UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TEXAS 75202-2733

SENT VIA FEDERAL EXPRESS OVERNIGHT MAIL AND VIA
CERTIFIED MAIL NUMBER:_____
RETURN RECEIPT REQUESTED
URGENT LEGAL MATTER; PROMPT REPLY REQUESTED

Mr. Bruce D. Ray
Associate General Counsel
Johns Manville
717 17th Street
Denver, CO 80202

Re: Westbank Asbestos Site, Jefferson and Orleans Parishes, LA; Site ID # 06Y6 LAD 985170711; Notice of CERCLA Liability and Initial Notification by the United States to Johns Manville and Johns Manville Corporation under Manville Corporation et al. v. United States, No. 91 Civ. 6683 (RWS) (S.D.N.Y., Oct. 28, 1994) (Stipulation and Order of Settlement and Dismissal)

Dear Mr. Ray:

This is to notify Johns Manville (f/k/a Johns Manville International, Inc., Schuller International, Inc., and Manville Sales Corporation) and Johns Manville Corporation (f/k/a Schuller Corporation and Manville Corporation) that they are liable for response costs incurred by the U.S. Environmental Protection Agency ("EPA") at the Westbank Asbestos Site (the "Site") located in Jefferson Parish and Orleans Parish, Louisiana, and to demand payment for such costs. This is also provides Johns Manville and Johns Manville Corporation with an Initial Notification under the terms of the above-referenced Order (the "Global Settlement Order" or "GSO").

I. NOTICE THAT JOHNS MANVILLE IS LIABLE UNDER CERCLA SECTION 107(A)

Asbestos waste from a plant that operated in Jefferson Parish from about 1929 to about 1975 was disposed of as fill or paving material throughout Jefferson Parish and parts of Orleans Parish. Asbestos is a dangerous hazardous substance that causes deadly lung disease. To address the contamination, EPA undertook an extensive response action at the Site under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675. Using its removal authority under CERCLA Section 104, 42 U.S.C. § 9604, EPA cleaned up 1,365 separate properties–mostly residential yards, removing 52,210 cubic yards of asbestos contaminated waste and soil. The EPA incurred response costs

90098796

consistent with the National Contingency Plan, 40 CFR Part 300.

Under CERCLA, four types of persons[1] are liable for EPA's response costs. Specifically, Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), provides in pertinent part:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section -
>
> (1) the owner and operator of a vessel or a facility[2],
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for -
>
> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
>
> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release. . . .

The EPA has information which shows that Johns Manville and Johns Manville Corporation, their predecessors, or companies for whose actions or omissions Johns Manville and Johns Manville Corporation are liable under the Global Settlement Order (hereinafter these various companies are collectively referred to as "JM") arranged with a transporter for transport for disposal of hazardous substances owned or possessed by JM at a facility within the meaning of CERCLA Section 107(a)(3). In this matter, the hazardous substance in question was asbestos waste from the JM plant described in the first paragraph of section I of this letter. The facility

---

[1]"Persons" is a defined term under CERCLA and includes corporations. 42 U.S.C. § 9601.

[2]The term "facility" means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel. 42 U.S.C. § 9601(9).

that was selected for disposal of the asbestos waste was the Site which is generally described on the enclosed map (Exhibit 1). Accordingly, Johns Manville and Johns Manville Corporation are jointly and severally liable to the United States for EPA's response costs.

II. DEMAND FOR PAYMENT **[Please note: This demand for payment will be withdrawn if Johns Manville or Johns Manville Corporation settles with the United States under the GSO or otherwise.]**

The EPA has paid for response actions for the Site. The EPA's costs are consistent with CERCLA and the National Contingency Plan (NCP). The NCP, 40 CFR Part 300, includes the EPA's procedures for preparing and responding to releases of hazardous substances. The EPA's costs include without limitation cleanup costs, investigative research and data gathering, site inspections, and enforcement costs. As of April 30, 2002, the EPA had paid $27,415,396.87 related to the Site. As explained in section I of this letter, under CERCLA Section 107, 42 U.S.C. § 9607, liable parties must pay the United States' costs including without limitation EPA's costs. As explained above in section I, the EPA believes Johns Manville and Johns Manville Corporation are liable parties. Accordingly, the EPA hereby requests that Johns Manville and Johns Manville Corporation pay the EPA $27,415,396.87 to reimburse the EPA for costs it has paid related to the Site.

Please make your payment of $27,415,396.87 in the form of a certified or cashier's check payable to "EPA Hazardous Substance Superfund." Please include these references on the check: Westbank Asbestos Site, and Site Identification No. "06Y6." Send the check, with your name and address, to:

EPA Hazardous Substance Superfund
Westbank Asbestos Site 06Y6
P.O. Box 360582M
Pittsburgh, Pennsylvania 15251
ATTN: Superfund Collections Officer

A copy of your check and transmittal letter should be sent simultaneously to Cost Recovery Section Chief at the address indicated below. Your adherence to these procedures will ensure proper credit when payment is received. In the event that you file for protection in the Bankruptcy Court, EPA reserves its right to file a proof of claim or application for reimbursement of Administrative Expense against the bankrupt estate.

Chief Cost Recovery Section
Superfund Cost Recovery Section (6SF-AC)
United States Environmental Protection Agency Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733
Telephone: (214) 655-2712
Fax: (214) 655-6660

THE UNITED STATES' INITIAL NOTIFICATION UNDER THE GSO

A. The United States has made a good faith determination that the Manville Share for the Westbank Asbestos Site is 100 percent. The United States has also determined that the Manville Response Cost Liability is $15,078,468.27

This is to provide Johns Manville and Johns Manville Corporation with an Initial Notification including an initial determination by the United States of the Manville Share for the Westbank Asbestos Site which is an Additional Site, within the meaning of paragraph 57(c) of the Global Settlement Order. Pursuant to GSO paragraph 57(c), the United States has made a good faith determination, based on an evaluation performed by EPA (EPA's evaluation is described in Exhibit 2), that Johns Manville and Johns Manville Corporation are liable for the United States costs (including without limitation EPA's costs) related to the Site. Moreover, the United States in good faith believes that it has sufficient information to support a determination of the Manville Share within the meaning of GSO paragraph 57(c)(ii). Based on the EPA evaluation (Exhibit 2), the United States has made a good faith determination that the Manville Share for the Westbank Asbestos Site is 100 percent.

Under the Global Settlement Agreement, the dollar amount equal to the product of the Manville Share and the total amount of Response Costs for an Additional Site is referred to as the Manville Response Cost Liability. GSO ¶ 56. For the Westbank Asbestos Site, as explained in the preceding paragraph, the Manville Share is 100 percent. The total Response Costs for the Site are $27,415,396.87. Accordingly, the Manville Response Cost Liability is $15,078,468.27.

B. Pursuant to the terms of the Global Settlement Order, if Johns Manville and Johns Manville Corporation concur in the United States determination of the Manville Share, they must make their first payment 120 days after the date Johns Manville and Johns Manville Corporation receive this letter.

Under the Global Settlement Order, if Johns Manville and Johns Manville Corporation concur in the initial determination of the Manville Share for the Site determined by the United States in this Initial Notification, then the GSO provides that the Concluding Date is 60 days from the date Johns Manville and Johns Manville Corporation receives this letter. *See* GSO ¶ 57(d). Under GSO paragraph 66, Johns Manville and Johns Manville Corporation must make their first payment of the Manville Response Cost Liability within 30 days after Johns Manville and Johns Manville Corporation receive an itemized statement as described in GSO paragraph

64, provided, however, that in no event shall any payment be required prior to the date 60 days after the Concluding Date. Since EPA has included an itemized statement of its costs for the Site in this letter (*see* Exhibit 3), if Johns Manville and Johns Manville Corporation concur in the United States' determination of the Manville Share for the Site, then Johns Manville and Johns Manville Corporation must make their first payment of the Manville Response Cost Liability

within 120 days of the date that you receive this letter.

If Johns Manville and Johns Manville Corporation concur in the United States' determination of the Manville Share, they must make their payment to the United States in the form of a certified or cashier's check payable to "EPA Hazardous Substance Superfund." Please include these references on the check: Westbank Asbestos Site, and Site Identification No. "06Y6." Send the check, with your name and address, to:

EPA Hazardous Substance Superfund
Westbank Asbestos Site 06Y6
P.O. Box 360582M
Pittsburgh, Pennsylvania 15251
ATTN: Superfund Collections Officer

A copy of the check and transmittal letter should be sent simultaneously to:

Chief Cost Recovery Section (6SF-AC)
U.S. Environmental Protection Agency Region 6
1445 Ross Avenue
Dallas, TX 75202-2733

If you have any questions, please call EPA attorney Mr. James E. Costello at (214) 665-8045.

Sincerely yours,

Myron O. Knudson, P.E.
Director
Superfund Division

Enclosures

cc: Mr. Lowell Gordon Harriss
Davis Polk & Hardwell
450 Lexington Avenue
New York, NY 10017

Mr. Michael Donnellan
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Enforcement Section
Room 13063
1425 New York Ave., N.W.
Washington, DC 20005

EXHIBITS

Exhibit 1	Map generally describing the Westbank Asbestos Site located in Jefferson Parish and Orleans Parish, Louisiana.
Exhibit 2	Westbank Asbestos Site, Jefferson Parish and Orleans Parish, LA; Evaluation of Johns Manville and Johns Manville Corporation liability under the Global Settlement Order
Exhibit 3	Webb, Regina "Cost Documentation Westbank Asbestos," LA (06-Y6) (December 10, 2002) - Itemized Cost Statement describing in detail Response Costs actually incurred by the United States at the Westbank Asbestos Site, Jefferson and Orleans Parish, Louisiana; includes The Agency for Toxic Substances and Disease Registry Cost Summary for the period October 1, 1980, through September 30, 2002, for Westbank Asbestos (November 22, 2002)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TEXAS 75202-2733

MEMORANDUM

SUBJECT: Westbank Asbestos Site, Jefferson Parish and Orleans Parish, LA; Evaluation of Johns Manville and Johns Manville Corporation liability under the Global Settlement Order

FROM: James E. Costello
Group Practice Leader (6RC-S)

THROUGH: Buddy Parr, Chief
Cost Recovery Section (6SF-AC)

TO: Myron O. Knudson, Director
Superfund Division (6SF)

The United States' has settled its Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") claims (including the U.S. Environmental Protection Agency's ("EPA") claim) against Johns Manville and Johns Manville Corporation in a settlement document styled Manville Corporation et al. v. United States, No. 91 Civ. 6683 (RWS) (S.D.N.Y., Oct. 28, 1994) (Stipulation and Order of Settlement and Dismissal) (hereinafter the "Global Settlement Order" or GSO). This memorandum provides, according to the terms of the Global Settlement Order, an evaluation of the Johns Manville and Johns Manville Corporation[3] share of CERCLA liability at the Westbank Asbestos Site (the "Site").

I. Global Settlement Order provisions

Under the Global Settlement Order, the percent of the total Site costs for which Johns Manville and Johns Manville Corporation are liable is known as the Manville Share.[4] The Manville Share is to be determined by the Untied States based on
the factors described in Section 122(e)(3) of CERCLA, including volume,

[3]Johns Manville (f/k/a Johns Manville International, Inc., Schuller International, Inc., and Manville Sales Corporation) and Johns Manville Corporation (f/k/a Schuller Corporation and Manville Corporation) are the same companies that entered into the Global Settlement Order.

