UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX

IN THE MATTER OF:	)	**U.S. EPA Docket No.**
	)	**OPA-9-2004-0007**
NATIVE AMERICAN ENERGY, LLC;	)	
TODD NICHOLSON; BRIAN NICHOLSON;	)	**Proceeding under Sections 311(c) and**
DALE A. NICHOLSON TRUST	)	**(e) of the Clean Water Act, 33 U.S.C.**
dba SPEEDY'S TRUCK STOP; SPEEDY'S	)	**§§ 1321(c) and (e); Section 7003(a) of**
CONVENIENCE, INC.; SPEEDY'S	)	**the Resource Conservation and**
CONVENIENCE I, INC.; CLYDE H.	)	**Recovery Act, as amended, 42 U.S.C. §**
FREDERICKSON III; PETRO USA CO.	)	**6973(a)**
INC.; PETRO USA, INC.	)	
	)	
Respondents	)	

UNILATERAL ADMINISTRATIVE ORDER

INTRODUCTION

This Order requires Respondents Native American Energy, LLC; Dale A. Nicholson Trust dba Speedy's Truck Stop; Todd Nicholson; Brian Nicholson; Speedy's Convenience, Inc.; Speedy's Convenience I, Inc.; Clyde H. Frederickson III; Petro U.S.A., Inc.; and Petro U.S.A. Co. Inc. ("Respondents") to stop all releases to soil and water of oil and hazardous and solid waste, as defined in 42 U.S.C. §§ 6903(27) and (5), at the facility located at Grants Road Exit 359, Lupton, Arizona ("Speedy's Truck Stop" or "Speedy's" or "the Facility"), and, in accordance with the procedures described herein, to abate any contamination resulting from prior releases. Respondents manage and dispose of solid and hazardous wastes in a manner that discharges pollutants into surrounding soils and waters of the United States including areas both in and around the Navajo Nation, Arizona, and New Mexico. Respondents' discharge of gasoline, diesel, ethanol, contaminated soil, and other pollutants in and around the area may present an imminent and substantial endangerment to public health and the environment in and around the Navajo Nation, Arizona and New Mexico.

I. JURISDICTION AND PROCEDURE

1. This Administrative Order ("Order") is issued to Respondents by the United States Environmental Protection Agency ("EPA") pursuant to the authority vested in the Administrator of EPA by Section 311(c) and (e) of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1321(c) and (e), and by Section 7003(a) of the Resource Conservation and Recovery Act, as amended, 42 U.S.C. Section 6901 *et seq.* ("RCRA"), which authority has been duly delegated to the Regional Administrator of EPA, Region IX, and redelegated to the Director of the Superfund Division, Region IX. Notice of this Order has been provided to the Navajo Nation and the state of Arizona and the state of New Mexico.

II. PARTIES BOUND

2. This Order shall apply to and be binding upon the Respondents identified above, and their directors, officers, employees, agents, successors and assigns, and upon all other persons and entities who are under the direct or indirect control of Respondents, including, but not limited to, any contractors or independent agents or consultants acting under or for Respondents in performing their obligations under this Order.

3. This Order is based on the administrative record compiled by EPA and incorporated herein by reference. The record is available for review by the Respondents and the public at EPA's Regional Office at 75 Hawthorne Street, San Francisco, California.

4. No change in the ownership or legal status of Respondents, or of any property to which access is required for performance of any obligations under this Order, will in any way alter Respondents's obligations and responsibilities under this Order.

5. Respondents shall provide a copy of this Order and all other documents approved under or pursuant to this Order that are relevant to compliance with this Order to each contractor, sub-contractor, laboratory, or consultant retained to perform any Work to be performed under this Order, within five (5) days after the Effective Date of this Order or on the date such services are retained, whichever date occurs later. Notwithstanding the terms of any contract, Respondents are responsible for compliance with this Order and for ensuring that their contractors, subcontractors and agents comply with this Order.

6. At all times after service of this Order, Respondents shall provide a copy of this Order to any prospective owners or successors before a controlling interest in Respondents' assets, property rights or stock are transferred to the prospective owner or successor. Respondents shall notify EPA at least seven (7) days prior to such transfer.

III. FINDINGS OF FACT

7. Respondents operate or have operated a full service truck stop and oil storage, processing and distribution facility (hereinafter "Speedy's" or "the Facility") in Lupton, Arizona, on land located in Arizona, New Mexico and the Navajo Nation. Respondents have operated the Facility since on or about May 13, 1996.

8. The Facility is located on Parcel 209-13-002, an 11.06-acre parcel in Section 27, T23N, R31E, Apache County, Arizona and Section 15, T23N, R21W, McKinley County, New Mexico. The Facility is located at exit 359, Grant Road on Interstate Highway 40.

9. Operations at Speedy's include bulk storage of oil, a fuel separation and blending system, a gasoline and diesel service station, bulk distribution of diesel, an auto and truck repair shop, a tire shop, a café and a convenience store. At least twenty aboveground storage tanks are located at the Facility, ranging in capacity from 8,000 gallons to 720,000 gallons, totaling approximately 945,000 gallons. The tanks generally store gasoline, diesel, transmix, ethanol, and reformate, but tank contents are often changed due to the purchases, processing and sales conducted by the Facility.

