INC.,
C. C. GRISHAM, MARY JO GRISHAM
and MASS MERCHANDISERS, INC. — RESPONDENTS

HALLIE C. ORMOND — THIRD-PARTY PLAINTIFF

VS.

MCKESSON CORPORATION — THIRD-PARTY DEFENDANT

RESPONSE TO MOTION FOR
APPROVAL OF REMEDIAL INVESTIGATION,
MOTION FOR ACCESS, AND MOTION TO COMPEL
NOTICE FILED BY MASS MERCHANDISERS, INC.

Comes now ARKWOOD, INC., and for its response to the above motions state:

(1)

That it denies all allegations set forth in said motions that may be applicable to it, and objects to the relief sought by Mass Merchandisers, Inc., in said motions.

(2)

That it is not a proper party to this action and has filed herein its Motion To Dismiss it from the case; and that said Motion To Dismiss should be heard before it is required to respond to these motions.

(3)

That it reserves the right to amend this response and plead further after further investigation and hearing on its Motion To Dismiss.

WHEREFORE, ARKWOOD, INC., prays for orders of the Court dismissing the motions filed herein above stated by Mass Merchandisers, Inc.

FILED FOR RECORD
1987 FEB 27 PM 4: 4
HELEN SPEER, CLERK
BY _____ D.C.

ARKWOOD, INC.

By: Bill Doshier

DOSHIER and BOWERS
ATTORNEYS AT LAW
P. O. BOX 1797
HARRISON, AR 72601
(501) 741-6166

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February, 1987, I served the foregoing Response by depositing a true copy in the United States mail, first-class postage prepaid, addressed to Mr. Phillip S. Deisch, Arkansas Department of Pollution Control and Ecology, P. O. Box 9583, Little Rock, Arkansas 72209 and Mr. Allen Gates, Mitchell, Williams, Selig & Tucker, 1000 Savers Federal Building, Little Rock, Arkansas 72201.

Bill Doshier
BILL F. DOSHIER

BRIEF SUPPORTING STATEMENT

Arkwood, Inc., was named as a Respondent in the original complaint filed herein by the Arkansas Department of Pollution Control and Ecology.

In response to said complaint Arkwood, Inc., filed its Motion to Dismiss the complaint against it. The Motion To Dismiss is based on the fact that Arkwood, Inc., was dissolved in 1978, is not now a legal entity and therefore, no relief can be granted against it.

The Motion To Dismiss and the allegations in the Complaint should be heard before any hearing on the instant motions.

Respectfully Submitted,

By: Bill Doshier
DOSHIER and BOWERS
ATTORNEYS AT LAW
P. O. BOX 1797
HARRISON, AR 72601
(501) 741-6166

FILED FOR RECORD
1987 FEB 27 PM 4:49
HELEN SPEER, CLERK
BY _____ D.C.

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY — PETITIONER

VS. — NO. E-86-293

HALLIE C. ORMOND, ARKWOOD, INC., MOUNTAIN ENTERPRISES, INC., C. C. GRISHAM, MARY JO GRISHAM and MASS MERCHANDISERS, INC. — RESPONDENTS

2-27-87

HALLIE C. ORMOND — THIRD-PARTY PLAINTIFF

VS.

MCKESSON CORPORATION — THIRD-PARTY DEFENDANT

RESPONSE TO MOTION FOR APPROVAL OF REMEDIAL INVESTIGATION, MOTION FOR ACCESS, AND MOTION TO COMPEL NOTICE FILED BY MASS MERCHANDISERS, INC.

Comes now C. C. GRISHAM and MARY JO GRISHAM and for their response to the above motions state:

(1)

That they deny all allegations set forth in said motions that may be applicable to them, and object to the relief sought by Mass Merchandisers, Inc., in said motions.

(2)

That they are not proper parties to this action and have filed herein their Motion To Dismiss them from the case; and that said Motion To Dismiss should be heard before they are required to respond to these motions.

(3)

That they reserve the right to amend this response and plead further after further investigation and hearing on their Motion To Dismiss.

WHEREFORE, C. C. GRISHAM and MARY JO GRISHAM pray for orders of the Court dismissing the motions filed herein above stated by Mass Merchandisers, Inc.

C. C. GRISHAM and MARY JO GRISHAM

By: Bill Doshier

DOSHIER and BOWERS
ATTORNEYS AT LAW
P. O. BOX 1797
HARRISON, AR 72601
(501) 741-6166

FILED FOR RECORD
1987 FEB 27 PM 4:48
HELEN SPEER, CLERK
BY ____ D.C.

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February, 1987, I served the foregoing Response by depositing a true copy in the United States mail, first-class postage prepaid, addressed to Mr. Phillip S. Deisch, Arkansas Department of Pollution Control and Ecology, P. O. Box 9583, Little Rock, Arkansas 72209 and Mr. Allen Gates, Mitchell, Williams, Selig & Tucker, 1000 Savers Federal Building, Little Rock, Arkansas 72201.

Bill Doshier
BILL F. DOSHIER

BRIEF SUPPORTING STATEMENT

C. C. Grisham and Mary Jo Grisham were named as Respondents in the original complaint filed herein by the Arkansas Department of Pollution Control and Ecology.

In response to said complaint they filed their Motion to Dismiss the complaint against them. The Motion To Dismiss is based on the fact that they were never operators and as mere stockholders in a corporate operator no relief can be granted against them.

Their Motion To Dismiss and the allegations in the Complaint should be heard before any hearing on the instant motions.

Respectfully Submitted,

By: Bill Doshier
DOSHIER and BOWERS
ATTORNEYS AT LAW
P. O. BOX 1797
HARRISON, AR 72601
(501) 741-6166

FILED FOR RECORD
1987 FEB 27 PM 4:48
HELEN SPEER, CLERK
BY ____ D.C.

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY — PETITIONER

VS. — NO. E-86-293 — 2-27-87

HALLIE C. ORMOND, ARKWOOD, INC., MOUNTAIN ENTERPRISES, INC., C. C. GRISHAM, MARY JO GRISHAM and MASS MERCHANDISERS, INC. — RESPONDENTS

copies

HALLIE C. ORMOND — THIRD-PARTY PLAINTIFF

VS.

MCKESSON CORPORATION — THIRD-PARTY DEFENDANT

RESPONSE TO MOTION FOR
APPROVAL OF REMEDIAL INVESTIGATION

Comes now HALLIE C. ORMOND and for his Response to Petitioner's Motion for Approval of Remedial Investigation doth state:

(1)

That Respondent Hallie C. Ormond objects to the relief sought in said Motion and denies that said Petitioner is entitled to said relief or that said relief will advance final resolution of any issues in this case.

(2)

That said Respondent denies each allegation in said motion that is material to the issues raised in this case.

(3)

That said Respondent objects to the said Motion, and any hearing thereon, prior to Court orders determining the issues presented by the Complaint and Answers filed herein.

(4)

That said Respondent reserves the right to amend this response after further investigation of the facts and allegations raised in the Motion.

WHEREFORE, Respondent Hallie C. Ormond prays for orders of this Court denying the said Motion for Approval of Remedial

MAR 02 REC'D
191

Investigation filed herein by Mass Merchandisers, Inc.

HALLIE C. ORMOND

By: Bill Doshier

DOSHIER and BOWERS
ATTORNEYS AT LAW
P. O. BOX 1797
HARRISON, AR 72601
(501) 741-6166

FILED FOR RECORD
1987 FEB 27 PM 4:46
HELEN SPEER, CLERK
BY _____ D.C.

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February, 1987, I served the foregoing Response by depositing a true copy in the United States mail, first-class postage prepaid, addressed to Mr. Phillip S. Deisch, Arkansas Department of Pollution Control and Ecology, P. O. Box 9583, Little Rock, Arkansas 72209 and Mr. Allen Gates, Mitchell, Williams, Selig & Tucker, 1000 Savers Federal Building, Little Rock, Arkansas 72201.

Bill Doshier

BILL F. DOSHIER

BRIEF SUPPORTING STATEMENT

The Uniform Rules for Chancery Court, Rule 2C, provides that if a Respondent opposes a pleading he shall file his response, including a brief statement.

Hallie C. Ormond does oppose the relief sought by Mass Merchandisers, Inc. The issue of the necessity for remedial work on said site has not been determined. The allegations in the Complaint have not been heard. It has not been established that any hazard exist and certainly not to the extent to justify the relief sought by Mass Merchandisers, Inc., in the motion.

The plan Mass Merchandisers, Inc., seeks approval of herein will cost approximately $1,000,000.00 just to make the study and Mass Merchandisers, Inc., proposes to pass this cost on to Hallie C. Ormond and others. (See Cross-complaint of Mass Merchandisers, Inc., filed herein.)

Hallie C. Ormond believes that any remedy ordered by this Court will not require the expenditure Mass Merchandisers, Inc., seeks approval for and that the issues in the Complaint must be heard before this motion is considered.

Respectfully Submitted,

By: Bill Doshier

DOSHIER and BOWERS
ATTORNEYS AT LAW
P. O. BOX 1797
HARRISON, AR 72601
(501) 741-6166

FILED FOR RECORD
1987 FEB 27 PM 4:46
HELEN SPEER, CLERK
BY _____ D.C.

2-27-87

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

ARKANSAS DEPARTMENT OF POLLUTION
CONTROL AND ECOLOGY PETITIONER

VS. NO. E-86-293

HALLIE C. ORMOND, ARKWOOD, INC.,
MOUNTAIN ENTERPRISES, INC.,
C. C. GRISHAM, MARY JO GRISHAM
and MASS MERCHANDISERS, INC. RESPONDENTS

HALLIE C. ORMOND THIRD-PARTY PLAINTIFF

VS.

MCKESSON CORPORATION THIRD-PARTY DEFENDANT

RESPONSE TO MOTION TO COMPEL PRIOR NOTICE

Comes HALLIE C. ORMOND and for his Response to the Motion To Compel Prior Notice states:

(1)

That he denies all material allegations set forth in said Motion, and objects to the relief sought.

(2)

That the Motion is not timely because there has been no determination by the Court on the issues raised in the Complaint and Answers herein.

(3)

That he reserves the right to amend this response after further investigation of the fact and allegations set forth in said Complaint.

WHEREFORE, Hallie C. Ormond prays for orders of this Court dismissing said Motion To Compel Notice.

HALLIE C. ORMOND

By: Bill Doshier

DOSHIER AND BOWERS
ATTORNEYS AT LAW
P. O. BOX 1797
HARRISON, AR 72601
(501) 741-6166

FILED FOR RECORD
1987 FEB 27 PM 4:48
HELEN SPEER, CLERK
BY ____ D.C.

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February, 1987, I served the foregoing Response by depositing a true copy in the United States mail, first-class postage prepaid, addressed to Mr. Phillip S. Deisch, Arkansas Department of Pollution Control and Ecology, P. O. Box 9583, Little Rock, Arkansas 72209 and Mr. Allen Gates, Mitchell, Williams, Selig & Tucker, 1000 Savers Federal Building, Little Rock, Arkansas 72201.

Bill Doshier

BILL F. DOSHIER

BRIEF SUPPORTING STATEMENT

There has been no determination made by this Court on the allegations in the Complaint and there is no order or finding giving the State or Mass Merchandisers, Inc., any rights to seek the relief sought in this motion.

Respectfully Submitted,

By: Bill Doshier

DOSHIER and BOWERS
ATTORNEYS AT LAW
P. O. BOX 1797
HARRISON, AR 72601
(501) 741-6166

FILED FOR RECORD
1987 FEB 27 PM 4:48
HELEN SPEER, CLERK
BY _____ D.C.

2-11-87

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY — PETITIONER

VS. NO. E-86-293

HALLIE C. ORMOND, ARKWOOD, INC., MOUNTAIN ENTERPRISES, INC., C. C. GRISHAM, MARY JO GRISHAM and MASS MERCHANDISERS, INC. — RESPONDENTS

HALLIE C. ORMOND — THIRD-PARTY PLAINTIFF

VS.

MCKESSON CORPORATION — THIRD-PARTY DEFENDANT

MOTION FOR ACCESS TO THE ARKWOOD SITE

Respondent Mass Merchandisers, Inc. ("MMI") hereby moves the Court to enter an order granting MMI permission for access to the site for the purpose of executing the Remedial Investigation and Feasibility Study ("RI/FS") Work Plan required by the United States Environmental Protection Agency. In support of its motion, MMI states the following:

1. By a separate motion filed simultaneously with this Motion for Site Access, MMI has requested approval to implement its RI/FS for the Arkwood site.

2. Execution of the RI/FS will require access to the Arkwood site for the purpose of taking measurements, collecting samples and conducting tests. The precise nature of the activity proposed on site is described in the RI/FS Work Plan attached as Exhibit 1 to the Motion for Approval filed simultaneously herewith.

3. MMI has requested permission from respondent Ormond, the landowner, for access to the site for the purpose of conducting the RI/FS Work Plan. Although temporary access was previously granted, that permission has now expired. Permission for the continuing access needed to conduct the RI/FS Work Plan has been requested but has not been granted by Ormond.

4. The measurements, sample collections, tests and other activities proposed on site by MMI will not injure the property or interfere with the landowner's reasonable use and enjoyment.

5. Granting site access will significantly advance the ultimate resolution of the claims asserted in this action by providing the parties and the Court with detailed information regarding conditions at the Arkwood site, the damages asserted, and the relief available.

WHEREFORE, MMI respectfully requests that this Court enter an order granting MMI access to the Arkwood site for the purpose of executing the Remedial Investigation and Feasibility Study proposed in MMI's RI/FS Work Plan.

FILED FOR RECORD
1987 FEB 12 PM 12:
HELEN SPEER, CLERK
BY

Respectfully submitted,

MITCHELL, WILLIAMS, SELIG, & TUCKER
1000 Savers Federal Building
Little Rock, Arkansas 72201
(501) 376-3151

By Allan Gates
Allan Gates

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of February, 1987, I served the foregoing Motion for Access to the Arkwood Site by depositing a true copy in the United States mail, first-class postage prepaid, addressed to Mr. Phillip S. Deisch, Arkansas Department of Pollution Control and Ecology, P. O. Box 9583, Little Rock, Arkansas 72209; to Mr. Robert R. Ross, Arnold & Grobmyer, P.A., 875 Union National Plaza, P. O. Box 70, Little Rock, Arkansas 72203; and to Mr. Bill F. Doshier, Doshier & Bowers, P. O. Box 1797, Harrison, Arkansas 72601.

Allan Gates
Allan Gates

2-11-87

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY — PETITIONER

VS. NO. E-86-293

HALLIE C. ORMOND, ARKWOOD, INC., MOUNTAIN ENTERPRISES, INC., C. C. GRISHAM, MARY JO GRISHAM and MASS MERCHANDISERS, INC. — RESPONDENTS

HALLIE C. ORMOND — THIRD-PARTY PLAINTIFF

VS.

MCKESSON CORPORATION — THIRD-PARTY DEFENDANT

MOTION TO COMPEL
PRIOR NOTICE OF SITE ALTERATIONS

Respondent Mass Merchandisers, Inc. ("MMI") hereby moves the Court to enter an order compelling the landowner, Respondent Ormond, and all other parties to this action, to give prior notice to the Court and other parties before undertaking any alterations of current conditions at the Arkwood site. In support of this motion, MMI states the following:

1. This is an action regarding conditions at the site of a former wood treating operation in Omaha, Arkansas ("the Arkwood site").

2. The relief sought in this action includes, among other things, the investigation and possible remediation of areas of potential contamination due to the former operations of the wood treating plant.

3. Subsequent to the filing of this action, Respondents Ormond, C. C. Grisham, Mary Jo Grisham, and Arkwood, Inc. have removed certain buildings and tanks, filled in areas of potential contamination, and otherwise altered the condition of the site.

4. Although some of the activities of Respondents Ormond, C. C. Grisham, Mary Jo Grisham, and Arkwood, Inc. may

have removed sources of potential contamination, MMI fears that the expense and difficulty of investigation and any ultimate remediation may have been increased; and the danger of environmental contamination may have been aggravated by some of the steps recently taken at the Arkwood site.

5. Unless restrained by this Court, Respondents Ormond, C. C. Grisham, Mary Jo Grisham, and Arkwood, Inc. may undertake, without notice to the other parties, additional actions which could cause environmental harm or increase the ultimate expense of any investigation or remediation that may be required.

6. A substantial number of samples and measurements have already been taken by ADPC&E, EPA, and MMI. Alteration of the site conditions without notice to the other parties may render much of the existing information regarding the site partially or entirely meaningless.

7. MMI proposes that prior to undertaking any actions at the site that would alter its physical condition, Respondents Ormond, C. C. Grisham, Mary Jo Grisham, and Arkwood, Inc. be required to give all other parties to this action thirty (30) days advance written notice of the proposed action. This advance notice would allow the affected parties an opportunity to review the proposed action and to seek appropriate relief in this Court if the action proposed would cause environmental harm or otherwise be inappropriate.

8. A requirement of prior notice requested by this motion would not constitute a significant burden on the owner's right to the use and enjoyment of the property, especially in light of the current nature and condition of the site.

WHEREFORE, MMI prays that this Court enter an order requiring Respondents Ormond, C. C. Grisham, Mary Jo Grisham, and Arkwood, Inc. to give the other parties in this action

thirty (30) days advance written notice of any activities at the Arkwood site which would alter the physical conditions of the site.

Respectfully submitted,

MITCHELL, WILLIAMS, SELIG & TUCKER
1000 Savers Federal Building
Little Rock, Arkansas 72201
(501) 376-3151

FILED FOR RECORD
1987 FEB 12 PM 12
HELEN SPELL, CLERK
BY

By _____
Allan Gates

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of February, 1987, I served the foregoing Motion to Compel Prior Notice of Site Alterations by depositing a true copy in the United States mail, first-class postage prepaid, addressed to Mr. Phillip S. Deisch, Arkansas Department of Pollution Control and Ecology, P. O. Box 9583, Little Rock, Arkansas 72209; to Mr. Robert R. Ross, Arnold & Grobmyer, P.A., 875 Union National Plaza, P. O. Box 70, Little Rock, Arkansas 72203; and to Mr. Bill F. Doshier, Doshier & Bowers, P. O. Box 1797, Harrison, Arkansas 72601.

_____
Allan Gates

2-11-87

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY — PETITIONER

VS. NO. E-86-293

HALLIE C. ORMOND, ARKWOOD, INC., MOUNTAIN ENTERPRISES, INC., C. C. GRISHAM, MARY JO GRISHAM and MASS MERCHANDISERS, INC. — RESPONDENTS

HALLIE C. ORMOND — THIRD-PARTY PLAINTIFF

VS.

MCKESSON CORPORATION — THIRD-PARTY DEFENDANT

MOTION FOR APPROVAL OF REMEDIAL INVESTIGATION AND FEASIBILITY STUDY WORK PLAN

Respondent Mass Merchandisers, Inc. ("MMI") hereby moves the Court to enter an order approving the Remedial Investigation and Feasibility Study ("RI/FS") Work Plan described below as an element of relief in this action, and reserving MMI's rights to seek reimbursement from the other respondents for the costs of executing the RI/FS. In support of this motion MMI states the following:

1. Pursuant to a consent administrative order with the United States Environmental Protection Agency, MMI has developed a comprehensive proposal and work plan for a Remedial Investigation and Feasibility Study of the Arkwood site. The Remedial Investigation will ascertain all pertinent conditions on and off the site, and the Feasibility Study will analyze the available alternatives for remedying any conditions which require response. A true copy of the RI/FS Work Plan is attached as Exhibit 1 of this motion.

2. On December 19, 1986, EPA approved the RI/FS Work Plan for immediate implementation. The RI/FS Work Plan complies with all applicable federal environmental standards.

3. Petitioner ADPC&E has been given copies of all drafts of the RI/FS Work Plan as they were prepared. ADPC&E

has not advanced any objections or suggestions regarding the content of the RI/FS Work Plan to either MMI or EPA.

4. MMI believes that execution of the RI/FS as proposed in the RI/FS Work Plan will be in the public interest and will significantly advance the remedial objectives inherent in the claims asserted by ADPC&E in this litigation.

5. MMI is willing to advance funds for implementation of the RI/FS Work Plan, provided only that it is authorized by this Court to do so with a reservation of all rights it may have against the other respondents in this action for reimbursement of the costs so advanced.

6. The information generated by the Remedial Investigation and Feasibility Study proposed by MMI will materially advance final resolution of the claims asserted in this action by providing the parties and the Court with accurate and detailed information regarding conditions on and off the Arkwood site and the remedial alternatives that are available.

7. Unless the RI/FS Work Plan is approved as an element of relief in this action, MMI could face claims for remedial action or investigation that duplicate or conflict with the RI/FS Work Plan activities.

WHEREFORE, MMI respectfully prays that this Court enter an order (1) approving MMI's RI/FS Work Plan as an element of relief in this action; (2) directing that MMI proceed with implementation of the RI/FS Work Plan promptly after obtaining site access; (3) reserving all rights MMI may have to seek reimbursement from other parties for any or all costs MMI may incur in executing the RI/FS Work Plan; and (4) granting such other and additional relief as may be appropriate.

Respectfully submitted,

MITCHELL, WILLIAMS, SELIG & TUCKER
1000 Savers Federal Building
Little Rock, Arkansas 72201
(501) 376-3151

By _____
Allan Gates

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of February, 1987, I served the foregoing Motion for Approval of Remedial Investigation and Feasibility Study by depositing a true copy in the United States mail, first-class postage prepaid, addressed to Mr. Phillip S. Deisch, Arkansas Department of Pollution Control and Ecology, P. O. Box 9583, Little Rock, Arkansas 72209; to Mr. Robert R. Ross, Arnold & Grobmyer, P.A., 875 Union National Plaza, P. O. Box 70, Little Rock, Arkansas 72203; and to Mr. Bill F. Doshier, Doshier & Bowers, P. O. Box 1797, Harrison, Arkansas 72601.

_____
Allan Gates

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY — PETITIONER

VS. — NO. E-86-293

HALLIE C. ORMOND, ARKWOOD, INC., MOUNTAIN ENTERPRISES, INC., C. C. GRISHAM, MARY JO GRISHAM and MASS MERCHANDISERS, INC. — RESPONDENTS

HALLIE C. ORMOND — THIRD-PARTY PLAINTIFF

VS.

MCKESSON CORPORATION — THIRD-PARTY DEFENDANT

MEMORANDUM IN SUPPORT OF MOTION FOR
APPROVAL OF REMEDIAL INVESTIGATION AND FEASIBILITY STUDY

This is an action by the state agency responsible for environmental regulation against the owner and former operators of a wood treating plant in Omaha, Arkansas (the "Arkwood site"). The action seeks, among other things, an investigation of conditions at the site and implementation of any appropriate remedial steps that may be required. In a separate federal administrative proceeding relating to the same site, Mass Merchandisers, Inc. ("MMI") has already signed a Consent Order requiring it to undertake a Remedial Investigation and Feasibility Study ("RI/FS") of the Arkwood site. Execution of the RI/FS proposed by MMI would accomplish much of the initial relief sought by petitioner ADPC&E in this proceeding by determining the conditions at the site and the nature of any remedial action that might be necessary. Furthermore, the information generated by MMI's proposed RI/FS would materially advance final resolution of the claims asserted by ADPC&E, because it would provide the Court and all parties with detailed information regarding environmental conditions at the Arkwood site and remedial alternatives for any conditions that may require response.

MMI is ready to initiate implementation of the RI/FS Work Plan immediately, provided only that: (i) it be protected from the possibility of duplicative or conflicting requests for study in this proceeding; and (2) any rights MMI may have to seek reimbursement from other parties be preserved for litigation at a later date. Site access necessary for execution of the study is the subject of a separate motion filed simultaneously with this memorandum.

This Court has the authority to approve and order implementation of the RI/FS Work Plan under the Water and Air Pollution Control Act, Ark. Stat. Ann. § 82-1901, et seq. (1976 Repl.), the Remedial Action Trust Fund Act, Ark. Stat. Ann. § 82-4712 et seq. (Supp. 1985), and the inherent powers of the Chancellor in equitable actions.

MMI believes that most of the other parties to this action favor implementation of the RI/FS Work Plan as proposed by MMI. The Work Plan has already been approved by EPA as meeting all applicable federal requirements. ADPC&E has received all drafts of the RI/FS Work Plan as they were prepared; and ADPC&E has offered no comments or suggestions regarding the content of the RI/FS Work Plan to either MMI or EPA. Respondents Ormond, C. C. Grisham, Mary Jo Grisham, and Arkwood, Inc. have been aware of the development of the RI/FS Work Plan and have expressed no objections to the concept of the study or the content of the Work Plan. The only obstacles to immediate execution of the RI/FS Work Plan are: (1) the possibility that ADPC&E may seek separate, duplicative, or conflicting relief as a part of this action; (2) the lack of permission from the landowner for access to the site for the purpose of conducting the study (which is the subject of a separate motion filed simultaneously with this Motion for Approval); and (3) the lack of agreement from the other parties that MMI could proceed to implement the RI/FS Work

Plan with a reservation of rights to seek reimbursement at a later date.

MMI respectfully submits that approval of the plan by this Court as an element of relief in this proceeding will eliminate any potential that ADPC&E or any other party might obtain relief in this action that conflicts with, or is duplicative of, the RI/FS Work Plan proposed by MMI. The second obstacle, access to the site for the purpose of implementing the RI/FS, is addressed in a separate motion. The third obstacle, reservation of MMI's rights to seeks reimbursement, can be adequately resolved for the time being by a provision in this Court's order directing that MMI be allowed to assert a claim for reimbursement at a later date in this proceeding against Respondents Ormond, C. C. Grisham, Mary Jo Grisham, and Arkwood, Inc. for any reimbursement to which it may be entitled.

For the reasons stated above, MMI respectfully submits that this Court should grant its Motion for Approval.

Respectfully submitted,

MITCHELL, WILLIAMS, SELIG & TUCKER
1000 Savers Federal Building
Little Rock, Arkansas 72201
(501) 376-3151

By _____
Allan Gates

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of February, 1987, I served the foregoing Memorandum in Support of Motion for Approval of Remedial Investigation and Feasibility Study by depositing a true copy in the United States mail, first-class postage prepaid, addressed to Mr. Phillip S. Deisch, Arkansas Department of Pollution Control and Ecology, P. O. Box 9583, Little Rock, Arkansas 72209; to Mr. Robert R. Ross, Arnold & Grobmyer, P.A., 875 Union National Plaza, P. O. Box 70, Little Rock, Arkansas 72203; and to Mr. Bill F. Doshier, Doshier & Bowers, P. O. Box 1797, Harrison, Arkansas 72601.

Allan Gates

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY — PETITIONER

VS. — NO. E-86-293

HALLIE C. ORMOND, ARKWOOD, INC., MOUNTAIN ENTERPRISES, INC., C. C. GRISHAM, MARY JO GRISHAM and MASS MERCHANDISERS, INC. — RESPONDENTS

HALLIE C. ORMOND — THIRD-PARTY PLAINTIFF

VS.

MCKESSON CORPORATION — THIRD-PARTY DEFENDANT

MOTION FOR ACCESS TO THE ARKWOOD SITE

Respondent Mass Merchandisers, Inc. ("MMI") hereby moves the Court to enter an order granting MMI permission for access to the site for the purpose of executing the Remedial Investigation and Feasibility Study ("RI/FS") Work Plan required by the United States Environmental Protection Agency. In support of its motion, MMI states the following:

1. By a separate motion filed simultaneously with this Motion for Site Access, MMI has requested approval to implement its RI/FS for the Arkwood site.

2. Execution of the RI/FS will require access to the Arkwood site for the purpose of taking measurements, collecting samples and conducting tests. The precise nature of the activity proposed on site is described in the RI/FS Work Plan attached as Exhibit 1 to the Motion for Approval filed simultaneously herewith.

3. MMI has requested permission from respondent Ormond, the landowner, for access to the site for the purpose of conducting the RI/FS Work Plan. Although temporary access was previously granted, that permission has now expired. Permission for the continuing access needed to conduct the RI/FS Work Plan has been requested but has not been granted by Ormond.

4. The measurements, sample collections, tests and other activities proposed on site by MMI will not injure the property or interfere with the landowner's reasonable use and enjoyment.

5. Granting site access will significantly advance the ultimate resolution of the claims asserted in this action by providing the parties and the Court with detailed information regarding conditions at the Arkwood site, the damages asserted, and the relief available.

WHEREFORE, MMI respectfully requests that this Court enter an order granting MMI access to the Arkwood site for the purpose of executing the Remedial Investigation and Feasibility Study proposed in MMI's RI/FS Work Plan.

Respectfully submitted,

MITCHELL, WILLIAMS, SELIG, & TUCKER
1000 Savers Federal Building
Little Rock, Arkansas 72201
(501) 376-3151

By Allan Gates
Allan Gates

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of February, 1987, I served the foregoing Motion for Access to the Arkwood Site by depositing a true copy in the United States mail, first-class postage prepaid, addressed to Mr. Phillip S. Deisch, Arkansas Department of Pollution Control and Ecology, P. O. Box 9583, Little Rock, Arkansas 72209; to Mr. Robert R. Ross, Arnold & Grobmyer, P.A., 875 Union National Plaza, P. O. Box 70, Little Rock, Arkansas 72203; and to Mr. Bill F. Doshier, Doshier & Bowers, P. O. Box 1797, Harrison, Arkansas 72601.

Allan Gates
Allan Gates

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY — PETITIONER

VS. — NO. E-86-293

HALLIE C. ORMOND, ARKWOOD, INC., MOUNTAIN ENTERPRISES, INC., C. C. GRISHAM, MARY JO GRISHAM and MASS MERCHANDISERS, INC. — RESPONDENTS

HALLIE C. ORMOND — THIRD-PARTY PLAINTIFF

VS.

MCKESSON CORPORATION — THIRD-PARTY DEFENDANT

MEMORANDUM IN SUPPORT OF
MOTION FOR ACCESS TO THE ARKWOOD SITE

This is an action by the state agency responsible for environmental issues regarding conditions at the site of a former wood treating plant ("the Arkwood site"). At all times pertinent to this proceeding, respondent Ormond has been the owner of the Arkwood site. As reflected in the Motion for Approval of Remedial Investigation and Feasibility Study, Mass Merchandisers, Inc. ("MMI") is required by the United States Environmental Protection Agency to conduct an investigation of environmental conditions at the Arkwood site. Implementation of the Remedial Investigation and Feasibility Study ("RI/FS") proposed by MMI will require access to the property for the purpose of taking measurements, collecting samples and conducting scientific tests.

MMI has requested permission of the landowner to enter upon the Arkwood site for the purpose of executing the RI/FS Work Plan. Although access was previously granted for a limited time, permission for site access for the purpose of conducting the RI/FS has not been granted.

This Court has authority under the Water and Air Pollution Control Act, Ark. Stat. Ann. § 82-1901 et seq. (1976 Repl.), the Remedial Action Trust Fund Act, Ark. Stat. Ann.

§ 82-4712 et seq. (Supp. 1985), and the inherent equitable powers of the Chancellor to grant respondent MMI access to the Arkwood site. To the extent that the RI/FS will provide information pertinent to the merits of this action, the Court also has authority to grant access under Rule 34 of the Arkansas Rules of Civil Procedure.

The Arkwood site is presently vacant and undeveloped. The equipment used in the former wood treating operation has been removed and the old buildings have recently been leveled. Entry upon the Arkwood site for the purpose of executing the RI/FS Work Plan will not injure the property or interfere with the landowner's use or enjoyment of the site.

Completion of the RI/FS as proposed by MMI will materially advance the ultimate resolution of the claims asserted in this action by providing all of the parties with detailed information regarding conditions at the site, the damages asserted, and the relief available.

For the reasons stated above, MMI respectfully submits that the Court should grant its Motion for Access.

Respectfully submitted,

MITCHELL, WILLIAMS, SELIG & TUCKER
1000 Savers Federal Building
Little Rock, Arkansas 72201
(501) 376-3151

By _____
Allan Gates

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of February, 1987, I served the foregoing Memorandum in Support of Motion for Access to the Arkwood Site by depositing a true copy in the United States mail, first-class postage prepaid, addressed to Mr. Phillip S. Deisch, Arkansas Department of Pollution Control and Ecology, P. O. Box 9583, Little Rock,

Arkansas 72209; to Mr. Robert R. Ross, Arnold & Grobmyer, P.A., 875 Union National Plaza, P. O. Box 70, Little Rock, Arkansas 72203; and to Mr. Bill F. Doshier, Doshier & Bowers, P. O. Box 1797, Harrison, Arkansas 72601.

Allan Gates

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY — PETITIONER

VS. — NO. E-86-293

HALLIE C. ORMOND, ARKWOOD, INC., MOUNTAIN ENTERPRISES, INC., C. C. GRISHAM, MARY JO GRISHAM and MASS MERCHANDISERS, INC. — RESPONDENTS

HALLIE C. ORMOND — THIRD-PARTY PLAINTIFF

VS.

MCKESSON CORPORATION — THIRD-PARTY DEFENDANT

MOTION TO COMPEL
PRIOR NOTICE OF SITE ALTERATIONS

Respondent Mass Merchandisers, Inc. ("MMI") hereby moves the Court to enter an order compelling the landowner, Respondent Ormond, and all other parties to this action, to give prior notice to the Court and other parties before undertaking any alterations of current conditions at the Arkwood site. In support of this motion, MMI states the following:

1. This is an action regarding conditions at the site of a former wood treating operation in Omaha, Arkansas ("the Arkwood site").

2. The relief sought in this action includes, among other things, the investigation and possible remediation of areas of potential contamination due to the former operations of the wood treating plant.

3. Subsequent to the filing of this action, Respondents Ormond, C. C. Grisham, Mary Jo Grisham, and Arkwood, Inc. have removed certain buildings and tanks, filled in areas of potential contamination, and otherwise altered the condition of the site.

4. Although some of the activities of Respondents Ormond, C. C. Grisham, Mary Jo Grisham, and Arkwood, Inc. may

have removed sources of potential contamination, MMI fears that the expense and difficulty of investigation and any ultimate remediation may have been increased; and the danger of environmental contamination may have been aggravated by some of the steps recently taken at the Arkwood site.

5. Unless restrained by this Court, Respondents Ormond, C. C. Grisham, Mary Jo Grisham, and Arkwood, Inc. may undertake, without notice to the other parties, additional actions which could cause environmental harm or increase the ultimate expense of any investigation or remediation that may be required.

6. A substantial number of samples and measurements have already been taken by ADPC&E, EPA, and MMI. Alteration of the site conditions without notice to the other parties may render much of the existing information regarding the site partially or entirely meaningless.

7. MMI proposes that prior to undertaking any actions at the site that would alter its physical condition, Respondents Ormond, C. C. Grisham, Mary Jo Grisham, and Arkwood, Inc. be required to give all other parties to this action thirty (30) days advance written notice of the proposed action. This advance notice would allow the affected parties an opportunity to review the proposed action and to seek appropriate relief in this Court if the action proposed would cause environmental harm or otherwise be inappropriate.

8. A requirement of prior notice requested by this motion would not constitute a significant burden on the owner's right to the use and enjoyment of the property, especially in light of the current nature and condition of the site.

WHEREFORE, MMI prays that this Court enter an order requiring Respondents Ormond, C. C. Grisham, Mary Jo Grisham, and Arkwood, Inc. to give the other parties in this action

thirty (30) days advance written notice of any activities at the Arkwood site which would alter the physical conditions of the site.

Respectfully submitted,

MITCHELL, WILLIAMS, SELIG & TUCKER
1000 Savers Federal Building
Little Rock, Arkansas 72201
(501) 376-3151

By _____
Allan Gates

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of February, 1987, I served the foregoing Motion to Compel Prior Notice of Site Alterations by depositing a true copy in the United States mail, first-class postage prepaid, addressed to Mr. Phillip S. Deisch, Arkansas Department of Pollution Control and Ecology, P. O. Box 9583, Little Rock, Arkansas 72209; to Mr. Robert R. Ross, Arnold & Grobmyer, P.A., 875 Union National Plaza, P. O. Box 70, Little Rock, Arkansas 72203; and to Mr. Bill F. Doshier, Doshier & Bowers, P. O. Box 1797, Harrison, Arkansas 72601.

_____
Allan Gates

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY — PETITIONER

VS. — NO. E-86-293

HALLIE C. ORMOND, ARKWOOD, INC., MOUNTAIN ENTERPRISES, INC., C. C. GRISHAM, MARY JO GRISHAM and MASS MERCHANDISERS, INC. — RESPONDENTS

HALLIE C. ORMOND — THIRD-PARTY PLAINTIFF

VS.

MCKESSON CORPORATION — THIRD-PARTY DEFENDANT

MEMORANDUM OF MASS MERCHANDISERS, INC.
IN SUPPORT OF MOTION TO COMPEL
PRIOR NOTICE OF SITE ALTERATIONS

This is an action by the state agency responsible for environmental regulation seeking relief in connection with the conditions at the site of a former wood treating plant in Omaha, Arkansas ("the Arkwood site"). Subsequent to the filing of this action, the landowner and some of the former operators of the wood treating plant have removed equipment and buildings, and filled in certain areas potentially at issue. These activities were undertaken without notice to any other parties to this action. Some of the actions may have removed certain soils, equipment or other material at issue, and therefore may have been beneficial in overall effect. However, Mass Merchandisers, Inc. ("MMI") fears that some of these actions may have aggravated the conditions and endangered the validity of numerous samples and other data already collected by ADPC&E, EPA, and MMI.

This Court has the authority to grant the relief sought by this motion under the Water and Air Pollution Control Act, Ark. Stat. Ann. § 82-1901 et seq. (1976 Repl.); the Remedial Action Trust Fund Act, Ark. Stat. Ann. § 82-4712 et seq. (Supp. 1985), and the inherent powers of this

Chancellor in equitable proceedings. The requirement of prior notice sought in this motion will not constitute a meaningful burden on the landowner's right of use and enjoyment of his property. The prior notice contemplated by this motion, however, would provide the other parties to the action with a significant opportunity to seek relief in this Court if the actions proposed would threaten environmental harm or jeopardize the validity of investigations or data that have already been completed.

For the reasons stated above, MMI respectfully requests that this Court enter an order requiring Respondents Ormond, C. C. Grisham, Mary Jo Grisham, and Arkwood, Inc. to give the other parties to this action thirty (30) days advance written notice of any actions which they propose to take that would affect or alter the physical conditions of the Arkwood site.

Respectfully submitted,

MITCHELL, WILLIAMS, SELIG & TUCKER
1000 Savers Federal Building
Little Rock, Arkansas 72201
(501) 376-3151

By Allan Gates
Allan Gates

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of February, 1987, I served the foregoing Memorandum in Support of Motion to Compel Prior Notice of Site Alterations by depositing a true copy in the United States mail, first-class postage prepaid, addressed to Mr. Phillip S. Deisch, Arkansas Department of Pollution Control and Ecology, P. O. Box 9583, Little Rock, Arkansas 72209; to Mr. Robert R. Ross, Arnold & Grobmyer, P.A., 875 Union National Plaza, P. O. Box 70,

Little Rock, Arkansas 72203; and to Mr. Bill F. Doshier, Doshier & Bowers, P. O. Box 1797, Harrison, Arkansas 72601.

Allan Gates

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY — PETITIONER

VS. — NO. E-86-293

HALLIE C. ORMOND, ARKWOOD, INC., MOUNTAIN ENTERPRISES, INC., C. C. GRISHAM, MARY JO GRISHAM and MASS MERCHANDISERS, INC. — RESPONDENTS

HALLIE C. ORMOND — THIRD-PARTY PLAINTIFF

VS.

MCKESSON CORPORATION — THIRD-PARTY DEFENDANT

ORDER

The Motions of Respondent, Mass Merchandisers, Inc., for site access and notice of site alterations were tried and submitted on June 1, 1987, and taken under advisement for decision at a later time; that from the testimony of witnesses, the official file, and statements and argument of counsel, the Court finds:

(1)

That the Court has jurisdiction of the parties and the subject matter hereof; and the Court has the power to grant the relief requested. The Court finds that the evidence does not show that there is a substantial threat to the public health or safety which would justify the Court in imposing on the Respondents' property the carrying out of a very intrusive and very expensive testing plan proposed by the Respondent, Mass Merchandisers, Inc; that the plan proposed by Mass Merchandisers, Inc., would involve drilling of test wells on the property which would increase risk of further disbursing the chemical pollutants in the ground on the Respondents' property and the implementation of the plan would not do anything to stop escape of pollutants or to clean them up; and that the proposed plan would cost hundreds of thousands of dollars.

(2)

That the relief sought at this hearing was preliminary in nature and that this matter has not been fully tried, and the record shows that there are some less intrusive and very much less expensive plans which may provide an acceptable way of

dealing with the problems presented at this site, and it appears to the Court that a stronger showing of need for this study and likelihood of harm to the public is required before the Court should impose such a drastic and risky procedure without full trial on the merits.

(3)

The Court thinks that the evidence justifies the request that at least 30 days notice should be given to Petitioners and Mass Merchandisers, Inc., of any proposed site alteration. Petitioner and Mass Merchandisers, Inc., have been given access for non-intrusive type surface inspection and that only will be permitted.

(4)

That the Court retains jurisdiction of this matter to make such future orders as may be appropriate as reflected by the testimony upon a final hearing of this matter.

THEREFORE, IT IS, BY THE COURT, CONSIDERED, ORDERED, ADJUDGED AND DECREED, That the Motion of Respondent, Mass Merchandisers, Inc., for site access to perform the "RI/FS" Work Plan should be, and same is hereby denied; that the other Respondents are ordered and directed to give at least 30 days prior written notice of any proposed site alterations to Petitioner and Mass Merchandisers, Inc.; that the Court retains jurisdiction of this matter to enter such future orders as may be appropriate and justified by the evidence after hearing same on its merits.

DATE:_____ _____
CHANCERY JUDGE

APPROVED:

_____
Phillip Deisch, Attorney for Petitioner

_____
Allan Gates, Attorney for Respondent, MMI

_____
Donald J. Adams, Attorney for Respondents, Ormond, et al

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY — PETITIONER

Vs. — No. E-86-293

HALLIE C. ORMOND, ARKWOOD, INC., MOUNTAIN ENTERPRISES, INC., C.C. GRISHAM, MARY JOY GRISHAM and MASS MERCHANDISERS, INC. — RESPONDENTS

HALLIE C. ORMOND — THIRD-PARTY PLAINTIFF

Vs.

McKESSON CORPORATION — THIRD-PARTY DEFENDANT

STIPULATION

Come now the parties and stipulate as follows:

(1)

That if an official of EPA was called to testify in this cause, that he or she would testify substantially as follows:

That the Arkwood site was a proposed super fund site but at the time additional sites were officially made a super fund site Arkwood was not included in those sites.

That EPA has agreed to re-evaluate to determine whether or not the Arkwood site meets the criteria of being a super fund site.

It is not known when this determination will be made.

HALLIE C. ORMOND, ARKWOOD, INC., MOUNTAIN ENTERPRISES, INC., C. C. GRISHAM and MARY JO GRISHAM

By:_____
Donald J. Adams, Their Attorney

MASS MERCHANDISERS, INC..

By:_____
Allan Gates, Its Attorney

ARKANSAS DEPARTMENT OF POLLUTION CONTROL & ECOLOGY

By:_____
Phillip S. Deisch, Its Attorney

ARNOLD, GROBMYER & HALEY
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ATTORNEYS AT LAW
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MEMPHIS, TENNESSEE 38112-4416
(901) 323-9300

LOVE FIELD BUILDING
SUITE N113, BOX 11
DALLAS, TEXAS 75235
(214) 358-4003

October 24, 1986

Ms. Helen Speer
Boone County Circuit Clerk
Boone County Courthouse
Harrison, Arkansas 72601

Re: Arkansas Department of Pollution Control and Ecology
vs. Hallie C. Ormond, et al.
Boone Chancery No. E 86-293

Dear Ms. Speer:

Enclosed for filing is an original and two copies of the Response to Motion to Strike to be filed on behalf of Arkwood, Inc. in the above-captioned matter. Please file and return a file-marked copy to us in the envelope provided.

By carbon copy of this letter, I am serving counsel of record with same.

Thank you for your assistance.

Yours very truly,

ARNOLD, GROBMYER & HALEY

Robert R. Ross

RRR:bg
Enclosure
cc/w/encl: Phillip Deisch, Esq.
Allan Gates, Esq.

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY — PETITIONER

vs. NO. E 86-293

HALLIE C. ORMOND, ARKWOOD, INC., MOUNTAIN ENTERPRISES, INC., C. C. GRISHAM, MARY JO GRISHAM and MASS MERCHANDISERS, INC. — RESPONDENTS

HALLIE C. ORMOND — THIRD-PARTY PLAINTIFF

vs.

McKESSON CORPORATION — THIRD-PARTY DEFENDANT

RESPONSE TO MOTION TO STRIKE

COMES NOW, Arkwood, Inc., by and through its attorneys, Arnold, Grobmyer & Haley, by Robert R. Ross, and responds to the Motion to Strike of Mass Merchandisers, Inc. as follows:

1. The instant action was instituted by complaint by the Arkansas Department of Pollution Control and Ecology in which Arkwood, Inc. was joined as a respondent.

2. Arkwood, Inc. was dissolved on August 20, 1974, as evidenced by the Certificate of Dissolution attached as Exhibit A to Arkwood, Inc.'s Motion to Dismiss the Complaint of Petitioner. Arkwood, Inc. filed a Brief in Support thereof to dismiss the Complaint.

3. The Cross-claims alleged by Respondent, Mass Merchandisers, Inc., are duplicative and derivative of the Petitioner's alleged claims.

4. The legal justification for Arkwood, Inc. to be dismissed from the Petitioner's Complaint applies equally to Arkwood, Inc.'s dismissal of Mass Merchandisers, Inc.'s Cross-complaint and therefore, Arkwood, Inc. hereby adopts and incorporates its Brief in Support of Motion to Dismiss to Petitioner's Complaint to the Motion to Dismiss the Cross-complaint of Mass Merchandisers, Inc.

5. The alleged defect asserted by Mass Merchandisers, Inc. is cured, and there is no prejudice to Mass Merchandisers, Inc. in that no hearing has occurred, therefore, the Motion to Strike should be denied.

WHEREFORE, Arkwood, Inc. prays that this Court deny Mass Merchandisers, Inc.'s Motion to Strike and for all other further relief to which it might be entitled.

Respectfully submitted,

ARKWOOD, INC.

By Its Attorneys:

ARNOLD, GROBMYER & HALEY
P. O. Box 70
Little Rock, Arkansas 72201
(501) 376-1171

By: Robert R. Ross

DOSHIER & BOWERS
P. O. Box 1797
Harrison, Arkansas 72601
(501) 741-6166

CITATION OF AUTHORITY

Arkansas Rules of Civil Procedure, Rule 61. Harmless Error.: "The Court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

CERTIFICATE OF SERVICE

I, Robert R. Ross, do hereby certify that on this 24th day of October, 1986, a true and correct copy of the foregoing Response to Motion to Strike has been served upon Mr. Phillip Deisch, P. O. Box 9583, Little Rock, Arkansas 72219 and Mr. Allan Gates, Mitchell, Williams, Selig, Jackson & Tucker, 1000 Savers Federal Building, Little Rock, Arkansas 72201.

Robert R. Ross

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

Oct 20-97

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY — PETITIONER

VS. — NO. E-86-293

HALLIE C. ORMOND, ARKWOOD, INC., MOUNTAIN ENTERPRISES, INC., C. C. GRISHAM, MARY JO GRISHAM and MASS MERCHANDISERS, INC. — RESPONDENTS

HALLIE C. ORMOND — THIRD-PARTY PLAINTIFF

VS.

McKESSON CORPORATION — THIRD-PARTY DEFENDANT

BRIEF OF HALLIE C. ORMOND
IN RESPONSE TO MOTION TO DISMISS

Pursuant to Rule 14 of the Arkansas Rules of Civil Procedure ("ARCP"), Respondent, Hallie C. Ormond ("Ormond"), filed a Third-Party Complaint against McKesson Corporation ("McKesson"), asserting that Respondent, Mass Merchandisers, Inc. ("MMI"), merged into McKesson and that McKesson is the successor in interest of MMI. On October 3, 1986, McKesson filed a Motion, Brief and Affidavit to dismiss the cause of action by Ormond against McKesson alleging an ARCP 12(b)(6) failure to state a claim against McKesson upon which relief can be granted. McKesson's Motion to Dismiss should be denied.

ARCP Rule 14(a) provides that:

> At any time after commencement of the action a defending party, as a third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. . . . The plaintiff may assert any claim against the third party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff.

The purpose of ARCP Rule 14 is to settle all controversies at one time, thereby avoiding a multiplicity of suits. Aclin Ford Co., Inc. v. Fiat Motors of North America, Inc., 275 Ark. 445, 631 S.W.2d 283, 284 (1982).

Pursuant to a lease (attached as Exhibit "A" to Ormond's Cross-Claim and Third-Party Complaint and incorporated herein as if set out word for word), MMI operated a wood processing treatment plant from 1973 through 1984, on the site in Boone County, Arkansas, the alleged hazardous condition of which is the core of this lawsuit. MMI's post-notice continued contamination of the leasehold and corresponding off-site contamination constitute active waste of Ormond's fee interests in the property and MMI's failure to restore the leasehold is a breach of the lease agreement.

McKesson concedes that it acquired the ownership of MMI in 1985, but contends that MMI is an independent corporate entity in which McKesson's only direct relationship with MMI is that of a mere shareholder. The acquisition occurred under what McKesson characterizes as a "reorganization and merger between MMI and an indirect wholly-owned subsidiary of McKesson." Attached as Exhibit 1 is the cover and page 28, ¶ 4 of the McKesson Corporation Registration Statement of August 16, 1985, with the Securities and Exchange Commission. Due to the length of the Registration Statement only the portion containing the quoted material is included herein as an exhibit. As part of the acquistion and according to Exhibit 1 an escrow fund was created containing approximately four percent (4%) of the shares of McKesson common stock into which MMI common stock was converted at the time of merger. The escrow fund is intended to provide for the payment of portions of damages that may be asserted against or incurred by McKesson, MMI, or any other McKesson entity arising out of or resulting from the operation of MMI's wood treating operations in Omaha, Arkansas. Pursuant to the terms of the escrow agreement "McKesson will pay the first $2 million of such damages, if any, and thereafter such damages will be paid sixty percent (60%) by McKesson and forty

percent (40%) out of the escrow. . . . McKesson shall ultimately make all decisions concerning expenditures, if any, to be made in connection with the clean-up of the Arkansas operations even if such expenditures would affect the amount of McKesson common stock held in escrow." (Emphasis added.)

McKesson contends the separate legal status of a corporation can only be disregarded when the privilege of doing business in separate corporate form has been illegally abused to the injury of a third person. Contrary to this assertion, courts ignore the corporate form of a subsidiary when fairness demands it. In Humphries v. Bray, 271 Ark. 962, 611 S.W.2d 791 (Ark. App.,1981), the court held:

> The conditions under which the corporate entity may be disregarded or looked upon as the alter ego of the principal stockholder vary according to the circumstances of each case. This doctrine of piercing the corporate veil is founded in equity and is applied when the facts warrant its application to prevent an injustice. Id.at 793.

Through corporate manipulation, McKesson purports to be free from accountability to the environment and the populace as a whole while maintaining and directly controlling the fund established to satisfy the potential claims of the government and Ormond for MMI's transgressions at the Omaha, Arkansas, site. Equity and fairness require no such freedom for McKesson. Having pierced the corporate veil, Ormond states a claim upon which relief can be granted and respectfully requests McKesson's Motion to Dismiss be denied.

Ormond is instituting discovery to further support his claim against McKesson and upon response to the discovery Ormond will submit supplemental material to the Court. Ormond respectfully requests this Court to withhold ruling on the Motion until such time as the record can be supplemented through discovery efforts.

Respectfully submitted,

HALLIE C. ORMOND

By His Attorneys:

ARNOLD, GROBMYER & HALEY
One Union National Plaza
P.O. Box 70
Little Rock, Arkansas 72203
(501) 376-1171

By: _____
Robert R. Ross

DOSHIER & BOWERS
P.O. Box 1797
Harrison, Arkansas 72601

CERTIFICATE OF SERVICE

I, Robert R. Ross, do hereby certify that I have mailed a copy of the foregoing Brief in Response to Motion to Dismiss to Phillip Diesch, P.O. Box 9583, Little Rock, Arkansas 72219 and Allan Gates, 1000 Savers Federal Building, Little Rock, Arkansas 72201-3437, on this 20th day of October, 1986.

_____
Robert R. Ross

*** A02 ***

AS FILED WITH THE SECURITIES AND EXCHANGE COMMISSION ON AUGUST 16, 1985

REGISTRATION NO. 2-

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

FORM S-4

REGISTRATION STATEMENT

Under

THE SECURITIES ACT OF 1933

MCKESSON CORPORATION

(EXACT NAME OF REGISTRANT AS SPECIFIED IN ITS CHARTER)

MARYLAND
(STATE OR OTHER JURISDICTION OF
INCORPORATION OR ORGANIZATION)

5122
(PRIMARY STANDARD INDUSTRIAL
CLASSIFICATION CODE NUMBER)

13-1027923
(I.R.S. EMPLOYER
IDENTIFICATION NO.)

One Post Street
San Francisco, CA 94104
(415) 983-8300

(ADDRESS, INCLUDING ZIP CODE, AND TELEPHONE NUMBER, INCLUDING
AREA CODE, OF REGISTRANT'S PRINCIPAL EXECUTIVE OFFICES)

NANCY A. MILLER
Corporate Secretary
McKesson Corporation
One Post Street
San Francisco, CA 94104
(415) 983-8301

RONALD
Vice Presiden
McKess
One
San Fran
(41

(NAME, ADDRESS, INCLUDING ZIP CODE, AND TELEPHONE NUMBER,
INCLUDING AREA CODE, OF AGENT FOR SERVICE)

Copy to:

LOU R. KLING, ESQ.
Shadden, Arps, Slate, Meagher & Flom
919 Third Avenue
New York, NY 10022-9931

MORRIS M
Leonard, S
100 South Fif
Minneap

Approximate date of commencement of proposed sale of the securities to the public.

As soon as practicable after this registration statement becomes effective.

If the securities being registered on this form are being offered in connection with the formation of a holding company and there is compliance with General Instruction G, check the following box. / /

(Continued on following page.)

EXHIBIT
1

on each of the ten trading days immediately preceding the date of the Effective Time of the Merger and (ii) the fraction of a share of McKesson Common Stock to which such holder would otherwise be entitled.

McKesson, the Escrow Agent or the Representatives (as such term is hereinafter defined) will contact the holders of record of MMI Common Stock as of the Effective Time of the Merger at such time, if ever, as any of the Escrow Shares are to be distributed out of escrow to such holders and inform them as to the procedures to be used to distribute such shares to them.

INDEMNIFICATION; ESCROW FUND

On June 28, 1985, McKesson, Sub and MMI entered into an amendment to the Reorganization Agreement and to the form of Agreement of Merger (the "Amendment"). The Amendment also included an agreement as to a form of escrow agreement which is attached to Annex I hereto as Exhibit J (the "Escrow Agreement"). The Amendment provides, among other things, for the deposit of the Escrow Shares in an escrow account with an escrow agent (anticipated to be the Crocker National Bank) (the "Escrow Agent"). The Escrow Agreement will be executed at or immediately prior to the Effective Time of the Merger. The Escrow Agreement as executed may reflect such changes to Exhibit J hereto as McKesson, MMI and the Escrow Agent shall agree. As discussed below, the number of Escrow Shares equals approximately 4% of the number of shares of McKesson Common Stock into which MMI Common Stock is converted at the Effective Time of the Merger.

This escrow arrangement is intended to provide, subject to the limitations discussed below, for the payment of a portion of any fees, costs, penalties, expenses and damages (collectively, "Damages") that may be asserted against or incurred by McKesson or any of its subsidiaries (including MMI) and arising out of or resulting from the operation of MMI's discontinued wood treating operations formerly headquartered in Omaha, Arkansas, including the current or prior use or condition of, or activities on, the real property on which such wood treating operations were located, whether or not such use, condition or activities was known to MMI or related to its discontinued wood treating operations (the "Arkansas Operations"), in each case relating, among other things, to actual, potential or alleged injury to life, health, property or the environment resulting from the discharge or release of pollutants, toxic materials or wastes into the environment or otherwise relating to the manufacture, use, storage, disposal or transport of such materials arising out of wood treatment operations conducted at such locations ("Indemnifiable Claims").

Subject to the conditions outlined below, MMI has agreed on behalf of the holders of its Common Stock to indemnify McKesson for Damages incurred in connection with Indemnifiable Claims. Pursuant to the terms of the Escrow Agreement, McKesson will pay the first $2 million of such Damages, if any, and thereafter such Damages will be paid 66% by McKesson and 44% out of the escrow. Damages shall be calculated without giving effect to any reduction in tax liability which would inure to McKesson or any of its subsidiaries. Subject to the rights of the Representatives to dispute the proposed payment of Damages out of the escrow, McKesson shall ultimately make all decisions concerning expenditures, if any, to be made in connection with the cleanup of the Arkansas Operations even if such expenditures would affect the amount of McKesson Common Stock held in escrow.

The exact number of shares of McKesson Common Stock which will be deposited into escrow on behalf of a recordholder of MMI Common Stock at the Effective Time of the Merger shall equal the product of (a) the number of shares of MMI Common Stock held by such person, (b) .52 and (c) .04, such product being rounded to the nearest whole number if it is greater than 1 and being rounded to zero otherwise. Holders of MMI Non-Par Preferred Stock, MMI Convertible Debentures and MMI Stock Options at the Effective Time of the Merger shall not have any portion of the shares of McKesson Common Stock which they are entitled to receive in respect thereof (including upon the conversion or exercise of such Debentures and Stock Options) placed into the escrow.

Any Escrow Shares still held in escrow at the Escrow Release Date (as hereinafter defined) shall, subject to certain exceptions discussed below, at such time be released and returned to the appropriate MMI shareholders pro rata in proportion to the number of shares which were placed into escrow on their behalf at the Effective Time of the Merger. The Escrow Release Date is the date which is the earlier of: (i) sixty (60) days (or such other reasonable period necessary to enable McKesson to enter into an agreement with an engineering or consulting firm to implement the terms of the Order referred to below) following the entry of all final and binding administrative or judicial orders which finally determine all remedial actions required to be taken by MMI which arise out of the Arkansas Operations and the cleanup of the property related

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY — PETITIONER

VS. — NO. E-86-293

HALLIE C. ORMOND, ARKWOOD, INC., MOUNTAIN ENTERPRISES, INC., C. C. GRISHAM, MARY JO GRISHAM and MASS MERCHANCISERS, INC. — RESPONDENTS

HALLIE C. ORMOND — THIRD-PARTY PLAINTIFF

VS.

McKESSON CORPORATION — THIRD-PARTY DEFENDANT

RESPONSE TO MOTION TO DISMISS

Comes now Hallie C. Ormond ("Ormond") and for his response to the Motion to Dismiss of McKesson Corporation ("McKesson") states as follows:

1. Pursuant to Rule 14 of the Arkansas Rules of Civil Procedure, on or about September 11, 1986, Ormond filed a Cross-Claim and Third-Party Complaint naming McKesson as a Third-Party Defendant.

2. Ormond asserted that Respondent, Mass Merchandisers, Inc. ("MMI") merged into McKesson and that McKesson is the successor in interest of MMI.

3. As part of the acquisition of MMI by McKesson an escrow account was established, the terms of which require McKesson to pay a portion of the costs of any clean-up at the site in question. Further, McKesson, by the terms of the agreement, reserves the right to make all decisions with respect to any expenditures connected with the clean-up.

4. One of the issues to be determined herein is the extent of liability of the parties hereto and McKesson is indispensible to that determination.

WHEREFORE, Hallie C. Ormond prays that this Court deny the Motion to Dismiss and for any and all other proper relief to which he may be entitled.

Respectfully submitted,

HALLIE C. ORMOND

By His Attorneys:

ARNOLD, GROBMYER & HALEY
One Union National Plaza
P.O. Box 70
Little Rock, Arkansas 72203
(501) 376-1171

By: _____
Robert R. Ross

DOSHIER & BOWERS
P.O. Box 1797
Harrison, Arkansas 72601

CERTIFICATE OF SERVICE

I, Robert R. Ross, do hereby certify that I have mailed a copy of the foregoing Response to Motion to Dismiss to Phillip Diesch, P.O. Box 9538, Little Rock, Arkansas 72119 and Allan Gates, 1000 Savers Federal Building, Little Rock, Arkansas 72201-3437 on this the 20th day of October, 1986.

_____
Robert R. Ross

0417r

H. Maurice Mitchell
Richard A. Williams
John S. Selig
Joseph W. Gelzine
W. Christopher Barrier
Jerry D. Jackson
Jim Guy Tucker
Eugene G. Sayre
Byron Freeland
Kent Foster
Allan Gates
Pat Moran
W. H. L. Woodyard, III
Michael C. O'Malley
John C. Lessel
Doak Foster
James E. Smith, Jr.
Jean D. Stockburger
Anne Ritchey
Debra K. Brown
Susan Gunter
Craig Westbrook
W. Kirby Lockhart
Joyce Kinkead
Douglas B. Ward

Law Offices
Mitchell, Williams, Selig,
Jackson & Tucker
1000 Savers Federal Building
Capitol Avenue at Spring Street
Little Rock, Arkansas 72201
Telephone 501-376-3151

Jacksonville Office
1202 West Main Street
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Tracy Barger
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Sherry P. Bartley
James B. Speed, III
T. Scott Clevenger
Lyn Peeples Pruitt
Wylie D. Cavin III
Joe E. Madden, Jr.
W. Bradford Sherman

Counsel
W. B. Riley
Edwin F. Jackson
Michael K. Wilson

Of Counsel
Henry E. Spitzberg

October 10, 1986
VIA FEDERAL EXPRESS

Ms. Helen Speer
Chancery Clerk
Boone County Courthouse
Harrison, AR 72601

Re: Arkansas Department of Pollution Control and Ecology vs. Ormond, et al.
Boone County Chancery No. E-86-293

Dear Ms. Speer:

I am enclosing Mass Merchandiser's Motion to Strike or, in the Alternative, to Deny Motion to Dismiss of Hallie C. Ormond, Mass Merchandiser's Motion to Strike or, in the Alternative, to Deny Motion to Dismiss of Arkwood, Inc., and supporting Briefs for filing in the above-described matter. Please return the file-marked copies to me in the envelope provided.

Thank you for your assistance in this matter. If you have any questions, please let me know.

Very truly yours,

MITCHELL, WILLIAMS, SELIG,
JACKSON & TUCKER

By Allan Gates

AG:seg

Enclosures

cc: Mr. Phillip S. Deisch
Mr. Robert R. Ross
Mr. Bill F. Doshier

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY — PETITIONER

vs. — No. E-86-293

HALLIE C. ORMOND, ARKWOOD, INC., MOUNTAIN ENTERPRISES, INC., C. C. GRISHAM, MARY JO GRISHAM AND MASS MERCHANDISERS, INC. — RESPONDENTS

HALLIE C. ORMOND — THIRD-PARTY PLAINTIFF

vs.

MCKESSON CORPORATION — THIRD-PARTY DEFENDANT

BRIEF IN SUPPORT OF
MASS MERCHANDISERS, INC.'S MOTION TO
STRIKE OR, IN THE ALTERNATIVE, TO DENY
MOTION TO DISMISS OF HALLIE C. ORMOND

Arkansas Rules of Civil Procedure, Rule 78, and Arkansas Uniform Rules of Circuit and Chancery Courts, Rules 2(b) and (g) provide as follows:

> All motions shall be in writing and shall be supported by a brief statement of the factual and legal basis for such motion, including citations relied upon.... Failure to file briefs in accordance with this rule shall be grounds for the court's striking the motion....

Respondent Hallie C. Ormond ("Ormond"), in his Motion to Dismiss, neither attempts to state a factual or legal basis for his Motion nor provides a brief which supports his Motion. Instead, he makes the conclusory statement that the Cross-Complaint of Mass Merchandisers, Inc. ("MMI") does not state facts upon which relief can be granted and requests dismissal. Such a conclusory statement, without supporting factual and legal basis, is not a proper motion to dismiss and should be stricken by this Court.

ARCP RULE 12(b)(6)

Because Rule 12(b)(6) tests the sufficiency of the pleadings, it is to be read in conjunction with ARCP, Rule 8. Harvey v. Eastman Kodak Co., 271 Ark. 783, 610 S.W.2d 582 (1981). Rule 8 requires that a pleading state facts, in

ordinary, concise language, showing that the pleader is entitled to relief.

When considering a Rule 12(b)(6) motion to dismiss, the facts alleged in the complaint are treated as true and are viewed in the light most favorable to the party seeking relief. Blagg v. Fred Hunt Co., 272 Ark. 185, 612 S.W.2d 321 (1981).

Viewing the specific facts set forth in MMI's Cross-Complaint in the light most favorable to the Plaintiff, it is obvious that the Ormond's Motion should be denied. It is alleged that Ormond, individually and as owner-operator of Arkwood, Inc., operated a wood treating plant on the property in question, and during said operations the soil at the plant site was contaminated with certain waste products. It is also alleged that any contamination of surrounding waters claimed by Petitioner, Arkansas Department of Pollution Control and Ecology, was due to Respondents' operations of the treating plant. Further, it is stated that MMI, as subsequent lessee of the real property and operator of the plant, may be found liable for any such contamination. Should this occur, MMI would be entitled to judgment against and contribution from Respondent Ormond.

Respectfully submitted,

MITCHELL, WILLIAMS, SELIG,
JACKSON & TUCKER

By _____

Allan Gates
1000 Savers Federal Building
Little Rock, Arkansas 72201
(501) 376-3151

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of October, 1986, I have served the foregoing Brief in Support of Motion to Strike or, in the Alternative, to Deny the Motion to Dismiss of Hallie C. Ormond by depositing a true copy in the United States Mail, first class, postage prepaid, addressed to Mr. Phillip S. Deisch, Arkansas Department of Pollution Control and Ecology, P. O. Box 9583, Little Rock, Arkansas 72209; to Mr. Robert R. Ross, Arnold & Grobmyer, P.A., 875 Union National Plaza, P. O. Box 70, Little Rock, Arkansas 72203; and to Mr. Bill F. Doshier, Doshier & Bowers, P. O. Box 1797, Harrison, Arkansas 72601.

_____
Allan Gates

56:seg

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY — PETITIONER

vs. — No. E-86-293

HALLIE C. ORMOND, ARKWOOD, INC., MOUNTAIN ENTERPRISES, INC., C. C. GRISHAM, MARY JO GRISHAM AND MASS MERCHANDISERS, INC. — RESPONDENTS

HALLIE C. ORMOND — THIRD-PARTY PLAINTIFF

vs.

MCKESSON CORPORATION — THIRD-PARTY DEFENDANT

MASS MERCHANDISERS, INC.'S MOTION TO STRIKE OR, IN THE ALTERNATIVE, TO DENY THE MOTION TO DISMISS OF ARKWOOD, INC.

Mass Merchandisers, Inc. ("MMI"), by and through its attorneys, Mitchell, Williams, Selig, Jackson & Tucker, responds to the Motion to Dismiss of Arkwood, Inc. ("Arkwood") as follows:

1. Arkwood's Motion should be stricken as it is not supported by a brief statement of its factual and legal basis as required by Rule 78 of the Arkansas Rules of Civil Procedure and Rule 2 of the Arkansas Uniform Rules of Circuit and Chancery Courts.

2. Arkwood, despite the fact of dissolution, is amenable to process and subject to suit under Ark. Stat. Ann. §64-904.

WHEREFORE, Mass Merchandisers, Inc., prays that this Court strike or, in the alternative, deny the Motion to Dismiss of Respondent Arkwood, Inc., pursuant to Rule 78 of the Arkansas Rules of Civil Procedure and Rule 2 of the Arkansas Uniform Rules of Circuit and Chancery Courts, and for all further relief to which it may be entitled.

Respectfully submitted,

MITCHELL, WILLIAMS, SELIG, JACKSON & TUCKER

By _____

Allan Gates
1000 Savers Federal Building
Little Rock, Arkansas 72201
(501) 376-3151

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of October, 1986, I have served the foregoing Motion to Strike or, in the Alternative, to Deny the Motion to Dismiss of Arkwood, Inc., by depositing a true copy in the United States Mail, first class, postage prepaid, addressed to Mr. Phillip S. Deisch, Arkansas Department of Pollution Control and Ecology, P. O. Box 9583, Little Rock, Arkansas 72209; to Mr. Robert R. Ross, Arnold & Grobmyer, P.A., 875 Union National Plaza, P. O. Box 70, Little Rock, Arkansas 72203; and to Mr. Bill F. Doshier, Doshier & Bowers, P. O. Box 1797, Harrison, Arkansas 72601.

Allan Gates

56:seg

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

ARKANSAS DEPARTMENT OF POLLUTION
CONTROL AND ECOLOGY — PETITIONER

vs. — No. E-86-293

HALLIE C. ORMOND, ARKWOOD, INC.,
MOUNTAIN ENTERPRISES, INC.,
C. C. GRISHAM, MARY JO GRISHAM
AND MASS MERCHANDISERS, INC. — RESPONDENTS

HALLIE C. ORMOND — THIRD-PARTY PLAINTIFF

vs.

MCKESSON CORPORATION — THIRD-PARTY DEFENDANT

BRIEF IN SUPPORT OF
MASS MERCHANDISERS, INC.'S MOTION
TO STRIKE OR, IN THE ALTERNATIVE, TO DENY
THE MOTION TO DISMISS OF ARKWOOD, INC.