[4]Under the Global Settlement Agreement, the Manville Share is defined as the percentage representing the Manville (*i.e.*, Johns Manville and Johns Manville Corporation) share of the total amount of Response Costs relating to an Additional Site (Westbank Asbestos Site is an Additional Site).

toxicity, mobility, strength of evidence and aggravating factors, and in any further regulation or guidance documents or directives promulgated or established thereunder or under any other provision of CERCLA or RCRA, and based on all relevant available information.

See GSO ¶ 58. Accordingly, this memorandum uses these GSO provisions including without limitations the Section 122(e)(3) factors to determine the Manville Share.

A. EPA has developed guidelines for interpreting the Section 122(e)(3) factors

Section 122(e)(3) of CERCLA was added by the Superfund Amendments and Reauthorization Act of 1986 (SARA). It requires the EPA to develop guidelines for preparing nonbinding allocations of responsibility (NBARs). 52 Fed. Reg. 19919 (May 28, 1987) (Exhibit A). In developing the guidelines, SARA provides that the following factors may be considered: volume, toxicity, mobility, strength of evidence, ability to pay, litigative risks, public interest considerations, precedential value, and inequities and aggravating factors. In 1987, EPA announced that its Section 122(e)(3) guidelines were in effect. *See* Interim Guidelines for Preparing Nonbinding Preliminary Allocations of Responsibility, OSWER Directive #9839.1 (May 28, 1997); 52 Fed. Reg. 19919 (hereinafter the Guidelines) (Exhibit A; all Exhibits are attached).

B. Under the GSO it is appropriate to apply the Guidelines to the circumstances at the Site in order to determine the Manville share.

The Guidelines are a "guidance document or directive" within the meaning of paragraph 58 of the Global Settlement Order. *See* GSO at ¶ 58. Moreover, the Guidelines interpret the provisions of CERCLA Section 122(e)(3) which is explicitly mentioned in the Global Settlement Order. *See Id.* Consequently, it is appropriate to use the Guidelines as a basis for determining the Manville Share.

II. Application of the Guidelines to the Westbank Asbestos Site

A. Step 1:Allocate 100 percent of the responsibility among generators, based on the volume each contributed.

Under the Guidelines "the first step . . . is to allocate 100 percent of responsibility among generators, based on the volume each contributed." 52 Fed. Reg. 19920 (Exhibit A). Under this step, "any waste that is attributable to unknown parties is allocated to known parties in proportion to their volume." *Id.*

The EPA has information, including information provided by Johns Manville in its response to our information request issued pursuant to CERCLA Section 104(e), 42 U.S.C. § 9604(e), that shows that Johns Manville and Johns Manville Corporation, their predecessors, or companies for whose actions or omissions Johns Manville and Johns Manville Corporation are liable under the Global Settlement Order (hereinafter collectively "JM") arranged with a

transporter for transport for disposal of hazardous substances owned or possessed by JM at a facility within the meaning CERCLA Section 107(a)(3).[5] Accordingly, Johns Manville and Johns Manville Corporation are considered to be generators. Since no other generators have been identified, 100 percent of the responsibility is attributable to Johns Manville and Johns Manville Corporation under this step.

B. Step 2: The second step in the allocation phase of the NBAR process involves adjustments based on consideration of the settlement criteria. Any percentage allocated to a defunct or impecunious party should be reallocated to a viable party. Where appropriate, credit may be given for any PRP contributions to removal activities at the site.

According to the Guidelines, the second step in the allocation process involves

> adjustments based on consideration of the settlement criteria [described in the EPA's Interim CERCLA Settlement Policy, 50 Fed. Reg. 5034, 5037-5038 (February 5, 1985)(Exhibit B)]. Any percentage allocated to a defunct or impecunious party should be reallocated. Where appropriate, credit may be given for any PRP contributions to RI/FS and/or removal activities at the site. In addition, percentages of responsibility should be allocated to financially viable owners, operators and transporters. How much to allocate to such parties is a case-specific decision based upon consideration of the settlement criteria.

---

[5] In its September 19, 2002, response, Johns Manville states:

> Upon information and belief, Mr. Joe Rotolo had an agreement with the Johns Manville Marrero plant to haul away plant waste to the Rotolo & DiMarco Landfill, which was located at South Terminal and Garden Road in Marrero. In addition, Mr. Rotolo hauled some Marrero plant waste to the "Johns-Manville landfill"or "Johns Manville Dump," which was apparently located two miles from the Marrero plant. The documents are unclear as to whether the Rotolo & DiMarco Landfill and the Johns Manville Landfill were the same or different landfills. This waste included, without limitation, the asbestos cement product manufacturing waste that was used, inter alia, for paving of area driveways and Parish areas.
>
> It was apparently well known in the Westbank area that if a person desired some of these waste materials, that person would call Mr. Rotolo. Mr. Rotolo would then pick up the waste from the Marrero plant [and] deliver it to the requestor instead of taking it to a landfill. In addition, it is likely that persons also obtained these materials directly from the disposal and fill sites used by Mr. Rotolo and the Parish. Johns Manville had a recurring problem of persons retrieving from the landfill for sale certain off-spec product that had been disposed of in the landfill. . .
>
> Upon information and belief, Johns Manville also made these materials available for pick up [*sic*] by the Parish. . . [I]t was apparently a normal practice to make these materials available for use by the Parish as fill material around the Westbank area. . . .

Letter from Mr. Bruce Ray of Johns Manville to EPA (September 19, 2002) (Exhibit C) at p. 9-10.

52 Fed. Reg. 19920 (Exhibit B). Under the Guidelines 100 percent of the response costs are to be allocated among responsible parties. *See* 52 Fed. Reg. 19919 (Exhibit A).

The Interim CERCLA Settlement Policy provides that the "objective of negotiations is to collect 100 percent of cleanup costs or complete cleanup from responsible parties. The Agency recognizes that, in narrowly limited circumstances, exceptions to this goal may be appropriate, and has established [ten] criteria for determining where such exceptions are allowed." 50 Fed. Reg. 5035 (Exhibit B). As provided in the Guidelines, the ten settlement criteria of EPA's Interim CERCLA Settlement Policy are applied to the case at hand in the following enumerated sections of this memorandum.

1. <u>Volume of Wastes Contributed to Site by Each PRP</u>

The Interim CERCLA Settlement Policy provides that information concerning the volume of wastes contributed to the site by each potentially responsible party (PRP) should be collected, if available, and evaluated in each case. In the case at hand, approximately 52,210 cubic yards of asbestos contaminated waste and soil were excavated and disposed of. Martin, John, "POLREP #10, Final" (July 31, 2000) (Exhibit D). It should be noted that the Interim CERCLA Settlement Policy makes provisions for volumes of waste that cannot be attributed to any party, or can be attributed to a party that is unable to provide funds. Specifically, the Interim CERCLA Settlement Policy provides that

> to achieve the Agency's goal of obtaining 100 percent of cleanup or the cost of cleanup, it will be necessary in many cases to require a settlement contribution greater than the percentage of wastes contributed by each PRP to the site.

50 Fed. Reg. 5037. In the paragraphs which follow, the amount of waste contributed to the Site by various parties is analyzed.

a. <u>JM Companies</u>

The EPA has information which shows that Johns Manville and Johns Manville Corporation, their predecessors, or companies for whose actions or omissions Johns Manville and Johns Manville Corporation are liable under the Global Settlement Order (hereinafter collectively "JM") arranged with a transporter for transport for disposal of hazardous substances owned or possessed by JM, and that those hazardous substances, namely asbestos contaminated wastes, were disposed of on the Site. *See infra* note 5. The EPA has not found any information that would lead it to believe that any other company produced any of the asbestos waste disposed of at the Site.[6] In short, 100 percent of the asbestos generated is attributable to JM.

---

[6]Two other companies that operated in the area, National Gypsum Company and Celotex Corporation (Celotex was later purchased by Knight Industries, LLC) were investigated. National Gypsum Company has accounted for its asbestos waste disposal, and there is no evidence that it contributed to Site contamination. Our investigation of Celotex found that it did not use asbestos at its Marrero plant.

b. Mr. Joe Rotolo

Johns Manville's September 19, 2002, response to EPA's information request identifies Mr. Joe Rotolo as a transporter of the asbestos waste. Johns Manville was unable to determine the whereabouts of Mr. Rotolo. Mr. Rotolo's exploits took place more than 30 years ago, and, since Johns Manville was unable to find him, it appears that his operation is defunct. Since Mr. Rotolo is unable to pay–his operation is defunct, under the Interim CERCLA Settlement Policy, his share would be assigned to Johns Manville and Johns Manville Corporation–the only viable PRPs. This assignment of Mr. Rotolo's share to Johns Manville and Johns Manville Corporation is consistent with the Guidelines which provide that "[a]ny percentage allocated to a defunct or impecunious party should be reallocated" (52 Fed. Reg. 19920) (Exhibit A), the goal of the Guidelines being to produce an allocation of 100 percent of the costs (52 Fed. Reg. 19919) (Exhibit A).

c. Jefferson Parish

A Jefferson Parish employee has said[7] that it is possible that Jefferson Parish may have used some aggregate material, containing asbestos, for some of the driveways along 1st Avenue in Harvey, Louisiana between West Bank Expressway and Patriot Street (he estimated 10 to 20 driveways); however, EPA cleaned up no driveways on this part of 1st Avenue.[8] While it appears, from the Environmental Control Report that Johns Manville provided to EPA, that the Parish may have accepted asbestos waste from Johns Manville, for use as "fill,"[9] no Parish disposal sites have been identified on the Site. In short, although it appears that the Parish may have picked up asbestos waste for use as fill, we have not been able to find any places on the Site where the Parish disposed of this material. Consequently, it does not appear that the Parish contributed any waste to the Site.

d. Homeowners and miscellaneous parties that contributed less than .002 percent each

The Parish School Board owns the Gretna Kindergarten that was cleaned up. Various churches and day cares also own property that was addressed by EPA, and one city park was also cleaned up. Individual homeowners whose properties were addressed could also be considered

---

[7]Letter from Parish President Tim Coulon to Superfund Division Director Mr. Myron O. Knudson, (December 10, 2002) (*The account of the employee's statement is found in the Response from the Department of Drainage which is enclosed with the letter which is a response to EPA's information request).*

[8]A review of the list of residential yards that EPA had cleaned up found that, while EPA did cleanup some yards on 1st Avenue, none of these yards are on 1st Avenue at the locations identified by the Parish employee.

[9]One of the documents attached to Johns Manville's September 19, 2002, response to EPA's information request is an "Environmental Control Report" dated March 1, 1970, regarding the Marrero plant operated by Johns Manville, it says that "Inorganic wastes, containing asbestos, are picked up by Parish trucks and used for fill throughout the Parish. This practice is continuing. . . ."

