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CITIZEN ENFORCEMENT: TOOLS FOR EFFECTIVE PARTICIPATION

Capacity Building Support Document for Environmental Compliance and Enforcement Programs

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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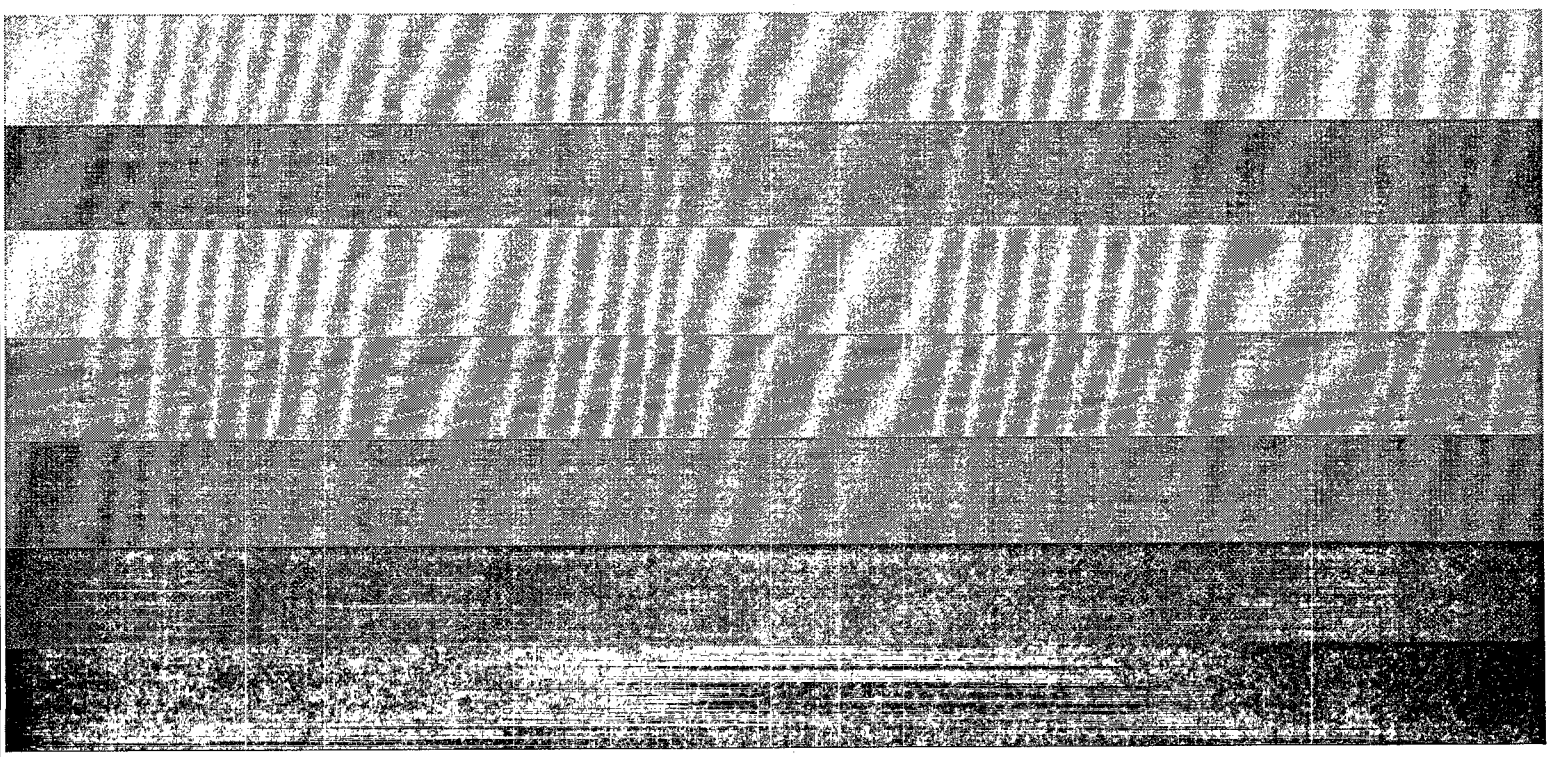

CITIZEN ENFORCEMENT:

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Capacity Building Support Document for Environmental Compliance and Enforcement Programs

Fifth International Conference on Environmental Compliance and Enforcement

November 16 - 20, 1998
Monterey, California, U.S.A.