Respondent Arkwood, Inc., seeks to avoid liability of this action by virtue of the fact that it was dissolved in 1978. Arkansas law is clear, however, that dissolution does not affect any remedy available against a corporation. Ark. Stat. Ann. §64-904(v). The corporation may be sued in its corporate name in the same manner as if there had been no dissolution. Ark. Stat. Ann. §64-904(vi).

Respectfully submitted,

MITCHELL, WILLIAMS, SELIG,
JACKSON & TUCKER

By _____

Allan Gates
1000 Savers Federal Building
Little Rock, Arkansas 72201
(501) 376-3151

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of October, 1986, I have served the foregoing Brief in Support of Motion to Strike or, in the Alternative, to Deny the Motion to Dismiss of Arkwood, Inc., by depositing a true copy in the United States Mail, first class, postage prepaid, addressed to Mr. Phillip S. Deisch, Arkansas Department of Pollution Control and Ecology, P. O. Box 9583, Little Rock, Arkansas 72209; to Mr. Robert R. Ross, Arnold & Grobmyer, P.A., 875 Union National Plaza, P. O. Box 70, Little Rock, Arkansas 72203; and to Mr. Bill F. Doshier, Doshier & Bowers, P. O. Box 1797, Harrison, Arkansas 72601.

Allan Gates

56:seg

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY — PETITIONER

vs. — No. E-86-293

HALLIE C. ORMOND, ARKWOOD, INC., MOUNTAIN ENTERPRISES, INC., C. C. GRISHAM, MARY JO GRISHAM AND MASS MERCHANDISERS, INC. — RESPONDENTS

HALLIE C. ORMOND — THIRD-PARTY PLAINTIFF

vs.

MCKESSON CORPORATION — THIRD-PARTY DEFENDANT

MASS MERCHANDISERS, INC.'S MOTION TO STRIKE OR, IN THE ALTERNATIVE, TO DENY MOTION TO DISMISS OF HALLIE C. ORMOND

Mass Merchandisers, Inc. ("MMI"), by and through its attorneys, Mitchell, Williams, Selig, Jackson & Tucker, responds to the Motion to Dismiss of Hallie C. Ormond ("Ormond") as follows:

1. Ormond's Motion should be stricken as it is not supported by a brief statement of its factual and legal basis as required by Rule 78 of the Arkansas Rules of Civil Procedure and Rule 2 of the Arkansas Uniform Rules of Circuit and Chancery Courts.

2. MMI, in its Cross-Complaint against Respondent Ormond, has alleged facts in ordinary and concise language as required by the Arkansas Rules of Civil Procedure, showing that it is entitled to relief.

3. Specifically, it is alleged that:

A. Ormond, individually and as owner-operator of Arkwood, Inc., operated a wood treating plant on real property also owned by Ormond (hereinafter "Arkwood site");

B. During the operation of the plant at the Arkwood site, Ormond and Arkwood, Inc., handled and stored contaminated waste in an unprotected manner whereby wastes were spilled onto surface

soil. Petitioner also alleges that the waste produced contaminated Arkansas waters;

C. Any contamination of the Arkwood site or surrounding waters is due to the acts of Ormond and Arkwood, Inc.;

D. Arkwood, Inc., has since been dissolved, and Ormond, as a distributee of its proceeds, is personally liable for claims against the dissolved corporation under Ark. Stat. Ann. §§64-904(v) and 64-905(c);

E. Subsequent to operations by Respondents Ormond and Arkwood, Inc., MMI operated the wood treating plant;

F. To the extent MMI is found to be liable, it is entitled to judgment against and contribution from Ormond.

WHEREFORE, Mass Merchandisers, Inc., prays that this Court strike or, in the alternative, deny the Motion to Dismiss of Respondent Hallie C. Ormond, and for all further relief to which it may be entitled.

Respectfully submitted,

MITCHELL, WILLIAMS, SELIG,
JACKSON & TUCKER

By _____

Allan Gates
1000 Savers Federal Building
Little Rock, Arkansas 72201
(501) 376-3151

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of October, 1986, I have served the foregoing Motion to Strike or, in the Alternative, to Deny the Motion to Dismiss of Hallie C. Ormond by depositing a true copy in the United States Mail, first class, postage prepaid, addressed to Mr. Phillip S. Deisch, Arkansas Department of Pollution Control and Ecology, P. O. Box 9583, Little Rock, Arkansas 72209; to Mr. Robert R. Ross, Arnold & Grobmyer, P.A., 875 Union National Plaza, P. O. Box 70, Little Rock, Arkansas 72203; and to Mr. Bill F. Doshier, Doshier & Bowers, P. O. Box 1797, Harrison, Arkansas 72601.

_____
Allan Gates

56:seg

STATE OF ARKANSAS)
)SS.
COUNTY OF BOONE)

AFFIDAVIT

I, Stuart D. Braznell, being first duly sworn, state and attest the following:

1. I am Executive Vice President - Operations of Mass Merchandisers, Inc. ("MMI"). I am familiar with the corporate books and records of MMI.

2. On or about October 29, 1985, McKesson Corporation, a Maryland corporation ("McKesson"), acquired MMI. The transaction was accomplished by means of a merger of an indirect wholly-owned subsidiary of McKesson with and into MMI. As a result of the merger, MMI became an indirect wholly-owned subsidiary of McKesson.

3. There has been no merger of MMI into McKesson. MMI continues to exist and operate as a separate corporate entity, the shares of which are now owned directly by McKesson.

4. MMI continues to own and operate its business and assets as it did prior to its acquisition by McKesson. MMI continues to maintain its own separate books and corporate records. MMI has its own officers and directors, and maintains its principal place of business in Harrison, Boone County, Arkansas. MMI also continues to maintain its separate registration to do business in the State of Arkansas and all other states in which it transacts business.

Dated this 3rd day of October, 1986.

Stuart D. Braznell
Executive Vice President
Mass Merchandisers, Inc.

SUBSCRIBED AND SWORN to before me, a Notary Public, this 3rd day of October, 1986.

Mary R. Stanley
Notary Public

My Commission Expires:
4-30-93
(S E A L)

FILED FOR RECORD,
1986 OCT -3 PM 3:15
HELEN SPEER, CLERK
BY _____ D.C.

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY — PETITIONER

VS. — NO. E-86-293

HALLIE C. ORMOND, ARKWOOD, INC., MOUNTAIN ENTERPRISES, INC., C. C. GRISHAM, MARY JO GRISHAM and MASS MERCHANDISERS, INC. — RESPONDENTS

HALLIE C. ORMOND — THIRD-PARTY PLAINTIFF

VS.

MCKESSON CORPORATION — THIRD-PARTY DEFENDANT

MOTION TO DISMISS

McKesson Corporation moves to dismiss the claims asserted against it in the Cross-Claim and Third-Party Complaint of respondent Hallie C. Ormond. In support of its motion, McKesson Corporation states the following:

1. On or about September 11, 1986, Respondent Hallie C. Ormond filed a Cross-Claim and Third-Party Complaint in this proceeding. The Cross-Claim and Third-Party Complaint named McKesson Corporation as a third-party defendant.

2. There is no allegation that McKesson Corporation was a party to the lease or a participant in any of the conduct asserted in the Cross-Claim and Third-Party Complaint as the basis for liability.

3. The only grounds for asserting a claim against McKesson Corporation are the allegations contained in paragraph 4 of the Cross-Claim and Third-Party Complaint that:

> On or about September 24, 1985, Cross-Defendant, MMI, merged into Third-Party Defendant, McKesson Corproation (hereinafter "McKesson"). Third-Party Defendant McKesson . . . is the successor-in-interest of Cross-Defendant, MMI.

As set forth more fully in the affidavit and supporting memorandum accompanying this motion, no merger has occurred between MMI and McKesson. Therefore, no basis for a claim against McKesson Corporation exists in this proceeding.

WHEREFORE, McKesson Corporation prays that this Court grant its motion to dismiss and enter an order dismissing all claims in this proceeding asserted against McKesson in Ormond's Cross-Claim and Third-Party Complaint.

Dated this 3rd day of October, 1986.

Respectfully submitted,

MITCHELL, WILLIAMS, SELIG,
JACKSON & TUCKER
1000 Savers Federal Building
Little Rock, Arkansas 72201
(501) 376-3151

By _____
Allan Gates

FILED FOR RECORD
1986 OCT -3 PM 3:15
HELEN SPEER, CLERK
BY _____ D.C.

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of October, 1986, I served the foregoing Motion to Dismiss by depositing a true copy in the United States mail, first-class postage prepaid, addressed to Mr. Phillip S. Deisch, Arkansas Department of Pollution Control and Ecology, P. O. Box 9583, Little Rock, Arkansas 72209; to Mr. Robert R. Ross, Arnold & Grobmyer, P.A., 875 Union National Plaza, P. O. Box 70, Little Rock, Arkansas 72203; and to Mr. Bill F. Doshier, Doshier & Bowers, P. O. Box 1797, Harrison, Arkansas 72601.

_____
Allan Gates

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY — PETITIONER

VS. — NO. E-86-293

HALLIE C. ORMOND, ARKWOOD, INC., MOUNTAIN ENTERPRISES, INC., C. C. GRISHAM, MARY JO GRISHAM and MASS MERCHANDISERS, INC. — RESPONDENTS

HALLIE C. ORMOND — THIRD-PARTY PLAINTIFF

VS.

MCKESSON CORPORATION — THIRD-PARTY DEFENDANT

ANSWER OF MASS MERCHANDISERS, INC. TO CROSS-CLAIM AND THIRD-PARTY COMPLAINT OF HALLIE C. ORMOND

Mass Merchandisers, Inc. ("MMI") answers the Cross-Claim and Third-Party Complaint of respondent Hallie C. Ormond as follows:

1. MMI admits the allegations contained in paragraph 1 of Ormond's Cross-Claim and Third-Party Complaint.

2. MMI admits that the parties to the lease entered into the agreement with the expectation that there would be continued operation of the wood-processing treatment plant that then existed upon the leasehold premises. The terms of the lease speak for themselves. Except to the extent specifically admitted herein, MMI denies the remaining allegations of paragraph 2 of Ormond's Cross-Claim and Third-Party Complaint.

3. MMI admits the allegations contained in paragraph 3 of Ormond's Cross-Claim and Third-Party Complaint.

4. MMI admits that McKesson Corporation is a foreign corporation authorized to do business in the State of Arkansas. MMI denies the remaining allegations contained in paragraph 4 of Ormond's Cross-Claim and Third-Party Complaint.

5. MMI denies the allegations contained in paragraph 5 of Ormond's Cross-Claim and Third-Party Complaint.

6. MMI denies the allegations contained in paragraph 6 of Ormond's Cross-Claim and Third-Party Complaint.

7. MMI denies the allegations contained in paragraph 7 of Ormond's Cross-Claim and Third-Party Complaint.

8. MMI admits that it conducted wood-processing treatment operations on the leasehold premises during the term of the lease. MMI denies the remaining allegations contained in paragraph 8 of Ormond's Cross-Claim and Third-Party Complaint.

9. MMI denies the allegations contained in paragraph 9 of Ormond's Cross-Claim and Third-Party Complaint.

10. MMI denies the allegations contained in paragraph 10 of Ormond's Cross-Claim and Third-Party Complaint.

11. MMI denies the allegations contained in paragraph 11 of Ormond's Cross-Claim and Third-Party Complaint.

12. MMI denies the allegations contained in paragraph 12 of Ormond's Cross-Claim and Third-Party Complaint.

13. Except to the extent specifically admitted above, MMI denies all remaining allegations contained in Ormond's Cross-Claim and Third-Party Complaint.

14. The claims asserted in Ormond's Cross-Claim and Third-Party Complaint are barred by the defenses of unclean hands, waiver, and estoppel.

15. The claims asserted in Ormond's Cross-Claim and Third-Party Complaint are barred by the defenses of laches and the applicable statute of limitations.

16. The claims asserted in Ormond's Cross-Claim and Third-Party Complaint are barred by the defense of accord and satisfaction.

WHEREFORE, MMI prays that Ormond's Cross-Claim and Third-Party Complaint be dismissed and held for naught, that MMI be awarded its costs and attorneys' fees expended herein, and that MMI be granted all such other and additional relief as may be appropriate.

Respectfully submitted,

MITCHELL, WILLIAMS, SELIG,
JACKSON & TUCKER
1000 Savers Federal Building
Little Rock, Arkansas 72201
(501) 376-3151

By _____
Allan Gates

FILED FOR RECORD
1986 OCT -3 PM 3:14
HELEN SPEER, CLERK
BY _____ D.C.

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of October, 1986, I served the foregoing Answer of Mass Merchandisers, Inc. to Cross-Claim and Third-Party Complaint of Hallie C. Ormond by depositing a true copy in the United States mail, first-class postage prepaid, addressed to Mr. Phillip S. Deisch, Arkansas Department of Pollution Control and Ecology, P. O. Box 9583, Little Rock, Arkansas 72209; to Mr. Robert R. Ross, Arnold & Grobmyer, P.A., 875 Union National Plaza, P. O. Box 70, Little Rock, Arkansas 72203; and to Mr. Bill F. Doshier, Doshier & Bowers, P. O. Box 1797, Harrison, Arkansas 72601.

_____
Allan Gates

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY — PETITIONER

VS. — NO. E-86-293

HALLIE C. ORMOND, ARKWOOD, INC., MOUNTAIN ENTERPRISES, INC., C. C. GRISHAM, MARY JO GRISHAM and MASS MERCHANDISERS, INC. — RESPONDENTS

HALLIE C. ORMOND — THIRD-PARTY PLAINTIFF

VS.

MCKESSON CORPORATION — THIRD-PARTY DEFENDANT

MEMORANDUM OF MCKESSON CORPORATION
IN SUPPORT OF MOTION TO DISMISS

The Cross-Claim and Third-Party Complaint filed in this action by respondent Hallie C. Ormond seeks to assert a claim against McKesson Corporation ("McKesson") solely on the ground that it is "the successor-in-interest of [Mass Merchandisers, Inc.]." Respondent Ormond's assertion of successor liability for McKesson is based on the mistaken notion that Mass Merchandisers, Inc. ("MMI") was merged into McKesson in September 1985. In fact, there has never been any merger of MMI into McKesson. It is true that McKesson acquired ownership of MMI in October 1985, but this acquisition was accomplished through a reorganization and merger between MMI and an indirect wholly-owned subsidiary of McKesson. After the acquisition, MMI has continued to exist and operate as an independent corporate entity. MMI continues to maintain its own officers and directors and keeps its own books and records. McKesson's only direct relationship with MMI is that of shareholder, and even that relationship did not come into existence until after all of the operative events pertinent to this proceeding had occurred.

It is well established that a corporation and its stockholders are separate and distinct entities, even though a

stocholder may own a majority of, or even all of, the stock of the corporation. E.g., Banks v. Jones, 239 Ark. 396, 390 S.W.2d 108 (1965). The separate legal status of a corporation cannot be disregarded unless the privilege of doing business in separate corporate form has been illegally abused to the injury of a third person, Starr Farms, Inc. v. Southwestern Electric Power Co., 271 Ark. 137, 607 S.W.2d 391 (1980).

In this case there is no allegation that the separate corporate form has been abused or illegally utilized to the injury of respondent Ormond or anyone else. There is no suggestion that MMI is a sham or mere agent of McKesson. Instead, the reverse is plainly true. MMI continues to exist and operate in the same independent corporate form as it did prior to McKesson's acquisition of MMI. As set forth more fully in the accompanying affidavit, MMI continues to own and operate its business and assets in the same manner as it did prior to McKesson's acquisition of MMI.

Under these circumstances, respondent Hallie C. Ormond's Cross-Claim and Third-Party Complaint fails to state a claim against McKesson upon which relief can be granted.

For the reasons stated above, McKesson Corporation respectfully requests that its Motion to Dismiss be granted.

Respectfully submitted,

MITCHELL, WILLIAMS, SELIG,
JACKSON & TUCKER
1000 Savers Federal Building
Little Rock, Arkansas 72201
(501) 376-3151

By _____
Allan Gates

FILED FOR RECORD
1986 OCT -3 PM 3:13
HELEN SPEER, CLERK
BY _____ D.C.

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of October, 1986, I served the foregoing Memorandum of McKesson Corporation in Support of Motion to Dismiss by depositing a true copy in the United States mail, first-class postage prepaid, addressed to Mr. Phillip S. Deisch, Arkansas Department of Pollution Control and Ecology, P. O. Box 9583, Little Rock, Arkansas 72209; to Mr. Robert R. Ross, Arnold & Grobmyer, P.A., 875 Union National Plaza, P. O. Box 70, Little Rock, Arkansas 72203; and to Mr. Bill F. Doshier, Doshier & Bowers, P. O. Box 1797, Harrison, Arkansas 72601.

Allan Gates

ARNOLD, GROBMYER & HALEY
A PROFESSIONAL ASSOCIATION
ATTORNEYS AT LAW
EIGHTH FLOOR, ONE UNION NATIONAL PLAZA
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LITTLE ROCK, ARKANSAS 72203-0070
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WASHINGTON, D.C. 20036-5468
(202) 223-8877

COMMERCE UNION BANK BUILDING
SUITE 400
MEMPHIS, TENNESSEE 38112-4416
(901) 323-9300

LOVE FIELD BUILDING
SUITE N113, BOX 11
DALLAS, TEXAS 75235
(214) 358-4003

October 1, 1986

Ms. Helen Speer
Boone County Circuit Clerk
Boone Counrty Courthouse
Harrison, AR 72601

RE: Arkansas Department of Polluton Control
and Ecology v. Hallie C. Ormond et al.
Boone County Chancery Court No. E-86-293

Dear Ms. Speer:

Enclosed for filing are Separate Answer of Respondents C. C. Grisham and Mary Jo Grisham, Motion to Dismiss of Hallie C. Ormond and Alternative Answer and Motion to Dismiss Cross Complaint for filing in the above captioned matter.

Please return the extra file marked copy to me in the envelope enclosed for that purpose.

By copy of this letter all attorneys of record shall be notified of the filing of said pleadings.

Yours truly,

ARNOLD, GROBMYER & HALEY

Robert R. Ross

RRR:vlw
Enclosure

cc: Allan Gates
Phillip Deisch

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

ARKANSAS DEPARTMENT OF
POLLUTION CONTOL AND ECOLOGY PETITIONER

v. CIVIL ACTION NO. E-86-293

HALLIE C. ORMOND, ARKWOOD, INC,.
MOUNTAIN ENTERPRISES, INC.,
C. C. GRISHAM, MARY JO GRISHAM
and MASS MERCHANDISERS, INC. RESPONDENTS

SEPARATE ANSWER OF RESPONDENTS
C. C. GRISHAM, and MARY JO GRISHAM TO
RESPONDENT MASS MERCHANDISERS, INC. CROSS COMPLAINT

Comes now, C. C. Grisham and Mary Jo Grisham, (collectively "Grisham") Respondents herein for their Separate Answer to the Cross Complaint of Respondent Mass Merchandisers, Inc., ("MMI") state as follows:

1. Grisham admits that the document attached as Exhibit B to MMI's Cross Complaint is a contract whereby MMI acquired Arkwood, Inc. To the extent paragraph 21 of the Cross Complaint seeks to interpret the contract by its allegation, Grisham objects to the allegations therein and denies the interpretation.

2. Grisham objects to the attempted construction of the contract provision set out in paragraph 22. To the extent the conclusion drawn therein constitutes an allegation of fact it is denied.

3. Paragraph 23 of MMI's Cross Complaint states a legal conclusion and, as such, requires no response. To the extent paragraph 23 of MMI's Cross Complaint is deemed to contain or constitute an allegation of fact, Grisham is without information or knowledge sufficient to form a belief regarding the truth or falsity of the allegation contained in paragraph 23 of the Cross Complaint and the same is therefore denied.

4. Grisham denies the allegations contained in paragraph 24 of MMI's Cross Complaint.

5. Grisham objects to the statements and conclusions set out in paragraph 25. Said statements are no more than

self-serving conclusions. To the extent they constitute allegations of fact they are denied.

6. Grisham denies the allegations contained in sentence one of paragraph 26 of MMI's Cross Complaint. Sentence two of paragraph 26 of MMI's Cross Complaint states a legal conclusion and, as such, requires no response. To the extent sentence two of paragraph 26 of MMI's Cross Complaint is deemed to contain or constitute an allegation of fact, Arkwood is without information or knowledge sufficient to form a belief regarding the truth or falsity of the allegations contained in sentence two of paragraph 26 of MMI's Cross Complaint and the same is therefore denied.

7. Grisham objects to the allegations contained in paragraph 27 of MMI's Cross Complaint as conclusory, as unsupported by the facts and should be stricken. Grisham hereby denies the allegation to the extent it constitutes an allegation of fact.

8. Paragraph 28 of MMI's Cross Complaint states a legal conclusion and, as such requires no response. To the extent paragraph 28 of MMI's Cross Complaint is deemed to contain or constitute an allegation of fact, Grisham is without information or knowledge sufficient to form a belief regarding the truth or falsity of the allegations contained in paragraph 28 of MMI's Cross Complaint and the same is therefore denied.

9. Pargraph 29 of MMI's Cross Complaint states a legal conclusion and, as such requires no response. To the extent paragraph 29 of MMI's Cross Complaint is deemed to contain or constitute an allegation of fact, Grisham is without information or knowledge sufficient to form a belief regarding the truth or falsity of the allegations contained in paragraph 29 of MMI's Cross Complaint and the same is therefore denied.

10. Paragraph 30 of MMI's Cross Complaint states a legal conclusion and, as such requires no response. To the extent paragraph 30 of MMI's Cross Complaint is deemed to contain or constitute an allegation of fact, Grisham is without information or knowledge sufficient to form a belief regarding the truth or

falsity of the allegations contained in paragraph 30 of MMI's Cross Complaint and the same are therefore denied.

11. Any allegation contained in the Answer and Cross Complaint of MMI not specifically admitted herein is denied.

AFFIRMATIVE DEFENSES

Further Respondent Grisham states that Mass Merchandisers, Inc.'s alleged claims are barred by the doctrines of laches, waiver, estoppel and unclean hands.

WHEREFORE, Respondents Grisham, having fully answered the Cross Complaint of Respondent MMI prays that the Cross Complaint be dismissed, that they be awarded their costs, attorneys fees and for any and all of such further relief to which they may be entitled.

C. C. GRISHAM
MARY JO GRISHAM

By Their Attorneys:

ARNOLD, GROBMYER & HALEY, P.A.
P.O. BOX 70
Little Rock, AR 72203
(501) 376-1171

By: _____
Robert R. Ross

DOSHIER & BOWERS
P.O. BOX 1797
Harrison, AR 72601
(501) 741-6166

CERTIFICATE OF SERVICE

I, Robert R. Ross, do hereby state on oath, that on this 12 day of ~~September~~ October a true and correct copy of the foregoing pleading was placed in the United States mail, first-class postage attached to: Mr. Phillip Deisch, P.O. Box 9583, Little Rock, AR 72219 and Mr. Allan Gates, Mitchell, Williams, Selig, Jackson & Tucker, 1000 Savers Building, Little Rock, AR 72201.

_____
Robert R. Ross

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY — PETITIONER

v. — NO. E-86-293

HALLIE C. ORMOND, ARKWOOD, INC., MOUNTAIN ENTERPRISES, INC., C. C. GRISHAM, MARY JO GRISHAM and MASS MERCHANDISERS, INC. — RESPONDENTS

HALLIE C. ORMOND — THIRD-PARTY PLAINTIFF

v.

McKESSON CORPORATION — THIRD-PARTY DEFENDANT

MOTION TO DISMISS OF HALLIE C. ORMOND
AND ALTERNATIVE ANSWER

Comes now Hallie C. Ormond, Respondent herein and for his Motion to Dismiss states as follows:

1. The Cross Complaint by Respondent Mass Merchandisers against Hallie C. Ormond fails to state facts upon which relief can be granted and should be dismissed pursuant to Arkansas Rules of Civil Procedure 12(b)(6).

WHEREFORE, Respondent, Hallie C. Ormand prays this Court to dismiss the Cross Complaint for failure to state a claim on which relief can be granted, for his costs, attorney's fees and for any and all of such further relief to which he may be entitled pursuant to Arkansas Rules of Civil Procedure 12(b)(6).

ALTERNATIVE ANSWER

Comes now Hallie C. Ormond, Respondent herein and for his Answer to the Cross Complaint of Mass Merchandisers, Inc., subject to his Motion to Dismiss filed above and states:

1. Hallie C. Ormond ("Ormond") denies the allegations contained in paragraph 24 of Respondent Mass Merchandisers, Inc. ("MMI") Cross Complaint.

2. Ormond denies the allegations contained in paragraph 25 of MMI's Cross Complaint.

3. Paragraph 26 of MMI's Cross Complaint states a legal conclusion, and as such, requires no response. To the extent

paragraph 26 of MMI's Cross Complaint is deemed to contain or constitute as allegation of fact, Ormond is without information or knowledge sufficient to form a belief regarding the truth or falsity of the allegations contained in paragraph 26 of MMI's Cross Complaint and the same are therefore denied.

4. Ormond denies the allegations contained in paragprah 27 of MMI's Cross Complaint.

5. Ormond denies the allegations contained in paragraph 28 of MMI's Cross Complaint. Further, Ormond incorporates by reference paragraphs 1-12 of his Cross Claim and Third Party Complaint.

6. Paragraph 29 of MMI's Cross Complaint states a legal conclusion, and as such, requires no response. To the extent paragraph 29 of MMI's Cross Complaint is deemed to contain or constitute an allegation of fact, Ormond is without information or knowledge sufficient to form a belief regarding the truth of falsity of the allegations contained in paragraph 29 of MMI's Cross Complaint are the same and therefore denied.

7. Paragraph 30 of MMI's Cross Complaint states a legal conclusion and as such, requires no response. To the extent paragraph 30 of MMI's Cross Complaint is deemed to contain or constitute an allegation of fact, Ormond is without information or knowledge sufficient to form a belief regarding the truth or falsity of allegations contained in paragraph 30 of Petitioners Complaint are the same and therefore denied.

8. Any allegation contained in the Answer and Cross Complaint of MMI not specifically admitted herein is denied.

WHEREFORE, Respondent, Hallie C. Ormond, having fully Answered the Cross Complaint of Respondent MMI prays that the Cross Complaint be dismissed: that he be awarded his costs,

attorneys fees and for any and all of such further relief to which he may be entitled.

HALLIE C. ORMOND

By His Attorneys:

ARNOLD, GROBMYER & HALEY, P.A.
P.O. Box 70
Little Rock, AR 72203
(501) 376-1171

By: _____
Robert R. Ross

DOSHIER & BOWERS
P.O. Box 1797
Harrison, AR 72601
(501) 741-6166

CERTIFICATE OF SERVICE

I, Robert R. Ross, do hereby state, that on this 1st day of ~~September~~ July, 1986, a true and correct copy of the foregoing pleading was placed in the United States mail, first-class postage attached to: Mr. Phillip Deisch, P.O. Box 9583, Little Rock, AR 72219 and Mr. Allan Gates, Mitchell, Williams, Selig, Jackson & Tucker, 1000 Savers Building, Little Rock, AR 72201.

_____
Robert R. Ross

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

ARKANSAS DEPARTMENT OF
POLLUTION CONTROL AND ECOLOGY PETITIONER

VS. CIVIL ACTION NO. E-86-293

HALLIE C. ORMOND,
ARKWOOD, INC., MOUNTAIN
ENTERPRISES, INC., C.C. GRISHAM,
MARY JO GRISHAM, and MASS
MERCHANDISERS, INC. RESPONDENTS

MOTION TO DISMISS CROSS-COMPLAINT

Comes now Arkwood, Inc., and for its Motion to Dismiss Cross-Complaint pursuant to Rule 12 (b) (6) of the Arkansas Rules of Civil Procedure states as follows:

1. The instant action was instituted by a Complaint in which Arkwood, Inc. was joined as a Respondent and in paragraph 5 of said Complaint it is stated:

> "Respondent, Arkwood, Inc., an Arkansas Corporation, incorporated in 1965 and dissolved in 1978, is a former operator of the wood treating plant at the "Arkwood site".

2. By Petitioner's own allegation which this Respondent admits, the Respondent was dissolved on August 20, 1974 as evidenced by the Certificate of Dissolution, (attached and marked Exhibit "A" to the original Motion to Dismiss) and incorporated by reference herein.

3. The cross--claims alleged by Respondent Mass Merchandisers, Inc. are duplicative and derivative of the Petitioner Arkansas Department of Pollution Control and Ecology alleged claims.

4. There being no legal entity in existence known as Arkwood, Inc., there can be no relief granted to Respondent Mass Merchandisers, Inc. against such nonexistent entity.

WHEREFORE, Respondent's Cross-Complaint having failed to state a claim upon which relief can be granted, the Respondent, Arkwood, Inc. prays that the Cross-Complaint be dismissed and for any and all such further relief to which it may be entitled.

ARKWOOD, INC.

By Its Attorneys:

ARNOLD, GROBMYER & HALEY
One Union National Plaza
P.O. Box 70
Little Rock, Arkansas 72203
(501) 376-1171

By: _____
Robert R. Ross

DOSHIER & BOWERS
P.O. Box 1797
Harrison, Arkansas 72601
(501) 741-6166

By: Bill F. Doshier by [illegible]
Bill F. Doshier

CERTIFICATE OF SERVICE

I, Robert R. Ross, do hereby certify that I have mailed a copy of the foregoing Motion to Dismiss to Phillip Deisch, P.O. Box 9538, Little Rock, Arkansas 72219 on this 1st day of ~~September~~ October, 1986.

_____
Robert R. Ross

0350849

WARRANTY DEED
WITH RELINQUISHMENT OF DOWER AND CURTESY

KNOW ALL MEN BY THESE PRESENTS:

Sept-26-86

That I, HALLIE C. ORMOND, a single person, hereinafter called GRANTOR, (whether one or more) for and in consideration of the sum of Ten Dollars and other good and valuable consideration in hand paid by MARY F. BURKE, an unmarried person, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell and convey unto MARY F. BURKE, an unmarried person, hereinafter called GRANTEE, (whether one or more) and unto Grantee's heirs and assigns forever, the following lands lying in Boone County, Arkansas, to-wit:

A part of the Northwest Quarter of the Southeast Quarter; North Half of the Southwest Quarter and South Half of the Northwest Quarter, all in Section 27, Township 21 North, Range 21 West, Boone County, described as follows: Beginning at the Southwest Corner of the Northwest Quarter Southwest Quarter, thence North 990 feet to the center of Clary Road; thence in a Northeasterly direction in the center line of said road 1172.6 feet to the North side of the said Northwest Quarter Southwest Quarter at a point 965 feet East of the Northwest Corner thereof; thence North 32 Degrees East along and with the center of said Clary Road 390 feet to the center of Boone County paved road; thence North 31 Degrees West and with the center of said Boone County paved road 235 feet to Missouri Pacific Railroad right-of-way at a point 150 feet Southwesterwardly from and radially to the existing center line of Missouri Pacific Railroad main track; thence Northwestwardly parallel with said existing center line 370 feet; thence Northeastwardly, by a straight line, radially to said existing center line of said main track 100 feet to a point 50 feet Southwestwardly from and radially to said existing center line; thence Southwestwardly parallel with said existing center line 1497 feet to a point 50 feet Southwestwardly from and raially to said existing center line; thence Southwestwardly, by a straight line, radially to said existing center line 135 feet; thence Southeastwardly, parallel with said existing center line 244 feet; thence Northeastwardly, by a straight line, radially to said existing center line 100 feet; thence Southwest along the North side of lands described in Deed dated February 22, 1961, recorded in Book 85, Pages 164-165, of Recorder's Office for Boone County, Arkansas, to the Westerly right-of-way line of U.S. Highway 65; thence South 22 Degrees West along said right-of-way line 550 feet to the South side of the Northwest Quarter Southeast Quarter; thence West along the South side of the Northwest Quarter Southeast Quarter 457 feet to the Southwest Corner of the said Northwest Quarter Southeast Quarter; thence West along the South side of the North Half Southwest Quarter 2640 feet to point of beginning, containing in all 85.38 acres, more or less, subject to all existing easements. It is the intent of the within Grantor to cover in the foregoing description all of the lands conveyed in Deeds recorded in the Recorder's Office of Boone County, Arkansas, in Book 85 at Pages 164-165, 165-166, 166-167, 351-352, and Pages 509-510, subject to County Road and any existing easements.

To have and to hold the same unto the said MARY F. BURKE, an unmarried person, Grantee, and unto Grantee's heirs and assigns forever, with all appurtenances thereunto belonging.

And I hereby covenant with said GRANTEE, that I will forever warrant and defend the title to the said lands against all claims whatever.

WITNESS my hand and seal on this 24th day of September, 1986.

PREPARED BY:
DOSHIER AND BOWERS
HARRISON, ARKANSAS

Hallie C. Ormond (L.S.)

ACKNOWLEDGMENT

STATE OF ARKANSAS)
)
COUNTY OF BOONE)

BE IT REMEMBERED, That on this 24th day of September, 1986 came before the undersigned, a Notary Public within and for the County aforesaid, duly commissioned and acting, HALLIE C. ORMOND, a single person, to me well known as the GRANTOR in the foregoing Deed, and stated that he had executed the same for the consideration and purposes therein mentioned and set forth.

Bill F. Doshier
Notary Public

My Commission Expires:
6-15-91

I certify under penalty of false swearing that at least the legally correct amount of documentary stamps have been placed on this instrument.

Bill Doshier
~~Grantor~~/Grantee's Agent
Box 1797, Harrison, AR 72601
Address

Filed for Record 25th Day of Sept.
1986 at 1:25 o'clock P.M.
Helen Speer, Clerk
By Mary K. Honeycutt D.C.

CLERK'S CERTIFICATE

STATE OF ARKANSAS }
County of Boone } ss.

I, Helen Speer, Circuit Clerk and Recorder in and for the County and State aforesaid, do hereby certify that the foregoing instrument in writing is a true and correct copy of the original Warranty Deed as recorded in Book 220 at Page 204 in my office at Harrison, Arkansas.

Given under my hand and seal this 30th day of April, 1987

HELEN SPEER, Clerk
By Mary K. Honeycutt Deputy Clerk

Bill Doshier

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

ARKANSAS DEPARTMENT OF
POLLUTION CONTROL AND ECOLOGY PETITIONER

NO. E-86-293

VS.

9-11-86

HALLIE C. ORMOND,
ARKWOOD, INC., MOUNTAIN
ENTERPRISES, INC., C. C. GRISHAM,
MARY JO GRISHAM, and MASS
MERCHANDISERS, INC. RESPONDENTS

SEPARATE ANSWER OF HALLIE C. ORMOND

Comes now, Hallie C. Ormond, Respondent herein for his separate response to the Complaint states as follows:

1. Upon information and belief, Respondent Hallie C. Ormond, (hereinafter "Ormond"), admits the allegations of paragraph 1.

2. Respondent Ormond admits that he owns real property located within the general description set out in paragraph 2 of the Complaint. The property which properly would be described as the "Arkwood site" is more particularly described as follows:

> The following lands lying in the County of Boone, State of Arkansas, to-wit: A part of the NW 1/4 SE 1/4, a part of the N 1/2 SW 1/4, and a part of the S 1/2 NW 1/4 all in Section 27, Township 21 North, Range 21 West. Commencing at a stone marking the SE corner of the NE 1/4 of the SW 1/4 of said Section 27. Thence N 86 degrees 02'53" W 946.17 feet, thence N 01 degrees 28'49" E 970.62 feet to the place of beginning. Said Place of Beginning being located on the northerly right of way of the Boone County Road, thence with said northerly right of way in a northwesterly direction 1501 feet more or less, thence leaving said Boone County Road northerly right of way N 42 degrees42'38" E 2.83 feet to the southerly right of way of the Missouri Pacific Railroad, thence with said southerly right of way in a southeasterly direction to a point where said southerly MOPAC right of way intersects the north side of lands described in deed dated February 22, 1961, between Elmer F. Cox and Gertrude Cox, Grantors, and Hallie C. Ormond and Jeanne M. Ormond, Grantees, recorded in Book 85, Page 164-165, thence southwest along the north side of above mentioned lands to the westerly right of way line of U.S. Highway 65, thence south 22 degrees west along said westerly right of way line 550 feet to the south side of the NW 1/4 SE 1/4, thence west along said south side to the northerly right of way line of the Boone County Road, thence running with said northerly right of way line in a northwesterly direction to the point of beginning

3. Respondent Ormond admits that a wood processing treatment plant was operated at the "Arkwood site". Respondent, Ormond, denies that such treatment plant was operated in 1961.

4. Respondent Ormond denies that he was ever the operator of a wood processing treatment plant at the "Arkwood site".

5. Respondent, Ormond, is without sufficient knowledge or information to admit or deny the allegations of paragraph 5.

6. Respondent Ormond admits the allegations of paragraph 6

7. Respondent Ormond denies the allegations of the first sentence of paragraph 7. Respondent, Ormond, objects to the allegations contained in the second sentence of paragraph 7, as legal conclusions of the Petitioner and not statements of fact.

8. Respondent Ormond denies that he was ever the operator of a wood treatment plant as described in the first sentence of paragraph 8. Further, Respondent, Ormond, is without sufficient knowledge or information to admit or deny the remaining allegations of paragraph 8 and, therefore, the same are denied.

9. Respondent Ormond is without sufficient knowledge or information to admit or deny the allegations contained in paragraph 9 and, therefore, the same are denied.

10. Respondent Ormond objects to the allegations of paragraph 10 as being legal conclusions by the Petitioner and not facts which are subject to being admitted or denied. For purposes of this Response, the allegations of paragraph 10 are denied.

11. Respondent Ormond objects to paragraph 11 as being legal conclusions drawn by the Petitioner and not stating facts which are subject to being admitted or denied. For purposes of this Response, the allegations of paragraph 11 are denied.

12. Respondent Ormond objects to the allegations of paragraph 12 as being legal conclusions by the Petitioner and

not facts which are subject to being admitted or denied. For purposes of this Response, the allegations of paragraph 12 are denied.

13. Respondent Ormond objects to paragraph 13 as being legal conclusions by the Petitioner and not facts which are subject to being admitted or denied. For purposes of this Response, the allegations of paragraph 13 are denied.

WHEREFORE, Respondent Hallie C. Ormond having fully Answered the Complaint of the Petitioner prays that the Complaint be dismissed; that he be awarded his costs, attorneys' fees and for any and all of such further relief to which they may be entitled.

HALLIE C. ORMOND

By His Attorneys:

ARNOLD, GROBMYER & HALEY
One Union National Plaza
P.O. Box 70
Little Rock, Arkansas 72203
(501) 376-1171

By: Robert R. Ross

DOSHIER AND BOWERS
P.O. BOx 1797
Harrison, Arkansas 72601
(501) 741-6166

By: Bill F. Doshier

FILED FOR RECORD
1986 SEP 11 PM 2:24
HELEN SPEER, CLERK
BY _____ D.C.

CERTIFICATE OF SERVICE

I, Robert R. Ross, do hereby certify that I have mailed a copy of the foregoing Separate Answer of Hallie C. Ormond to Phillip Deisch, Esq., P.O. Box 9583, Little Rock, Arkansas, + Allan Gates Atty for MM on this 11th day of September, 1986.

Robert R Ross

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

ARKANSAS DEPARTMENT OF POLLUTION
CONTROL AND ECOLOGY PETITIONER

VS. NO. E-86-293

HALLIE C. ORMOND, ARKWOOD, INC.,
MOUNTAIN ENTERPRISES, INC.,
C. C. GRISHAM, MARY JO GRISHAM
and MASS MERCHANDISERS, INC. RESPONDENTS

HALLIE C. ORMOND THIRD-PARTY PLAINTIFF

VS.

McKESSON CORPORATION THIRD-PARTY DEFENDANT

CROSS-CLAIM AND THIRD-PARTY COMPLAINT

COMES Hallie C. Ormond, Respondent/Cross-Claimant/Third Party Plaintiff herein, and for his Cross-Claim against the Respondents, Mountain Enterprises, Inc. and Mass Merchandisers, Inc., and his cause of action against Third-Party Defendant, McKesson Corporation, states as follows:

1. Pursuant to a Lease executed in 1973, Cross-Claimant, Hallie C. Ormond, leased to Mountain Enterprises, Inc., a wholly-owned subsidiary of Mass Merchandisers, Inc., certain property described in paragraph 2 of the Answer of Hallie C. Ormond. A copy of said Lease is attached hereto and marked "Exhibit "A"" and incorporated by reference herein.

2. Pursuant to the Lease, Cross-Defendants, Mountain Enterprises, Inc. and Mass Merchandisers, Inc. (hereinafter referred to as "MMI"), were to operate a wood processing treatment plant on the leasehold.

3. From 1973 through 1984, said wood processing treatment plant was operated by MMI.

4. On or about September 24, 1985, Cross-Defendant, MMI, merged into Third-Party Defendant, McKesson Corporation (hereinafter "McKesson"). Third-Party Defendant McKesson, a foreign corporation authorized to do business in the state, is the successor-in-interest of Cross-Defendant, MMI.

5. In 1981, MMI was notified by the Arkansas Department of Pollution Control and Ecology (hereinafter "PC&E") that

contaminated wastes used by MMI on the leasehold converted the leasehold into a hazardous substance site as defined by Ark. Stat. Ann. § 82-4714(1) and that clean up on the contaminated leasehold should begin.

6. Despite notice, MMI continued to contaminate the leasehold and refused to take any action to institute remedial actions necessary to restore the leasehold and abate off-site contamination.

7. Despite notice, McKesson refused to take any action to institute remedial actions necessary to restore the leasehold and abate off-site contamination.

8. Throughout the term of the Lease from January 1, 1973 until January 1, 1985, the Cross-Defendant, MMI, conducted wood processing treatment operations on the leasehold in such a manner as to cause PC&E to institute proceedings to require remedial actions necessary to restore the leasehold and abate off-site contamination.

9. Cross-Defendant, MMI's use of substances, including pentachlorophenol and pentachlorophenol contaminated wastes and their disposal onto the leasehold property constitute active waste of the Cross-Claimant's fee interests in said property, and their failure to restore the leasehold is a breach of the Lease Agreement.

10. The waste committed and breach of the Lease Agreement by the Cross-Defendants damaged the Cross-Claimant through his loss of use of the property in the amount of One Million and No/100 Dollars ($1,000,000.00). Cross-Claimant is further damaged by the Cross-Defendant's actions by the cost of clean-up necessary to restore the leasehold and the costs associated with defense of Petitioner's action and the necessity to institute this Cross-Claim.

11. Third-Party Defendant McKesson's failure to restore the leasehold damaged Third-Party Plaintiff through his loss of use of the property in the amount of One Million and No/100 Dollars ($1,000,000.00), the cost of clean-up necessary to restore the

property and the costs associated with the necessity to institute this Third-Party Complaint.

12. Cross-Defendant's failure to institute appropriate remedial actions necessary to restore the leasehold and abate off-site contamination and its willful, wanton and reckless post-notice, continued contamination and commission of active waste upon the leasehold renders them liable for punitive damages in the amount of One Million and No/100 Dollars ($1,000,000.00).

WHEREFORE, premises considered, the Cross-Claimant, Hallie C. Ormond prays for judgement against Mountain Enterprises, Inc. and Mass Merchandisers, Inc. for One Million and No/100 Dollars ($1,000,000.00) compensatory damages, One Million and No/100 Dollars ($1,000,000.00) punitive damages, for the cost of clean-up to restore the property, for his costs, attorneys' fees, and for any and all such further relief which he may be entitled.

WHEREFORE, premises further considered, the Third-Party Plaintiff, Hallie C. Ormond, prays for judgment against McKesson for One Million and No/100 Dollars ($1,000,000.00) compensatory damages, for the cost of clean-up to restore the property, for his costs, attorneys' fees, and for any and all such further relief which he may be entitled.

HALLIE C. ORMOND

By His Attorneys:

ARNOLD, GROBMYER & HALEY
One Union National Plaza
P.O. Box 70
Little Rock, Arkansas 72203
(501) 376-1171

By: Robert R. Ross

DOSHIER & BOWERS
P.O. Box 1797
Harrison, Arkansas 72601

By: Bill Doshier
Bill F. Doshier

FILED FOR RECORD
1986 SEP 11 PM 2:24
HELEN SPEER, CLERK
BY _____ D.C.

CERTIFICATE OF SERVICE

I, Robert R. Ross, do hereby certify that I have mailed a copy of the foregoing Cross-Claim and Third-Party Complaint to Phillip Diesch, P.O. Box 9583, Little Rock, Arkansas 72219, Allan Gates Atty For MMI, this 11th day of September, 1986.

Robert R. Ross

0386r

LEASE CONTRACT AND AGREEMENT

This Agreement made and entered into this 11th day of January, 1973, by and between HALLIE C. ORMOND and JEANNE M. ORMOND, his wife, and hereby made binding upon their heirs, successors, legal representatives and/or trustees, hereinafter designated as GRANTORS, and Mountain Enterprises, Inc. a Corporation being a wholly own subsidiary of MASS MERCHANDISERS, INC., an Arkansas Corporation, and hereby made binding upon the successors and/or assigns of the said Mountain Enterprises, Inc. and MASS MERCHANDISERS, INC., jointly and severally, hereinafter designated as GRANTEES, W I T N E S S E T H :

That the GRANTORS for the considerations, purposes, covenants and agreements as hereinafter set out do hereby lease, let and demise unto the said GRANTEES, the following lands in Boone County, Arkansas, to-wit:

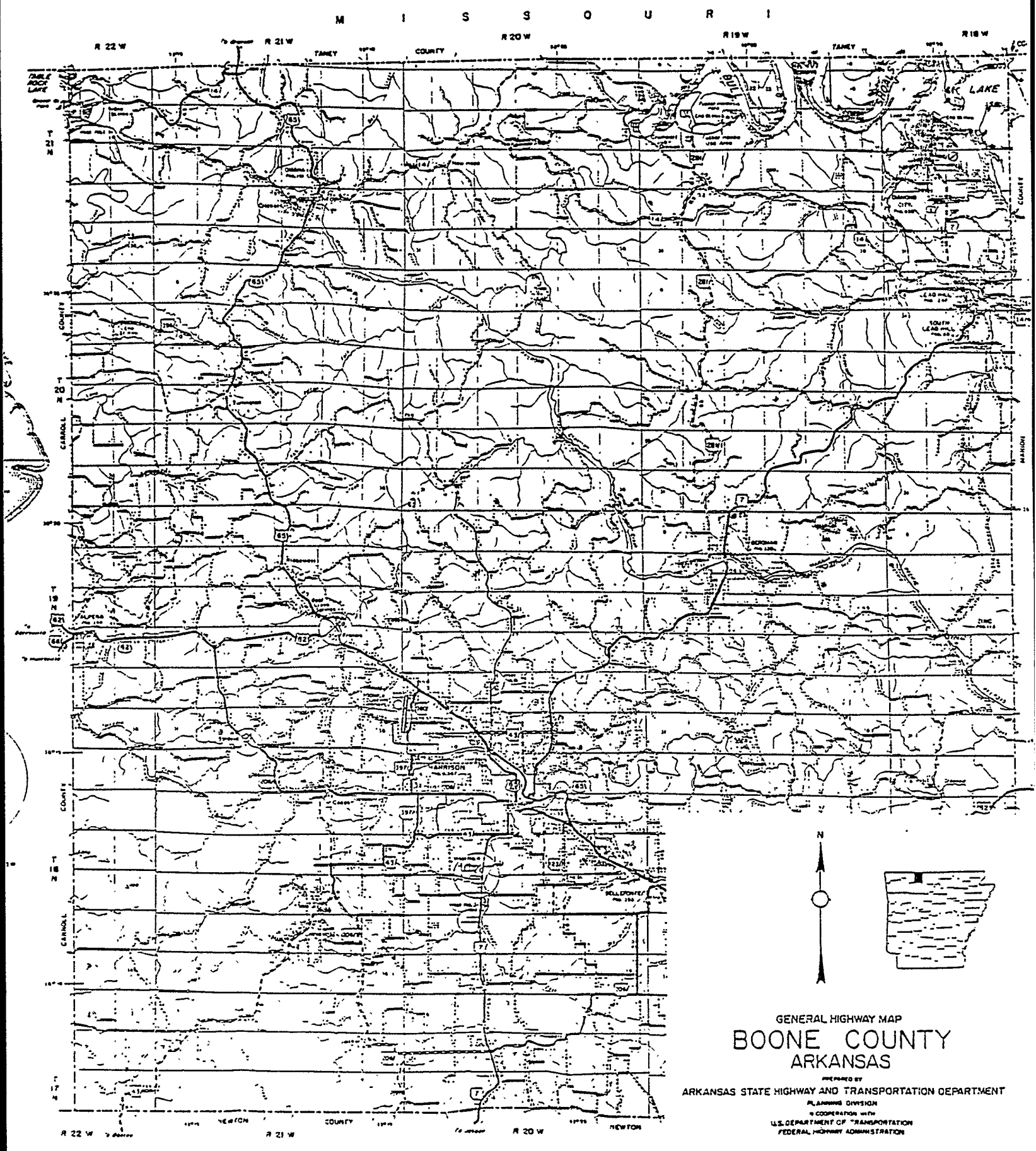
A part of the Northwest Quarter Southeast Quarter, North Half, Southwest Quarter and South Half Northwest Quarter, all in Section 27, Township 21 North, Range 21 West, Boone County, described as follows:

Beginning at the Southwest Corner of the Northwest Quarter Southwest Quarter, thence North 990 feet to the center of Clary Road; thence in a Northeasterly direction in the center line of said road 1172.6 feet to the North side of the said Northwest Quarter Southwest Quarter at a point 965 feet East of the Northwest Corner thereof; thence North 32 Degrees East along and with the center of said Clary Road 390 feet to the center of Boone County paved road; thence North 31 Degrees West and with the center of said Boone County paved road 235 feet to Missouri Pacific Railroad Right-of-Way at a point 150 feet Southwesterwardly from and radially to the existing center line of Missouri Pacific Railroad main track; thence Northwestwardly parallel with said existing center line 370 feet; thence Northeastwardly, by a straight line, radially to said existing center line of said main track 100 feet to a point 50 feet Southwestwardly from and radially to said existing center line; thence Southwestwardly parallel with said existing center line 1497 feet to a point 50 feet Southwestwardly from and radially to said existing center line; thence Southwestwardly, by a straight line, radially to said existing center line 135 feet; thence Southeastwardly, parallel with said existing center line 244 feet; thence Northeastwardly, by a straight line, radially to said existing center line 100 feet; thence Southwest along the North side of lands described in Deed dated February

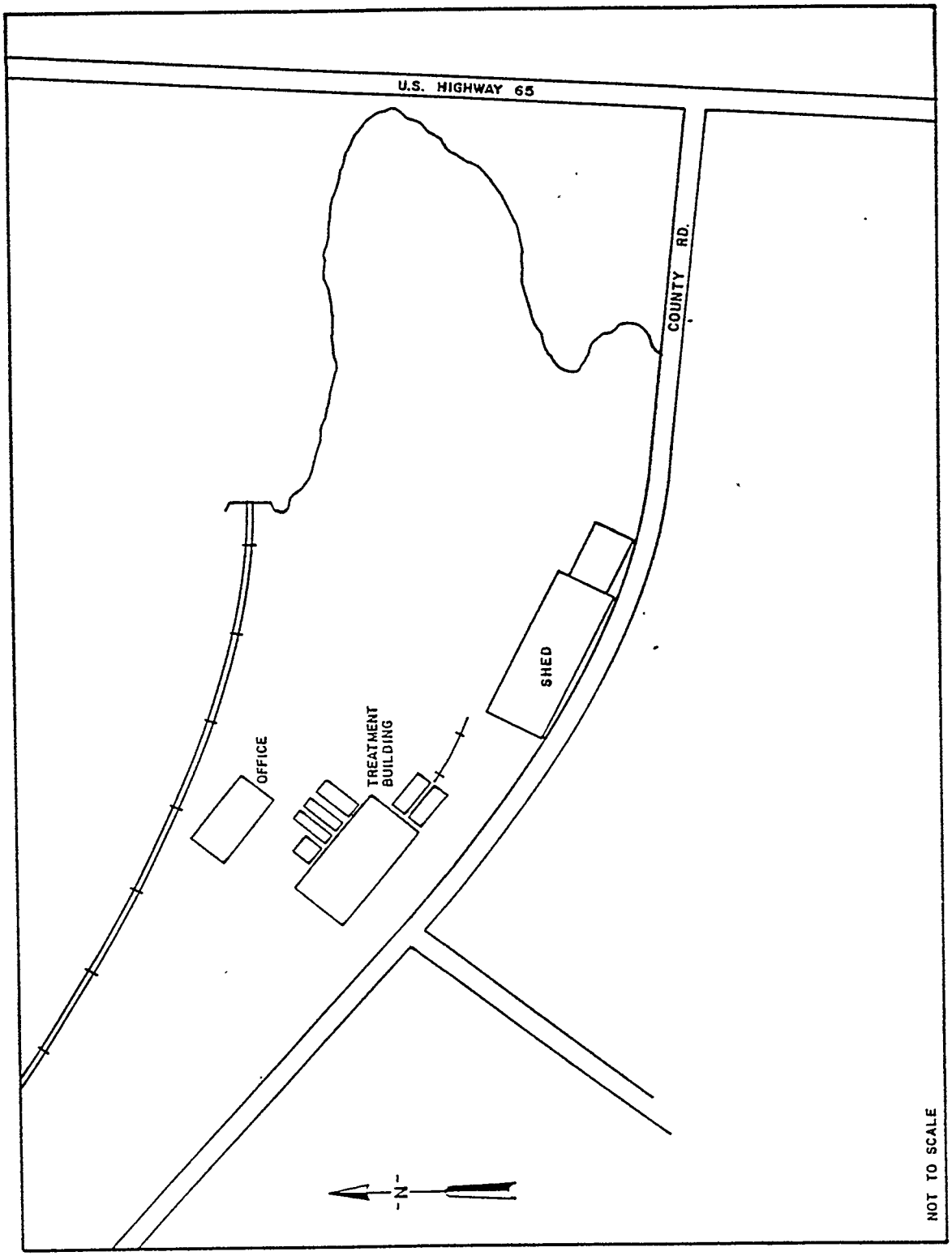
Outline

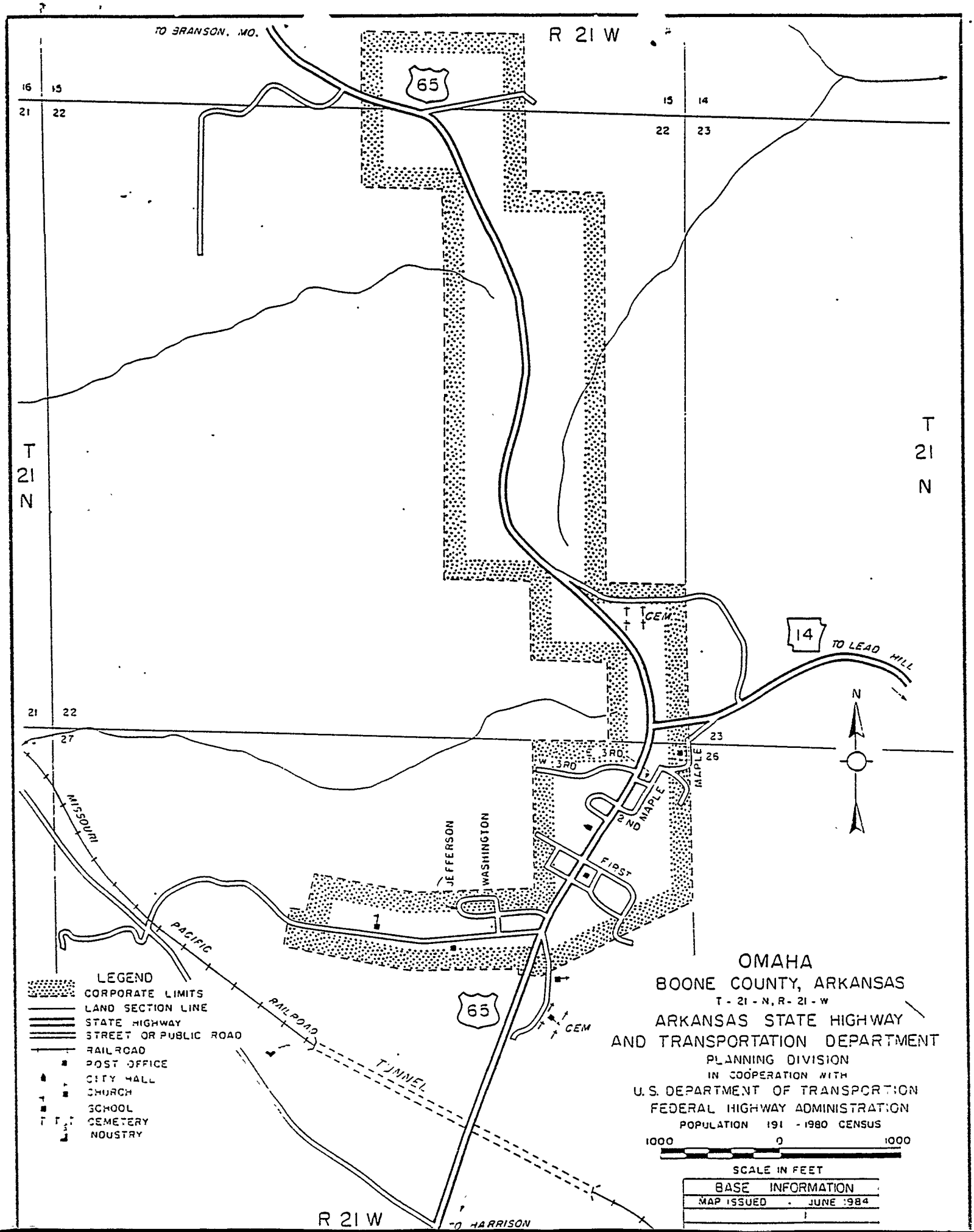
TECHNICAL PRESENTATION

- CHRONOLOGY
- GEOLOGY AND HYDROGEOLOGY
- HISTORY OF INVESTIGATION
- INTERPRETATION OF ANALYTICAL RESULTS
- INTERIM ACTIONS
- HYDROGEOLOGIC ASSESSMENT


M I S S O U R I
R 22 W
R 21 W
R 20 W
R 19 W
R 18 W
TANEY
COUNTY
T 21 N
T 20 N
T 19 N
T 18 N
T 17 N
CARROLL
COUNTY
MARION
COUNTY
NEWTON
COUNTY
HARRISON
BELLEFONTE
N
GENERAL HIGHWAY MAP
BOONE COUNTY
ARKANSAS
PREPARED BY
ARKANSAS STATE HIGHWAY AND TRANSPORTATION DEPARTMENT
PLANNING DIVISION
IN COOPERATION WITH
U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION

Geraghty & Miller, Inc.




TO BRANSON, MO.
R 21 W
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16
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T 21 N
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CEM
14
TO LEAD HILL
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21
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27
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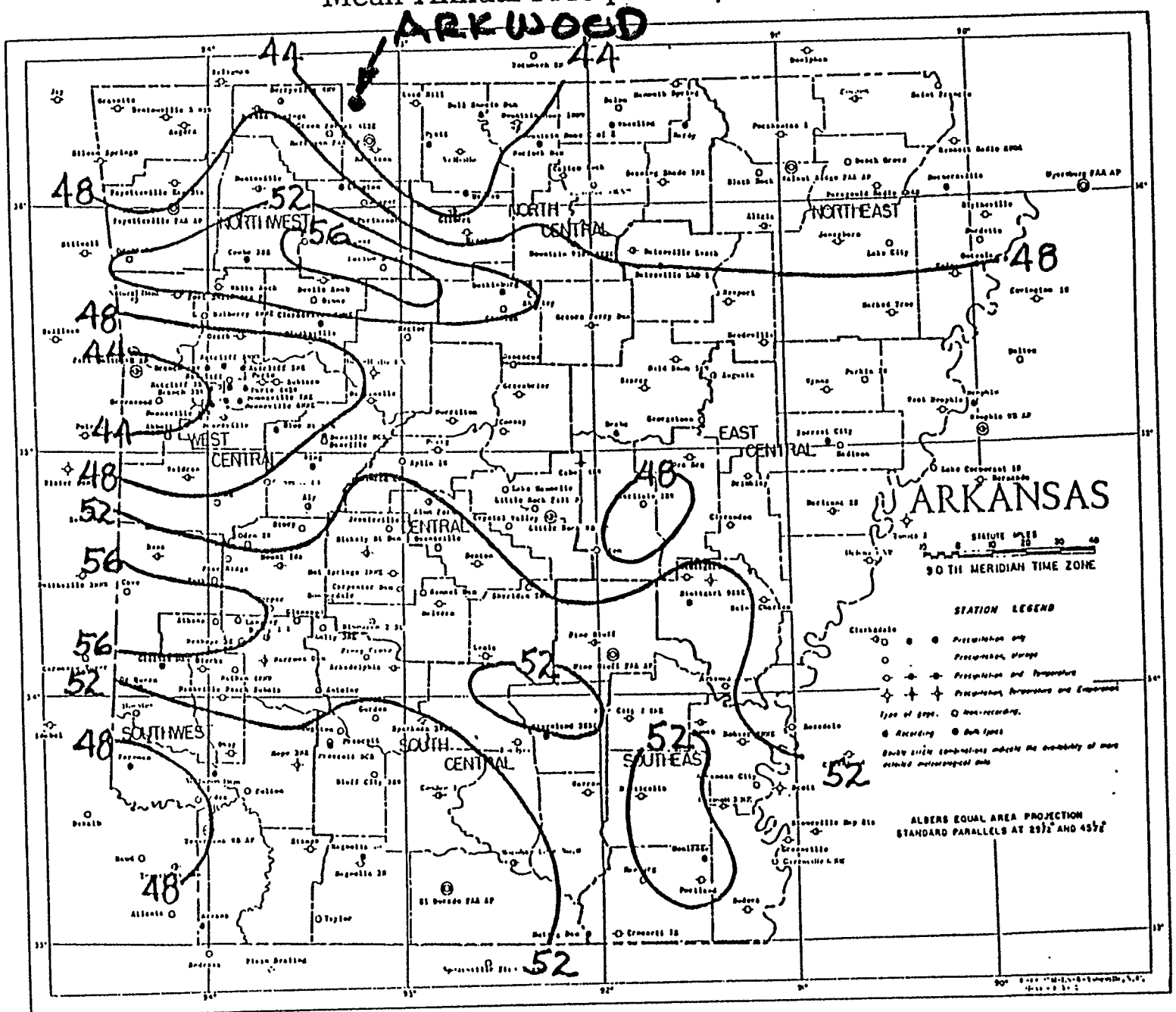
26
W. 3RD
E. 3RD
MAPLE
2ND MAPLE
MISSOURI
JEFFERSON
WASHINGTON
FIRST
PACIFIC
RAILROAD
TUNNEL
65
CEM
LEGEND
CORPORATE LIMITS
LAND SECTION LINE
STATE HIGHWAY
STREET OR PUBLIC ROAD
RAILROAD
POST OFFICE
CITY HALL
CHURCH
SCHOOL
CEMETERY
INDUSTRY
OMAHA
BOONE COUNTY, ARKANSAS
T - 21 - N, R - 21 - W
ARKANSAS STATE HIGHWAY
AND TRANSPORTATION DEPARTMENT
PLANNING DIVISION
IN COOPERATION WITH
U. S. DEPARTMENT OF TRANSPORTION
FEDERAL HIGHWAY ADMINISTRATION
POPULATION 191 - 1980 CENSUS
1000
0
1000
SCALE IN FEET
BASE INFORMATION
MAP ISSUED - JUNE 1984
R 21 W
TO HARRISON

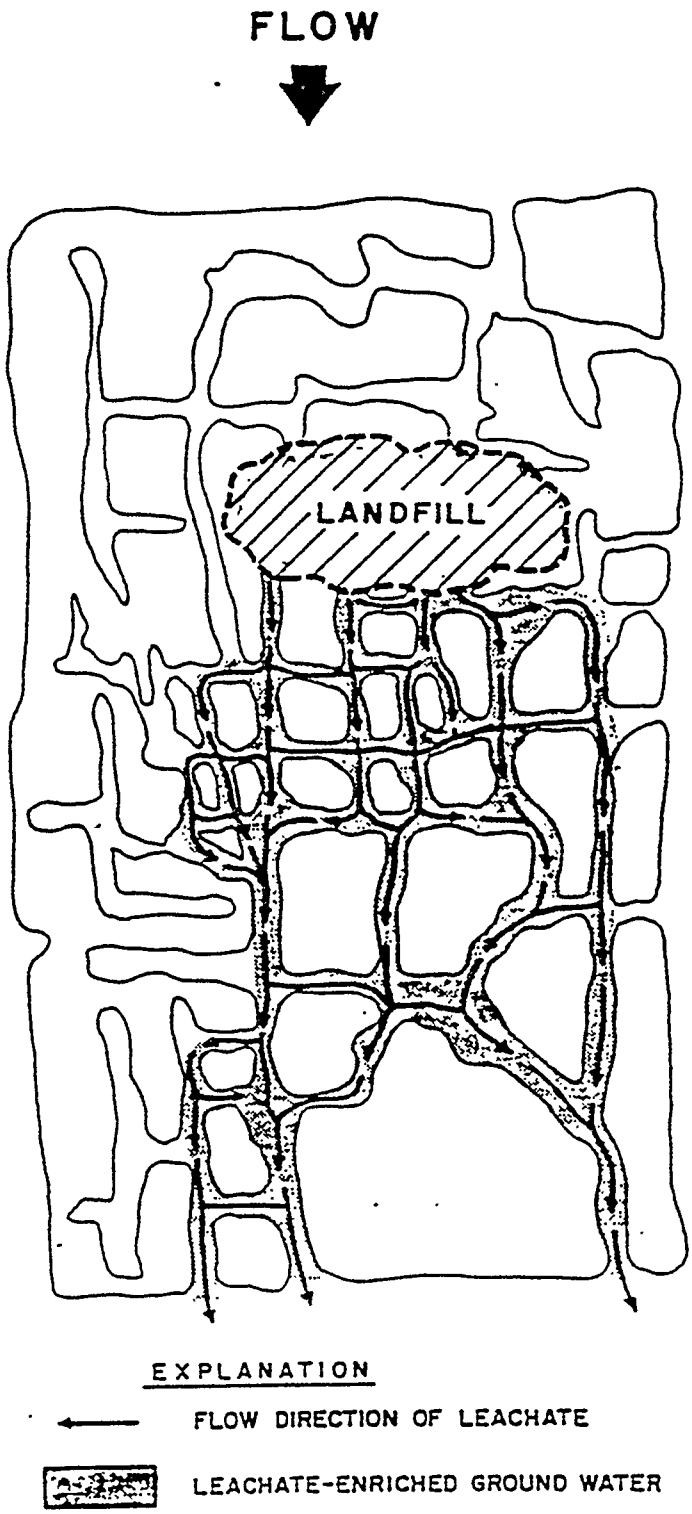
Mean Annual Precipitation, Inches



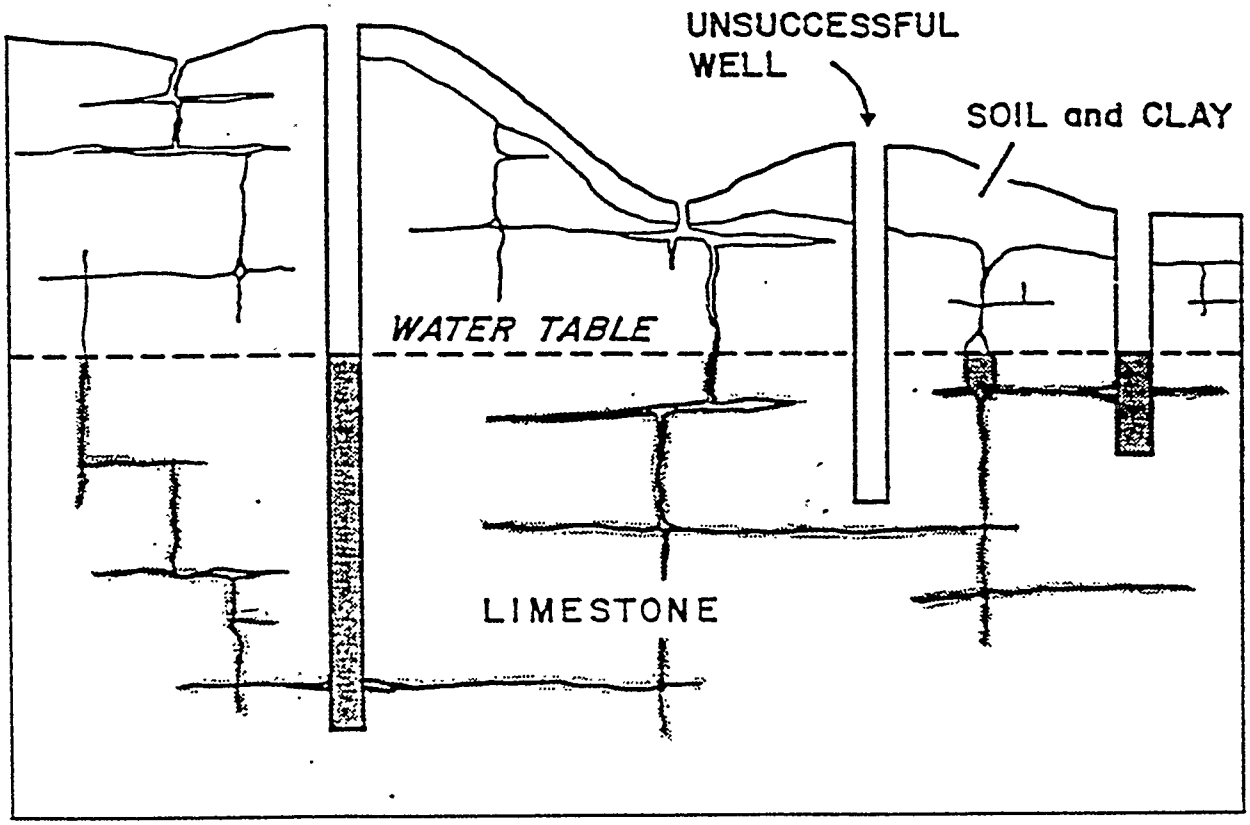
Based on period 1931-1960
Isolines are drawn through points of approximately equal values. Caution should be used in interpolating on these maps, particularly in mountainous areas.