PRPs. However, the cost of cleaning up each of these properties (*i.e.*, the school, churches, day cares, and residential yards) was small–about $20,000.00 on the average. In fact, less than .002 percent of the total cost of the remedy was spent on each property. Had these property owners been generators or transporters of the contamination, their contributions would have been considered *de micromis* under the Revised Guidance on CERCLA Settlements with De Micromis Waste Contributors (June 3, 1996) (the "*De Micromis* Settlement Guidance"), and under that guidance they would not be pursued. In part, the *De Micromis* Settlement Guidance recognizes that the transaction costs associated with pursuing such small parties are disproportionate to the potential for recovery, and, while the *De Micromis* Settlement Guidance does not apply here, the same reasoning does apply to this case. That is, these are small contributors and it is likely that the cost of pursuing them would be greater than any cost recovery realized.[10] Moreover, the area residents are generally impecunious with a median household income of $24,778.00–much lower than the median income level for Louisiana (*See* "Income Distribution of Westbank Asbestos Superfund Site" (December 19, 2002) (Exhibit E)). Functionally and absolutely, these parties are unable to pay, and, pursuant to the provisions of the Interim CERCLA Settlement Policy, Johns Manville and Johns Manville Corporation would have to pick up this share. As explained above under the analysis of Mr. Rotolo's share (*see infra* Section II(1)(b)), the assignment of the share attributable to the impecunious property owners to Johns Manville and Johns Manville Corporation is consistent with the Guidelines which provide that "[a]ny percentage allocated to a defunct or impecunious party should be reallocated" (52 Fed. Reg. 19920) (Exhibit A), the goal of the Guidelines being to produce an allocation of 100 percent of the costs (52 Fed. Reg. 19919).

2. <u>Nature of the wastes contributed</u>

Under the Interim CERCLA Settlement Policy, "if a waste contributed by one or more of the parties offering a settlement disproportionately increases the costs of cleanup at the site, it may be appropriate for parties contributing such waste to bear a larger percentage of cleanup costs than would be the case by using solely a volumetric basis." 50 Fed. Reg. 5037 (Exhibit B). At the Site, however, the waste is generally homogenous, and there is no reason to make adjustments on this basis.

---

[10]In a July 19, 1999, letter from Johns Manville attorney Mr. Bruce Ray to EPA, he suggests that EPA should follow the cost recovery procedures described in EPA's "Interim Guidance on Maximizing Insurer's Contributions to Responses at Residences Contaminated with Methyl Parathion" (August 1, 1997) (hereinafter the Methyl Parathion Guidance) to recover Site costs. The Methyl Parathion Guidance applies to situations in which there is indoor Methyl Parathion contamination, and it is not applicable to this case. Nonetheless, we did look into the possibility of applying analogous techniques to recover costs at the Site, but our research found that Agency personnel who have applied the techniques described in the Methyl Parathion Guidance have found them to be resource intensive–producing little compared to the amount of resources expended, or unsuccessful all together. In addition, since the Site area is economically depressed (*see* "Income Distribution of Westbank Asbestos Superfund Site" (December 19, 2002) (Exhibit E), and, since, therefore, property owners are less likely to have adequate insurance coverage, it is likely that the Methyl Parathion Guidance cost recovery techniques would be even less successful at the Site. Accordingly, it was decided that these techniques would not be used.

3. Strength of Evidence Tracing the Wastes at the Site to the Settling Parties

As the Interim CERCLA Settlement Policy points out, "the quality and quantity of the Government's evidence connecting PRPs to the wastes at the site obviously affects the settlement value of the Government's case." 50 Fed. Reg. 5034 (Exhibit B). As explained in section 1 above, however, the only viable settling parties are Johns Manville and Johns Manville Corporation. They have admitted that JM asbestos waste was distributed throughout the Site (*see infra* note 5). Accordingly, the evidence tracing the waste at the Site to JM is very strong. No adjustments in the settlement should be made under this factor.

4. Ability of the Settling Parties To Pay

Under the Interim Settlement Policy, accommodations may be made based on a settling party's ability to pay. 50 Fed. Reg. 5037-5038 (Exhibit B). The Global Settlement Order has provisions which enable Johns Manville and Johns Manville Corporation to limit their payments to a maximum of $850,000.00 per year. So the ability of these parties to pay has already been taken into consideration.

5. Litigative Risks in Proceeding to Trial

The Interim CERCLA Settlement Policy provides that litigative risks which might be encountered at trial should be weighed in consideration of any settlement offer. These risks include:

> i) admissibility of the Government's evidence . . . , ii) adequacy of the Government's evidence . . . , and iii) availability of defenses. . . .

50 Fed. Reg. 5038 (Exhibit B).

The Government's case against Johns Manville and Johns Manville Corporation is straightforward. *See infra* section II(A)(1)(a)(1) (JM Companies). There is evidence to support all of the elements of a *prima facie* case. Generally this evidence is in the form of admissions by Johns Manville and Johns Manville Corporation, and Site sampling data. If necessary, it should be relatively easy to gather testimony from on-Site property owners who received asbestos waste that came from JM.

John Manville's July 19, 1999, letter to EPA

Under CERCLA, EPA can recover response costs that are "not inconsistent with the national contingency plan," (42 U.S.C. § 9607(a)) so this subsection of this memorandum weighs part of our litigative risk by analyzing Johns Manville's allegation that EPA's removal action at the Site was inconsistent with the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601 *et seq.*, and with the National Contingency Plan, 40 CFR Part 300. Johns Manville attorney Mr. Bruce Ray made this allegation in the opening

paragraphs and in section I of a July 19, 1999, letter[11] to EPA Region 6 Superfund Division Director Mr. Myron O. Knudson (Exhibit F). Section II of Mr. Ray's letter explains the bases for his allegation, and the following paragraphs (lettered a. through d.) of this memorandum address these bases.

a. **According to Johns Manville, EPA should have contacted Johns Manville, and should have also investigated various parties before EPA undertook the removal at the Site. Johns Manville implies that EPA's failure to take these actions prior to the removal means that it did not comply with Section 300.415(a)(2) of the NCP. However, the purpose of Section 300.415 is to give EPA the enforcement discretion provided by SARA Section 104(a) when it amended CERCLA, and Section 300.415(a)(2) does not mandate the type of actions described by Johns Manville.**

In his July 19, 1999, letter, Mr. Ray says that EPA failed to comply with 40 CFR § 400.415(a)(2), and, according to Mr. Ray, EPA's removal action was, therefore, inconsistent with the NCP. Section 400.415(a)(2) provides that

> [w]here the responsible parties are known, an effort initially shall be made, to the extent practicable, to determine whether they can and will perform the necessary removal action promptly and properly.

To support his contention that EPA's removal action was not consistent with Section 300.425(a)(2) of the NCP, Mr. Ray criticizes EPA's investigation, saying

> [t]here is no evidence that the Region has even attempted to determine whether other responsible parties, public or private, could or would perform the response action.

Mr. Ray is also critical of EPA's attempts to contact Johns Manville, and he goes on to say that

> EPA has also refused to determine if other parties might be the source of or have liability for some of the asbestos containing materials used in these areas.

Mr. Ray gives several examples of parties that EPA should have pursued, according to him. Specifically, Mr. Ray says or implies that EPA should have pursued an unnamed manufacturer of asbestos with a plant in the Site area, an unnamed public entity that obtained asbestos contaminated waste for use in paving public areas, unknown parties who added "fillers" to the asbestos contaminated waste, and some "men with a truck" who sold asbestos contaminated waste door to door in the Westbank area. Mr. Ray also indicates that EPA should pursue the homeowners whose properties were used as disposal sites for the asbestos waste, following the

[11]Mr. Ray wrote the letter (Exhibit F) on behalf of Johns Manville International, Inc. which is now named Johns Manville.

paradigm that EPA developed for dealing with insurers of methyl parathion contaminated homes.

In short, Mr. Ray essentially argues that EPA should have contacted Johns Manville, and should have also investigated various parties before EPA undertook the removal at the Site, and, according to Mr. Ray, EPA's failure to take these actions prior to the removal means that EPA did not comply with Section 300.415(a)(2) of the NCP. However, the purpose of Section 300.415(a)(2) is to give EPA the enforcement discretion provided by the Superfund Amendments and Reauthorization Act of 1986 (SARA) Section 104(a) when it amended CERCLA, and Section 300.415(a)(2) does not mandate the actions described by Johns Manville.

The present NCP is not the first NCP (it is the third). SARA mandated that the previous NCP be revised to reflect the revisions to CERCLA contained in SARA. *See* 53 Fed. Reg. 51394 (December 21, 1988). Among the revisions to the NCP made in response to SARA was the deletion of 40 CFR 300.61(b) which provided the following:

> (b) Section 104(a)(1) of [pre-SARA] CERCLA authorizes removal or remedial action unless is determined that such removal or remedial action will be done properly by the owner or operator of the vessel or facility from which the release or threat of release emanates, or by any other responsible party.

47 Fed. Reg. 31213 (July 16, 1982). Based on SARA's revision to CERCLA Section 104(a)(1)(b), 40 CFR 300.61(b) was deleted to

> clarify that the Federal government is not precluded from conducting a response action, merely because responsible parties have indicated a willingness to take some form of response action.

53 Fed Reg 51407 (December 21, 1988). That is, in writing the present NCP, EPA specifically removed language that required it to work with PRPs if they were willing. This change was based on a statutory change set forth in SARA, and the change is contrary to Mr. Ray's contention that EPA was not consistent with the NCP when it went ahead with its removal action at the Site without further contact with known PRPs and without additional investigation.

When the NCP was revised, Section 300.415(a)(2) was added with language "articulating EPA's commitment to contact *known* PRPs *'to the extent practicable'* in order to *'determine whether they can and will perform the necessary removal action'*" 55 Fed. Reg. 8775 (March 8, 1990) (*emphasis added*). EPA added this language to the NCP in order "to preserve its discretion regarding timing of PRP notification provided in [SARA] to protect its enforcement and response flexibility." *Id.* To recap, 40 CFR § 300.415(a)(2) was not intended as a constraint on EPA, forcing it to undertake enforcement investigations before it could undertake a removal action at a site, it was added to enhance EPA's response and enforcement discretion consistent with SARA. Moreover, section 300.415(a)(2) applies only to *known* PRPs, and there is no requirement that EPA undertake additional investigation. *See* United States v. Odabashian, 1999 U.S. Dist. LEXIS 23203 (W.D. Tenn. May 17, 1999) pp. 23-24.

At the time that EPA's September 11, 1996, action memorandum[12] was signed by the Region 6 Superfund Division Director,[13] the only PRP that EPA had identified (*i.e.*, using the terms of 40 CFR § 300.415(a)(2), the only *known* PRP) was Johns-Manville Corporation [note hyphen], but, as it turned out, that company was defunct at that time.[14] As documented in the Enforcement Attachment (the Enforcement Attachment is part of the 1996 Action Memorandum), the Region 6 Enforcement Officer assigned to the Site was trying to determine

---

[12]Martin, John, "Request for a Time-Critical Removal Action and an Exemption from the $2 Million Statutory Limit at the Westbank Asbestos Site, Marrero, Jefferson Parish, Louisiana" (September 11. 1996) (hereinafter the 1996 Action Memorandum) (Exhibit G). The 1996 Action Memorandum memorializes the EPA Region 6 Superfund Division Director's decision to conduct a removal action at the Site.

[13]The Regional Administrator of Region 6 is responsible for the execution and enforcement of the Superfund program within the boundaries of the Region which include Louisiana. *See* 40 CFR § 1.61. The Regional Administrator delegated CERCLA response action and enforcement authority to the Superfund Division Director through various delegations (*see, e.g.*, R6-14-2-A (October 8, 1996) (Removal Actions Initially Expected to Cost Over $2 million and Continued Removal Actions After Obligations of $2 million (Pursuant to the Emergency Waiver) *superseded by* R6-14-2 (March 21, 2002) (Response); R6-14-14-C (administrative actions through consent orders); and R6-14-6 (August 4, 1995) (Demand Letters).