Preface

This document, *Citizen Enforcement: Tools for Effective Participation*, was prepared as one of eight Environmental Compliance and Enforcement Capacity Building Technical Resource Documents that developed to support the International Conferences on Environmental Compliance and Enforcement and ongoing exchange under the International Network for Environmental Compliance and Enforcement. Additional country examples and tools will be added based upon comments received during and following use at the Fifth International Conference in Monterey, California, November 16-20, 1998. These documents were developed as resource documents to be used by government officials and others who have responsibility for developing and/or enhancing environmental compliance and enforcement programs. The Resource Documents include:

- Financing Environmental Permit, Compliance and Enforcement Programs,
- Source Self-Monitoring, Reporting, and Recordkeeping Requirements: an International Comparison
- Multimedia Inspection Protocols,
- Communications Strategies for Environmental Enforcement Programs, and
- Transboundary Trade in Potentially Hazardous (Waste, Pesticides and Ozone depleting) Substances.
- International Inspector Training Compendium, Course and Program Comparison
- Country Progress/Self Assessment Reports on Environmental Compliance and Enforcement
- Citizen Enforcement: Tools for Effective Participation

Consistent with the goals of the Executive Planning Committees for the Fourth and Fifth International Conferences to build capacity internationally for environmental compliance and enforcement, this document addresses

The information presented can be used by government officials to help design or enhance their own environmental enforcement programs with the objective of achieving a higher level of compliance.

Citizen Enforcement: Tools for Effective Participation, and the other documents listed above are available on the International Network for Environmental Compliance and Enforcement's (INECE) Internet site: http://www.inece.org. They also are available from the INECE Secretariat at the addresses below. Finally, the INECE Secretariat seeks your comments as to whether these documents serve their intended purpose and how they might be improved. Please send comments in writing to the INECE Secretariat in care of Ms. Wasserman or Mr. Gerardu at the following addresses:

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ELI also appreciates the work of those who contributed papers on this topic to the International Conferences on Environmental Compliance and Enforcement, including participants from Australia, Bangladesh, Belgium, Colombia, India, Kenya, Malawi, Nepal, the Netherlands, the Philippines, Poland, Russia, Tanzania, Ukraine, and the United States. References to these papers can be found in Appendix I.

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1 Introduction

This document, *Citizen Enforcement: Tools for Effective Participation*, is part of a series of capacity building support documents prepared for the International Conferences on Environmental Compliance and Enforcement. It was prepared for the Fifth International Conference to be held in Monterey, California, U.S.A., November 16-20, 1998. This series is for use as a resource by government officials and citizen enforcers.

Citizen Enforcement: Tools for Effective Participation pulls together in one document experiences and understandings of the various ways in which citizens around the world can be involved in environmental compliance and enforcement. The document relies on the efforts of government and citizen enforcers, primarily as documented in International Conference proceedings and workshop reports.

The role of citizens in environmental compliance and enforcement is fairly new in most countries. Historically, public participation has not included clear mechanisms for citizen involvement in programs and actions to achieve compliance with and enforce environmental law. Perhaps the most well-known mechanism is direct citizen enforcement through lawsuits. However, there are many other opportunities for citizens to supplement governmental efforts. For example, in some countries citizens contribute to monitoring or inspections. Citizens have much to add to the negotiation and settlement process of enforcement actions. Finally, there are a growing number of international mechanisms for citizen participation in enforcement, as demonstrated by the Commission on Environmental Cooperation's citizen submission mechanism, the World Bank Inspection Panel, and the new Convention on Access to Environmental Information, Public Participation and Access to Justice in Environmental Matters.

As citizens bring their knowledge of local affairs and the added resources of their time and energy to environmental compliance and enforcement, governments are beginning to establish processes to facilitate citizen participation. These include guidelines for citizen monitoring, programs for citizen inspections, public complaint processes, provisions for citizen enforcement suits, and guidelines for citizen participation in settlements. Governments have found that giving citizens the proper tools can enhance government enforcement efforts.