PRECIPITATION (In.)

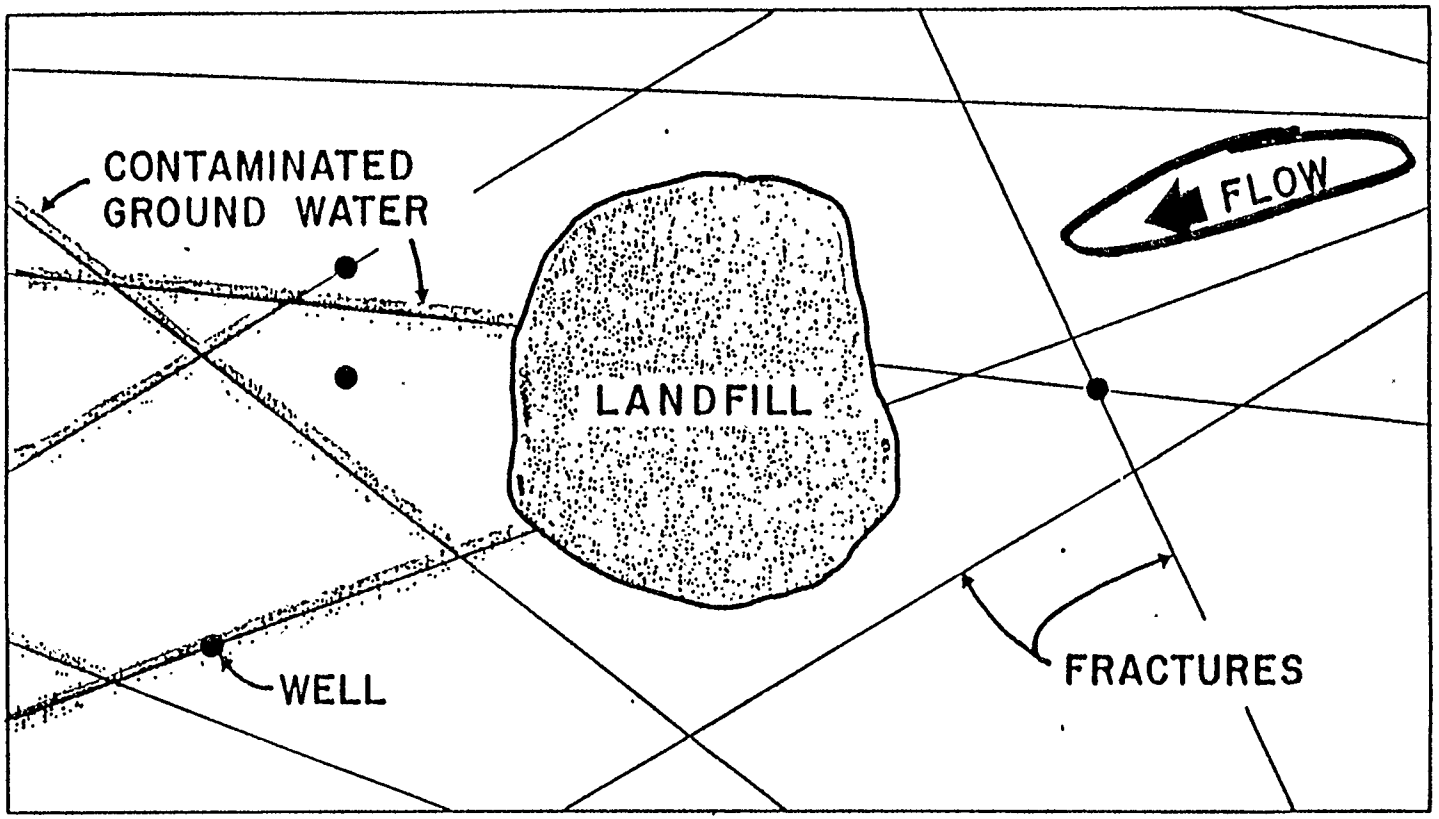
STATIONS (By Divisions)	JAN	FEB	MAR	APR	MAY	JUNE	JULY	AUG	SEPT	OCT	NOV	DEC	ANN
NORTHWEST													
EUREKA SPRINGS	2.77	3.17	3.84	4.48	6.55	5.61	3.89	3.69	4.35	3.71	3.55	2.83	48.44
FAYETTEVILLE EXP STA	2.56	3.04	3.36	4.77	5.98	5.07	3.63	3.38	4.10	3.55	3.23	2.54	45.21
GRAVETTE	2.34	2.91	3.46	4.70	6.18	5.21	3.15	3.28	4.52	3.71	3.04	2.46	44.96
HARRISON	•	•	•	•	•	•	•	•	•	•	•	•	•
LEAD HILL	2.68	3.20	3.26	4.06	5.15	4.52	3.45	3.02	3.23	2.99	3.20	2.52	41.28
ROGERS	2.58	3.02	3.52	4.57	6.09	5.39	3.92	3.57	4.64	3.77	3.23	2.47	46.77
DIVISION	2.57	3.13	3.53	4.59	6.08	5.14	3.59	3.31	4.08	3.57	3.25	2.57	45.85



Plan view of flow of contaminated ground water in aquifer with solution porosity.

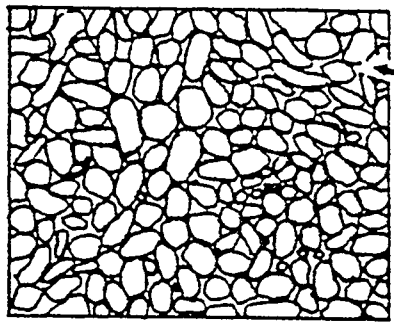


Occurrence of ground water in a crevice system
(Davis and DeWeist, 1966).

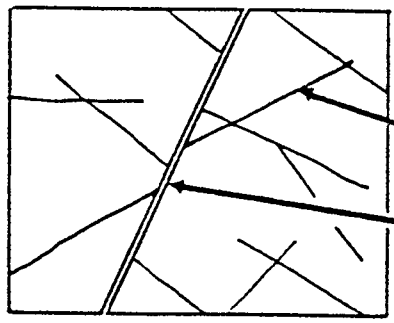


Plan view of contaminated ground water in bedding planes and fractures in a rock aquifer, caused by leachate from a landfill (Miller et al., 1974).

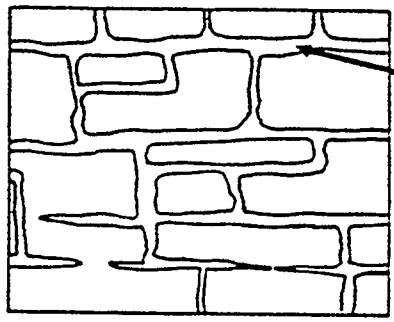
Sand and Gravel



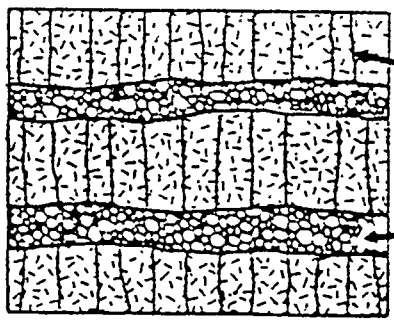
Consolidated Rock

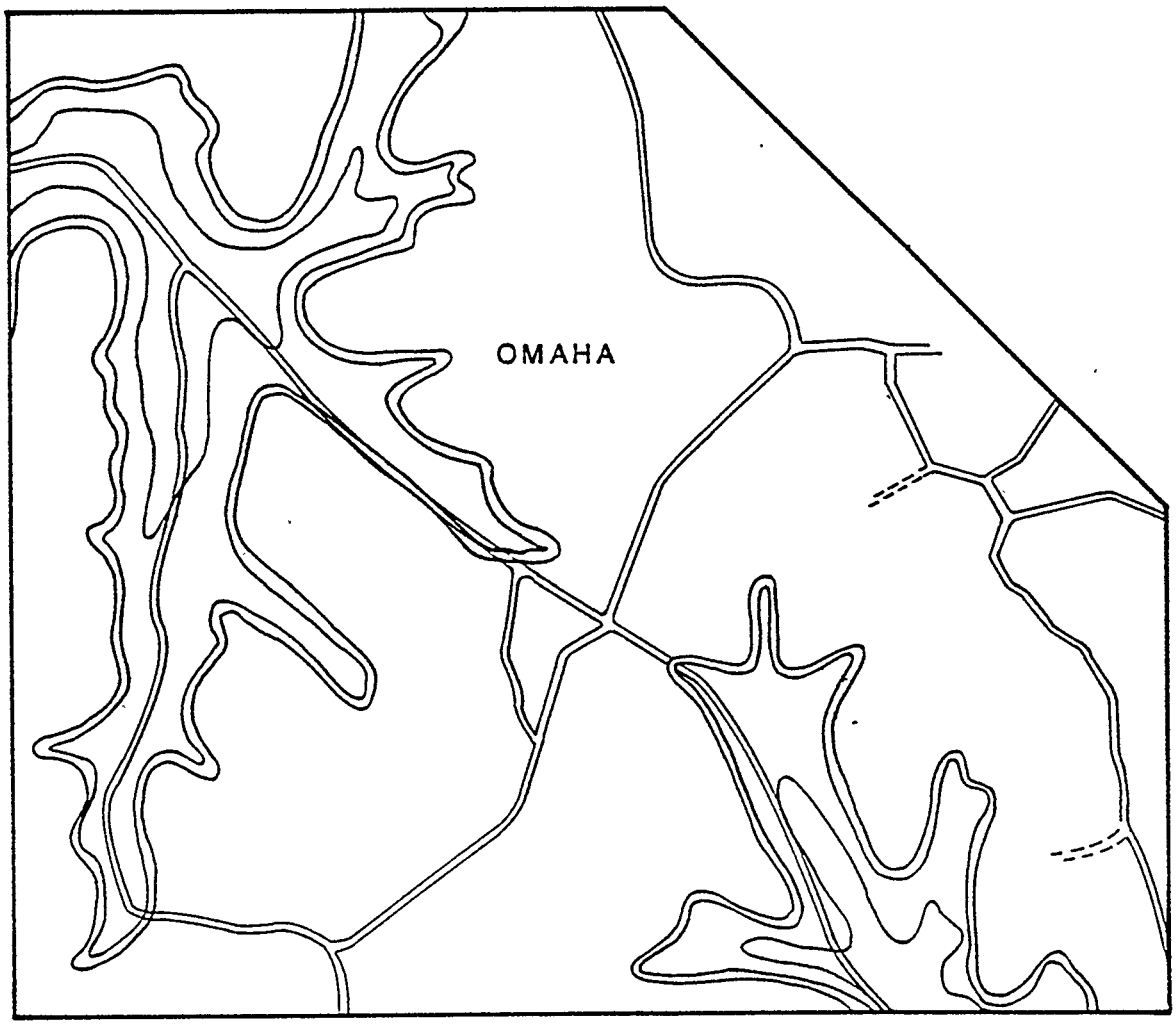


Carbonate Rock



Volcanic Rock





GEOLOGIC UNITS Arkwood	Approx. Thickness (ft.)
BOONE FORMATION- LIMESTONE, RED CLAY AND CHERT WHERE WEATHERED	100
ST. JOE MEMBER- CRYSTALINE LIMESTONE HIGHLY SOLUABLE (SPRINGS AT BASE)	30
CHATTANOOGA SHALE- CLAY/SHALE LOW PERMEABILITY	30
POWELL DOLOMITE/LIMESTONE, DENSE, LOW PERMEABILITY	300
COTTER DOLOMITE-WATER BEARING ZONE (NOT EXPOSED)	500

EXTERNAL EFFECTS ON HYDROGEOLOGIC SYSTEM

- TUNNEL COLLAPSE
  - Blasting
  - Rebuilding
- TRAIN DERAILMENT
- FLOODS
- DROUGHTS

REPLACEMENT WELL ☐

STATE OF ARKANSAS
Report of Water Well Construction

County in which well is located: ~~CO~~ BOONE

...OR Bud ESSARY
...TOR Bill Aynold
...R LICENSE NO. C1077
... OF DRILLER Bill Aynold
DRILLER REGISTRATION NO. ~~D2140~~ D2141
DATE WELL WAS COMPLETED 7 (MO.) 15 (DAY) 76 (YR.)

Well is near Cricket road, approximately 1 miles N NE E SE S SW W NW of OMAHA (TOWN, ETC.)
Section 27, Township 21, Range 21.
Directions for reaching well: (use permanent landmarks) 1/4 mile West of Omaha High school

1. Total Depth of Well 300
2. Water Producing Formation: From 270 ft. To 215 ft.
3. Method of Construction:
Rotary ___ Cable X Driven ___ Jetted ___ Bored ___ Dug ___
4. Water Level Below Land Surface 160 ft.
5. Gallons per Hour 100 Gallons per Minute 1X
6. Well disinfected with Clorox
7. Cased to 10 ft. with 6" Diameter PVC Sch. 40 Casing
8. Cemented from ___ ft. to ___ ft.
9. Casing Perforated from ___ ft. to ___ ft.
10. Well ~~Backfilled with:~~ Bentonite & Clay from 0 ft. to 10 ft. (SAND, CLAY, CEMENT, MUD)
11. Gravel Pack from ___ ft. to ___ ft.
12. Screen Diameter: ___ inches from ___ ft. to ___ ft.
13. Type Screen ___ Fittings ___ Slot Size ___
14. Use of Well: ✓ DOMESTIC ___ IRRIGATION ___ MUNICIPAL ___ OTHER

Description and Color of Formation: (Sand, Shale, Sandstone, etc.)	Depths in Feet From	To
Clay & Rock	0	4'
white Limestone	4	73'
Shale & Lime	73	110'
Limestone & shale mixed	110	300

Remarks:

RECEIVED JUL 22 1976 COMMITTEE ON WATER WELL CONSTRUCTION

Signed: Bill Arnold
Date: 7 (MONTH) 20 (DAY) 76 (YEAR)

Mail to: Committee on Water Well Construction — 3815 W. Roosevelt Road — Little Rock, Arkansas 72204

GEOLOGY COPY

FORM NO. WD-1

STATE OF ARKANSAS

REPORT OF WATER WELL CONSTRUCTION

New Well X Work-over Well ____ Replacement Well ____

Owner of Well Bud ESSARY

Well Contractor Bill Arnold

Driller Name and No. John ROBERTS D2209

Date Well was Completed 7-20-81

1. Total Depth of Well 688 Ft.
2. Water Producing Formation: From 640 Ft. To 650 Ft.
3. Water Level Below Land Surface 300
4. Gallons per Hour 1100
5. Well Disinfected with Clorox
6. Casing to 50 Ft.
7. Cased with 6" Diameter PVC Casing
8. Cemented from 0 Ft. to 18 Ft.
9. Use of Well: X Domestic ____ Irrigation ____ Municipal ____ Other ____

County BOONE (in which well is located)

Well is near OMAHA School Road

Section 27 Township 21 Range 21

Directions for Reaching Well: 4 mi W. on (use permanent landmark) school on old Cotter Rd.

Description and Color of Formation (sand, shale, sandstone, etc.)	Depths in feet from	to
Rock & CLAY	0	48
BOONE LIME	48	260
St Joe Lime	260	310
Gray Lime	310	688

Remarks:

Signed: Bill Arnold Date: 8-10-81

Form No. AWD-3

Mail to: Committee on Water Well Construction, 2915 So. Pine Street, Little Rock, Arkansas 72204

GEOLOGY COPY

NEW WELL [X] REPLACEMENT WELL [ ]

STATE OF ARKANSAS
Report of Water Well Construction

County in which well is located: ~~Cri~~ BOONE

(Please print or type)

OWNER OF WELL: Bud Essary
WELL CONTRACTOR: Bill Arnold
CONTRACTOR LICENSE NO.: L1077
NAME OF DRILLER: Bill Arnold
DRILLER REGISTRATION NO.: ~~D2146~~ D2141
DATE WELL WAS COMPLETED: 7 (MO.) 15 (DAY) 76 (YR.)

Well is near: Cricket road, approximately 1/4 miles N NE E SE S SW W NW of OMAHA (TOWN, ETC.)
Section 27, Township 21, Range 21.
Directions for reaching well: (use permanent landmarks) 1/4 mile West of Omaha High school

1. Total Depth of Well: 300
2. Water Producing Formation: From 270 ft. To 215 ft.
3. Method of Construction:
Rotary ___ Cable X Driven ___ Jetted ___ Bored ___ Dug ___
4. Water Level Below Land Surface: 160 ft.
5. Gallons per Hour: 100 Gallons per Minute: 1x
6. Well disinfected with: Clorox
7. Cased to 10 ft. with 6" Diameter PVC Sch. 40 Casing
8. Cemented from ___ ft. to ___ ft.
9. Casing Perforated from ___ ft. to ___ ft.
10. Well ~~Backfilled with:~~ Bentonite & Clay from 0 ft. to 10 ft. (SAND, CLAY, CEMENT, MUD)
11. Gravel Pack from ___ ft. to ___ ft.
12. Screen Diameter: ___ inches from ___ ft. to ___ ft.
13. Type Screen ___ Fittings ___ Slot Size ___
14. Use of Well: ✓ DOMESTIC ___ IRRIGATION ___ MUNICIPAL ___ OTHER

Description and Color of Formation: (Sand, Shale, Sandstone, etc.)	Depths in Feet From	To
Clay & Rock	0	4'
white Limestone	4	73'
shale & Lime	73	110'
limestone & shale mixed	110	300

Remarks:

RECEIVED JUL 22 1976 COMMITTEE ON WATER WELL CONSTRUCTION

Signed: Bill Arnold
Date: 7 (MONTH) 20 (DAY) 76 (YEAR)

Mail to: Committee on Water Well Construction — 3815 W. Roosevelt Road — Little Rock, Arkansas 72204

GEOLOGY COPY

FORM NO. WD-1

STATE OF ARKANSAS

REPORT OF WATER WELL CONSTRUCTION

New Well ✓ Work-over Well ____ ~~Replacement Well~~ ____

Owner of Well Robert Bahrens Bob Barker ARK-Woods County Boone (In which well is located)

Contractor Harold L. Kirk 1151

Driller Name and No. Harold L. Kirk D2512

Date Well was Completed 7-17-82

Well is near County Road

Section 27 Township 21N Range 24W

Directions for Reaching Well: 1/2 m.s. Omaha 4 1/2 mi. W. (use permanent landmark)

1. Total Depth of Well 565 Ft

2. Water Producing Formation: From 274 Ft. To 274½ Ft.
More water in flinty lime - 380' to 387'

3. Water Level Below Land Surface 240'

4. Gallons per Hour 500

5. Well Disinfected with 65% Chlorine Granules

6. Casing to 54½ Ft.

7. Cased with 7 4" Diameter New Steel Casing

8. Cemented from 0 Ft. to 12 Ft.

9. Use of Well: Domestic Irrigation Municipal Other

Description and Color of Formation (sand, shale, sandstone, etc.)	Depths from	in feet to
Top soil + chunk chert	0	20
Mostly " " + shale	20	32
Boone lime	32	36
Brittle broken lime	36	38
Boone lime	38	40
Brittle lime + mud	40	46
Grey lime	46	380
" flinty-lime	380	387
Dolomite lime	387	565

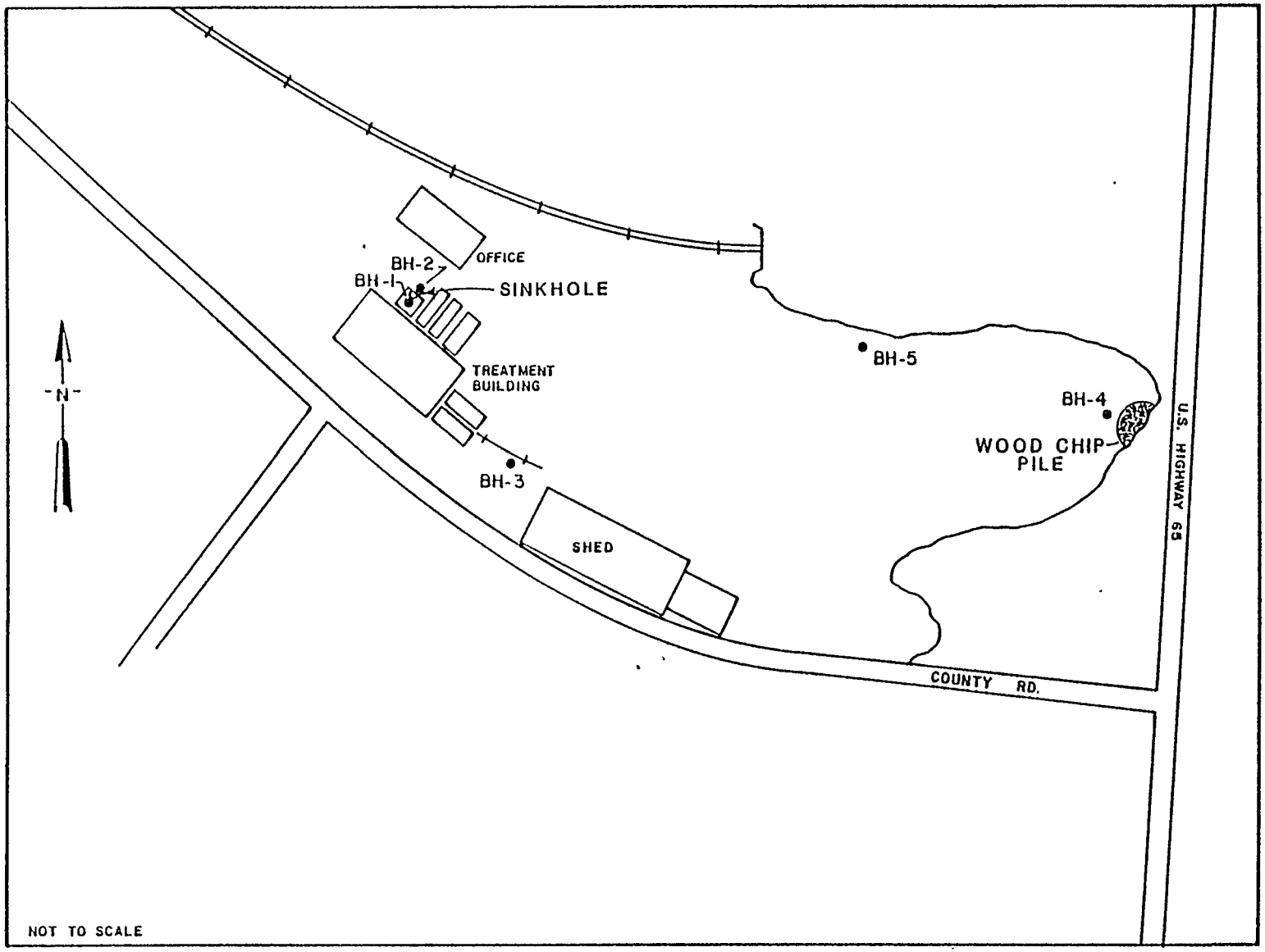
Remarks:

Signed: Harold L. Kirk Date: 7-20-82

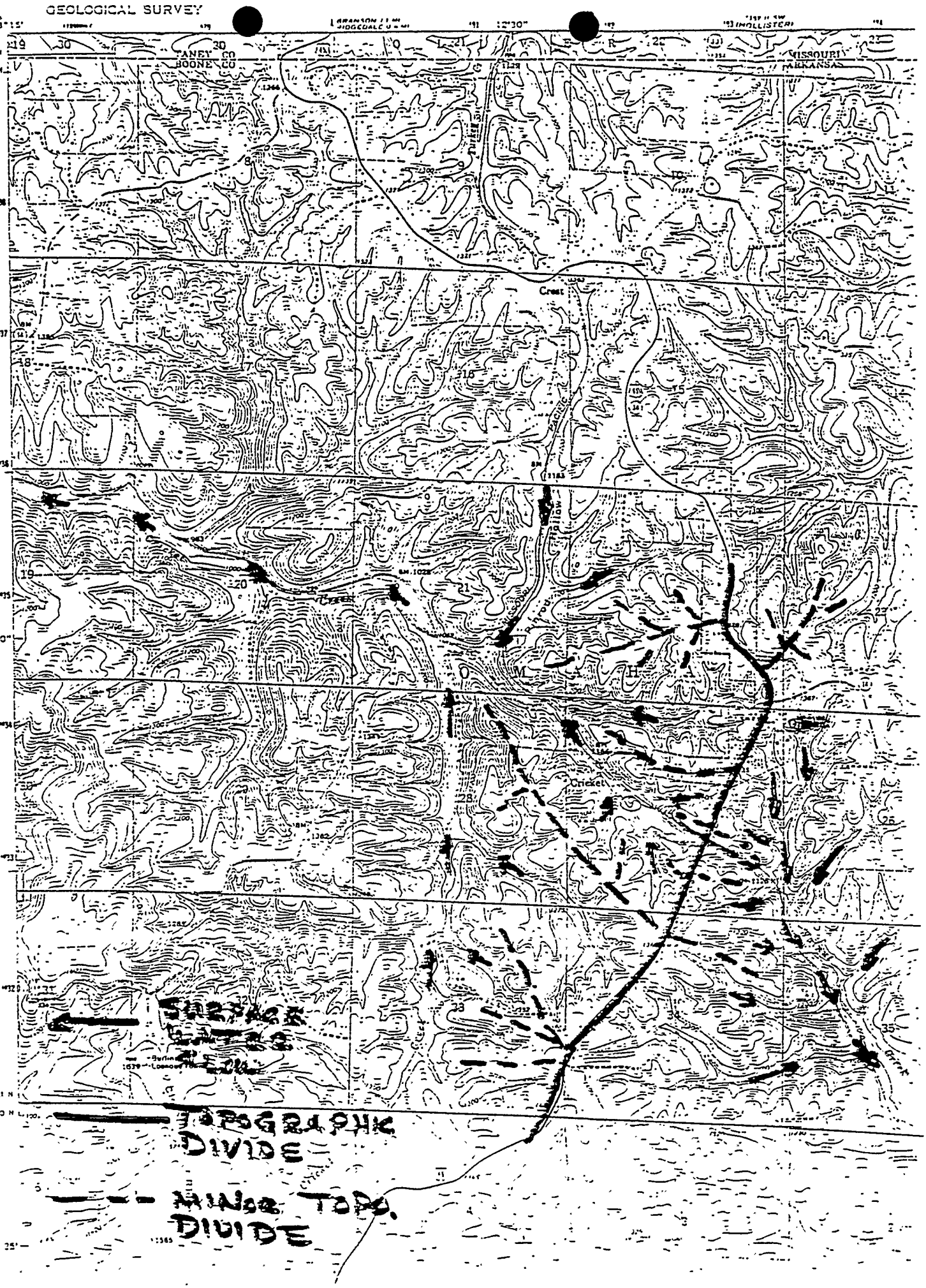
Form No. AWD-3

Mail to: Committee on Water Well Construction, 2915 So. Pine Street, Little Rock, Arkansas 72204

CUSTOMER COPY



Geraghty & Miller, Inc.


GEOLOGICAL SURVEY
TANEY CO
BOONE CO
MISSOURI
ARKANSAS
Crest
Cricket
SURFACE
WATER
TOPOGRAPHIC
DIVIDE
MINOR TOPO.
DIVIDE

Geraghty & Miller, Inc.

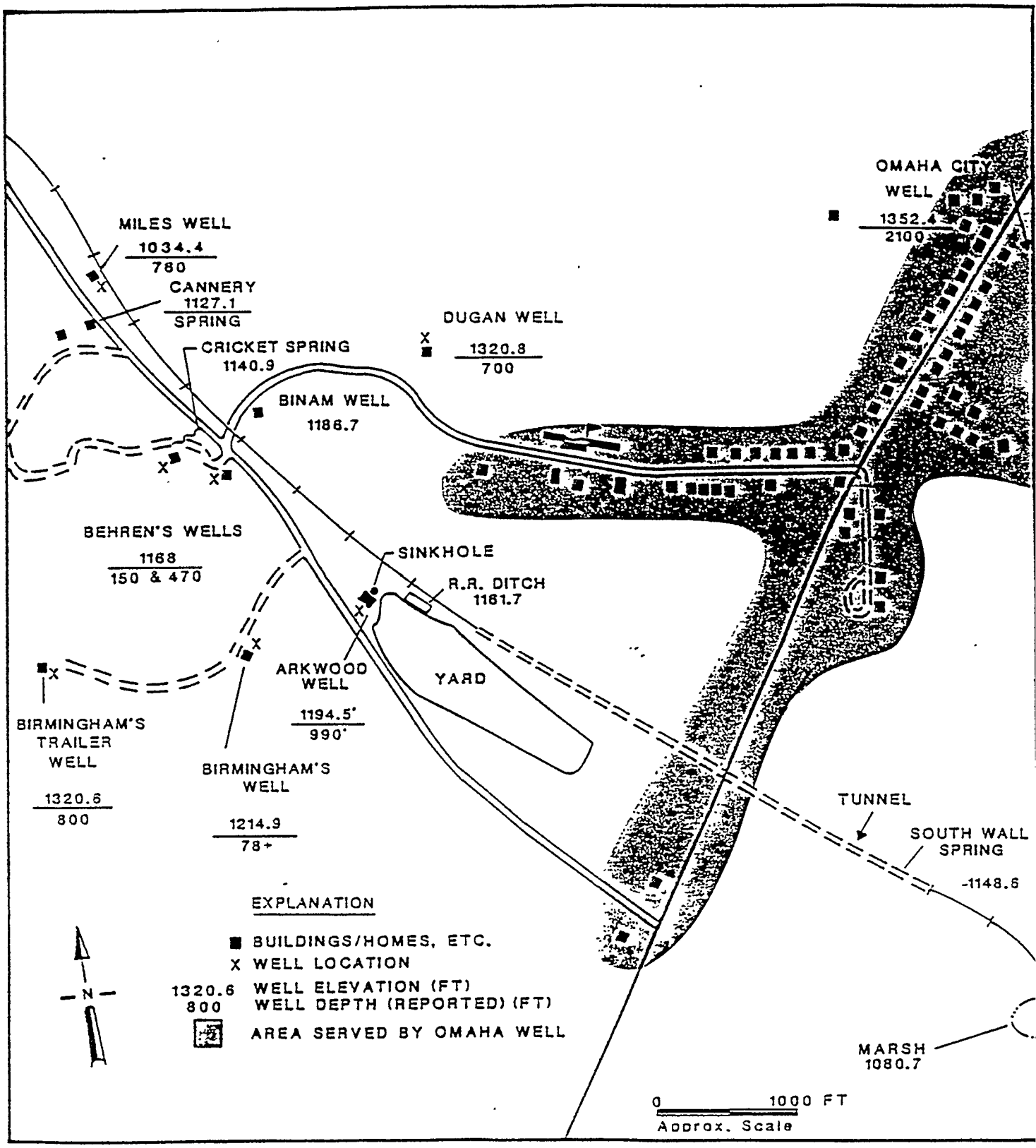


TABLE I

Summary of Drilling Locations

Borehole No.	Location	Drilling Method	Total Depth (Ft)
BH-1	Concrete pad 3.5 ft north of treatment building, 4.0 ft east of west edge of concrete pad	Mud rotary with tri-cone bit	8.53
BH-2	11.5 ft north of BH-1 (5 ft north edge of concrete pad)	Mud rotary with tri-cone bit	14.50
BH-3	Approximately 75 ft southeast of southeast end of treatment building, on south side of trolley track leading out of treatment cylinder	Solid-stem auger to 7 ft depth mud rotary wiith tri-cone bit, split spoon and core barrel	37.00
BH-4	Southeast end of stack yard, adjacent to wood chip pile	Solid-stem auger	10.00
BH-5	Northeast side of stack yard approximately 250 ft east of treatment building	Solid-stem auger	10.00

TABLE II
Lithologic Log of Soil Boring BH-1

Description	Depth (ft)	Thickness (ft)
Concrete slab.....	0 - .33	.33
Void.....	.33- 1.33	1.0
Oily water (app. 60% H_2O, 30% oil, 10% solids).....	.33- 5.33	4.0
Boone Limestone.....	5.33- 8.5	3.2

Lithologic Log of Soil Boring BH-2

Description	Depth (ft)	Thickness (ft)
Redclay matrix with 50% chert fragments, strong odor of aromatic hydrocarbons.....	0 - 2.5	2.5
Red clay matrix with 50-70% chert fragments, strong odor of aromatic hydrocarbons.....	2.5 - 9.0	6.5
100% clay (no chert fragments) slight odor of aromatic hydrocarbons.....	9.0 - 10.0	1.0
Red clay matrix with approximately 25% chert fragments, slight odor of aromatic hydrocarbons.....	10 - 12	2.0
Boone Limestone massive, reddish-brown matrix with 30% chert fragments and numerous clay stringers.....	12 - 14.5	2.5

TABLE III

Sampling Locations and Water Quality Results, Arkwood Plant

Sample No.	Location	Acid Extractable Organic Compounds in Parts per billion	Base Neutral Extractable Organic Compounds (PNA's) in parts per billion
BH-1-1	"Sinkhole" along north side of treatment plant	PCP (84,700)	Naphthalene (68) Acenaphthylene (28) Phenanthrene (36) Anthracene (15) Pyrene (trace)
OM201	Cricket Spring, approximately 0.15 miles NW of Arkwood well	PCP (3,320) 2 Methyl 4 6 Dinitrophenol (trace)	ND*
OM202	Birmingham's old well approximately 0.10 miles NW of Arkwood well.	ND*	ND*
OM203	Disposal ditch, approximately 325 ft NE of Arkwood well.	PCP (5,038)	Acenaphthene (trace) Phenanthrene (271) Fluoranthene (99) Pyrene (174)
OM204	Willy Tate residence approximately 1.0 mile NW of Arkwood well.	ND*	Phenanthrene (trace)
OM205	Spring at SE end of RR tunnel, approximately 0.6 miles SE of Arkwood well.	ND*	ND*

*ND - Not Detected

Lithologic Log of Soil Boring BH-3

Description	Depth (ft)	Thickness (ft)
Clay matrix, red, dry & sticky with varying amounts of chert fragments, strong odor of aromatic hydrocarbons.....	0 - 18	18
100% clay matrix with trace chert fragments, strong odor of aromatic hydrocarbons.....	18 - 20	2
75% clay matrix with 25% chert fragments, no noticeable odor of aromatic hydrocarbons, Lost drilling fluid circulation at 26.5 ft depth.....	20 - 26.5	6.5
Void (Lost circulation zone).....	26.5 - 30.0	3.5
Boone Limestone matrix, 25% chert fragments, numerous clay stringers (recovered 4 ft core) Terminated drilling at 37 ft depth.....	33 - 37	4.0

Lithologic Log for Soil Boring BH-4

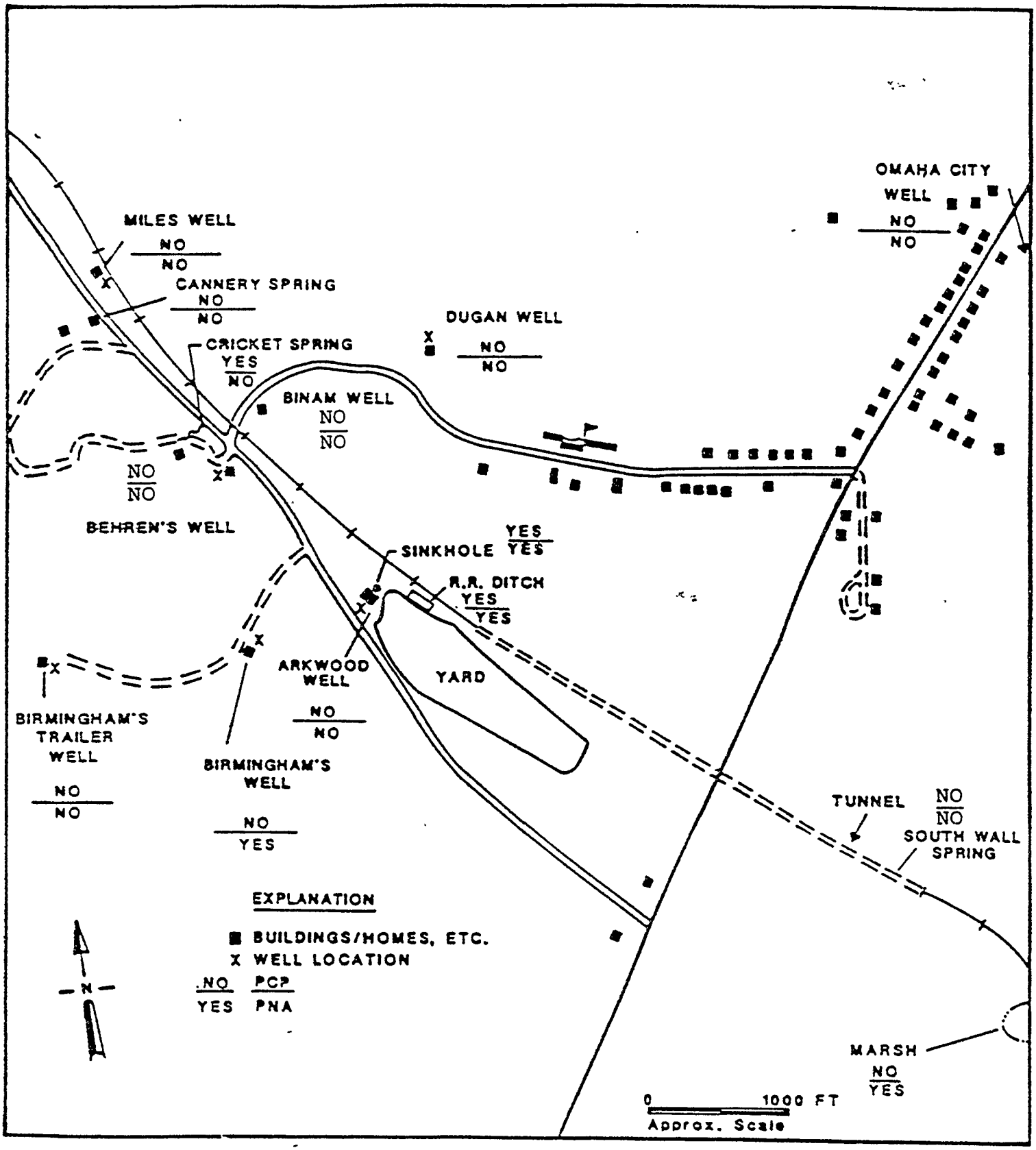
Description	Depth (ft)	Thickness (ft)
Clay matrix, red, 50-70% chert fragments, clay is plastic and sticky. Noticeable aromatic hydrocarbon odor.....	0 - 10	10

Augering terminated at 10 ft depth

Lithologic Log for Soil Boring BH-5

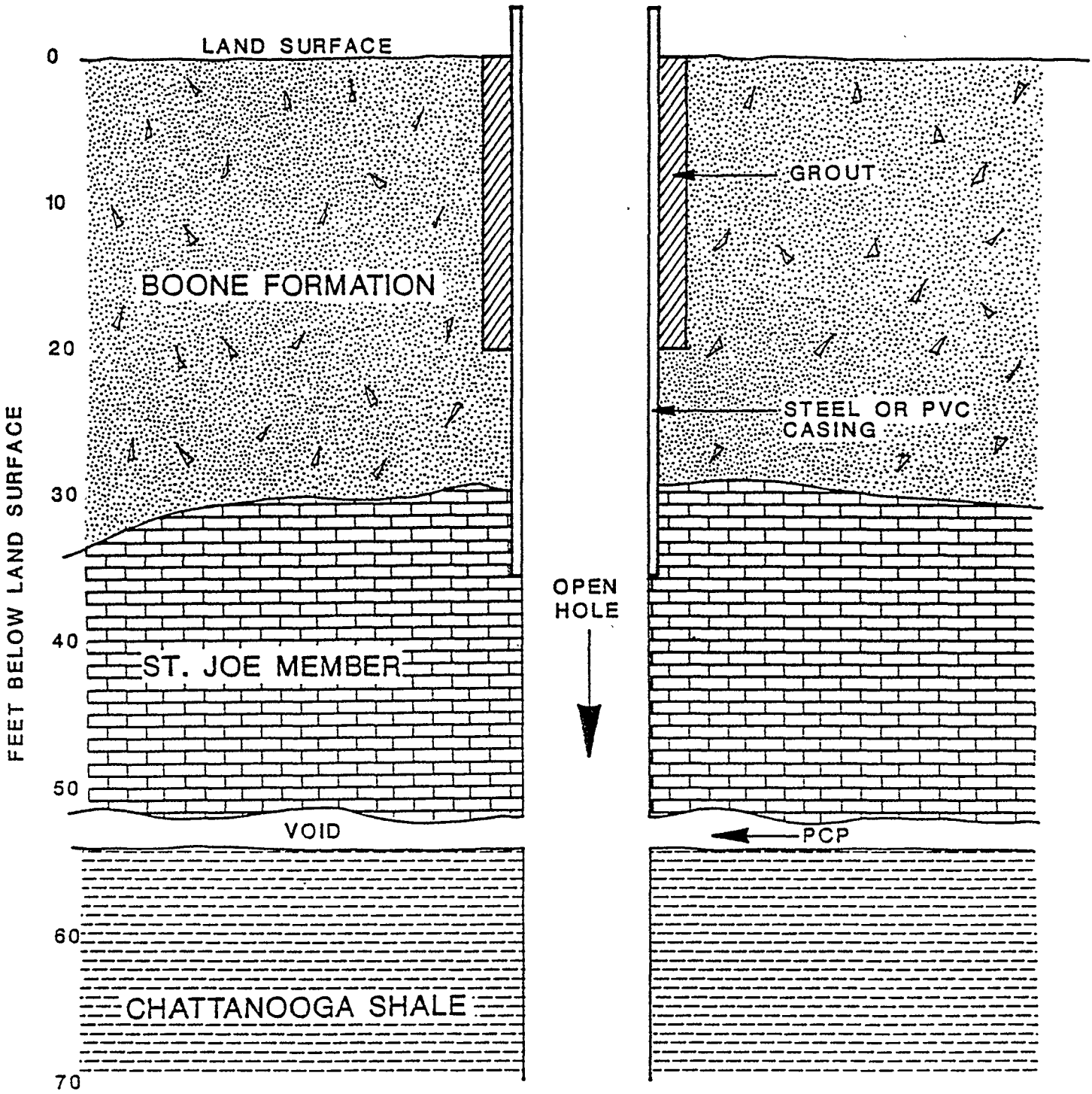
Description	Depth (ft)	Thickness (ft)
Clay matrix, red, plastic and sticky, 50% chert fragments, No detectable odor of aromatic hydrocarbons.....	0 - 10	10

Geraghty & Miller, Inc.

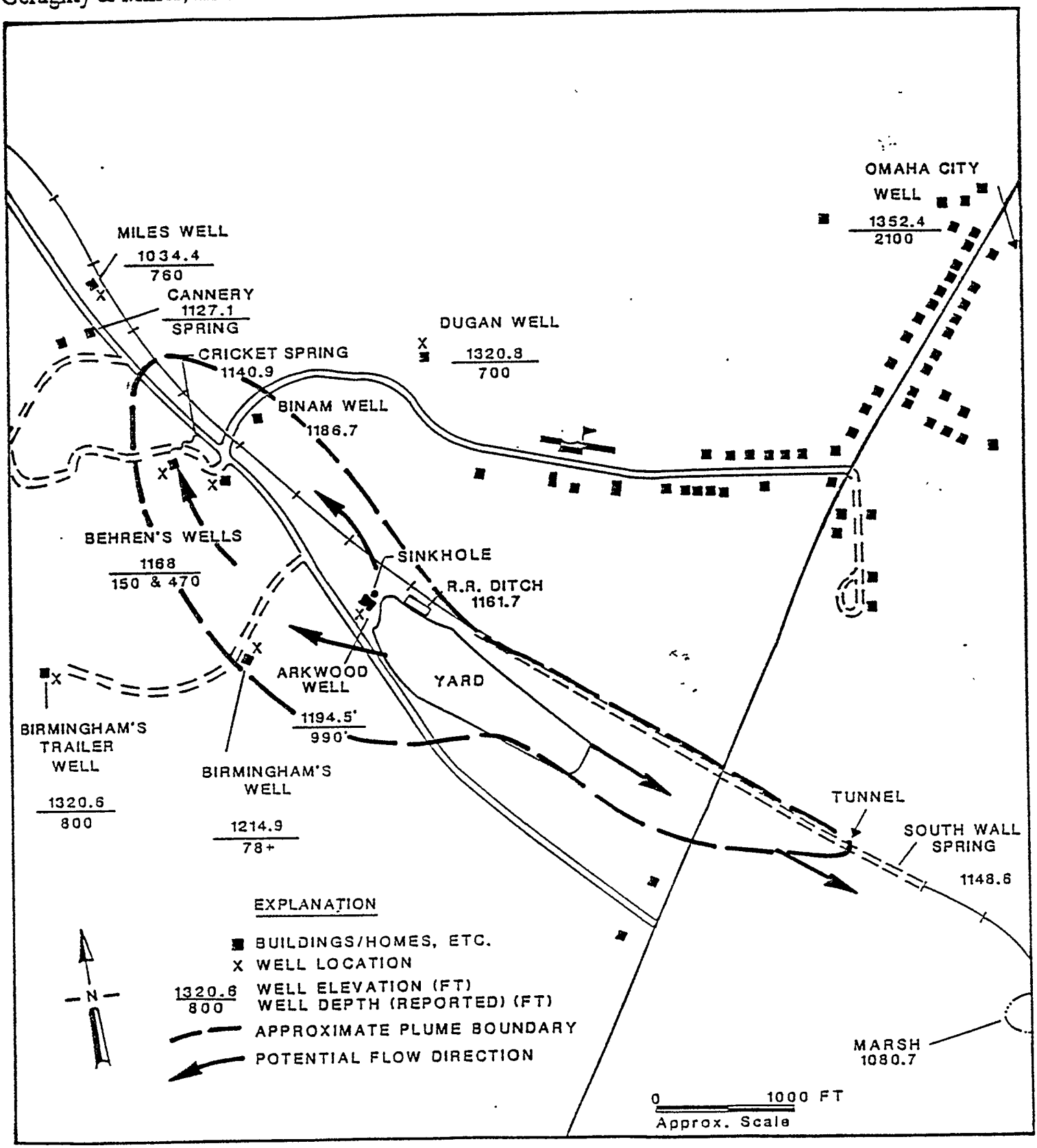


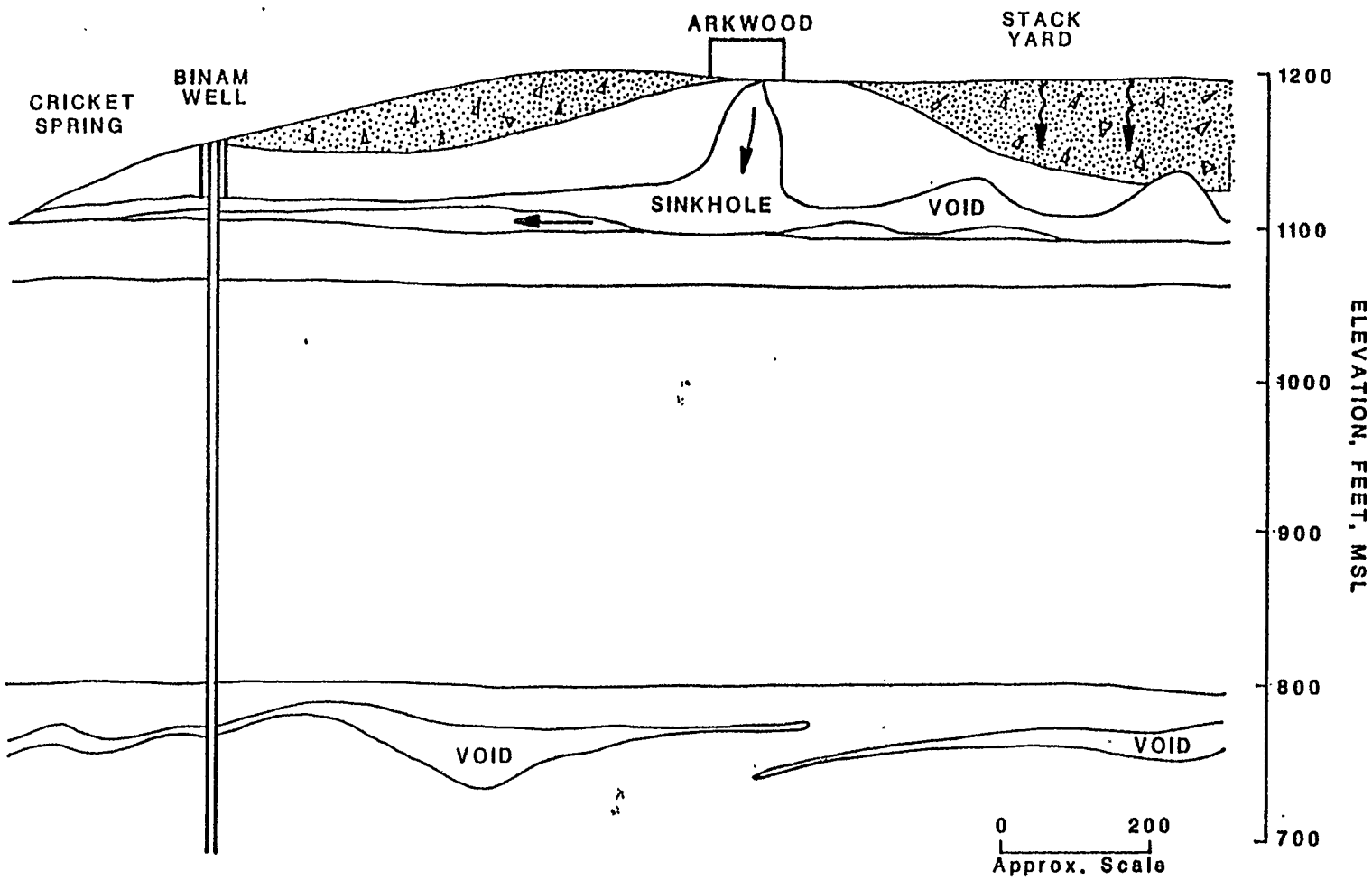
POTENTIAL SOURCES

1. SINKHOLE
2. RAILROAD DITCH
3. STACK YARD, INCLUDING WOOD CHIP PILE


LAND SURFACE
0
10
20
30
40
50
60
70
FEET BELOW LAND SURFACE
BOONE FORMATION
ST. JOE MEMBER
VOID
CHATTANOOGA SHALE
OPEN HOLE
GROUT
STEEL OR PVC CASING
PCP

Geraghty & Miller, Inc.





EXPLANATION

- CONCRETE
- SHALE
- LIMESTONE
- DOLOMITE

INTERIM ACTIONS

- REMOVAL OF STAINED SOIL
  - Disposal Ditch
  - Yard (Incl. Wood Chips)
- MONITORING PROGRAM
  (Determine Impact of Soil Removal)

•SAMPLE TEST PARAMETERS

- PCP
- PHENANTHRENE
- ADDITIONAL PARAMETERS WHERE APPLICABLE

- SAMPLING FREQUENCY

  - MONTHLY PRIOR TO SOIL REMOVAL
  - WEEKLY FOR ONE MONTH AFTER SOIL REMOVAL
  - MONTHLY THEREAFTER

•SAMPLING LOCATIONS

- –CRICKET SPRING
- –CANNERY SPRING
- –BINHAM WELL & CISTERN
- –4 CASED BOREHOLES ALONG RR TRACKS
- –MILES WELL
- –WELLS THAT PREVIOUSLY CONTAINED ORGANICS

POTENTIALLY SOLUBLE CONSTITUENTS IN CREOSOTE

BENZENE TOLUENE XYLENE	Light fraction lost during preserving process
NAPHTHALENE ACENAPHTHENE	
*PHENANTHRENE ANTHRACENE FLOURENE *CARBAZOLE	Primary constituents of residues

*= Most mobile in ground water

United States
Environmental Protection
Agency

Environmental Monitoring and
Support Laboratory
Cincinnati OH 45268

Research and Development

EPA

Test Method

Polynuclear Aromatic Hydrocarbons — Method 610

1. Scope and Application

1.1 This method covers the determination of certain polynuclear aromatic hydrocarbons (PAH). The following parameters may be determined by this method:

Parameter	STORET No.	CAS No.
Acenaphthene	34205	83-32-9
Acenaphthylene	34200	208-96-8
Anthracene	34220	120-12-7
Benzo (a) anthracene	34526	56-55-3
Benzo (a) pyrene	34247	50-32-8
Benzo (b) fluoranthene	34230	205-99-2
Benzo (ghi) perylene	34521	191-24-2
Benzo (k) fluoranthene	34242	207-08-9
Chrysene	34320	218-01-9
Dibenzo (a, h) anthracene	34556	53-70-3
Fluoranthene	34376	206-44-0
Fluorene	34381	86-73-7
Indeno (1, 2, 3-cd) pyrene	34403	193-39-5
Naphthalene	34696	91-20-3
Phenanthrene	34461	85-01-8
Pyrene	34469	129-00-0

1.2 This is a chromatographic method applicable to the determination of the compounds listed above in municipal and industrial discharges as provided under 40 CFR 136.1. When this method is used to analyze unfamiliar samples for any or all of the compounds above, compound identifications should be supported by at least one additional qualitative technique. Method 625 provides gas chromatograph/mass spectrometer (GC/MS) conditions appropriate for the qualitative and quantitative confirmation of results for many of the parameters listed in Section 1.1, using the extract produced by this method.

1.3 This method provides for both high performance liquid chromatographic (HPLC) and gas chromatographic (GC) approaches to the determination of PAHs. The gas chromatographic procedure does not adequately resolve the following four pairs of compounds: anthracene and phenanthrene; chrysene and benzo (a) anthracene; benzo (b) fluoranthene and benzo (k) fluoranthene; and dibenzo (a, h) anthracene and indeno (1, 2, 3-cd) pyrene. Unless the purpose for the analysis can be served by reporting the sum of an unresolved pair, the liquid chromatographic approach must be used for these compounds. The liquid

INTERIM MONITORING PROGRAM

- SAMPLING LOCATIONS
- SAMPLING FREQUENCY
- SAMPLE TEST PARAMETERS

HYDROGEOLOGIC ASSESSMENT

- Determined After Interim Action Monitoring
- Will Consist of:
  - BORINGS (Continuous)
  - MONITOR WELLS (Varying Depths)
  - WIER (Springs)

ARKWOOD

SAMPLE ANALYSIS RESULTS

1981	ARKANSAS DEPARTMENT OF ECOLOGY & POLLUTION CONTROL
1982 - 1984	McCLELLAND ENGINEERS
1985	GERAGHTY & MILLER/McKESSON

1981

ARKANSAS DEPARTMENT OF ECOLOGY AND POLLUTION CONTROL

SAMPLING DATE: OCTOBER 6, 1981

PARAMETER: PENTACHLOROPHENOL

WOOD CHIP/SAWDUST PILE:	23,000-30,000 PPM
DITCH-SOUTH OF RAILROAD TRACK:	5,600 PPM
RAILROAD TUNNEL AREA:	2-3 PPM
WATER FROM ARKWOOD DRAIN PIPE:	18-21 PPM
ARKWOOD WELL:	<0.01 PPM

1982 - 1984

McCLELLAND CONSULTING ENGINEERS

SAMPLING DATES: APRIL 1982 - OCT 1984 [redacted]

LABORATORY: AMERICAN INTERPLEX COMPANY
LITTLE ROCK, ARKANSAS

METHOD: EPA 604

PARAMETER: PENTACHLOROPHENOL

DETECTION LIMITS: GC/ECD-PFBB, 0.59 PPB (0.00059 PPM)
GC/FID, 7.4 PPB (0.0074 PPM)

REPORTED RANGE: <0.00005 - 97 PPM

LOCATION	RANGE
CRICKET SPRING:	0.00064 - 97 PPM
BINAN WELL:	<0.008 PPM
OLD BIRMINGHAM WELL:	0.011 PPM
BEHREN CISTERN:	0.48 - 5.6 PPM
BEHREN WELL #1:	<0.00005 - 0.0013 PPM
BEHREN WELL #2:	<0.00005 - 0.37 PPM
RAILROAD TUNNEL SPRING:	<0.00005 - 5.6 PPM

1985

McKESSON ENVIRONMENTAL SERVICES

GERAGHTY & MILLER

SAMPLING DATES: MAY & JUNE 1985

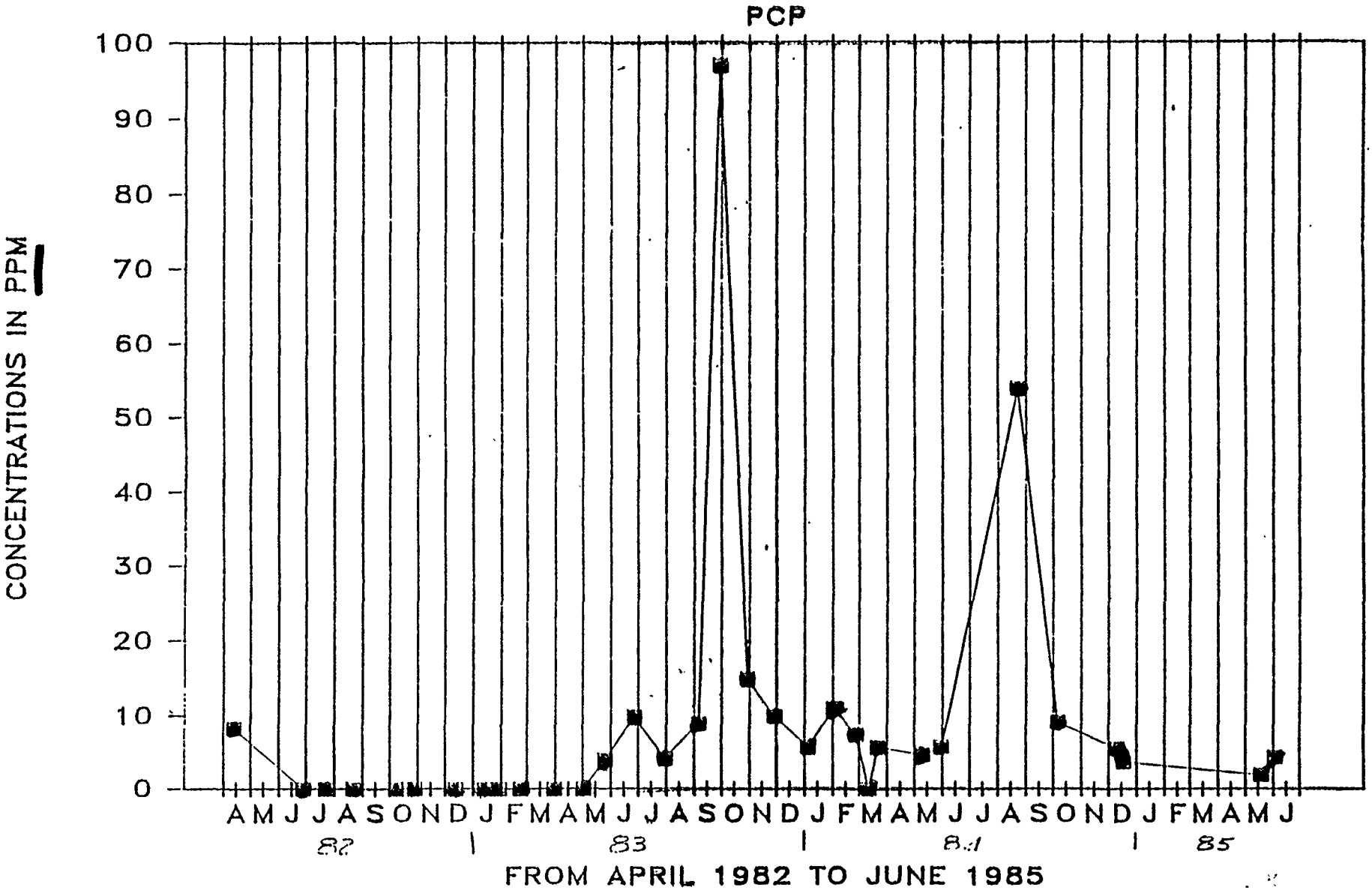
METHOD: EPA 625 - GC/MS

PARAMETERS: PENTACHLOROPHENOL

POLYNUCLEAR AROMATIC HYDROCARBONS

LOCATION	PCP	PNA
BINAN WELL	<0.005 PPM	<0.005 PPM
BIRMINGHAM (OLD WELL)	0.011 PPM	0.06 PPM
CRICKET SPRING	2-5 PPM	<0.005 PPM
BEHREN - WELL #2	<0.005 PPM	<0.005 PPM
RAILROAD TUNNEL SPRING	<0.005 PPM	<0.005 PPM
SWAMP EAST OF RR TUNNEL	<0.005 PPM	1.4 PPM
DITCH SOUTH OF RR TRACK	10,000-30,000 PPM	UP TO 3,600 PPM
BENEATH CONCRETE PAD	16 - 7,000 PPM	0.2 - 2,700 PPM
TREATING ROOM APPROACH	800 PPM	200 PPM
WOODCHIP AREA	<20 PPM	<20 PPM
ARKWOOD WELL	<0.005 PPM	<0.005 PPM
OMAHA CITY WELL	<0.005 PPM	<0.005 PPM

SPRING AT CRICKET



LAW OFFICES
WALKER & CAMPBELL
SUITE 300 SECURITY PLAZA
P.O. BOX 729
HARRISON, ARKANSAS
72602

WILLIAM S. WALKER
GENE C. CAMPBELL
GAIL INMAN-CAMPBELL

TELEPHONE
AREA 501
741-3448

September 10, 1986

Mr. Phillip Deish
Attorney at Law
P.O.Box 9583
Little Rock, Ar 72219

RE: ARK.DEPT. POLLUTION VS. HALLIE C.ORMOND ET AL, BOONE NO. E 86-293

Dear Mr.Deish:

Enclosed herewith please find copy of Motion to Dismiss and Brief in support thereof, filed this date on behalf of Mountain Enterprises, Inc. in the above matter.

Very truly yours,

GENE C.CAMPBELL

GCC:l
encl.

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

ARKANSAS DEPARTMENT OF
POLLUTION CONTROL AND
ECOLOGY PETITIONER

VS. CIVIL ACTION NO. 86-293

HALLIE C. ORMOND,
ARKWOOD, INC., MOUNTAIN
ENTERPRISES, INC., C.C.
GRISHAM, MARY JO GRISHAM,
AND MASS MERCHANDISERS,INC. RESPONDENTS

MOTION TO DISMISS

Comes now separate defendant, MOUNTAIN ENTERPRISES, INC. and for its Motion states:

(1)

That it is a dissolved corporation and files its Motion pursuant to Ark. Stats. 64-904.

(2)

That the Complaint fails to allege facts sufficient to state a cause of action against it and should be dismissed.

(3)

That any cause of action against it is barred by the statute of limitations and laches.

WHEREFORE, separate Defendant MOUNTAIN ENTERPRISES,INC. moves the Court to dismiss the Complaint as against it, at costs to Plaintiff and for all proper relief.

MOUNTAIN ENTERPRISES,INC.

BY: _____
GENE C.CAMPBELL
WALKER & CAMPBELL
P.O.BOX 729
HARRISON,AR 72602

CERTIFICATE OF SERVICE

I, GENE C.CAMPBELL of WALKER & CAMPBELL hereby certify that I have served a copy of the foregoing Motion on the Plaintiff herein by forwarding a true and correct copy thereof in teh U.S. Mail at Harrison, Arkansas, with sufficient postage and the return address of said attorneys thereon, properly addressed to Mr. Phillip Deish, Attorney at Law, P.O.Box 9583, Little Rock, Ar 72219, Plaintiff's attorney of record this 10th day of September,1986.

_____
GENE C.CAMPBELL

BRIEF

This corporation was dissolved May 2, 1978, and the action herein alleged clearly relates to actions of others taken over five years ago and should be barred by limitation and laches. A Motion to Dismiss under ARCP 12 b(6) should be granted.

GENE C. CAMPBELL

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Richard A. Williams
John S. Selig
Joseph W. Gelzine
W. Christopher Barrier
Jerry D. Jackson
Jim Guy Tucker
Eugene G. Sayre
Byron Freeland
Kent Foster
Allan Gates
Pat Moran
W. H. L. Woodyard, III
Michael C. O'Malley
John C. Lessel
Doak Foster
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September 9, 1986

Mr. Phillip S. Deisch
Chief Counsel
Arkansas Department of
Pollution Control & Ecology
8001 National Drive
P. O. Box 9583
Little Rock, Arkansas 72209

Re: Arkansas Department of Pollution Control & Ecology vs. Hallie C. Ormond, et al., Boone Chancery No. E-86-293

Dear Phil:

I am enclosing a copy of the Answer and Cross-Complaint of Mass Merchandisers, Inc. which we are filing in the above-mentioned matter.

If you have any questions, please do not hesitate to call.

Very truly yours,

MITCHELL, WILLIAMS, SELIG,
JACKSON & TUCKER

By Allan Gates
Allan Gates

AG:gs
Enclosure

cc: John Haley
Bill Doshier

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY — PETITIONER

vs. CIVIL ACTION NO. E-86-293

HALLIE C. ORMOND, ARKWOOD, INC., MOUNTAIN ENTERPRISES, INC., C. C. GRISHAM, MARY JO GRISHAM, and MASS MERCHANDISERS, INC. — RESPONDENTS

ANSWER AND CROSS-COMPLAINT OF MASS MERCHANDISERS, INC.

Respondent Mass Merchandisers, Inc. answers the Complaint of Petitioner, Arkansas Department of Pollution Control and Ecology, as follows:

1. Mass Merchandisers, Inc. ("MMI") admits the allegations contained in paragraph 1 of Petitioner's Complaint.

2. MMI admits the allegations contained in paragraph 2 of Petitioner's Complaint.

3. MMI admits the allegations contained in paragraph 3 of Petitioner's Complaint.

4. MMI admits the allegations contained in paragraph 4 of Petitioner's Complaint.

5. MMI admits the allegations contained in paragraph 5 of Petitioner's Complaint.

6. MMI admits that in 1973 Respondent Ormond leased the Arkwood site for a period of twelve years to Mountain Enterprises, Inc., an Arkansas corporation which was then a wholly-owned subsidiary of MMI. MMI admits that it has been at all times pertinent to this litigation an Indiana corporation authorized to do business in Arkansas. MMI admits that Mountain Enterprises, Inc. was dissolved in 1978. MMI admits that it is a former operator of the wood treating plant at the Arkwood site. Except to the extent specifically admitted herein, the remaining allegations of paragraph 6 are denied.

7. MMI admits the allegations contained in paragraph 7 of Petitioner's Complaint.

8. MMI admits that during the operation of the wood treating plant at the Arkwood site, Respondents Hallie Ormond, C. C. Grisham, Arkwood, Inc., and MMI used creosote and pentachlorophenol to treat wood products. MMI admits that in the course of operations of the wood treating plant by Respondents Ormond, Grisham, and Arkwood, Inc., waste products, including pentachlorophenol and pentachlorophenol-contaminated wastes, were handled and stored in an unprotected manner whereby wastes were spilled or spread on surface soils or stored in open pits; and were disposed of by surface dumping or dumping into crevices on the property or otherwise applying it to the land surface. Most of these practices ceased prior to the lease of the Arkwood site to Mountain Enterprises, Inc., and MMI's operation of the wood treating plant. Upon initiating its operation of the wood treating plant, MMI took steps to reduce the volume of wastes generated and improve the method and manner of their disposition. At all times, MMI's disposition of wastes conformed within applicable regulatory requirements and industry customs and practices. Except to the extent specifically admitted herein, all remaining allegations contained in paragraph 8 are denied.

9. Paragraph 9 of Petitioner's Complaint states a legal conclusion and, as such, requires no response. To the extent Paragraph 9 of Petitioner's Complaint is deemed to contain or constitute an allegation of fact, MMI is without information or knowledge sufficient to form a belief regarding the truth or falsity of the allegations contained in paragraph 9 of Petitioner's Complaint.

10. Paragraph 10 of Petitioner's Complaint states a legal conclusion and, as such, requires no response. To the extent Paragraph 10 of Petitioner's Complaint is deemed to

contain or constitute an allegation of fact, MMI is without information or knowledge sufficient to form a belief regarding the truth or falsity of the allegations contained in paragraph 10 of Petitioner's Complaint.