10. There are two aboveground storage tank areas, a Main Tank Farm in the central area of the Facility, and an East Tank Farm in the eastern corner of the Facility. There are at least thirteen tanks located in the Main Tank Farm. Records vary regarding the contents of the tanks. During an Arizona Department of Environmental Quality ("ADEQ") hazardous and solid waste inspection on or around February 24, 2004, Facility personnel indicated the tanks contained ethanol, gasoline (three tanks), diesel (seven tanks), toluene (one tank), methyl tertiary-butyl ether ("MTBE") (one tank), and transmix (one tank). A map of the Facility dated February 27, 2003, provided by Speedy's, indicates the tanks contain gasoline (three tanks), diesel (seven tanks), and transmix (three tanks).

11. There are at least six tanks located in the East Tank Farm. During the ADEQ inspection, Facility personnel indicated the tanks contained transmix, gasoline, and diesel. A map of the Facility dated February 27, 2003, provided by Speedy's, indicates that all six tanks contain ethanol.

12. Each of the two tank farms is surrounded by earthen secondary containment and each has a tank truck loading and unloading area that drains to a sump. The tanks are connected to each other with various aboveground pipelines. The East Tank Farm is connected to the Main Tank Farm with subsurface piping.

13. Facility personnel told ADEQ that in January there had been a release of 1,000 gallons of diesel inside the earthen berm surrounding the Main Tank Farm. Facility personnel stated that the area had been covered with new soil, rather than excavating the contaminated soils.

14. A processing area northwest of the Main Tank Farm contains what the Facility refers to as a "splitter column unit." This unit is located on a concrete pad with a small concrete berm. There is connection piping in a subsurface trench with a grate which connects the processing area with the Main Tank Farm. Drainage from the trench leads to a waste collection tank. During the ADEQ inspection, Facility personnel were not able to produce documentation demonstrating that the waste liquid and sludge from the periodic cleanup of the waste tank are being characterized and disposed of properly. Facility personnel informed ADEQ inspectors that liquid from the Facility's waste collection tank is pumped periodically into a tanker truck, the waste sludge is shoveled into buckets, and both are then dumped on various locations behind the Facility.

15. Fitzgerald Cadman, Senior Environmental Specialist with Navajo Nation Environmental Protection Agency ("NNEPA"), visited Speedy's on or around February 2, 2004, to investigate a complaint by Alvin Yellowhorse that Speedy's had discharged oil-related waste onto Mr. Yellowhorse's private property, which is located adjacent to Speedy's. In response to NNEPA's inquiries regarding the spill, Respondent Clyde H. Frederickson III wrote a letter dated February 13, 2004, to NNEPA stating that Respondent Todd Nicholson had directed a truck driver to dump waste from the collector tank in the fuel storage area, and from the sumps at the fuel islands, "onto the ground behind the mobile home that is located at the facility." The mobile home at the Facility is located near the northwestern boundary of the Facility, close to Mr. Yellowhorse's property. Mr. Frederickson states that the waste was mostly water, with as much as 10 gallons of petroleum product released with the water . However, as described above in Paragraph 14, the Facility does not have documentation demonstrating that the waste liquid and sludge from the waste tank are being disposed of properly. Mr. Frederickson's letter states that as a result of the incident Mr. Nicholson was "released and is no longer associated with the company."

16. During the ADEQ inspection of the Facility on or around February 24, 2004, ADEQ inspectors observed a trench on Mr. Yellowhorse's property filled with liquid with a visible oil sheen in the area where Mr. Yellowhorse alleged that Speedy's had dumped its oily waste.

17. ADEQ inspectors also observed piles of excavated petroleum-contaminated soil at various areas at the Facility near the Main Tank Farm. At the time of the inspection, uncovered piles of petroleum-contaminated soil were drenched due to ongoing precipitation. Speedy's personnel were not able to provide a waste determination for the soil.

18. In an area between the Main Tank Farm and the East Tank Farm, ADEQ inspectors observed a pipe releasing fluid onto the ground. The pipe was leaking at the rate of approximately two gallons per minute. Facility personnel stated that the leaking liquid was comprised of ethanol and MTBE.

19. In the north area of the Facility, ADEQ inspectors observed several areas where the soil had been disturbed, and identified a yellowish liquid and black sludge in some of this area. A strong petroleum odor was noted in this area. The inspectors noted vehicle tracks leading from the Facility to the areas of disturbed soil.

20. ADEQ inspectors observed a sump and oil/water separator at the pump for the diesel service station that ran from the pumps to the front of the Facility and drained into a ditch (Outfall #1). The oil/water separator was inoperable, allowing all sump waste, consisting of liquid wastes from the diesel distribution portion of the Facility, to drain directly to the ditch. In addition, the wastes from the gasoline distribution portion of the Facility drain to the same ditch via a trench (Outfall #2). The ditch contained yellow and black liquid, and the ADEQ inspectors observed an oily sheen on the liquid in the ditch.

21. The drainage ditch, which runs along the southern portion of the Facility, flows to the Puerco River, located 1/4 mile east/southeast of the Facility. The Puerco River eventually discharges to the Upper Colorado River.

22. Gasoline constituents, such as benzene, toluene, ethylbenzene and xylene, are listed as hazardous wastes in 40 C.F.R. Part 261, Appendix VIII, and pose a significant health threat. Specifically, benzene is a known human carcinogen (Class A) and leukemogen. Toluene and xylene are organic solvents, which are linked with toxic effects in the central nervous system, the liver, the kidney and the reproductive system. Ethylbenzene has demonstrated hepatic, kidney and central nervous system toxicity. [EPA Integrated Risk Information System (IRIS) 1999.] Benzene and toluene are RCRA hazardous constituents as defined at 40 C.F.R. Part 261, Appendix VIII.

23. Benzene has been detected in groundwater beneath the Facility, downgradient from the

Main Tank Farm, at 29 micrograms per liter and 111 micrograms per liter, levels above the federal maximum contaminant level ("MCL") of 5 micrograms per liter.