This document gives an overview of how citizens can and do participate in domestic environmental compliance and enforcement efforts, as well as how governments can facilitate this participation. It also looks at several international mechanisms for citizen participation in environmental enforcement, as well as at the growing role for international institutions in facilitating citizen participation in enforcement. It is organized to follow the set of principles for effective public participation in enforcement developed during a workshop at the Fourth International Conference. It begins with the list of prerequisites to effective public participation identified during the workshop at the Fourth International Conference which include:

- Recognition of Environmental Rights
- Clear Environmental Standards
- Access to Environmental Information
- Access to Justice and "Standing"
- Independent and Well-Informed Judiciary

It then reviews examples and how citizens participate in four different elements of the compliance and enforcement program. Some of these ways to participate are more commonplace than others. They include:

- Monitoring Compliance
- Public Complaint Processes
- Citizen Enforcement Litigation
- Settlement of Enforcement Actions

The INECE partnership recognizes that citizens may also serve to promote compliance, however, there are no current examples in support of these activities. When they are identified they too will be added to a future version of this document.

2 Setting the Stage for Effective Citizen Participation

Effective public participation in environmental compliance assurance and enforcement actions requires more than a willing citizenry. In countries where citizen involvement in enforcement is fairly common, and in countries where it is just beginning, there are several fundamental regulatory and institutional elements that are necessary for effective citizen participation. These prerequisites include recognition of environmental rights and a citizen cause of action, clear environmental standards, access to information, standing, and an independent and well-informed judiciary. Where even one of these elements is missing, citizens may find it difficult to participate in the environmental enforcement process.

2.1 Recognition of Environmental Rights

Citizen participation in the environmental enforcement process is usually built around the recognition of certain rights beyond personal property rights. In many countries, citizen participation in environmental enforcement is grounded in the recognition of a right to a clean environment. When granted this right, citizens have a platform on which to stand in both administrative proceedings and court cases.

Many countries' constitutions expressly establish environmental rights and assign the state responsibility for protecting those rights. For example, the Constitution of Chile guarantees all persons the right to live in an environment free from contamination, and assigns the state the duty to protect this right and to preserve nature. Similarly, in the Philippines, the constitution instructs the state to protect and advance environmental rights.

> "The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature." ***Article 2, Section 16, Constitution of the Philippines (1986).***

Other countries have more general constitutional provisions that have been determined by courts to encompass environmental rights. For example, in Argentina, courts have used *amparo*, a constitutional guarantee that can be loosely translated as "protection," to defend individual or collective environmental rights derived from statutes, international treaties, and the constitution itself. In India, the Supreme Court has extended the constitutionally guaranteed right to life to include the right

to a clean and hygienic environment and has held that a person genuinely interested in the protection of environment on behalf of the society or community may appeal to the Supreme Court of India for the preservation of this fundamental right.

2.2 Clear Environmental Standards

Clear permitted emissions levels and clear standards of conduct to which actual emissions and facility or government actions can be compared are important pre-requisites for effective citizen participation in enforcement efforts. When a citizen has information concerning required emissions levels, deadlines for compliance, or other enforceable substantive requirements in statutes, regulations, or permits, it is easier to identify and prove violations. A law that simply prohibits "harmful" or "dangerous" pollution would be much more difficult to enforce consistently and would require citizen enforcers to tackle complicated questions of science and policy. With clear standards of conduct, the only question at issue in most enforcement actions can be whether the defendant violated the legal standard, order, or permit.

For example, in the United States, the implementing regulations for most major environmental statutes set quantified pollution limits that entities such as states and municipalities must meet within specified time frames. To achieve area-wide compliance levels, regulatory agencies with jurisdiction over environmental matters issue industrial sources individual permits that establish specific emission and effluent limits for each facility. Historically, these standards have enabled citizen enforcers to hold violators accountable for their actions.

2.3 Access to Environmental Information

To effectively participate in environmental enforcement, citizens must be able to access information held by the government, such as monitoring data, environmental permits, government reports, industry records, and other relevant sources of information that document the status of administrative proceedings, government decisions, environmental quality, emissions, and releases.

Some countries have laws that specifically guarantee the right to access environmental information. This right is usually subject to certain limitations such as exemptions for industry trade secrets and matters of national security. For example, Member States of the European Union are implementing access to environmental information legislation pursuant

to EU Directive 90/313/EEC, which calls for public access to information on the environment held by public authorities. The Directive also requires an appeal process for denials of access to information.