11. MMI admits that trace levels of pentachlorophenol and creosote-related compounds have been detected in springs and surface waters immediately adjacent to the Arkwood site. MMI affirmatively asserts that the presence of these trace levels of pentachlorophenol and creosote-related compounds is caused directly by the disposal practices of Respondents Ormond, Grisham, and Arkwood, Inc. MMI specifically denies that any of its disposal practices or any actions of Mountain Enterprises, Inc. are related to the trace levels of pentachlorophenol and creosote-related compounds observed in any samples. Except to the extent specifically admitted herein, MMI denies the remaining allegations contained in paragraph 11 of Petitioner's Complaint.

12. Paragraph 12 of Petitioner's Complaint states a legal conclusion and, as such, requires no response. MMI specifically denies that its conduct or the conduct of Mountain Enterprises, Inc. ever constituted the placement of wastes in a location where they would be likely to cause pollution of waters of the state in violation of Ark. Stat. Ann § 82-1908 subdivision 1.

13. Paragraph 13 of Petitioner's Complaint states a legal conclusion and, as such, requires no response. MMI specifically denies that its activity or any activity of Mountain Enterprises, Inc. was unlawful in any regard. To the extent that Petitioner may be entitled to relief under its Complaint, MMI affirmatively asserts that all liability under Petitioner's Complaint is the liability of Respondents Ormond, Grisham, and Arkwood, Inc., alone.

14. Except to the extent specifically admitted above, MMI denies all remaining allegations contained in Petitioner's Complaint.

AFFIRMATIVE DEFENSE-
WAIVER, ESTOPPEL, AND LACHES

15. Prior to the commencement of this action, MMI cooperated with Petitioner and the United States Environmental Protection Agency ("EPA") in the investigation of environmental conditions in and adjacent to the Arkwood site. In connection with this effort MMI voluntarily collected and analyzed numerous environmental samples at its own expense; and, during the period of its operation of the Arkwood site, MMI promptly complied with all requests and suggestions of Petitioner and EPA regarding the method and manner of operating the Arkwood treating plant and related facilities.

16. In a further effort to cooperate with Petitioner and EPA, MMI agreed to undertake a specialized study of environmental conditions, commonly referred to as a Remedial Investigation and Feasibility Study ("RI/FS"). MMI's agreement to undertake an RI/FS at the Arkwood site is formally set in a Consent Administrative Order negotiated between EPA and MMI. A true copy of the Consent Administrative Order is attached as Exhibit A to this Answer and Cross-Complaint.

17. Petitioner was aware of MMI's plans to undertake an RI/FS and has been given copies of all documents related to the negotiation and implementation of the Consent Administrative Order. By agreement of MMI and EPA, copies of all documents generated under the Consent Administrative Order have been and will continue to be sent to Petitioner.

18. All of the foregoing actions by MMI were undertaken not only to cooperate with the requests of Petitioner and EPA, but also to prevent and/or mitigate any possible damage or threat to human health or the environment.

19. To the extent that Petitioner's Complaint seeks to impose upon MMI sanctions, remedies, or obligations which duplicate, compound, or conflict with the undertakings already completed or committed to by MMI in the Consent Administrative Order, such relief is barred by waiver, estoppel, and laches.

CROSS-COMPLAINT

Respondent MMI for its Cross-Complaint states as follows:

20. MMI realleges and incorporates by reference as if set forth herein word for word paragraphs 1-19 above.

COUNT ONE
CONTRACTUAL INDEMNIFICATION

21. On or about March 29, 1973, Respondents Arkwood, Inc., C. C. Grisham, and Mary Jo Grisham entered into a contract by which they sold to MMI all of the assets of Arkwood, Inc. A true copy of the contract is reproduced as Exhibit B of this Answer and Cross-Complaint.

22. In paragraph 10.4 of the contract, Arkwood Inc., C. C. Grisham, and Mary Jo Grisham expressly agreed to indemnify MMI from "any debt, liability or other obligation of Arkwood" not expressly assumed under the contract.

23. The environmental liability asserted by Petitioner was not assumed by MMI under the contract, and MMI is therefore entitled to indemnification from Arkwood, Inc., C. C. Grisham, and Mary Jo Grisham for all claims asserted in Petitioner's complaint.

COUNT TWO
SOLE LIABILITY OF
ORMOND, GRISHAM, AND ARKWOOD, INC.

24. The conditions complained of by Petitioner were caused solely by the conduct of Ormond, C. C. Grisham, and Arkwood, Inc. in depositing creosote and pentachlorophenol wastes into crevasses upon the Arkwood site.

25. MMI did not deposit any waste into crevasses on the Arkwood site. The only conduct engaged in by MMI at the

Arkwood site was the normal operation of the wood treating facility.

26. MMI's operation of the treating plant at the Arkwood site did not cause or contribute to any of the conditions complained of by Petitioner. Therefore, to the extent that Petitioner's complaint may state a valid claim, MMI is entitled to judgment over against Ormond, C. C. Grisham, and Arkwood, Inc. for an portion of such liability that might otherwise be apportioned to MMI.

COUNT THREE
CONTRIBUTION

27. If and to the extent Petitioner's complaint may state a valid claim against MMI, the liability in question would arise partly or entirely out of the conduct of Ormond, C. C. Grisham, and Arkwood, Inc. as the landowner, designer, and original operator of the treating plant at the Arkwood site.

28. As owner, designer, and original operator of the treating plant at the Arkwood site, Ormond, C. C. Grisham, and Arkwood, Inc., are solely or primarily liable for all claims asserted against MMI by Petitioner.

29. To the extent that any judgment or liability may be awarded against MMI, under Petitioner's complaint, MMI is entitled to a judgment over against Ormond, C. C. Grisham, and Arkwood, Inc. in contribution.

30. To the extent that Arkwood, Inc. is liable to MMI, MMI is also entitled to judgment against Mary Jo Grisham in her capacity as distributee of the assets of Arkwood, Inc. and successor to Arkwood's liability.

WHEREFORE, MMI prays that (i) Petitioner's Complaint be dismissed and held for naught insofar as it seeks relief against MMI; (ii) that any judgment entered in favor of Petitioner be entered solely against respondents other than MMI; (iii) that MMI be granted a judgment over against

respondents Ormond, C. C. Grisham, Mary Jo Grisham, and Arkwood, Inc. for any relief granted in this action; (iv) that MMI be awarded its costs and attorneys' fees herein; and (v) that MMI be awarded all such other relief as may be appropriate.

Respectfully submitted,

MITCHELL, WILLIAMS, SELIG,
JACKSON & TUCKER
1000 Savers Federal Building
Little Rock, Arkansas 72201
(501) 376-3151

By _____
Allan Gates

Attorney for
Mass Merchandisers, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of September, 1986, I served the foregoing Answer and Cross-Complaint of Mass Merchandisers, Inc. by depositing a true copy in the United States mail, first-class postage prepaid, addressed to Mr. Phillip Deisch, Arkansas Department of Pollution Control & Ecology, P. O. Box 9583, Little Rock, Arkansas 72219; to Mr. John Haley, Haley, Polk & Heister, P.A., Suite 330, One Spring Street, Little Rock, Arkansas 72201-2428; and to Mr. Bill F. Doshier, Doshier & Bowers, P. O. Box 1797, Harrison, Arkansas 72601.

_____
Allan Gates

STATE OF ARKANSAS
DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY
8001 NATIONAL DRIVE, P.O. BOX 9583
LITTLE ROCK, ARKANSAS 72209

August 13, 1986

PHONE: (501) 562-7444

Ms. Helen Speer
Circuit and Chancery Clerk
Boone County Courthouse
Harrison, AR 72601

Re: Arkansas Department of Pollution Control and Ecology vs. Hallie C. Ormond, et al

Dear Ms. Speer:

Enclosed please find an original and eight (8) copies of a Complaint in Equity to be filed and docketed in the Chancery Court of Boone County. Also enclosed herewith is a check in the sum of $42.00 to cover the cost of filing.

Please prepare a summons for each defendant and deliver the summons for Hallie Ormond; Arkwood, Inc.; Mountain Enterprises, Inc.; C. C. Grisham; and Mary Jo Grisham to the Boone County Sheriff for service of process. The summons for Hallie Ormond; Arkwood, Inc; C. C. Grisham; and Mary Jo Grisham should be served upon Mr. Bill Doshier, Attorney at Law, 215 West Rush, Harrison, Arkansas. The summons for Mountain Enterprises, Inc. should be served upon W. W. Walker, Agent, 218 E. Ridge, Harrison, Arkansas.

Please send me the summons for Mass Merchandisers and the extra copy of the complaint in the enclosed envelope. Cost of service will be promptly remitted upon receipt of a statement.

Thank you for your assistance in this matter.

Sincerely,

Phillip Deisch

Phillip Deisch
Chief Counsel

PD:mlw

Enclosures

cc: Allan Gates
Bill Doshier

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY — PETITIONER

V. CIVIL ACTION NO. _____

HALLIE C. ORMOND, ARKWOOD, INC., MOUNTAIN ENTERPRISES, INC., C. C. GRISHAM, MARY JO GRISHAM, and MASS MERCHANDISERS, INC. — RESPONDENTS

COMPLAINT IN EQUITY

Comes Petitioner, Arkansas Department of Pollution Control and Ecology, and by its attorney, Phillip Deisch, for its Complaint states as follows:

1. Petitioner is an agency of the State of Arkansas charged with the administration and enforcement of the Arkansas Water and Air Pollution Control Act (Act 472 of 1949, as amended; Ark. Stat. Ann. § 82-1901 et seq.) and the Remedial Action Trust Fund Act (Act 479 of 1985; Ark. Stat. Ann. § 82-4712 et seq.).

2. Respondent, Hallie C. Ormond (hereinafter "Ormond") owns real property and fixtures located in Section 27, Township 21 North, Range 21 West in Boone County, Arkansas (hereinafter the "Arkwood site").

3. A wood treating plant has been operated at the Arkwood site, beginning at a time unknown to Petitioner but believed to have begun in 1961 and operations continued through 1984.

4. Respondents, Ormond and C. C. Grisham, are former operators of the wood treating plant at the Arkwood site.

5. Respondent, Arkwood, Inc., an Arkansas corporation, incorporated in 1965 and dissolved in 1978, is a former operator of the wood treating plant at the Arkwood site.

6. In 1973, Respondent, Ormond leased the Arkwood site for a period of twelve years to Respondent, Mountain Enterprises, Inc., an Arkansas corporation and wholly owned subsidiary of Respondent, Mass Merchandisers, Inc., an Indiana corporation, authorized to do business in Arkansas. Respondent, Mountain Enterprises, Inc., dissolved in 1978. Respondents, Mountain Enterprises, Inc. and Mass Merchandisers, Inc., are former operators of the wood treating plant at the Arkwood site.

7. Respondents, Hallie C. Ormond, C. C. Grisham, and Mary Jo Grisham, are distributees of the proceeds of the liquidation of Arkwood, Inc. The Respondent distributors are personally liable for claims of this State against Arkwood, Inc. pursuant to Ark. Stat. Ann. § 64-905(c).

8. During the operation of the wood treating plant at the Arkwood site by Respondents, Hallie C. Ormond, C. C. Grisham, Arkwood, Inc., Mountain Enterprises, Inc., and Mass Merchandisers, Inc., creosote and pentachlorophenol were used to treat wood products. In the course of operations of the wood treating plant, waste products, including pentachlorophenol and pentachlorophenol contaminated wastes, were handled and stored in an unprotected manner, whereby wastes were spilled or spread on surface soils or stored in open pits; and were disposed of by surface dumping or dumping into crevices on the property or otherwise applying it to the land surface.

9. The wastes referred to in paragraph 8 include wastes which are defined as hazardous substances under Ark. Stat. Ann. § 82-4714(h).

10. By the actions described in paragraph 8, the Arkwood site is a hazardous substance site as defined by Ark. Stat. Ann. § 82-4714(l).

11. The actions of the Respondents described in paragraph 8 have caused and are causing pollution of the waters of the State, both surface and groundwater, by allowing wastes, including hazardous substances such as pentachlorophenol and pentachlorophenol contaminated wastes, to enter the waters of the State in violation of Ark. Stat. Ann. § 82-1908, Subdivision 1.

12. The actions of Respondents described in paragraph 8 constitute the placing of wastes in a location where it is likely to cause pollution of waters of the State in violation of Ark. Stat. Ann. § 82-1908, Subdivision 1.

13. Respondents, Hallie C. Ormond, Arkwood, Inc., Mountain Enterprises, Inc., C. C. Grisham, and Mass Merchandisers, Inc., are liable for the actions described herein under the provisions of Ark. Stat. Ann. § 82-4719(a) and for the unlawful activity described in paragraphs hereinabove pursuant to the provisions of Ark. Stat. Ann. § 82-1908.

WHEREFORE, Petitioner prays for the issuance of a permanent injunction against the Respondents, jointly and severally, whereby they are ordered, upon pain of contempt, to: 1) cease and abate pollution of waters of the State and to remove or contain wastes which have been placed in a location likely to cause pollution of waters of the State; 2) undertake remedial actions as necessary to investigate, control, prevent, abate or contain any releases or threatened releases of hazardous substances from the Arkwood site; 3) to pay Petitioner's costs in this action; and 4) to provide all further relief as ordered by this Court that it may deem appropriate.

ARKANSAS DEPARTMENT OF
POLLUTION CONTROL AND ECOLOGY

BY: Phillip Deisch

PHILLIP DEISCH
P.O. BOX 9583
LITTLE ROCK, AR 72219
TEL: (501) 562-7444

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

Sep 9-86

ARKANSAS DEPARTMENT OF
POLLUTION CONTROL AND ECOLOGY PETITIONER

VS. CIVIL ACTION NO. E-86-293

HALLIE C. ORMOND,
ARKWOOD, INC., MOUNTAIN
ENTERPRISES, INC., C.C. GRISHAM,
MARY JO GRISHAM, and MASS
MERCHANDISERS, INC. RESPONDENTS

MOTION TO DISMISS

Comes now, C. C. Grisham and Mary Jo Grisham, Respondents herein, and for their Motion to Dismiss pursuant to Rule 12 (b) (6) of the Arkansas Rules of Civil Procedure states as follows:

1. C. C. Grisham and Mary Jo Grisham have been joined as Respondents in the above style matter.

2. The basis for joining C. C. Grisham and Mary Jo Grisham is stated in paragraph 7 of the Complaint as ". . . C. C. Grisham and Mary Jo Grisham, are distributees of the proceeds of the liquidation of Arkwood, Inc." The Complaint goes on to state," that they are personnally liable for claims of the State pursuant to Ark. Stat. Ann.§ 64-905 (c)".

3. Ark. Stat. Ann. § 64-905 does not impose liability upon individual shareholders of a corporation for claims such as those being made by the Plaintiff in this matter.

4. In the alternative, even if Ark. Stat. Ann. § 64-905 should impose liability upon the shareholders and/or distributees of the assets of a corporation, such claim is barred by the equitable doctrine of latches.

WHEREFORE, Petitioners' Complaint having failed to state a claim upon which relief can be granted, Respondents C. C. Grisham and Mary Jo Grisham pray that the Complaint against

them be dismissed, that they be awarded their costs, attorneys fees, and any and all such further relieve to which they may show themselves entitled.

C. C. GRISHAM AND MARY JO GRISHAM

By Their Attorneys:

ARNOLD, GROBMYER & HALEY
One Union National Plaza
P.O. Box 70
Little Rock, Arkansas 72203
(501) 376-1171

Robert R. Ross

DOSHIER & BOWERS
P.O. Box 1797
Harrison, Arkansas 72601

By: Bill F. Doshier
Bill F. Doshier

FILED FOR RECORD
1986 SEP 11 PM 2:22
HELEN SPEER, CLERK
BY _____ D.C.

CERTIFICATE OF SERVICE

I, Robert R. Ross, do hereby certify that I have mailed a copy of the foregoing Motion to Dismiss to Phillip Deisch, P.O. Box 9583, Little Rock, Arkansas 72219 on this 11th day of September, 1986. Also Allan Gates Atty For MMI.

Robert R. Ross

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

ARKANSAS DEPARTMENT OF
POLLUTION CONTROL AND ECOLOGY PETITIONER

v. CIVIL ACTION NO. E-86-293

HALLIE C. ORMOND,
ARKWOOD, INC., MOUNTAIN
ENTERPRISES, INC., C. C.
GRISHAM, MARY JO GRISHAM
and MASS MERCHANDISERS, INC. RESPONDENTS

BRIEF IN SUPPORT OF MOTION TO DISMISS

Comes now, C. C. Grisham and Mary Jo Grisham, Respondents herein, and for their Brief in Support of the Motion to Dismiss pursuant to Rule 12(b)(6) the Arkansas Rules of Civil Procedure affirmatively state that there is no basis to hold them personally liable for the alleged claims of the Arkansas Department of Pollution Control & Ecology (hereinafter "PC&E") as mere distributees of the proceeds of the dissolution of Arkwood, Inc.

Petitioner Arkansas Department of Pollution Control & Ecology (hereinafter "PC&E") relies on Ark. Stat. Ann. §64-905(c) dealing with notice to creditors during and after the dissolution of an Arkansas corporation to establish distributee personal liability. In its entirety, Ark. Stat. Ann. §64-905(c) states:

> "Notwithstanding this section and §88 (§64-906), tax claims and other claims of this state and of the United States shall not be required to be filed under those sections, and such claims shall not be barred because not so filed, and distribution of the assets of the corporation, or any part thereof, may be deferred until determination of any such claims."

Ark. Stat. Ann. §64-905(c) does not establish personal liability to distributees of proceeds of a liquidation. Petitioner can point to no statute or case authority establishing retroactive personal liability against a distributee when in fact upon dissolution the state had no lawful claim against the subsequently dissolved corporation.

Furthermore, such a claim is barred by the equitable doctrine of laches. Respondent Arkwood, Inc. an Arkansas

corporation incorporated on June 16, 1965 was dissolved pursuant to statute, with all formalities having been met, on August 20, 1974. At the time of dissolution, the State of Arkansas and more particularly Petitioner PC&E had no claim against Respondent Arkwood, Inc. and the shareholders/distributees C. C. "Bud" Grisham and Mary Jo Grisham.

The doctrine of laches is based on a number of equitable principles, particularly on the assumption that the party to whom laches is imputed has knowledge of his alleged rights and an opportunity to assert them, that by reason of his delay the adverse party had good reason to believe those rights are worthless or have been abandoned, and that because of a change of condition or relations during this delay it would be unjust to the latter to permit him to assert them. Briarwood Apartments v. Lieblong, 12 Ark. App. 94, 671 S.W.2d 207 (1984). Upon the facts of the present, this doctrine is acutely applicable. Petitioner PC&E attempts to allege a claim against a dissolved corporation and its distributees, said claim accruing, if at all, over twelve years prior to initiation of proceedings. To allow such claim to proceed would be of the highest prejudice and contrary to any sense of equity.

For the reasons stated, Respondents C. C. Grisham and Mary Jo Grisham pray their motion to dismiss be granted.

Respectfully submitted,

C. C. GRISAM and MARY JO GRISHAM

By their attorneys,

ARNOLD, GROBMYER & HALEY, P.A.
8th Floor Union Nat'l Bank Bldg.
P.O. Box 70
Little Rock, AR 72203
(501) 376-1171

By: Robert R. Ross

DOSHIER & BOWERS
P.O. Box 1797
Harrison, AR 72601

FILED FOR RECORD
1986 SEP 11 PM 2:22
HELEN SPEER, CLERK
BY _____ D.C.

By: Bill Doshier
Bill F. Doshier

CERTIFICATE OF SERVICE

I, Robert R. Ross, do hereby certify that on this 8th day of September, 1986, a true and correct copy of the foregoing pleading to: Mr. Phillip Deisch, P.O. Box 9583, Little Rock, AR 72219. Also Allan Gates Atty For MMI.

Robert R. Ross

STATE OF ARKANSAS
DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY
8001 NATIONAL DRIVE, P.O. BOX 9583
LITTLE ROCK, ARKANSAS 72209

PHONE: (501) 562-7444

August 26, 1986

Ms. Ruth Israeli (6HEE)
U.S. Environmental Protection Agency
Region VI
InterFirst Two Building
1201 Elm Street
Dallas, TX 75270

Re: Arkansas Department of Pollution Control
and Ecology vs. Hallie C. Ormond, et al
Boone County Chancery Court, Case No. E-86-293

Dear Ms. Israeli:

Enclosed herewith is a copy of the "Complaint in Equity" filed August 15, 1986, in the above-referenced matter.

Please contact me if further information is desired.

Sincerely,

Phillip Deisch
Chief Counsel

PD:mlw

Enclosure

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

ARKANSAS DEPARTMENT OF
POLLUTION CONTROL AND
ECOLOGY

PETITIONER

V. CIVIL ACTION NO. E-86-293

HALLIE C. ORMOND,
ARKWOOD, INC., MOUNTAIN
ENTERPRISES, INC., C. C.
GRISHAM, MARY JO GRISHAM,
and MASS MERCHANDISERS, INC.

RESPONDENTS

COMPLAINT IN EQUITY

Comes Petitioner, Arkansas Department of Pollution Control and Ecology, and by its attorney, Phillip Deisch, for its Complaint states as follows:

1. Petitioner is an agency of the State of Arkansas charged with the administration and enforcement of the Arkansas Water and Air Pollution Control Act (Act 472 of 1949, as amended; Ark. Stat. Ann. § 82-1901 et seq.) and the Remedial Action Trust Fund Act (Act 479 of 1985; Ark. Stat. Ann. § 82-4712 et seq.).

2. Respondent, Hallie C. Ormond (hereinafter "Ormond") owns real property and fixtures located in Section 27, Township 21 North, Range 21 West in Boone County, Arkansas (hereinafter the "Arkwood site").

3. A wood treating plant has been operated at the Arkwood site, beginning at a time unknown to Petitioner but believed to have begun in 1961 and operations continued through 1984.

4. Respondents, Ormond and C. C. Grisham, are former operators of the wood treating plant at the Arkwood site.

5. Respondent, Arkwood, Inc., an Arkansas corporation, incorporated in 1965 and dissolved in 1978, is a former operator of the wood treating plant at the Arkwood site.

6. In 1973, Respondent, Ormond leased the Arkwood site for a period of twelve years to Respondent, Mountain Enterprises, Inc., an Arkansas corporation and wholly owned subsidiary of Respondent, Mass Merchandisers, Inc., an Indiana corporation, authorized to do business in Arkansas. Respondent, Mountain Enterprises, Inc., dissolved in 1978. Respondents, Mountain Enterprises, Inc. and Mass Merchandisers, Inc., are former operators of the wood treating plant at the Arkwood site.

7. Respondents, Hallie C. Ormond, C. C. Grisham, and Mary Jo Grisham, are distributees of the proceeds of the liquidation of Arkwood, Inc. The Respondent distributors are personally liable for claims of this State against Arkwood, Inc. pursuant to Ark. Stat. Ann. § 64-905(c).

8. During the operation of the wood treating plant at the Arkwood site by Respondents, Hallie C. Ormond, C. C. Grisham, Arkwood, Inc., Mountain Enterprises, Inc., and Mass Merchandisers, Inc., creosote and pentachlorophenol were used to treat wood products. In the course of operations of the wood treating plant, waste products, including pentachlorophenol and pentachlorophenol contaminated wastes, were handled and stored in an unprotected manner, whereby wastes were spilled or spread on surface soils or stored in open pits; and were disposed of by surface dumping or dumping into crevices on the property or otherwise applying it to the land surface.

9. The wastes referred to in paragraph 8 include wastes which are defined as hazardous substances under Ark. Stat. Ann. § 82-4714(h).

10. By the actions described in paragraph 8, the Arkwood site is a hazardous substance site as defined by Ark. Stat. Ann. § 82-4714(l).

11. The actions of the Respondents described in paragraph 8 have caused and are causing pollution of the waters of the State, both surface and groundwater, by allowing wastes, including hazardous substances such as pentachlorophenol and pentachlorophenol contaminated wastes, to enter the waters of the State in violation of Ark. Stat. Ann. § 82-1908, Subdivision 1.

12. The actions of Respondents described in paragraph 8 constitute the placing of wastes in a location where it is likely to cause pollution of waters of the State in violation of Ark. Stat. Ann. § 82-1908, Subdivision 1.

13. Respondents, Hallie C. Ormond, Arkwood, Inc., Mountain Enterprises, Inc., C. C. Grisham, and Mass Merchandisers, Inc., are liable for the actions described herein under the provisions of Ark. Stat. Ann. § 82-4719(a) and for the unlawful activity described in paragraphs hereinabove pursuant to the provisions of Ark. Stat. Ann. § 82-1908.

WHEREFORE, Petitioner prays for the issuance of a permanent injunction against the Respondents, jointly and severally, whereby they are ordered, upon pain of contempt, to: 1) cease and abate pollution of waters of the State and to remove or contain wastes which have been placed in a location likely to cause pollution of waters of the State; 2) undertake remedial actions as necessary to investigate, control, prevent, abate or contain any releases or threatened releases of hazardous substances from the Arkwood site; 3) to pay Petitioner's costs in this action; and 4) to provide all further relief as ordered by this Court that it may deem appropriate.

ARKANSAS DEPARTMENT OF
POLLUTION CONTROL AND ECOLOGY

BY: Phillip Deisch

PHILLIP DEISCH
P.O. BOX 9583
LITTLE ROCK, AR 72219
TEL: (501) 562-7444

FILED FOR RECORD
1986 AUG 15 AM 10: 19
HELEN SPEER, CLERK
BY _____ D.C.

IN THE CHANCERY ~~CIRCUIT~~ COURT OF BOONE COUNTY, ARKANSAS

SUMMONS

FOURTEENTH DISTRICT
BOONE COUNTY, ARKANSAS

SUMMONS

Plaintiff: Arkansas Department of Pollution Control and Ecology

vs.

Defendant: Hallie C. Ormond, Arkwood, Inc., Mountain Enterprises, Inc., et al

Case Number: E-86-293

Plaintiff's Attorney: Phillip Deisch

(name and address) P.O. Box 9583 Little Rock, AR 72219

THE STATE OF ARKANSAS TO DEFENDANT: MASS MERCHANDISERS, INC.

NOTICE

1. You are hereby notified that a lawsuit has been filed against you; the relief asked is stated in the attached complaint.

2. The attached complaint will be considered admitted by you and a judgment by default may be entered against you for the relief asked in the complaint unless you file a pleading and thereafter appear and present your defense. Your pleading or answer must meet the following requirements:

A. It must be in writing, and otherwise comply with the Arkansas Rules of Civil Procedure.
B. It must be filed in the court clerk's office within 20 days from the day you were served with this summons.

3. If you desire to be represented by an attorney you should immediately contact your attorney so that an answer can be filed for you within the time allowed.

4. ☐ Additional notices:
☐ Standing Restraining Order attached.

Witness my hand and the seal of the court this 15th day of August, 19 86

Helen Speer
Circuit & Chancery Clerk
P.O. Box 957
Harrison, Arkansas 72601

Helen Speer
Clerk
Joyce Dunnagan
D.C.

IN THE CHANCERY ~~CIRCUIT~~ COURT OF BOONE COUNTY, ARKANSAS

SUMMONS

FOURTEENTH DISTRICT
BOONE COUNTY, ARKANSAS

SUMMONS

Plaintiff: Arkansas Department of Pollution Control and Ecology

vs.

Defendant: Hallie C. Ormond, Arkwood, Inc., Mountain Enterprises, Inc., et al

Case Number: E-86-293

Plaintiff's Attorney: Phillip Deisch

(name and address) P.O. Box 9583 Little Rock, AR 72219

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Helen Speer
Circuit & Chancery Clerk
P.O. Box 957
Harrison, Arkansas 72601

Helen Speer
Clerk
Joyce Dunnagan
D.C.

No. _____ SUMMONS

AGAINST

FEES

Clerk ..... $ _____
Sheriff ..... $ _____
Service ..... $ _____
Mileage ..... $ _____
Return ..... $ _____

STATE OF ARKANSAS
County of Boone } SS.

On this _____ day of _____, 19____.

I have duly served the within summons, by delivering a copy of same, personally, to the within named.

_____

_____

_____ Sheriff

_____ D.S.

☐ Standing Restraining Order Attached

No. _____ SUMMONS

AGAINST

FEES

Clerk ..... $ _____
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County of Boone } SS.

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_____

_____ Sheriff

_____ D.S.

☐ Standing Restraining Order Attached

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

ARKANSAS DEPARTMENT OF
POLLUTION CONTROL AND
ECOLOGY PETITIONER

V. CIVIL ACTION NO. E-86-293

HALLIE C. ORMOND,
ARKWOOD, INC., MOUNTAIN
ENTERPRISES, INC., C. C.
GRISHAM, MARY JO GRISHAM,
and MASS MERCHANDISERS, INC. RESPONDENTS

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5. Respondent, Arkwood, Inc., an Arkansas corporation, incorporated in 1965 and dissolved in 1978, is a former operator of the wood treating plant at the Arkwood site.

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6. In 1973, Respondent, Ormond leased the Arkwood site for a period of twelve years to Respondent, Mountain Enterprises, Inc., an Arkansas corporation and wholly owned subsidiary of Respondent, Mass Merchandisers, Inc., an Indiana corporation, authorized to do business in Arkansas. Respondent, Mountain Enterprises, Inc., dissolved in 1978. Respondents, Mountain Enterprises, Inc. and Mass Merchandisers, Inc., are former operators of the wood treating plant at the Arkwood site.

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ARKANSAS DEPARTMENT OF
POLLUTION CONTROL AND ECOLOGY

BY: Phillip Deisch

PHILLIP DEISCH
P.O. BOX 9583
LITTLE ROCK, AR 72219
TEL: (501) 562-7444

FILED FOR RECORD
1986 AUG 15 AM 10: 18
HELEN SPEER, CLERK
BY _____ D.C.

Deisch

H. MAURICE MITCHELL
RICHARD A. WILLIAMS
JOHN S. SELIG
JOSEPH W. GELZINE
W. CHRISTOPHER BARRIER
JERRY D. JACKSON
JIM GUY TUCKER
EUGENE G. SAYRE
BYRON FREELAND
KENT FOSTER
ALLAN GATES
PAT MORAN
W. H. L. WOODYARD, III
MICHAEL C. O'MALLEY
JOHN C. LESSEL
DOAK FOSTER
JAMES E. SMITH, JR.
JEAN D. STOCKBURGER
ANNE RITCHEY
DEBRA K. BROWN
SUSAN GUNTER
CRAIG WESTBROOK
W. KIRBY LOCKHART
JOYCE KINKEAD
DOUGLAS B. WARD

LAW OFFICES
MITCHELL, WILLIAMS, SELIG,
JACKSON & TUCKER
1000 SAVERS FEDERAL BUILDING
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COUNSEL
W. B. RILEY
EDWIN F. JACKSON
MICHAEL K. WILSON

OF COUNSEL
HENRY E. SPITZBERG

June 9, 1986

Chief, Superfund Enforcement Section
US EPA, Region VI
1201 Elm Street
Dallas, Texas 75270

Re: Arkwood, Inc. (Omaha, Arkansas)

Dear Sir:

Pursuant to Section VI(J) of the Consent Administrative Order in this matter, I am enclosing a copy of Mass Merchandisers, Inc.'s first monthly progress report. I have also mailed a copy of the report, together with a copy of this letter, to the State of Arkansas, addressed to the Deputy Director for Program Operations of the Arkansas Department of Pollution Control and Ecology.

If you have any questions regarding this monthly progress report, please do not hesitate to contact me.

Very truly yours,

MITCHELL, WILLIAMS, SELIG,
JACKSON & TUCKER

By Allan Gates

Allan Gates

AG:gs
Enclosure

cc: Deputy Director for Program Operations
Ark. Dept. of Pollution Control & Ecology (w/encl.)
Ruth Izraeli (w/encl.)
Bob Barker (w/encl.)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VI
DALLAS, TEXAS

IN THE MATTER OF:	§	
	§	
MASS MERCHANDISERS, INC.	§	
	§	
	§	
REGARDING THE ARKWOOD, INC. SITE, OMAHA, ARKANSAS	§ §	ADMINISTRATIVE ORDER ON CONSENT
	§	
	§	
Proceeding under Section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9606(a))	§ § § § §	DOCKET NUMBER CERCLA VI-6-86

MMI PROGRESS REPORT NO. 1
(Progress as of June 1, 1986)

1. Execution of Consent Administrative Order and Clarification of Effective Date. On May 20, 1986 MMI received an executed copy of the Consent Administrative Order. In light of the delay in transmitting the order, MMI requested clarification regarding the effective date, from which certain deadlines under the order are calculated. By a letter dated May 27, 1986, the Agency confirmed that the effective date of the order was May 15, 1986, but that the deadline for submission of the RI/FS Work Plans would be extended to July 19, 1986.

2. Designation of Project Coordinators. By a letter dated May 20, 1986, MMI designated Bob Barker as its Project Coordinator under Section VII of the Consent Administrative Order. By a letter of May 23, 1986, EPA designated Ruth Izraeli as the Agency's Project Coordinator.

3. Contractual Arrangements. Immediately upon receipt of the executed Consent Administrative Order, MMI began final contractual negotiations to secure the services of Geraghty & Miller, Inc., to assist MMI in preparing the RI/FS Work Plans. MMI anticipates that a formal contractual agreement will be reached and executed with Geraghty & Miller in the next monthly reporting period.

4. Access Agreements. Immediately upon receipt of the executed Consent Administrative Order, MMI commenced negotiations with the site owner and the Missouri Pacific Railroad to seek access agreements pursuant to Section IX of the Consent Administrative Order.

A. Site Access. The owner of the site, Hallie C. Ormond of Harrison, Arkansas, is in ill health. Mr. Ormond's interests are presently being handled by his former son-in-law, C.C. "Bud" Grisham, and a daughter, Mary Jo Grisham. Mr. and Ms. Grisham have advised MMI that Mr. Grisham holds a power of attorney for Mr. Ormond. MMI has asked the Grishams orally and in writing for access to the site. A copy of MMI's written request is attached as Exhibit 1 of this Progress Report. Mr. Grisham has asked for a meeting on June 6, 1986, to discuss among other things the request for site access.

B. Access to Railroad Right-of-Way. Contact has been made with Missouri Pacific Railroad, and MMI has been informed that permission for access to the railroad right-of-way in Omaha must be directed to the Kansas City District Office for Contracts and Real Estate. On June 3, 1986, MMI wrote to Mr. J. A. Anthony, the railroad official in charge of the Kansas City District Contracts and Real Estate office, formally requesting access. A copy of MMI's letter is attached as Exhibit 2 of this Progress Report. The railroad has informed MMI that Mr. Anthony is on vacation and that the request will be processed upon Mr. Anthony's return.

5. Sample results and Test Data. During the period covered by this report, MMI has not received any sampling, tests, or other data in connection with activities under the Consent Order.

6. Plans and Procedures Completed. No plans or procedures of the type contemplated by Section VI(F)(2) of the Consent Order were completed during the period covered by this report.

7. Scheduled Activity for Next Reporting Period. Consent Administrative Order deadlines for the next monthly reporting period are as follows:

June 14, 1986	Obtain access agreements, if possible, from Ormond and railroad. Consent Administrative Order Section IX.
June 21, 1986	Notify EPA of any failure to obtain access agreements from Ormond or railroad and MMI's efforts to obtain them. Consent Administrative Order, Section IX.

Date: June 9, 1986

Respectfully submitted,

MITCHELL, WILLIAMS, SELIG,
JACKSON & TUCKER
1000 Savers Federal Building
Little Rock, Arkansas 72201
(501) 376-3151

By _____
Allan Gates

H. Maurice Mitchell
Richard A. Williams
John S. Selig
Joseph W. Gelzine
W. Christopher Barrier
Jerry D. Jackson
Jim Guy Tucker
Eugene G. Sayre
Byron Freeland
Kent Foster
Allan Gates
Pat Moran
W. H. L. Woodyard, III
Michael C. O'Malley
John C. Lessel
Doak Foster
James E. Smith, Jr.
Jean D. Stockburger
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Michael K. Wilson

Of Counsel
Henry E. Spitzberg

May 23, 1986

Mr. C. C. Grisham
Box 434
Harrison, Arkansas 72601

Hand Delivery

Dear Mr. Grisham:

As you know, Mass Merchandisers, Inc. has entered into a consent Administrative Order to perform an RI/FS for the Arkwood Site. To perform the RI/FS, MMI must obtain legal access to the site and authorization to perform tests, collect samples, conduct surveys, etc.

We would like to obtain the necessary access by agreement. Bob Barker informs me that you hold a power of attorney for Hallie Ormond, and that our request for access should be addressed to you.

I have enclosed with this letter an Access Agreement. If you are willing to allow access for the RI/FS, please execute the Access Agreement and return it to me. If you are not wiling to allow access for the RI/FS, please advise me of that fact in writing.

Whatever you decide, I would appreciate receiving your response not later than May 31, 1986. If you determine to withhold access, MMI will then have no choice but to advise EPA of the failure to reach agreement and the need to seek authority for access through judicial channels.

EXHIBIT 1

If you have any questions or desire any further information, please feel free to call me.

Very truly yours,

MITCHELL, WILLIAMS, SELIG,
JACKSON & TUCKER

By
Allan Gates

AG:gs
Enclosure

cc: Ms. Mary Jo Grisham

ACCESS AGREEMENT

Mass Merchandisers, Inc. ("MMI") and Hallie C. Ormond ("Ormond"), acting by and through C. C. Grisham as his attorney in fact, hereby agree as follows:

1. Ormond is the owner of certain real property in or near Omaha, Arkansas, known as the "Arkwood Site."

2. Ormond has given a general power of attorney to C. C. Grisham. A true copy of the power of attorney is attached as Exhibit A to this Access Agreement.

3. On September 18, 1985, EPA published a notice in the Federal Register proposing to add the Arkwood site to the National Priorities List. 50 Fed. Reg. 37950.

4. On May 15, 1986, MMI entered into a consent Administrative Order with the Environmental Protection Agency by which MMI agreed to perform a Remedial Investigation and Feasibility Study (RI/FS) for the Arkwood Site under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601 et seq.

5. In order to perform the RI/FS contemplated by the consent Administrative Order, MMI, EPA, and their duly authorized agents, representatives, and contractors will need access to the Arkwood site and authorization to inspect, survey, collect samples, conduct tests, and perform other work related to the RI/FS.

6. Section 103 of CERCLA empowers EPA to obtain by compulsory process access to the Arkwood site for the purpose of conducting the RI/FS.

7. In order to avoid litigation and to expedite performance of the RI/FS, Ormond hereby grants to MMI, EPA, and their duly authorized agents, representatives, and contractors the right of access to the Arkwood site and permission to inspect, survey, collect samples, conduct tests, and perform all other work related to the RI/FS.

8. The right of access granted by this agreement shall expire upon the completion and EPA approval of the Arkwood Site RI/FS.

9. MMI and Ormond agree that this Access Agreement shall not alter, waive, satisfy, release, increase, decrease, or otherwise modify any claims or rights that either party may have against one another or against any other third party with respect to the Arkwood Site.

Agreed this _____ day of May, 1986.

Hallie C. Ormond

By _____
C. C. Grisham
Attorney in Fact

Mass Merchandisers, Inc.

By _____
Stuart Braznell

AUTHENTICATION

STATE OF ARKANSAS)
)SS.
COUNTY OF PULASKI)

I, _____, a duly authorized notary public, state that on this _____ day of _____, 1986, C. C. Grisham and Stuart Braznell, to me well known, appeared before me and executed the foregoing Access Agreement on behalf of Hallie C. Ormond.

_____
Notary Public

My Commission Expires:

_____
(S E A L)

H. Maurice Mitchell
Richard A. Williams
John S. Selig
Joseph W. Gelzine
W. Christopher Barrier
Jerry D. Jackson
Jim Guy Tucker
Eugene G. Sayre
Byron Freeland
Kent Foster
Allan Gates
Pat Moran
W. H. L. Woodyard, III
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T. Scott Clevenger
Lynn Peeples Pruitt

Counsel
W. B. Riley
Edwin F. Jackson
Michael K. Wilson

Of Counsel
Henry E. Spitzberg

June 3, 1986

Mr. J. A. Anthony
District Director of Contracts and Real Estate
Missouri Pacific Railroad Company
6400 Martin Avenue
Kansas City, Missouri 64120

Dear Mr. Anthony:

I am writing you at the suggestion of Herb Goering to request permission for access to a portion of the Missouri Pacific right-of-way in the vicinity of Omaha, Arkansas.

I represent Mass Merchandisers, Inc. in connection with certain environmental issues arising out of the operation of a wood-treating plant adjacent to the Missouri Pacific right-of-way in Omaha, Arkansas. Mass Merchandisers, Inc. recently entered into a consent order with the Environmental Protection Agency which calls for a study of potential surface and groundwater contamination in and around the old Arkwood treating plant site. We anticipate that this study will require occasional access to the adjacent railroad right-of-way for the collection of samples, surveying elevations, and possibly the removal of some contaminated soils.

I am enclosing a map which indicates the general location of Omaha. The Arkwood plant is immediately south of the Missouri Pacific tracks at the west end of a tunnel which passes under Highway 65 near Omaha.

After you have had a chance to review this letter, I would like to visit further with you or a member of your staff regarding the nature of the access we would like to have.

EXHIBIT 2

Thank you in advance for your cooperation in this matter.

Very truly yours,

MITCHELL, WILLIAMS, SELIG,
JACKSON & TUCKER

By
Allan Gates

AG:gs

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VI
1201 ELM STREET
DALLAS, TEXAS 75270

May 20, 1986

Robert Blanz, Ph.D.
Deputy Director for Program Planning
Arkansas Department of Pollution Control
and Ecology
8001 National Drive
P.O. Box 9583
Little Rock, Arkansas 72201

Dear Dr. Blanz:

Enclosed for your information is a copy of the Administrative Order on Consent that the Agency issued on May 15, 1986, to Mass Merchandisers Inc. This Order has been issued pursuant to Section 106(a) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §9606, and requires that certain activities be taken at the Arkwood, Inc., site located south of the city of Omaha in Boone County, Arkansas.

Please refer to the enclosed copy of the Order for the specific actions required of the parties. If you should have any questions concerning this matter, please contact me.

Sincerely yours,

Allyn M. Davis

Allyn M. Davis
Director
Hazardous Waste Management Division

Enclosure

cc: Honorable Bill Clinton
Governor of Arkansas

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VI
DALLAS, TEXAS

IN THE MATTER OF:	§	
	§	
MASS MERCHANDISERS, INC.	§	
	§	
	§	
REGARDING THE ARKWOOD, INC. SITE	§	ADMINISTRATIVE ORDER
OMAHA, ARKANSAS	§	ON CONSENT
	§	
	§	
Proceeding Under Section 106(a)	§	DOCKET NUMBER
of the Comprehensive Environ-	§	CERCLA VI-6-86
mental Response, Compensation,	§	
and Liability Act of 1980	§	
(42 U.S.C. §9606(a))	§	

ADMINISTRATIVE ORDER ON CONSENT

I. JURISDICTION

This Consent Order is issued pursuant to the authority vested in the President of the United States by Section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §9606(a), and delegated to the Administrator of the United States Environmental Protection Agency ("EPA") on August 14, 1981, by Executive Order 12316, 46 Fed. Reg. 42237, and further delegated to the Assistant Administrator for Solid Waste and Emergency Response and the Regional Administrators by EPA Delegation Nos. I4-14 and I4-14-A, the latter of which was signed on April 16, 1984.

Respondent, Mass Merchandisers, Inc. ("MMI") agrees to undertake all actions required by the terms and conditions of this Consent Order. MMI consents to and will not contest EPA jurisdiction regarding this Consent Order.

II. STATEMENT OF PURPOSE

In entering into this Consent Order, the mutual objectives of EPA and MMI are: (1) to determine fully the nature and extent of the threat to the public health or welfare or the environment caused by the release or threatened release of hazardous substances, pollutants or contaminants, including pentachlorophenol, from the Arkwood, Inc. site (Remedial Investigation), and (2) to evaluate alternatives for the appropriate extent of remedial action to prevent or mitigate the migration or release or threatened release of hazardous substances, pollutants, or contaminants from the Arkwood, Inc. site (Feasibility Study). The activities conducted pursuant to this Consent Order are subject to approval by EPA and shall be consistent with the National Contingency Plan, 40 CFR Part 300, 50 Fed. Reg. 47972 (November 20, 1985).

III. FINDINGS OF FACT

The following constitutes an outline of the facts upon which this Consent Order is based:

A. The Arkwood, Inc. site ("the Site") is located on a parcel of approximately twenty acres of land along the Missouri Pacific Cricket railroad siding, south of the town of Omaha, in Boone County, Arkansas. From approximately 1962 until late 1984, the site was the location of a pentachlorophenol (PCP) and creosote wood treating operation. The site is owned by Hallie C. Ormond ("Ormond"), who originally built the plant and commenced its operation. Subsequently, Ormond formed an Arkansas corporation, Arkwood, Inc., which operated the plant in corporate form under lease from Ormond individually as landowner. In 1974 MMI purchased the assets of Arkwood, Inc. and operated the plant until 1984. During the period of its operations, MMI leased the land and fixtures from Ormond.

B. Located on-site are: A millwork shop; PCP and creosote treatment process area; storage tanks for PCP and creosote; pressure treatment cylinder; building sump; a spill containment basin used to control process spills; railroad drainage ditch and cave (entrance now covered) used to dispose of process wastes; and a sawdust and woodchip pile.

C. MMI is an Indiana corporation with its principal place of business in Harrison, Boone County, Arkansas. MMI operated the wood treating plant at the Arkwood, Inc. site until 1984. During the period of its operation, MMI leased the land and fixtures from Ormond.

D. The Arkwood, Inc. site was proposed for addition to the National Priorities List in September, 1985. 50 Fed. Reg. 37950 (published September 18, 1985).

E. Approximately 660 persons live within three miles of the site and depend upon groundwater as a source of drinking water.

F. Limited site investigations have been performed by the Arkansas Department of Pollution Control and Ecology. These investigations have included the sampling and analysis for concentrations of PCP of springs, groundwater, run-off from the Site, streams and sediment. The results of these analyses report the following ranges of PCP:

Sample (Type)	Concentration Range of PCP (ppm or mg/kg)
Groundwater	*Less than 0.0005 to 5.6
Spring water	*Less than 0.00005 to 97
Runoff from site	0.0028 to 10.6
Sediment from disposal area	23,000 to 30,000
Surface water	0.00021 to 2.8

*The lower number represents the detection limit for the analytical procedure utilized, for an individual sample. Analysis of some samples resulted in no PCP detected at these limits.

These analyses indicate that there has been a past release of PCP into the environment and that there is a potential for future additional releases of PCP and other contaminants into the environment.

G. According to "Chemical, Physical and Biological Properties of Chemicals Present at Hazardous Waste Sites Disposal Sites" (EPA, 1985), PCP has been found to be embryotoxic and phytotoxic. Chronic exposure to PCP may result in chloracne, headaches, muscle weakness, weight loss, and liver and kidney damage.

H. The release of PCP and creosote into the environment may cause an imminent and substantial endangerment to health or the environment.

IV. CONCLUSIONS OF LAW

A. The Arkwood, Inc. site is a "facility" as defined in Section 101(9) of CERCLA, 42 U.S.C. §9601(9).

B. MMI is a "person" as defined in Section 101(21) of CERCLA, 42 U.S.C. §9601(21).

C. Wastes and constituents thereof generated and disposed of at the Site, including PCP and creosote, are "hazardous substances as defined in Section 101(14) of CERCLA, 42 U.S.C. §9601(14).

D. The past, present, and potential future migration of hazardous substances from the Site constitutes an actual or threatened "release" as defined in Section 101(22) of CERCLA, 42 U.S.C. of §9601(22).

E. MMI is one of the responsible parties under Section 107(a) of CERCLA, 42 U.S.C. §9607(a).

V. DETERMINATIONS

A. Based on the Findings of Fact and Conclusions of Law set out above, EPA has determined that:

1. The actual and/or threatened release of hazardous substances from the Site may present an imminent and substantial endangerment to the public health or welfare or the environment.

2. The actions required by this Administrative Order, including the preparation of a Remedial Investigation and Feasibility Study are necessary to assure adequate protection of the public health and welfare and the environment.

VI. WORK TO BE PERFORMED

All work performed pursuant to this Consent Order shall be under the direction and supervision of a qualified professional engineer or certified geologist with expertise in hazardous waste site investigation and cleanup. Prior to the initiation of site work, MMI shall notify EPA in writing regarding the name, title, and qualifications of such engineer or geologist and of any contractors and/or subcontractors to be used in carrying out the terms of this Consent Order.

Based on the foregoing, it is hereby AGREED TO AND ORDERED that the following work shall be performed:

A. Within 60 calendar days of the effective date of this Consent Order, MMI shall submit to EPA a plan for a complete Remedial Investigation and Feasibility Study (RI/FS Work Plan). This plan shall be developed in accordance with the EPA Remedial Investigation and Feasibility Study guidance documents entitled ("Guidance on Remedial Investigations Under CERCLA", (May 1985) and "Guidance on Feasibility Studies Under CERCLA", (April 1985)) which have been provided to MMI by EPA. As described in this guidance, the RI/FS Work Plan must include: (1) a sampling plan, (2) a health and safety plan, (3) a plan for satisfaction of permitting requirements, (4) a description of chain of custody procedures, and (5) a description of quality control and quality assurance procedures. An outline of the elements to be included in the RI/FS work plan, including deliverables, is attached to and incorporated in this Consent Order. The RI/FS Work Plan shall be subject to review, modification, and approval by EPA.

B. Within 30 calendar days after receipt of the RI/FS Work Plan by EPA, EPA shall review and provide comments on the Health and Safety Plan and notify MMI in writing of EPAs approval or disapproval of the remainder of the RI/FS work plan or any part thereof. In the event of any disapproval, EPA shall specify in writing both the deficiencies and any EPA recommended modifications regarding the RI/FS Work Plan.

C. Within 30 calendar days of the receipt of EPA notification of RI/FS Work Plan disapproval, MMI shall amend and submit to EPA a revised RI/FS Work Plan. In the event of subsequent disapproval of the RI/FS Work Plan, EPA retains the right to conduct a complete RI/FS pursuant to its authority under CERCLA and to seek cost recovery.

D. MMI shall implement the tasks detailed in the RI/FS Work Plan when and if the Plan is approved by EPA. Upon approval by EPA, the RI/FS Work Plan will be attached to and incorporated in this Consent Order. Work performed in implementation of the Plan shall be conducted in accordance with the EPA Remedial Investigation and Feasibility Study guidance documents listed in paragraph VI(A) above, and with the standards, specifications, and schedule contained in the RI/FS Work Plan.

E. Within fifteen calendar days of receiving written approval of the RI/FS Work Plan by EPA, MMI shall commence work called for in the RI/FS Work Plan.

F. MMI shall provide monthly written progress reports to EPA. These progress reports shall: (1) describe the actions which have been taken during the period covered by the report toward achieving compliance with this Consent Order, (2) include all results of sampling and tests and other data received by MMI in connection with activities under this Consent Order during the period of the report, and (3) include all plans and procedures completed subsequent to EPA approval of the RI/FS Work Plan, during the period covered by the report as well as such actions, data, and plans which are scheduled for the next month. These reports are to be submitted to EPA by the tenth day of each month following the effective date of this Consent Order.

G. MMI shall provide preliminary and final reports to EPA according to the schedule contained in the RI/FS Work Plan.

H. EPA shall review the preliminary and final reports, and within 30 calendar days of receipt by EPA of such reports, EPA shall notify MMI in writing of EPA's approval or disapproval of these reports or any part thereof. In the event of any disapproval, EPA shall specify in writing both the deficiencies and the reasons for such disapproval.

I. Within 30 calendar days of receipt of EPA notification of preliminary or final report disapproval, MMI shall amend and submit to EPA such revised reports. In the event of disapproval, EPA retains the right to amend such reports, to perform additional studies, and to conduct a complete Remedial Investigation and Feasibility Study pursuant to its authority under CERCLA and to seek cost recovery.

J. Documents, including reports, approvals, disapprovals, and other correspondence, to be submitted pursuant to this Consent Order, shall be sent by certified mail or other means of verified delivery to the following addresses or to such other addresses as MMI or EPA hereafter may designate in writing:

1) Documents (one copy of monthly reports, ten copies of final RI/FS reports, and three copies of the RI/FS Work Plan and other miscellaneous reports) to be submitted to EPA should be sent to:

Chief, Superfund Enforcement Section
US EPA, Region VI
1201 Elm Street
Dallas, Texas 75270

2) Documents to be submitted to MMI should be sent to:

Stewart Braznell
Mass Merchandisers, Inc.
P.O. Box 790
Harrison, Arkansas 72601

3) MMI will send to the State of Arkansas copies of all notices and submissions which MMI is required by this order to send to EPA. The copies for the State of Arkansas should be addressed to:

Deputy Director for Program Operations
Arkansas Department of Pollution Control
and Ecology
8001 National Drive
P. O. Box 9583
Little Rock, Arkansas 72209

or such other person as may be designated by ADPC&E.

K. EPA may determine that other tasks, including remedial investigatory work and/or engineering evaluation, are necessary as part of a Remedial Investigation and Feasibility Study in addition to EPA approved tasks and deliverables, including reports, which have been completed pursuant to this Consent Order. Subject to the "Dispute Resolution" Section (Section XII) of this Consent Order, MMI shall implement any additional tasks which EPA determines are necessary as part of a Remedial Investigation and Feasibility Study and which are in addition to the tasks detailed in the RI/FS Work Plan. The additional work shall be completed in accordance with the standards, specifications, and schedule determined or approved by EPA.

VII. DESIGNATED PROJECT COORDINATORS

On or before the effective date of this Consent Order, EPA and MMI shall each designate a Project Coordinator. Each Project Coordinator shall be responsible for overseeing the implementation of this Consent Order. The EPA Project Coordinator will be EPA's designated representative at the Site. To the maximum extent possible, communications between MMI and EPA concerning the activities performed pursuant to the terms and conditions of this Consent Order shall be directed through the Project Coordinators, except where otherwise required pursuant to paragraph VI(J).

EPA and MMI each have the right to change their respective Project Coordinator. Such a change shall be accomplished by notifying the other party in writing at least five calendar days prior to the change.

The EPA designated "On-Scene-Coordinator," who may be the EPA Project Coordinator, shall have the authority vested in the On-Scene-Coordinator by the National Contingency Plan; 40 C.F.R. Part 300, 50 Fed. Reg. 47972 (November 20, 1985). This includes the authority to halt, conduct, or direct any tasks required by this Consent Order and/or any response actions or portions thereof when conditions present an immediate risk to public health or welfare or the environment.

The absence of the EPA Project Coordinator from the Site shall not be cause for the stoppage of work.

VIII. QUALITY ASSURANCE

MMI shall use quality assurance, quality control, and chain of custody procedures in accordance with the EPA approved Quality Assurance and Quality Control Plan included in the RI/FS Work Plan throughout all sample collection and analysis activities. MMI shall consult with EPA in planning for, and prior to, all sampling and analysis as detailed in the RI/FS Work Plan. In order to provide quality assurance and maintain quality control regarding all samples collected pursuant to this Consent Order, MMI shall:

A. Use its best efforts to ensure that EPA personnel and/or EPA authorized representatives are allowed access to the laboratory(s) and personnel utilized by MMI for analyses.

B. Ensure that the laboratory(s) utilized by MMI for analyses perform such analyses according to EPA methods or methods deemed satisfactory to EPA and submit all protocols to be used for analyses in the appropriate reports in the RI/FS Work Plan

C. Ensure that laboratory(s) utilized by MMI for analyses participate in an EPA quality assurance/quality control program equivalent to that which is followed by EPA contract laboratories As part of such a program, and upon request by EPA, such laboratory(s) shall conduct an annual quality assurance performance audit consisting of analysis of samples provided by EPA to demonstrate the quality of each laboratory's analytical data.

IX. SITE ACCESS

The Site, as well as other potentially contaminated properties, are presently owned by parties other than those bound by this Consent Order. MMI will use its best efforts to obtain access agreements from Ormand (the site owner) as well as from the Missouri-Pacific Railroad within 30 days of the effective date of this Consent Order. MMI will use its best efforts to obtain similar access agreements with nearby property

owners as these agreements may become necessary to the progress of the RI/FS. Such agreement shall provide reasonable access to EPA and/or its authorized representatives. In the event that a site access agreement is not obtained within the time referenced above, MMI shall, within seven days of the expiration of this time period, notify EPA regarding both the lack of such agreement and the efforts to obtain it.

X. SAMPLING, ACCESS, AND DATA/DOCUMENT AVAILABILITY

MMI shall make the results of all sampling and/or tests or other data generated by MMI, or on MMI's behalf, with respect to the implementation of this Consent Order, available to EPA and shall submit these results in monthly progress reports as described in Section VI of this Consent Order. EPA will make available to MMI the results of sampling and/or tests or other data similarly generated by EPA.

At the request of EPA, MMI shall allow split or duplicate samples to be taken by EPA and/or its authorized representatives, of any samples collected by MMI pursuant to the implementation of this Consent Order. MMI shall notify EPA not less than 48 hours not including weekends and holidays in advance of any sample collection activity. EPA will afford MMI advance notice of any collection of samples by or on behalf of the Agency related to the Arkwood Site and allow MMI to take split or duplicate samples. The project coordinators may agree orally or in writing to a shorter notification period.

To the extent that permission is within MMI's control, EPA or any EPA authorized representative shall have the authority to enter and freely move about all property at the Site at all reasonable times for the purposes of, inter alia: inspecting records, operating logs, and contracts related to the Site; reviewing the progress of MMI in carrying out the terms of this Consent Order; conducting such tests as EPA or the Project Coordinator deem necessary; using a camera, sound recording, or other documentary type equipment; and verifying the data submitted to EPA by MMI. MMI shall permit such persons to inspect and copy all records, files, photographs, documents, and other writings, including all sampling and monitoring data, in any way pertaining to work undertaken pursuant to this Consent Order. All parties with access to the Site pursuant to this paragraph shall comply with all approved health and safety plans.

MMI may assert a confidentiality claim, if appropriate, covering part or all of the information requested by this Consent Order pursuant to 40 C.F.R. §2.203(b). Such an assertion shall be adequately substantiated when the assertion

is made. Analytical data shall not be claimed as confidential by MMI. Information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no such claim accompanies the information when it is submitted to EPA, it may be made available to the public by EPA without further notice to MMI.

Nothing contained in this Administrative Order is intended to waive, or in any way limit, the authority granted in Section 104 of CERCLA. All authority granted in Section 104 is specifically reserved.

XI. RECORD PRESERVATION

EPA and MMI agree that each shall preserve, during the pendency of this Consent Order and for a minimum of six (6) years after its termination, all records and documents in their possession or in the possession of their divisions, employees, agents, accountants, contractors, or attorneys which relate in any way to the Site, despite any document retention policy to the contrary After this six year period, MMI shall notify EPA within 30 calendar days prior to the destruction of any such documents. Upon request by EPA, MMI shall make available to EPA such records or copies of any such records. Additionally, if EPA requests that some or all documents be preserved for a longer period of time, MMI shall comply with that request.

XII. DISPUTE RESOLUTION

If MMI objects to any EPA notice of disapproval or decision made pursuant to this Consent Order, MMI shall notify EPA in writing of its objections within fourteen (14) days of receipt of the decision. EPA and MMI then have an additional fourteen (14) days from the receipt by EPA of the notification of objection to reach agreement. If agreement cannot be reached on any issue within this fourteen (14) day period, EPA shall provide a written statement of its decision to MMI. In the event MMI fails or declines to comply with a decision made by EPA pursuant to this paragraph, EPA may proceed to implement the decision in question or to complete the RI/FS and seek cost recovery pursuant to CERCLA. The penalties provided in paragraph XIII of this Consent Order shall not run during the dispute resolution. For purposes of penalty accrual under paragraph XIII, dispute resolution under this paragraph shall end when EPA provides a written statement of its decision to MMI.

XIII. DELAY IN PERFORMANCE/STIPULATED PENALTIES

Stipulated penalties shall accrue in the amount of $1,000.00 for the first week and $2,000.00 for each week, or part thereof, thereafter for failure to submit to EPA the RI/FS Work Plan, any monthly progress report, any deliverable required under the RI/FS

Work Plan or this Consent Order, the Remedial Investigation, or the Feasibility Study or comply with a schedule as required by the RI/FS Work Plan or this Consent Order.

If any event occurs which causes delay in the achievement of the requirements of this Consent Order, MMI shall have the burden of proving that the delay was caused by circumstances beyond the reasonable control of MMI which could not have been overcome by due diligence. MMI shall promptly notify EPA's Project Coordinator orally and shall, within seven (7) calendar days of oral notification to EPA, notify EPA in writing of the anticipated length and cause of the delay, the measures taken and/or to be taken to prevent or minimize the delay, and the timetable by which MMI intends to implement these measures. If the parties can agree that the delay or anticipated delay has been or will be caused by circumstances beyond the reasonable control of MMI, the time for performance hereunder shall be extended; in writing, for a period equal to the delay resulting from such circumstances. MMI shall adopt all reasonable measures to avoid or minimize delay. Failure of MMI to comply with the notice requirements of this paragraph shall constitute a waiver of MMI's right to request a waiver of the requirements of this Consent Order for the delay in question. Increased costs of performance of the terms of this Consent Order or changed economic circumstances shall not be considered circumstances beyond the control of MMI.

In the event that EPA and MMI cannot agree that any delay in the achievement of the requirements of this Consent Order, including the failure to submit any report or document, has been or will be caused by circumstances beyond the reasonable control of the Respondent, the dispute shall be resolved in accordance with the provisions of the "Dispute Resolution" Section (Section XII) of this Consent Order.

The stipulated penalties set forth in this Section do not preclude EPA from electing to pursue any other remedies or sanctions which may be available to EPA by reason of MMI's failure to comply with any of the requirements of this Consent Order. Such remedies and sanctions may include a suit for statutory penalties as authorized by Section 106 of CERCLA, a federally-funded response action, and a suit for reimbursement of costs incurred by the United States and the State of Arkansas.

XIV. RESERVATION OF RIGHTS

Notwithstanding compliance with the terms of this Consent Order, including the completion of an EPA approved Remedial Investigation and Feasibility Study, MMI is not released from liability, if any, for any actions beyond the terms of this

W. J. "Bill" McCuen
SECRETARY OF STATE

State of Arkansas
SECRETARY OF STATE

State Capitol
Little Rock, Arkansas 72201-1094

C E R T I F I C A T E

I, Bill McCuen, Secretary of State of the State of Arkansas, do hereby certify that the attached instrument of writing is a true and correct copy of

ARKWOOD, INC.

In Testimony Whereof, I have hereunto set my hand and official seal on this, the 11th day of September, 1985.

W. J. "Bill" McCuen
Secretary of State

by Betty Masten
Corporation Department

CERTIFICATE OF AMENDMENT
OF
ARTICLES OF INCORPORATION
OF
ARKWOOD, INC.

FILED
APR 17 1969
KELLY BRYANT
SECRETARY OF STATE
BY _____

Pursuant to the authority and directions of the holders of all of the stock of Arkwood, Inc., an Arkansas Corporation, entitled to a vote, the Articles of Incorporation of said Corporation are hereby amended in the following particulars only:

ARTICLE NINTH: Dividends in respect to and on Class "A" Common Stock shall be and are hereby limited to a maximum of $1.00 per share, per year, when earned and declared, which dividends shall be non-cumulative.

In the event of dissolution, the distribution of assets to the holders of Class "A" Common Stock shall be and is hereby limited to the maximum of $1.00 per share.

The exclusive voting rights of the holders of said Class "A" Common Stock shall remain unchanged.

A copy of the resolution, adopted at the annual meeting of the stockholders of said corporation, had and held on April 14, 1969, being the second Monday in the Month of April, 1969, authorizing and directing the foregoing Amendment and bearing the endorsement of the holders of all of the stock of said corporation, entitled to vote, is hereto attached as Exhibit "A".

The number of shares outstanding entitled to vote on said Resolution and Amendment was: 300.

The number of shares voting for said Amendment was : 300.

The number of said shares voting against said Amendment was: None

No other article or provision of the Articles of Incorporation of this Corporation shall be affected.

CERTIFICATE OF AMENDMENT

OF ARTICLES OF INCORPORATION

OF ARKWOOD, INC.

Page # 2

IN TESTIMONY WHEREOF, the within amendment is executed in the name and behalf of said Corporation by its proper officers, hereunto duly authorized, this 14th day of April, 1969.

Hallie C. Ormond
PRESIDENT

ATTEST:

Mary Jo Grisham
SECRETARY

STATE OF ARKANSAS:
ss
COUNTY OF BOONE :

A C K N O W L E D G M E N T

On this day personally appeared before me, a Notary Public within and for the County and State aforesaid, duly commissioned and acting, Hallie C. Ormond and Mary Jo Grisham, who stated that they were the President and Secretary, respectively, of ARKWOOD, INC., and acknowledged that they had executed the foregoing Certificate of Amendment to Articles of Incorporation of said Corporation, for the purposes therein mentioned, in the name and behalf of said Corporation, pursuant to authority in them duly vested. WITNESS MY HAND AND SEAL as such Notary Public on this 14th day of April, 1969.

Mary Stanley
NOTARY PUBLIC

My Commission Expires:

My Commission Expires Feb. 19, 1973

R E S O L U T I O N

RESOLVED: That the Articles of Incorporation of ARKWOOD, INC., be and hereby are amended in respect to ARTICLE NINTH thereof, as follows:

Dividends in respect to and on Class "A" Common Stock shall be and are hereby limited to a maximum of $1.00 per share, per year, when earned and declared, which dividends shall be non-cumulative. In the event of dissolution, the distribution of assets to the holders of Class "A" Common Stock shall be and is hereby limited to the maximum of $1.00 per share.

The exclusive voting rights of the holders of said Class "A" Common Stock shall remain unchanged.

C E R T I F I C A T E

The undersigned, being the holders of all the Class "A" Common Stock of ARKWOOD, INC., hereby certify that the foregoing Resolution was duly and regularly adopted by the affirmative vote of the holders of all said stock; and that we, and each of us, hereby approve and confirm said Resolution, passed and adopted by a vote of all the stockholders of said corporation at the annual meeting had and held by said corporation on April 14, 1969, being the second Monday in the Month of April, 1969, at its principal offices in Harrison, Arkansas.

Hallie C. Ormond
Hallie C. Ormond

C. C. Grisham
C. C. Grisham

Mary Jo Grisham
Mary Jo Grisham

Ina Ann Farmer
Ina Ann Farmer

CERTIFICATE OF DISSOLUTION

(i) The name of the Corporation to be dissolved is:

ARKWOOD, INC.

(ii) The names and respective addresses of the officers of said corporation are as follows:

C.C. GRISHAM, 1212 Berry Street, Harrison,Arkansas -PRESIDENT
C.R. BARKER, 1123 North Liberty, Harrison,Arkansas-Vice President
MARY JO GRISHAM,1212 Berry St., Harrison, Arkansas-Sec.-Treasurer
MARY STANLEY- Valley Inn, Harrison, Arkansas - Assistant Secretary

(iii) The names and respective addresses of the Board of Directors are as follows:

C.C.GRISHAM, 1212 Berry Street,Harrison,Arkansas
C.R. BARKER, 1123 North Liberty Street,Harrison, Arkansas
Mary Jo Grisham - 1212 Berry Street, Harrison, Arkansas

(iv) Attached hereto a copy of the shareholders resolution directing the dissolution.

(v) The number and classes of shares outstanding:

200 shares of Class A. Common Stock and 690 shares of Class B Common Stock.

(vi) The resolution of the shareholders for dissolution was approved unanimously.

IN WITNESS WHEREOF, WITNESS our hands as President and Secretary of the corporation on this 13 day of August,1974.

C C Grisham
PRESIDENT

ATTEST:
Mary Jo Grisham
SECRETARY

FILED
AUG 20 1974
KELLY BRYANT
SECRETARY OF STATE
By

A C K N O W L E D G M E N T

STATE OF ARKANSAS)
)SS
COUNTY OF BOONE)

On this 13 day of August, 1974, before me, a Notary Public, duly commissioned, qualified and acting within and for the said County and State, appeared in person C.C. GRISHAM and MARY JO GRISHAM, being the President and Secretary respectively, of ARKWOOD, INC. and who had been designated by said corporation to execute the above and foregoing instrument, to me personally well known, and who stated that they were the President and Secretary of the said ARKWOOD, INC. and were duly authorized in their respective capacities to execute the foregoing instrument for the considerations, uses and purposes therein mentioned and set forth.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal this 13 day of August, 1974.

Mary Stanley
NOTARY PUBLIC

My Commission Expires:
April 12, 1977

SHAREHOLDERS RESOLUTION

At a special meeting of the Shareholders of Arkwood, Inc. held in the corporate offices at Harrison, Arkansas, on August 13, 1974, with all outstanding shares being represented and voting, the following resolution was by proper motion proposed:

> RESOLVED, that the corporation be dissolved by the filing of proper documents with the office of the Secretary of State of Arkansas and that thereafter any and all corporate activities cease.

Upon second & call for vote, the aforesaid resolution was unanimously approved.

WITNESS My hand as Secretary this 13 day of August, 1974.

MARY JO GRISHAM, Secretary

STATE OF ARKANSAS)
)SS
COUNTY OF BOONE)

V E R I F I C A T I O N

Comes now, MARY JO GRISHAM, and on oath states that she is the Secretary of Arkwood, Inc. and that the foregoing constitutes a true and correct copy of the corporate resolution as same appears on the records of the corporation.