[14]The Enforcement Attachment to the Action Memorandum for the Westbank Site, Marrero, Jefferson Parish, Louisiana CERCLIS ID# LAD985170711 (August 14, 1996) (hereinafter the Enforcement Attachment), identifies Johns-Manville Corporation as the only PRP, but Johns-Manville Corporation is not the same as Johns Manville or Johns Manville Corporation. In its September 19, 2002, response to EPA's information request, Johns Manville described various corporate entities associated with it and the Site as follows:

> Until 1982, the Johns Manville Marrero Plant [the plant that produced the asbestos waste] was owned and operated by Johns-Manville Products Corporation (note hyphen), which was a subsidiary of Johns-Manville Corporation. As part of the bankruptcy, the assets of the Johns-Manville Corporation operating facilities were transferred to the newly incorporated subsidiaries of the newly incorporated Manville Corporation. One of these subsidiaries was Manville Sales Corporation, which owned and operated the Marrero Plant beginning ca. 1983. In 1992, Manville Sales Corporation and Manville Corporation changed their names to Schuller International, Inc. and Schuller Corporation, repectively. In 1997, Schuller International, Inc., and Schuller Corporation changed their names to Johns Manville International, Inc. and Johns Manville Corporation, respectively (*without* the hyphen). In 2002, Johns Manville International, Inc., changed its name to Johns Manville.
>
> The current Johns Manville (*without* hyphen) and the old Johns-Manville (hyphen) are not the same; rather, they are legally distinct groups of companies separated by time, corporate reorganizations and bankruptcy. The distinction is recognized in the Stipulation and Order of Dismissal and Settlement, which was entered as an order of the Court on October 28, 1994 in Manville Corp. et al. v. United States of America, United States District Court for the Southern District of New Yourk (91 Civ. 6683 [RWS]) (Global Settlement Order), which limits Johns Manville's liability at the Westbank Asbestos Site. Each company that owned and/or operated, the Marrero plant was a debtor in the Johns-Manville bankruptcy. In Re Johns Manville Corporation et al. Debtors, Case Nos. 82 B 11656-11676 (BRL) United States Bankruptcy Court for the Southern District of New York.

Johns Manville Response to US EPA Region 6 CERCLA Section 104(e) Request (September 19, 2002) at pp. 5-6.
.

whether EPA could take enforcement action against Johns-Manville Corporation under the terms of the bankruptcy court order, so no liability notice letter was sent to Johns-Manville Corporation at the time the 1996 Action Memorandum was issued. In essence, to use the terms codified at Section 300.415(a)(2) of the NCP, it was *"not practicable"* for the Superfund Division Director to contact Johns-Manville Corporation at the time he decided to undertake a time-critical[15] removal action at the Site.

Finally, had EPA undertaken any additional investigation, it would have found that, other than Johns Manville and Johns Manville Corporation, there are no other financially viable PRPs at the Site. *See infra.* section II(B)(1)(Volume of Wastes Contributed to Site by Each PRP). Mr. Ray's suggestion that EPA should have followed procedures analogous to those described in the Methyl Parathion Guidance was explored and rejected as inappropriate for the depressed economic conditions at the Site.[16]

To summarize, Mr. Ray's contention that EPA failed to comply with 40 CFR § 400.415(a)(2) is groundless. There is no NCP requirement that EPA undertake any investigation to find additional PRPs, as Mr. Ray implies. Moreover, it was not practicable for the Superfund Division Director to notify the only known PRP, Johns-Manville Corporation, at the time he signed the 1996 Action Memorandum memorializing his decision to take a removal action to address contamination at the Site. Lastly, the Superfund Division Director, who has response and enforcement authority for the Site, did not know of Johns Manville (nor did he know of Johns Manville Corporation [no hyphen]) at the time, and neither did his enforcement staff.

b. EPA properly determined that a time-critical removal action was appropriate in accordance with 40 CFR §§ 300.415(b)(3) and (4), despite Johns Manville's allegations to the contrary.

i. Mr. Ray implies that the pre-Action-Memorandum history of the Site shows that EPA had at least six months planning time, and that an EE/CA was, therefore, according to Mr. Ray, warranted under 40 CFR § 300.415(b)(4). However, under the regulations EPA determines whether there is enough planning time for an EE/CA at the time the Action Memorandum is issued, not before, so Mr. Ray's implication is wrong.

[15] *See infra* section II(B)(5)(b)(i).

[16] *See infra* note 10; *and see* Exhibit E.

In his July 19, 1999, letter, Mr. Ray says that "[t]he [September 21, 1996] Action Memorandum[17] makes it clear that EPA had ample time before initiating the removal action to conduct an engineering evaluation/cost evaluation [*sic*[18]], and failed to do so." Mr. Ray goes on to describe various events leading up to EPA's decision, memorialized in the 1996 Action Memorandum, beginning with evaluations of the Site that EPA and the Louisiana Department of Environmental Quality (LDEQ) conducted in 1990, and including a Site inspection in 1994 and EPA's 1995 decision that the Site did not qualify as a candidate for the National Priority List (NPL), 40 CFR Part 300, Appendix B. Mr. Ray concludes his pre-Action-Memorandum history by saying that

> "[t]he Action Memorandum was apparently prepared in August 1996, and approved in September 1996. The actual removal began shortly after approval."

While Mr. Ray never directly says what this pre-Action-Memorandum history means, his implication is that EPA had ample time to conduct an engineering evaluation/cost analysis (EE/CA) prior to issuing the Action Memorandum, and that EPA was, therefore, required to do so under the terms of 40 CFR 300.415(b)(4),[19] according to Mr. Ray.

Mr. Ray's implication is off the mark. As explained by EPA's Environmental Appeals Board (EAB),

> . . . the regulations contemplate that once the Region has determined that a removal action is "appropriate," one of the additional "necessary determinations" it must then make is the determination whether a six-month planning period is available before initiation of on-site activities within which to conduct an EE/CA and hold a public comment period. *The "planning period" referred to in Section 300.415(b)(4) therefore begins with*

---

[17]Martin, John, "Request for a Time-Critical Removal Action and an Exemption from the $2 Million Statutory Limit at the Westbank Asbestos Site, Marrero, Jefferson Parish, Louisiana" (September 11. 1996) (hereinafter the 1996 Action Memorandum) (Exhibit G)

[18]Presumably Mr. Ray is referring to an engineering evaluation and cost analysis (EE/CA). *See* 40 CFR § 300.415(b)(4)(i).

[19]40 CFR § 300.415(b)(4) provides that "[w]henever a planning period of at least six months exists before on-site activities must be initiated, and the lead agency determines, based on a site evaluation, that a removal action is appropriate: (i) The lead agency shall conduct an engineering evaluation/cost analysis (EE/CA) of removal alternatives for a site. . . . In this case EPA is the lead agency.

> *the determination that a removal action is appropriate, and ends with the initiation of on-site activities.* Consistent with this reading of the regulation, OSWER Directive # 9318.0-05 (Apr. 13, 1987) states that a "Non-Time-Critical Removal Action" is one that "may be delayed for six months or more following approval of the action memo," and that: *Time-Critical Removal Actions* are actions initiated in response to a release or threat of release that poses a risk to public health or welfare or the environment, such that cleanup or stabilization actions must be initiated within six months following approval of the action memo.

In re: Circle Smelting Site ASARCO Incorporated and Federated Metals Corporation, CERCLA § 106(b) Petition No. 94-22, 1996 EPA App. LEXIS 8; 6 E.A.D. 410 (April 17, 1996) (*emphasis added; citations omitted*) pp. 30-31. The EAB also explains that

> [t]he "action memo" is a memorandum prepared by Regional personnel to support their recommendation for a proposed removal action. When approved by the authorized Regional official, the action memorandum constitutes a determination [within the meaning of 40 CFR §§ 300.415(b)(3) and (4)] that a removal action is appropriate.

In re: Circle Smelting Site at n. 25. Therefore, EPA Region 6 did not make a determination that a removal action was appropriate, within the meaning of 40 CFR §§ 300.415(b)(3) and (4), until it issued the 1996 Action Memorandum which documents its determination that the asbestos release on the Site posed an "imminent and substantial endangerment" and which also documents its determination that the required removal action was "time-critical."[20] *See* In Re:Circle Smelting Site at pp. 35-36. Mr. Ray has not suggested any valid legal basis for us to consider the period before the issuance of the 1996 Action Memorandum as the "planning period" to which the regulations refer. The regulations require the Region to determine whether a "six-month planning period" for an EE/CA exists at the time it determines that a removal action is appropriate, and the time period described in Mr. Ray's pre-Action-Memorandum history preceded the Region's determination that a removal action was appropriate. The fact that the

[20]The terms "non-time critical" and "time critical" do not appear in EPA regulations. The EPA introduced these terms in guidance documents, as a short-hand way of distinguishing between removal actions for which it had determined that a planning period of at least six months exists before on-site activities must be initiated and removal actions for which such a lengthy planning period did not exist. *See In Re:Circle Smelting Site* at p. 27, n. 23.

time period described by Mr. Ray exceeded six months has no bearing on whether the Region should have conducted an EE/CA. *See Id.*

ii. Mr. Ray contends that an unidentified EPA employee said that a removal action was chosen for the Site, instead of a remedial action, because sufficient remedial action funds were not available; however, at the time it was evaluated, the Site did not meet the criteria for placement on the NPL. Only sites placed on the NPL qualify for remedial action. At the time, EPA decided to undertake a time-critical removal, such action was warranted under the regulations.

In his July 19, 1999, letter, Mr. Ray says that

> [a]t the EPA-JM meeting in Dallas on February 13, 1997 JM asked Regional [EPA] officials why this project did not go through the RI/FS remedial action process. Their response, in a moment of candor, was that a removal action was chosen because sufficient remedial action funds were not available while ample removal funds were.

In 1995, when EPA evaluated the Site for possible listing on the NPL, it used the Hazardous Ranking System (HRS), and, based on information available at the time, EPA determined that the Site did not have an HRS score high enough to merit listing. Around the time the 1996 Action Memorandum was issued, EPA may have had enough new information that, had the Site been reevaluated using the HRS, the Site may have ranked high enough for NPL listing. However, due to the deadly risk posed by the asbestos, and due to the immediacy of the exposure, the Superfund Division Director decided that a time-critical removal was warranted. The regulatory factors that the Director considered, and upon which he based his decision are memorialized in the 1996 Action Memorandum. The Administrative Record supports the Director's decision. As documented in the 1996 Action Memorandum, the time-critical removal was perfectly appropriate under those regulatory factors. Funding plays a role in all EPA response action decisions, but, as far as the appropriateness of the Westbank removal action under CERCLA and the NCP is concerned, the funding issue raised by Mr. Ray in his letter is not germane.

iii. Mr. Ray contends that the 1996 Action Memorandum provides no indication that EPA considered any response action alternatives other than the alternative suggested, but this is not the case. In the 1996 Action Memorandum, EPA considered, and rejected, the encapsulation alternative proposed by Johns Manville.

In Mr. Ray's July 19, 1999, letter, he maintains that "[n]otwithstanding Region VI's suggestion to the contrary, the Action Memorandum provides no indication that EPA considered any alternatives other than the one selected." Mr. Ray goes on to say that "[h]ad the Region

spent any time reviewing alternatives . . . EPA could have abated the potential hazard through encapsulation much sooner and at significantly less cost."