> "Save as provided in this Article, Member States shall ensure that public authorities are required to make available information relating to the environment to any natural or legal person at his request and without his having to prove an interest." ***European Council Directive 90/313/EEC on Freedom of Access to Information on the Environment, Article 3(1).***

Other countries have general provisions of law providing for access to government-held information, which can often be extended to include environmental information. For example, the Canadian Access to Information Act guarantees citizens the right to information held by the federal government, including environmental information. Like the EU Directive, this Act provides for an appeal process for denied requests. For these and similar laws to be effective, clear procedures for filing information requests are important. For example, procedures can clearly address responsibility for answering requests, response time limits, affordability of the information, and an appeals process.

In addition to requirements that information be provided on request, some countries are affirmatively providing certain types of information to the public. For example, under the concept of "community right-to-know," some countries require that industry report on pollutant releases and transfers to the government. The government in turn is required to make this information publicly accessible. Pollutant release and transfer registers (PRTRs) enable citizens to monitor industrial environmental performance by providing detailed facility-specific data on types, locations, and amounts of hazardous substances released or transferred. In several countries, including Canada and the United States, certain corporations are required by law to compile and submit this data to the federal government, which then makes the information publicly accessible in a user-friendly format over the Internet. Equipped with detailed information on facility-specific emissions, citizens can track compliance, work directly with corporations to encourage compliance, and help governments identify violations. The specific type of information reported in PRTRs and the range of facilities covered vary from country to country. Key elements that define the scope of PRTR include: the types of facilities required to report; the thresholds for staff size and chemical use above which a facility must report; and the types of pollutants covered and how their use is quantified.

2.4 Access to Justice and "Standing"

To seek judicial resolution of alleged violations, citizens must have access to an appeals process, including standing to appear in court. Standing for citizen participation is often linked to a personal stake in the outcome of the case. A citizen may have to show that he or she has suffered or is threatened by some kind of harm, and often must have been a party to prior proceedings. How broadly the concept of "harm" is defined usually gives the scope of standing, both in prior proceedings and in appeals.

For example, in the United States, federal environmental statutes grant citizens broad access to both administration proceedings and appeals processes. In addition, most environmental laws contain specific citizen enforcement suit provisions, granting standing to any person. However, when citizen suits are not specifically authorized, courts have great power to limit standing to those representing personal interests rather than the public interest. India, on the other hand, has a tradition of citizens having access to justice on behalf of the public interest, whether or not there is specific statutory authorization for citizen suits.

Even where a law seems to grant citizens standing to become party to a proceeding, this access can be controversial when requested by environmental groups. For example, in Slovakia, the Supreme Court denied standing to a forest protection group to become party to an administrative proceeding concerning their local forest. However, in a few countries, environmental organizations are expressly granted standing to represent the "public interest" through legal proceedings. For example, in the Netherlands, the Environmental Protection Act stipulates that the interest for which private organizations were established is regarded as sufficient interest in an environmental case. In Indonesia, in a 1989 case, the Jakarta District Court granted an environmental NGO, the Indonesian Forum for the Environment, legal standing to sue five national government agencies and the pulp-and-paper industry to enforce environmental laws.

> It is possible for environmental organizations to use civil proceedings to protect the environment. It is not necessary to prove that a specific individual interest has been harmed. The fact alone that environmental organizations tried to protect the interests of the environment was sufficient. ***De Nieuwe Meer Case, Supreme Court of the Netherlands, 17 June 1986.***

In some countries, standing in an environmental suit hinges on prior involvement with the case during administrative proceedings. For example, in Hungary, a local environmental association was granted standing on appeal because it had proven interest in the case by participating in previous administrative proceedings.

2.5 Independent and Well-Informed Judiciary

When administrative avenues for citizen enforcement fail, the judicial system is often the final resource for appealing environmental conflicts. For this reason, it is imperative that the judiciary be established and operated in manner that facilitates redress of environmental harms.

For access to justice in environmental matters to be effective, it is critical to have a judiciary that is independent of political pressures. If the judiciary is closely associated with government agencies, citizen enforcement actions against those agencies may be impractical. Citizen suits against industry or the government also may be disadvantaged if judges rely on political support for reappointment or reelection.