MARY JO GRISHAM

SUBSCRIBED and Sworn to before me, a Notary Public, this 13 day of August, 1974.

N O T A R Y P U B L I C

My Commission Expires:

April 12, 1979

ARTICLES OF INCORPORATION
OF
ARKWOOD, INC.

WE, THE UNDERSIGNED, in order to form a Corporation for the purposes hereinafter stated, under and pursuant to the provisions of Chapter One of an Act of the General Assembly of the State of Arkansas entitled "An Act to Provide for the Formation of Corporations, the Regulation and Control of Corporations and for Other Purposes" (approved April 1, 1931),
DO HEREBY CERTIFY as follows:

FIRST:

The name of this Corporation is:

ARKWOOD, INC.

SECOND:

The nature of the business of the Corporation and the objects or purposes proposed to be transacted, promoted or carried on by it, are as follows, to-wit:

(a) To conduct and carry on a timber business involving forest products of every kind; to deal in timber and timber lands and timber products of every kind; to own, lease or rent and operate wood treating plants and equipment, post and pole peelers, sawmills and other woodworking or processing equipment of any kind; to manufacture, process and chemically treat forest products of all kinds; to own, operate, lease, buy and sell mines and mineral deposits of all kinds and rock and stone quarries of all kinds and sand and gravel deposits of all kinds and to produce, manufacture, process and mill all kinds of the products of mines, rock and stone quarries and sand and gravel deposits; to buy, sell, produce or process agricultural products and livestock and poultry; to conduct and carry on any and all kinds of farming, including livestock and poultry; to engage in the merchandising, manufacturing, treating or processing of feed, grain, fertilizer, oils, petroleum, or any other goods, wares or merchandise of any and every kind and description; to own, operate, lease, buy or sell construction, building and other equipment of any kind and to engage itself in the business of light or heavy general construction or building work of any and every kind and description, whether by contract or otherwise.

CERTIFIED COPY
CERTIFIED COPY

(b) To acquire the good will, rights, property, business and franchise of any person, firm, association or corporation engaged in any lawful business and to acquire, own, sell, pledge and otherwise employ stocks, bonds, notes, mortgages, debentures and securities of any person, firm, association or corporation.

(c) To become a joint venturer or partner (either general or limited or both), to enter into agreements of joint venture or partnership with one or more other persons, partnerships, associations or corporations for the purpose of carrying on any business whatsoever which this corporation may deem proper or convenient in connection with any other persons herein set forth or otherwise, or which may be calculated directly or indirectly to promote the best interest of this corporation or to enhance the value of its property or business.

THIRD:

The period of existence of this corporation shall be perpetual.

FOURTH:

The principal office of place of business of this corporation shall be located in the County of Boone, in the City of Harrison, State of Arkansas, and the address of the principal office or place of business shall be Harrison, Arkansas.

FIFTH:

The name of the resident agent of this corporation is C. C. Grisham, whose address is Harrison, County of Boone, State of Arkansas.

SIXTH:

The total amount of the authorized capital stock of this corporation is 5,300 shares, of which 300 shares shall be Class "A" Common Capital Stock; having no nominal or par value each, and 5,000 shares shall be Class "B" non-voting Common Capital Stock, having no nominal or par value each; said Class "A" Stock being exclusively the voting and controlling stock of the corporation, as further particularly provided in Article Ninth hereof.

SEVENTH:

The amount of capital with which this corporation will begin business is THREE HUNDRED ($300.00) DOLLARS.

EIGHTH:

The names and Post Office address of each of the Incorporators and the number of shares of Class "A" Common Capital Stock subscribed by each of them is as follows:

NAMES	POST OFFICE ADDRESS	NO. OF SHARES
Hallie C. Ormond	Harrison, Arkansas	210
C. C. Grisham	Harrison, Arkansas	30
Mary Jo Grisham	Harrison, Arkansas	30
Ina Ann Farmer	Batesville, Arkansas	30

NINTH:

The Class "A" Common Capital Stock aforesaid shall be and is the exclusive voting and controlling stock of said Corporation. The Class "B" Stock shall be and is non-voting and non-controlling stock and the holders of Class "B" Stock shall not by reason of such holding be entitled to vote at meetings of the stockholders.

Both Class "A" and Class "B" Stock shall be on an equal per share basis in respect to dividends and distribution of assets in the event of dissolution.

IN WITNESS WHEREOF, we have hereunto set our hands on this 16th day of June, A.D., 1965.

INCORPORATORS:

Hallie C. Ormond

C. C. Grisham

Mary Jo Grisham

Ina Ann Farmer

STATE OF ARKANSAS)
) ss
COUNTY OF BOONE)

ACKNOWLEDGMENT

BE IT REMEMBERED that on this 16th day of June A.D., 1965, personally came before me, the undersigned, a Notary Public within and for the State and County aforesaid, Hallie C. Ormond, C. C. Grisham, Mary Jo Grisham and Ina Ann Farmer, parties to the foregoing Articles of Incorporation, known to me personally to be such, and severally acknowledged the same to be the act and deed of the signers respectively, and that the facts therein stated are truly set forth.

GIVEN UNDER MY HAND AND SEAL OF OFFICE the day and year aforesaid.

My Commission Expires:
2-7-1966

NOTARY PUBLIC

Form CORP-1
5M—11-71—66725—PP&SCo.

STATE OF ARKANSAS — OFFICE OF THE SECRETARY OF STATE

CERTIFICATE OF AMENDMENT

Arkwood, Inc., a corporation duly organized, created and existing under and by virtue of the laws of the State of Arkansas, by its President and its Secretary,

C. C. Grisham and Mary Stanley

DOES HEREBY CERTIFY:

A. That a written or printed notice setting forth the proposed Amendment was given to each shareholder entitled to vote thereon within the time and manner as provided in the "Arkansas Business Corporation Act" (Act 576 of 1965), and that this Amendment (s) is filed pursuant to said Act.

B. That at a special (or regular) meeting of the stockholders of said corporation, duly called and held at the office of the Company, in the City of Harrison, State of Arkansas, on September 22, 19 72, the Amendment to the Articles of Incorporation, as herein stated, was (were) offered and adopted.

C. That the number of shares outstanding are 890, and the number of shares entitled to vote thereon are 200 (100%). The number of shares which voted for are 200. The number of shares which voted against are none. (If the shares are entitled to vote thereon as a class, the designation and number of outstanding shares entitled to vote thereon of each such class, and the number of shares of each class which voted for and against are required.)

D. That the following Article (s) of the Articles of Incorporation of this corporation were amended, Articles VI, _____, Section II, to read as follows:

"There shall be no restrictions on the transfer of stock whether by gift, by sale or otherwise."

FILED
OCT 19 1972
KELLY BRYANT
SECRETARY OF STATE
BY _____

IN WITNESS WHEREOF, the said Corporation, Arkwood, Inc. has caused its corporate name to be subscribed by its President, who hereby verifies that the statements contained in the foregoing Certificate of Amendment are true and correct to the best of his/her knowledge and beliefs, and its corporate seal hereto affixed and duly attested by its Secretary, on this 18th date, October, 19 72.

Corporate Seal

Arkwood, Inc.
Corporate Name

C. C. Grisham
President

1212 Berry - Harrison, Arkansas 72601
Address

ATTEST:

Secretary

(Acknowledgment optional).

INSTRUCTIONS: File in Duplicate with Kelly Bryant, Secretary of State, State Capitol, Little Rock, Arkansas, 72203. Duplicate copy will be returned to the above address, which should be filed with the County Clerk of the County where the Corporation's registered office is located, within 60 days of the filing herewith (other than Pulaski County).

KELLY BRYANT
Secretary of State

CERTIFICATE OF
AMENDMENT
of
ARKWOOD, INC

KELLY BRYANT
Secretary of State
STATE OF ARKANSAS

AMENDMENT TO ARTICLE VI, SECTION II

Repeal sub-paragraphs 1 through 10, inclusive, of Section II, Article VI and in place thereof insert a new addition to the By-laws under Section II, Article VI as follows:

" There shall be no restrictions on the transfer of stock whether by gift, by sale or otherwise."

Dated this 22nd day of September, A.D. 1972, at Harrison, in the County of Boone, State of Arkansas.

Mary Jo Grisham

Mary Jo Grisham

Date: 9-22-72

C C Grisham

C. C. Grisham

Date: 9/22/72

State of Arkansas
SECRETARY OF STATE
State Capitol
Little Rock, Arkansas 72201-1094

W. J. "Bill" McCuen
SECRETARY OF STATE

C E R T I F I C A T E

I, Bill McCuen, Secretary of State of the State of Arkansas, do hereby certify that the attached instrument of writing is a true and correct copy of

MOUNTAIN ENTERPRISES, INC.

In Testimony Whereof, I have hereunto set my hand and official seal on this, the 11th day of September, 1985.

W. J. "Bill" McCuen
Secretary of State

by Betty Masten
Corporation Department

Form SS-14—2M—11-61—160382—C.-McB.

NOTICE: "MUST BE FILED IN DUPLICATE"

ARTICLES OF INCORPORATION

OF

MOUNTAIN ENTERPRISES, INC.

WE, THE UNDERSIGNED, in order to form a corporation for the purposes hereinafter stated, under and pursuant to the provisions of Chapter One of an Act of the General Assembly of the State of Arkansas entitled "An Act to Provide for the Formation of Corporations, the Regulation and Control of Corporations, and for Other Purposes" (approved April 1, 1931), DO HEREBY CERTIFY as follows:

FIRST:

The name of this corporation is

Mountain Enterprises, Inc.

(The corporate name must end with the abbreviation "Inc.," or must include the word "Corporation" or "incorporated," or may include the word "Company" or the abbreviation "Co." if that word or abbreviation is not immediately preceded by the word "and" or the abbreviation "&.")

SECOND:

The nature of the business of the corporation and the objects or purposes proposed to be transacted, promoted or carried on by it, are as follows, to-wit:

To purchase, own, improve, equip, operate and manage farms and ranches, and to engage in any agriculture or livestock pursuit or undertaking.

To purchase, locate, lease or otherwise acquire mines, mining claims, mining rights and lands and enter into any interest therein, and to explore, work, exercise, develop, and turn to account the same; to quarry, dress, refine and process and market stone and earth and mineral substances of all kind.

To purchase, or otherwise acquire, own, sell, pledge or otherwise dispose of stocks, bonds, notes, debentures and securities of other persons, firms and corporations; and to do and to carry on any other operations or business which may seem necessary, convenient and incidental to any of the obligations aforesaid.

CERTIFIED COPY

CERTIFIED COPY

THIRD:

The period of existence of this corporation shall be perpetual

(The period of existence shall be perpetual unless limited to a number of years. If limited, state the number of years, and if perpetual so state.)

FOURTH:

The principal office or place of business of this corporation shall be located in the County of Boone, in the city (or town) of Harrison, State of Arkansas, and the address of the principal office or place of business shall be _____ Street.

FIFTH:

The name of the resident agent of this corporation is W. S. Walker, whose address is Coffman Building Street, City (or town) of Harrison, County of Boone, State of Arkansas.

SIXTH:

The total amount of the authorized capital stock of this corporation is 300 shares, having ~~a~~ no par value of $ No Par each.

(If the corporation is to be authorized to issue more than one class of stock, the statements required by paragraph f of Section I of Act 255 of 1931 shall be stated.)

SEVENTH:

The amount of capital with which this corporation will begin business is $ 300.00 (not less than Three Hundred ($300.00) Dollars).

EIGHTH:

The names and post office address of each of the incorporators and the number of shares of the capital stock subscribed by each of them is as follows:

NAMES	POST OFFICE ADDRESS	NO. OF SHARES
W. S. Walker	Harrison, Arkansas	25
Nina B. Walker	Harrison, Arkansas	1
Marian Bourque	Harrison, Arkansas	1

NINTH:

The incorporators may insert here any provisions which they may choose for the regulation of the business and for the conduct of the affairs of the corporation and any provisions creating, dividing, limiting and regulating the powers of the corporation, the directors and stockholders, including the provisions governing the issuance of stock certificates to replace lost or destroyed stock certificates, such provisions not to be contrary to the laws of this State.

STATE OF Arkansas
COUNTY OF Boone } ss.

BE IT REMEMBERED that on this 5 day of October A. D. 19 62, personally came before me, the undersigned, a Notary Public within and for the State and County aforesaid, W. S. Walker, Nina B. Walker and Marian Bourque,

parties to the foregoing Articles of Incorporation, known to me personally to be such, and severally acknowledged the same to be the act and deed of the signers respectively, and that the facts therein stated are truly set forth.

GIVEN under my hand and seal of office the day and year aforesaid.

My comm. exp.
10-31-62

Robert W. Cummins
Notary Public

(These Articles must first be filed with the Secretary of State and a certified copy thereof then filed with the County Clerk.)

CERTIFICATE OF CLERK

STATE OF ARKANSAS
COUNTY OF _____ } ss.

I, _____, Clerk of the County and Probate Courts in and for the County aforesaid, do hereby certify that the foregoing instrument of writing, being certificate of incorporation of _____ was filed for record in my office on the _____ day of _____, 19____, and the same is now duly recorded in Book _____, Page _____, of the records of my said office.

IN TESTIMONY WHEREOF, I hereunto set my hand and the seal of said Court this _____ day of _____, 19____.

_____
County Clerk

_____
D. C.

Mountain Enterprises Inc.

ARTICLES OF INCORPORATION

of

Filed in the office of the Secretary of State of the State of Arkansas on this _____ day of _____ A. D. 19____

FILED
OCT 8 1962
NANCY J. HALL
SECRETARY OF STATE
BY _____

Secretary of State

By _____ Deputy

CERTIFICATE OF DISSOLUTION

ONE: Name of Corporation: MOUNTAIN ENTERPRISES, INC.

TWO: Name and Address of Officers:

W.S. WALKER - President
218 East Ridge
Harrison, AR 72601

GENE C. CAMPBELL
Secretary-Treasurer
218 East Ridge
Harrison, AR 72601

LAVERNE GARRY
218 East Ridge
Harrison, AR 72601

THREE: Names and Addresses of Directors:

Those persons listed in Paragraph Two above plus: NO OTHERS

FILED

MAY 2 1978

WINSTON BRYANT
SECRETARY OF STATE
By

FOUR: Shareholders Resolution:

Attached as Exhibit "A".

FIVE: Number of Shares Outstanding: 300 shares of No-par common stock.

SIX: Number of Shares Voted For and Against Resolution:

For: 300
Against: 0

Witness my hand as President of said Corporation on this 25th day of April, 1978.

W.S. WALKER PRESIDENT

ATTEST:

GENE C. CAMPBELL

STATE OF ARKANSAS)
)SS
COUNTY OF BOONE)

VERIFICATION

BE IT REMEMBERED that on this 24 day of April, 1978, personally appeared before me, the undersigned, a Notary Public, within and for the State and County aforesaid, W.S. WALKER, party to the foregoing Certificate of Dissolution, known to me personally to be such, and severally acknowledged the same to be the act and deed of the signer respectively, and that the facts therein stated are truly set forth.

GIVEN under my hand and seal this 24 day of April, 1978.

My Comm. Expires: 11-11-81 NOTARY PUBLIC

SHAREHOLDERS RESOLUTION

On April 24, 1978, a special meeting of the shareholders of MOUNTAIN ENTERPRISES, INC. was held in the Corporations office pursuant to proper notice and all shareholders were present and participating in said meeting.

Upon Motion duly made and seconded, the following resolution was adopted unanimously by a vote of 300 to 0 in favor.

RESOLVED, that in view of the lack of any corporate assets and the inactive status of the Corporation for several years, it is in the best interest of the shareholders that the Corporation be dissolved forthwith.

There being no further business the meeting was adjourned.

WITNESS MY HAND as Secretary this 24 day of April, 1978, stating this to be a true extract of the action taken at said meeting.

GENE C. CAMPBELL

STATE OF ARKANSAS)
)ss
COUNTY OF BOONE)

VERIFICATION

Comes now GENE C. CAMPBELL, and states on oath that the facts contained in the foregoing, are correct and true to the best of his knowledge and information.

GENE C. CAMPBELL

SUBSCRIBED AND SWORN to before me, a Notary Public, within and for the County and State aforesaid, this 24 day of April, 1978.

NOTARY PUBLIC

My Comm. Expires: 11-11-91

STATE OF ARKANSAS
DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY
8001 NATIONAL DRIVE, P.O. BOX 9583
LITTLE ROCK, ARKANSAS 72209

PHONE: (501) 562-7444

June 11, 1985

Mr. Ed Bisno
Haley, Polk & Heister, P.A.
One Spring Street
Suite 330
Little Rock, AR 72201

Mr. Allan Gates
Mitchell, Williams, Selig, Jackson
& Tucker
1000 Savers Federal Bldg.
Capitol Avenue at Spring Street
Little Rock, AR 72201

Re: Arkwood Plant Site

Gentlemen:

Enclosed herewith is a proposed Consent Administrative Order concerning the Arkwood plant site. Please review this proposed order with your clients and let me know your position as soon as possible. If a meeting is desired, I would be happy to arrange it. I realize there has been a significant delay on my part in getting this proposal out to you; however, I must ask for your prompt attention hereto.

Yours truly,

Phil Deisch

Phillip Deisch
Chief Counsel
Legal Section

PD:mlw

Enclosure

cc: w/enc.
Robert Blanz
Doice Hughes

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY

IN THE MATTER OF:
ARKWOOD, INC; MOUNTAIN
ENTERPRISES, INC.;
MASS MERCHANDISERS, INC.
and HALLIE C. ORMOND

LIS 85-035

CONSENT ADMINISTRATIVE ORDER

This Administrative Order is issued by the Director of the Arkansas Department of Pollution Control and Ecology ("ADPC&E") pursuant to the authority of the Arkansas Water and Air Pollution Control Act (Act 472 of 1949, as amended), the Arkansas Hazardous Waste Management Act (Act 406 of 1979, as amended), and the regulations promulgated pursuant to such acts including, but not limited to, Regulation No. 2: "Arkansas Water Quality Standards" (Regulation No. 2) and the Arkansas Hazardous Waste Management Code ("Hazardous Waste Code").

The issues in this matter having been settled by the agreement of the parties hereto, it is hereby agreed and stipulated that the following Findings of Fact and Order be entered herein:

FINDINGS OF FACT

1. Hallie C. Ormond ("Ormond") owns certain real property and the fixtures thereon located in Section 27, Township 21 North, Range 21 West, in Boone County, Arkansas, which has been used, as hereinbelow described, for commercial wood treating operations.

2. Beginning in 1963 and continuing until or shortly before December 31, 1984, the realty and fixtures were leased by Ormond to Arkwood, Inc. and then in 1973 to Mountain Enterprises, Inc. Both Arkwood, Inc. and Mountain Enterprises, Inc. are wholly owned subsidiaries of Mass Merchandisers, Inc. and are hereinafter all collectively referred to as Mass Merchandisers, Inc. or ("MMI"). The lease terminated December 31, 1984.

3. During the course of said leases, MMI operated a commercial wood treating plant on the site utilizing creosote and pentachlorophenol to treat wood products. In the course of such operations, waste products, including pentachlorophenol, were handled and stored in an unprotected manner, whereby wastes were spilled or spread on surface soils or stored in open piles; and were disposed of by surface dumping, or dumping into crevices on the property, or otherwise applying it to the land surface. Such handling, storage, and disposal of wastes constituted a violation of:

(a) Ark. Stat. Ann. 82-1908 Subdivision 2 by reason of the failure to have a permit for such storage and disposal;

(b) Ark. Stat. Ann. 82-1908 Subdivision 1 by reason of such disposal causing pollution of the surface waters of the State violating Regulation No. 2: "Arkansas Water Quality Standards"; and

(c) Ark. Stat. Ann. 82-1908 Subdivision 1 by reason of such disposal causing pollution of the ground waters of the State.

(d) Ark. Stat. Ann. 82-1908 Subdivision 1 for placing wastes in a location where it is likely to cause contamination of the waters of the State.

4. In addition to those violations cited in paragraph 3 above, the handling and disposal of pentachlorophenol contaminated wastes subsequent to July 14, 1979, by MMI failed to comply with the Arkansas Hazardous Waste Management Act and Code in that:

(a) Such activity constituted the operation of a hazardous waste disposal facility without having a permit for such activity in violation of Ark. Stat. Ann. 82-4205(a);

(b) Such activity was conducted without complying with the interim standards required by 40 CFR Part 265, as adopted by reference in Section 3 of the Arkansas Hazardous Waste Management Code.

ORDER

The parties do, therefore, consent and agree to the following:

1. Ormond shall permit and allow the authorized representatives and agents of MMI and ADPC&E access at all times to the subject property as necessary to implement fully

all actions required hereby, including such inspections, surveys, and data gathering as may be necessary or appropriate to investigate the site and to document and inspect implementation of actions.

2. Within sixty (60) days from the date hereof, MMI and Ormond, jointly or severally, shall submit to ADPC&E for approval a detailed written proposal prepared by qualified professionals in hydrogeology for a hydrogeological assessment, together with a proposed schedule of implementation, not to exceed one hundred twenty (120) days to investigate and determine the horizontal and vertical extent of contaminant migration emanating from the Arkwood facility. Such investigation is to include, but not limited to, a determination of the location, direction, and rate of groundwater flow, hydrological, geological, and lithological maps and reports showing the formations, permeabilities, dips and strikes, recharge areas and their characteristics, sink areas, solution channels, fissure spots, fractures, clay fill areas and a detailed soils map showing their location, depth, and characteristics. This investigation shall also include a study of the surface hydrology with emphasis on determining the relation of spring location and flow to groundwater; and shall include sampling and analysis on all springs and water wells within an area within three miles of the site.

3. MMI and Ormond shall thereafter implement the hydrogeological assessment as approved in accordance with the schedule of implementation.

4. Within sixty (60) days of the date hereof, MMI and Ormond shall, jointly or severally, submit to ADPC&E for approval a detailed written proposal with a proposed schedule of implementation to take the following intermediate steps to abate sources of contamination on the site:

(a) Drain and properly dispose of all on-site liquids from all ponds, impoundments, tanks, pipes, dumps, sumps and other fixture or equipment;

(b) Decontaminate or properly dispose of all on-site contaminated plant fixtures and equipment;

(c) Remove or treat all contaminated soils and materials including the contaminated 'sawdust piles' on-site, which were contaminated by the disposal practices of the Arkwood plant so that a cleanliness level is achieved of no more than 1 mg/kg of pentachlorophenol in a solid sample using a total recoverable technique approved by ADPC&E and no more than 1 ug/l by a leachable testing technique approved by ADPC&E, to the extent that such contaminated soils and materials can be identified without completion of the approved assessment plan;

(d) Remove or treat all contaminated soils in off site areas in which there is contamination to the extent permitted by the owners of such properties;

(e) Establishing appropriate groundwater monitoring of all contaminated areas on the site; and

(f) Otherwise abating all sources or potential sources of contamination emanating from the site.

5. MMI and Ormond shall implement such actions as approved in accordance with any conditions of approval and in accordance with the approved schedule of implementation.

6. Within ninety (90) days of the completion of the hydrogeologic assessment required above, MMI and Ormond shall submit, jointly or severally, to ADPC&E for approval a final remedial action plan with a proposed time schedule designed to:

(a) Permanently eliminate the contamination or threat thereof of surface and groundwaters of the State of Arkansas from the Arkwood plant site; and

(b) Achieve compliance with all requirements of the Arkansas Hazardous Waste Management Act and Code for closure of this site as a hazardous waste management unit.

7. Within thirty (30) days of approval of the final remedial plan by ADPC&E, MMI and Ormond shall, jointly or severally, submit a detailed cost estimate for implementation of the plan; and within sixty (60) days of approval of the plan, MMI and Ormond shall submit to ADPC&E a surety bond in the amount of such cost estimate or other equivalent financial guarantee in favor of ADPC&E for the completion of the plan.

8. MMI and Ormond shall implement the remedial plan as approved in accordance with any condition of approval and in accordance with the approved implementation schedule.

9. MMI and Ormond, jointly and severally, consent and agree to pay to ADPC&E civil penalties, as authorized by Ark. Stat. Ann. 82-1909(c) and 82-4213(b), for failure to meet any deadlines required by this Order or any approved implementation schedule hereunder as follows:

(a) First day through the tenth day: $ 500.00 per day

(b) Eleventh day through the twentieth day: $ 750.00 per day

(c) Twenty-first day through the thirtieth day: $1,000.00 per day

(d) Each day beyond the thirtieth day: $2,500.00 per day

Any such penalties shall be due and payable upon demand of ADPC&E.

10. If any event occurs which causes or may cause delay in the achievement of compliance by MMI and Ormond with the requirements of this Administrative Order, they shall notify ADPC&E, in writing, as soon as reasonably possible after it is apparent that delay will result, describing in detail the anticipated length of delay, the precise cause of the delay, and the measures being taken to minimize the delay.

11. The Department may grant an extension of any provision of this Administrative Order, provided sufficient cause therefor has been shown. Failure to notify the Department promptly, as provided in paragraph (10), may be grounds for denying an extension.

SO ORDERED _____ day of _____, 1985.

_____

Director

APPROVED AS TO FORM AND CONTENT:

ARKWOOD, INC.

BY: _____

DATE: _____

H. C. ORMOND

BY: _____

DATE: _____

CERTIFICATE OF DISSOLUTION

ONE: Name of Corporation: MOUNTAIN ENTERPRISES, INC.

TWO: Name and Address of Officers:

W.S. WALKER - President
218 East Ridge
Harrison, AR 72601

GENE C. CAMPBELL
Secretary-Treasurer
218 East Ridge
Harrison, AR 72601

LAVERNE GARRY
218 East Ridge
Harrison, AR 72601

THREE: Names and Addresses of Directors:

Those persons listed in Paragraph Two above plus: NO OTHERS

FILED
MAY 2 1978
WINSTON BRYANT
SECRETARY OF STATE
By

FOUR: Shareholders Resolution:

Attached as Exhibit "A".

FIVE: Number of Shares Outstanding: 300 shares of No-par common stock.

SIX: Number of Shares Voted For and Against Resolution:

For: 300
Against: 0

Witness my hand as President of said Corporation on this 25th day of April, 1978.

W.S. WALKER PRESIDENT

ATTEST:

GENE C. CAMPBELL

STATE OF ARKANSAS)
)SS
COUNTY OF BOONE)

VERIFICATION

BE IT REMEMBERED that on this 24 day of April, 1978, personally appeared before me, the undersigned, a Notary Public, within and for the State and County aforesaid, W.S. WALKER, party to the foregoing Certificate of Dissolution, known to me personally to be such, and severally acknowledged the same to be the act and deed of the signer respectively, and that the facts therein stated are truly set forth.

GIVEN under my hand and seal this 24 day of April, 1978.

My Comm. Expires: 11-11-81 NOTARY PUBLIC

SHAREHOLDERS RESOLUTION

On April 24, 1978, a special meeting of the shareholders of MOUNTAIN ENTERPRISES, INC. was held in the Corporations office pursuant to proper notice and all shareholders were present and participating in said meeting.

Upon Motion duly made and seconded, the following resolution was adopted unanimously by a vote of 300 to 0 in favor.

RESOLVED, that in view of the lack of any corporate assets and the inactive status of the Corporation for several years, it is in the best interest of the shareholders that the Corporation be dissolved forthwith.

There being no further business the meeting was adjourned.

WITNESS MY HAND as Secretary this 24 day of April, 1978, stating this to be a true extract of the action taken at said meeting.

GENE C. CAMPBELL

STATE OF ARKANSAS)
)ss
COUNTY OF BOONE)

VERIFICATION

Comes now GENE C. CAMPBELL, and states on oath that the facts contained in the foregoing, are correct and true to the best of his knowledge and information.

GENE C. CAMPBELL

SUBSCRIBED AND SWORN to before me, a Notary Public, within and for the County and State aforesaid, this 24 day of April, 1978.

NOTARY PUBLIC

My Comm. Expires: 11-11-91

Form SS-14—2M—11-61—160382—C.-McB.

NOTICE: "MUST BE FILED IN DUPLICATE"

ARTICLES OF INCORPORATION

OF

MOUNTAIN ENTERPRISES, INC.

WE, THE UNDERSIGNED, in order to form a corporation for the purposes hereinafter stated, under and pursuant to the provisions of Chapter One of an Act of the General Assembly of the State of Arkansas entitled "An Act to Provide for the Formation of Corporations, the Regulation and Control of Corporations, and for Other Purposes" (approved April 1, 1931), DO HEREBY CERTIFY as follows:

FIRST:

The name of this corporation is

Mountain Enterprises, Inc.

(The corporate name must end with the abbreviation "Inc.," or must include the word "Corporation" or "incorporated," or may include the word "Company" or the abbreviation "Co." if that word or abbreviation is not immediately preceded by the word "and" or the abbreviation "&.")

SECOND:

The nature of the business of the corporation and the objects or purposes proposed to be transacted, promoted or carried on by it, are as follows, to-wit:

To purchase, own, improve, equip, operate and manage farms and ranches, and to engage in any agriculture or livestock pursuit or undertaking.

To purchase, locate, lease or otherwise acquire mines, mining claims, mining rights and lands and enter into any interest therein, and to explore, work, exercise, develop, and turn to account the same; to quarry, dress, refine and process and market stone and earth and mineral substances of all kind.

To purchase, or otherwise acquire, own, sell, pledge or otherwise dispose of stocks, bonds, notes, debentures and securities of other persons, firms and corporations; and to do and to carry on any other operations or business which may seem necessary, convenient and incidental to any of the obligations aforesaid.

THIRD:

The period of existence of this corporation shall be perpetual

(The period of existence shall be perpetual unless limited to a number of years. If limited, state the number of years, and if perpetual so state.)

FOURTH:

The principal office or place of business of this corporation shall be located in the County of Boone, in the city (or town) of Harrison, State of Arkansas, and the address of the principal office or place of business shall be _____ Street.

FIFTH:

The name of the resident agent of this corporation is W. S. Walker, whose address is Coffman Building Street, City (or town) of Harrison, County of Boone, State of Arkansas.

SIXTH:

The total amount of the authorized capital stock of this corporation is 300 shares, having ~~a~~ no par value of $ No Par each.

(If the corporation is to be authorized to issue more than one class of stock, the statements required by paragraph f of Section I of Act 255 of 1931 shall be stated.)

SEVENTH:

The amount of capital with which this corporation will begin business is $ 300.00 (not less than Three Hundred ($300.00) Dollars).

EIGHTH:

The names and post office address of each of the incorporators and the number of shares of the capital stock subscribed by each of them is as follows:

NAMES	POST OFFICE ADDRESS	NO. OF SHARES
W. S. Walker	Harrison, Arkansas	25
Nina B. Walker	Harrison, Arkansas	1
Marian Bourque	Harrison, Arkansas	1

NINTH:

The incorporators may insert here any provisions which they may choose for the regulation of the business and for the conduct of the affairs of the corporation and any provisions creating, dividing, limiting and regulating the powers of the corporation, the directors and stockholders, including the provisions governing the issuance of stock certificates to replace lost or destroyed stock certificates, such provisions not to be contrary to the laws of this State.

IN WITNESS WHEREOF, We have hereunto set our hands on this 5 day of October, A. D. 19 62

INCORPORATORS:

M D Wacker

Nina B Wacker

Marion Bourque

STATE OF Arkansas
COUNTY OF Boone } ss.

BE IT REMEMBERED that on this 5 day of October A. D. 19 62, personally came before me, the undersigned, a Notary Public within and for the State and County aforesaid, W. S. Walker, Nina B. Walker and Marian Bourque,

parties to the foregoing Articles of Incorporation, known to me personally to be such, and severally acknowledged the same to be the act and deed of the signers respectively, and that the facts therein stated are truly set forth.

GIVEN under my hand and seal of office the day and year aforesaid.

My comm. exp.
10-31-62

Robert W. Cummins
Notary Public

(These Articles must first be filed with the Secretary of State and a certified copy thereof then filed with the County Clerk.)

CERTIFICATE OF CLERK

STATE OF ARKANSAS
COUNTY OF _____ } ss.

I, _____, Clerk of the County and Probate Courts in and for the County aforesaid, do hereby certify that the foregoing instrument of writing, being certificate of incorporation of _____ was filed for record in my office on the _____ day of _____, 19____, and the same is now duly recorded in Book _____, Page _____, of the records of my said office.

IN TESTIMONY WHEREOF, I hereunto set my hand and the seal of said Court this _____ day of _____, 19____.

_____
County Clerk

_____
D. C.

2393

Mountain Enterprises, Inc.

ARTICLES OF INCORPORATION

of

Filed in the office of the Secretary of State of the State of Arkansas on this _____ day of _____ A. D. 19 OCT 8 1962

NANCY J. HALL
SECRETARY OF STATE
BY _____

_____
Secretary of State

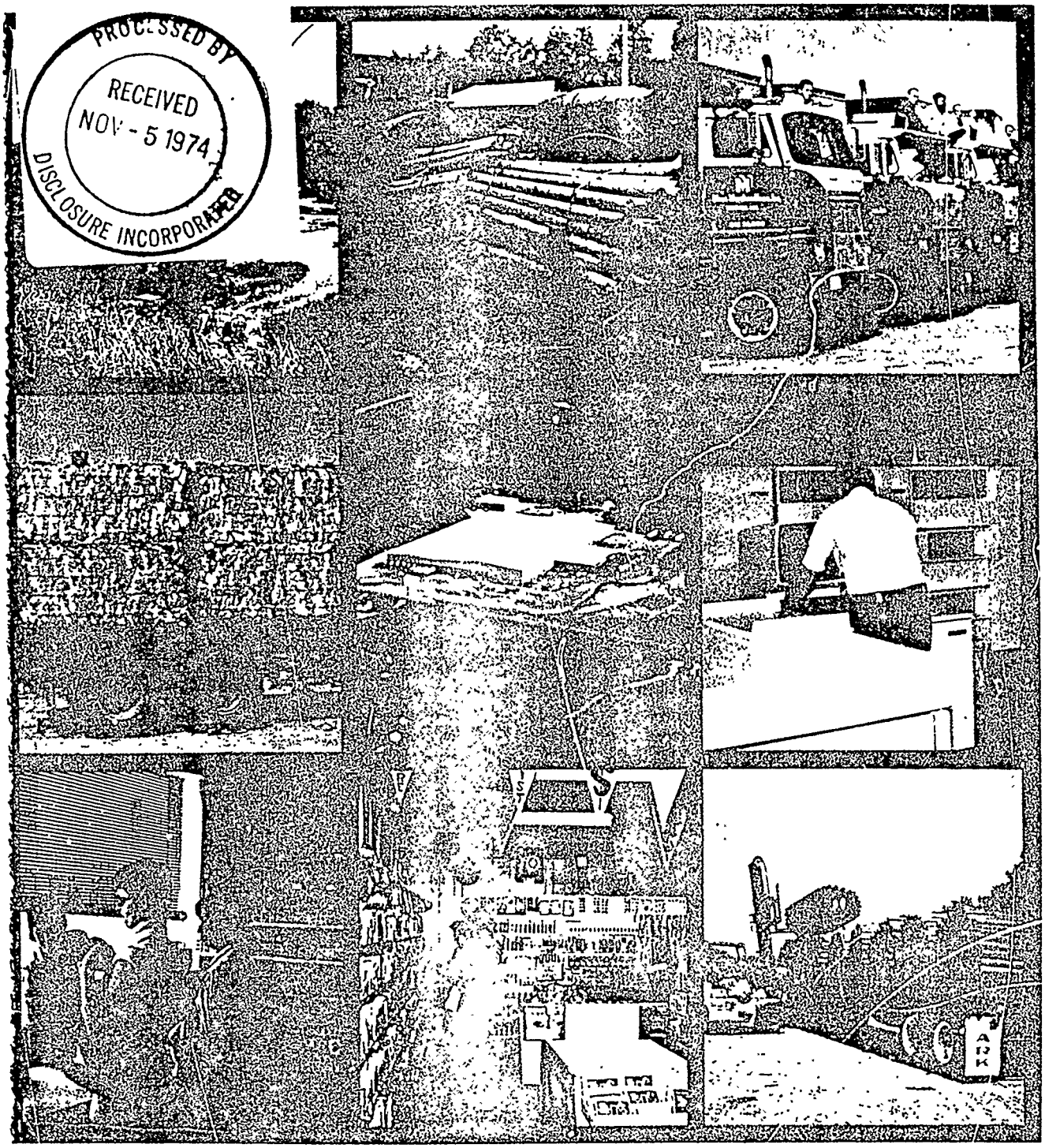
By _____
Deputy

11

M231068 6:30:74

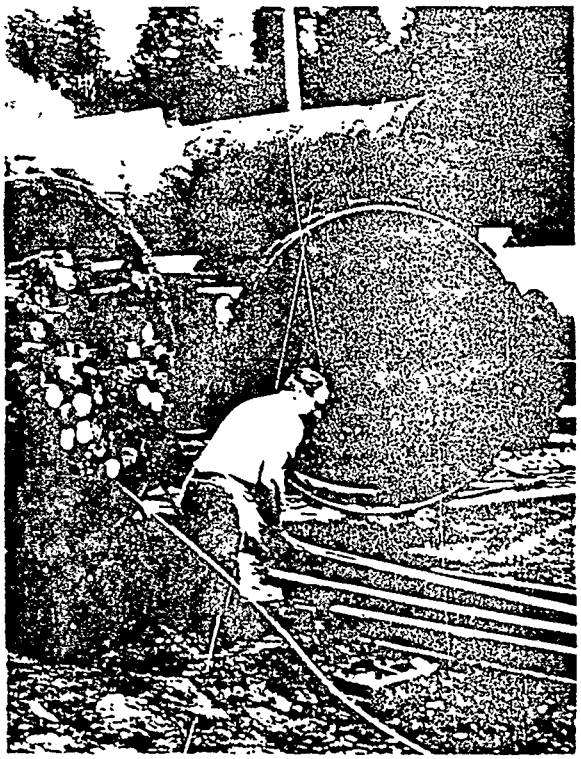
Mass Merchandisers, Inc.

PROCESSED BY
RECEIVED
NOV - 5 1974
DISCLOSURE INCORPORATED



1974 Annual Report

DISCLOSURE® IF THE ABOVE PAGE IS LESS CLEAR THAN THIS STATEMENT, IT IS DUE TO POOR PHOTOGRAPHIC QUALITY OF THIS DOCUMENT



DISCLOSURE® IF THE ABOVE PAGE IS LESS CLEAR THAN THIS STATEMENT, IT IS

Mass Merchandisers, Inc.

Notes to Financial Statements, Continued

(2) Long-Term Debt

Information with respect to long-term debt is as follows:

	June 30, 1974 Current	June 30, 1974 Long-term	June 30, 1973 Current	June 30, 1973 Long-term
5½% promissory notes payable in quarterly instalments of $17,500 through 1974	$ 35,000	--	70,000	35,000
8½% mortgage note payable in monthly instalments of principal and interest of $9,299 through 1981	65,049	511,819	59,766	576,864
Three year promissory note payable in monthly instalments of $18,000 with the balance due November 1, 1975	216,000	499,000	216,000	715,000
5¾% Industrial Revenue Bonds maturing serially through 1983 with interest payable semiannually	32,000	338,000	30,000	370,000
Non-interest bearing agreement issued in connection with acquisition of inventory payable in quarterly instalments of $8,450 through 1978, including imputed interest of 9%	23,357	99,895	5,520	123,252
7% promissory note payable in instalments of $20,000 on December 31, 1974 and 1975 and the balance on December 31, 1976	20,000	38,000	—	58,000
6⅞% Industrial Revenue Bonds maturing serially through 1984 with interest payable semiannually net of unamortized discount of $6,900	5,846	87,254	—	—
Obligation under long-term equipment leases; due in monthly instalments of $1,695 including imputed interest of 10%	17,573	17,940	—	—
	$414,825	1,591,908	381,286	1,878,120

On November 14, 1972, the Company entered into a bank loan agreement under which the Company borrowed $1,075,000 on a three year promissory note due in monthly instalments. In addition, the Company may borrow under a line of credit up to a maximum of $750,000 at any one time. Both the promissory notes and borrowings under the line of credit call for an interest rate (10% at June 30, 1974) of 1% above the bank's prime rate of interest not to be less than 6% nor more than 10%. Under this agreement the Company must maintain certain working capital and debt ratios and may not pay cash dividends. Accordingly, all the Company's retained earnings are restricted. In addition, there are other restrictions as to the acquisitions of businesses, future borrowings and capital expenditures. The proceeds from the bank loan were used to retire an existing three year bank promissory note and subordinated debentures. The amount of unused available borrowings under the line of credit was $350,000 at June 30, 1974. The line of credit can be withdrawn at any time at the option of the bank. The average amount of short-term debt outstanding during the year was $136,459 with a related average interest rate of 9.86%. The maximum amount outstanding at any month end during the year was $500,000.

The warehouse building was erected by Rogers Investments, Inc. and sold to the Company at cost, subject to the mortgage note payable. The mortgage note payable is secured by the building, by certain assets owned by Rogers Investments, Inc. and by the guarantee of two officers of the Company who are major shareholders of the Company and of Rogers Investments, Inc.

During the year ended June 30, 1974, the Company completed construction of an addition to the warehouse and a new maintenance shop. These additions were financed through two separate Industrial Development Revenue Bonds, issued by the City of Harrison, Arkansas. The bonds mature in instalments over a ten year period with annual rentals being an amount equal to the current maturities and interest on the unpaid principal balance. The additions are being accounted for as a lease purchase.

The aggregate maturities of the long-term debt during each of the five years ending June 30, 1979 are $414,825, $674,183, $166,973, $160,495 and $157,275 respectively.

(3) Business Combination

On March 29, 1973 the Company acquired all of the outstanding stock of Arkwood, Inc. in exchange for 85,500 shares of its common stock. This transaction has been accounted for by the pooling of interests method and accordingly the financial statements for the year ended June 30, 1973 include the results of operations and changes in stockholders' equity of Arkwood, Inc. The results of operations, applicable to Arkwood, Inc., include sales of $1,925,999 and net earnings of $140,191.

M231068

PROCESSED BY
RECEIVED
OCT 03 1974
DISCLOSURE INCORPORATED

SECURITIES AND EXCHANGE COMMISSION

Washington, D. C. 20549

FORM 10-K

ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the fiscal year ended June 30, 1974 Commission file number 0-5230

MASS MERCHANDISERS, INC.
(EXACT NAME OF REGISTRANT AS SPECIFIED IN ITS CHARTER)

Arkansas
(STATE OR OTHER JURISDICTION OF INCORPORATION OR ORGANIZATION)

71-0221374
(I.R.S. EMPLOYER IDENTIFICATION NO.)

Highway 43, Harrison, Arkansas 72601
(ADDRESS OF PRINCIPAL EXECUTIVE OFFICES) (ZIP CODE)

Registrant's telephone number, including area code (501) 365-3425

Securities registered pursuant to Section 12(b) of the Act:

TITLE OF EACH CLASS	NAME OF EACH EXCHANGE ON WHICH REGISTERED
None	

Securities registered pursuant to Section 12(g) of the Act:

Common Stock, $.50 par value
(TITLE OF CLASS)

(TITLE OF CLASS)

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities and Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to the filing requirements for at least the past 90 days. Yes X No ____

Discount Stores

The Registrant operates 40 discount stores under the names of U-Save Mart, Lot-O-Savings, and Wee Discount. These discount stores sell on a retail basis the same non-food items as are sold to the grocery stores and supermarkets by the Registrant. These discount stores are generally located in smaller communities away from the metropolitan areas, and are located in the States of Missouri, Illinois, Kansas, Arkansas and Oklahoma.

During the fiscal year, the Registrant closed five marginally profitable stores located respectively in Farmington, Missoui; Marceline, Missouri; Du Quoin, Illinois; Richmond, Missouri; and, McPherson, Kansas. In addition, during the fiscal year, registrant sold three discount stores located, respectively in St. Clair, Missouri; Washington, Missouri; and Ste. Genevieve, Missouri. In areas where the large chain discount stores open new facilities in proximity to the Registrant's stores, and where the Registrant's stores become marginally profitable the Registrant will continue to close its discount stores.

Wood Products

Arkwood, a division of the Registrant, acquired in March 1973 and dissolved into the Registrant during the year, is engaged in the manufacture of various wood products, including fence posts, fence rails, guard rails, sign posts, bridge timbers, and railroad ties. Arkwood produces its various wood products at ten manufacturing lumber yards located in Arkansas and Oklahoma.

(b) Describe any material changes and developments since the beginning of the fiscal year in the business done and intended to be done by the registrant and its subsidiaries. The description shall include information as to matters such as the following:

(1) Competitive conditions in the industry or industries involved and the competitive position of the registrant if known or reasonably available to the registrant. If several products or services are involved, separate consideration shall be given to the principal products or services or classes of products or services.

The service merchandising and discount store operations are highly competitive. In both of these areas the Registrant

(7) The material effects that compliance with Federal, State and local provisions which have been enacted or adopted regulating the discharge of materials into the environment, or otherwise relating to the protection of the environment, may have upon the capital expenditures, earnings and competitive position of the registrant and its subsidiaries.

Arkwood has complied with the environmental standards and received the approval of the State of Arkansas for its wood waste burners, used in its lumber yards to dispose of various wood waste material. Future expenditures for compliance with environmental regulations are not expected to have any material effect on earnings or the competitive position of Arkwood, Inc.

(8) The number of persons employed by the registrant.

647

(9) The extent to which the business of the registrant or a material portion thereof is or may be seasonal.

The business of Arkwood is considered to be seasonal. The most advantageous portion of the year for the timber cutting operations is during the spring and summer. During the winter months, mainly due to weather conditions, Arkwood's operation will be approximately 50-60% of full capacity.

(c)(1) Information as to lines of business. If the registrant and its subsidiaries are engaged in more than one line of business, state, for each of the registrant's last five fiscal years, or for each fiscal year ending after December 31, 1966, or for each fiscal year the registrant has been engaged in business, whichever period is less, the approximate amount or percentage of (i) total sales and revenues, and (ii) income (or loss) before income taxes and extraordinary items attributable to each line of business which during either of the last two fiscal years accounted for --

(A) 10 per cent or more of the total sales and revenues;

(B) 10 per cent or more of income before income taxes and extraordinary items computed without deduction of loss resulting from operations of any line of business, or

(C) A loss which equalled or exceeded 10 per cent of the amount of income specified in (B) above;

Arkwood conducts its business at ten locations in Arkansas and Oklahoma. Arkwood owns three and leases seven of these locations. The leases, with annual rental payments of $63,900, expire in 1985, and are renewable for two ten year periods under the same terms and conditions. The manufacturing and wood processing equipment located in Arkwood's various lumber yards ranges in age from four to ten years.

Item 4. Parents and Subsidiaries.

(a) Furnish a list or diagram of all parents and subsidiaries of the registrant and as to each person named indicate the percentage of voting securities owned, or other basis of control, by its immediate parent, if any.

The following table sets forth the subsidiaries of the Registrant, all of which are wholly owned.

Name	State of Incorporation
D-B Drug Company, Inc.	Missouri
Mountain Enterprises, Inc.	Arkansas

On July 1, 1973, U-Save Mart, Inc., Lot-O-Savings, Inc., Wee Discount Stores, Inc. and Arkwood, Inc. were dissolved and liquidated into the Registrant. The activities of these liquidated subsidiaries were continued as part of the business of the Registrant. D-B Drug Company, Inc. and Mountain Enterprises, Inc. are inactive companies and their former business activities are now being conducted by the Registrant.

Item 5. Pending Legal Proceedings.

Briefly describe any material pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the registrant or any of its subsidiaries is a party or of which any of their property is the subject. Include the name of the court or agency in which the proceedings are pending, the date instituted, the principal parties thereto, a description of the factual basis alleged to underlie the proceeding and the relief sought. Include similar information as to any such proceedings known to be contemplated by governmental authorities.

On June 1, 1973, Western Merchants Wholesale Company instituted a lawsuit in Denver, Colorado, against the Registrant,

	Number of shares
Options canceled during year ended June 30:	
1971	600
1972	1,567
1973	7,269
1974	5,431
Shares reserved and under option at June 30:	
1971	29,600
1972	37,417
1973	69,215
1974	63,615

Of the 63,615 shares under option at June 30, 1974, 36,758 shares were exercisable at that date. An additional 10,967 shares of common stock were reserved for granting of options at June 30, 1974.

The Company has granted to its underwriter through November 10, 1974 a warrant to purchase 16,000 common shares. The warrant became exercisable on November 10, 1970 at $10.70 per share, which price increases $.70 each year.

During the year ended June 30, 1973, the Company authorized the sale of 10,000 shares each of its common stock to two officers of the Company. The stock was sold at the quoted market price on the day of the authorization.

Earnings per common share and common equivalent share have been computed by dividing net earnings by the weighted average number of common and common equivalent shares outstanding each year. Common equivalent shares arise from the assumed exercise of outstanding stock options and warrants, the proceeds of which are assumed to have been used to repurchase outstanding common stock at the average of quoted market values during each fiscal quarter. Earnings per share - assuming full dilution are the same as earnings per share. The number of shares entering into the computation are as follows:

	1974	1973
Average common shares outstanding	813,141	804,541
Common equivalent shares resulting from outstanding stock options and warrants	3,679	11,029
	816,820	815,570

(6) Business Combination

On March 29, 1973 the Company acquired all of the outstanding stock of Arkwood, Inc. in exchange for 85,500 shares of its common stock. This transaction has been accounted for by the pooling of interests method and accordingly the financial statements for the year ended June 30, 1973 include the results of operations and changes in stockholders' equity of Arkwood, Inc. The results of operations, applicable to Arkwood, Inc., for 1973 include sales of $1,925,999 and net earnings of $140,191.

STATE OF ARKANSAS)
)SS
COUNTY OF BOONE)

On this 13 day of August, 1974, before me, a Notary Public, duly commissioned, qualified and acting within and for the said County and State, appeared in person C.C. GRISHAM and MARY JO GRISHAM, being the President and Secretary respectively, of ARKWOOD, INC. and who had been designated by said corporation to execute the above and foregoing instrument, to me personally well known, and who stated that they were the President and Secretary of the said ARKWOOD, INC. and were duly authorized in their respective capacities to execute the foregoing instrument for the considerations, uses and purposes therein mentioned and set forth.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal this 13 day of August, 1974.

Mary Storley
NOTARY PUBLIC

My Commission Expires:
April 12, 1977

CERTIFICATE OF DISSOLUTION

(i) The name of the Corporation to be dissolved is:

ARKWOOD, INC.

(ii) The names and respective addresses of the officers of said corporation are as follows:

C.C. GRISHAM, 1212 Berry Street, Harrison,Arkansas -PRESIDENT
C.R. BARKER, 1123 North Liberty, Harrison,Arkansas-Vice President
MARY JO GRISHAM,1212 Berry St., Harrison, Arkansas-Sec.-Treasurer
MARY STANLEY- Valley Inn, Harrison, Arkansas - Assistant Secretary

(iii) The names and respective addresses of the Board of Directors are as follows:

C.C.GRISHAM, 1212 Berry Street,Harrison,Arkansas
C.R. BARKER, 1123 North Liberty Street,Harrison, Arkansas
Mary Jo Grisham - 1212 Berry Street, Harrison, Arkansas

(iv) Attached hereto a copy of the shareholders resolution directing the dissolution.

(v) The number and classes of shares outstanding:

200 shares of Class A. Common Stock and 690 shares of Class B Common Stock.

(vi) The resolution of the shareholders for dissolution was approved unanimously.

IN WITNESS WHEREOF, WITNESS our hands as President and Secretary of the corporation on this 13 day of August,1974.

C C Grisham
PRESIDENT

ATTEST:
Mary Jo Grisham
SECRETARY

FILED
AUG 20 1974
KELLY BRYANT
SECRETARY OF STATE
By

A C K N O W L E D G M E N T

STATE OF ARKANSAS)
)SS
COUNTY OF BOONE)

On this 13 day of August, 1974, before me, a Notary Public, duly commissioned, qualified and acting within and for the said County and State, appeared in person C.C. GRISHAM and MARY JO GRISHAM, being the President and Secretary respectively, of ARKWOOD, INC. and who had been designated by said corporation to execute the above and foregoing instrument, to me personally well known, and who stated that they were the President and Secretary of the said ARKWOOD, INC. and were duly authorized in their respective capacities to execute the foregoing instrument for the considerations, uses and purposes therein mentioned and set forth.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal this 13 day of August, 1974.

Mary Stanley
NOTARY PUBLIC

My Commission Expires:
April 12, 1977

SHAREHOLDERS RESOLUTION

At a special meeting of the Shareholders of Arkwood, Inc. held in the corporate offices at Harrison, Arkansas, on August 13, 1974, with all outstanding shares being represented and voting, the following resolution was by proper motion proposed:

> RESOLVED, that the corporation be dissolved by the filing of proper documents with the office of the Secretary of State of Arkansas and that thereafter any and all corporate activities cease.

Upon second & call for vote, the aforesaid resolution was unanimously approved.

WITNESS My hand as Secretary this 13 day of August, 1974.

Mary Jo Grisham

MARY JO GRISHAM, Secretary

STATE OF ARKANSAS)
)SS
COUNTY OF BOONE)

VERIFICATION

Comes now, MARY JO GRISHAM, and on oath states that she is the Secretary of Arkwood, Inc. and that the foregoing constitutes a true and correct copy of the corporate resolution as same appears on the records of the corporation.

Mary Jo Grisham

MARY JO GRISHAM

SUBSCRIBED and Sworn to before me, a Notary Public, this 13 day of August, 1974.

Nancy Stanley

NOTARY PUBLIC

My Commission Expires:

April 12, 1979

Form CORP-1
5M—11-71—66725—PP&SCo.

STATE OF ARKANSAS — OFFICE OF THE SECRETARY OF STATE

CERTIFICATE OF AMENDMENT

Arkwood, Inc., a corporation duly organized, created and existing under and by virtue of the laws of the State of Arkansas, by its President and its Secretary,

C. C. Grisham and Mary Stanley

DOES HEREBY CERTIFY:

A. That a written or printed notice setting forth the proposed Amendment was given to each shareholder entitled to vote thereon within the time and manner as provided in the "Arkansas Business Corporation Act" (Act 576 of 1965), and that this Amendment (s) is filed pursuant to said Act.

B. That at a special (or regular) meeting of the stockholders of said corporation, duly called and held at the office of the Company, in the City of Harrison, State of Arkansas, on September 22, 19 72, the Amendment to the Articles of Incorporation, as herein stated, was (were) offered and adopted.

C. That the number of shares outstanding are 890, and the number of shares entitled to vote thereon are 200 (100%). The number of shares which voted for are 200. The number of shares which voted against are none. (If the shares are entitled to vote thereon as a class, the designation and number of outstanding shares entitled to vote thereon of each such class, and the number of shares of each class which voted for and against are required.)

D. That the following Article (s) of the Articles of Incorporation of this corporation were amended, Articles VI, _____, Section II, to read as follows:

"There shall be no restrictions on the transfer of stock whether by gift, by sale or otherwise."

FILED
OCT 19 1972
KELLY BRYANT
SECRETARY OF STATE
BY

IN WITNESS WHEREOF, the said Corporation, Arkwood, Inc. has caused its corporate name to be subscribed by its President, who hereby verifies that the statements contained in the foregoing Certificate of Amendment are true and correct to the best of his/her knowledge and beliefs, and its corporate seal hereto affixed and duly attested by its Secretary, on this 18th date, October, 1972.

Corporate Seal

Arkwood, Inc.
Corporate Name

C. C. Grisham
President

1212 Berry - Harrison, Arkansas 72601
Address

ATTEST:

Mary Stanley
Secretary

(Acknowledgment optional).

INSTRUCTIONS: File in Duplicate with Kelly Bryant, Secretary of State, State Capitol, Little Rock, Arkansas, 72203. Duplicate copy will be returned to the above address, which should be filed with the County Clerk of the County where the Corporation's registered office is located, within 60 days of the filing herewith (other than Pulaski County).

KELLY BRYANT
Secretary of State

CERTIFICATE OF
AMENDMENT
of
ARKWOOD, INC

KELLY BRYANT
Secretary of State

STATE OF ARKANSAS

AMENDMENT TO ARTICLE VI, SECTION II

Repeal sub-paragraphs 1 through 10, inclusive, of Section II, Article VI and in place thereof insert a new addition to the By-laws under Section II, Article VI as follows:

" There shall be no restrictions on the transfer of stock whether by gift, by sale or otherwise."

Dated this 22nd day of September, A.D. 1972, at Harrison, in the County of Boone, State of Arkansas.

Mary Jo Grisham

Mary Jo Grisham

Date: 9-22-72

C C Grisham

C. C. Grisham

Date: 9/22/72

CERTIFICATE OF AMENDMENT
OF
ARTICLES OF INCORPORATION
OF
ARKWOOD, INC.

FILED
APR 17 1969
KELLY BRYANT
SECRETARY OF STATE
BY

Pursuant to the authority and directions of the holders of all of the stock of Arkwood, Inc., an Arkansas Corporation, entitled to a vote, the Articles of Incorporation of said Corporation are hereby amended in the following particulars only:

ARTICLE NINTH: Dividends in respect to and on Class "A" Common Stock shall be and are hereby limited to a maximum of $1.00 per share, per year, when earned and declared, which dividends shall be non-cumulative.

In the event of dissolution, the distribution of assets to the holders of Class "A" Common Stock shall be and is hereby limited to the maximum of $1.00 per share.

The exclusive voting rights of the holders of said Class "A" Common Stock shall remain unchanged.

A copy of the resolution, adopted at the annual meeting of the stockholders of said corporation, had and held on April 14, 1969, being the second Monday in the Month of April, 1969, authorizing and directing the foregoing Amendment and bearing the endorsement of the holders of all of the stock of said corporation, entitled to vote, is hereto attached as Exhibit "A".

The number of shares outstanding entitled to vote on said Resolution and Amendment was: 300.

The number of shares voting for said Amendment was : 300.

The number of said shares voting against said Amendment was: None

No other article or provision of the Articles of Incorporation of this Corporation shall be affected.

CERTIFICATE OF AMENDMENT

OF ARTICLES OF INCORPORATION

OF ARKWOOD, INC.

Page # 2

IN TESTIMONY WHEREOF, the within amendment is executed in the name and behalf of said Corporation by its proper officers, hereunto duly authorized, this 14th day of April, 1969.

Hallie C. Ormond
PRESIDENT

ATTEST:
Mary Jo Grisham
SECRETARY

STATE OF ARKANSAS:
ss
COUNTY OF BOONE :

ACKNOWLEDGMENT

On this day personally appeared before me, a Notary Public within and for the County and State aforesaid, duly commissioned and acting, Hallie C. Ormond and Mary Jo Grisham, who stated that they were the President and Secretary, respectively, of ARKWOOD, INC., and acknowledged that they had executed the foregoing Certificate of Amendment to Articles of Incorporation of said Corporation, for the purposes therein mentioned, in the name and behalf of said Corporation, pursuant to authority in them duly vested. WITNESS MY HAND AND SEAL as such Notary Public on this 14th day of April, 1969.

Mary Stanley
NOTARY PUBLIC

My Commission Expires:

My Commission Expires Feb. 19, 1973

RESOLUTION

RESOLVED: That the Articles of Incorporation of ARKWOOD, INC., be and hereby are amended in respect to ARTICLE NINTH thereof, as follows:

Dividends in respect to and on Class "A" Common Stock shall be and are hereby limited to a maximum of $1.00 per share, per year, when earned and declared, which dividends shall be non-cumulative. In the event of dissolution, the distribution of assets to the holders of Class "A" Common Stock shall be and is hereby limited to the maximum of $1.00 per share.

The exclusive voting rights of the holders of said Class "A" Common Stock shall remain unchanged.

CERTIFICATE

The undersigned, being the holders of all the Class "A" Common Stock of ARKWOOD, INC., hereby certify that the foregoing Resolution was duly and regularly adopted by the affirmative vote of the holders of all said stock; and that we, and each of us, hereby approve and confirm said Resolution, passed and adopted by a vote of all the stockholders of said corporation at the annual meeting had and held by said corporation on April 14, 1969, being the second Monday in the Month of April, 1969, at its principal offices in Harrison, Arkansas.

Hallie C. Ormond
Hallie C. Ormond

C. C. Grisham
C. C. Grisham

Mary Jo Grisham
Mary Jo Grisham

Ina Ann Farmer
Ina Ann Farmer

ARTICLES OF INCORPORATION
OF
ARKWOOD, INC.

WE, THE UNDERSIGNED, in order to form a Corporation for the purposes hereinafter stated, under and pursuant to the provisions of Chapter One of an Act of the General Assembly of the State of Arkansas entitled "An Act to Provide for the Formation of Corporations, the Regulation and Control of Corporations and for Other Purposes" (approved April 1, 1931),

DO HEREBY CERTIFY as follows:

FIRST:

The name of this Corporation is:

ARKWOOD, INC.

SECOND:

The nature of the business of the Corporation and the objects or purposes proposed to be transacted, promoted or carried on by it, are as follows, to-wit:

(a) To conduct and carry on a timber business involving forest products of every kind; to deal in timber and timber lands and timber products of every kind; to own, lease or rent and operate wood treating plants and equipment, post and pole peelers, sawmills and other woodworking or processing equipment of any kind; to manufacture, process and chemically treat forest products of all kinds; to own, operate, lease, buy and sell mines and mineral deposits of all kinds and rock and stone quarries of all kinds and sand and gravel deposits of all kinds and to produce, manufacture, process and mill all kinds of the products of mines, rock and stone quarries and sand and gravel deposits; to buy, sell, produce or process agricultural products and livestock and poultry; to conduct and carry on any and all kinds of farming, including livestock and poultry; to engage in the merchandising, manufacturing, treating or processing of feed, grain, fertilizer, oils, petroleum, or any other goods, wares or merchandise of any and every kind and description; to own, operate, lease, buy or sell construction, building and other equipment of any kind and to engage itself in the business of light or heavy general construction or building work of any and every kind and description, whether by contract or otherwise.

(b) To acquire the good will, rights, property, business and franchise of any person, firm, association or corporation engaged in any lawful business and to acquire, own, sell, pledge and otherwise employ stocks, bonds, notes, mortgages, debentures and securities of any person, firm, association or corporation.

(c) To become a joint venturer or partner (either general or limited or both), to enter into agreements of joint venture or partnership with one or more other persons, partnerships, associations or corporations for the purpose of carrying on any business whatsoever which this corporation may deem proper or convenient in connection with any other persons herein set forth or otherwise, or which may be calculated directly or indirectly to promote the best interest of this corporation or to enhance the value of its property or business.

THIRD:

The period of existence of this corporation shall be perpetual.

FOURTH:

The principal office of place of business of this corporation shall be located in the County of Boone, in the City of Harrison, State of Arkansas, and the address of the principal office or place of business shall be Harrison, Arkansas.

FIFTH:

The name of the resident agent of this corporation is C. C. Grisham, whose address is Harrison, County of Boone, State of Arkansas.

SIXTH:

The total amount of the authorized capital stock of this corporation is 5,300 shares, of which 300 shares shall be Class "A" Common Capital Stock; having no nominal or par value each, and 5,000 shares shall be Class "B" non-voting Common Capital Stock, having no nominal or par value each; said Class "A" Stock being exclusively the voting and controlling stock of the corporation, as further particularly provided in Article Ninth hereof.

SEVENTH:

The amount of capital with which this corporation will begin business is THREE HUNDRED ($300.00) DOLLARS.

EIGHTH:

The names and Post Office address of each of the Incorporators and the number of shares of Class "A" Common Capital Stock subscribed by each of them is as follows:

NAMES	POST OFFICE ADDRESS	NO. OF SHARES
Hallie C. Ormond	Harrison, Arkansas	210
C. C. Grisham	Harrison, Arkansas	30
Mary Jo Grisham	Harrison, Arkansas	30
Ina Ann Farmer	Batesville, Arkansas	30

NINTH:

The Class "A" Common Capital Stock aforesaid shall be and is the exclusive voting and controlling stock of said Corporation. The Class "B" Stock shall be and is non-voting and non-controlling stock and the holders of Class "B" Stock shall not by reason of such holding be entitled to vote at meetings of the stockholders.

Both Class "A" and Class "B" Stock shall be on an equal per share basis in respect to dividends and distribution of assets in the event of dissolution.

IN WITNESS WHEREOF, we have hereunto set our hands on this 16th day of June, A.D., 1965.

INCORPORATORS:

Hallie C. Ormond

C C Grisham

Mary Jo Grisham

Ina Ann Farmer

STATE OF ARKANSAS)
) ss
COUNTY OF BOONE)

ACKNOWLEDGMENT

BE IT REMEMBERED that on this 16th day of June A.D., 1965, personally came before me, the undersigned, a Notary Public within and for the State and County aforesaid, Hallie C. Ormond, C. C. Grisham, Mary Jo Grisham and Ina Ann Farmer, parties to the foregoing Articles of Incorporation, known to me personally to be such, and severally acknowledged the same to be the act and deed of the signers respectively, and that the facts therein stated are truly set forth.

GIVEN UNDER MY HAND AND SEAL OF OFFICE the day and year aforesaid.

My Commission Expires:
2-7-1966

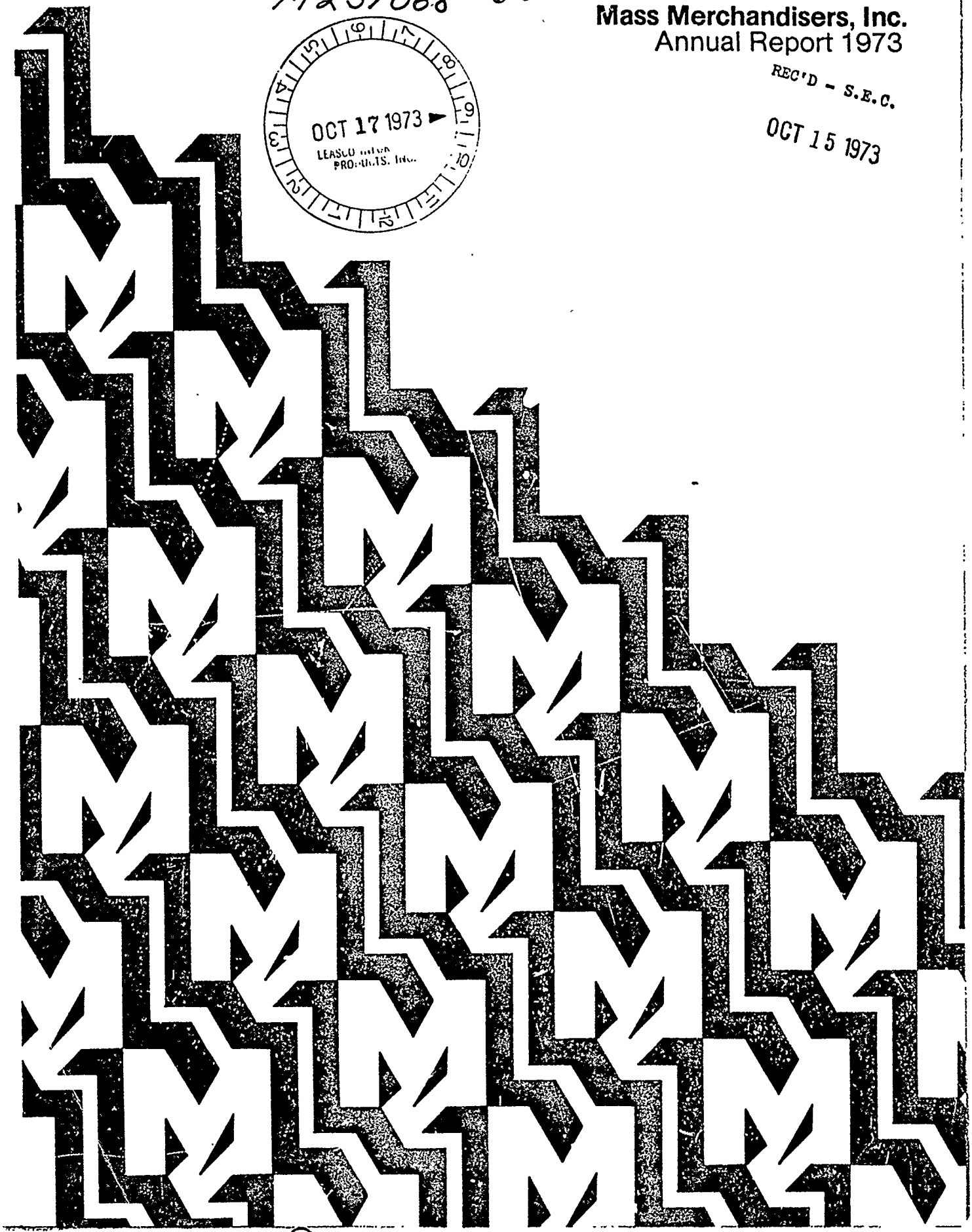
NOTARY PUBLIC

M231068 6·30·73

Mass Merchandisers, Inc.
Annual Report 1973

REC'D - S.E.C.
OCT 15 1973

OCT 17 1973
LEASCO DATA PROCESSING, Inc.