Mr. Ray's contention that EPA did not consider other response alternatives is simply mistaken. On page 13 of the 1996 Action Memorandum, under the heading "3. Description of alternative technologies," it says:

> An alternative response action considered was to have the ACM [asbestos containing material] encapsulated to minimize the release of the asbestos. While this alternative could be achieved at an initial cost savings, it would only serve to temporary mitigate the threat of release. After the removal completion, there would be no means to provide maintenance of the encapsulated ACM. Ultimate break-down of the encapsulated material is expected and ACM removal will then be required.

In short, the EPA considered encapsulation, decided that encapsulation was a temporary remedy at best, and rejected it. While EPA's analysis of alternatives in the 1996 Action Memorandum is brief, an analysis of alternatives need not be extensive if time constraints preclude detailed analysis. In re: Circle Smelting Site at p. 27, n. 23. Since this was a time-critical removal, a brief analysis was appropriate.

c. In the 1996 Action Memorandum, EPA properly determined that conditions at the Site constituted an emergency, and that an exemption from the $2 million statutory limit on removal action was warranted under 42 U.S.C. §9604(c)(1)(A) (and under its implementing regulations found at 40 § CFR 300.415(b)(5)), although Johns Manville contends that such an exemption was not warranted.

Under CERCLA, funding for removal actions is generally limited to $2 million, and removal response time is limited to 12 months with certain exceptions. Under CERCLA, when EPA determines that (i) continued response actions are immediately required to prevent, limit, or mitigate an emergency, (ii) there is an immediate risk to public health or welfare or the environment, and (iii) such assistance will not otherwise be provided on a timely basis, funding for a removal action may exceed the $2 million limit and response time may exceed 12 months. 42 U.S.C. § 9604(c)(1)(A). In his letter, Mr. Ray says that

> "EPA exceeded the statutory restrictions on cost and duration of removal actions without adequate justification . . . ," and he says that
>
> "EPA made a feeble attempt to provide justification to exceed the statutory limits on expenditures and duration of removal actions," and finally he says that
>
> "EPA failed to comply with 40 CFR § 300.415(b)(5).[21]"

[21] In his letter, Mr. Ray says that "EPA failed to comply with 40 CFR § 300.415(b)(5)." The regulations

that implement the statutory factors of 42 U.S.C. § 9604(c)(1)(A) are codified at 40 CFR § 300.415(b)(5).

Mr. Ray's letter contains various statements to support his contention that EPA failed to comply with the statutory factors; however, as described in the sections immediately below, EPA's 1996 Action Memorandum justified continuation of the removal action under the statutory factors provided in 42 U.S.C. § 9604(c)(1)(A). Moreover, EPA's administrative record for the removal provides documents that support EPA's justification.

In section V(A) (Emergency Exemption) of the 1996 Action Memorandum, EPA explains how the conditions at the Site meet all three of the "emergency waiver" criteria listed at 42 U.S.C. § 9604(c)(1)(A) (and in 40 CFR § 300.415(b)(5)). The following two subsections of this memorandum (i and ii) show that the explanations found in the 1996 Action Memorandum are supported by the administrative record that EPA established for the removal.[22] That is, EPA's 1996 Action Memorandum and Administrative Record demonstrate that, as provided in 42 U.S.C. § 9604(c)(1)(A) (and in 40 CFR § 300.415(b)(5)), EPA's removal action met the statutory exceptions to the funding and duration limits. Subsection iii, which also follows, addresses the various statements that Mr. Ray has made to support his contention that EPA "failed to comply with 40 CFR § 300.415(b)(5)."

i. First two statutory factors: "(i) continued response actions are immediately required to prevent, limit, or mitigate an emergency, [and] (ii) there is an immediate risk to public health or welfare or the environment." 42 U.S.C. §§ 9604(c)(1)(A)(i) and (ii).

In order for EPA to conduct a removal action that exceeds the funding and duration limits established in CERCLA, it must meet three statutory factors. The first two of these factors are that "(i) continued response actions are immediately required to prevent, limit, or mitigate an emergency, and (ii) there is an immediate risk to public health or welfare or the environment." 42 U.S.C. § 9604(c)(1)(A)(i) and (ii). In the 1996 Action Memorandum, in order to support its determination that conditions at the Site met the first statutory factor EPA said:

> Continued response actions are immediately required to prevent, limit, or mitigate an emergency
>
> The dramatic increase in friability and structural breakdown of ACM [asbestos containing material] [at the Site] coupled with high public accessibility warrants immediate continued response. The [S]ite has not been secured and there remains potential for exposure to persons trafficking the area. That likelihood of fruition of that potential is further increased by the large number of people found in and around the contaminated area. Furthermore, . . . the public's exposure to a known carcinogenic substance will become greater as friability increases and wind and soil contamination becomes more widespread.

[22] Administrative Record, Removal Action, Site Name: Westbank Asbestos, Marrero, Jefferson Parish, Louisiana, Site Number: LAD985170711, Volume 1 of 1 (March 11, 1997) (hereinafter the Administrative Record).

1996 Action Memorandum at p. 9 (Administrative Record at p. 000364). In that same Action Memorandum, EPA discusses the facts supporting its determination that conditions at the Site met the second factor by saying the following:

> There is an immediate risk to public health or welfare or the environment
>
> The [S]ite consists of six-communities located on the bank of the Mississippi River which consists of over 500 areas determined to have asbestos-containing materials. An initial assessment by EPA and LDEQ in early 1990 of the contaminated area revealed that much of the ACM was in tact and maintaining its structural integrity. Since that assessment, the friability of such materials has increased dramatically and thus increased potential for human exposure. Friability is exacerbated by natural as well as mechanical disturbances such as walking pressures, mowing, driving, and recreational activities.
>
> The need for emergency action is further supported by the particular location of the ACM which causes this site to pose substantial and imminent threats to the public health and welfare. More specifically, the asbestos containing materials are located in residential yards and driveways, school playgrounds, around day care centers, and in other areas easily accessed by the public. Children have been seen playing on driveways composed of friable ACM with toys and basketballs. Residents have been seen mowing grass with ACM outcropping in the yard, and dust clouds of ACM are being created by passing automobiles.
>
> This deterioration of the ACM has increased the mobility of such materials, rendering them more of a threat of direct human contact through transfer by wind or direct soil exposure. Therefore, because asbestos is a CERCLA-designated hazardous substance and is found at the Site in quantities and physical form such that it poses a release or threat of release at the Site's numerous locations, there is an immediate risk to public health and welfare, and a corresponding need to abate such risks.

1996 Action Memorandum at p. 9 (Administrative Record at p. 000364).

EPA's position that the asbestos was becoming friable is supported by various Administrative Record documents. For example, as reported in the 1996 Removal Assessment,[23]

> in November 1995, the LDEQ [Louisiana Department of Environmental Quality]

[23]Nanquin, Troy, Removal Assessment - Final Report: Westbank Asbestos, Marrero, Jefferson Parish Louisiana, TDD#: S06-9601-033 (July 30, 1996) (Administrative Record at pp 304-355) (hereinafter the 1996 Removal Assessment) at attachment F (Field Data Entry Sheets).

> conducted an inspection of the WBA site and observed that conditions had deteriorated. The ACM [asbestos contaminated material] appeared to be more friable and had asbestos fibers outcropping from the material. At the time, the LDEQ requested additional assistance from the EPA to re-evaluate the WBA site. Based on the request, the EPA RPB [Response and Prevention Branch] tasked the START [Superfund Technical Assistance and Response Team] contractor to conduct removal assessment activities at the WBA site.

1996 Removal Assessment at Interim Report p. 5 (Administrative Record p. 000308). In addition, in late November 1995, EPA's Technical Assistance Team (TAT) and the LDEQ conducted drive-by assessments of several residential locations to observe and document current conditions of the asbestos. TAT and the LDEQ noted that the condition of the asbestos had deteriorated since the past site visits in 1990.[24] From February 7 through March 1, 1996, START members (including Mr. Troy Nanquin, the author of the 1996 Removal Assessment (*see infra* note 24), undertook Phase I Removal Assessment activities at the Site.[25] The 1996 Removal Assessment's Field Data Entry Sheets, collected during Phase I, document the friability of the asbestos found at the various properties addressed by the response action. These Field Data Entry Sheets show that, while some asbestos found on Site properties remained hard, in general it was becoming or had become friable.[26] In addition, photographs taken as part of the 1996 Removal Assessment provide visual evidence that the asbestos found on residential properties was breaking up, and had become friable or was becoming friable.[27] The

---

[24]*Id. at* Attachment B (Removal Assessment - Interim Report No.2 (June 14, 1996)) at p. 5 (Administrative Record p. 000334) (Note that the 1996 Removal Assessment documents on p. 5 that Mr. Nanquin, the author of the 1996 Removal Assessment, was the TAT member who participated in the drive-by assessments with LDEQ. Note that Mr. Nanquin's name also appears as the inspector on the Field Data Entry Sheets described in note 25. In short, Mr. Nanquin's 1996 Removal Assessment Report is written from first hand experience.)

[25]*Id. at* Attachment B (Removal Assessment - Interim Report No.2 (June 14, 1996)) at p. 6. (Administrative Record p. 000335).

[26]*Id. at* Attachment F (Field Data Entry Sheets) (*see e.g.,* the following Data Entry Sheets which describe the conditions at various residences where asbestos was found (these sheets are attached but addresses have been redacted to protect the privacy of the residents and property owners): F1101 (February 29, 1996)("ACM [asbestos contaminated material] friable and eroding."), F1039 (February 27, 1996) ("ACM being broken up by roots of an oak tree, material very friable"), F1031 (February 27, 1996) ("Some ACM hard and filled with transite chunks, some softer and becoming friable."), F957 (February 27, 1996) ("ACM very friable in both driveway and servitude."), F953 (February 27, 1996) ("ACM becoming friable"), F751 (February 22, 1996) ("ACM is friable, drain near ACM."), F733 (February 22, 1996) ("ACM is friable"), F719 (February 21, 1996) ("ACM very loose on surface."), F617 (February 16, 1996) ("Material is broken up into small chunks and patches."), F615 (February 16, 1996) ("ACM is weathered and appears powdery."), F353 (February 14, 1996) ("Asphalt capsule is deteriorating and reexposing ACM."), F299 (February 13, 1996) ("ACM is very friable and is near a drain."), F137 (February 8, 1996) ("Small child in residence is dragging toy/cart across ACM."), and F123 (February 8, 1996) ("ACM broken up mixed with white gravel.")). (Field Data Entry sheets listed here are attached as Exhibit H to this memorandum.)

[27]*See Id. at* Attachment D (Slides) (slides mentioned in the following parenthetical were converted to digital images and printouts are attached as Exhibit I; addresses are omitted to protect privacy) (*See e.g.,* Roll 4 #27 (February 8, 1996) (Notes at D2 accompanying the slide say: "Note Flaking of Material."), Roll 5 #18 (February 8,

photographs include images of children playing in asbestos, and children's play areas contaminated with friable asbestos.

When EPA inspectors made a finding, during the Removal Assessment that asbestos material found on the Site was "friable," they were referring to a specific standard. As EPA has explained,

> [i]n 1973 when the asbestos NESHAP [National Emission Standards for Hazardous Air Pollutants] rules were first promulgated for the demolition of buildings, EPA's intention was to distinguish between materials that would readily release asbestos fibers when damaged or disturbed and those materials that were unlikely to result in the release of significant amounts of asbestos fibers. To accomplish this, EPA labeled as "friable" those materials that were likely to readily release fibers.