For example, Brazil's judicial system is designed specifically to free the judiciary of political allegiances. Instead of election or appointment, judges earn their positions based on their performance on a standard examination. Once in office, they can never be removed. In India, being independent and well-respected by society has allowed the judiciary to confront difficult environmental problems and require individuals, government agencies, and industry to comply with the law and accept the costs associated with pollution control.

> "It is the Courts and more importantly the Judges who man these Courts who are required to give body and soul to these vibrant concepts [of environmental rights]." ***Justice M. F. Saldanha, High Court of Karnataka, Bangalore, India, August 1998.***

For the judiciary to be truly protective of environmental rights and the public interest, it is also important that judges be educated about environmental issues and related legal topics, such as emerging scientific principles, the concept of risk and future harm, and the practice of public interest litigation. Continuing legal education is, therefore, critical to the ultimate usefulness of the judicial system in resolving environmental disputes.

3 Citizen Role in Domestic Environmental Compliance and Enforcement

3.1 Monitoring Compliance

Monitoring compliance through collecting and analyzing information on the compliance status of the regulated community is one of the most important elements of an enforcement program. Citizens can contribute to monitoring by tracking industrial environmental performance through independently-compiled emissions data or compliance reports produced by regulated entities. Citizen monitoring can help government agencies identify violations and is particularly important when resources for government monitoring are scarce or insufficient.

In some countries, governmental institutions make use of citizen monitoring that may already be taking place independent of any coordinating government program. However, many government agencies find that establishing a program to clearly communicate their information needs to citizen monitors provides for collection of information more directly useful in the identification of potential environmental violations. For example, in the United States, the state of Virginia has established a coordinator of citizens who volunteer to monitor streams in the state. This program allows citizens to collect information needed by the state water program to detect potential problems or violations around the state. It also provides citizens with a direct contact in the government to receive the information they collect and channel it to the proper authorities.

Another formal vehicle for public participation in monitoring is the establishment of coordination agreements between government agencies and private organizations. For example, in the Philippines, the emergence of multi-party monitoring has enabled local community residents, private organizations, and industrial project proponents to join representatives from the Department of Environment and Natural Resources (DENR) to undertake post-Environmental Impact Analysis (EIA) compliance monitoring. The DENR is moving to institutionalize this system of multi-party team monitoring by creating, in each regional office, a Regional Community Advisory and Monitoring Committee whose membership will include NGOs and the private sector. The committees are expected to be involved in all phases of EIA, including compliance monitoring.

Inspections are an important mechanism for monitoring. Typically, government agencies with jurisdiction over environmental regulations dispatch inspectors to visit companies to see first-hand whether a facility is in compliance with environmental standards or required practices. Failed inspections often provide a basis for further agency efforts to bring facilities into compliance.

Some countries allow citizens to participate in compliance inspections conducted by government officials. Usually, the citizen must have been involved in the complaint process prior to the inspection. For example, water quality legislation in Argentina allows private parties who have filed a complaint about a facility to participate in any inspection of the facility during the investigation.

Sample Legal Provision for Citizen Participation in Inspections

"When the Federal inspection results from information provided to the Secretary by any person, the Secretary shall notify such person when the Federal inspection is proposed to be carried out and such person shall be allowed to accompany the inspector during the inspection." ***United States Surface Mining Control and Reclamation Act, 30 U.S.C. §1271(a)(1).***

In some countries, government agencies are allowed to contract with citizen groups or other associations to enlist their assistance in inspection efforts. For example, under Estonia's Nature Protection Act, citizens can be deputized as "public inspectors" to monitor compliance with laws, regulations, and permits concerning hunting, fishing, and forestry. They are permitted to write protocols about violations of nature protection rules, but they cannot collect penalties. In Poland, a similar institution exists in the form of the Nature Protection Guard, an organization affiliated with conservation associations that monitors compliance with nature protection laws. Authorized members of the guard have the right to enforce nature conservation laws directly through a procedure of ticketing violators and imposing small fines. This model has yet to be transferred to the pollution control area through regulation, but there is a legal framework, under the Polish Environmental protection Act of 1980, for deputizing trade unions and other associations as inspectors.