DISCLOSURE® IF THE ABOVE PAGE IS LESS CLEAR THAN THIS STATEMENT IT IS

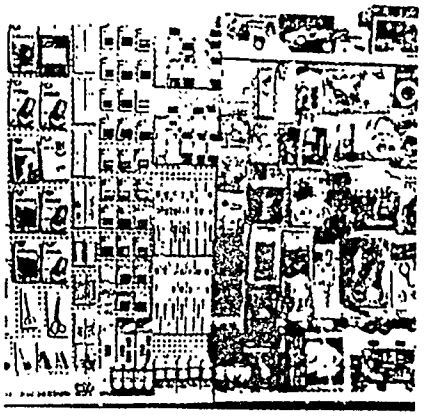
Additional profits were realized by a decrease in interest expense. This decrease was made possible through the negotiation of a new loan agreement which provides $1,075,000 under a three year term loan at 1% over prime and $750,000 short-term borrowing at 1% over prime. Included in this loan agreement is a 10% interest rate ceiling.

In our retail operation, we have concentrated on internal controls with emphasis placed on the profitable stores while discontinuing those which were non-profitable.

We now have 48 discount retail stores operating under the names of Lot-O-Savings, U-Save Mart and Wee Discount.

MMI announced (March, 1973) the expansion of its woodworking operations through the acquisition of Arkwood, Inc.

As the name implies, Arkwood is an Arkansas-based, wood products firm.



Southern yellow pine fence posts, poles and lumber are its basic products. The company also manufactures and supplies decorative rail fence, guard rail, sign posts and bridge timbers to the highway departments, lumber yards, farmers co-ops and railroads of eight midwestern states.

Arkwood's raw material is accumulated and processed at post peelers and saw mills on twelve company yards in Arkansas and Oklahoma.

MASS MERCHANDISERS, INC. AND SUBSIDIARIES

Consolidated Statement of Changes in Financial Position, Continued

	1973	1972
Changes in working capital:		
Increase (decrease) in current assets:		
Cash	$ 51,554	$ 139,723
Proceeds from bond issue due from City of Harrison	400,000	—
Receivables	(167,973)	713,243
Inventories	1,194,621	(338,294)
Prepaid expenses	(4,412)	42,412
	1,473,790	557,084
Increase (decrease) in current liabilities:		
Notes payable	(587,500)	(25,192)
Current maturities on long-term debt	106,374	154,459
Due to prior owners of subsidiaries acquired	—	(409,914)
Accounts payable	822,651	(40,642)
Accrued expenses	83,402	60,902
Federal and state income taxes	301,303	(118,982)
	726,230	(379,369)
Increase in working capital	$ 747,560	$ 936,453

See accompanying notes to consolidated financial statements.

Notes to Consolidated Financial Statements

June 30, 1973

(1) Summary of Significant Accounting Policies

The accounting policies of Mass Merchandisers, Inc. and subsidiaries are consistent with generally accepted accounting principles. In those instances in which more than one generally accepted accounting principle can be applied, the Company has adopted the accounting principle that it believes most accurately and fairly reflects the situation, as described in the following paragraphs.

Basis of Consolidation

The consolidated financial statements include the accounts of the Company and its subsidiaries. All significant intercompany transactions have been eliminated in consolidation.

On March 29, 1973, the Company acquired all of the outstanding stock of Arkwood, Inc. in exchange for 85,500 shares of its own common stock. This transaction is accounted for by the pooling of interests method and accordingly the accompanying financial statements include the results of operation and changes in stockholders' equity of Arkwood, Inc. The results of operations included in the accompanying statement of earnings are summarized as follows:

	1973	1972
Sales	$ 1,925,999	1,047,477
Net earnings	$ 140,191	59,057

Amortization

The excess of cost of businesses acquired, in acquisitions which have been accounted for as purchases, over their net tangible

assets is being amortized by the straight-line method over forty years.

Inventories

Warehouse inventories and wood products inventories are stated at the lower of cost (first-in, first-out) or market; retail discount store inventories are valued at lower of cost or market by use of the retail inventory method. Inventories are summarized as follows:

	1973	1972
Warehouse inventories	$ 3,488,428	2 583,913
Retail store inventories	1,103,706	1,095,550
Wood product inventories	509,370	227,420
	$ 5,101,504	3 906,883

Depreciation

Depreciation allowances have been computed principally under accelerated methods, and depreciation expense amounted to $195,208 in 1973 and $204,901 in 1972. Fully depreciated assets are removed from the accounts.

A summary of estimated useful lives for depreciation purposes is as follows:

Category	Life in years
Land improvements	15
Building	40
Furniture, fixtures, machinery and equipment	5-10
Transportation equipment	3- 4

Income Taxes

The Company does not file a consolidated Federal income tax return and the provision for taxes on income is determined on a separate return basis for each of the companies included in the consolidation. Investment credits are accounted for using the "flow-through" method; for the year ended June 30, 1973, investment credits used to reduce Federal income tax liabilities amounted to $7,725.

Earnings per share

Earnings per common share and common equivalent share have been computed by dividing net earnings by the weighted average number of common and common equivalent shares outstanding each year. The number of shares, which has been adjusted to give retroactive effect for shares issued in connection with a stock dividend and the pooling of interests, entering into the computation is as follows:

	1973	1972
Average common shares outstanding	804,541	801,213
Common equivalent shares resulting from outstanding stock options and warrants	11,029	20,532
	815,570	821,745

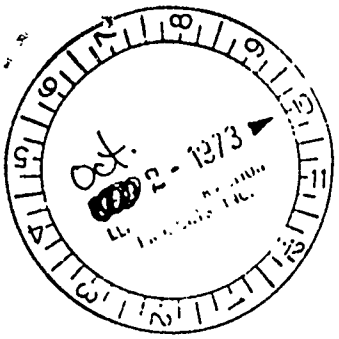
(2) Long-Term Debt

Information with respect to long-term debt is as follows:

	Classified as Current	Long-term
5 1/2%, promissory notes payable in quarterly instalments of $17,500 through 1974	$ 70,000	35 000
8 1/2% mortgage note payable in monthly instalments of principal and interest of $9,299 through 1981	59,766	576,868
Three year promissory note payable in monthly instalments of $18,000 with the balance due November 1, 1975	216,000	715,000
5 3/4% Industrial Revenue Bonds with annual maturities through 1983 Interest is payable semiannually	30,000	370,000
Noninterest bearing agreement issued in connection with acquisition of inventory payable in quarterly instalments of $8,450 through 1978 (discount is based on imputed interest rate of 9%)	5,520	123 252
7% promissory note payable in annual instalments of $20,000 beginning December 31, 1974 and the balance payable on December 31, 1976		58,000
	$ [illegible]	1,878,120

On November 14, 1972, the Company entered into a bank term loan agreement under which the Company borrowed $1,075,000 on a three year promissory note due in monthly instalments at 1% above the bank's prime rate of interest not to be less than 6% nor more than 10%. In addition, the Company may borrow from time to time on 90 day promissory notes up to a maximum of $750,000 at any one time at 1% above the bank's prime rate of interest not to be less than 6% nor more than 10%. Under this agreement the Company must maintain certain working capital and debt ratios and may not pay cash dividends. Accordingly, all the Company's retained earnings are restricted. In addition, there are other restrictions as to the acquisitions of businesses, future borrowings and capital expenditures. The proceeds from the bank loan were used to retire an existing three year bank promissory note and subordinated debentures.

The warehouse building was erected by Rogers Investments, Inc. and sold to the



M231068

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SECURITIES AND EXCHANGE COMMISSION

Washington, D. C. 20549

FORM 10-K

ANNUAL REPORT PURSUANT TO SECTION 13 OR 15 (d) OF
THE SECURITIES EXCHANGE ACT OF 1934

For the fiscal year ended June 30, 1973

Commission file Number 0-5230

MASS MERCHANDISERS, INC.
(Exact name of registrant as specified in its charter)

Arkansas
(State or other jurisdiction or incorporation or organization)

71-0221374
(IRS Employer Identification Number)

Highway 43
Harrison, Arkansas
(Address of principal executive offices)

72601
Zip Code

Registrant's telephone number, including area code: (501)365-3425

Securities registered pursuant to Section 12(g) of the Act:

Common Stock
$.50 par value
(Title of Class)

Indicate by check mark whether the registrant (1)has filed all annual, quarterly and other reports required to be filed with the Commission and (2)has been subject to the filing requirements for at least the past 90 days. Yes X No _____.

several products or services are involved, separate consideration shall be given to the principal products or services or classes of products or services.

The service merchandising and discount store operations are highly competitive. In both of these areas the Registrant competes with other companies, many of which are national concerns with substantially greater resources and personnel. In the service merchandising business, the Registrant's principal competition comes from grocery stores which engage in direct buying for themselves of the non-food and other soft good items offered by the Registrant's merchandising service. In the discount store operations, in those locations where large full-line discount stores such as K-Mart, Wal-Mart, Howard's, or Gibson Discount Stores, have opened in competition with the Registrant's stores, the Registrant has found it difficult to profitably compete with such full-line discount stores, and has been closing those stores where continued profitability is questionable.

The wood products business of Arkwood is highly competitive. Competition in the sales area of the wood products business comes from large national concerns, mainly International Paper Company and Weyerhaeuser Paper Company, which have substantially greater resources and personnel. Arkwood also has competition from these same national concerns in the acquisition of raw timber and in the various labor markets.

(2) If a material part of the business is dependent upon a single customer or a few customers, the loss of any one or more of whom would have a materially adverse effect on the business of the registrant, the name of the customer or customers, their relationship, if any, to the registrant and material facts regarding their importance to the business of the registrant shall be stated.

Arkwood has several large customers, and the loss of any one might have a materially adverse effect on its business. These large customers are: the state governments of

Kansas and Iowa; Payless Cashway Lumber Company, Iowa City, Iowa; and Farmland Industries, Kansas City, Missouri. However, the management of the Registrant is of the opinion, in view of the continuing high demand for Arkwood's products, that, if one of these large customers were lost, other customers for the products could readily be found.

(3) To the extent that information concerning backlog is material to an understanding of the business of the registrant, the dollar amount of backlog of orders believed to be firm, as of the end of the registrant's fiscal year, together with an indication of the portion thereof not reasonably expected to be filled within the current fiscal year and seasonal or other material aspects of the backlog.

As of the end of the fiscal year, Arkwood had a backlog of orders amounting to approximately $400,000, and all of which are believed to be firm. It is anticipated that all of these orders will be filled during the current fiscal year.

(4) The sources and availability of raw materials essential to the business.

Arkwood owns approximately 650 acres of land located in Arkansas for the purpose of timber removal. Once the timber has been removed Arkwood normally sells such lands. Arkwood has the timber rights to an additional 1,500 acres of land located in Arkansas. The future success of the manufacturing operations of Arkwood depends, in large part, upon its ability to obtain new sources of timber.

(5) The importance to the business and the duration and effect of, all material patents, trademarks, licenses, franchises and concessions held.

Inapplicable.

(6)(a) The estimated dollar amount spent during each of the last two fiscal years on material research activities relating to the developments of new products or services or the improvement of existing products or services, indicating those activities which were company-sponsored and/or those which were customer-sponsored.

Inapplicable.

(b) If there has been a public announcement of, or if information otherwise has become public about, a new product or line of business requiring the investment of a material amount of total assets, a description of the status of such product or line (e.g., whether in the planning stage, whether prototypes exist, the degree to which product design has progressed or whether further engineering is necessary).

Inapplicable.

(c) Where material, state the approximate number of employees engaged full-time in each of the activities described in (a) above during each fiscal year and in (b).

Inapplicable.

(7) The material effects that compliance with Federal, State and local provisions which have been enacted or adopted regulating the discharge of materials into the environment, or otherwise relating to the protection of the environment, may have upon the capital expenditures, earnings and competitive position of the registrant and its subsidiaries.

Arkwood has complied with the environmental standards and received the approval of the State of Arkansas for its wood waste burners, used in its lumber yards to dispose of various wood waste material. During the past fiscal year Arkwood expended approximately $7,000 in remodeling its burners to comply with the State standards. Future expenditures for compliance with environmental regulations are not expected to have any material effect on earnings or the competitive position of Arkwood, Inc.

(8) The number of persons employed by the registrant.

653

(9) The extent to which the business of the registrant or a material portion thereof is or may be seasonal.

The business of Arkwood is considered to be seasonal. The best portion of the year for the timber cutting operations is during the spring and summer. During the winter months, mainly due to weather conditions, Arkwood's operation will be approximately 50-60% of capacity.

are leased for a ten year term from the City of Harrison, Arkansas. This expansion was financed through the issuance, by the City of Harrison, Arkansas, of $400,000 of 5 3/4% Industrial Development Revenue Bonds. These bonds mature serially over a ten year period, with the Registrant's annual rental being an amount equal to the current maturities, or $40,000 per year, plus interest on the unpaid principal amount of the bonds. The Registrant has the option to purchase the expansion for $100.00 following the full payment of the Bonds.

Arkwood, Inc. conducts its business at thirteen locations in Arkansas and Oklahoma. Arkwood, Inc. owns eleven of these locations and leases two. The leases expire in 1985, with annual rental payments of $63,900, and are renewable for two ten year periods under the same terms and conditions. The manufacturing and wood processing equipment located in Arkwood's various lumber yards ranges in age from four to ten years.

Item 4. Parents and Subsidiaries.

(a) Furnish a list or diagram of all parents and subsidiaries of the registrant and as to each person named indicate the percentage of voting securities owned, or other basis of control, by its immediate parent, if any.

There is no parent of the Registrant. The following table sets forth the subsidiaries, all of which are wholly owned, of the Registrant, and the financial statements for which are included in the consolidated financial statements of the Registrant from the date of acquisition:

Name	State of Incorporation
U-Save Mart, Inc.	Missouri
Lot-O-Savings, Inc.	Illinois
D-B Drug Company, Inc.	Missouri

Wee Discount Stores, Inc.	Missouri
Mountain Enterprises	Arkansas
Arkwood, Inc..*	Arkansas

*Subsidiary of Mountain Enterprises

Item 5. Pending Legal Proceedings.

Briefly describe any material pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the registrant or any of its subsidiaries is a party or of which any of their property is the subject. Include the name of the court or agency in which the proceedings are pending, the date instituted, the principal parties thereto, a description of the factual basis alleged to underlie the proceeding and the relief sought. Include similar information as to any such proceedings known to be contemplated by governmental authorities.

On June 1, 1973, Western Merchants Wholesale Company instituted a lawsuit in Denver, Colorado, against the Registrant, in the United States District Court for the District of Colorado. The suit alleges unfair methods of competition and price discrimination in contravention of the Sherman Antitrust Act. Western Merchants Wholesale Company seeks money damages, in the amount of $4,000,000, and injunctive relief on account of the alleged violations of the antitrust laws. The lawsuit is currently in the discovery stages.

Item 6. Increases and Decreases in Outstanding Equity Securities.

(a) Give the following information as to all increases and decreases during the fiscal year in the amount of equity securities of the registrant outstanding.

(1) The title of the class of securities involved;

Common Stock.

(2) The date of the transaction;

March, 1973, May, 1973, August, 1972, and October and November, 1972.

(3) The amount of securities involved and whether an increase or a decrease;

During the fiscal year ending June 30, 1972 the Registrant had a net increase in the amount of securities outstanding of 167,529 shares.

(4) A brief description of the transaction in which the increase or decrease occurred. If previously reported, the description may be incorporated by a specific reference to the previous filing.

In August of 1972 there was an exercise of a stock option in the amount of 33 shares. During October and November of 1972 the Registrant purchased 12,104 shares of its own stock in the open market and retired such shares. The Registrant issued 85,500 shares of its common stock in March of 1973 in the acquisition of Arkwood, Inc. In March of 1973 the Registrant sold 20,000 shares of its stock to two officers.

Reconciliation of Outstanding Common Stock

Common Stock Outstanding as of June 30, 1972 (1)		731,073
Add:	Shares sold to Officers	20,000
	Stock Dividend	74,100
	Shares issued under Qualified Stock Option Plan	33
Less:	Shares purchased and retired	(12,104)
Common Stock Outstanding as of June 30, 1973		813,102

(1) The acquisition of Arkwood, Inc. in March, 1973 has been accounted for as a pooling of interest, and accordingly the number of shares outstanding, as of June 30, 1972, has been restated giving retroactive effect to the issuance of 85,500 shares of stock in connection with such acquisition.

(b) Give the following information as to all securities of the registrant sold by the registrant during the fiscal year, which were not registered under the Securities Act of 1933, in reliance upon an exemption from registration provided by Section 4(2) of that Act. Include sales of the registrant's reacquired securities as well as new issues, securities issued in exchange for property, services or other securities, and new securities resulting from the modification of outstanding securities:

(1) Give the date of sale, and the title and amount of the registrant's securities sold;

(a) March 29, 1973, Common Stock, 85,500 shares.

(b) March 29, 1973, Common Stock, 20,000 shares

(2) Give the market price on the date of sale, if applicable;

(a) Bid $8.00, Asked $8.75.

(b) Same

(3) Give the names of the brokers, underwriters or finders, if any. As to any securities sold but which were not the subject of a public offering, name the persons or identify the class of persons to whom the securities were sold;

(a) 85,500 shares of the Registrant's common stock was issued to Charles C. Grisham and Mary Jo Grisham, husband and wife, in exchange for all of the assets of Arkwood, Inc. There were no brokers, underwriters or finders in this transaction.

(b) John D. Erwin, Vice-President of the Registrant, purchased 10,000 shares of Common Stock. Mark L. Stone, former Vice-President of the Registrant, purchased 10,000 shares of Common Stock of the Registrant. There were no brokers, underwriters or finders in this transaction.

(4) As to securities sold for cash, state the aggregate offering price and the aggregate underwriting discount brokerage commissions, or finder's fees. As to any securities sold otherwise than for cash, state the nature of the transaction and the nature and aggregate amount of consideration received by the registrant;

(a) The shares issued to Charles C. Grisham and Mary Jo Grisham were in exchange for all of the assets and assumption of certain liabilities of Arkwood, Inc. The consideration received by the Registrant was the acquisition of Arkwood as a going concern.

(b) The shares purchased by Messrs. Erwin and Stone were purchased for consideration of $7.50 per share or an aggregate consideration of $150,000. There were no fees or commission in connection with this transaction.

(5) Indicate the Section of the Act or Rule of the Commission under which exemption from registration was claimed and state briefly the facts relied upon to make the exemption available; and

(a) The 85,500 shares of stock issued in connection with the Arkwood transaction were issued to Charles C. Grisham and Mary Jo Grisham, his wife. Mr. Grisham is currently an officer of the Registrant, and Mr. & Mrs. Grisham represented to the Registrant that the shares were being acquired for investment purposes only.

(b) The sales to Messrs. Erwin and Stone, both of whom were officers of the Registrant at the time of such sale, were made on the basis of representations by them that the shares were being acquired for investment purposes only.

(6) State whether the securities have been legended and stop-transfer instructions given in connection therewith, and if not, state the reasons why not.

In the case of both of these sales the securities have been legended and stop-transfer instructions given.

Item 7. Approximate Number of Equity Security Holders.

State in the tabular form indicated below the approximate number of holders of record of each class of equity securities of the registrant as of the end of the fiscal year:

(1) Title of Class	(2) Number of Record Holders
Common Stock	910

Item 8. Executive Officers of the Registrant.

(a) List the names and ages of all executive officers of the registrant and all persons chosen to become executive officers; state the nature of any family relationship between them; indicate all positions and offices with the registrant held by each such person; state his term of office as officer and the period during which he has served as such and briefly describe any arrangement or understanding between him and any other person pursuant to which he was selected as an officer.

Name	Office	Age
T. W. Rogers, Sr. (1)	Chairman of Board	57
T. W. Rogers, Jr. (1)	President	32
John D. Erwin	Vice-President - Sales	37

MASS MERCHANDISERS, INC. AND SUBSIDIARIES

Notes to Consolidated Financial Statements

(1) Summary of Significant Accounting Policies

The accounting policies of Mass Merchandisers, Inc. and subsidiaries are consistent with generally accepted accounting principles. In those instances in which more than one generally accepted accounting principle can be applied, the Company has adopted the accounting principle that it believes most accurately and fairly reflects the situation, as described in the following paragraphs.

Basis of Consolidation

The consolidated financial statements include the accounts of the Company and its subsidiaries. All significant intercompany transactions have been eliminated in consolidation.

On March 29, 1973, the Company acquired all of the outstanding stock of Arkwood, Inc. in exchange for 85,500 shares of its own common stock. This transaction is accounted for by the pooling of interests method and accordingly the accompanying financial statements include the results of operation and changes in stockholders' equity of Arkwood, Inc. The results of operations included in the accompanying statements of earnings are summarized as follows:

	1973	1972
Sales	$ 1,925,999	1,047,477
Net earnings	$ 140,191	59,057

Amortization

The excess of cost of businesses acquired, in acquisitions which have been accounted for as purchases, over their net tangible assets is being amortized by the straight-line method over forty years.

Inventories

Warehouse inventories and wood products inventories are stated at the lower of cost (first-in, first-out) or market; retail discount store inventories are valued at lower of cost or market by use of the retail inventory method.

Inventory amounts entering into the computation of cost of merchandise sold were as follows:

	Warehouse	Retail discount stores	Wood products	Total
June 30, 1971	$ 2,875,432	1,117,902	251,843	4,245,177
June 30, 1972	2,583,913	1,095,550	227,420	3,906,883
June 30, 1973	3,488,428	1,103,706	509,370	5,101,504

Property, Plant and Equipment

Depreciation and amortization are provided at rates which are sufficient to write off the cost of the assets over their estimated useful lives. The double-declining balance method is used for substantially all assets except for leasehold improvements which are amortized by the straight-line method over the lives of the leases or estimated useful lives, whichever is lesser. A summary of estimated useful lives for depreciation is as follows:

Category	Life years
Land improvements	15
Buildings	40
Leasehold improvements	5-20
Furniture, fixtures, machinery and equipment	5-10
Transportation equipment	3- 4

LEASE CONTRACT AND AGREEMENT

This Agreement made and entered into this 11th day of January, 1973, by and between HALLIE C. ORMOND and JEANNE M. ORMOND, his wife, and hereby made binding upon their heirs, successors, legal representatives and/or trustees, hereinafter designated as GRANTORS, and Mountain Enterprises Inc. a Corporation, being a wholly own subsidiary of MASS MERCHANDISERS, INC., an Arkansas Corporation, and hereby made binding upon the successors and/or assigns of the said Mountain Enterprises Inc. and MASS MERCHANDISERS, INC., jointly and severally, hereinafter designated as GRANTEES, W I T N E S S E T H :

That the GRANTORS for the considerations, purposes, covenants and agreements as hereinafter set out do hereby lease, let and demise unto the said GRANTEES, the following lands in Boone County, Arkansas, to-wit:

A part of the Northwest Quarter Southeast Quarter, North Half, Southwest Quarter and South Half Northwest Quarter, all in Section 27, Township 21 North, Range 21 West, Boone County, described as follows:

Beginning at the Southwest Corner of the Northwest Quarter Southwest Quarter, thence North 990 feet to the center of Clary Road; thence in a Northeasterly direction in the center line of said road 1172.6 feet to the North side of the said Northwest Quarter Southwest Quarter at a point 965 feet East of the Northwest Corner thereof; thence North 32 Degrees East along and with the center of said Clary Road 390 feet to the center of Boone County paved road; thence North 31 Degrees West and with the center of said Boone County paved road 235 feet to Missouri Pacific Railroad Right-of-Way at a point 150 feet Southwesterwardly from and radially to the existing center line of Missouri Pacific Railroad main track; thence Northwestwardly parallel with said existing center line 370 feet; thence Northeastwardly, by a straight line, radially to said existing center line of said main track 100 feet to a point 50 feet Southwestwardly from and radially to said existing center line; thence Southwestwardly parallel with said existing center line 1497 feet to a point 50 feet Southwestwardly from and radially to said existing center line; thence Southwestwardly, by a straight line, radially to said existing center line 135 feet; thence Southeastwardly, parallel with said existing center line 244 feet; thence Northeastwardly, by a straight line, radially

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Boone County Lands - Continued from Page 1

22, 1961, recorded in Book 85, Pages 164-165, of Recorder's Office for Boone County, Arkansas, to the Westerly right-of-way line of U.S. Highway 65; thence South 22 Degrees West along said right-of-way line 550 feet to the South side of the Northwest Quarter Southeast Quarter; thence West along the South side of the Northwest Quarter Southeast Quarter 457 feet to the Southwest Corner of the said Northwest Quarter Southeast Quarter; thence West along the South side of the North Half Southwest Quarter 2640 feet to point of beginning, containing in all 85.38 acres, more or less, subject to all existing easements. It is the intent of the within Grantors to cover in the foregoing description all of the lands conveyed in Deeds recorded in the Recorder's Office of Boone County, Arkansas, in Book 85 at Pages 164-165, 165-166, 166-167, 351-352, and pages 509-510, subject to County Road and any existing easements.

Also, the following lands in Van Buren County, Arkansas, to-wit:

A tract of land in Northeast Quarter, Section 2, Township 10 North, Range 14 West, 5th Principal Meridian, more particularly described as:

Starting at the Northeast Corner of Section 2, Township 10, North, Range 14 West; thence South 00 Degrees 17 Minutes West 730.54 feet along the line between Sections 1 and 2 to the point of beginning of the tract herein described: thence continuing South 00 Degrees 17 Minutes West 680.00 feet along said section line to a point 210.00 feet South of North line Southeast Quarter Northeast Quarter, Section 2; thence South 88 Degrees 43 Minutes West 1307.65 feet along a line 210.00 feet South of and parallel to said North line Southeast Quarter Northeast Quarter, Section 2, to a point on the Easterly right-of-way line of U.S. Highway 65, said point being 17.63 feet East of East line Southwest Quarter Northeast Quarter, Section 2; thence North 16 Degrees 30 Minutes West 720.45 feet along said Easterly right-of-way line to a point, said point being South 16 Degrees 30 Minutes

Also, the following lands in Van Buren County, Arkansas, to wit:

A tract of land [illegible] Northeast Quarter, Section [illegible] Township 10 North, Range 14 West, 5th Principal Meridian, more particularly described as:

Starting at the Northeast Corner of Section 2, Township 10, North, Range 14 West; thence South 00 Degrees 17 Minutes West 730.54 feet along the line between Sections 1 and 2 to the point of beginning of the tract herein described: thence continuing South 00 Degrees 17 Minutes West 680.00 feet along said section line to a point 210.00 feet South of North line Southeast Quarter Northeast Quarter; Section 2; thence South 88 Degrees 43 Minutes West 1307.65 feet along a line 210.00 feet South of and parallel to said North line Southeast Quarter Northeast Quarter, Section 2, to a point on the Easterly right-of-way line of U.S. Highway 65, said point being 17.63 feet East of East line Southwest Quarter Northeast Quarter, Section 2; thence North 16 Degrees 30 Minutes West 720.45 feet along said Easterly right-of-way line to a point, said point being South 16 Degrees 30 Minutes East 781.29 feet from the interesection of North line Section 2 and said Easterly right-of-way line of Highway 65; thence North 89 Degrees 18 Minutes East 1515.45 feet along a fence line and boundary line by occupation, to the point of beginning, containing 22.26 acres, less and except 1.60 acres taken by the Arkansas State Highway Commission being their tract #67, Job No. 8566, described as follows:

Beginning at the Northeast Corner of the Southwest Quarter Northeast Quarter, Section 2; thence North 88 Degrees 58 Minutes West a distance of 76.97 feet to a point on the existing centerline of U.S. Highway 65; thence South 14 Degrees 14 Minutes 30 Seconds East along said existing centerline a distance of 214.9 feet to a point; thence South 88 Degrees 58 Minutes East a distance of 41.5 feet to a point on the existing Easterly right-of-way line of said highway for the point of beginning; thence North 14 Degrees 14 Minutes 30 Seconds West along said existing right-of-way line a distance of 720.0 feet to a point; thence South 87 Degrees 41 Minutes East a distance of 74.1 feet to a point on the proposed Easterly right-of-way line of said highway; thence South 19 Degrees 57 Minutes East along said proposed right-of-way line a

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Van Buren County Lands - Continued from Page 2

distance of 391.6 feet to a point; thence South 12 Degrees 15 Minutes East along said proposed right-of-way line a distance of 336.3 feet to a point; thence North 88 Degrees 58 Minutes West a distance of 101.9 feet to the point of beginning and containing 1.60 acres, more or less in said exception; also except and subject to a water stand pipe site heretofore deeded to the City of Clinton, Arkansas.

Subject to any existing easements.

Together with all buildings, fixtures, machinery, equipment and appurtenances owned by GRANTORS now situated and located on the above described lands.

TO HAVE AND TO HOLD the same unto the said GRANTEES for and during the term of Twelve (12) years from the date hereof upon the terms and conditions herein expressed.

GRANTEES, jointly and severally, agree to pay and GRANTORS agree to accept as rental for all of the property hereby leased the sum of TWELVE HUNDRED DOLLARS ($1,200.00) per week, payable in United States Dollars of the most recent issue current at the time of payment, within not more than three (3) days after the end of each week, regardless of the day of the week within which any calendar year may end.

GRANTEES, jointly and severally, agree to pay and GRANTORS agree to accept as rental for all of the property hereby leased the sum of TWELVE HUNDRED DOLLARS ($1,200.00) per week, payable in United States Dollars of the most recent issue current at the time of payment, within not more than three (3) days after the end of each week, regardless of the day of the week within which any calendar year may end.

- 2 -

It is understood and agreed that this Lease Contract and Agreement shall be and is effective as of Monday, January 1, 1973, and which shall likewise become the anniversary date of said Lease Contract and Agreement.

- 3 -

GRANTEES, jointly and severally, hereby bind themselves to pay said weekly payment each week as hereinabove provided for and during the term of twelve (12) years dated from January 1, 1973, as well as each ten (10) year extension period as provided in numbered paragraph

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with MM's usual practices less 11% for health and beauty aids and 15% for non-health and beauty aids;

e) receipt of an opinion from Mill's legal counsel

3. (Continued from Page 3)

and, failing and/or refusing to do so for any reason and said default shall continue for a period of twenty-eight (28) days, then this Lease shall be at an end, subject to the conditions and stipulations as provided in paragraph numbered 8 hereof.

4. GRANTORS warrant that they are the absolute owners of the land and properties aforesaid; that they will, during the life of this Agreement, defend the same and hold harmless the GRANTEES against the lawful claims of any and all persons whomsoever in respect to GRANTEE'S peaceful enjoyment of the lands and properties aforesaid, according to the terms hereof.

5. It is understood and agreed that the GRANTEES shall have the right and privilege of bringing in and setting up machinery and equipment, erect buildings and/or structures, carry on any kind of wood processing or milling operations; to engage itself in the merchandising of forest products, grain and grain products, or any other items, in any manner and any other operations that it may deem advisable.

6. At the expiration of the term of twelve (12) years as hereinabove provided GRANTEES are hereby granted the exclusive right and option of renewing this Lease Contract and Agreement for one or two additional ten (10) year periods to run consecutively upon the same terms and conditions as herein expressed.

To clarify the terms of this Lease; the first ten (10) year extension period would begin January 1, 1985, and the second ten (10) year extension period would begin January 1, 1995, and end December

paragraph numbered 8 hereof.

4. GRANTORS warrant that they are the absolute owners of the land and properties aforesaid; that they will, during the life of this Agreement, defend the same and hold harmless the GRANTEES against the lawful claims of any and all persons whomsoever in respect to GRANTEE'S peaceful enjoyment of the lands and properties aforesaid, according to the terms hereof.

5. It is understood and agreed that the GRANTEES shall have the right and privilege of bringing in and setting up machinery and equipment, erect buildings and/or structures, carry on any kind of wood processing or milling operations; to engage itself in the merchandising of forest products, grain and grain products, or any other items, in any manner and any other operations that it may deem advisable.

6. At the expiration of the term of twelve (12) years as hereinabove provided GRANTEES are hereby granted the exclusive right and option of renewing this Lease Contract and Agreement for one or two additional ten (10) year periods to run consecutively upon the same terms and conditions as herein expressed.

To clarify the terms of this Lease; the first ten (10) year extension period would begin January 1, 1985, and the second ten (10) year extension period would begin January 1, 1995, and end December 31, 2004. Such Option shall be exercised by Notice in writing by the GRANTEES to GRANTORS within sixty (60) days before the expiration date of the first twelve (12) year period, and also sixty (60) days before the expiration date of the first ten (10) year extension period, whereupon this Agreement, including all provisions and stipulations therein contained shall then, and at that time, be made operative for the one or two ten (10) year extension periods as

[illegible] may elect, subject to the conditions and stipulations as provided in paragraph numbered 8.

7. (a) GRANTEES shall use exclusively their own methods, means and ways in carrying on their business and shall, at their own expense, maintain and keep all properties hereby leased in good operating condition and repair and in the case of loss by fire, tornado or otherwise, of any of the properties hereby leased, regardless of cause, the GRANTEES shall reconstruct, replace or restore such loss at their own expense. To that end, GRANTEES shall have an insurable interest in the leased improvements aforesaid.

(b) GRANTEES may not sell, assign, lease or sublease this Lease, or sell or attempt to sell or transfer in any way any part or all of the properties hereby leased, including any additions to said properties in the way of buildings, and fixtures ~~machinery or equipment~~, to any third person, copartnership or corporation without the specific written consent and approval of said GRANTORS, but GRANTORS shall not unreasonably withhold such consent.

TR Act

8. It is hereby specifically understood and agreed as follows:

(a) That should the GRANTEES fail or refuse to perform or carry out any of the provisions contained in all of paragraph numbered three hereof as well as any other requirements on GRANTEES' part as contained herein then, and in that event, the said GRANTORS may, at their option, cancel this Lease Contract and Agreement and the said GRANTEES shall thereupon vacate the said leased premises within ninety days with the understanding and agreement that they shall leave in place, as is, any and all improvements in the way of buildings, and fixtures ~~machinery and equipment~~ that the GRANTEES may have added to the operations carried on in connection with the premises hereby leased. Nevertheless, and in all events, the said GRANTEES shall, jointly

TR Act

GRANTORS for such period of time remaining under the lease period from the time of default to the end of the operating term of the first twelve (12) year period, or the first ten (10) year period, or the second ten (10) year period as the case may be to determine the true total amount due GRANTORS based upon the rental figure of $1200 per week times the number of weeks in arrears and the said GRANTEES shall be liable for such difference due, plus ten per cent interest during the time the rent remains unpaid and such total amount shall become a direct lien on the assets of the within GRANTEES.

(b) The anniversary and effective date of this Lease Contract and Agreement is as of Monday, January 1, 1973, and the initial term is for a period of twelve (12) years dating from January 1, 1973, under paragraph numbered 6 hereof the GRANTEES are granted an exclusive right and option of renewing this Lease Contract and Agreement for one or two additional ten (10 year periods to run consecutively upon the same terms and conditions as provided in said Lease Contract and Agreement. Now, if and when GRANTEES decide to abandon the premises and cancel this Lease Contract and Agreement at the end of the initial term of twelve (12) years, or at the end of the first ten (10) year extension period, or at the end of the second ten (10) year extension period, the said GRANTEES shall within sixty (60) days prior to the effective date of such abandonment, which could only be December 31, 1984, or December 31, 1994, or December 31, 2004, notify GRANTORS of their intent to abandon the premises and cancel this Lease Contract and Agreement, then within the sixty (60) days period as above specified, the GRANTORS are hereby given the exclusive right and option to purchase all buildings, and fixtures ~~machinery and equipment~~ that GRANTEES may have added to and put in operation on the premises hereby leased for and at GRANTEES' book value, that is, cost less depreciation taken in prior years up to date of purchase, which will be paid for

8. (c) Any and all payments to be made under this paragraph numbered 8 shall be paid in United States Dollars of the most recent issue and current at time of payment.

9. It is hereby stipulated and agreed that within sixty (60) days before the expiration of the first twelve (12) year period, and likewise within sixty (60) days before the expiration date of the first ten (10) year extension period, and also within sixty (60) days before the expiration date of the second ten (10) year extension period as provided in paragraph numbered six hereof, the within GRANTEES are hereby granted the exclusive right and option to purchase the premises hereby leased, to include all of the lands, together with all buildings, fixtures, machinery and equipment owned by the GRANTORS and situated and located on the above described lands for the lump sum price of ONE MILLION ($1,000,000.00), United States Dollars of the most recent issue current at the time of any and all payments, payable $200,000.00 as down payment upon consummation of the sale, the balance of $800,000.00 to be paid in four (4) successive, annual payments of $200,000.00 each, payable on the anniversary of the closing date with interest at the rate of six per cent (6%) per annum on unpaid balance until same has been fully paid. Payments of the balance of the purchase price shall be secured by a first Mortgage and security interest covering all of the above described land, together with all buildings, fixtures, machinery and equipments owned by either GRANTORS or GRANTEES, situated and located on the above described lands, such first Mortgage to contain the usual covenants against waste and standard acceleration clause.

Upon exercise of this option to purchase as outlined above, the sale shall be consummated within sixty (60) days from the delivery of notice of GRANTEE'S desire to purchase as provided in paragraph numbered nine, subject to the following stipulations:

(a) GRANTORS warrant that they are the absolute owners of the land properties aforesaid, free and unencumbered.

(b) GRANTORS agree to deliver to GRANTEES good and sufficient Warranty Deeds together with proper Bill of Sale conveying said property in fee simple to the said GRANTEES, or to its nominee, contemporaneously with delivery by the GRANTEES of the consideration as set out in paragraph numbered seven hereof.

(c) GRANTORS agree to furnish at their expense Abstract of Title covering the above described lands, certified to closing date, and to pay real estate and personal property taxes up to closing date, as well as provide, at their expense, the cost of documentary stamps.

(d) GRANTEES shall have the right to pay off the balance of said purchase price at any time, plus interest at the rate of six per cent (6%) per annum on such unpaid balance.

(e) Upon consummation of sale as herein provided, this Lease Contract and Agreement shall terminate simultaneously with the closing date of said purchase.

IN TESTIMONY WHEREOF, WITNESS the hands of the parties,

the day and year here above first written.

HALLIE C. ORMOND

JEANNE M. ORMOND

G R A N T O R S

Mountain Enterprises, Inc.

BY:

Mark Stone, Secy.

AND

MASS MERCHANDISERS, INC.

BY:

G R A N T E E S

A C K N O W L E D G M E N T

STATE OF ARKANSAS)
)SS.
COUNTY OF BOONE)

BE IT REMEMBERED, That on this day came before me, the undersigned, a Notary Public, within and for the County aforesaid, duly commissioned and acting, HALLIE C. ORMOND and JEANNE M. ORMOND, Husband and Wife, to me well known as the grantors in the foregoing Deed, and stated that they had executed the same for the consideration and purposes therein mentioned and set forth. And on the same day also voluntarily appeared before me, the said JEANNE M. ORMOND, Wife of the said HALLIE C. ORMOND, to me well known and in the absence of her said husband, declared that she had, of her own free will, signed and sealed the relinquishment of Dower and Homestead in the foregoing Deed, for the considerations and purposes therein contained and set forth without compulsion or undue influence of her said husband.

Witness My Hand and Seal as such Notary Public, on this 11 day of January, 1973.

NOTARY PUBLIC

My Commission Expires:
7/7/74

A C K N O W L E D G M E N T

STATE OF ARKANSAS)
)SS.
COUNTY OF BOONE)

On this 11th day of January, 1973, before me, a Notary Public, duly commissioned, qualified and acting within and for the said County and State, appeared in person T.W. Rogers, Jr. and Paul L. Rogers, being the Exc. Vice President and Secretary, respectively, of MASS MERCHANDISERS, INC., and who had been designated by said Corporation to execute the above and foregoing instrument, to me personally well known, who stated that they were the Exc. Vice President and Secretary of the said MASS MERCHANDISERS, INC., and were duly authorized in their respective capacities to execute the foregoing instrument for the consideration, uses and purposes therein mentioned and set forth.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal this 11th day of January, 1973.

NOTARY PUBLIC

My Commission Expires:

2/7 - 1974

A C K N O W L E D G E M E N T

STATE OF ARKANSAS)
) SS
COUNTY OF BOONE)

On this 11th day of January, 1973, before me, a Notary Public, duly commissioned, qualified and acting within and for the said County and State, appeared in person T. W. ROGERS, JR. and MARK STONE, being the President and Secretary respectively, of MOUNTAIN ENTERPRISES, INC. and who had been designated by said Corporation to execute the above and foregoing instrument, to me personally well known, who stated that they were the President and Secretary of the said MOUNTAIN ENTERPRISES, INC. and were duly authorized in their respective capacities to execute the foregoing instrument for the consideration, uses and purposes therein mentioned and set forth.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal this 11 day of January, 1973.

NOTARY PUBLIC

My Commission Expires:
2-7-1974

 4-11-73

22, 1961, recorded in Book 85, Pages 164-165, of Recorder's Office for Boone County, Arkansas, to the Westerly right-of-way line of U.S. Highway 65; thence South 22 Degrees West along said right-of-way line 550 feet to the South side of the Northwest Quarter Southeast Quarter; thence West along the South side of the Northwest Quarter Southeast Quarter 457 feet to the Southwest Corner of the said Northwest Quarter Southeast Quarter; thence West along the South side of the North Half Southwest Quarter 2640 feet to point of beginning, containing in all 85.38 acres, more or less, subject to all existing easements. It is the intent of the within Grantors to cover in the foregoing description all of the lands conveyed in Deeds recorded in the Recorder's Office of Boone County, Arkansas, in Book 85 at Pages 164-165, 165-166, 166-167, 351-352, and pages 509-510, subject to County Road and any existing easements.

Also, the following lands in Van Buren County, Arkansas, to-wit:

A tract of land in Northeast Quarter, Section 2, Township 10 North, Range 14 West, 5th Principal Meridian, more particularly described as:

Starting at the Northeast Corner of Section 2, Township 10, North, Range 14 West; thence South 00 Degrees 17 Minutes West 730.54 feet along the line between Sections 1 and 2 to the point of beginning of the tract herein described: thence continuing South 00 Degrees 17 Minutes West 680.00 feet along said section line to a point 210.00 feet South of North line Southeast Quarter Northeast Quarter, Section 2; thence South 88 Degrees 43 Minutes West 1307.65 feet along a line 210.00 feet South of and parallel to said North line Southeast Quarter Northeast Quarter, Section 2, to a point on the Easterly right-of-way line of U.S. Highway 65, said point being 17.63 feet East of East line Southwest Quarter Northeast Quarter, Section 2; thence North 16 Degrees 30 Minutes West 720.45 feet along said Easterly right-of-way line to a point, said point being South 16 Degrees 30 Minutes East 781.29 feet from the interesection of North line Section 2 and said Easterly right-of-way line of Highway 65; thence North 89 Degrees 18 Minutes East 1515.45 feet along a fence line and boundary line by occupation, to the point of beginning, containing 22.26 acres, less and except 1.60 acres taken by the Arkansas State Highway Commission being their tract #67, Job No. 8566, described as follows:

Beginning at the Northeast Corner of the Southwest Quarter Northeast Quarter, Section 2; thence North 88 Degrees 58 Minutes West a distance of 76.97 feet to a point on the existing centerline of U.S. Highway 65; thence South 14 Degrees 14 Minutes 30 Seconds East along said existing centerline a distance of 214.9 feet to a point; thence South 88 Degrees 58 Minutes East a distance of 41.5 feet to a point on the existing Easterly right-of-way line of said highway for the point of beginning; thence North 14 Degrees 14 Minutes 30 Seconds West along said existing right-of-way line a distance of 720.0 feet to a point; thence South 87 Degrees 41 Minutes East a distance of 74.1 feet to a point on the proposed Easterly right-of-way line of said highway; thence South 19 Degrees 57 Minutes East along said proposed right-of-way line a

distance of 391.6 feet to a point; thence South 12 Degrees 15 Minutes East along said proposed right-of-way line a distance of 336.3 feet to a point; thence North 88 Degrees 58 Minutes West a distance of 101.9 feet to the point of beginning and containing 1.60 acres, more or less in said exception; also except and subject to a water stand pipe site heretofore deeded to the City of Clinton, Arkansas.

Subject to any existing easements.

Together with all buildings, fixtures, machinery, equipment and appurtenances owned by GRANTORS now situated and located on the above described lands.

TO HAVE AND TO HOLD the same unto the said GRANTEES for and during the term of Twelve (12) years from the date hereof upon the terms and conditions herein expressed.

- 1 -

GRANTEES, jointly and severally, agree to pay and GRANTORS agree to accept as rental for all of the property hereby leased the sum of TWELVE HUNDRED DOLLARS ($1,200.00) per week, payable in United States Dollars of the most recent issue current at the time of payment, within not more than three (3) days after the end of each week, regardless of the day of the week within which any calendar year may end.

- 2 -

It is understood and agreed that this Lease Contract and Agreement shall be and is effective as of Monday, January 1, 1973, and which shall likewise become the anniversary date of said Lease Contract and Agreement.

- 3 -

GRANTEES, jointly and severally, hereby binds themselves to pay said weekly payment each week as hereinabove provided for and during the term of twelve (12) years dated from January 1, 1973, as well as each ten (10) year extension period as provided in numbered paragraph 6 hereof;

- continued - 208

3. (Continued from Page 3)

and, failing and/or refusing to do so for any reason and said default sh continue for a period of twenty-eight (28) days, then this Lease shall b at an end, subject to the conditions and stipulations as provided in paragraph numbered 8 hereof.

4. GRANTORS warrant that they are the absolute owners of the land and properties aforesaid; that they will, during the life of this Agreement, defend the same and hold harmless the GRANTEES against the lawful claims of any and all persons whomsoever in respect to GRANTEE'S peaceful enjoyment of the lands and properties aforesaid, according to the terms hereof.

5. It is understood and agreed that the GRANTEES shall have the right and privilege of bringing in and setting up machinery and equipment, erect buildings and/or structures, carry on any kind of wood processing or milling operations; to engage itself in the merchandising of forest products, grain and grain products, or any other items, in any manner and any other operations that it may deem advisable.

6. At the expiration of the term of twelve (12) years as hereinabove provided GRANTEES are hereby granted the exclusive right and option of renewing this Lease Contract and Agreement for one or two additional ten (10) year periods to run consecutively upon the same terms and conditions as herein expressed.

To clarify the terms of this Lease; the first ten (10) year extension period would begin January 1, 1985, and the second ten (10) year extension period would begin January 1, 1995, and end December 31, 2004. Such Option shall be exercised by Notice in writing by the GRANTEES to GRANTORS within sixty (60) days before the expiration date of the first twelve (12) year period, and also sixty (60) days before the expiration date of the first ten (10) year extension period, whereupon this Agreement, including all provisions and stipulations therein contained shall then, and at that time, be made operative for the one or two ten (10) year extension periods as

Grantees may elect, subject to the conditions and stipulations as provided in paragraph numbered 8.

7. (a) GRANTEES shall use exclusively their own methods, means and ways in carrying on their business and shall, at their own expense, maintain and keep all properties hereby leased in good operating condition and repair and in the case of loss by fire, tornado or otherwise, of any of the properties hereby leased, regardless of cause, the GRANTEES shall reconstruct, replace or restore such loss at their own expense. To that end, GRANTEES shall have an insurable interest in the leased improvements aforesaid.

(b) GRANTEES may not sell, assign, lease or sublease this Lease, or sell or attempt to sell or transfer in any way any part or all of the properties hereby leased, including any additions to said properties in the way of buildings, and fixtures TR 1/1/73 to any third person, copartnership or corporation without the specific written consent and approval of said GRANTORS, but GRANTORS shall not unreasonably withhold such consent.

8. It is hereby specifically understood and agreed as follows:

(a) That should the GRANTEES fail or refuse to perform or carry out any of the provisions contained in all of paragraph numbered three hereof as well as any other requirements on GRANTEES' part as contained herein then, and in that event, the said GRANTORS may, at their option, cancel this Lease Contract and Agreement and the said GRANTEES shall thereupon vacate the said leased premises within ninety days with the understanding and agreement that they shall leave in place, as is, any and all improvements in the way of buildings, and fixtures TR 1/1/73 that the GRANTEES may have added to the operations carried on in connection with the premises hereby leased. Nevertheless, and in all events, the said GRANTEES shall, jointly and severally, remain liable for the total amount that would be due

GRANTORS for such period of time remaining under the lease period from the time of default to the end of the operating term of the first twelve (12 year period, or the first ten (10) year period, or the second ten (10) year period as the case may be to determine the true total amount due GRANTORS based upon the rental figure of $1200 per week times the number of weeks in arrears and the said GRANTEES shall be liable for such difference due, plus ten per cent interest during the time the rent remains unpaid and such total amount shall become a direct lien on the assets of the within GRANTEES.

(b) The anniversary and effective date of this Lease Contract and Agreement is as of Monday, January 1, 1973, and the initial term is for a period of twelve (12) years dating from January 1, 1973, under paragraph numbered 6 hereof the GRANTEES are granted an exclusive right and option of renewing this Lease Contract and Agreement for one or two additional ten (10 year periods to run consecutively upon the same terms and conditions as provided in said Lease Contract and Agreement. Now, if and when GRANTEES decide to abandon the premises and cancel this Lease Contract and Agreement at the end of the initial term of twelve (12) years, or at the end of the first ten (10) year extension period, or at the end of the second ten (10) year extension period, the said GRANTEES shall within sixty (60) days prior to the effective date of such abandonment, which could only beeDecember 31, 1984, or December 31, 1994, or December 31, 2004, notify GRANTORS of their intent to abandon the premises and cancel this Lease Contract and Agreement, then within the sixty (60) days period as above specified, the GRANTORS are hereby given the exclusive right and option to purchase all buildings, and fixtures TR 1/11/73 HCO 1/11/73 that GRANTEES may have added to and put in operation on the premises hereby leased for and at GRANTEES' book value, that is, cost less depreciation taken in prior years up to date of purchase, which will be paid for in cash.

8. (c) Any and all payments to be made under this paragraph numbered 8 shall be paid in United States Dollars of the most recent issue and current at time of payment.

9. It is hereby stipulated and agreed that within sixty (60) days before the expiration of the first twelve (12) year period, and likewise within sixty (60) days before the expiration date of the first ten (10) year extension period, and also within sixty (60) days before the expiration date of the second ten (10) year extension period as provided in paragraph numbered six hereof, the within GRANTEES are hereby granted the exclusive right and option to purchase the premises hereby leased, to include all of the lands, together with all buildings, fixtures, machinery and equipment owned by the GRANTORS and situated and located on the above described lands for the lump sum price of ONE MILLION ($1,000,000.00), United States Dollars of the most recent issue current at the time of any and all payments, payable $200,000.00 as down payment upon consummation of the sale, the balance of $800,000.00 to be paid in four (4) successive, annual payments of $200,000.00 each, payable on the anniversary of the closing date with interest at the rate of six per cent (6%) per annum on unpaid balance until same has been fully paid. Payments of the balance of the purchase price shall be secured by a first Mortgage and security interest covering all of the above described land, together with all Buildings, fixtures, machinery and equipments owned by either GRANTORS or GRANTEES, situated and located on the above described lands, such first Mortgage to contain the usual covenants against waste and standard acceleration clause.

Upon exercise of this option to purchase as outlined above, the sale shall be consummated within sixty (60) days from the delivery of notice of GRANTEE'S desire to purchase as provided in paragraph numbered nine, subject to the following stipulations:

(a) GRANTORS warrant that they are the absolute owners of the land properties aforesaid, free and unencumbered.

(b) GRANTORS agree to deliver to GRANTEES good and sufficient Warranty Deeds together with proper Bill of Sale conveying said property in fee simple to the said GRANTEES, or to its nominee, contemporaneously with delivery by the GRANTEES of the consideration as set out in paragraph numbered seven hereof.

(c) GRANTORS agree to furnish at their expense Abstract of Title covering the above described lands, certified to closing date, and to pay real estate and personal property taxes up to closing date, as well as provide, at their expense, the cost of documentary stamps.

(d) GRANTEES shall have the right to pay off the balance of said purchase price at any time, plus interest at the rate of six per cent (6%) per annum on such unpaid balance.

(e) Upon consummation of sale as herein provided, this Lease Contract and Agreement shall terminate simultaneously with the closing date of said purchase.

IN TESTIMONY WHEREOF, WITNESS the hands of the parties,

the day and year hereinabove first written.

Hallie C. Ormond
HALLIE C. ORMOND

Jeanne M. Ormond
JEANNE M. ORMOND

G R A N T O R S

Mountain Enterprises, Inc.

BY: Jan Rosen Exec. V-P.

Mark Stone, Secy.

AND

MASS MERCHANDISERS, INC.

BY: Jan Rosen Exec. V-P

Paul R. Rosen Sec.

G R A N T E E

A C K N O W L E D G M E N T

STATE OF ARKANSAS)
)SS.
COUNTY OF BOONE)

BE IT REMEMBERED, That on this day came before me, the undersigned, a Notary Public, within and for the County aforesaid, duly commissioned and acting, HALLIE C. ORMOND and JEANNE M. ORMOND, Husband and Wife, to me well known as the grantors in the foregoing Deed, and stated that they had executed the same for the consideration and purposes therein mentioned and set forth. And on the same day also voluntarily appeared before me, the said JEANNE M. ORMOND, Wife of the said HALLIE C. ORMOND, to me well known and in the absence of her said husband, declared that she had, of her own free will, signed and sealed the relinquishment of Dower and Homestead in the foregoing Deed, for the considerations and purposes therein contained and set forth without compulsion or undue influence of her said husband.

Witness My Hand and Seal as such Notary Public, on this 11 day of January, 1973.

NOTARY PUBLIC

My Commission Expires:

2-7-74

A C K N O W L E D G M E N T

STATE OF ARKANSAS)
)SS.
COUNTY OF BOONE)

On this 11 day of January, 1973, before me, a Notary Public, duly commissioned, qualified and acting within and for the said County and State, appeared in person T.W. ROGERS, JR. and PAUL L. ROGERS, being the Exc. Vice President and Secretary, respectively, of MASS MERCHANDISERS, INC., and who had been designated by said Corporation to execute the above and foregoing instrument, to me personally well known, who stated that they were the Exc. Vice President and Secretary of the said MASS MERCHANDISERS, INC., and were duly authorized in their respective capacities to execute the foregoing instrument for the consideration, uses and purposes therein mentioned and set forth.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal this 11 day of January, 1973.

NOTARY PUBLIC

My Commission Expires:

2-7-74

STATE OF ARKANSAS }
COUNTY OF BOONE } SS

I hereby certify that this instrument was filed for record in my office this 11 day of April 1973 at 9 o'clock A.M. and duly recorded in Misc Record Book No. 2 at page 206

Witness my hand and the court seal this 11 day of April 1973

Naomi Parker
Circuit Clerk and Recorder
By Grace Mikum D.C.

A C K N O W L E D G E M E N T

STATE OF ARKANSAS)
) SS
COUNTY OF BOONE)

On this 11th day of January, 1973, before me, a Notary Public, duly commissioned, qualified and acting within and for the said County and State, appeared in person T. W. ROGERS, JR. and MARK STONE, being the President and Secretary respectively, of MOUNTAIN ENTERPRISES, INC. and who had been designated by said Corporation to execute the above and foregoing instrument, to me personally well known, who stated that they were the President and Secretary of the said MOUNTAIN ENTERPRISES, INC. and were duly authorized in their respective capacities to execute the foregoing instrument for the consideration, uses and purposes therein mentioned and set forth.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal this 11 day of January, 1973.

NOTARY PUBLIC

My Commission Expires:
2-7-74

Filed for Record 11th day of April
1973 at 9 o'clock A M
Naomi Parker, Clerk
By Naomi Parker D.C.

STATE OF ARKANSAS }
COUNTY OF BOONE } SS

I hereby certify that this instrument was filed for record in my office the 11 day of Apr. 1973 at 9 o'clock A. M., and duly recorded in Record Book No. 2 at page 206-217 Inc

Witness my hand and the court seal this 11 day of April 1973.

Naomi Parker
Circuit Clerk and Recorder
By Grace Milum D.C

C E R T I F I C A T E

WHEREAS, on January 11, 1973, MASS MERCHANDISERS, INC., formerly SAV-A-STOP MIDWEST, INC., entered into a Lease Agreement effective as of January 1, 1973, with H. C. ORMOND and JEANNE M. ORMOND, Husband and Wife, with reference to lands and property then under Lease Agreement with ARKWOOD, INC.; and,

WHEREAS, incident to said Lease and the execution thereof it was understood and agreed by the parties and set out in a memorandum of agreement, that ultimate consummation of the transaction was subject to approval and confirmation by, and would become fully and formally effective upon approval by the Board of Directors of MASS MERCHANDISERS, INC.

NOW; The undersigned, President and Secretary of MASS MERCHANDISERS, INC., hereby certify that at a meeting of the Board of Directors had and properly held on the 2nd day of February, 1973, said Board of Directors approved and confirmed the action of the management in respect to said Lease and all matters pertinent thereto, and said Lease Agreement stands in all things approved, confirmed, and is effective according to its terms.

IN TESTIMONY WHEREOF, Witness the Hands and the Seal of said Corporation, this 30 day of March, 1973.

PRESIDEN

A T T E S T:

SECRETARY

Filed for Record 11th day of Ap
1973 at 9 o'clock A

Naomi Parker, Clerk

By Naomi Parker

18

LEASE CONTRACT AND AGREEMENT

This Agreement made and entered into this 11th day of January, 1973, by and between HALLIE C. ORMOND and JEANNE M. ORMOND, his wife, and hereby made binding upon their heirs, successors, legal representatives and/or trustees, hereinafter designated as GRANTORS, and Mountain Enterprises Inc a Corporation, being a wholly own subsidiary of MASS MERCHANDISERS, INC., an Arkansas Corporation, and hereby made binding upon the successors and/or assigns of the said Mountain Enterprises Inc. and MASS MERCHANDISERS, INC., jointly and severally, hereinafter designated as GRANTEES, W I T N E S S E T H :

That the GRANTORS for the considerations, purposes, covenants and agreements as hereinafter set out do hereby lease, let and demise unto the said GRANTEES, the following lands in Boone County, Arkansas, to-wit:

A part of the Northwest Quarter Southeast Quarter, North Half, Southwest Quarter and South Half Northwest Quarter, all in Section 27, Township 21 North, Range 21 West, Boone County, described as follows:

Beginning at the Southwest Corner of the Northwest Quarter Southwest Quarter, thence North 990 feet to the center of Clary Road; thence in a Northeasterly direction in the center line of said road 1172.6 feet to the North side of the said Northwest Quarter Southwest Quarter at a point 965 feet East of the Northwest Corner thereof; thence North 32 Degrees East along and with the center of said Clary Road 390 feet to the center of Boone County paved road; thence North 31 Degrees West and with the center of said Boone County paved road 235 feet to Missouri Pacific Railroad Right-of-Way at a point 150 feet Southwesterwardly from and radially to the existing center line of Missouri Pacific Railroad main track; thence Northwestwardly parallel with said existing center line 370 feet; thence Northeastwardly, by a straight line, radially to said existing center line of said main track 100 feet to a point 50 feet Southwestwardly from and radially to said existing center line; thence Southwestwardly parallel with said existing center line 1497 feet to a point 50 feet Southwestwardly from and radially to said existing center line; thence Southwestwardly, by a straight line, radially to said existing center line 135 feet; thence Southeastwardly, parallel with said existing center line 244 feet; thence Northeastwardly, by a straight line, radially to said existing center line 100 feet; thence Southwest along the North side of lands described in Deed dated February

22, 1961, recorded in Book 85, Pages 164-165, of Recorder's Office for Boone County, Arkansas, to the Westerly right-of-way line of U.S. Highway 65; thence South 22 Degrees West along said right-of-way line 550 feet to the South side of the Northwest Quarter Southeast Quarter; thence West along the South side of the Northwest Quarter Southeast Quarter 457 feet to the Southwest Corner of the said Northwest Quarter Southeast Quarter; thence West along the South side of the North Half Southwest Quarter 2640 feet to point of beginning, containing in all 85.38 acres, more or less, subject to all existing easements. It is the intent of the within Grantors to cover in the foregoing description all of the lands conveyed in Deeds recorded in the Recorder's Office of Boone County, Arkansas, in Book 85 at Pages 164-165, 165-166, 166-167, 351-352, and pages 509-510, subject to County Road and any existing easements.

Also, the following lands in Van Buren County, Arkansas, to-wit:

A tract of land in Northeast Quarter, Section 2, Township 10 North, Range 14 West, 5th Principal Meridian, more particularly described as:

Starting at the Northeast Corner of Section 2, Township 10, North, Range 14 West; thence South 00 Degrees 17 Minutes West 730.54 feet along the line between Sections 1 and 2 to the point of beginning of the tract herein described: thence continuing South 00 Degrees 17 Minutes West 680.00 feet along said section line to a point 210.00 feet South of North line Southeast Quarter Northeast Quarter, Section 2; thence South 88 Degrees 43 Minutes West 1307.65 feet along a line 210.00 feet South of and parallel to said North line Southeast Quarter Northeast Quarter, Section 2, to a point on the Easterly right-of-way line of U.S. Highway 65, said point being 17.63 feet East of East line Southwest Quarter Northeast Quarter, Section 2; thence North 16 Degrees 30 Minutes West 720.45 feet along said Easterly right-of-way line to a point, said point being South 16 Degrees 30 Minutes East 781.29 feet from the interesection of North line Section 2 and said Easterly right-of-way line of Highway 65; thence North 89 Degrees 18 Minutes East 1515.45 feet along a fence line and boundary line by occupation, to the point of beginning, containing 22.26 acres, less and except 1.60 acres taken by the Arkansas State Highway Commission being their tract #67, Job No. 8566, described as follows:

Beginning at the Northeast Corner of the Southwest Quarter Northeast Quarter, Section 2; thence North 88 Degrees 58 Minutes West a distance of 76.97 feet to a point on the existing centerline of U.S. Highway 65; thence South 14 Degrees 14 Minutes 30 Seconds East along said existing centerline a distance of 214.9 feet to a point; thence South 88 Degrees 58 Minutes East a distance of 41.5 feet to a point on the existing Easterly right-of-way line of said highway for the point of beginning; thence North 14 Degrees 14 Minutes 30 Seconds West along said existing right-of-way line a distance of 720.0 feet to a point; thence South 87 Degrees 41 Minutes East a distance of 74.1 feet to a point on the proposed Easterly right-of-way line of said highway; thence South 19 Degrees 57 Minutes East along said proposed right-of-way line a

distance of 391.6 feet to a point; thence South 12 Degrees 15 Minutes East along said proposed right-of-way line a distance of 336.3 feet to a point; thence North 88 Degrees 58 Minutes West a distance of 101.9 feet to the point of beginning and containing 1.60 acres, more or less in said exception; also except and subject to a water stand pipe site heretofore deeded to the City of Clinton, Arkansas.

Subject to any existing easements.

Together with all buildings, fixtures, machinery, equipment and appurtenances owned by GRANTORS now situated and located on the above described lands.

TO HAVE AND TO HOLD the same unto the said GRANTEES for and during the term of Twelve (12) years from the date hereof upon the terms and conditions herein expressed,

- 1 -

GRANTEES, jointly and severally, agree to pay and GRANTORS agree to accept as rental for all of the property hereby leased the sum of TWELVE HUNDRED DOLLARS ($1,200.00) per week, payable in United States Dollars of the most recent issue current at the time of payment, within not more than three (3) days after the end of each week, regardless of the day of the week within which any calendar year may end.

- 2 -

It is understood and agreed that this Lease Contract and Agreement shall be and is effective as of Monday, January 1, 1973, and which shall likewise become the anniversary date of said Lease Contract and Agreement.

- 3 -

GRANTEES, jointly and severally, hereby bind themselves to pay said weekly payment each week as hereinabove provided for and during the term of twelve (12) years dated from January 1, 1973, as well as each ten (10) year extension period as provided in numbered paragraph 6 hereof;

- continued -

3. (Continued from Page 3)

and, failing and/or refusing to do so for any reason and said default shal continue for a period of twenty-eight (28) days, then this Lease shall be at an end, subject to the conditions and stipulations as provided in paragraph numbered 8 hereof.

4. GRANTORS warrant that they are the absolute owners of the land and properties aforesaid; that they will, during the life of this Agreement, defend the same and hold harmless the GRANTEES against the lawful claims of any and all persons whomsoever in respect to GRANTEE'S peaceful enjoyment of the lands and properties aforesaid, according to the terms hereof.

5. It is understood and agreed that the GRANTEES shall have the right and privilege of bringing in and setting up machinery and equipment, erect buildings and/or structures, carry on any kind of wood processing or milling operations; to engage itself in the merchandising of forest products, grain and grain products, or any other items, in any manner and any other operations that it may deem advisable.

6. At the expiration of the term of twelve (12) years as hereinabove provided GRANTEES are hereby granted the exclusive right and option of renewing this Lease Contract and Agreement for one or two additional ten (10) year periods to run consecutively upon the same terms and conditions as herein expressed.

To clarify the terms of this Lease; the first ten (10) year extension period would begin January 1, 1985, and the second ten (10) year extension period would begin January 1, 1995, and end December 31, 2004. Such Option shall be exercised by Notice in writing by the GRANTEES to GRANTORS within sixty (60) days before the expiration date of the first twelve (12) year period, and also sixty (60) days before the expiration date of the first ten (10) year extension period, whereupon this Agreement, including all provisions and stipulations therein contained shall then, and at that time, be made operative for the one or two ten (10) year extension periods as

Grantees may elect, subject to the conditions and stipulations as provided in paragraph numbered 8.

7. (a) GRANTEES shall use exclusively their own methods, means and ways in carrying on their business and shall, at their own expense, maintain and keep all properties hereby leased in good operating condition and repair and in the case of loss by fire, tornado or otherwise, of any of the properties hereby leased, regardless of cause, the GRANTEES shall reconstruct, replace or restore such loss at their own expense. To that end, GRANTEES shall have an insurable interest in the leased improvements aforesaid.

(b) GRANTEES may not sell, assign, lease or sublease this Lease, or sell or attempt to sell or transfer in any way any part or all of the properties hereby leased, including any additions to said properties in the way of buildings, And Fixtures ~~machinery or equipment~~, to any third person, copartnership or corporation without the specific written consent and approval of said GRANTORS, but GRANTORS shall not unreasonably withhold such consent.

8. It is hereby specifically understood and agreed as follows:

(a) That should the GRANTEES fail or refuse to perform or carry out any of the provisions contained in all of paragraph numbered three hereof as well as any other requirements on GRANTEES' part as contained herein then, and in that event, the said GRANTORS may, at their option, cancel this Lease Contract and Agreement and the said GRANTEES shall thereupon vacate the said leased premises within ninety days with the understanding and agreement that they shall leave in place, as is, any and all improvements in the way of buildings, And Fixtures ~~machinery and equipment~~ that the GRANTEES may have added to the operations carried on in connection with the premises hereby leased. Nevertheless, and in all events, the said GRANTEES shall, jointly and severally, remain liable for the total amount that would be due

GRANTORS for such period of time remaining under the lease period from the time of default to the end of the operating term of the first twelve (12) year period, or the first ten (10) year period, or the second ten (10) year period as the case may be to determine the true total amount due GRANTORS based upon the rental figure of $1200 per week times the number of weeks in arrears and the said GRANTEES shall be liable for such difference due, plus ten per cent interest during the time the rent remains unpaid and such total amount shall become a direct lien on the assets of the within GRANTEES.

(b) The anniversary and effective date of this Lease Contract and Agreement is as of Monday, January 1, 1973, and the initial term is for a period of twelve (12) years dating from January 1, 1973, under paragraph numbered 6 hereof the GRANTEES are granted an exclusive right and option of renewing this Lease Contract and Agreement for one or two additional ten (10 year periods to run consecutively upon the same terms and conditions as provided in said Lease Contract and Agreement. Now, if and when GRANTEES decide to abandon the premises and cancel this Lease Contract and Agreement at the end of the initial term of twelve (12) years, or at the end of the first ten (10) year extension period, or at the end of the second ten (10) year extension period, the said GRANTEES shall within sixty (60) days prior to the effective date of such abandonment, which could only be December 31, 1984, or December 31, 1994, or December 31, 2004, notify GRANTORS of their intent to abandon the premises and cancel this Lease Contract and Agreement, then within the sixty (60) days period as above specified, the GRANTORS are hereby given the exclusive right and option to purchase all buildings, and fixtures ~~machinery and equipment~~ that GRANTEES may have added to and put in operation on the premises hereby leased for and at GRANTEES' book value, that is, cost less depreciation taken in prior years up to date of purchase, which will be paid for in cash.

8. (c) Any and all payments to be made under this paragraph numbered 8 shall be paid in United States Dollars of the most recent issue and current at time of payment.

9. It is hereby stipulated and agreed that within sixty (60) days before the expiration of the first twelve (12) year period, and likewise within sixty (60) days before the expiration date of the first ten (10) year extension period, and also within sixty (60) days before the expiration date of the second ten (10) year extension period as provided in paragraph numbered six hereof, the within GRANTEES are hereby granted the exclusive right and option to purchase the premises hereby leased, to include all of the lands, together with all buildings, fixtures, machinery and equipment owned by the GRANTORS and situated and located on the above described lands for the lump sum price of ONE MILLION ($1,000,000.00), United States Dollars of the most recent issue current at the time of any and all payments, payable $200,000.00 as down payment upon consummation of the sale, the balance of $800,000.00 to be paid in four (4) successive, annual payments of $200,000.00 each, payable on the anniversary of the closing date with interest at the rate of six per cent (6%) per annum on unpaid balance until same has been fully paid. Payments of the balance of the purchase price shall be secured by a first Mortgage and security interest covering all of the above described land, together with all buildings, fixtures, machinery and equipments owned by either GRANTORS or GRANTEES, situated and located on the above described lands, such first Mortgage to contain the usual covenants against waste and standard acceleration clause.