55 Fed. Reg. 48419 (November 20, 1990). So, when the field data entry sheets and photograph captions written by the inspectors that carried out the 1996 Removal Assessment say that the asbestos waste found was friable, what it means is that the material was likely to readily release asbestos fibers.[28]

1996) (Notes at D3 say: "Powdery ACM in servitude at [address], Westwego"), Roll 6 #9 (February 9, 1996) (Notes at D3 say: "Friable ACM at [address]"), Roll 6 #18 (February 12, 1996) (Notes at D3 say: "Friable ACM at [address]."), Roll 6 #12 (February 9, 1996) (Note at D3 says "Children on ACM at [address]– large area of ACM."), Roll 7#9 (February 15, 1996) (Notes at D4 say: "Children playing on ACM [Asbestos Containing Material] at [address],"), Roll 8 #12 (February 22, 1996) (Notes at D4 say: "Friable ACM at [address], Marrero), Roll 8# 27 (February 26, 1996), (Note at D5 says: "ACM at [address] used for basketball court."), Roll 9# 9 (February 27, 1996) ("ACM weathering in walkway at [address]"), Roll 9# 15 (February 28, 1996) (Note at D5 says: " Friable ACM in school yard - Gretna #2 Kindergarten Center"), Roll 9# 30 (Note at D6 says: "Friable ACM in driveway at [address] in Gretna."), and Roll 10 #3 (February 26, 1996) (Note at D6 says "ACM below children's play equipment at [address]").

[28]In order to determine whether the asbestos material found on the Site was friable, the inspectors used a test that has been described by EPA as follows:

> Friable materials, when dry, [can] easily be crumbled, pulverized, or reduced to powder using hand pressure. The term "reduced to powder" is readily understood to mean that the affected material is changed to a dust or powder that can become airborne. "Pulverized" indicates that the resulting material will include dust as well as a large number of small pieces of the original material. The term "crumbled" indicates that the affected material is easily (i.e., using hand pressure) broken into a large number of small pieces. Although dust is likely to be produced as a result of crumbling, it is possible that there are some types of materials that can be crumbled without producing dust. It is also understood that crumbling refers to an action that occurs essentially in one effort and not to repeated attempts to crumble the material.

55 Fed. Reg. 48419 (November 20, 1990).

In addition to being friable, the asbestos at the Site was found in concentrations that were about 20 to 45 times the concentration that EPA has historically considered to be dangerous. In the 1996 Action Memorandum EPA explained that the concentrations of asbestos found on the Site were very high–20 to 30 percent in the asbestos waste, and 35 to 45 percent in the surrounding soils.[29] Historically, EPA has used an action level[30] of 1 percent asbestos in soils to trigger response actions,[31] so the concentrations found at the Site were 20 to 45 times the historic action level.

Moreover, in a health consultation document, the Agency for Toxic Substances and Disease Registry (ATSDR) supported EPA's decision to take a time-critical removal action, saying that

> ATSDR believes that the removal action is warranted based on the friable condition of the [asbestos waste] and the resultant concentration of asbestos fibers in the surrounding soils. The asbestos [at the Site] poses a public health threat to residents who may inhale, or to a lesser extent, ingest asbestos fibers. Children are at an increased risk because they are more likely to play in soil and ingest or inhale fibers. Also there is a concern that the early exposure of children to asbestos would result in longer "residence times" for fibers in their lungs and therefore may increase the risk of cancer over a lifetime. ;

and ATSDR went on to say that it

> [c]oncurs with EPA Region IV that a Time-Critical Removal Action is warranted and necessary at this site to protect public health. . . .

ATSDR Record of Activity - Health Consultation (August 13, 1996) (Administrative Record p. 000373) (Exhibit J).

To summarize, the administrative record gives strong support to EPA's determination that "continued response actions are immediately required to prevent, limit, or mitigate an emergency" (42 U.S.C. §§ 9604(c)(1)(A)(i)) and that "there is an immediate risk to public health

---

[29]1996 Action Memorandum at p. 7 (Administrative Record at p. 000362); and see Letter from Richard K. Harding to Mr. Troy Nanquin (April 27, 1996) at enclosure pp. 1 through 8 (Administrative Record pp. 000319-000326 (shows concentrations of asbestos found in samples taken at the Site)).

[30]EPA uses the term "action level" to mean the contaminant concentration level at which a response action in question will be taken.

[31]*See* Crump, Hans, "Superfund Asbestos Workgroup Activities," OSWER (September 8, 1988) Attachment B, section II(D) (Administrative Record pp. 000156 and 000157; *see also* Shane, Daniel, "Supporting Documentation for Use of 'Action Levels' in Response Action Decision-Making Processes" (July 16, 1986) p. 4 (Administrative Record at p. 000043); *and see* Lewis, William, "Copper Cove Village Asbestos Site, Copperopolis, CA," (July 24, 1986) p. 7 (Administrative Record at p. 000055).

or welfare or the environment" (42 U.S.C. §§ 9604(c)(1)(A)(ii)). The administrative record shows that asbestos was present at the site in concentrations that were 20 to 45 times higher than EPA's historic action levels, that the waste at the site had become friable–releasing dangerous fibers, and that this asbestos waste was located in areas that were frequented by children who are more at risk for asbestos-related disease due to the fact that asbestos has a longer residence time in their lungs. The administrative record shows that the health risk at the Site was recognized not only by EPA, but by ATSDR as well, and that ATSDR supported EPA's determination that a removal action was warranted.

ii. Third statutory factor: "such assistance will not otherwise be provided on a timely basis." 42 U.S.C. § 9604(c)(1)(A)(iii).

To demonstrate that it has met the third statutory factor that EPA must meet in order for EPA to conduct a removal action that exceeds the funding and duration limits established in CERCLA, EPA must determine that assistance will not otherwise be provided on a timely basis. 42 U.S.C. § 9604(c)(1)(A)(iii). The Administrative Record for the Site shows that the Louisiana Department of Environmental Quality (LDEQ), the State agency responsible for environmental response in Louisiana, was unable to perform a timely response action at the Site, and asked for EPA's assistance. Specifically, in a June 6, 1996, letter from LDEQ to EPA, LDEQ said that it was asking for EPA assistance because "existing State resources will not facilitate a timely response action."[32]

iii. In Mr. Ray's July 19, 1999, letter, he makes various statements to support his contention that "EPA failed to comply with 40 CFR § 300.415(b)(5)," but these statements are either unfounded or irrelevant.

In Mr. Ray's July 19, 1999, letter, he says that "EPA had previously concluded that the site was not even a sufficient threat to warrant further action, and then abruptly changed its approach." Mr. Ray's statement implies that there was some sort of impropriety involved in EPA's change of direction at the Site, but this is not true. EPA's 1995 decision to categorize the Site as "No Further Action Planned" or "NFRAP," meaning that EPA decided not to propose the Site for listing on the National Priority List (NPL), was based on a Site Inspection Report that generally found that the "majority of the ACM [asbestos containing material] is contained by cement and other paving materials." *See* Site Inspection Report, Westbank Asbestos, Marrero, Jefferson Parish, Louisiana, EPA CERCLA ID No.: LAD985170711 (March 1995) (hereinafter the "Site Inspection") p. 2-5 (Administrative Record p. 000262); *and see* United States Environmental Protection Agency Superfund Site Strategy Recommendation - Region 06, Site Name: Westbank Asbestos, CERCLIS ID#: LAD985170711 (March 16, 1995) p. 2 (Administrative Record p. 000302). However, on the same page that the Site Inspection makes the finding that the ACM was "contained," it also notes, in the next sentence, that "the ACM

[32]Letter from Mr. Herman Robinson and Mr. Gus Von Bodungen, both of LDEQ, to Mr. Myron Knudson of EPA (June 6, 1996) (Administrative Record p. 000370).

may deteriorate and become friable" (*see* Site Inspection at Administrative Record p. 000262), and that is exactly what the LDEQ, TAT, and START found when they inspected the Site later that year. *See infra* section II(B)(5)(c)(i) pp. 17 to 18; *see also infra* notes 26 and 27 (Field Data Entry Sheets documenting inspections that found friable asbestos in residential areas and day cares, and photographs of friable asbestos). Mr. Ray finds significance in the fact that EPA provides no explanation as to "why the asbestos containing material was suddenly deteriorating so much more rapidly during the period between EPA's March 1995 decision that no further action was necessary and its August 1996 declaration of a 'health emergency.'" He goes on to say that "JM is unaware of any physical process or event that could have caused such an abrupt transformation." What caused the asbestos waste to deteriorate is not relevant, nor is fact that EPA did not explain why the asbestos waste was deteriorating and becoming friable. EPA plainly states that it changed its mind about the dangers at the Site. The administrative record clearly documents the change that EPA made in its estimation of the danger. *See e.g.,* 1996 Action Memorandum pp. 2, 3 and 6 (Administrative Record pp. 000357, 000358, and 000361) (Exhibit G); *and* Removal Assessment - Final Report for Westbank Asbestos, Marrero, Jefferson Parish, Louisiana (July 30, 1996) (hereinafter the Final Removal Assessment Report) pp. 4 and 5 (Administrative Record pp. 000307 and 000308). What is relevant is that an LDEQ inspection, an inspection by the TAT, and an inspection by START each found that the asbestos waste in residential areas and day cares on the Site was friable (*i.e.,* that it could emit dangerous fibers). *See infra* section II(B)(5)(c)(i) pp. 17 to 18. The results of these inspections showing that the asbestos waste on the Site was friable is well documented in Field Data Entry Sheets (*see infra* note 26) and in photographs taken at the Site (*see infra* note 27), and the results of these inspections are summarized and analyzed in the Final Removal Assessment Report (*see e.g.,* Final Removal Assessment Report at Attachment B pp. B-6 through B-10 (Administrative Record pp. 000334 through 000338). Moreover, as explained above, the concentration of asbestos fibers in the soil and in the asbestos waste were 20 percent to 45 percent which is 20 to 45 times the concentration that EPA has historically found to be dangerous at other asbestos cleanup sites (*see infra* section II(B)(5)(c)(i) p. 19; *and see* Letter from Richard K. Harding to Mr. Troy Nanquin (April 27, 1996) at enclosure pp. 1 through 8 (Administrative Record pp. 000319-000326)(shows concentrations of asbestos found in samples taken at the Site)). No matter what EPA had previously decided about the Site, the Administrative Record shows that at the time EPA made its decision, there were high concentrations of dangerous friable asbestos in residential areas, day cares, and children's play areas, and, accordingly, the non-time critical removal was warranted.

iv. <u>In Mr. Ray's July 19, 1999, letter he criticizes certain evidence that EPA includes in the Administrative Record, but he ignores the bigger picture. That is, he ignores the inspections which found the friable asbestos and the high concentration of asbestos on the Site.</u>

In Mr. Ray's July 19, 1999, letter, he says that

> [t]he only empirical data concerning airborne exposure to asbestos (air samples) showed that asbestos was not detectable in the air (12 samples) or detectable at background levels (3 samples), even close to driveways containing asbestos

> materials. The Region [EPA Region 6] commenced a comprehensive air sampling program when the removal action began, apparently concerned that excavating the asbestos containing materials with heavy equipment would lead to fiber release. The Region later cancelled this program after every sample came back with no detectable fiber concentrations.