3.2 Public Complaint Processes

In many countries, public complaint processes facilitate citizen participation in enforcement efforts. Typically, the government establishes a mechanism for citizens to submit complaints concerning activities that are causing environmental harm. The mechanism can require government agencies to address complaints and respond in a timely manner. Public complaints can be very useful in drawing government attention to potential violations that may otherwise go unrecognized.

Citizens may be able to use informal complaint mechanisms or petitions to draw government attention to enforcement issues. In Mexico, for example, the federal environmental law and parallel state laws enable any person to file a complaint with the appropriate government agency regarding activities that cause environmental harm or ecological imbalance. The agency is required to investigate the matter and provide a prompt response.

Throughout Mexico, this process is the principal vehicle for public participation in administrative enforcement matters. In some states, the process has been the principal driving force behind enforcement efforts. Some states have established telephone hotlines to receive citizen complaints or set up a toll free numbers or "green" mailboxes to facilitate the complaint process.

Some countries have an independent complaint committee or designated staff member (ombudsman) at the national or local levels to receive and process citizen complaints. The position of ombudsman is usually funded by, but independent of, the government and may be competent to deal with complaints on the basis of statutory rules. The laws creating the ombudsman position often regulate what kinds of complaints may be reviewed.

Mexico's Citizen Complaint Process

The Mexican general environmental law and its predecessors establish a system for public complaints to be filed for any incident, act, or omission that falls within the jurisdiction of the Federal Government and produces an ecological imbalance or environmental damage, or which violates any environmental law provisions. The Mexican government has the obligation to receive, investigate, and respond to the administrative complaints and claims of citizens concerning failure to comply with environmental law. The government has specific time limits to inform the complainant of the procedures being undertaken, and to inform him or her of the results concerning verification of the alleged violations and the response measures being taken.

Poland, for example, created a position called the Commissioner for Civil Rights Protection. The Commissioner's role is to receive and manage complaints about infringements of citizens' rights and freedoms determined by the Constitution and other provisions of law. The Commissioner is not limited to environmental issues, but environmental issues fall under the Commissioner's jurisdiction and historically have been a focus of activity. The Commissioner does not have authority to rule on administrative matters, but can recommend or appeal decisions, suggest legislative initiatives or procedural amendments, and pursue solutions to specific violations to promote compliance with the law.

3.3 Citizen Enforcement Litigation

In many countries citizens can be given the right to assume or share the primarily governmental function of taking a potential violator to court to enforce the law. Citizen enforcement suits generally take one of two forms. Members of the public or environmental associations can sue industrial facilities (including regulated government facilities) directly for violating applicable laws or rights. Alternatively, members of the public can sue the government for failure to perform non-discretionary enforcement duties, with the aim of obtaining a court order requiring the appropriate agency to enforce the law.

In either case, citizen enforcement suits are designed to protect the public interest by allowing citizens to help ensure that environmental laws and rights are properly upheld. To achieve this purpose, countries throughout the world have established a variety of mechanisms for authorizing citizen enforcement suits. The following are some common models that have enabled citizens to utilize their judicial systems to enhance environmental enforcement.

Some countries grant citizens access to courts for the express purpose of environmental enforcement and provide specific authority in their environmental statutes for citizen enforcement suits concerning those laws. For example, in the United States, all major federal environmental statues grant citizens the right to bring suit against any person (including individuals, corporations, associations, and governments) to enforce the provisions of the law.

In some countries, the right to enforce environmental laws in-court is derived from general provisions of the civil code. For example, in Hungary, the civil code allows individuals to sue others for violating an obligation not to disturb others needlessly, "especially neighbors." While this provision is not specific to environmental law, it can be used by citizens to

address environmental violations. In the case of pollution, the "neighborhood" encompassed is not restricted to property immediately adjoining the site of polluting activity, but instead includes anyone affected by the pollution.

Some countries allow citizens to go to court to enforce environmental laws in the public interest. For example, in India, citizens are granted broad access to bring public interest law suits to defend their human and social rights. Litigants need not prove a violation of law, as in countries where access to courts is established in environmental statutes, but they must demonstrate a violation of natural rights. Because these suits are filed in the public interest, citizens must base their claims on damages to society – not solely to themselves.