Upon exercise of this option to purchase as outlined above, the sale shall be consummated within sixty (60) days from the delivery of notice of GRANTEE'S desire to purchase as provided in paragraph numbered nine, subject to the following stipulations:

(a) GRANTORS warrant that they are the absolute owners of the land properties aforesaid, free and unencumbered.

(b) GRANTORS agree to deliver to GRANTEES good and sufficient Warranty Deeds together with proper Bill of Sale conveying said property in fee simple to the said GRANTEES, or to its nominee, contemporaneously with delivery by the GRANTEES of the consideration as set out in paragraph numbered seven hereof.

(c) GRANTORS agree to furnish at their expense Abstract of Title covering the above described lands, certified to closing date, and to pay real estate and personal property taxes up to closing date, as well as provide, at their expense, the cost of documentary stamps.

(d) GRANTEES shall have the right to pay off the balance of said purchase price at any time, plus interest at the rate of six per cent (6%) per annum on such unpaid balance.

(e) Upon consummation of sale as herein provided, this Lease Contract and Agreement shall terminate simultaneously with the closing date of said purchase.

IN TESTIMONY WHEREOF, WITNESS the hands of the parties,

A C K N O W L E D G M E N T

STATE OF ARKANSAS)
)SS.
COUNTY OF BOONE)

On this 11th day of January, 1973, before me, a Notary Public, duly commissioned, qualified and acting within and for the said County and State, appeared in person T.W. Rogers, Jr. and Paul L. Rogers, being the Exc. Vice President and Secretary, respectively, of MASS MERCHANDISERS, INC., and who had been designated by said Corporation to execute the above and foregoing instrument, to me personally well known, who stated that they were the Exc. Vice President and Secretary of the said MASS MERCHANDISERS, INC., and were duly authorized in their respective capacities to execute the foregoing instrument for the consideration, uses and purposes therein mentioned and set forth.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal this 11th day of January, 1973.

NOTARY PUBLIC

My Commission Expires:

2/7-1974

A C K N O W L E D G E M E N T

STATE OF ARKANSAS)
) SS
COUNTY OF BOONE)

On this 11th day of January, 1973, before me, a Notary Public, duly commissioned, qualified and acting within and for the said County and State, appeared in person T. W. ROGERS, JR. and MARK STONE, being the President and Secretary respectively, of MOUNTAIN ENTERPRISES, INC. and who had been designated by said Corporation to execute the above and foregoing instrument, to me personally well known, who stated that they were the President and Secretary of the said MOUNTAIN ENTERPRISES, INC. and were duly authorized in their respective capacities to execute the foregoing instrument for the consideration, uses and purposes therein mentioned and set forth.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal this 11 day of January, 1973.

NOTARY PUBLIC

My Commission Expires:
2-7-1974

A C K N O W L E D G M E N T

STATE OF ARKANSAS)
)SS.
COUNTY OF BOONE)

BE IT REMEMBERED, That on this day came before me, the undersigned, a Notary Public, within and for the County aforesaid, duly commissioned and acting, HALLIE C. ORMOND and JEANNE M. ORMOND, Husband and Wife, to me well known as the grantors in the foregoing Deed, and stated that they had executed the same for the consideration and purposes therein mentioned and set forth. And on the same day also voluntarily appeared before me, the said JEANNE M. ORMOND, Wife of the said HALLIE C. ORMOND, to me well known and in the absence of her said husband, declared that she had, of her own free will, signed and sealed the relinquishment of Dower and Homestead in the foregoing Deed, for the considerations and purposes therein contained and set forth without compulsion or undue influence of her said husband.

Witness My Hand and Seal as such Notary Public, on this 11 day of January, 1973.

NOTARY PUBLIC

My Commission Expires:
7/7/74

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

ARKANSAS DEPARTMENT OF
POLLUTION CONTROL AND ECOLOGY PETITIONER

VS. CIVIL ACTION NO. E-86-293

HALLIE C. ORMOND,
ARKWOOD, INC., MOUNTAIN
ENTERPRISES, INC., C.C. GRISHAM,
MARY JO GRISHAM, and MASS
MERCHANDISERS, INC. RESPONDENTS

MOTION TO DISMISS

Comes now Arkwood, Inc., and for its Motion to Dismiss pursuant to Rule 12 (b) (6) of the Arkansas Rules of Civil Procedure states as follows:

1. The instant action was instituted by a Complaint in which Arkwood, Inc. was joined as a Respondent and in paragraph 5 of said Complaint it is stated:

> "Respondent, Arkwood, Inc., an Arkansas Corporation, incorporated in 1965 and dissolved in 1978, is a former operator of the wood treating plant at the "Arkwood site".

2. By Plaintiff's own allegation which this Respondent admits, the Respondent was dissolved on August 20, 1974 as shown by the Certificate of Dissolution, which is attached (marked Exhibit "A") and incorporated by reference herein.

There being no legal entity in existence known as Arkwood, Inc., there can be no relief granted to Plaintiff against such nonexistent entity.

WHEREFORE, Petitioner Complaint having failed to state a claim upon which relief can be granted, the Respondent, Arkwood, Inc. prays that the Complaint be dismissed with costs to the Petitioner and for any and all such further relief to which it may be entitled.

ARKWOOD, INC.

OCT 0 1 REC'D

By Its Attorneys:

ARNOLD, GROBMYER & HALEY
One Union National Plaza
P.O. Box 70
Little Rock, Arkansas 72203
(501) 376-1171

By: _____
Robert R. Ross

DOSHIER & BOWERS
P.O. Box 1797
Harrison, Arkansas 72601
(501) 741-6166

By: Bill F. Doshier
Bill F. Doshier

CERTIFICATE OF SERVICE

I, Robert R. Ross, do hereby certify that I have mailed a copy of the foregoing Motion to Dismiss to Phillip Deisch, P.O. Box 9538, Little Rock, Arkansas 72219 on this 22nd day of September, 1986.

_____
Robert R. Ross

CERTIFICATE OF DISSOLUTION

(i) The name of the Corporation to be dissolved is:

ARKWOOD, INC.

(ii) The names and respective addresses of the officers of said corporation are as follows:

C.C. GRISHAM, 1212 Berry Street, Harrison,Arkansas -PRESIDENT
C.R. BARKER, 1123 North Liberty, Harrison,Arkansas-Vice President
MARY JO GRISHAM,1212 Berry St., Harrison, Arkansas-Sec.-Treasurer
MARY STANLEY- Valley Inn, Harrison, Arkansas - Assistant Secretary

(iii) The names and respective addresses of the Board of Directors are as follows:

C.C.GRISHAM, 1212 Berry Street,Harrison,Arkansas
C.R. BARKER, 1123 North Liberty Street,Harrison, Arkansas
Mary Jo Grisham - 1212 Berry Street, Harrison, Arkansas

(iv) Attached hereto a copy of the shareholders resolution directing the dissolution.

(v) The number and classes of shares outstanding:

200 shares of Class A. Common Stock and 690 shares of Class B Common Stock.

(vi) The resolution of the shareholders for dissolution was approved unanimously.

IN WITNESS WHEREOF, WITNESS our hands as President and Secretary of the corporation on this 13 day of August,1974.

C C Grisham
PRESIDENT

ATTEST:
Mary Jo Grisham
SECRETARY

FILED
AUG 20 1974
KELLY BRYANT
SECRETARY OF STATE
By

EXHIBIT
A

A C K N O W L E D G M E N T

STATE OF ARKANSAS)
)SS
COUNTY OF BOONE)

On this 13 day of August, 1974, before me, a Notary Public, duly commissioned, qualified and acting within and for the said County and State, appeared in person C.C. GRISHAM and MARY JO GRISHAM, being the President and Secretary respectively, of ARKWOOD, INC. and who had been designated by said corporation to execute the above and foregoing instrument, to me personally well known, and who stated that they were the President and Secretary of the said ARKWOOD, INC. and were duly authorized in their respective capacities to execute the foregoing instrument for the considerations, uses and purposes therein mentioned and set forth.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal this 13 day of August, 1974.

Mary Stanley
NOTARY PUBLIC

My Commission Expires:
April 12, 1977

SHAREHOLDERS RESOLUTION

At a special meeting of the Shareholders of Arkwood, Inc. held in the corporate offices at Harrison, Arkansas, on August 13, 1974, with all outstanding shares being represented and voting, the following resolution was by proper motion proposed:

> RESOLVED, that the corporation be dissolved by the filing of proper documents with the office of the Secretary of State of Arkansas and that thereafter any and all corporate activities cease.

Upon second & call for vote, the aforesaid resolution was unanimously approved.

WITNESS My hand as Secretary this 13 day of August, 1974.

Mary Jo Grisham

MARY JO GRISHAM, Secretary

STATE OF ARKANSAS)
)SS
COUNTY OF BOONE)

VERIFICATION

Comes now, MARY JO GRISHAM, and on oath states that she is the Secretary of Arkwood, Inc. and that the foregoing constitutes a true and correct copy of the corporate resolution as same appears on the records of the corporation.

Mary Jo Grisham

MARY JO GRISHAM

SUBSCRIBED and Sworn to before me, a Notary Public, this 13 day of August, 1974.

Mary Stanley

NOTARY PUBLIC

My Commission Expires:

April 12, 1978

I hereby certify that this is a true and correct copy.

Elizabeth L. Cutcliffe,
State Records Manager
Arkansas History Commission

STATE OF ARKANSAS

DEPARTMENT OF STATE

KELLY BRYANT, SECRETARY OF STATE

To All to Whom These Presents Shall Come, Greeting
I, Kelly Bryant, Secretary of State of the State of Arkansas, do hereby certify that the following and hereto attached instrument of writing is a true and perfect copy of

CERTIFICATE OF DISSOLUTION

OF

ARKWOOD, INC.

Filed in this office:
August 20, 1974

In Testimony Whereof, I have hereunto set my hand and affixed my official Seal
Done at office in the City of Little Rock, this 20th *day of* August *19* 74

KELLY BRYANT
Secretary of State

By Helen Dook
Deputy

5M-11-73-3892-C.P.Co.

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

DEPARTMENT OF POLLUTION
CONTROL & ECOLOGY PETITIONER

v. Civil Action NO. E-86-293

HALLIE C. ORMOND, ARKWOOD, INC.,
MOUNTAIN ENTERPRISES, INC., C. C.
GRISHAM, MARY JO GRISHAM and MASS
MERCHANDISERS, INC. RESPONDENTS

BRIEF IN SUPPORT OF MOTION TO DISMISS

Comes now Respondent Arkwood, Inc. (hereinafter "Arkwood") and for its Brief in Support of its Motion to Dismiss pursuant to Rule 12(b)(6) of the Arkansas Rules of Civil Procedure affirmatively states that there being no legal entity in existence known as Arkwood, Inc., there can be no relief granted to the Petitioner against such non-existent entity.

Ark. Stat. Ann. §64-901 et seq. authorizes the dissolution of an Arkansas corporation. Ark. Stat. Ann. §64-902(b) provides that "upon the filing of said [dissolution] certificate with the Secretary of State the corporation is dissolved." Exhibit "A" of Respondent Arkwood's Motion to Dismiss affirms that Arkwood executed and filed its certificate of dissolution with the Secretary of State on August 20, 1974.

Ark. Stat. Ann. §64-904(a) provides:

> "a dissolved corporation...may continue to function for the sole purpose of winding up the affairs of the corporation in the same manner as if the dissolution had not taken place, and for this limited purpose the existence of the corporation as a legal entity shall be preserved indefinitely..." [Emphasis added]

According to the dictates of Ark. Stat. Ann. §64-904(a), after August 20, 1974, Arkwood existed for the sole purpose of winding up the affairs of the corporation.

In Larey v. Mountain Valley Spring Company, 245 Ark. 689, 434 S.W.2d 820 (1968) the Supreme Court of Arkansas upheld the limited purpose underlying the indefinite preservation of a dissolved corporation. In Larey, the Commissioner of Revenues levied an assessment against a dissolved corporation in which the corporation pursuant to its plan of liquidation, sold its

assets for more than their book value and did not report the profit as income but rather passed the taxable gain to the shareholders who received the proceeds of the sale under the plan of liquidation. The Commissioner urged that a dissolved corporation, in selling its assets for the purposes of liquidation, is not carrying on or doing business within the meaning of the income tax law and as such under Ark. Stat. Ann. §64-904 was not engaging in the sole purpose of winding up the affairs of the corporation. Interpreting §64-904, Justice George Rose Smith writing for the Court, stated:

> "It seems clear that the change in the general corporation law was not intended by the legislature to alter corporate income tax liability in the manner suggested by the Commissioner. ...In a note to the Section now cited the drafting committee explained that the prior provision limiting the effective life of the corporation to a period of three years after dissolution was being changed to avoid the difficulty that arose when the trustees of the dissolved company failed to get the title to real estate out of the corporation within three years. Note to Ark. Stat. Ann. §64-904. We are certain that the legislature did not intend by that trivial change, fully explained by the draftsmen, to bring about the far reaching tax consequences now urged by the appellant." [Emphasis added]

Petitioner recognizes by its own complaint that Arkwood was properly dissolved and yet attempts, with "far reaching" ramificiations, to wage claim against the dissolved corporation twelve years after dissolution. This attempt is manifestly contrary to the equitable doctrine of laches.

The doctrine of laches is based on a number of equitable principles, particularly on the assumption that the party to whom laches is imputed has knowledge of his alleged rights and an opportunity to assert them, that by reason of his delay the adverse party had good reason to believe those rights are worthless or have been abandoned, and that because of a change of condition or relations during this delay it would be unjust to the latter to permit him to assert them. Briarwood Apartments v. Lieblong, 12 Ark. App. 94, 671 S.W.2d 207 (1984). Upon the facts of the present suit, this doctrine is acutely applicable.

The only mechanism by which Petitioner can make claim against a dissolved corporation is provided by Ark. Stat. Ann. §64-904(V) which provides:

> "the dissolution of a corporation shall not effect any remedy available to or against such a corporation...for any right or claim existing or any liability incurred before such a dissolution except as provided by §64-905 or §64-906." [Emphasis added]

Petitioner ADPC&E had no right or claim existing before the dissolution of Arkwood, Inc. As such, the limited exception of allowing suit to be brought against a dissolved corporation, a non-existent entity, has not been met.

For the reasons stated, Respondent Arkwood prays the Motion to Dismiss be granted.

Respectfully submitted,

ARKWOOD, INC.

By its Attorneys:

ARNOLD, GROBMYER & HALEY, INC.
One Union National Plaza, 8th Floor
P.O. Box 70
Little Rock, AR 72203

By: Robert R. Ross
Robert R. Ross

DOSHIER & BOWERS
P.O. Box 1797
Harrison, AR 72601
(501) 741-6166

By: Bill Doshier
Bill F. Doshier

CERTIFICATE OF SERVICE

I, Robert R. Ross do hereby certify that on this date a true and correct copy of the foregoing pleading was placed in the United States mail, first-class postage attached to: Phillip Deisch, Esq., P.O. Box 9583, Little Rock, AR 72219.

Robert R. Ross
Robert R. Ross

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

DEPARTMENT OF POLLUTION
CONTROL & ECOLOGY PETITIONER

v. Civil Action NO. E-86-293

HALLIE C. ORMOND, ARKWOOD, INC.,
MOUNTAIN ENTERPRISES, INC., C. C.
GRISHAM, MARY JO GRISHAM and MASS
MERCHANDISERS, INC. RESPONDENTS

BRIEF IN SUPPORT OF MOTION TO DISMISS

Comes now Respondent Arkwood, Inc. (hereinafter "Arkwood") and for its Brief in Support of its Motion to Dismiss pursuant to Rule 12(b)(6) of the Arkansas Rules of Civil Procedure affirmatively states that there being no legal entity in existence known as Arkwood, Inc., there can be no relief granted to the Petitioner against such non-existent entity.

Ark. Stat. Ann. §64-901 et seq. authorizes the dissolution of an Arkansas corporation. Ark. Stat. Ann. §64-902(b) provides that "upon the filing of said [dissolution] certificate with the Secretary of State the corporation is dissolved." Exhibit "A" of Respondent Arkwood's Motion to Dismiss affirms that Arkwood executed and filed its certificate of dissolution with the Secretary of State on August 20, 1974.

Ark. Stat. Ann. §64-904(a) provides:

> "a dissolved corporation...may continue to function for the sole purpose of winding up the affairs of the corporation in the same manner as if the dissolution had not taken place, and for this limited purpose the existence of the corporation as a legal entity shall be preserved indefinitely..." [Emphasis added]

According to the dictates of Ark. Stat. Ann. §64-904(a), after August 20, 1974, Arkwood existed for the sole purpose of winding up the affairs of the corporation.

In Larey v. Mountain Valley Spring Company, 245 Ark. 689, 434 S.W.2d 820 (1968) the Supreme Court of Arkansas upheld the limited purpose underlying the indefinite preservation of a dissolved corporation. In Larey, the Commissioner of Revenues levied an assessment against a dissolved corporation in which the corporation pursuant to its plan of liquidation, sold its

corporation incorporated on June 16, 1965 was dissolved pursuant to statute, with all formalities having been met, on August 20, 1974. At the time of dissolution, the State of Arkansas and more particularly Petitioner PC&E had no claim against Respondent Arkwood, Inc. and the shareholders/distributees C. C. "Bud" Grisham and Mary Jo Grisham.

The doctrine of laches is based on a number of equitable principles, particularly on the assumption that the party to whom laches is imputed has knowledge of his alleged rights and an opportunity to assert them, that by reason of his delay the adverse party had good reason to believe those rights are worthless or have been abandoned, and that because of a change of condition or relations during this delay it would be unjust to the latter to permit him to assert them. Briarwood Apartments v. Lieblong, 12 Ark. App. 94, 671 S.W.2d 207 (1984). Upon the facts of the present, this doctrine is acutely applicable. Petitioner PC&E attempts to allege a claim against a dissolved corporation and its distributees, said claim accruing, if at all, over twelve years prior to initiation of proceedings. To allow such claim to proceed would be of the highest prejudice and contrary to any sense of equity.

For the reasons stated, Respondents C. C. Grisham and Mary Jo Grisham pray their motion to dismiss be granted.

Respectfully submitted,

C. C. GRISAM and MARY JO GRISHAM

By their attorneys,

ARNOLD, GROBMYER & HALEY, P.A.
8th Floor Union Nat'l Bank Bldg.
P.O. Box 70
Little Rock, AR 72203
(501) 376-1171

By: _____
Robert R. Ross

DOSHIER & BOWERS
P.O. Box 1797
Harrison, AR 72601

By: _____
Bill F. Doshier

CERTIFICATE OF SERVICE

I, Robert R. Ross, do hereby certify that on this 8th day of September, 1986, a true and correct copy of the foregoing pleading to: Mr. Phillip Deisch, P.O. Box 9583, Little Rock, AR 72219.

_____
Robert R. Ross

The only mechanism by which Petitioner can make claim against a dissolved corporation is provided by Ark. Stat. Ann. §64-904(V) which provides:

> "the dissolution of a corporation shall not effect any remedy available to or against such a corporation...for any right or claim existing or any liability incurred before such a dissolution except as provided by §64-905 or §64-906." [Emphasis added]

Petitioner ADPC&E had no right or claim existing before the dissolution of Arkwood, Inc. As such, the limited exception of allowing suit to be brought against a dissolved corporation, a non-existent entity, has not been met.

For the reasons stated, Respondent Arkwood prays the Motion to Dismiss be granted.

Respectfully submitted,

ARKWOOD, INC.

By its Attorneys:

ARNOLD, GROBMYER & HALEY, INC.
One Union National Plaza, 8th Floor
P.O. Box 70
Little Rock, AR 72203

By: _____
Robert R. Ross

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By: _____
Bill F. Doshier

CERTIFICATE OF SERVICE

I, Robert R. Ross do hereby certify that on this date a true and correct copy of the foregoing pleading was placed in the United States mail, first-class postage attached to: Phillip Deisch, Esq., P.O. Box 9583, Little Rock, AR 72219.

_____
Robert R. Ross

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

ARKANSAS DEPARTMENT OF
POLLUTION CONTROL AND ECOLOGY PETITIONER

v. CIVIL ACTION NO. E-86-293

HALLIE C. ORMOND,
ARKWOOD, INC., MOUNTAIN
ENTERPRISES, INC., C. C.
GRISHAM, MARY JO GRISHAM
and MASS MERCHANDISERS, INC. RESPONDENTS

BRIEF IN SUPPORT OF MOTION TO DISMISS

Comes now, C. C. Grisham and Mary Jo Grisham, Respondents herein, and for their Brief in Support of the Motion to Dismiss pursuant to Rule 12(b)(6) the Arkansas Rules of Civil Procedure affirmatively state that there is no basis to hold them personally liable for the alleged claims of the Arkansas Department of Pollution Control & Ecology (hereinafter "PC&E") as mere distributees of the proceeds of the dissolution of Arkwood, Inc.

Petitioner Arkansas Department of Pollution Control & Ecology (hereinafter "PC&E") relies on Ark. Stat. Ann. §64-905(c) dealing with notice to creditors during and after the dissolution of an Arkansas corporation to establish distributee personal liability. In its entirety, Ark. Stat. Ann. §64-905(c) states:

> "Notwithstanding this section and §88 (§64-906), tax claims and other claims of this state and of the United States shall not be required to be filed under those sections, and such claims shall not be barred because not so filed, and distribution of the assets of the corporation, or any part thereof, may be deferred until determination of any such claims."

Ark. Stat. Ann. §64-905(c) does not establish personal liability to distributees of proceeds of a liquidation. Petitioner can point to no statute or case authority establishing retroactive personal liability against a distributee when in fact upon dissolution the state had no lawful claim against the subsequently dissolved corporation.

Furthermore, such a claim is barred by the equitable doctrine of laches. Respondent Arkwood, Inc. an Arkansas

assets for more than their book value and did not report the profit as income but rather passed the taxable gain to the shareholders who received the proceeds of the sale under the plan of liquidation. The Commissioner urged that a dissolved corporation, in selling its assets for the purposes of liquidation, is not carrying on or doing business within the meaning of the income tax law and as such under Ark. Stat. Ann. §64-904 was not engaging in the sole purpose of winding up the affairs of the corporation. Interpreting §64-904, Justice George Rose Smith writing for the Court, stated:

> "It seems clear that the change in the general corporation law was not intended by the legislature to alter corporate income tax liability in the manner suggested by the Commissioner. ...In a note to the Section now cited the drafting committee explained that the prior provision limiting the effective life of the corporation to a period of three years after dissolution was being changed to avoid the difficulty that arose when the trustees of the dissolved company failed to get the title to real estate out of the corporation within three years. Note to Ark. Stat. Ann. §64-904. We are certain that the legislature did not intend by that trivial change, fully explained by the draftsmen, to bring about the far reaching tax consequences now urged by the appellant." [Emphasis added]

Petitioner recognizes by its own complaint that Arkwood was properly dissolved and yet attempts, with "far reaching" ramificiations, to wage claim against the dissolved corporation twelve years after dissolution. This attempt is manifestly contrary to the equitable doctrine of laches.

The doctrine of laches is based on a number of equitable principles, particularly on the assumption that the party to whom laches is imputed has knowledge of his alleged rights and an opportunity to assert them, that by reason of his delay the adverse party had good reason to believe those rights are worthless or have been abandoned, and that because of a change of condition or relations during this delay it would be unjust to the latter to permit him to assert them. Briarwood Apartments v. Lieblong, 12 Ark. App. 94, 671 S.W.2d 207 (1984). Upon the facts of the present suit, this doctrine is acutely applicable.

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY — PETITIONER

VS. — NO. E-86-293

HALLIE C. ORMOND, ARKWOOD, INC., MOUNTAIN ENTERPRISES, INC., C. C. GRISHAM, MARY JO GRISHAM and MASS MERCHANDISERS, INC. — RESPONDENTS

HALLIE C. ORMOND — THIRD-PARTY PLAINTIFF

VS.

McKESSON CORPORATION — THIRD-PARTY DEFENDANT

BRIEF

I. GLOSSARY

PETITIONER	=	Arkansas Department of Pollution Control and Ecology and Pollution Department
EPA	=	United States Government and Environmental Protection Agency
SITE	=	15 acres of land near Omaha, Arkansas, originally owned by Hallie C. Ormond, where the wood treatment plant was operated for 22 years, 1963-1985
MMI	=	Mass Merchandisers, Inc., and McKesson Corporation
ORMOND	=	Hallie C. Ormond, C. C. Grisham, Mary Jo Grisham, Arkwood, Inc., and Mary F. Burke

II. INTRODUCTION

The Arkwood site operated for 22 years as a wood treatment facility. Mass Merchandisers, Inc., (MMI) was in control of the operations on the site for the last 12 years. MMI's declared position is that MMI did not cause or contribute to any of the polluted condition at the site and that HALLIE ORMOND, C. C. GRISHAM and ARKWOOD, INC., are sole and primarily liable for all claims asserted by the State of Arkansas in this case. (See: Page 6 of Answer and Cross-Complaint, copy attached.) The pleadings in this case will reflect that ORMOND strongly denies the position taken by MMI and actually claim that MMI is by far the greater contributor of any pollution located on the site. Notwithstanding the legal position taken by MMI they now seek an

JUN 16 1984 RECD

order of this Court granting them access to and possession of the ORMOND property for the purpose of conducting an RI/FS study of the site pollution which is estimated to take approximately two years and cost approximately 1.5 million dollars. ORMOND resists the motions for the reasons set forth in the following paragraphs.

III. REASONS ORMOND OBJECTS TO THE MOTION FOR ACCESS AND MOTION FOR PRIOR NOTICE:

(A) Conflicting Cases: The plan that MMI seeks to implement once they secure access to the site is a Federal plan influenced and approved by the EPA. It is not a State plan geared to meet the problems covered by the Arkansas Statutes. There is currently pending in Case No. 87-3034 of the United States District Court, Harrison Division, a suit between the EPA and HALLIE ORMOND and C. C. GRISHAM covering the same issues involved herein. We believe that since it is a Federal plan that MMI seeks to implement that the issue should be considered in the Federal Court case and not in the State case.

(B) Temporary Relief Becomes Conclusive: The nature of this hearing is for temporary relief since the PETITIONER has not asked for a hearing on the merits. At the hearing on the merits the ORMOND interest will be asking the Court to approve their plan prepared by Dr. Cranmer and allow cleanup accordingly. If MMI is allowed at this time to have access to the site they will implement the Federal plan and thus preempt the Court considering the merits of the Cranmer plan. In essence the ruling at this time will negative any effect of the suit on the merits and in essence the issues in the case will be decided by the temporary orders.

(C) Danger of Exacerbating Conditions: The evidence in the case reflects that the plan promulgated by MMI has a serious potential of causing further environmental damage to the site and surrounding neighborhood. The evidence shows that the MMI plan provides for drilling various deep and shallow holes through the

strata with the possibility that any contamination could be allowed to escape to deeper aquafers and allow both horizontal and lateral escape of polluted liquids. We believe that the evidence at the trial of the case will prove that the plan is bad and carries the distinct risk of more damage to the environment than there already exists and that the plan should not be approved by this Court.

(D) Excessive Costs: The plan proposed by MMI will cost approximately 1.5 million dollars for the study alone without making any correction to any pollution problems found on the site. This expense is of great concern to the ORMOND interest because of the declared intent of MMI to collect and recover all of said cost from ORMOND. The testimony of Dr. Cranmer reveals that the plan promoted by MMI contains many extravagant and useless expenditures which are not tailored to the subject site. The testimony revealed that the plan was drawn from a computerized word processing standard format used in other EPA sites and incorporates testing and techniques not applicable to this site. MMI witnesses conceded that there was unreasonable expense involved and said expense was included because EPA demanded it.

(E) A Better Plan: The ORMOND interests have proposed a plan for the site which complies with the State law and incorporates corrective measures to be taken at the beginning of the study rather than two years afterwards. The ORMOND plan is much less expensive and will give relief for the more obvious contamination immediately and commence correction of the more serious problems now. The danger involved in this site is greatly over exaggerated by PETITIONER and EPA as evidenced by their willingness to approve a plan that does not attempt to correct any problem until two years after the study begins.

(F) Not Superfund Yet: The EPA and MMI are proceeding as if the site has been listed on the "Superfund" list already. The evidence reflected that the site has not been placed on this list at this time but has only been proposed for the list. The ORMOND interest are currently engaged in an effort to keep the site off

the list by means of insisting on an accurate calculation by EPA rather than an exaggerated calculation previously utilized by EPA. The issue of implementation of the EPA plan at this time is premature, if the site is not listed on the superfund the action specified in the MMI plan would not be required. The State Statutes would then be controlling and this Court could go forward with this case to an orderly solution on a local level. Both experts testifying at the hearing agreed that the condition of this site did not warrant the superfund listing and the forthcoming superfund treatment.

(G) Slanting: ORMOND believes that it is unfair for MMI to have access to the ORMOND property to implement a plan produced by MMI the results of which will be used against ORMOND in the ultimate suit by MMI to recover the total expenditures. ORMOND believes that MMI would be in a position to control the direction of the investigation and eschew the results of the tests. The plan itself is evidence that the slanting has already begun. The plan contains erroneous statements going to the liability of the parties. Dr. Cranmer testified that such statements have no place in a neutral study plan. Since MMI has declared its intention of collecting all expenditures back from ORMOND it seems to us to be unfair to permit MMI to control the testing and the expenditures. It is already obvious that the plan adopted by MMI is excessively expensive and can only be justified by the fact that MMI does not plan to pay said costs in the end.

IV. AUTHORITY TO GRANT MOTIONS

MMI cites Rule 34 as giving authority to the Court to grant site access, admitting that the scope and duration of the discovery under Rule 34 exceed the normal intention of said discovery practice. But MMI's argument on this point overlooks the real issues objectionable to ORMOND as set forth in the reasons mentioned above. ORMOND has no objection to MMI going on to the site to do normal discovery procedures at their on expense, and at its own risk of causing further danger to the

environment. Clearly the implementation of the RI/FS work plan promoted by MMI goes far beyond discovery procedures and cannot be justified under our discovery law for the reasons set forth in Paragraph III above.

Second, MMI proposes that the Court has inherent power to grant the preliminary injunctive relief requested pending trial on the merits. MMI then argues that preliminary injunctive relief is typically considered when the following four factors are present: (1) likelihood of success on the merits; (2) the presence or absence of an adequate remedy at law; (3) extent of any injury of the party being enjoined; and (4) the interest of the public. We submit that the facts of this case fail to meet any one of the four tests, to-wit:

(1) LIKELIHOOD OF SUCCESS ON THE MERITS: We do not believe that when the case is heard on the merits that the Court will adopt the MMI plan because of its excessiveness in cost and scope and the inherent danger of further environmental damage in the plan plus the other reasons set forth in Paragraph III, above. We believe that the plan submitted by ORMOND on the trial of the merits will be found by the Court to be adequate and reasonable for the severity and amount of pollution involved in this site.

(2) THE PRESENCE OR ABSENCE OF AN ADEQUATE REMEDY AT LAW: MMI has not shown that there is any immediate or substantial danger to any person or property at this time because of this site. The same type of action is pending in Federal Court which can be pursued if MMI desires a solution before the hearing on the merits of this case. In fact, the plan presented by MMI is on its face selfdefeating because it does not attempt any remedy within the next two years but only a study of the site itself.

(3) THE EXTENT OF ANY INJURY OF THE PARTY BEING ENJOINED: The ORMOND interest believe that they will be

injured if the temporary injunction is granted because it in essence preempts and destroys the ORMOND right to have their plan or solution considered on the trial on the merits. If the MMI plan is already underway the argument in favor of the ORMOND plan will be undercut because the site will be altered by the drilling of numerous wells and test holes complicating the ORMOND plan. Also, the ORMOND interest will be damaged severely in the event that the MMI plan does further environmental damage to the site because of the hole drilling permitting the escape of pollutants to other strata. Obviously, ORMOND will be damaged when the division of liability is divided into the excessive costs of the plan, not to mention the loss of use of the land during the study and cleanup periods under the MMI plan.

(4) THE INTEREST OF THE PUBLIC: The facts are that there has not been even one personal injury sustained by the workmen on the site or the public surrounding the site during the last 22 years and that there is nothing endangering the public at this time, with the exception of someone who might drink tons of the polluted spring water. However, the MMI plan insures that the spring will not be corrected for at least two years, whereas, the ORMOND plan provides for immediate cleanup of the spring water.

(5) There is an additional burden that MMI must meet before this Court may grant the preliminary injunction relief requested in the motions. As stated in Paccar Financial Corp. vs. Hummell, Ark. App. 606 SW2d 384;

> "When a hearing is held on the question of whether a preliminary injunction should issue, the party requesting the injunction must have made allegations of irreparable harm which stand unrebutted by the defendant, or must show that absent the injunction he or she will suffer irreparable harm, otherwise no injunction may issue."

MMI did not allege irreparable harm in its motion and

Arkwood site was the normal operation of the wood treating facility.

26. MMI's operation of the treating plant at the Arkwood site did not cause or contribute to any of the conditions complained of by Petitioner. Therefore, to the extent that Petitioner's complaint may state a valid claim, MMI is entitled to judgment over against Ormond, C. C. Grisham, and Arkwood, Inc. for an portion of such liability that might otherwise be apportioned to MMI.

COUNT THREE
CONTRIBUTION

27. If and to the extent Petitioner's complaint may state a valid claim against MMI, the liability in question would arise partly or entirely out of the conduct of Ormond, C. C. Grisham, and Arkwood, Inc. as the landowner, designer, and original operator of the treating plant at the Arkwood site.

28. As owner, designer, and original operator of the treating plant at the Arkwood site, Ormond, C. C. Grisham, and Arkwood, Inc., are solely or primarily liable for all claims asserted against MMI by Petitioner.

29. To the extent that any judgment or liability may be awarded against MMI, under Petitioner's complaint, MMI is entitled to a judgment over against Ormond, C. C. Grisham, and Arkwood, Inc. in contribution.

30. To the extent that Arkwood, Inc. is liable to MMI, MMI is also entitled to judgment against Mary Jo Grisham in her capacity as distributee of the assets of Arkwood, Inc. and successor to Arkwood's liability.

WHEREFORE, MMI prays that (i) Petitioner's Complaint be dismissed and held for naught insofar as it seeks relief against MMI; (ii) that any judgment entered in favor of Petitioner be entered solely against respondents other than MMI; (iii) that MMI be granted a judgment over against

the evidence did not show that any would occur.

MMI thirdly alleges that the environmental statutes covering this action authorize the relief requested. MMI attempts in this brief to argue that MMI is an agent, employee, or representative of the State under Arkansas Statute 82-4705(c) and Arkansas Statute 82-4717(b). However, at the hearing the evidence on this point was noticeably absent. If the State has made MMI its agent, employee, or representative it was not presented at the hearing. Ordinarily, the purpose of a hearing is to allow the parties to express the legal grounds for their position and this evidence was not forth coming. At the taking of the deposition of the representative of MMI, BOB BARKER, and the representative of the State of Arkansas, DOICE HUGHES, both witnesses stated that MMI was not an agent, employee, or representative of the State. We relied on that testimony and did not present negative testimony on this point at the hearing. Negative evidence should not be necessary because MMI did not meet its burden of proof of establishing this point at the hearing. To argue the point in the brief is an attempt to bootstrap a position without supporting the position with evidence or even prima facie evidence.

V. RESPONSE TO PETITIONER'S BRIEF

The PETITIONER makes the point that all Respondents who have contributed the hazardous waste on the site have waived their rights to contest the obligations placed upon them by the legislative acts. From that premise the PETITIONER argues that the landowner must permit another responsible party to proceed with its plan regardless of the reasonableness and cost or subsequent danger. While this argument might have its place at the hearing on the merits it has no merit in the preliminary hearing stage because there are two plans being offered for the Court's consideration.

And again, if MMI were proposing to make its study at its own expense and not plan or attempt to recoup the cost from ORMOND then the right of access would have less consequences.

If the plan had no potential to cause more damage to the environment the consequences would be fewer still. However, that is not the case with the MMI plan and such relief at this stage in the case is premature and prejudicial to the rights of ORMOND.

The PETITIONER apparently is also attempting to envoke the statute permitting an employee, agent or representative of the State to enter upon property for discovery purposes. Again at the hearings the State did not indicate that MMI was such agent or representative and at this point there has been no evidence indicating that MMI has in fact been authorized by the PETITIONER or the State of Arkansas to act as its agent.

It should be remembered that the State of Arkansas started demanding that MMI take care of the pollution problem as early as 1981, and entered into agreements with MMI that would have abated the problem at this site during the time that MMI had a leasehold interest in said property. The State allowed MMI to "drag its feet" and avoid the cleanup of the site for at least four years. In light of the procrastination of the State for four years the request for immediate temporary relief is unwarranted.

VI. SUMMARY

MMI and the PETITIONER are asking the Court to grant temporary injunctive relief, before the trial of the case in chief, to enable MMI to commence a two year, 1.5 million dollar study of the site over the objections of the past and present landowner. MMI claims that it is important to start the study at this time, but in reality has not shown any real reason for doing so, particularly since the plan itself does not provide for any correction of the problems until some time after the study is completed, at least two years hence. On the other hand, ORMOND says that the plan is really not geared to this site but is mainly couched to permit MMI to secure a superior position in the ultimate liabilities stage of the matter and make it impossible for the ORMOND plan to be considered.

To sustain its position MMI has provided little evidence and proof that its plan, even if ultimately determined to be correct

for the site, needs to be started at this stage in the litigation prior to the full development of the other issues in the case. MMI attempts to create a false urgency that the study go forward now even though there is no corrective measures planned for more than two years. On the other hand, ORMOND has presented evidence that corrective measures could be made now and the entire site cleaned up at less than the cost proposed by MMI for the study alone.

MMI has announced that its purpose is to collect all of the costs and expenses back from ORMOND and have revealed their intentions to compile records and facts to achieve that end. Their proposal for access and possession of the ORMOND property appears to be most important for that purpose.

VII. CONCLUSION

The granting of temporary injunctive relief as requested subjects ORMOND to excessive costs, danger to the property and others, and prejudices the right to litigate on the merits. The rights of past and present landowners should not be so casually destroyed.

The petition should be denied and this Court defer to the Federal jurisdiction or set the matter for trial on the merits.

Respectfully submitted,

BILL DOSHIER and DON ADAMS
FOR THE ORMOND INTERESTS

By: Bill Doshier

DOSHIER and BOWERS
ATTORNEYS AT LAW
P. O. BOX 1797
HARRISON, AR 72602-1797
(501) 741-6166

DRAFT COPY

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY, Petitioner,	)	Civil Action No.
v.	)	
HALLIE C. ORMOND, ARKWOOD, INC., C. C. GRISHAM, MARY JO GRISHAM, and MASS MERCHANDISERS, INC., Respondents.	)	

Submitted by Mass Merchandisers

Bob comment ASAP Phil 11-14

INTERIM CONSENT DECREE

WHEREAS,

1. From 1961 until 1984 a wood treating plant was operated in Omaha, Arkansas (the "Arkwood site"); and

2. Investigations of environmental conditions in and around the Arkwood site have led to the filing of this action by the Arkansas Department of Pollution Control and Ecology ("ADPC&E") against Hallie C. Ormond ("Ormond"), the owner of the Arkwood site and a former operator of the wood treating plant; Arkwood, Inc., an Arkansas corporation, now dissolved, and a former operator of the wood treating plant at the Arkwood site; C. C. Grisham, a distributee of the proceeds of the liquidation of Arkwood, Inc.; Mary Jo

Grisham, also a distributee of the proceeds of the liquidation of Arkwood, Inc.; and Mass Merchandisers, Inc. ("MMI"), an Indiana corporation and a former operator of the wood treating plant at the Arkwood site; and

3. Mass Merchandisers, Inc. is willing to undertake a hydrogeological investigation and certain remedial actions with respect to the Arkwood site, provided that it does so pursuant to this court's order that it does so with (i) a complete reservation of all rights it may have against other persons, including other parties to this action, for indemnification, contribution and reimbursement of the costs it incurs and other relief; and (ii) a complete reservation of all defenses it may have against any claims by ADPC&E or any other person or entity; and

ADPC&E [illegible] ?

4. ADPC&E and the Respondents agree that the investigation and remedial actions to be undertaken by MMI pursuant to this Decree are necessary and appropriate to undertake; and

5. Ormond is willing to allow a contractor selected by MMI and representatives of MMI and ADPC&E access to the Arkwood site and permission to undertake such hydrogeological investigation and the remedial activities; and

6. All of the parties agree to the aforementioned reservation of rights requested by MMI as a pre-condition to

undertaking the hydrogeological investigation and remedial activities; and

7. This interim order is appropriate and in the public interest.

NOW THEREFORE, in light of the foregoing, but without this Decree constituting any evidence, or waiver or admission by any party, with respect to any issue of fact or law, except with respect to the necessity and appropriateness of the remedial actions proposed to be undertaken by MMI, and with the consent of the parties, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

I.

JURISDICTION

This Court has jurisdiction over the parties and jurisdiction over the subject matter in this civil action pursuant to the Arkansas Water and Air Pollution Control Act, Ark. Stat. Ann. § 82-1901, et seq. and the Arkansas Remedial Action Trust Fund Act, Ark. Stat. Ann. § 82-4712, et seq. for the purpose of entering this Decree.

II.

APPLICABILITY

The provisions of this Decree shall apply to, be binding upon and inure to the benefit of the parties to this

civil action, their agents, heirs, successors and assigns, and all other persons with actual notice who are in active concert or participation with such parties.

III.

ENTRY ONTO AND ACTIVITIES UPON THE SITE

Ormond shall allow the contractors selected pursuant to this Decree and authorized representatives of MMI and ADPC&E access to the Arkwood site and shall permit them to undertake all actions contemplated by this Decree, including, but not limited to, inspections, gathering of soil and water samples, placement of soil borings and monitoring wells, and removal, treatment or isolation of soils and other materials, and shall sign all manifests and documents of origin necessary for the removal and transportation of soils and materials from the site.

IV.

SURFACE SOIL REMOVAL

Immediately upon execution and entry of this decree, MMI shall commence the actions set forth in this Section IV and, insofar as practicable, shall complete the actions within 90 days of the date of entry of this decree:

Add with expressed written consent of ADPC&E and same method of approval

A. Cause the removal, isolation or treatment of all visibly discolored surface soils on the Arkwood site, including the sawdust pile, the trolley area east of the treating cylinder, and the treated wood storage area; and

B. Subject to the permission of the landowner or any necessary order of this court, cause the removal, isolation, or treatment of all visibly discolored surface soils, sludges, and surface debris in the so-called "railroad ditch" north of the Arkwood site adjacent to the Missouri-Pacific right-of-way.

V.

HYDROGEOLOGICAL INVESTIGATION

A. Within sixty days after the date of entry of this Decree, MMI shall submit to ADPC&E a written proposal by qualified professionals in hydrogeology for a hydrogeological assessment to investigate and determine the horizontal and vertical extent of contaminant migration, if any, emanating from the Arkwood site. This proposal shall contain a schedule of implementation which is not to exceed one year.

B. Copies of the proposed hydrogeological assessment shall be simultaneously delivered to Ormond and the Grishams. Each of these Respondents shall submit in writing any comments and state any objections he or she may have concerning the proposal to ADPC&E, with a copy to MMI,

within 15 calendar days of his or her receipt of the proposal.

C. Within ~~15~~ 45 calendar days after receiving the proposed hydrogeological assessment, and after consideration of all comments and objections of Ormond and the Grishams, ADPC&E shall approve in writing the proposal or state why the proposal is unacceptable and what specific changes ADPC&E deems necessary in order for the proposal to meet the specifications in Paragraph V(A). Copies of this written ADPC&E response shall be provided to MMI, Ormond and the Grishams.

D. Within 15 calendar days after receiving ADPC&E's written response pursuant to Paragraph V(C), MMI, Ormond and the Grishams will consult with ADPC&E in an effort to resolve any differences among or between them.

E. Any hydrogeological assessment proposal agreed upon by all of the parties will be submitted to the Court by them by stipulation. Such proposal, including the agreed upon schedule of implementation, will become an enforceable addendum to this Decree upon entry by the Court.

F. If the parties fail to reach an agreement concerning the assessment proposal within 15 days after MMI, Ormond and the Grishams have received ADPC&E's written submission pursuant to Paragraph V(C), or within any further

additional period of time agreed to among all of the parties, they shall jointly seek resolution of this issue by the Court.

G. MMI will cause the completion of the assessment ordered pursuant to Paragraph V(E) or V(F) and submit a final written report containing the results of the assessment to ADPC&E, Ormond and the Grishams, in accordance with the schedule for implementation contained in the assessment proposal, subject to any reasonable delays caused by unforeseen events.

VI.

DISCLAIMER OF LIABILITY

AND RESERVATION OF RIGHTS

A. This Consent Decree and actions taken pursuant to it shall never for any purpose be considered an admission of liability or responsibility concerning the Arkwood site or any of the claims referred to in this action, and no past or present wrongdoing on the part of any of the parties shall be implied for purposes of this or any other action or claim.

B. Any remedial action or investigation or other action undertaken pursuant to this Decree shall be with a complete reservation of rights by MMI to seek indemnification, contribution, reimbursement or other relief from any

other person or entity, including the other parties to this action, and a complete reservation of all defenses against ADPC&E or any other person or entity.

VII.

DELAY

NO END DATE! OR NO REVIEW for cause

A. If any circumstance arises or any event occurs which may cause a delay in the achievement by any party of one or more requirements of this Decree, that party shall notify this Court and each other party, in writing, as soon as reasonably possible after the party concludes that delay will result. The notice shall describe the anticipated length of the delay, the cause of the delay and the measures taken or to be taken to minimize the delay.

B. The parties may by unanimous agreement extend any of the deadlines specified in this Decree. Notice of such extension by agreement shall be filed with the Court. This Court may for cause shown extend any deadline specified by this Decree upon motion by one or more of the parties.

VIII.

SUBMISSION OF INFORMATION

A. All reports or other communications required to be given in writing under this Decree shall be addressed as follows:

1. If to ADPC&E,

Phillip S. Deisch
Chief Counsel
Arkansas Department of Pollution
Control & Ecology
8001 National Drive
Little Rock, Arkansas 72209

2. If to MMI,

Bob Barker
Mass Merchandisers, Inc.
P. O. Box 790
Harrison, Arkansas 72601

Copy to,

Allan Gates
Mitchell, Williams, Selig,
Jackson & Tucker
1000 Savers Federal Building
Little Rock, Arkansas 72201

3. If to Ormond,

William Doshier
Doshier and Bowers
P. O. Box 1797
Harrison, AR 72601

4. If to the Grishams,

_____
_____
_____

5. If to Arkwood, Inc.,

_____
_____
_____

or to such other person or at such other place as any of the parties, as to itself, notifies all of the other parties in writing.

B. All such reports and communications shall be effective when deposited in the mails addressed as set forth in Paragraph VIII(A).

IX.

AUTHORITY

The parties to this Decree represent to this Court that their respective undersigned counsel and other signatories have full authority to approve the provisions of this Decree, to execute this Decree and to legally bind the parties to this Decree.

X.

SEVERABILITY

In the event that one or more provisions of this Decree are declared invalid and unenforceable by a court of competent jurisdiction, the remaining provisions of this Decree shall remain valid and enforceable.

ORDERED _____ day of _____, 1985.

_____

WE HEREBY CONSENT to the entry of this Decree.

FOR THE ARKANSAS DEPARTMENT
OF POLLUTION CONTROL AND ECOLOGY

Date:_____

_____
[Name
Title
Address]

FOR MASS MERCHANDISERS, INC.

Date:_____

_____
[Name
Title
Address]

FOR HALLIE C. ORMOND

Date:_____

_____
[Name
Title
Address]

FOR C. C. GRISHAM

Date:_____

_____
[Name
Title
Address]

FOR MARY JO GRISHAM

Date:_____

_____
[Name
Title
Address]

FOR ARKWOOD, INC.

Date:_____

_____
[Name
Title
Address]

IN THE CHANCERY COURT OF BOONE COUNTY, ARKANSAS

ARKANSAS DEPARTMENT OF
POLLUTION CONTROL AND
ECOLOGY PETITIONER

V. CIVIL ACTION NO. _____

HALLIE C. ORMOND,
ARKWOOD, INC., MOUNTAIN
ENTERPRISES, INC., C. C.
GRISHAM, MARY JO GRISHAM,
and MASS MERCHANDISERS, INC. RESPONDENTS

COMPLAINT IN EQUITY

Comes Petitioner, Arkansas Department of Pollution Control and Ecology, and by its attorney, Phillip Deisch, for its Complaint states as follows:

1. Petitioner is an agency of the State of Arkansas charged with the administration and enforcement of the Arkansas Water and Air Pollution Control Act (Act 472 of 1949, as amended; Ark. Stat. Ann. § 82-1901 et seq.) and the Remedial Action Trust Fund Act (Act 479 of 1985; Ark. Stat. Ann. § 82-4712 et seq.).

2. Respondent, Hallie C. Ormond (hereinafter "Ormond") owns real property and fixtures located in Section 27, Township 21 North, Range 21 West in Boone County, Arkansas (hereinafter the "Arkwood site").

3. A wood treating plant has been operated at the Arkwood site, beginning at a time unknown to Petitioner but believed to have begun in 1961 and operations continued through 1984.

4. Respondents, Ormond and C. C. Grisham, are former operators of the wood treating plant at the Arkwood site.

5. Respondent, Arkwood, Inc., an Arkansas corporation, incorporated in 1965 and dissolved in 1978, is a former operator of the wood treating plant at the Arkwood site.

6. In 1973, Respondent, Ormond leased the Arkwood site for a period of twelve years to Respondent, Mountain Enterprises, Inc., an Arkansas corporation and wholly owned subsidiary of Respondent, Mass Merchandisers, Inc., an Indiana corporation, authorized to do business in Arkansas. Respondent, Mountain Enterprises, Inc., dissolved in 1978. Respondents, Mountain Enterprises, Inc. and Mass Merchandisers, Inc., are former operators of the wood treating plant at the Arkwood site.

7. Respondents, Hallie C. Ormond, C. C. Grisham, and Mary Jo Grisham, are distributees of the proceeds of the liquidation of Arkwood, Inc. The Respondent distributors are personally liable for claims of this State against Arkwood, Inc. pursuant to Ark. Stat. Ann. § 64-905(c).

8. During the operation of the wood treating plant at the Arkwood site by Respondents, Hallie C. Ormond, C. C. Grisham, Arkwood, Inc., Mountain Enterprises, Inc., and Mass Merchandisers, Inc., creosote and pentachlorophenol were used to treat wood products. In the course of operations of the wood treating plant, waste products, including pentachlorophenol and pentachlorophenol contaminated wastes, were handled and stored in an unprotected manner, whereby wastes were spilled or spread on surface soils or stored in open pits; and were disposed of by surface dumping or dumping into crevices on the property or otherwise applying it to the land surface.

9. The wastes referred to in paragraph 8 include wastes which are defined as hazardous substances under Ark. Stat. Ann. § 82-4714(h).

10. By the actions described in paragraph 8, the Arkwood site is a hazardous substance site as defined by Ark. Stat. Ann. § 82-4714(1).

11. The actions of the Respondents described in paragraph 8 have caused and are causing pollution of the waters of the State, both surface and groundwater, by allowing wastes, including hazardous substances such as pentachlorophenol and pentachlorophenol contaminated wastes, to enter the waters of the State in violation of Ark. Stat. Ann. § 82-1908, Subdivision 1.

12. The actions of Respondents described in paragraph 8 constitute the placing of wastes in a location where it is likely to cause pollution of waters of the State in violation of Ark. Stat. Ann. § 82-1908, Subdivision 1.

13. Respondents, Hallie C. Ormond, Arkwood, Inc., Mountain Enterprises, Inc., C. C. Grisham, and Mass Merchandisers, Inc., are liable for the actions described herein under the provisions of Ark. Stat. Ann. § 82-4719(a) and for the unlawful activity described in paragraphs hereinabove pursuant to the provisions of Ark. Stat. Ann. § 82-1908.

WHEREFORE, Petitioner prays for the issuance of a permanent injunction against the Respondents, jointly and severally, whereby they are ordered, upon pain of contempt, to: 1) cease and abate pollution of waters of the State and to remove or contain wastes which have been placed in a location likely to cause pollution of waters of the State; 2) undertake remedial actions as necessary to investigate, control, prevent, abate or contain any releases or threatened releases of hazardous substances from the Arkwood site; 3) to pay Petitioner's costs in this action; and 4) to provide all further relief as ordered by this Court that it may deem appropriate.

ARKANSAS DEPARTMENT OF
POLLUTION CONTROL AND ECOLOGY

BY: Phillip Deisch
PHILLIP DEISCH
P.O. BOX 9583
LITTLE ROCK, AR 72219
TEL: (501) 562-7444

CERTIFICATION OF EXEMPTION

_____, the undersigned, do hereby certify that
I, we
_____ is not engaged in a regulated activity
company name
according to the rules and regulations promulgated pursuant to the Resource Conservation and Recovery Act of 1976 as amended, the Arkansas Resource Reclamation Act of 1979, or the Arkansas Hazardous Waste Management Act (Act 406) of 1979.

(check if applicable) We do further certify that ArKwood
I, we company name
is a small quantity generator and is complying with the special requirements as stated in 40 CFR 261.5.

"I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment."

C.R. Barker
Authorized Facility Representative

Mary Starley 4-29-85
Notary Public Expiration of Term

RECD JAN 1983

JAN 1983
RECEIVED
Ark. Dept. of
Pollution Control
& Ecology

McCLELLAND CONSULTING ENGINEERS INC.

Environmental and Materials Testing
Civil, Environmental and Chemical Engineering Consulting

LITTLE ROCK
JAMES E. McCLELLAND, P.E.
FRED NIELSEN, R.L.S.

FAYETTEVILLE
J.E. McCLELLAND, P.E.
VERNON D. ROWE, P.E.

November 19, 1984 81-161

Mr. Doice Hughes
Arkansas Department of Pollution
Control and Ecology
8001 National Drive
Little Rock, Arkansas 72209

NOV 1984
RECEIVED
Ark. Dept. of
Pollution Control
& Ecology

Re: Arkwood
Omaha, Arkansas

Dear Mr. Hughes:

Two water samples were collected near the Arkwood plant on October 7, 1984. The results of pentachlorophenol analyses on these samples follow:

Sample Description	PCP, mg/l
Railroad tunnel spring, south side near east end	0.0039
Spring west of plant, south of country road	9.2

Please advise if there are any questions at this time.

Sincerely,

Charles McLaughlin, P.E.

CMcL/paa

cc: Mr. Bob Barker
Mr. Devoe Gregory

McCLELLAND CONSULTING ENGINEERS INC.

Environmental and Materials Testing
Civil, Environmental and Chemical Engineering Consulting

LITTLE ROCK
JAMES E. McCLELLAND, P.E.
FRED NIELSEN, R.L.S.

FAYETTEVILLE
J.E. McCLELLAND, P.E.
VERNON D. ROWE, P.E.

November 8, 1984

81-161

NOV 1984
RECEIVED
Ark. Dept. of
Pollution Control
& Ecology

Mr. Doice Hughes
Arkansas Department of Pollution
Control and Ecology
8001 National Drive
Little Rock, Arkansas 72209

Re: Arkwood
Omaha, Arkansas

Dear Mr. Hughes:

As you requested this morning, I am sending you additional copies of Arkwood analytical results dated as follows:

March 8, 1984
June 18, 1984
October 5, 1984

Please call if you need anything else.

Sincerely,

Charles McLaughlin, P.E.

CMcL/paa

cc: Bob Barker
Devoe Gregory

1810 N. COLLEGE AVE. P.O. BOX 1229 FAYETTEVILLE, ARKANSAS 72702-1229 TELEPHONES (501) 443-4271/443-2377

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J.E. McCLELLAND, P.E.
VERNON D. ROWE, P.E.

October 5, 1984

81-161

Mr. Doice Hughes
Arkansas Department of Pollution
Control and Ecology
8001 National Drive
Little Rock, Arkansas 72209

Re: Arkwood
Omaha, Arkansas

Dear Mr. Hughes:

One water sample was collected near the Arkwood plant on August 24, 1984. The result of a pentachlorophenol analysis on the sample follows:

Sample Description	PCP, mg/l
Spring west of plant, south of county road	54.0

There was no noticeable flow from the spring at the time of sampling, so the sample was collected from a still pool immediately below the spring. Other points previously sampled were inaccessable during this sampling trip.

As you are aware, Arkwood discontinued treating operations on June 1, 1984. However, we plan to continue regular sampling of the above spring and the spring in the railroad tunnel.

Please advise if there are any questions at this time.

Sincerely,

Charles McLaughlin, P.E.

CMcL/mlt

cc: Mr. Bob Barker
Mr. Devoe Gregory

1810 N. COLLEGE AVE. P.O. BOX 1229 FAYETTEVILLE, ARKANSAS 72702-1229 TELEPHONES (501) 443-4271/443-2377

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June 18, 1984 81-161

Mr. Doice Hughes
Arkansas Department of Pollution
Control and Ecology
8001 National Drive
Little Rock, Arkansas 72209

Re: Arkwood
Omaha, Arkansas

Dear Mr. Hughes:

Five water samples were collected near the Arkwood plant on June 1, 1984. The results of pentachlorophenol analyses on these samples are as follows:

Sample Description	PCP, mg/l
Railroad tunnel spring, south side, near east end	0.051
Spring west of plant, south of county road	5.7
Behren Well No. 2	0.00027
Behren Well No. 3	0.00050
Binam	0.0081

Continued -

Lt to DH/ADPC&E

1810 N. COLLEGE AVE. P.O. BOX 1229 FAYETTEVILLE, ARKANSAS 72702-1229 TELEPHONES (501) 443-4271/443-2377

Please advise if there are any questions at this time.

Sincerely,

Charles McLaughlin, P.E.

CMcL/paa

cc: Mr. Bob Barker
Mr. Devoe Gregory

Lt to DH/ADPC&E

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VERNON D. ROWE, P.E.

May 22, 1984 81-161

Mr. Doice Hughes
Arkansas Department of Pollution
Control and Ecology
8001 National Drive
Little Rock, Arkansas 72209

Re: Arkwood
Omaha, Arkansas

Dear Mr. Hughes:

Six water samples were collected near the Arkwood plant on May 11, 1984. The results of pentachlorophenol analyses on these samples are as follows:

Sample Description	PCP, mg/l
Railroad tunnel spring, south side, near east end	0.057
Spring west of plant, south of county road	4.6
Behren Well No. 2	0.00021
Behren Well No. 3	0.00024
Runoff No. 1	4.2
Runoff No. 2	0.85

Lt to DH/ADPC&E

1810 N. COLLEGE AVE. P.O. BOX 1229 FAYETTEVILLE, ARKANSAS 72702-1229 TELEPHONES (501) 443-4271/443-2377

Please advise if there are any questions at this time.

Sincerely,

Charles McLaughlin, P.E.

CMcL/paa

cc: Mr. Bob Barker
Mr. Devoe Gregory

Lt to DH/ADPC&E

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April 10, 1984 81-161

Mr. Doice Hughes
Arkansas Department of Pollution
Control and Ecology
8001 National Drive
Little Rock, Arkansas 72209

Re: Arkwood
Omaha, Arkansas

Dear Mr. Hughes:

Five water samples were collected near the Arkwood Plant on March 23, 1984. The results of pentachlorophenol analyses on these samples are as follows:

Sample Description	PCP, mg/l
Railroad tunnel spring, south side, near east end	0.1
Spring west of plant, south of county road	5.6
Behren Well No. 2	< 0.0001
Behren Well No. 3	< 0.0001
Binan Well	<0.0001

Continued -

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Please advise if there are questions at this time.

Sincerely,

Charles McLaughlin, P.E.

CMcL/paa

cc: Mr. Bob Barker
Mr. Devoe Gregory

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March 8, 1984 81-161

Mr. Doice Hughes
Arkansas Department of Pollution
Control and Ecology
8001 National Drive
Little Rock, Arkansas 72209

Re: Arkwood
Omaha, Arkansas

Dear Mr. Hughes:

All but two of the water samples that were collected near the Arkwood plant on February 20, 1984, were destroyed by UPS. Results of pentachlorophenal analyses on the two salvaged samples follow:

Sample Description	PCP, mg/l
Behren Well No. 2	0.00034
Railroad tunnel spring, South side, near east end	0.012

Eight additional water samples were collected on February 28, 1984. The results of pentachlorophenol analyses on these samples are as follows:

Continued -

1810 N. COLLEGE AVE. P.O. BOX 1229 FAYETTEVILLE, ARKANSAS 72702-1229 TELEPHONES (501) 443-4271/443-2377

Sample Description	PCP, mg/l
Railroad tunnel spring, south side, near east end	0.028
Spring west of plant, south of county road	7.4
Behren Well No. 2	<0.0002
Behren Well No. 3 (Sample A)	0.0019
Behren Well No. 3 (Sample B)	0.0016
Binam Well	0.0028
Runoff No. 1	0.28
Runoff No. 2	2.3

Please advise if there are any questions at this time.

Sincerely,

Charles McLaughlin, P.E.

CMcL/paa

cc: Mr. Bob Barker
Mr. Devoe Gregory

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February 17, 1984 81-161

Mr. Doice Hughes
Arkansas Department of Pollution
Control and Ecology
8001 National Drive
Little Rock, Arkansas 72209

Re: Arkwood
Omaha, Arkansas

Dear Mr. Hughes:

Five water samples were collected near the Arkwood plant on February 3, 1984. The results of pentachlorophenol analyses on these samples are as follows:

Sample Description	PCP, mg/l
Railroad tunnel spring, south side, near east end	0.002
Spring west of plant, south of county road	11.0
Behren Well No. 2	< 0.0005
Behren Well No. 3	0.37
Binam Well	< 0.0005

Continued -

1810 N. COLLEGE AVE. P.O. BOX 1229 FAYETTEVILLE, ARKANSAS 72702-1229 TELEPHONES (501) 443-4271/443-2377

We plan to take samples again on Monday, February 20th in order to check the unusually high result reported above on the Sample from Behren Well No. 3.

Please advise if there are any questions at this time.

Sincerely,

Charles McLaughlin, P.E.

CMcL/paa

cc: Mr. Bob Barker
Mr. Devoe Gregory

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January 24, 1984 81-161

Mr. Doice Hughes
Arkansas Department of Pollution
Control and Ecology
8001 National Drive
Little Rock, Arkansas 72209

Re: Arkwood
Omaha, Arkansas

Dear Mr. Hughes:

Four water samples were collected near the Arkwood plant on January 6, 1984. The results of pentachlorophenol analyses on these samples are as follows:

Sample Description	PCP, mg/l
Railroad tunnel spring, south side, near east end	0.012
Spring west of plant, south of county road	5.7
Behren Well No. 2	0.0084
Behren Well No. 3	0.0031

In response to your telephone call today, I've included below a list of dates that water samples were collected at Arkwood since the monthly sampling began in October, 1982. From the information you gave me, it appears that the July, 1983 report is the only one you are missing. A copy of that report is attached.

Continued -

1810 N. COLLEGE AVE. P.O. BOX 1229 FAYETTEVILLE, ARKANSAS 72702-1229 TELEPHONES (501) 443-4271/443-2377

MONTH	ACTUAL SAMPLE DATE	DATE OF REPORT SENT TO ADPC&E
October, 1982	10/09/82	10/19/82
November	10/30/82	11/09/82
December	12/14/82	01/17/83
January, 1983	01/15/83	01/31/83
February	01/31/83	02/04/83
March	02/23/83	03/01/83
April	04/01/83	04/14/83
May	05/03/83	05/13/83
June	05/27/83	06/21/83
July	06/28/83	07/12/83
August	08/01/83	09/07/83
September	09/07/83	09/26/83
October	09/30/83	10/17/83
November	10/31/83	11/30/83
December	11/30/83	12/14/83
January, 1984	01/06/84	01/24/84

Please advise if you need anything further at this time.

Sincerely,

Charles McLaughlin, P.E.

CMcL/paa

cc: Mr. Bob Barker
Mr. Devoe Gregory

Lt to DH/ADPC&E

ESCOM LAB

ENVIRONMENTAL SCIENCES AND CONSTRUCTION MATERIALS LABORATORIES

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CHEMICAL ANALYSIS, MATERIALS TESTING, ENVIRONMENTAL MONITORING AND CONSULTATION

December 14, 1983 81-161

Mr. Doice Hughes
Arkansas Department of Pollution
Control and Ecology
8001 National Drive
Little Rock, Arkansas 72209

RE: Arkwood
Omaha, Arkansas

Dear Mr. Hughes:

Five water samples were collected near the Arkwood plant on November 30, 1983. The results of pentachlorophenol analyses on these samples are as follows:

Sample Description	PCP, mg/1
Railroad tunnel spring, south side, near east end	0.14
Spring west of plant, south of county road	10.0
Behren Well No. 2	0.00011
Behren Well No. 3	0.00020
Runoff	2.6

Please let me know if you have any questions.

Sincerely,

Charles McLaughlin, P. E.

CMcL/gc

CC: Mr. Bob Barker
Mr. Devoe Gregory

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VERNON D. ROWE, P.E.

November 30, 1983

81-161

Mr. Doice Hughes
Arkansas Department of Pollution
Control and Ecology
8001 National Drive
Little Rock, Arkansas 72209

RE: Arkwood
Omaha, Arkansas

Dear Mr. Hughes:

Six water samples were collected near the Arkwood plant on October 31, 1983. The results of pentachlorophenol analyses on these samples are as follows:

Sample Description		PCP, mg/1
Railroad tunnel spring, south side, near east end		0.0046
Spring west of plant, south of county road		15.0
Behren Well No. 2		0.00056
Behren Well No. 3		0.0011
Runoff samples collected during October:	No.1	2.0
	No.2	3.6

Please let me know if you have any questions.

Sincerely,

Charles McLaughlin, P.E.

CMcL/gc

CC: Mr. Bob Barker
Mr. Devoe Gregory

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October 17, 1983 81-161

Mr. Doice Hughes
Arkansas Department of Pollution
Control and Ecology
8001 National Drive
Little Rock, Arkansas 72209

RE: Arkwood
Omaha, Arkansas

Dear Mr. Hughes:

Three water samples were collected near the Arkwood plant on September 30, 1983. The results of pentachlorophenol analyses on these samples are as follows:

Sample Description	PCP, mg/l
Spring west of plant, south of county road	97
Behren Well No. 2	0.0026
Behren Well No. 3	0.0002

No sample was collected from the railroad tunnel spring on this trip due to unusually high train traffic at the time of sampling.

I have discussed the results of the spring sample with Mr. Barker of Arkwood who explained that they recently discovered that a crack in the floor of the treating room pit was apparently allowing some of the pit contents to leak from the pit. Since this became known, operational procedures have been changed so that the pit is now kept pumped out as much as possible to minimize any leaking. In addition, Mr. Barker plans to, within the next two to three weeks, clean out the pit and seal the leak.

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We trust that this will meet with your approval. Please advise if you have any questions.

Sincerely,

Charles McLaughlin

CMcL/kms

cc: Mr. Bob Barker
Mr. Devoe Gregory

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September 26, 1983 81-161

Mr. Doice Hughes
Arkansas Department of Pollution
Control and Ecology
8001 National Drive
Little Rock, Arkansas 72209

Re: Arkwood
Omaha, Arkansas

Dear Mr. Hughes:

Five water samples were collected near the Arkwood plant on September 7, 1983. The results of pentachlorophenol analyses on these samples are as follows:

Sample Description	PCP, mg/l
Railroad tunnel spring, south side, near east end	0.029
Spring west of plant, south of county road	9.0
Sediment sample at above spring	6.0
Behren Well No. 2	0.0022
Behren Well No. 3	0.0033

Please let me know if you have any questions.

Sincerely,

Charles McLaughlin, P.E.

CMcL/paa

cc: Mr. Bob Barker
Mr. Devoe Gregory

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September 7, 1983 83-607

Mr. Doice Hughes
Arkansas Department of Pollution
Control and Ecology
8001 National Drive
Little Rock, Arkansas 72209

Re: Arkwood
Omaha, Arkansas

Dear Mr. Hughes:

Four water samples were collected near the Arkwood Plant on August 1, 1983. The results of pentachlorophenol analyses on these samples are as follows:

Sample Description	PCP, mg/l
Railroad tunnel spring, south side, near east end	0.011
Spring west of plant,south of county road	4.2
Behren Well No. 2	0.00028
Behren Well No. 3	0.0004

During the next sampling period, we plan to collect and analyze some of the sediment in the spring's runoff streambed. it is possible, that due to the very low spring flow, that the last two

Continued . . . .

1810 N. COLLEGE AVE. P.O. BOX 1229 FAYETTEVILLE, ARKANSAS 72702-1229 TELEPHONES (501) 443-4271/443-2377

samples collected from this source may have included sediment that had been contaminated in the past. These results should be available within thirty days.

Please let me know if you have any questions.

Sincerely,

Charles McLaughlin, P.E.

CMcL/mkl

cc: Mr. Bob Barker
Mr. Devoe Gregory

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July 12, 1983 81-161

Mr. Doice Hughes
Arkansas Department of Pollution
Control and Ecology
8001 National Drive
Little Rock, Arkansas 72209

Re: Arkwood
Omaha, Arkansas

Dear Mr. Hughes:

Six water samples were collected near the Arkwood Plant on June 28, 1983. The results of pentachlorophenol analyses on these samples are as follows:

Sample Description	PCP, mg/l
Railroad tunnel spring, south side, near east end	0.03
Spring west of plant, south of county road	10.0
Behren Well No. 2	< 0.00005
Behren Well No. 3	<0.00005
Run-off	0.87

The well samples have shown continued improvement with no PCP detected in these latest samples. However, during the last two sampling periods, the spring samples have had increased concentration of PCP. While we do not know what caused these increases, we can suggest two possible contributing factors:

Continued -

1810 N. COLLEGE AVE. P.O. BOX 1229 FAYETTEVILLE, ARKANSAS 72702-1229 TELEPHONES (501) 443-4271/443-2377

(1) heavy rains and higher groundwater flows in the spring months may have "washed out" some of the waste material which had been deposited underground at the plant in years past; and (2) the very low spring flows on June 28th may have provided lower dilution volumes than in the past thereby resulting in higher PCP concentrations.