Respondents Status

24. Respondents are Native American Energy, LLC; Dale A. Nicholson Trust dba Speedy's Truck Stop; Todd Nicholson; Brian Nicholson; Speedy's Convenience, Inc.; Speedy's Convenience I, Inc.; Clyde H. Frederickson III; Petro U.S.A., Inc.; and Petro U.S.A. Co. Inc.

25. EPA is informed and believes that Native American Energy, LLC is a corporate entity that manages the refinery portion of the Speedy's site and receives revenues from the Facility's operations.

26. EPA is informed and believes that Dale A. Nicholson Trust dba Speedy's Truck Stop is an owner of the Speedy's Facility.

27. EPA is informed and believes that Todd Nicholson is a prior operator of the site, who was Plant Manager and managed day-to-day operations of the Facility. Todd Nicholson reportedly directed the release of waste liquid onto the ground behind the Facility on or about January 22, 2004.

28. EPA is informed and believes that Brian Nicholson is a prior operator of the site.

29. EPA is informed and believes that Speedy's Convenience, Inc. is a prior operator of the Facility, and may be a current operator of the Facility.

30. EPA is informed and believes that Speedy's Convenience I, Inc. is a prior operator of the Facility, and may be a current operator of the Facility.

31. EPA is informed and believes that Clyde H. Frederickson III is the General Manager and a current operator of the Facility who currently manages day-to-day operations at the Facility.

32. EPA is informed and believes that Petro U.S.A., Inc. is a current operator of the Facility.

33. EPA is informed and believes that Petro U.S.A. Co. Inc. is a current operator of the Facility.

IV. DETERMINATIONS AND CONCLUSIONS OF LAW

34. The Facility is a "facility or site" within the meaning of Section 3013(a) of RCRA, 42 U.S.C. § 6934(a), and a "facility" within the meaning of Section 311(e)(1) of the CWA,

33 U.S.C. § 1321(e)(1).

35. Respondents are each a "person" as defined in Section 1004(15) of RCRA, 42 U.S.C. § 6903(15), and as defined in Section 311(a)(7) of the CWA, 33 U.S.C. § 1321(a)(7), whose past or present handling, storage, treatment, transportation or disposal of "solid wastes" as defined by Section 1004(27) of RCRA, 42 U.S.C. Section 6903(27), have contributed and are contributing to a condition which may present an imminent and substantial endangerment to health or the environment under Section 7003 of RCRA, 42 U.S.C. § 6973. Respondents are each the past or current owner or operator of the Facility within the meaning of Section 7003(a) of RCRA, 42 U.S.C. § 6973(a), and as defined in Section 311(a)(6) of the CWA, 33 U.S.C. § 1321(a)(6).

36. Section 1004(27) of RCRA, 42 U.S.C. § 6903(27), defines the term "solid waste" to mean "any garbage, refuse . . . and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations . . . ." The releases at the Facility and on adjoining properties, including gasoline, diesel, and ethanol spills, are "solid waste," as defined in Section 1004(27) of RCRA.

37. The discharged petroleum material, including gasoline, diesel or ethanol, at and near the Facility may be a "hazardous waste" as defined in Section 1004(5) of RCRA, 42 U.S.C. § 6903(5), which defines the term "hazardous waste" to mean:

> a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may-
>
> (A) cause or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
>
> (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

38. Section 1004(3) of RCRA, 42 U.S.C. § 6903(3), defines the term "disposal" to mean "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." The spilled, dumped, leaked, or otherwise placed petroleum material in and around soils at the Facility was the result of "disposal," as defined in Section 1004(3) of RCRA, 42 U.S.C. § 6903(3).

39. Section 311(a)(2) of the CWA, 33 U.S.C. §1321(a)(2), defines the term "discharge" to include, but not be limited to, "any spilling, leaking, pumping, pouring, emitting,

emptying or dumping . . . ." The petroleum material in, around and from the Facility and in the ditch leading to the Puerco River is a result of a "discharge," as defined in Section 311(a)(2) of the CWA, 42 U.S.C. § 1321(a)(2).

40. The Puerco River is a "navigable water" as that term is used in the CWA, Sections 311(b) and (c). The discharge from Speedy's is a discharge of a harmful quantity of oil or hazardous substances into or on the navigable waters of the United States or adjoining shorelines, a violation of the CWA § 311(b).

41. The spilled petroleum material in, around and from the Facility is an "oil" as defined in Section 311(a)(1) of the CWA, 33 U.S.C. §1321(a)(1). Pursuant to 40 C.F.R. § 112.2, "oil" includes but is not limited to petroleum and non-petroleum oil. EPA interprets this definition to include crude oil and refined petroleum products. [56 FR 54617; October 22, 1991].

42. The CWA prohibits discharge of a harmful quantity of oil to waters of the United States. EPA has defined "harmful quantity" of discharged oil as one that violates water quality standards, causes a film or sheen on the surface of the water or adjoining shoreline, or causes a sludge or emulsion to be deposited beneath the surface of the water. [40 C.F.R. §110.3]. Inspectors noted an oily sheen on liquid in the drainage ditch at the Facility that leads to the Puerco River.

43. Based on the foregoing Findings of Fact, and pursuant to Section 7003(a) of RCRA, 42 U.S.C. § 6973(a), EPA has hereby determined that Respondents have contributed or are contributing to the past or present handling, storage, treatment, transportation or disposal of solid or hazardous waste at the Facility, and that there may be an imminent and substantial endangerment to health or the environment. The Director of the Superfund Division of EPA, Region IX, has determined that issuance of this Order is necessary to protect public health and the environment.