Many countries, particularly those in Latin America, authorize citizens or citizen organizations to bring popular actions, similar to class action law suits, to enforce environmental laws. For example, in Colombia, citizen groups can bring suit against any public or private entity causing threat of harm.

Similarly, Brazil allows citizens to file popular actions against public administrative acts that may be injurious to the public patrimony of the federal, state, or local government. However, in Brazil, only individual citizens may file popular actions; legal entities such as associations, corporations, or the state may not. Nevertheless, popular actions only serve to protect community rights, not the individual rights of the plaintiff. In Brazil, popular actions may be used to remedy administrative violations.

Elements of Citizen Suits Under U.S. Environmental Laws

***Statutory Standing*:** Any person has standing to sue any other person (including the government) who is violating the requirements of the given law.

***Notice to Government*:** Before filing suit, a citizen must notify state and federal agencies as well as the alleged violator that a lawsuit is pending. As long as the violation continues and the state or federal government is not pursuing a diligent enforcement action against the alleged violator in court, the lawsuit may be filed.

***Fee Shifting*:** If the citizen wins, the court costs and attorney fees associated with bringing the action may be warded to the plaintiff.

Remedies: The court may order the defendant to stop the violating activities. Some statutes allow the citizen to ask the court to impose civil penalties upon the violator, payable to the U.S. Treasury.

Granting citizens the ability to bring enforcement suits does not necessarily mean that citizens will be able to do this in practice. Citizens also need to consider the costs of lawyers, court fees, and expert witnesses. In some countries, citizen suit provisions in environmental laws contain fee-shifting provisions that allow citizen enforcers who prevail on significant issues to recover the costs of litigation, including reasonable fees for attorneys and experts. Citizen enforcers are not responsible for the fees of the opposing side if the citizens do not prevail.

For citizen enforcement suits to be effective, courts need to have authority to impose effective remedies. Citizen suits can only supplement governmental enforcement actions to curb pollution if courts possess and use sufficient power to stop and deter violators. Environmental citizen suit provisions may allow courts to award civil penalties and to issue mandatory injunctions.

3.4 Settlement of Enforcement Actions

In some countries environmental enforcement actions, including citizen enforcement actions, may be settled in negotiation among the parties. To ensure that settlements are enforceable, they are often crafted as court negotiated consent decrees, with interim deadlines for specific actions and penalties. In many cases, there is a role for citizens in this process. In addition to citizen suit settlements, citizens who are parties to, or have an interest in, a government enforcement suit often may participate in negotiating the terms of the consent decrees. For example, in the United States, settlements typically include requirement that violations cease, feasible remediation of harm, and monetary penalties to deter noncompliance. In civil judicial cases, the U.S. Department of Justice seeks public comment on lodged consent decrees. In certain administrative enforcement actions, there are also public notice requirements that are followed before a settlement is finalized.

In the United States, U.S. EPA has developed a policy on "supplemental environmental projects" (SEPs). SEPs are environmentally beneficial projects which a violator agrees to undertake in settlement of an enforcement action. The violator is still required to comply with the law; the SEP usually means a reduction in the civil penalty in exchange for projects regarding public health, pollution prevention, pollution reduction, environmental restoration, assessments and audits, environmental compliance promotion, or emergency planning and preparedness. U.S. EPA issued the final Supplemental Environmental Projects Policy in April 1998. The Policy sets out the types of projects that are permissible as SEPs, the penalty mitigation appropriate for a particular SEP, and the terms and conditions under which they

may become part of a settlement. The U.S. EPA SEP Policy recommends that EPA make special efforts to seek input on project proposals from the local community that may have been adversely impacted by the violations.

A related emerging mechanism in the United States for achieving citizen-industry partnerships during the settlement of an enforcement case is the use of Good Neighbor Agreements. Under Good Neighbor Agreements, companies enter into negotiated contracts with workers, local community members and associations to establish a framework for public assessment of industrial environmental conditions. Common elements of Good Neighbor Agreements include provisions for public disclosure of relevant company information and stakeholder audits, whereby citizens engage in direct, on-site evaluations of facilities to identify changes that may be needed to ensure environmental compliance, safety, and sustainability. Good Neighbor Agreements can also provide a forum for addressing community recommendations for improvements in environmental protocol.