In addressing Mr. Ray's comment, it is important to note that EPA can exercise its CERCLA removal response authority whenever "any hazardous substance is released or *there is a threat of such a release* into the environment . . . which *may* present an imminent and substantial danger to the public health or welfare." 42 U.S.C. § 9604(a)(1). The disposal of friable asbestos into and onto the surface soil at the Site certainly qualifies as a release into the environment, and the potential for friable asbestos to release fibers into the air is certainly a threat of a release. "Friable" asbestos is the type that is likely to emit fibers (*see infra* section II(B)(5)(c)(i) p. 18); accordingly, EPA has decided that friable asbestos becomes dangerous and should be addressed when soil concentrations exceed 1 percent whether or not any asbestos fibers are detected in air (*see infra* section II(B)(5)(c)(i) p. 19). This makes sense because, once asbestos fibers become airborne, the deadly[33] inhalation exposure pathway is complete. This is not to say that the air pathway at the Site was not complete, while it is true that passive sampling techniques did not reveal alarming concentrations of airborne asbestos, it is likely that more aggressive sampling techniques (*e.g.*, sampling using a leaf blower, or sampling while impacting an asbestos driveway to simulate children at play) could have revealed very high asbestos fiber concentrations in ambient outdoor air near contaminated residences. *See e.g.*, Lewis, William, "Copper Cove Village Asbestos Site, Copperopolis, CA; Report of the asbestos dust mitigation action" (July 24, 1986) p. 28 (Administrative Record p. 000076) (unpaved asbestos contaminated roads were subjected to vehicle traffic to test dust emissions); *and* Crump, Hans "Superfund Asbestos Workgroup Activities" (September 8, 1988) section II(C) (Administrative Record p. 000156) (activity-specific sampling (*i.e.*, conducting air sampling while cars travel through asbestos-contaminated areas) reveals information on actual exposure levels). However, there was no reason to use aggressive sampling techniques, friable asbestos had been found, and friable asbestos poses and imminent and substantial danger[34] to the public health and welfare;

---

[33] All forms of asbestos are hazardous, and all can cause cancer. Toxicological Profile for Asbestos (Update) ATSDR (September 2001) at p. 1 (an earlier version of this Toxicological Profile for Asbestos is included in the Administrative Record at p. 000006). Asbestos workers have increased chances of getting two principal types of cancer: cancer of the lung tissue itself and mesothelioma, a cancer of the thin membrane that surrounds the lung and other internal organs. Lung cancer is usually fatal, while mesothelioma is almost always fatal, often within a few months of diagnosis. *Id.* at p. 6. People are most likely to be exposed to asbestos by breathing in asbestos that are suspended in air. *Id.* at p. 3. At a waste site where asbestos is not properly covered, then the asbestos in dust and wind-blown soil may be higher. *Id.* at p. 8.

[34] The "imminent and substantial endangerment" requirement was discussed by the Environmental Appeals Board in In re: The Sherwin Williams Company, CERCLA § 106(b) Petition No. 94-7 (EAB, Oct. 12, 1995) where the Board said:

> While the phrase "imminent and substantial endangerment" is not specifically defined in CERCLA, the phrase has been scrutinized by the courts. "Endangerment means a threatened or potential harm and does not require proof of actual harm." The "endangerment" need not be an

therefore, it was perfectly appropriate, under CERCLA, for EPA to address this deadly danger with a removal action. 42 U.S.C § 9607(a)(1). It should also be noted, that the inhalation exposure pathway was not EPA's only concern. ATSDR, in its health consultation document said that ingestion of asbestos was also a concern and that "[c]hildren are at an increased risk because they are more likely to play in soil and *ingest* or inhale fibers." ATSDR Record of Activity (August 13, 1996) (Administrative Record p. 000373). The hard non-friable asbestos at the Site was also appropriately addressed under EPA's removal authority because, as documented in the Administrative Record, it was apparent to EPA that, over time, the non-friable asbestos was becoming friable due to the impact of cars, children playing, and so on. *See* 1996 Action Memorandum at p. 3 (Attachment G) (Administrative Record p. 000358).

In short, while the asbestos found in Site air during passive sampling was not excessive, it is likely that aggressive sampling (*e.g.*, sampling that simulates the impact of children at play or residents doing yard work) would have found dangerous airborne concentrations of fibers, but, what is more important, EPA has determined that friable asbestos (*i.e.*, asbestos that is likely to release fibers) should be cleaned up whenever soil concentrations reach 1 percent, and Site concentrations were 20 to 45 times that level.

> emergency, nor does it have to be immediate to be "imminent." Given the importance of any threat to public health and the reality that implementing a corrective plan might take years, "imminence" must be considered in light of the time that might be needed to sufficiently protect the public health. Thus, an "endangerment" is "imminent" "if factors giving rise to it are present even though the harm may not be realized for years."
>
> Furthermore, the word "substantial" does not require quantification of the endangerment; "an endangerment is 'substantial' if there is reasonable cause for concern that someone or something may be exposed to a risk of harm by a release or a threatened release of a hazardous substance if remedial action is not taken."

Sherwin Williams, slip op. at 14-15 (citations and footnote omitted); In re: A&W Smelters and Refiners, Inc., slip op. at 32 and 33, CERCLA § 106(b) Petition Nos. 94-14 and 94-15 (EAB, March 11, 1996); see also In re: Asarco Incorporated, slip op. at 23, CERCLA § 106(b) Petition No. 94-22 (EAB, April 17, 1996) ("...an endangerment is "substantial" whenever there is a reasonable likelihood that the public may be exposed to a threat of harm").

iv. Mr. Ray criticizes the ATSDR document that is attached to the 1996 Action Memorandum, but his analysis is speculative and unfounded. Moreover, he draws unwarranted conclusions from ATSDR's recommendation regarding interim measures.

The Agency for Toxic Substances and Disease Registry (ATSDR) was created by CERCLA. 42 U.S.C. § 9604(i). Upon request, ATSDR provides EPA consultations regarding health issues relating to exposure to hazardous substances such as asbestos. 42 U.S.C. § 9604 (i)(4). In developing its removal response action for the Site, EPA consulted extensively with ATSDR. ATSDR's health consultation and its recommendations for the Site are summarized in a document that EPA attached to the 1996 Action Memorandum.[35]

As described above (*see infra* subsection II(B)(5)(c)(i)), in the ATSDR Health Consultation Document, ATSDR memorializes its finding that the asbestos at the Site "poses a public health threat to [Site] residents who may inhale, or to a lesser extent, ingest asbestos fibers." ATSDR goes on to explain that Site children are especially at risk. In the ATSDR Health Consultation Document, ATSDR also concurs in EPA's decision to conduct a time-critical removal action at the Site.

In Mr. Ray's July 19, 1999, letter, he criticizes ATSDR's Health Consultation Document saying

> [a]lthough EPA attached a document that purports to be an Agency for Toxic Substances and Disease Registry (ATSDR) Record of Activity in support of its Action Memorandum, it is clear that the [*sic*] neither EPA nor ATSDR made any actual evaluation of the potential *risk* to human health or the environment posed by the Westbank Asbestos site. The ATSDR attachment indicates that ATSDR merely reviewed the [1996] action memorandum, summarized the well known hazards of asbestos, and assumed the statements made by EPA were correct. The document does not even purport to address asbestos risks at the site or even indicate that immediate action is necessary.

[35]ATSDR Record of Activity - Health Consultation (August 13, 1996) (hereinafter the ATSDR Health Consultation Document) (Exhibit J)(Administrative Record pp. 000372 to 000374).

Mr. Ray's criticism of the ATSDR Health Consultation Document is unfounded. The author of the ATSDR Health Consultation Document, Environmental Scientist Tammie McRae[36] of ATSDR reports that Ms. Roberta Erlwein, an ATSDR scientist, who was stationed at EPA Region 6 offices as Regional Representative, worked closely with EPA On-Scene Coordinator (OSC) John Martin, and was thoroughly briefed regarding the situation at the Site. Ms. Erlwein advised Ms. McRae as Ms. McRae prepared the ATSDR Health Consultation Document. Ms. McRae reports that after the ATSDR Health Consultation Document was prepared, ATSDR personnel visited the Site, and they found that the danger to human health

> "was a lot worse than we [at ATSDR] originally thought that it was. We found friable asbestos in basketball courts and children's play areas, and in places where workers could be exposed."

Costello, James "Westbank Asbestos, Jefferson Parish, LA; Record of communication: Ms. Tammie McRae of ATSDR (February 13, 2003) (hereinafter ROC McRae) (confirmed by Ms. McRae (February 18, 2003)) (Exhibit K).

Mr. Ray's July 19, 1999, letter goes on to cite the following recommendation from ATSDR's Health Consultation Document:

> Based on the information provided, ATSDR recommends/concurs the following:
>
> . . . 2. If removal actions are not initiated [at the Site] within the next six to eight months, interim measures should be taken to stop or reduce human exposure to asbestos contamination.

ATSDR's Health Consultation Document at pp. 2-3 (Administrative Record pp. 000373 to 000374). Mr. Ray finds great significance in ATSDR's recommendation, and says,

> [t]his [ATSDR] statement vitiates any contention by EPA that the need for immediate action was sufficiently great that an RI/FS [Remedial Investigation and Feasibility Study] or at least an EE/CA [Engineering Evaluation and Cost Analysis] could not be conducted.

Mr. Ray completely misses the point, however, as confirmed by Ms. McRae of ATSDR. When Ms. McRae was asked about Mr. Ray's comment, she said that

> "something had to be done at the Site right away, and ATSDR was suggesting that, if EPA could not get out there with the removal action right away, then interim measures should be taken to protect human health."

---

[36]Ms. McRae works in ATSDR's Atlanta, Georgia headquarters in the Technical Project Office. At the time she prepared the ATSDR Health Consultation Document, Ms. McRae was also working at ATSDR headquarters, but in the Health Consultation Section of the Exposure Investigation and Consultation Branch.

ROC McRae. The ATSDR health consultation document was not saying that delay was appropriate as Mr. Ray contends.

d. <u>Johns Manville has said that the asbestos waste released on the Site could not be from its Marrero plant because the waste contained gypsum, but recent sampling found no gypsum in the waste</u>.

In our discussions with Mr. Bruce Ray, counsel for Johns Manville and Johns Manville Corporation, he has called our attention to the fact that the 1996 Action Memorandum for the Site lists gypsum as a constituent of some of the asbestos contaminated waste found at the Site.[37] Mr. Ray maintains that the waste produced by JM contained no gypsum, and the response of Johns Manville and Johns Manville Corporation to our information request supports his contention. Mr. Ray says that this means that the Site waste could not have been from JM.

When the 1996 Action Memorandum was written, the reference to gypsum was based on studies performed by the Louisiana Department of Environmental Quality (LDEQ). The EPA has attempted to track down the source of the statement (*i.e.*, the sampling data upon which the statement is based), but we have been unable to locate it at LDEQ or in EPA files. The source document was found at LDEQ, but it makes its conclusion without providing the data upon which the conclusion is based; therefore, there is no way to check its validity. No other sampling at the Site has found gypsum in the asbestos-contaminated waste; moreover, recent sampling by the National Enforcement Investigation Center (NEIC) of the residual contamination on the Site (*e.g.*, under houses on remediated properties) has found no gypsum.[38] Instead the NEIC sampling found asbestos waste, the constituents of which were comparable to the waste streams produced by JM, according to the information submitted by Mr. Ray in his response to our information request. Consequently, it appears that the statement in the EPA 1996 Action Memorandum was either incorrect or based on an anomaly.