44. Based on the foregoing Findings of Fact, and pursuant to Section 311(c) and (e) of the CWA, 33 U.S.C. §§ 1321(c) and (e), EPA has hereby determined that there may be an imminent and substantial threat to the public health or welfare of the United States because of an actual or threatened discharge of oil from the Facility into the navigable waters of the United States or adjoining shorelines in such quantities as may be harmful. EPA has also determined that the actions required by this Order are necessary to ensure the removal, mitigation or prevention of a substantial threat of the discharge of oil or a hazardous substance into navigable waters, adjoining shorelines or such discharges that may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States.

45. EPA has further determined that Respondents, as owners and operators, or past owners or operators, of the Facility, are the parties responsible for conducting the actions ordered

herein, which are necessary to ascertain and abate the source, nature and extent of the hazard to human health or the environment.

V. ORDER

Based on the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW, and pursuant to Sections 311(c) and (e) of the CWA, 33 U.S.C. §§ 1321(c) and (e), and Section 7003(a) of RCRA, 42 U.S.C. § 6973(a), it is hereby ORDERED that:

46. Respondents immediately cease all discharges and other unpermitted releases of oil, and solid and/or hazardous wastes from the Facility into the environment, including navigable waters of the United States and adjoining shorelines. Respondents must present to the EPA On Scene Coordinator ("OSC") as identified in Paragraph 70, within three (3) days of the effective date of this order, a proposal for corrective measures to be conducted to comply with this paragraph. The proposal must include, but is not limited to, measures to accomplish all of the following: (1) cease all discharges from the gasoline and diesel service station trenches, and all leaks from all piping, valves, flanges, gaskets and storage, processing and distribution equipment inside or outside of secondary containment areas; (2) empty all improperly stored or inadequately characterized wastes in sumps, trenches, oil/water separators, and waste collection tanks and drums on the Facility; (3) properly characterize the waste, in accordance with 40 C.F.R. Section 265.13; and (4) dispose of the waste in a manner authorized under RCRA. All wastes must be properly manifested and all waste manifests must be provided to EPA. All work necessary to satisfy the corrective measures described must be initiated within five (5) days of EPA approval of the corrective measures.

47. Respondents must submit within ten (10) days of the effective date of this order, a sampling and analysis plan (SAP), subject to review as set forth in Section VIII. Respondents are hereby ordered to implement such proposal within seven (7) calendar days of approval by EPA OSC. This SAP shall be a comprehensive assessment of the Facility and other areas of concern. This SAP shall be specific and include, but not be limited to, the following:

    A. An introduction, scope of SAP, Facility description, legal description of property, description of operations including lists of all oil and chemical storage, and Facility layout;

    B. A plan for the determination of the source, nature and extent of any soil and surface and groundwater contamination in, around and from the Facility;

    C. An assessment which includes, but is not limited to these areas: the drainage ditch all along the southern boundary of the Facility, including outfalls #1, #2, and #3; areas inside and outside of the Main and East Tank Farm berms, including soil areas around

loading/unloading areas and pipelines; all stockpiles of soils in and around the Facility; the area around the tire shop; standing liquid materials in and around the Facility; areas of alleged releases on the Yellowhorse property; any areas of disturbed soil at the Facility and any other areas as directed by EPA;

D. Collection and analysis of soil and water samples for volatile organic compounds (VOCs), semi-volatile organic compounds (SVOCs), RCRA metals, and petroleum hydrocarbons (range C6-C36);

E. Proper hazardous waste determination on the liquids and sludges in any waste tanks and containers, and contaminated-soil piles, at the Facility;

F. The number, location and depth of samples, the parameters of the analyses, quality assurance and quality control (QA/QC), data validation, chain of custody procedures and identification of all laboratories proposed for the analysis;

G. Maps of proposed sampling locations, property boundaries, aboveground and below-ground utilities and structures, and exclusion and decontamination zones;

H. A schedule for implementing the SAP, including transportation and sample analysis time frames; and

I. Samples shall include near surface soils and extend to the full depth necessary to determine the extent of contamination. The SAP must assess potential impact to surface and groundwater.

48. Within thirty (30) days of completion of the approved SAP, Respondents shall submit a Sampling and Assessment Report (SAR) and a Work Plan (WP) to the EPA OSC to address all areas of concern indicated by the sampling implemented in compliance with the approved SAP. The SAR must include, but not be limited to:

A. A summary of all worked conducted in the implementation of the SAP;

B. Maps of all sampling locations, including surface and sub-surface contamination plumes;

C. All laboratory data and quality assurance and quality control information; and

D. Recommendations of further sampling which needs to be conducted as a result of the sampling pursuant to the SAP.

49. The WP shall provide a concise description of the activities to be conducted to address removal, transportation and proper disposal of waste oil, solid and hazardous waste from

the Facility and other areas identified from the implementation of the SAP. This WP must also address the mitigation and/or prevention of any additional oil and hazardous waste discharges into the environment. The WP shall include, but not be limited to:

A. The scope of all proposed cleanup methods to address the contamination found during the SAP implementation;

B. Identification of all cleanup contractors and subcontractors proposed to conduct work in accordance with WP;

C. Measures appropriate for post-removal controls consistent with section 40 C.F.R. § 300.415(l) and OSWER Directive 9360.2-02; and

D. Schedules for implementing and completing all tasks described in the WP.

50. On completion of the work conducted pursuant to the WP required in this Order, and any additional work required pursuant to Section VI of this Order, Respondents shall submit to EPA OSC a final report within forty-five (45) calendar days of work completion which documents all actions conducted in the implementation of the WP. The final report also shall summarize all other actions taken to comply with this Order.