We plan to continue the sampling program at Arkwood over the next several months and will continue to inform you of the results. Meanwhile, please call if you have any questions.

Sincerely,

Charles McLaughlin, P.E.

CMcL/paa

cc: Mr. Bob Barker
Mr. Devoe Gregory

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June 21, 1983 81-161

Mr. Doice Hughes
Arkansas Department of Pollution
Control and Ecology
8001 National Drive
Little Rock, Arkansas 72209

Re: Arkwood
Omaha, Arkansas

Dear Mr. Hughes:

Six water samples were collected near the Arkwood plant on May 27, 1983. The results of pentachlorophenol analyses on these samples are as follows:

Sample Description	PCP, mg/l
Railroad tunnel spring, south side, near east end	0.00047
Spring west of plant, south of county road	4.0
Behren Well No. 2	0.00018
Behren Well No. 3	0.00064
Binam Well	0.00019

Please call if you have any questions.

Sincerely,

Charles McLaughlin, P.E.

CMcL/paa

cc: Mr. Bob Barker
Mr. Devoe Gregory

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May 13, 1983 81-161

Mr. Doice Hughes
Arkansas Department of Pollution
Control and Ecology
8001 National Drive
Little Rock, Arkansas 72209

Re: Arkwood
Omaha, Arkansas

Dear Mr. Hughes:

Six water samples were collected near the Arkwood plant on May 3, 1983. The results of pentachlorophenol analyses on these samples are as follows:

Sample Description	PCP, mg/l
Railroad tunnel spring, south side, near east end	0.00038
Spring west of plant, south of county road	0.00064
Behren Well No. 2	0.00024
Behren Well No. 3	0.00023
Binam Well	0.000088
Runoff	0.0028

1810 N. COLLEGE AVE. P.O. BOX 1229 FAYETTEVILLE, ARKANSAS 72702-1229 TELEPHONES (501) 443-4271/443-2377

Please call if you have any questions.

Sincerely,

Charles McLaughlin, P.E.

CMcL/paa

cc: Mr. Bob Barker
Mr. Devoe Gregory

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VERNON D. ROWE, P.E.

14 April 1983

81-161

Mr. Doice Hughes
Arkansas Department of Pollution
Control & Ecology
8001 National Drive
P. O. Box 9583
Little Rock, AR 72209

Re: Arkwood
Omaha, Arkansas

Dear Mr. Hughes:

Four water samples were collected near the Arkwood plant on April 1, 1983. The results of pentachlorophenol analyses on these samples are as follows:

Sample Description	PCP, mg/l
Railroad tunnel spring, south side, near east end	0.0003
Spring west of plant, south of county road	0.0037
Behren Well No. 2	<0.00005
Behren Well No. 3	0.00015

Please call if you have any questions.

Sincerely,

Charles McLaughlin, P.E.

CMcL/mkl

cc: Mr. Bob Barker
Mr. Devoe Gregory

1810 N. COLLEGE AVE. P.O. BOX 1229 FAYETTEVILLE, ARKANSAS 72702-1229 TELEPHONES (501) 443-4271/443-2377

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March 1, 1983 81-161

Mr. Doice Hughes
Arkansas Department of Pollution
Control and Ecology
8001 National Drive
Little Rock, Arkansas 72209

Re: Arkwood
Omaha, Arkansas

Dear Mr. Hughes:

Four water samples were collected near the Arkwood plant on February 23, 1983. The results of pentachlorophenol analyses on these samples are as follows:

Sample Description	PCP, mg/l
Railroad tunnel spring, south side, near east end	< 0.00005
Spring west of plant, south of county road	0.0013
Behren Well No. 2	< 0.00005
Behren Well No. 3	0.00059

Please call if you have any questions.

Sincerely,

Charles McLaughlin, P.E.

CMcL/paa

cc: Mr. Bob Barker
Mr. Devoe Gregory

1810 N. COLLEGE AVE. P.O. BOX 1229 FAYETTEVILLE, ARKANSAS 72702-1229 TELEPHONES (501) 443-4271/443-2377

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VERNON D. ROWE, P.E.

February 4, 1983 81-161

Mr. Doice Hughes
Arkansas Department of Pollution
Control and Ecology
8001 National Drive
Little Rock, Arkansas 72209

Re: Arkwood
Omaha, Arkansas

Dear Mr. Hughes:

Four water samples were collected near the Arkwood plant on January 31, 1983. The results of pentachlorophenol analyses on these samples are as follows:

Sample Description	PCP, mg/l
Railroad tunnel spring, south side, near east end	*
Spring west of plant, south of county road	0.0069
Behren Well No. 2	0.00054
Behren Well No. 3	0.000098

* Unable to sample due to nearby train derailment.

1810 N. COLLEGE AVE. P.O. BOX 1229 FAYETTEVILLE, ARKANSAS 72702-1229 TELEPHONES (501) 443-4271/443-2377

Please call if you have any questions.

Sincerely,

Charles McLaughlin, P.E.

CMcL/paa

cc: Mr. Bob Barker
Mr. Devoe Gregory

FEB 1983

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Environmental and Materials Testing
Civil, Environmental and Chemical Engineering Consulting

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FRED NIELSEN, R.L.S.

FAYETTEVILLE
J.E. McCLELLAND, P.E.
VERNON D. ROWE, P.E.

January 31, 1983 81-161

Mr. Doice Hughes
Arkansas Department of Pollution
Control and Ecology
8001 National Drive
Little Rock, Arkansas 72209

Re: Arkwood
Omaha, Arkansas

Dear Mr. Hughes:

Four water samples were collected near the Arkwood plant on January 15, 1983. The results of pentachlorophenol analyses on these samples are as follows:

Sample Description	PCP, mg/l
Railroad tunnel spring, south side, near east end	0.0015
Spring west of plant, south of county road	0.0021
Behren Well No. 2	0.00024
Behren Well No. 3	0.00097

1810 N. COLLEGE AVE. P.O. BOX 1229 FAYETTEVILLE, ARKANSAS 72702-1229 TELEPHONES (501) 443-4271/443-2377

Please call if you have any questions.

Sincerely,

Charles McLaughlin, P.E.

CMcL/paa

cc: Mr. Bob Barker
Mr. Devoe Gregory

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VERNON D. ROWE, P.E.

January 17, 1983 81-161

Mr. Doice Hughes
Arkansas Department of Pollution
Control and Ecology
8001 National Drive
Little Rock, Arkansas 72209

Re: Arkwood
Omaha, Arkansas

Dear Mr. Hughes:

Results of PCP analyses on water samples collected at Arkwood on December 14, 1982, follow:

Sample Description	PCP, mg/l
Railroad tunnel spring, south side, near east end	0.00021
Spring west of plant, south of county road	0.0026
Behren Well No. 2	< 0.00005
Behren Well No. 3	<0.00005
Run-off	0.004

No sample was collected from the Binam well since the residence is still vacant.

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The run-off sample was collected by Arkwood in early December.

Please call if you have any questions.

Sincerely,

Charles McLaughlin, P.E.

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cc: Mr. Bob Barker
Mr. Devoe Gregory

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November 9, 1982 81-161

Mr. Doice Hughes
Arkansas Department of Pollution
Control and Ecology
8001 National Drive
Little Rock, Arkansas 72209

NOV 1982
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Ark. Dept. of
Pollution Control
& Ecology

Re: Arkwood
Omaha, Arkansas

Dear Mr. Hughes:

Results of PCP analyses on water samples collected at Arkwood on October 30, 1982, follow:

Sample Description	PCP, mg/l
Railroad tunnel spring, south side, near east end	0.007
Spring west of plant, south of county road	0.007
Behren Well No. 2	<0.00005
Behren Well No. 3	<0.00005
Run-off	0.010

No sample was collected from the Binam well since the residence has been vacated and the water shut off.

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The run-off sample was collected by Arkwood on October 28, 1982.

Please call if you have any questions.

Sincerely,

Charles McLaughlin, P.E.

CMcL/paa

cc: Mr. Bob Barker
Mr. Devoe Gregory

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October 19, 1982 81-161

Mr. Doice Hughes
Arkansas Department of Pollution
Control and Ecology
8001 National Drive
Little Rock, Arkansas 72209

Re: Arkwood
Omaha, Arkansas

Dear Mr. Hughes:

Results of PCP analyses on water samples collected at Arkwood on October 9, 1982, follow:

Sample Description	PCP, mg/l
Railroad tunnel spring, south side, near east end	0.046
Spring west of plant, south of county road	0.0047
Behren Well No. 2	0.00026
Behren Well No. 3	0.0001
Binam Well	<0.00005

Heavy rainfall was received in Omaha on the day before the sampling, and both of the springs had greater flows than normal. This may account for the increase in PCP for these two samples as compared to the previous samples collected on August 23, 1982. It is encouraging, however, to note that the well samples continue to show decreasing PCP concentrations.

1810 N. COLLEGE AVE. P.O. BOX 1229 FAYETTEVILLE, ARKANSAS 72702-1229 TELEPHONES (501) 443-4271/443-2377

Please let us know if there are any questions or if anything further is needed at this time.

Very truly yours,

Charles McLaughlin, P.E.

CMcL/paa

cc: Mr. Bob Barker
Mr. Devoe Gregory

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VERNON D. ROWE, P.E.

September 29, 1982 81-161

Mr. Doice Hughes
Arkansas Department of Pollution
Control and Ecology
8001 National Drive
Little Rock, Arkansas 72209

Re: Arkwood
Omaha, Arkansas

Dear Mr. Hughes:

In my correspondence to you dated August 31, 1982, I stated that a water well report and percolation test results would be forthcoming. Please find these documents enclosed.

Sincerely,

Charles McLaughlin, P.E.

CMcL/paa

Enclosure: Water Well Report
Percolation Test Results

cc: Mr. Bob Barker
Mr. Devoe Gregory

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STATE OF ARKANSAS

REPORT OF WATER WELL CONSTRUCTION

New Well ✓ Work-over Well ____ Replacement Well ____

Owner of Well Robert Bahrens Bob Barker ARK-Woods County Boone (in which well is located)

Contractor ~~Harold L. Kirk~~ C 1151

Driller Name and No. ~~Harold L. Kirk~~ D2312

Date Well was Completed 7-17-82

Well is near County Road

Section 27 Township 21N Range 24W

Directions for Reaching Well: ½ m.s. Omaha #1 & 1 mi. W. (use permanent landmark)

1. Total Depth of Well 565 Ft.
2. Water Producing Formation: From 274 Ft. To 274½ Ft.
   More water in Flinty lime - 380' to 387'
3. Water Level Below Land Surface 240'
4. Gallons per Hour 500 65%
5. Well Disinfected with ~~65% Chlorine Granules~~
6. Casing to 54½ Ft.
7. Cased with 6¼" I.D. Diameter New Steel Casing
8. Cemented from 0 Ft. to 12 Ft.
9. Use of Well: ✓ Domestic ____ Irrigation ____ Municipal ____ Other

Description and Color of Formation (sand, shale, sandstone, etc.)	Depths from	in feet to
Top soil + chunk chert	0	2
~~Mostly~~ " " + red clay	2	32
Boone lime	32	36
Brittle ~~Broken~~ lime	36	38
Boone lime	38 -	40
Brittle lime + mud	40	46
Grey lime	46	380
" Flinty-lime	380	387
Dolomite lime	387 -	565

Remarks:

Signed: Jacob R. Kirk Date: 7-20-82

Form No. AWD-3

Mail to: Committee on Water Well Construction, 2915 So. Pine Street, Little Rock, Arkansas 72204

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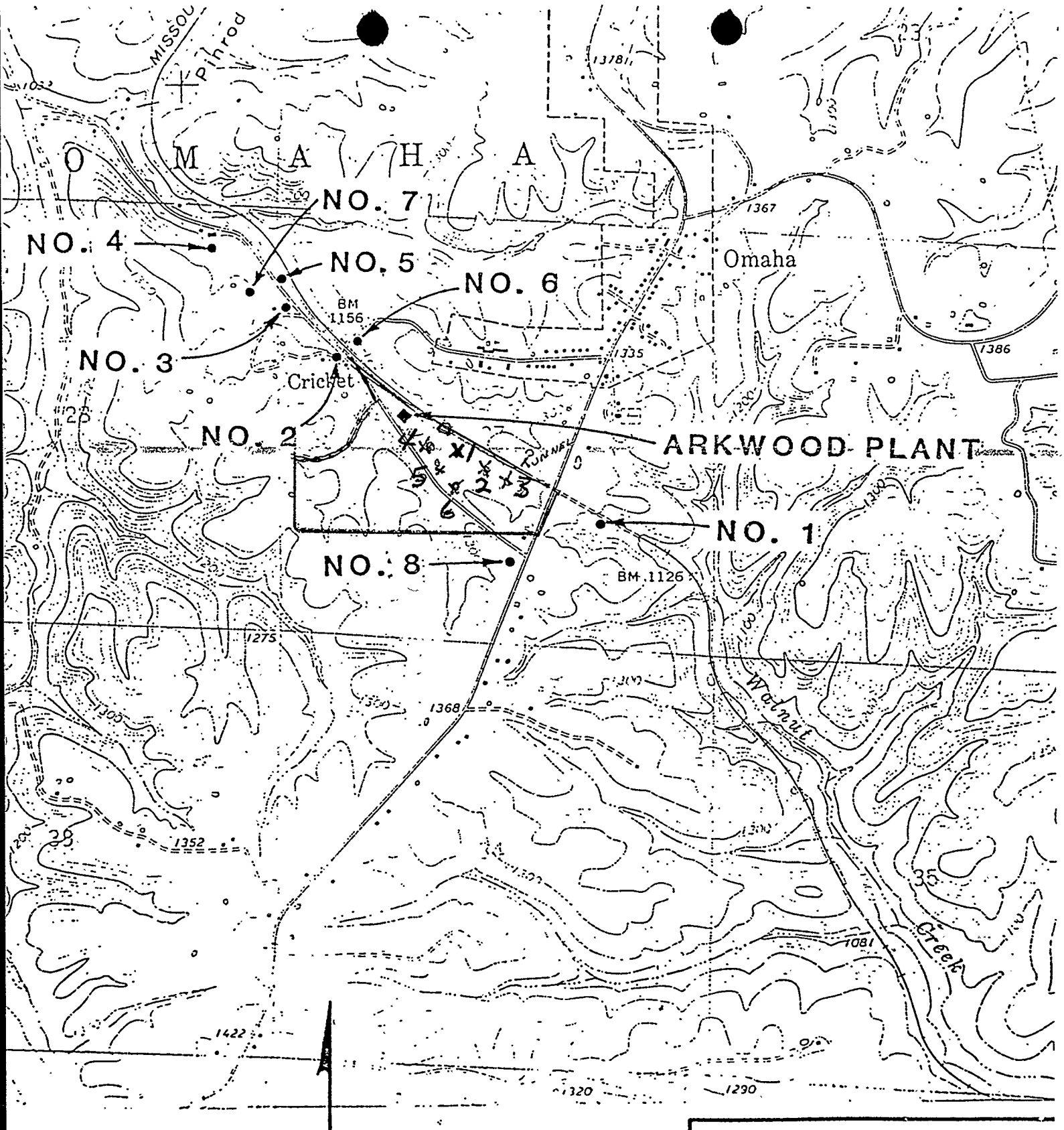

NORTH
1" = 2000'±

McCLELLAND CONSULTING ENGINEERS, INC.

little rock fayetteville

WATER SAMPLE LOC.

4-15-82

ARKWOOD

OMAHA, ARKANSAS

SEP 29 1982

THOMAS T. MILLARD

CONSULTANT SERVICES

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HARRISON, ARKANSAS

72601

Phone 365-3226

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- Unimproved Lands
- Recreation Areas

Sept. 24 1982

Mc Clelland Consulting Engineers
1810 North College Fayetteville Ark.

Re: ARKWOOD DRAINAGE Problem
SOIL PERCOLATION Data.

attention: Mr. Charles McLaughlin P.E

Enclosed are field notes of THE on site study that should have been included in my report on the geology of the ARKWOOD area.

You will note I enlarged your water sample map, in order to show the Percolation test sites better. The test holes are indicated with a red x and numbered one through six.

I hope this information will meet your needs.

Very truly yours.

Thomas T. Millard

Orig - file
Cy - CMcL

THOMAS T. MILLARD
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On Site Data - Percolation Tests - ARKWOOD Stack yard OMAHA ARK.

BASE map Water Sample Locations - Dated 4-15-82

Site #1 Very Cherty throughout, Small angular fragments.
Perc rate - 2 Minutes = 1 inch - (Profile too open to reach Soil Saturation Point)

Site #2 Profile and Soil material Similar to Site #1 with thin layer 2" thick on Surface Containing Some red Clay material mixed with Penta. Residue.
Perc rate at 24" deep - 2 Min = 1 inch

Site # 3
Hard Packed Layer on Surface, this Layer Practically impervious but only 3" thick. Soil Profile below hard Packed Layer is Similar to Site #1 in Soil material, approx. 70% fine angular Chert, by Volume. Perc Rate at 24" deep 2 min = 1 inch

Sites #1 #2 and #3
On Site tests Show the North Side of the stack yard Can Carry much more Surface drainage than at Present, Since it has a very rapid Perc. rate.

THOMAS T. MILLARD
CONSULTANT SERVICES—NATURAL RESCOURCES
SOIL PERCOLATION & WATER TESTING
335 WEST RIDGE, HARRISON, ARK. 72601

THOMAS T. MILLARD
CONSULTANT SERVICES
NATURAL RESOURCE INVENTORIES
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On site Data - Percolation tests - Arkwood - Omaha Ark.

ALL TEST HOLES - 24 in. Depth (tests taken after Saturation)

Site #4 (South side of Stack yard)

Clay filled fissures occur in this area - The clay is a heavy silty clay that has dissolved from the high grade Limestone. Perc rate 8 hrs = Less than 1 INCH.

Site #5 - Soil Profile Similar to Site #4 - Clay is brown and gray mottled, silty clay to clay, (Compact when dry) Perc Rate 8 hrs = Less than 1 inch.

Site #6 This test hole is in direct alignment with the fissure on the South east end of the stack yard.

site #6 Soil Profile similar to sites #4 and #5, except Clay was more Moist and sticky.

Perc. Rate - 8 hrs = Less than 1 inch.

The above 3 Sites would be rated as Very Slowly Permeable.

FIELD DATA COMPLETED = July 26 1982

THOMAS T. MILLARD
CONSULTANT SERVICES—NATURAL RESCOURCES
SOIL PERCOLATION & WATER TESTING
825 WEST RIDGE, HARRISON, ARK. 72601

Thomas T. Millard

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FAYETTEVILLE
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VERNON D. ROWE, P.E.

August 31, 1982 81-161

Mr. Doice Hughes
Arkansas Department of Pollution
Control and Ecology
8001 National Drive
Little Rock, Arkansas 72209

Re: Arkwood
Omaha, Arkansas

Dear Mr. Hughes:

In response to your request for certain information regarding the Arkwood plant and related environmental concerns, the following report is submitted for your consideration.

HISTORIES OF BEHREN'S WELLS

Discussions with Mr. Bill Arnold, well driller, and Mr. Bob Barker of Arkwood, revealed the following concerning Mr. Behren's wells:

Well No. 1. This well, which is located approximately 20 feet south of the Behren residence, is 150 feet deep and was drilled in 1965 or 1966. This was prior to the time well drilling records were required to be kept, but the practice at the time was to case a well one or two feet into solid rock, In this case, the well was probably cased about 20 feet deep and not grouted. Pumping tests indicated a yield of approximately 1/2 gallon per minute. Since a new well (Well No. 3) has been placed into service, Well No. 1 is now abandoned.

Continued -

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Well No. 2. Drilled in about 1978, this well is located in a field approximately 500 feet northwest of the Behren residence. This well is approximately 420 feet deep and was probably cased to a depth of approximately 80 feet. The yield was approximately 5 gallons per minute. Although we do not have a copy of the drilling log, it should be available if needed.

Well No. 3. Last month Arkwood drilled a new well for Mr. Behren approximately 100 feet south of his house. This well was drilled 580 feet deep and is now connected to the house plumbing, thus replacing Well No. 1. A copy of the drilling log for Well No. 3 will be forwarded to you when available.

RESULTS OF WATER SAMPLE ANALYSES

Wells and Springs. A summary of pentachlorophenol analyses performed on recent well and spring samples is attached. Groundwater contamination by PCP has apparently decreased significantly over the past few months.

Plant Yard Stormwater Runoff. Arkwood recently collected a sample of rain runoff from the plant yard on August 13, 1982. This sample contained 0.037 mg/l PCP.

Walnut Creek. A sample from Walnut Creek, approximately 5 miles east of Arkwood was collected on August 23rd. This sample contained 0.0002 mg/l PCP apparently indicating there is very little stream contamination resulting from Arkwood's operation.

Sludge Impoundment on Railroad R/W. On July 26, 1982, a sample of the liquid in this impoundment was collected and analyzed and found to contain 0.24 mg/l PCP. This sample was taken from the surface which was covered with an oily film. The depth of the liquid was approximately one foot. Wastewater flow to this impoundment has ceased, and surface drainage from the plant yard has been diverted so that it no longer passes into this area.

GEOLOGY REPORT

We have attached a copy of a letter and a report from Mr. Thomas Millard concerning the geology in the vicinity of the Arkwood plant. Mr. Millard believes, as we all had previously suspected, that PCP contamination of

Continued -

the groundwater originated from the two sludge disposal sites on the property rather than by percolation from the surface of the yard in general. Copies of the results of percolation tests conducted by Mr. Millard will be forwarded to you at a later date.

PHYSICAL IMPROVEMENTS

Arkwood plans to begin immediately the construction of the three items proposed in my May 26, 1982, correspondence to you. In addition, the old sludge disposal sump at the east edge of the yard has been capped with a one to two foot layer of cherty clay material in an effort to prevent surface runoff from being retained in the sump and allowed to travel to the groundwater through rock fissures. Rerouting of the surface drainage in this area is also planned so as to eliminate runoff from off-site flowing across the old dump site and the plant yard in general. It is Arkwood's intention to immediately begin implementing all of the improvements discussed herein and to have them completed by the end of the year.

PROPOSED NEW PROCESS

Arkwood is presently considering adding a waterborne treating system to their plant. Such a system, along with a proposed oil/water separator would permit wastewater resulting from the oil based process to be utilized in the waterborne system, thereby reducing the overall plant process wastewater to essentially zero.

We hope you will find the above information satisfactory. If you need anything further at this time, please contact us.

Sincerely,

Charles McLaughlin, P.E.

CMcL/paa

Enclosure: Summary of PCP Analyses
Geology Report

cc: Mr. Bob Barker
Mr. Devoe Gregory
Mr. Mike Bates

SUMMARY OF PENTACHLOROPHENOL ANALYSES
ARKWOOD
OMAHA, ARKANSAS

Sample Description	Sample Dates and PCP Values, mg/l			
	4/14/82	6/29/82	7/26/82	8/23/82
Railroad tunnel spring, south side, near east end	5.6	0.0042	0.00023	0.00023
Spring west of plant, south of county road	8.3	2.7	0.0134	0.0015
Well behind Behren residence (No. 1 - 150' deep)	5.6	0.48	*	*
Well in Behren field (No. 2 - 400' deep)	<0.005	0.0013	**	0.00035
New Behren Well, 7/82 (No. 3 - 580' deep)	---	---	0.00032	0.0004
Well behind Binam residence	<0.005	0.00048	0.00017	0.00039

* Pump and piping removed from well, no sample collected.
** Sample bottle broken during shipment.

81-161

THOMAS T. MILLARD

CONSULTANT SERVICES
NATURAL RESOURCE INVENTORIES
HARRISON, ARKANSAS
72601
Phone: 741-4415

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- Soils - Interpretation
- Soil Percolation Tests
- Subdivisions Feasibility Data
- TSI - Timber Stand Improvement
- Real Estate
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- Mineral Research

See MaP _ Geologic Formation ARKWOOI

GEOLOGY-

The geology of the Arkwood Post treatment site occurs Chiefly in the BOONE FORMATION which is a Cherty limestone of Mississippian age. The BOONE at this site ranges from 100 feet thick to 120 feet and ranges in Chert Content around 70% by volume. The Chert is strongly weathered and it shows Considerable slumping and and folding. The undulating folds of thin bedded Cherty material is referred to in geologic terms as "VALLEY FILL" or "TALUS" deposit. By Compaction of heavy machinery the Post yard floor has a layer of Cherty Clay that is relatively impervious. Thus after a heavy rain Surface water moves across the stack yard in a sheet, and Carries with it any Penta available.

orig - file
cc - MCO

THOMAS T. MILLARD
CONSULTANT SERVICES
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HARRISON, ARKANSAS
72601
Phone: 741-4415

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At the base of the BOONE formation is a strata about 30' thick called the St. Joe, which is a dense gray to Pink Coarse Crystalline, limestone or marble, most springs Crop out at at the base of this formation where it overlies the CHATTANOOGA SHALE, which is DEVONIAN IN AGE. This formation Contains a Considerable amount of tough Plastic Clay that is dark red to black in Color.

Under the Chattanooga shale there is a Considerable geologic gap for it is underlain by the *POWELL DOLOMITE, which is Ordivician in age. It is a drab gray, fine Crystalline, Magnesium limestone. The Powell dolomite is quite dense and not as readily soluble as the Boone and St. Joe limestones.

* See Columnar Geologic Sheet Attached

THOMAS T. MILLARD
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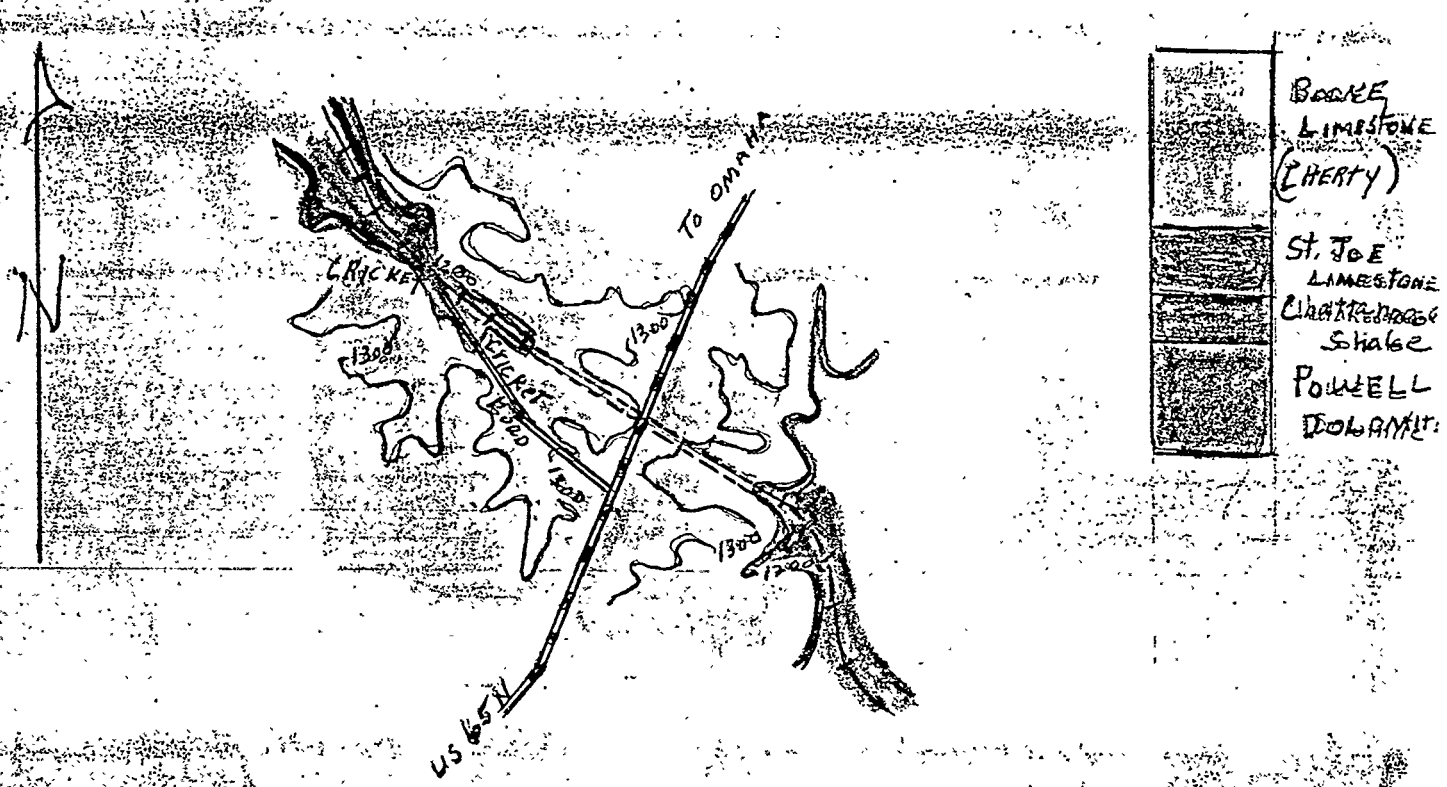
The POWELL DOLOMITE is underlain by the COTTER DOLOMITE these strata are dense and most wells end up in this formation, as did the recent well on the Behren Place. The Cotter in the Cricket area ranges around 500' to 600' thick and has few if any fissures developed.

The Clay filled fissures below the Post yard floor are Probably in the St Joe Limestone formation, which is a high grade lime and is readily soluble in ground water.

The suggestion made by Mr. McLaughlin as to the treatment of the fissure areas appears to be a Practical solution ie: grouting with Concrete after the plug of Clay has been removed by a backhoe. In Case the Proposed treatment does not relieve the Contamination, a dye treatment study Could be made to reveal the movement of water in the upper ground water table.



GEOLOGIC FORMATIONS AT ARKWOOD SITE

FROM GEOLOGIC FOLIO - 202 USGS,
AH PURDUE and H.D. MISER

PENNSYLV	Hartshorne		100-300	Gray, white to buff coarse-grained ss, brown silty shales, and coal.
	Atoka		1400 ±	Compact ss of variable character, and dark sandy sh in varying proportions.
MORROW GROUP	Bloyd: Kessler mbr; Woolsey mbr; Brentwood mbr		250 ±	Compact gray to brown fossiliferous ls. Dark brown to black clay shale. Limestone impure, fossiliferous.
	Hale: Prairie Grove mbr; Cane Hill mbr		275 ±	Black clay shale, massive brown calcareous ss.
MISSISSIPPIAN	Pitkin		100	Massive gray fossiliferous ls.
	Fayetteville; Wedington mbr		400 ±	Gray to brown massive ss. Black carbonaceous fissile sh, limy at base.
	Batesville; Hindsville mbr		250 ±	Gray to brown calcareous ss. Gray fossiliferous or oolitic ls.
	Ruddell		275 ±	Black, fissile shale.
	Moorefield		275 ±	Gray to black friable sh and ls lenses
	Boone; St. Joe mbr		100 ft. At ARKWOOD; ~~600 ±~~; 30' At ARKWOOD	Massive gray, crystalline, fossiliferous Limestone with much nodular chert. Thin-bedded reddish brown crinoidal ls.
DEVONIAN	Chattanooga		~~75 ±~~ 30' at ARKWOOD	Black fissile clay shale.
	Sylamore			White to brown ss in part pebbly.
	Clifty		20 ±	Gray compact [illegible] ls.
	Penters chert		90	Gray to blue nonfossiliferous chert.
SILURIAN	Lafferty		25 ±	Gray to red thin-bedded cherty ls.
	St. Clair		100	Pink, coarse-grained fossiliferous ls.
	Brassfield		15 ±	Blue gray thin limestone
ORDOVICIAN	Cason		25 ±	Platy gray calcareous shale
	Fernvale		125	Pink to gray fossiliferous ls.
	Kimmswick		50	Blue to gray massive ls.
MIDDLE ORDOVICIAN	Plattin		250	Gray to blue fine-grained ls.
	Joachim		200	Drab sandy dolomite.
	St. Peter		150	Massive and laminated saccharoidal ss.
	Everton: Jasper mbr; Newton mbr; Kings River		400	Massive white to buff ss. Gray to brown ss. Heavy-bedded, white friable ss.
	Powell		200	Fine-grained gray argillaceous dolomite.
LOWER ORDOVICIAN	Cotter		500	Fine-grained gray argillaceous dol. with nodular chert.
	Jefferson City		500	Gray dolomite, chert locally.
	Roubidoux		100	Appears in subsurface only (ss)
	Van Buren; Gasconade; Gunter mbr		300	Appears in subsurface only. (dol)

ABSENT AT ARKWOOD

Columnar Geologic Sheet ARKWOOD

Surface Soils – ARKWOOD

BOONE COUNTY, ARKANSAS — SHEET NUMBER 6

THOMAS T. MILLARD

CONSULTANT SERVICES
NATURAL RESOURCE INVENTORIES
HARRISON, ARKANSAS
72601
Phone: 741-4415

S1-161 1

Copy

Jim

- Soils-Interpretation
- Soil Percolation Tests
- Subdivisions Feasibility Data
- TSI - Timber Stand Improvement
- Real Estate
- Farm & Ranch Land
- Unimproved Lands
- Mineral Research

July 26 1982

Mr. Bob. Barker
Arkwood Treating Plant - Omaha, ark

Dear Mr. Barker:

In the letter I received from Mr. Charles McLaughlin he requested some special information as to the geology in the vicinity of the ARKWOOD treating Plant near Omaha, Ark.

Item - 1 In the area of the treatment plant and stock yard, the general direction of the ground water flow is west to slightly Northwest. The hydrologic Pattern of ground flow water at this site dates back several thousand years, at which time the Permanent springs were gradually established. By Checking the strata of the limestone still in Place along the sides of the Valley it appears the underlying limestone bedrock has a slight dip to the west.

THOMAS T. MILLARD
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Item - 2

after Closely Checking the geology of the ARKWOOD area I noted the "sink" area at the east end of the Property is taking a Considerable amount of surface water Which Completely saturates, not only the sink area Which is Visable, but also the series of fissure spots along the South edge of the stack yard.
My suggestion here would be to Carry the additional surface water to the North edge of the stack yard, before it reaches the "sink" area. The fissure spots mentioned above show up on the stack yard floor as boggy areas of plastic red Clay. The soil Percolation tests in the Vicinity of the fissure areas was Very slow to nil.
I also noted that the line of Clay filled fissures lined up with the fissure near the treatment Plant.

THOMAS T. MILLARD
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- Mineral Research

The waste sludge areas Mr. McLaughlin mentioned in his letter to me could very well be a strong source of contamination, depending of course upon the ability of the soil in that area to break down the pentachlorophenol.

The waste sludge pool between the railroad line and the office building should be drained westward, and a dike thrown up to prevent surface water from carrying the waste sludge material into the Mo. Pac tunnel. I was told that at times of flash flooding Penta saturated water drained from the sludge pool along the the R.R. tracks eastward toward the tunnel. This could be a logical source of the Penta contamination showing up in the spring at site #1 at the east end of the tunnel.

Please contact me should any additional on site data geological in nature be needed.

Very truly yours Thomas T. Millard

McCLELLAND CONSULTING ENGINEERS INC.

Environmental and Materials Testing
Civil, Environmental and Chemical Engineering Consulting

LITTLE ROCK
JAMES E. McCLELLAND, P.E.
FRED NIELSEN, R.L.S.

FAYETTEVILLE
J.E. McCLELLAND, P.E.
VERNON D. ROWE, P.E.

May 26, 1982

81-161

Mr. Doice Hughes
Arkansas Department of Pollution
Control and Ecology
8001 National Drive
Little Rock, Arkansas 72209

Re: Arkwood
Omaha, Arkansas

Dear Mr. Hughes:

This letter will provide you with an update on the situation at Arkwood relative to: (1) improved operational procedures now being practiced; (2) proposed physical improvements which will further minimize release of oil and pentachlorophenol into the environment; (3) the water and soil sampling results available to date; and (4) proposed continued water sampling.

OPERATIONAL PROCEDURES

Since you and Mr. Bates visited the Arkwood plant in January, several operational procedures have been adopted which have resulted in a drastic reduction in the quantity of oil released during the wood preserving process and subsequent product storage. These measures include the following:

1. The drain line from the sump under the treating cylinder door has been opened up. Each time the cylinder door is opened, released oil is caught in a container and manually transferred to the oil work tank, then reused. Any of the oil which is not captured in this manner enters the sump and flows back into the treating room floor pit where it is contained prior to being pumped to the sludge tank.

1810 N. COLLEGE AVE. P.O. BOX 1229 FAYETTEVILLE, ARKANSAS 72702-1229 TELEPHONES (501) 443-4271/443-2377

MAY 1982
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Air, Pest. &
Pollution Control
& Ecology

2. The initial air pressure and the vacuum time have been increased during the treating process. This results in essentially all of the excess oil in the treated products being removed prior to their withdrawal from the cylinder, thereby eliminating practically all of the "bleeding" which previously occurred.

3. The plant operating personnel have received instructions on general housekeeping measures aimed at preventing spills of any kind. The results of these efforts can be seen in the improved appearance both in and around the treating building.

In addition to the above, the source of the contamination of the steam condensate was found and eliminated from the discharge north of the office building. It was determined that the steam operated jet vacuum pump was picking up pentachlorophenol from the treating cylinder. This contaminated condensate is now being returned to the water tank instead of being discharged. This is recognized as a temporary measure until a comprehensive wastewater management program is implemented. Presently the only discharge north of the office building is the boiler blowdown.

PROPOSED IMPROVEMENTS

The following items are proposed for immediate implementation at Arkwood.

1. Seal the opening in the rock formation adjacent to the treating building. This would be done with a reinforced concrete slab and would prevent any future accidental spills or surface runoff from entering the opening.

2. Construct a concrete drip pad in front of the treating cylinder. This would drain back to the sump under the treating cylinder door.

3. Grade the area around the drip pad to preclude future stormwater drainage across that area.

These three items are seen as necessary first steps in any overall wastewater management system to be planned at Arkwood. It is believed that these improvements along with the present production curtailment due to the

economy (production is less than 50% of that one year ago) will greatly reduce the possibility of groundwater and surface water contamination in the near future.

SAMPLING RESULTS

Soil. The objective of studying the soil conditions at the plant site was to determine the likelihood of groundwater contamination resulting from the practice of storing treated products on the open plant yard. The entire plant yard area is constructed of cherty clay fill material obtained on-site and compacted by years of heavy equipment traffic. A sample of the material was collected and found to have a permeability coefficient of 4.5×10^{-6} cm/sec. The results of the analysis are attached. Three individual sites on the treated products storage yard were randomly selected for investigation. At each of these locations, it could be seen that the soil surface was obviously contaminated with oil.

However, from two to six inches below the surface, no evidence of oil contamination could be seen at any of the sites. The storage yard has adequate surface drainage and, being constructed of material with low permeability, very little percolation to groundwater is thought to occur. While it is recognized that the contaminated soil in the treated products storage yard has resulted in some contaminated runoff water, it is very unlikely that this situation has contributed to any groundwater contamination.

Water. The objective of the water sampling done to date was to verify pentachlorophenol contamination of spring water entering the railroad tunnel adjacent to the plant site and to sample known wells and springs in the immediate vicinity of the plant.

Attached are two sheets showing water sample locations and results of pentachlorophenol analyses. As can be seen, three samples, No. 1, No. 2, and No. 3, were found to be contaminated. These three samples were from sources south of the railroad track and within ½ mile of Arkwood's treating plant. Sample No. 3 is from the only known contaminated source with any apparent likelihood of being used as a drinking water supply. The owner of that property stated at the time of sampling that the well was not used for drinking purposes since contamination had been suspected. Instead, a second well on the property (which is not contaminated, Sample No. 7) was being utilized for that purpose.

PROPOSED WATER SAMPLING

In view of the contaminated groundwater that is now known to exist in the vicinity of the wood preserving plant, it is proposed that water sampling be continued. This will make it possible to monitor the contamination over a period of time, and hopefully within approximately six months will provide enough data to determine whether or not an extensive geohydrologic survey should be conducted.

Specifically, it is proposed that the following sources be sampled on a monthly basis and analyzed for pentachlorophenol:

Source	Sample No.-4/15/82 Survey
Railroad tunnel spring	1
Spring northwest of Arkwood	2
Binam well	6
Behren well No. 1, house	3
Behren well No. 2, field	7

SUMMARY

In summary, Arkwood's immediate goal is to minimize any future contamination of groundwater or surface water by: (1) process modifications; (2) improved housekeeping; and (3) site drainage improvements. Additionally, regular monitoring of the water sources listed above will provide data useful in determining a future course of action relative to the contaminated groundwater.

If you have any questions after reviewing the above, please let us know.

Very truly yours,

Charles McLaughlin, P.E.

CMc:lrh

Enclosure

cc: Mr. Bob Barker
Mr. Devoe Gregory
Mr. Mike Bates

STATE OF ARKANSAS
DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY
8001 NATIONAL DRIVE
LITTLE ROCK, ARKANSAS 72209

PHONE: (501) 562-7444

February 19, 1982

Don Beavers
Director
United Transporation Union
Suite 602
1515 West 7th Street Building
Little Rock, Arkansas 72202

Dear Mr. Beavers:

I would like to thank you for the concerned interest you have shown in regard to the situation near Crickett. This Department is aware that the problem still exists and we are currently working with the responsible party in an effort to abate the contamination.

A private engineering firm has been retained by the responsible party to determine, among other concerns, the source and extent of the contamination in the railroad tunnel and to accomplish the necessary cleanup. The site was visited on January 25 and 26, 1982 by Doice Hughes, Inspection Engineer with ADPC&E and myself. We also met with the consulting engineer in charge of the project to discuss items which should be incorporated into the Schedule for Action which has been submitted to this office. Work on this project is underway, however, before any cleanup can be started the source of the contamination must be located. When this is accomplished decisions must be made as to how to eliminate or treat the discharge, etc.

This is a very complex project, as I am sure you understand, and one which may take some time to complete. Please be assured that this office will remain in close contact with the responsible party and will continue to make periodic monitoring inspections throughout the project.

If I can be of further assistance to you, please feel free to contact me.

Sincerely,

Mike Bates

Mike Bates
Hazardous Waste Inspector
Compliance Branch

MB/rlb

cc: Doice Hughes

ARKANSAS LEGISLATIVE BOARD

DON R. BEAVERS, Director
Suite 602
1515 West Seventh Building
Little Rock, Arkansas 72202

united transportation union

File

February 11, 1982

Mr. Mike Bates
Compliance Branch
Department of Pollution Control and Ecology
8001 Natural Drive
Little Rock, Arkansas 72209

Dear Mr. Bates:

Please refer to your letter of October 23, 1981 to my office concerning your inspection of chemicals in a railroad tunnel near Crickett, Arkansas.

I continue to receive information from railroad crews operating through this tunnel that the problem still exist. In fact, the recent heavy rain and snow seem to have increased the discharge of chemicals into the ditches inside the tunnel.

In that nearly 4 months have elapsed since your investigation, I was hoping a solution to the matter would be forthcoming. Please advise my office as to current status.

Thanking you in advance, I am

Sincerely,

Don R. Beavers

McClelland engineers, inc. geotechnical consultants
P.O. Box 5239 / 10501 Stagecoach Road, Little Rock, Arkansas 72215
Tel. 501 / 455-2536

February 11, 1982
LR82-501

McClelland Consulting Engineers, Inc.
1811 College Avenue
P.O. Box 1229
Fayetteville, Arkansas

ATTENTION: Mr. R. Wayne Jones, P.E.

REFERENCE: Falling-head Permeability Test for
Arkwood Wood Products, Inc.
Omaha, Arkansas

Gentlemen:

Presented here are the results of the falling-head permeability test conducted for the above referenced project.

Coefficient of Permeability (k):	4.5×10^{-6} cm/sec
Unit dry weight as compacted:	90.6 pcf
Moisture content at compaction:	21.6%

The soil was compacted in a 4-in. diameter mold using Standard Proctor compactive energy. A lower permeability value would likely be obtained at a higher compactive energy.

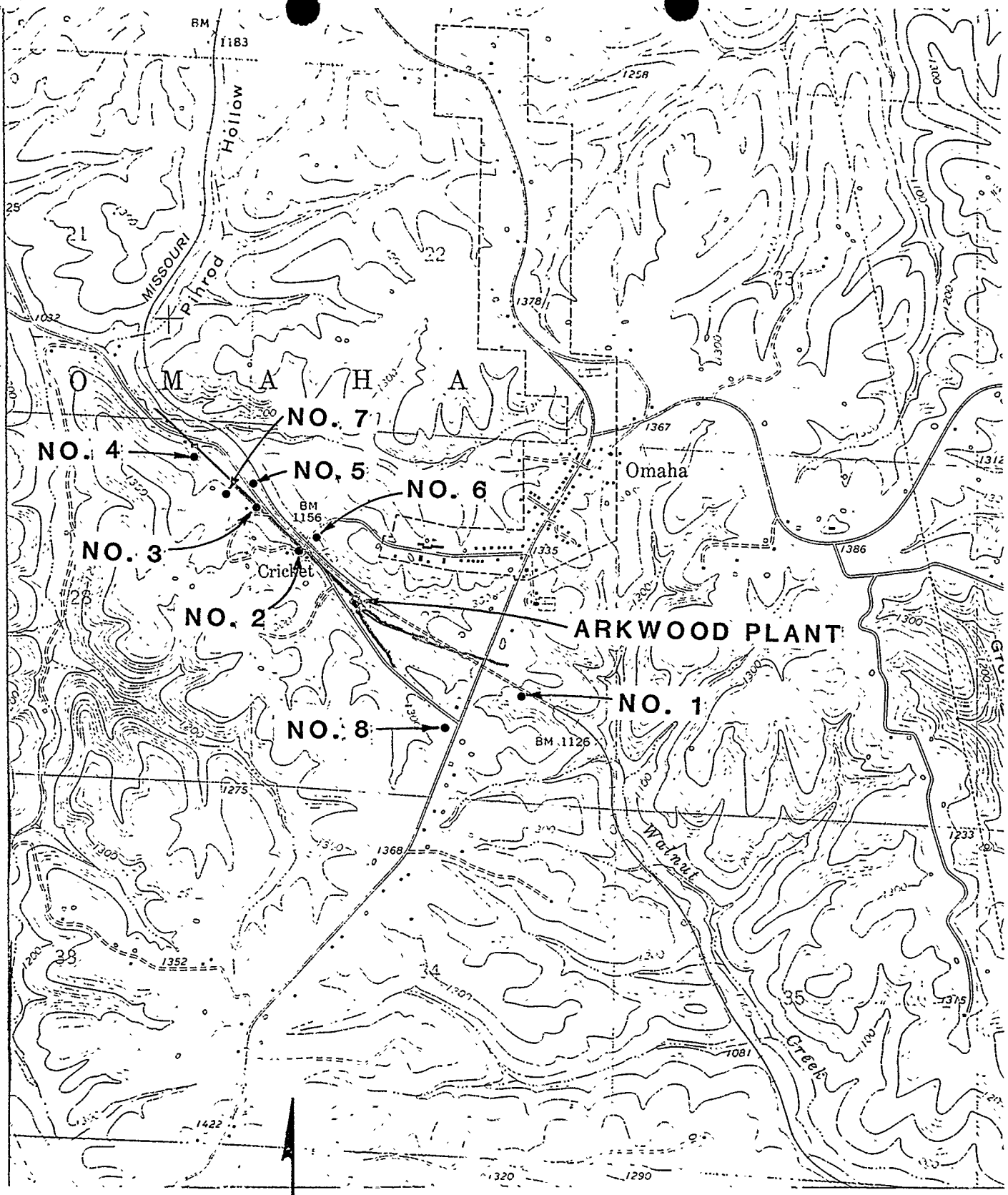
Very truly yours,

McCLELLAND ENGINEERS, INC.

Richard E. Ackley, P.E.

REA/mp

Copies Submitted: McClelland Consulting Engineers, Inc. (3)
Attn: Mr. R. Wayne Jones, P.E.



NORTH
1" = 2000'±

McCLELLAND CONSULTING ENGINEERS, INC.

little rock fayetteville

WATER SAMPLE LOCATIONS

4-15-82

ARKWOOD

OMAHA, ARKANSAS 81-161

RESULTS OF PENTACHLOROPHENOL ANALYSES
Arkwood
Omaha, Arkansas

(Sampled April 14, 1982)

Sample No.	Location	Pentachlorophenol, mg/l
1	Railroad tunnel spring, south side, near east end	5.6
2	Spring west of plant, south of county road	8.3
3	Well behind Behren residence (No. 1 - 150' deep)	5.6
4	Spring behind old cannery	< 0.005
5	Spring under railroad tracks, west of plant, north of county road	< 0.005
6	Well behind Binam residence	< 0.005
7	Well in Behren field (No. 2 - 400' deep)	< 0.005
8	City water from Scroggins residence at Highway 65 and Arkwood Road	< 0.005

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LITTLE ROCK
JAMES E. McCLELLAND, P.E.
FRED NIELSEN, R.L.S.

FAYETTEVILLE
J.E. McCLELLAND, P.E.
VERNON D. ROWE, P.E.

December 17, 1981

Dr. Robert E. Blanz
Deputy Director
Arkansas Department of Pollution
Control and Ecology
8001 National Drive
Little Rock, Arkansas 72209

Re: Mass Merchandisers, Inc.
Arkwood Plant
Omaha, Arkansas

Dear Dr. Blanz:

As I mentioned to you today by telephone, the chart which was enclosed with my letter to you dated December 16, 1981, does not properly correspond to the written schedule. The written schedule is correct so please replace the chart with the one that is attached.

We regret any inconvenience this may have caused.

Very truly yours,

Charles McLaughlin, P.E.

CM:lrt

Enclosure

cc: Mr. Devoe Gregory

Previous schedule destroyed AG

1810 N. COLLEGE AVE. P.O. BOX 1229 FAYETTEVILLE, ARKANSAS 72702-1229 TELEPHONES (501) 443-4271/443-2377

SCHEDULE FOR ACTION
Wood Products Division
Mass Merchandisers, Inc.
Arkwood Plant
Omaha, Arkansas

ITEM	1982 JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	1983 JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1. Provide proper storage and disposal of hazardous wastes. (Begin January 1, 1982).																								
2. Sample all known wells and springs within ½ mile of wood treating operation (January, 1982), and develop extensive groundwater monitoring plan, if required (March, 1982).																								
3. Plan on-site and off-site clean up of contaminated soil and water (February 1 to April, 30, 1982).																								
4. Clean up on-site and off-site contaminated soil and water (May 1, 1982 to Dec. 31, 1983).																								
5. Prepare Spill Prevention Control and Countermeasure Plan (SPCC) (February, 1982).																								
6. Conduct engineering study (February 1 to April 30, 1982).																								
7. Prepare hazardous waste management plans, if required. (March 1 to April 30, 1982.)																								
8. Prepare detailed plans and specifications for needed improvements. (June 1 to Sept. 30, 1982.)																								
9. Construct new facilities, if required. (November 1, 1982 to May 31, 1983.)																								
10. Operate in compliance with environmental regulations. (Begin July 1, 1983.)																								

McCLELLAND CONSULTING ENGINEERS INCORPORATED

DEC 1981

McCLELLAND CONSULTING ENGINEERS INC.

Environmental and Materials Testing
Civil, Environmental and Chemical Engineering Consulting

LITTLE ROCK
JAMES E. McCLELLAND, P.E.
FRED NIELSEN, R.L.S.

FAYETTEVILLE
J.E. McCLELLAND, P.E.
VERNON D. ROWE, P.E.

December 16, 1981

81-161
Fayetteville

Dr. Robert E. Blanz
Deputy Director
Arkansas Department of Pollution
Control and Ecology
8001 National Drive
Little Rock, Arkansas 72209

Re: Mass Merchandisers, Inc.
Arkwood Plant
Omaha, Arkansas

Dear Dr. Blanz:

On behalf of the Wood Products Division of Mass Merchandisers, Inc., we are submitting herewith a proposed "Schedule for Action" outlining steps to be taken to bring the Arkwood plant into compliance with existing environmental regulations. This schedule is being submitted in accordance with the request you made on October 22, 1981, during a meeting with representatives of Arkwood and McClelland Consulting Engineers, Inc. As you will recall, during that meeting Arkwood indicated their desire to comply with the regulations, and after discussing the current economic situation within their industry, expressed hope that a compliance schedule would be approved which would be realistic in terms of Arkwood's present financial condition.

It is hoped that the enclosed schedule will meet with your approval. Please let us know if you need any further information at this time.

Sincerely,

Charles McLaughlin

Charles McLaughlin, P.E.

Enclosure

cc: Mr. Bob Barker

CM:lrt

1810 N. COLLEGE AVE. P.O. BOX 1229 FAYETTEVILLE, ARKANSAS 72702-1229 TELEPHONES (501) 443-4271/443-2377

SCHEDULE FOR ACTION

Wood Products Division
Mass Merchandisers, Inc.
Arkwood Plant
Omaha, Arkansas

1. Provide proper storage and disposal of hazardous wastes. (Begin January 1, 1982). Contract with a permitted hazardous waste transport/treat/dispose facility to remove Arkwood's hazardous wastes. (Disposal requirements may be modified in the near future if the quantity of wastes generated can be reduced below the limit for a small quantity generator.)

2. Sample all known wells and springs within 1/4 mile of wood treating operation. (January, 1982) If any groundwater contamination attributable to Arkwood is detected then formulate a monitoring plan by March 31, 1982, aimed at determining the extent of subsurface contaminant migration.

3. Plan on-site and off-site clean up of contaminated soil and water. (February 1, to April 30, 1982.) Identify specific areas requiring clean up and estimate the quantity of contaminated soil and water to be removed. Evaluate various methods of accomplishing the clean up, and adopt a specific plan.

4. Clean up on-site and off-site contaminated soil and water. (May 1, 1982 to December 31, 1983.) Remove contaminated soil and water and provide proper disposal by contracting with a permitted hazardous waste transport/treat/dispose facility.

5. Prepare Spill Prevention Control and Countermeasure Plan. (February, 1982).

6. Conduct engineering study. (February 1, to April 30, 1982.) Perform a detailed engineering study with the following objectives:

   A. Identify the sources and quantities of wastewater and hazardous waste generated.

   B. Evaluate possible waste reduction measures including recovery and reuse of creosote and pentachlorophenol.

   C. Determine if Arkwood will qualify as a small quantity generator of hazardous waste as a result of reducing the quantity of waste generated.

   D. Evaluate the feasibility of using impervious drip pads for treated products.

E. Evaluate the need for storm water diversion and/or retention facilities.

F. Evaluate the need for a wastewater treatment facility. If needed, consider treatment alternatives, and prepare preliminary construction cost estimates.

7. Prepare hazardous waste management plans if required. (March 1 to April 30, 1982). Should it be determined that Arkwood will not qualify as a small quantity generator of hazardous waste, prepare a Contingency Plan, a Closure Plan, and a Waste Analysis Plan. Also a develop a reporting and recordkeeping program and a personnel training program.

8. Prepare detailed plans and specifications for needed improvements. (June 1, to September 30, 1982.) Based upon the results of the engineering study, prepare construction contract documents for the needed improvements.

9. Construct new facilities, if required. (November 1, 1982 to May 31, 1983.)

10. Operate in compliance with environmental regulations. (Begin July 1, 1983.)

STATE OF ARKANSAS
DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY
8001 NATIONAL DRIVE
LITTLE ROCK, ARKANSAS 72209

PHONE: (501) 562-7444

November 5, 1981

Johnny Quinn
McCelland Consulting Engineers, Inc.
P.O. Box 1229
Fayetteville, Arkansas 72701

Dear Mr. Quinn:

Enclosed are the results of the sampling of October 6, 1981 and a description of the sample points. Please refer to the enclosed sketch to better locate sample point #5 (indicated on sketch as A5).

If I may be of any help, please call.

Sincerely,

Mike Bates

Mike Bates
Hazardous Waste Inspector
Compliance Branch

MB/rlb

file Arkwood

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY

MEMORANDUM

TO : Mike Bates, Hazardous Waste Inspector, Air and Hazardous Waste

FROM : Jay Justice, Hazardous Waste Chemist, Technical Services JJ

DATE : November 5, 1981

SUBJECT: Results From Analysis of Samples Taken at Arkwood on October 6, 1981

#8 Water	#4 Water
Pentachlorophenol 21 ppm	Pentachlorophenol <0.01 ppm
#9 Sediment	#1 Sediment
Pentachlorophenol 5600 ppm	Pentachlorophenol 30,000 ppm
#5 Water	#2 Sediment
Pentachlorophenol 2.8 ppm	Pentachlorophenol 23,000 ppm
#6 Water	#3 Water
Pentachlorophenol 3.4 ppm	Pentachlorophenol 18 ppm
#7 Water	
Pentachlorophenol 2.0 ppm	

dp

Small

RCRA INSPECTION

I. SITE IDENTIFICATION

ARD084930148

A. Site Name: Arkwood, Inc

B. Street (or other identifier): P.O. Box 199

C. City: OMAHA

D. State: AR

E. Zip Code: 72622

F. County Name: Boone

G. Site Operator Information

1. Name

2. Telephone Number

3. Street

4. City

5. State

6. Zip Code

H. Site Description

I. Latitude (deg.-min.-sec.)

Longitude (deg.-min.-sec.)

J. Type of Ownership

___1. Federal ___2. State ___3. County ___4. Municipal ___5. Private

K. X 1. Generator ___2. Transporter ___3. Treatment ___4. Storage ___5. Disposal

INSPECTION INFORMATION

A. Principal Inspector Information

1. Name: Mike Bates

2. Title: Hazardous Waste Inspector

3. Organization: ADPC&E

4. Telephone No. (area code & No.): 501-562-7444

B. Inspection Participants

Bob Barker

Devoe Gregory

STATE OF ARKANSAS
DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY
8001 NATIONAL DRIVE
LITTLE ROCK, ARKANSAS 72209

PHONE: (501) 562-7444

October 23, 1981

Bob Barker
Mass Merchandisers, Inc.
Highway 43E
Harrison, Arkansas 72662

RE: Arkwood, Inc.

Dear Mr. Barker:

This is to confirm our meeting of October 22, 1981. The meeting was attended by representatives of Arkwood, McClelland and ADPC&E. The purpose of the meeting was to discuss the problem at the Arkwood woodtreating plant near Omaha, Arkansas.

The outcome of the meeting was that a study plan was agreed to be submitted to this office within 60 days. The plan is to outline the problem areas, propose a plan of action to correct the problem and contain a time frame for implementation of the corrective actions. The analysis results of our samples will be provided to you as soon as they are available.

I would like to thank you for the cooperative attitude that has been shown and I look forward to working with you on this project. If I may be of any assistance to you, please contact me.

Sincerely,

Mike Bates

Mike Bates
Hazardous Waste Inspector
Compliance Branch

MB/rlb

Mike - Please see me on this.

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY

MEMORANDUM

TO: Bob Blanz, Deputy Director

FROM: Mike Bates, Hazardous Waste Inspector MB

DATE: October 12, 1981

SUBJECT: Arkwood, Inc. at Cricket (South of Omaha)

Arkwood, Inc. of Omaha is located on 15-20 acres in Sec. 27 T21NR21W in Boone County, Arkansas. The business consists of a millwork shop, a woodtreating operation using pentachlorophenol and cresote and the storage of the treated wood products before sale.

David Orr of our Fayetteville office received a complaint about "bad looking water coming from a spring inside a railroad tunnel adjacent to the Arkwood property" and made an inspection along with the Boone County Sanitarian, Mike Youngblood on June 19, 1981 (see Attachment "A"). David took three water samples at the railroad tunnel, please refer to attached analysis (Attachment "B").

Arkwood, Inc. notified under RCRA as a generator of hazardous waste. I visited the site on October 5 and 6, 1981, for the purpose of conducting an interim status standards inspection and to follow-up the initial complaint.

Arkwood was founded and originally operated by H. C. Ormand in the early 1960's (approximately 1962). Mr. Ormand leased the process and land to Mass Merchandisers, Inc. of Harrison in the mid 1970's. Mass Merchandisers are the current operators of the site. Their representatives, Bob Barker and Devoe Gregory of the Wood Products Group, supplied the background information for this report during a meeting on October 6, 1981.

The wastes from the wood treating operation, according to Mr. Barker and Mr. Gregory, were dumped into a cave at the treating plant from the beginning of the operation to around 1970 when the cost of the treatment chemicals forced a recovery system to be employed. The cave was covered by boarding the entrance up and covering it with a layer of dirt (the entrance is flush with the ground surface). Currently the wastes consists of the wash down of the treatment room floor and the cleaning of the treatment cylinder between the use of penta and cresote. These wastes are accumlated in a tank and then spread over the storage yard for use as dust control. Mr. Barker estimated they generate approximately 500 gallons/year (6-7000 lbs/year) of these wastes. Steam is also used in the treatment process, the steam is said to be reused in the process, some is bled off to discharge behind the office building adjacent to Missouri Pacfic railroad.

Arkwood could be classified as a Small Quantity Generator, according to the generation amounts furnished by Mr. Barker, if they dispose of their waste properly. Arkwood is presently disposing of their waste improperly by spreading the material for dust control and by dumping it in several places at the northeastern end of their property near Highway 65. The frequency of these "dumps" are approximately every three weeks according to a Roy Horn, treatment

plant manager. The area around the treatment plant is saturated with the treatment chemicals. There are pools of oily material around the treatment cylinder and the storage tanks. The tanks are not diked (with the exception of the raw penta storage tank) nor is there any other type of containment to prevent the washing of the oily substances off-site during rains. The storage yard where the treated wood products are taken to "cure" is saturated in many areas with what appears to be the treatment chemicals leaching from the wood products. Mr. Horn indicated that this saturated soil is scooped out periodically and piled up along the entrance road when the storage areas get too mushy to operate the machinery.

The steam bleed off discharge, as mentioned above, exists on the slope behind the office building. The slope below the discharge pipes is oil stained; at the base of the stained area there is an impoundment which contains a black oily looking liquid. Mr. Horn said that nothing was discharged through the pipes except steam and that nothing had been put in the impoundment for years. The impoundment is approximately 15'X40', depth unknown. There was approximately 2' of freeboard with no evidence of overtopping. The impoundment is located adjacent to the Missouri Pacific railroad and approximately 400' northwest of the railroad tunnel mentioned in the initial complaint.

The tunnel lies in a northwest/southeast line and is approximately 1/2-3/4 of a mile in length. There is a construction crew working on the northwest entrance of the tunnel to widen it. They have been working on the tunnel since the first of the year, the work has reportedly involved a considerable amount of blasting. Gary Benham, with the construction crew, accompained me into the tunnel on October 5, 1981. There are three springs inside the tunnel; the first of which (approaching from the northwest) is located about halfway through the tunnel on the northern side. The other two are located in the southeast one-third of the tunnel, discharging from the south side of the tunnel. The first two springs discharge through pipes imbedded in the tunnel wall approximately 20-30' above the tracks. The southeastern most spring breaks out near the roof. Mr. Benham stated that the crew complained that the spray from the springs burned their eyes.

The water in the ditches along the tracks was brown in color and had a dark brown to black film on the surface. The tunnel walls and sides of the ditches were oil stained. Both ditches showed signs of contamination, however, the southern ditch appears to be more heavily contaminated.

The southern ditch flows southeasterly from the tunnel for about 1000' before it drops off into a depression formed by the points of two ridges intersecting the railroad. The trees growing in the bottom of this depression had oil stains on them up to 12' above the present level of the water (with oil film). This depression is the receiving point of three drainage patterns (see Attachments "D" and "E"). I did not observe a drainage point out of the depression under the railroad. This depression could possibly be a sinkhole. Mark Witherspoon of our staff agrees with this possibility but indicated that a closer study would be needed to confirm it.

The northern ditch also flows in a southeasterly direction for about 1000' before turning north and dropping sharply to intersect Walnut Creek on the eastern side of the railroad. The tunnel springs appear to be supplying most of the water in Walnut Creek at the present time. The creek bed is dry approximately 600' downstream from the point where the tunnel spring water intersects the creek. The rocks in the dry bed of Walnut Creek are tinted brown whereas the rocks of an intersecting intermittent stream from the northeast (dry also) are not. This could be an indication of the past flow of contaminates down Walnut Creek.

Nine samples were taken during the inspection. Locations of the samples are shown in Attachments "C" and "D", sample description on Attachment "F". Sample analysis for pentachlorophenol and cresote should be available around October 14th. Numerous photographs were taken and will be furnished when processed. The Arkwood property lies on the Pitkin limestone formation. The contaminated water flows southeast from the railroad tunnel to an area underlain by the Powell Dolomite and the Cotter and Jefferson City Dolomites. These formations are typically intermittently solutionized along jointing patterns. Solutionization may be retarded due to the chert content.

Omaha city water extends along Highway 65 for about one mile south of Arkwood. This according to Ralph Scroggins who owns the house and mobile home at the intersection of Highway 65 and the road leading to Cricket. Mr. Scroggins also said the city lines do not extend off of Highway 65 very far. There are approximately 14 homes which use individual wells as drinking water within a mile radius of Arkwood, assuming that all of the residences within the city limits are on city water and discounting the homes along Highway 65 which should also be on city water.

The Omaha city water supply is a well located in the NE¼, NE¼ Sec. 27T21NR21W, inside the city limits near the Post Office. This well is also within one mile of the site, the total depth of the well is 1315' with a casing depth of 60'. The only water well sample taken was from Arkwood. The depth of the well is unknown, however, Mr. Horn stated that the pump (submergable) was set at 920'.

We have recently received another complaint from a representative of the railroad who charges that a wood treating plant near Cricket is letting liquid wood preservatives out of a holding area and that this material is getting into a railroad tunnel. The complainant also states that railroad people are getting sick from the fumes in the tunnel. This complaint does have some validity to it. There is definitely wood treating chemicals getting into the tunnel, however, as stated earlier I did not observe any discharge or evidence of the overtopping of the dikes of the impoundment below Arkwood. The railroad people may be getting sick from fumes inside the tunnel, but I think the fumes would more likely be coming from the train engine exhausts, especially since the trains have to travel at a slow speed through the tunnel (complainant reports 10 m.p.h.).

The Arkwood wood treating plant is a serious threat to the groundwater and surface water quality in the area. The representatives of Arkwood have voiced their willingness to cooperate and do what is necessary, within their means,

to alleviate any environmental damage stemming from their operation. There are several things, in my opinion, which should be accomplished.

1. Seal the on-site cave, with concrete or other water tight material, to prevent any contaminates from entering it.

2. Cease the on-site dumping or spreading of wastes from the treating process.

3. Clean-up of all contaminated soil on-site and properly disposal of it.

4. Establish dip pads and runoff containment for the treated wood products storage area.

5. Eliminate any oily discharge and close out or maintain the impoundment according to RCRA (if it contains a hazardous waste).

6. Determine source of contamination inside tunnel and implement measures to correct it.

7. Clean-up all off-site contamination.

8. Sample residential wells in area for presence of contaminantes.

Please advise as to what action should be taken.

MB/rlb

cc: Doice Hughes
J.B. Jones

Attachment "A"

STATE OF ARKANSAS
DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY
8001 NATIONAL DRIVE
LITTLE ROCK, ARKANSAS 72209

501-371-1701 GEN OFFICE
501-371-1701 AIR DIVISION
501-371-1701 SOLID WASTE DIV
501-371-1701 WATER DIV
501-371-2130 BUS OFFICE

MEMORANDUM

TO: J. B. Jones

FROM: RDO R. David Orr

DATE: July 29, 1981

SUBJECT: Arkwood Preservative Plant near Omaha

At approximately 10:09 a.m. on June 19, 1981, I arrived at Arkwood Preservative Plant near Cricket, approximately 16 miles northwest of Harrison on Highway 65. Accompanying me on the complaint inspection was Mike Youngblood, Boone County Sanitarian, Arkansas Department of Health. At the plant office, we met Mr. Roy Horn, Plant Manager. We told Mr. Horn about the complaint we received ("Bad looking water coming from a spring inside a railroad tunnel adjacent to the Arkwood property), and told him that we would like a short tour of the treatment process.

Their treatment process involves steam pressure treatment with pentachlorophenol and cresote on a four-day cycle. After treatment, the wood posts are piled in small groups to cure. No means of containment was observed below the piles. There was a level area of "clayish" gravel soil.

Mr. Youngblood and I both observed several pools of blackish water on the property and adjacent to the property along a railroad right of way.

After the tour of the treatment process, we drove along the railroad tracks to a tunnel where a repair crew was repairing tracks. There we met Mr. Gary Benham, Motor Car Operator. We told Mr. Benham why we were there and he said, "I'll show you some bad water on the far side of the tunnel."

Inside the tunnel we observed a spring flowing from the north side which discharged through metal pipes. The water appeared clear. Futher inside the tunnel we observed another spring flowing about 30 feet above the tracks. This water appeared somewhat clear but further down the ditch, it formed an oil film on the surface and stained the walls and dirt surfaces. On the east side of the tunnel, we observed more oil film which collected in pools. The drainage flowed off the railroad track right of way into a large pool of water with a thick brownish