6. <u>Public Interest Considerations</u>

The Interim CERCLA Settlement Policy provides that public interest considerations may be taken into account when analyzing a settlement. Specifically it says:

> The purpose of site cleanup is to protect public health and the environment. Therefore, in analyzing a settlement proposal the timing of the cleanup and the

---

[37] 1996 Action Memorandum at p. 4 (Administrative Record p. 000359).

[38] Kendall, Douglas, "Analytical Results Westbank Asbestos Site, Jefferson and Orleans Parishes, Louisiana, NEIC VP0495E01(December 2002) (Exhibit L). This NEIC report was independently reviewed by Mr. Roger Lee of the U.S. Geological Survey. Mr. Lee concludes that "[b]ased on my assessment of the report and in consultation with expert colleagues in the U.S. Geological Survey, it is more likely than not that there was no gypsum in the samples reported for the Westbank Asbestos site in the NEIC report." Lee, Roger, "Re: Westbank Asbestos; Request that Mr. Roger Lee of USGS review the NEIC sampling report" (February 18, 2002)

> ability of the Government to clean up the site should be considered. For example, if the State cannot fund its portion of a Fund-financed cleanup, a private-party cleanup proposal may be given more favorable consideration than one received in a case where the State can fund its portion of cleanup costs, if necessary.
>
> Public interest considerations also include the availability of Federal funds for necessary cleanup, and whether privately financed action can begin more quickly than Federally-financed activity. Public interest concerns may be used to justify a settlement of less than 100 percent only when there is a demonstrated need for a quick remedy to protect public health or the environment.

50 Fed Reg. 5038 (Exhibit B).

In the 1996 Action Memorandum memorializing EPA's decision to undertake the removal action, the dangerous conditions posed by the asbestos and the immediate threat were paramount considerations justifying immediate action:

> (1) The action proposed to be undertaken is necessary to prevent, limit, or mitigate an emergency situation at the Site in that asbestos-containing materials (ACM) long present at the site are rapidly losing structural stability and becoming increasingly more friable; (2) there is an immediate risk to public health or welfare or the environment in that increased deterioration of ACM increases likelihood of transmission and passage of ACM through multiple pathways of exposure; and (3) such assistance will not otherwise be provided on a timely basis due to the Louisiana Department of Environmental Quality's (LDEQ's) lack of resources necessary to adequately respond to the emergency.

1996 Action Memorandum at p. 1 (Exhibit G). The 1996 Action Memorandum goes on to say:

> The potential impacts of asbestos exposure are chronic in nature and may not manifest themselves for a number of years after initial exposure. Diseases that are linked to asbestos include asbestosis, a chronic lung inflammation and a variety of lung cancers which vary in their prognoses. The most deadly cancer which is linked to inhalation of asbestos is mesothelioma, a disease which results in the destruction of the mesothelium, a lining surrounding various thoracic organs. Mesothelioma is 100 percent fatal within a period of one to two years after diagnosis.
>
> The ACM areas are located in residential and public areas such that they are readily accessible to human populations. Much of the concrete-like ACM has deteriorated such that it is defined as friable asbestos. Asbestos fibers have been documented as being released from the ACM. The non-friable ACM provides a threat of release since it too will most likely deteriorate into a friable condition

either naturally or artificially.

1996 Action Memorandum at p. 7 (Exhibit G). In short, there was an immediate deadly threat, and Superfund money was immediately available, so it was appropriate to spend Government funds to undertake the removal. Finally, criterion 6 "Public Interest Considerations" is generally forward looking–allowing less than 100 percent settlement where doing so would provide a speedier cleanup; consequently, criterion 6 does not apply to this cost recovery settlement where the Government's money has already been spent.

7. <u>Precedential Value</u>

The Interim CERCLA Settlement Policy says

> In some cases, the factual situation may be conducive to establishing a favorable precedent for future Government actions. For example, strong case law can be developed in cases of first impression. In addition, settlements in such cases tend to become precedents in themselves, and are examined extensively by PRPs in other cases. Settlement of such cases should always be on terms most favorable to the Government. Where PRPs will not settle on such terms, and the quality and quantity of evidence is strong, it may be in the overall interest of the Government to try the case.

50 Fed Reg. 5038 (Exhibit B). In the case at hand, under the Global Settlement Order, there is generally no direct option for trial in U.S. District Court. Moreover, the precedents upon which recovery in this case are based have already been established. Thus, this "Precedential Value" criterion has no bearing upon the settlement.

8. <u>Value of Obtaining a Present Sum Certain</u>

Under criterion 8, "Value of Obtaining a Present Sum Certain," of the Interim CERCLA Settlement Policy,

> if money can be obtained now and turned over to the Fund, where it can earn interest until the time it is spent to clean up a site, the net present value of obtaining the sum offered in settlement now can be computed against the possibility of obtaining a larger sum in the future. This calculation may show that the net present value of the sum offered in settlement is, in reality, higher than the amount the Government can expect to obtain at trial.

50 Fed Reg. 5038 (Exhibit B). Criterion 8 contemplates pre-cleanup settlement option, and Criterion 8 also assumes that there is a direct option for trial in U.S. District court. Since neither option exists in this case, criterion 8 is not applicable.

9. <u>Inequities and Aggravating Factors</u>

Under criterion 9, "Inequities and Aggravating Factors" of the Interim CERCLA Settlement Policy,

> All analyses of settlement proposals should flag for the decision makers any apparent inequities to the settling parties inherent in the Government's case, and apparent inequities to others if the settlement proposal is accepted, and any aggravating factors. However, it must be understood that the statute operates on the underlying principle of strict liability, and that equitable matters are not defenses.

50 Fed Reg. 5038 (Exhibit B). There are no inequities in the Government's case against Johns Manville and Johns Manville Corporation related to the Site, so criterion 9 does not apply to the case.

10. <u>Nature of the Case that Remains After Settlement</u>

The final criterion to be considered during a settlement, under EPA's Interim CERCLA Settlement Policy is the nature of the case that remains after settlement. The Interim CERCLA Settlement Policy says that

> [a]ll settlement evaluations should address the nature of the case that remains if the settlement is accepted. For example, if there are no financially viable parties left to proceed against for the balance of the cleanup after the settlement, the settlement offer should constitute everything the Government expects to obtain at that site. The questions are: What does the Government gain by settling this portion of the case? Does the settlement or its terms harm the remaining portion of the case? Will the Government have to expend the same amount of resources to try the remaining portion of the case? If so, why should the settlement offer be accepted?
>
> This analysis is extremely important and should come at the conclusion of the evaluation.

50 Fed Reg. 5038. The only viable PRPs identified in this case are Johns Manville and Johns Manville Corporation (*see infra* section II(B)(1) (Volume of Wastes Contributed to Site by Each PRP)); consequently, the only cost recovery that the United States will realize will be the money provided by Johns Manville and Johns Manville Corporation. Under the Interim CERCLA Settlement Policy, the Agency's goal is obtaining 100 percent of the cost of cleanup (50 Fed. Reg. 5037 (Exhibit B)), and, as explained herein above in section II(B)(1) through (9), there is no reason to provide Johns Manville or Johns Manville Corporation with a discount under the criteria described in the Interim CERCLA Settlement Policy. Since the amount recoverable from Johns Manville and Johns Manville Corporation is already limited to 55 percent of the "Manville Share" under the terms of the Global Settlement Order it is essential to maximize the Manville Share in order to come as close as possible to the 100 percent recovery objective. Accordingly, under this final settlement criterion, the Manville Share should be set at 100

percent.

III. In Johns Manville's July 19, 1999, letter, Mr. Ray reiterates the various contentions found in section II of his letter, and claims, based on those contentions, that EPA's removal action at the Site was arbitrary and capricious. However, as explained herein above, Mr. Ray's contentions are either unsubstantiated or they are based on incorrect interpretations of the law. EPA's decision to conduct the removal action at the Site is based on an extensive administrative record, and it is well reasoned.

The EAB has explained the standard of review for response actions under CERCLA as follows:

> The "arbitrary and capricious or otherwise not in accordance with law" standard is very narrow. To be upheld, a decision to select a response action need not be the "right" one. Instead, it need only be made without caprice. The Board will apply this test and uphold the Region's selection of a response action as long as it is supported by the facts in the administrative record and is not based upon legally impermissible considerations.

In re: A&W Smelters and Refiners, Inc., slip op. at 38 and 39 (*citations omitted*), CERCLA § 106(b) Petition Nos. 94-14 and 94-15 (EAB, March 11, 1996).

In Section II of his July 19, 1999, letter, Mr. Ray explains his reasoning behind his various contentions that, according to him, EPA was inconsistent with the NCP and generally unsupported in its decision to take the removal action at the Site. However, as explained herein above, Mr. Ray's contentions are either unfounded in fact or else they are a misinterpretation of the law. As documented in the 1996 Action Memorandum (Attachment G) and the rest of the administrative record, EPA's removal action was supported by the facts and consistent with the NCP.

Attachments: *See* Exhibit List

APPROVED:

_____ _____

Myron O. Knudson, P.E., Director Date
Superfund Division (6SF)

Exhibits

Exhibit A	Interim Guidelines for Preparing Nonbinding Preliminary Allocations of Responsibility, OSWER Diretive #9839.1 (May 28, 1997); 52 Fed. Reg. 19919
Exhibit B	EPA's Interim CERCLA Settlement Policy, 50 Fed. Reg. 5034, 5037-5038 (February 5, 1985)
Exhibit C	Letter from Mr. Bruce Ray of Johns Manville to EPA (September 19, 2002)
Exhibit D	Martin, John, "POLREP #10, Final" (July 31, 2000)
Exhibit E	Income Distribution of Westbank Asbestos Superfund Site" (December 19, 2002)
Exhibit F	Letter from Johns Maville to EPA Region 6 Superfund Division Director Mr. Myron O. Knudson (July 19, 1999)
Exhibit G	Martin, John, "Request for a Time-Critical Removal Action and an Exemption from the $2 Million Statutory Limit at the Westbank Asbestos Site, Marrero, Jefferson Parish, Louisiana" (September 11. 1996)
Exhibit H	Nanquin, Troy, Removal Assessment - Final Report: Westbank Asbestos, Marrero, Jefferson Parish Louisiana, TDD#: S06-9601-033 (July 30, 1996) (Administrative Record at pp 304-355) Attachment F (Field Data Entry Sheets)
Exhibit I	Nanquin, Troy, Removal Assessment - Final Report: Westbank Asbestos, Marrero, Jefferson Parish Louisiana, TDD#: S06-9601-033 (July 30, 1996) (Administrative Record at pp 304-355) Attachment D (Slides)
Exhibit J	ATSDR Record of Activity - Health Consultation (August 13, 1996)
Exhibit K	Costello, James "Westbank Asbestos, Jefferson Parish, LA; Record of communication: Ms. Tammie McRae of ATSDR (February 13, 2003) (hereinafter ROC McRae) (confirmed by Ms. McRae (February 18, 2003))
Exhibit L	Kendall, Douglas, "Analytical Results Westbank Asbestos Site, Jefferson and Orleans Parishes, Louisiana, NEIC VP0495E01(December 2002)