51. Respondents shall submit weekly progress reports to EPA OSC until all actions required by this Order are complete, unless otherwise directed in writing by EPA. These reports shall describe all significant developments during the preceding period, including work performed and any issues encountered; analytical data received during the reporting period; treatment, transportation and/or disposal information; developments anticipated during the next reporting period, including a scheduled of work to be performed; and anticipated issues and resolutions to issues which have been raised in past reports or anticipated in the future. The OSC may require more frequent reports when activities at the site warrant a higher reporting frequency.

52. All documents required to be submitted under this Order shall be mailed to the EPA OSC, EPA Project Coordinator, NNEPA Project Coordinator and ADEQ Project Coordinator, as designated in Section X.

53. Any variance from the approved terms and schedules in the approved work plans, or any monitoring, testing, analysis, reporting or removal conducted by Respondents without an approved work plan may be determined to be unsatisfactory by EPA, and subject Respondents to the potential consequences identified in Section XXII.

VI. ADDITIONAL WORK

54. In addition to the work performed under the work plans described above, EPA may

determine that additional monitoring, testing, analysis, reporting or removal is necessary to ascertain the nature and extent of or abate any hazard to human health and the environment, which may exist because of the presence or release of hazardous wastes or hazardous constituents at or from the Facility. If EPA determines that such additional work is necessary, EPA will notify Respondents in writing and specify the basis for its determination that additional work is necessary. Within three (3) days after the receipt of such determination, Respondents shall have the opportunity to meet or confer with EPA to discuss the additional work. If required by EPA, Respondents shall submit for EPA approval a work plan for the additional work. EPA will specify the scope of such work plan. Such work plan shall be submitted by Respondents within seven (7) days of receipt of EPA's determination that additional work is necessary, or according to an alternative schedule established by EPA. On approval by EPA, Respondents shall implement such work plan.

VII. MINIMUM QUALIFICATIONS FOR PERSONNEL

55. All work performed by the Respondents pursuant to this Order shall be under the direction and supervision of an individual who has demonstrated expertise in oil and solid and hazardous waste site investigation and cleanup. Before any work is performed, Respondents shall submit to EPA, in writing, the name, title, and qualifications of the supervisory personnel and of any contractors or subcontractors to be used in carrying out the terms of this Order. Additionally, Respondents shall ensure that when a license is required, only licensed individuals shall be used to perform any work required by this Order. The qualifications of the persons, contractors, and subcontractors undertaking the work for Respondents shall be subject to EPA review and approval.

56. If EPA disapproves of any individual's or contractor's technical or work-experience qualifications, EPA shall notify the Respondents in writing. After receipt of such notice, the Respondents shall, within five (5) working days of receipt of EPA's written disapproval, notify EPA of the identity and qualifications of the replacement(s). Should EPA disapprove of the proposed replacement(s), the Respondents shall be deemed to have failed to comply with the Order.

VIII. SUBMISSIONS/EPA REVIEW

57. EPA will review all plans, reports, and any other documents required to be submitted under this Order ("submissions"). EPA may: (a) approve the submission; (b) approve the submission with modifications; (c) disapprove the submission and direct Respondents to re-submit the document after incorporating EPA's comments; or (d) disapprove the submission and assume performance of all or any part of the work. As used in this Order, the terms "approval by EPA," "EPA approval," or a similar term means the action described in (a) or (b) of this paragraph.

58. Prior to approval by EPA in writing, no work plan, report, or other submission shall be construed as approved and final. Oral advice, suggestions, or comments given by EPA representatives will not constitute approval, nor shall any oral approval or oral assurance of approval be considered as binding, unless that information is conveyed by the OSC, as described in Section X. Any verbal direction by the OSC will be followed by a letter confirming the exchange.

59. On receipt of a notice of disapproval pursuant to paragraph 57 above, or a request for a modification, Respondents shall, within seven (7) calendar days or such longer time as specified by EPA in its notice of disapproval or request for modification, correct the deficiencies and resubmit the work plan, report, schedule, or other item for approval. Notwithstanding the notice of disapproval, or approval with modifications, Respondents shall proceed, at the direction of EPA, to take any action required by any non-deficient portion of the submission.

60. Within seven (7) calendar days following EPA approval, or approval with modifications of a work plan, Respondents shall implement the approved document, unless otherwise specified by EPA.

61. Respondents shall notify EPA's OSC and NNEPA's Project Coordinator, as identified in Section X, at least forty-eight (48) hours prior to commencement of any field work pursuant to this Order or any work plan approved in accordance with this Order.

62. All work plans, reports, or other submissions required by this Order are, on EPA approval, incorporated into this Order. Any noncompliance with such EPA-approved work plans, reports, specifications, schedules, and attachments shall constitute noncompliance with this Order. Oral advice or approvals given by EPA representatives, other than the OSC, shall not relieve Respondents of their obligation to obtain any formal, written approvals required by this Order.

63. In all instances in which this Order requires written submissions to be submitted to EPA, each submission must be signed by a responsible official with authority to bind the Respondents to the commitment or statement contained in each respective submission. Examples of a responsible official include the president, vice president, secretary of any company that owns or operates the Facility, or any other person authorized by the Respondents as stated above.

64. In all instances in which this Order requires written submissions to EPA, each submission must be accompanied by the following certification by a responsible official:

> I certify that the information contained in and accompanying this submission is true, accurate, and complete. As to those identified portions of this submission for which I cannot personally verify the

truth and accuracy, I certify as the facility official having supervisory responsibility for the person who, acting upon my direct instructions, made the verification, that this information is true, accurate, and complete.

The certification pursuant to this paragraph shall be followed by the name, title and signature of the responsible official.

IX. QUALITY ASSURANCE/QUALITY CONTROL

65. Respondents shall follow EPA guidance for sampling and analysis. Respondents shall develop a Quality Assurance Project Plan ("QAPP") for all sampling and analysis conducted pursuant to this Order. Work plans shall contain quality assurance/quality control ("QA/QC") and chain of custody procedures for all sampling, monitoring, and analytical activities. Any deviations from the QA/QC and chain of custody procedures in approved work plans must be approved by EPA prior to implementation, must be documented (including reasons for the deviations), and must be reported in the applicable report.

66. The contact person(s), name(s), addresses, and telephone numbers of the analytical laboratories that Respondents propose to use must be specified in the applicable work plan(s).

67. All work plans required under this Order shall include data quality objectives for each data collection activity to ensure that data of known and appropriate quality are obtained and that data are sufficient to support their intended use(s).

68. Respondents shall monitor to ensure that high quality data is obtained by their consultant or contract laboratories. Respondents shall ensure that laboratories used by Respondents for analysis perform such analysis according to the latest approved edition of "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods" (SW-846 Third Edition as amended by Update One, July 1992), or other methods deemed satisfactory to EPA. If methods other than EPA methods are to be used, Respondents shall specify and submit all such protocols for EPA approval in the work plan. EPA may reject any data that does not meet the requirements of the approved work plan or EPA analytical methods and may require resampling and additional analysis.

69. Respondents shall ensure that laboratories they use for analyses participate in a QA/QC program equivalent to that which is followed by EPA. EPA may conduct a performance and QA/QC audit of the laboratories chosen by Respondents before, during, or after sample analyses. On request by EPA, Respondents shall have the laboratory perform analyses of samples provided by EPA to demonstrate laboratory performance. If the audit reveals deficiencies in a laboratory's performance or QA/QC, resampling and additional

analysis may be required.

X. ON SCENE COORDINATOR AND PROJECT COORDINATORS

70. EPA hereby designates Janet Yocum, as the primary OSC. Janet Yocum shall have the authorities, duties, and responsibilities vested in the OSC by the National Contingency Plan, 40 C.F.R. Part 300. The OSC's authority includes, but is not limited to, the authority to halt, modify, conduct, or direct any tasks required by this Order. Janet Yocum may be reached at the address below in Paragraph 71.

71. EPA hereby designates as its Project Coordinator:

Sara Greiner
U.S. Environmental Protection Agency
Region IX, SFD-9-2
75 Hawthorne Street
San Francisco, CA 94105
(415) 972-3042

72. NNEPA hereby designates as its Project Coordinator:

Stephen B. Etsitty
Executive Director
Navajo Nation Environmental Protection Agency
P.O. Box 339
Window Rock, Arizona 86515
(928) 871-7690

73. ADEQ hereby designates as its Project Coordinator:

Henry Darwin
Compliance Section Manager
1110 W. Washington Street
Phoenix, Arizona
(602) 771-4153

74. Within ten (10) calendar days of Respondents' receipt of this Order, Respondents shall designate a Project Coordinator and submit the designated Project Coordinator's name, address, and telephone number in writing to EPA. EPA retains the right to disapprove of a designated Project Coordinator. If EPA disapproves of the designated Project Coordinator, Respondents shall retain a different Project Coordinator and shall notify EPA of that person's name, address, telephone number, and qualifications within seven (7) days following EPA's disapproval.

75. The EPA OSC will oversee the implementation of this Order. Each Project Coordinator shall, on behalf of the party that designated the Project Coordinator, function as the principal project contact. Receipt by Respondents' Project Coordinator(s) of any notice or communication from EPA relating to this Order shall constitute receipt by Respondents.

76. Respondents shall provide EPA with a written notice of any change in a designated Project Coordinator. Such notice shall be provided at least seven (7) calendar days prior to the change in Project Coordinator.

XI. SAMPLING AND DATA/DOCUMENT AVAILABILITY

77. At the request of EPA, Respondents shall provide or allow EPA or its authorized representatives to take split or duplicate samples of all samples collected by Respondents pursuant to this Order.

78. On request, Respondents shall submit to EPA the results of all sampling or tests or other data generated by, or on behalf of, the Respondents in implementing the requirements of this Order.

XII. ON-SITE AND OFF-SITE ACCESS

79. Respondents shall provide access at all reasonable times to the Facility and to all records and documentation relating to conditions at the Facility and the activities conducted pursuant to this Order to EPA, and its employees, contractors, agents, consultants, and representatives, and to NNEPA. These individuals shall be permitted to move freely at the Facility in order to conduct activities that EPA determines to be necessary.

80. To the extent that activities required by this Order, or by any approved work plans prepared pursuant hereto, must be done on property not owned or controlled by Respondents, Respondents will use their best efforts to obtain site access agreements in a timely manner from the present owners of such property. Best efforts, as used in this paragraph, shall include the payment of reasonable compensation in consideration of granting access. Respondents shall ensure that EPA's OSC and Project Coordinator have a copy of any access agreements.

81. Nothing in this Order limits or otherwise affects EPA's right of access and entry pursuant to applicable laws, including RCRA, the CWA, and the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA").

XIII. RECORD PRESERVATION

82. Respondents shall retain, during the pendency of this Order and for a minimum of five (5)

years after its termination, a copy of all data, records, and documents now in their possession or control, or in the possession or control of their contractors, subcontractors, or representatives, or which come into the possession or control of Respondents, its contractors, subcontractors, or representatives, which relate in any way to this Order. Respondents shall notify EPA, in writing, at least ninety (90) days in advance of the destruction of any such records, and shall provide EPA with the opportunity to take possession of any such records. Such written notification shall reference the caption, docket number and date of issuance of this Order and shall be issued to the EPA and NNEPA Project Coordinators, as listed in Section X.

Additionally, Respondents shall provide data, records and documents retained under this section at any time before the expiration of the five (5) year period at the written request of EPA.

XIV. INFORMATION SUBMITTED TO EPA

83. Any information that Respondents are required to provide or maintain pursuant to this Order is not subject to the Paperwork Reduction Act of 1995, 44 U.S.C. § 3501 et seq.

84. Respondents may assert a business confidentiality claim in the manner described in 40 C.F.R. § 2.203(b) covering all or part of any information submitted to EPA pursuant to this Order. In accordance with 40 C.F.R. § 2.204(e)(4), any assertion of confidentiality shall be adequately substantiated by Respondents when the assertion is made. Information submitted for which Respondents have asserted a claim of confidentiality as specified above shall be disclosed by EPA only to the extent and manner permitted by 40 C.F.R. Part 2, Subpart B. If no such confidentiality claim accompanies the information when it is submitted to EPA, the information may be made available to the public by EPA without further notice to the Respondents. Respondents shall not assert any confidentiality claim with respect to any physical, sampling, monitoring, or analytical data.

XV. RESERVATION OF RIGHTS

85. EPA expressly reserves all rights and defenses that it may have, including the right both to disapprove of work performed by Respondents pursuant to this Order, and to order that Respondents perform additional tasks.

86. EPA expressly reserves all of its statutory and regulatory powers, authorities, rights, remedies, both legal and equitable, including any which may pertain to Respondents' failure to comply with any of the requirements of this Order, including, without limitation, the right to commence a civil action against Respondents seeking an order requiring compliance with this Order or the assessment of penalties under Section 7003(b) of RCRA, 42 U.S.C. § 6973(b), and Section 311(b) of the CWA, 33 U.S.C. §

1321(b). This Order shall not be construed as a covenant not to sue, or as a release, waiver or limitation of any rights, remedies, defenses, powers or authorities, civil or criminal, which EPA has under RCRA, CERCLA, the CWA, the Safe Drinking Water Act, the Clean Air Act, or any other statutory, regulatory, or common law enforcement authority of the United States.

XVI. OTHER APPLICABLE LAWS

87. All actions required to be taken pursuant to this Order shall be undertaken in accordance with the requirements of all applicable federal, tribal, state, and local laws, regulations, permits, and ordinances.

88. Compliance by Respondents with the terms of this Order shall not relieve Respondents of their obligation to comply with RCRA, the CWA or any other applicable federal, tribal, state, or local laws, regulations, permits, and ordinances.

89. This Order is not and shall not be interpreted to be a permit, or as a ruling or a determination of any issue related to a permit under federal, tribal, state or local law. This Order shall not in any way affect Respondents' obligation, if any, to secure such a permit, nor shall this Order be interpreted in any way to affect or waive any of the conditions or requirements that may be imposed by such permit, nor of Respondents' right to appeal any conditions of such permit. Respondents shall obtain or cause their representatives to obtain all permits and approvals necessary under such laws and regulations.

XVII. OTHER CLAIMS

90. Nothing in this Order shall constitute or be construed as a release from any claim, cause of action, demand, or defense in law or equity, against any person, firm, partnership, or corporation 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 solid wastes, hazardous wastes, hazardous constituents, hazardous substances, oil, pollutants, or contaminants found at, taken to, or migrating from the Facility.

91. By issuance of this Order, the United States and EPA assume no liability for injuries or damages to persons or property resulting from any acts of omissions of Respondents or their agents, contractors, subcontractors or other representatives.

92. Neither the United States nor EPA shall be deemed a party to any contract involving Respondents and relating to activities at the Facility or be liable for any claim or cause of action arising from, or on account of, any act or omission of Respondents, their officers, employees, contractors, receivers, trustees, agents or assigns, in carrying out the activities required by this Order.

XVIII. SUBSEQUENT MODIFICATION OF ORDER

93. This Order may only be modified by written amendment signed by the undersigned EPA Region IX Director of the Superfund Division. Modifications in any schedule adopted pursuant to this Order may be made in writing by EPA.

94. No informal advice, guidance, suggestions, or comments by EPA shall be construed to modify the requirements of this Order. Routine communications exchanged verbally, in person, by telephone or by electronic mail between the parties to facilitate the orderly conduct of work contemplated by this Order shall not alter or waive any rights or obligations of the parties under this Order.

XIX. SEVERABILITY

95. If any provision or authority of this Order, or the application of this Order to any party or circumstances, is held by any judicial or administrative authority to be invalid, the application of such provisions to other Parties or circumstances and the remainder of the Order shall not be affected thereby and shall remain in full force.

XX. TERMINATION AND SATISFACTION

96. Respondents may seek termination of this Order by submitting to EPA a written document that indicates how all requirements of this Order have been or will be addressed, and any associated dates of approval correspondence from EPA. The provisions of this Order shall be deemed satisfied on Respondents' and EPA's execution of an "Acknowledgment of Termination and Agreement for Record Preservation and Reservation of Rights" ("Acknowledgment"). The Acknowledgment shall specify that Respondents have demonstrated to the satisfaction of EPA that the terms of this Order, including any additional tasks determined by EPA to be required pursuant to this Order, have been satisfactorily addressed.

97. The provisions of this Order shall be deemed satisfied on Respondents' receipt of written notice from EPA that Respondents have demonstrated to the satisfaction of EPA that the terms of the Order, including any additional tasks determined by EPA to be required pursuant to this Order, have been satisfactorily addressed. Such notice shall not be unreasonably withheld. This notice shall not, however, terminate Respondents' obligations to comply with any continuing obligations hereunder, including, but not limited to, Section XIII (Record Preservation), Section XV (Reservation of Rights), Section XVI (Other Applicable Laws), and Section XVII (Other Claims).

XXI. COMPLIANCE CONFERENCE AND CONFERENCE REGARDING WORK TO BE PERFORMED

A. COMPLIANCE CONFERENCE

98. Within three (3) days after receipt of this Order, Respondents may request a compliance conference regarding the provisions of this Order. EPA shall deem a failure to request a compliance conference as a waiver of the opportunity to confer prior to the Effective Date. If Respondents desire a compliance conference, the Respondents shall contact Rebecca Sugerman, EPA Attorney Advisor, at the address stated in Paragraph 100.

99. If requested, the compliance conference shall occur prior to the Effective Date, unless the date for the Effective Date and conference is extended by mutual agreement of the Parties, at EPA's Regional Office at 75 Hawthorne Street, San Francisco, California. The compliance conference shall be with the Branch Chief of the Response, Planning and Assessment Branch in the EPA Region IX Superfund Division, or whomever the Branch Chief may designate.

100. At any compliance conference held pursuant to this Section, the Respondents may appear in person, or be represented by an attorney or other representative. The purpose and scope of any such conference held pursuant to this Order shall be limited to issues involving the actions required by this Order and the extent to which Respondents intend to comply with this Order. If a compliance conference is held, Respondents may present any evidence, arguments or comments regarding this Order, its applicability, any factual determinations on which the Order is based, the appropriateness of any action that the Respondents are ordered to take, or any other relevant and material issue. Any such evidence, arguments or comments should be reduced to writing and submitted to EPA within three (3) days following the conference. This conference is not an evidentiary hearing, and does not constitute a proceeding to challenge this Order. It does not give Respondents a right to seek review of this Order, or to seek resolution of potential liability, and EPA will make no official record of the conference. If Respondents do not request a compliance conference, any evidence, arguments or comments may be submitted in writing within three (3) days following the Effective Date of this Order. Any such writing should be directed to the following address:

Rebecca Sugerman
U. S. Environmental Protection Agency
75 Hawthorne Street, ORC-3
San Francisco, CA 94105
(415) 972-3893

B. CONFERENCE REGARDING WORK TO BE PERFORMED

101. Respondents or their representatives may confer in person or by telephone with the EPA OSC regarding the Respondents' proposal pursuant to Section V, Paragraph 46. The opportunity to confer with EPA may be pursued by the Respondents either before or after the proposal is due, but not later than sixty (60) days after the effective date of this Order.

102. The scheduling of a conference with EPA does not relieve Respondents of the obligation to submit the written proposal required under Paragraph 46 of this Order within three (3) days of the date of issuance of this Order, or to implement the proposal once approved, or approved with modifications, by EPA.

XXII. POTENTIAL CONSEQUENCES OF FAILURE TO COMPLY

103. If EPA determines that Respondents are not able to conduct the activities required by this Order in a satisfactory manner, or if actions carried out by Respondents are deemed unsatisfactory, then EPA or its representatives may conduct such response, monitoring, testing and analysis deemed reasonable by EPA to address an actual or threatened discharge of oil into waters of the United States or adjoining shorelines, to address an imminent and substantial endangerment to health or the environment, to ascertain the source, nature and extent of the hazard at the Facility, or to authorize any other person to conduct such actions. Respondents may then be ordered to reimburse the United States or its representatives, or other person authorized by EPA, for the costs of such activity Pursuant to Section 3013(d) of RCRA, 42 U.S.C. § 6934(d), or Section 1002 of the Oil Pollution Act, 33 U.S.C. § 2702(a).

104. In the event Respondents fail or refuse to comply with the terms and provisions of this Order, EPA may commence a civil action in accordance with Section 7003(b) of RCRA, 42 U.S.C. § 6973(b), and/or Section 311(b) of the CWA, 33 U.S.C. § 1321(b), to require compliance with such Order and to assess a civil penalty for such failure or refusal. Civil penalties for failure to comply accrue at a rate of up to $32,500 per day of noncompliance.

XXIII. NOTICE OF INTENT TO COMPLY

105. Respondents shall, within two (2) days of the Effective Date of this Order, provide notice to EPA of its irrevocable intent to comply with this Order. Verbal notice shall be given to EPA's Project Coordinator, Sara Greiner at (415) 972-3042, and followed by written confirmation within two (2) days, faxed to Ms. Greiner at (415) 947-3518. EPA shall deem a failure to respond or a failure to agree to comply with this Order as a refusal to comply with this Order.

XXIV. EFFECTIVE DATE

106. This Order shall be effective ten (10) days after the date on which it is signed by the Director of the Superfund Division.

XXV. NOTICE TO AFFECTED STATE

107. By copy of this Order, EPA has provided notice to the Navajo Nation, the state of Arizona, and the state of New Mexico.

IT IS SO ORDERED
BY U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION IX

By: Daniel A. Meer 14 April 2004
for Keith Takata, Director Date
Superfund Division
U.S. Environmental Protection Agency
Region IX

EPA Contacts:

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