Common Elements of Citizen-Industry Agreements

Commitments to Community and Workforce

- Pollution Prevention
- Remedial Action
- Accident Prevention and Preparedness
- Local Hiring
- Infrastructure Commitments
- Philanthropic Policy Reforms

Rights and Resources for Neighbor and Workers

- Community-selected Oversight Bodies
- Right to Inspect
- Funding of Independent Experts
- Right-to-Know Provisions
- Notifications and Studies
- Whistleblower Protection
- Enforcement of Agreement

(from Sanford Lewis, The Good Neighbor Project for Sustainable Industries, 1996)

Each Good Neighbor Agreement is unique, because the parties, conditions, and issues vary significantly among cases. However, the Rhone-Poulenc Community Audit Agreement (RPCAA) in Texas serves as a good example for illustrating the fundamental elements of a typical agreement. The RPCAA provided for a safety and environmental audit to be financed by Rhone-Poulenc and integrated into the company's hazardous waste facility permit.

Under the agreement, the auditor was to be approved and accompanied by a committee comprised of community group members and facility workers. Citizens were also given

permission to conduct additional inspections by appointment. The scope of the audit included regulatory compliance, safety training, accident prevention, emergency response, waste analysis and information systems, monitoring programs, and waste minimization practices. The agreement also provided for public disclosure of company documents including: a hazard assessment and risk analysis; lists of accidents, upsets, and corrective actions; and waste minimization and reduction plans. In the agreement, Rhone-Poulenc consented to "negotiate in good faith" any recommendations resulting from the audit.

4 Citizen Role in International Environmental Compliance and Enforcement

Because many environmental issues and problems transcend national borders and fall outside the traditional realm of government jurisdiction, international and transboundary enforcement mechanisms are becoming an increasingly important avenue for citizen participation in environmental enforcement matters. Fora for international and transboundary citizen enforcement efforts include domestic and international court systems, regional and multilateral institutions, international treaties, and international cooperation. This section looks at three examples of international and transboundary mechanisms that enable citizen participation in environmental enforcement.

The 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters is the first international legal agreement placing an obligation on Parties to grant access to justice for citizens in the domestic implementation of the Convention. The Commission on Environmental Cooperation provides a model for a regional forum for gathering information following citizen complaints about alleged violations of domestic environmental law. The World Bank is the first multi–lateral institution to set up an information gathering mechanism, again based on citizen complaints to investigate alleged violations of its own internal environmental policies and procedures.

4.1 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters

The *Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters* is the fruition of two years of intensive government negotiation in the United Nations Economic Commission for Europe (UNECE). In June 1998, 35 countries and the European Community signed the Convention.

The Convention creates obligations that parties are to implement domestically. The three principles of the draft Convention, broadly stated, are: (1) the public should have access to environmental information, with limited, explicit exceptions; (2) the public should have a right to participate in the environmental decision-making process and have that participation taken into account in the decision-making process; and (3) the public should ultimately have access to an independent and impartial review process, capable of binding public authorities,

when the public feels its rights have been infringed. The Convention is the first time that States have agreed on the content of these principles and established their minimum procedural elements.

> Parties to the Convention are "concerned that the effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced."
> ***Preamble, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.***

Article 9 of the Convention contains the provisions on access to justice. Although the article limits its provisions by affirming that they be carried out in accordance with national law, it still sets out some important principles for domestic access to justice in environmental matters. Article 9 confirms the importance of having an impartial and independent review procedure to enforce a citizen's right to access information and to participate in decision-making under the Convention. The Convention refers to standing for individuals and organizations alike, and promotes a very broad interpretation of what "sufficient interest" would mean for the purposes of granting standing to individuals and organizations under the Convention. Under Article 9, Parties to the Convention have the following obligations, always in accordance with their national law:

- Any person whose request for information was not dealt with in accordance with the Convention shall have access to a review procedure before an independent and impartial body, such as a court.

- Members of the public shall have access to some type of a review procedure to challenge the substantive and procedural legality of any decision subject to the public participation provisions of the Convention.

- Although the Convention leaves what constitutes "sufficient interest" for a member of the public to have standing to national law, it does encourage that this be determined "consistently with the objective of giving the public concerned wide access to justice within the scope of the Convention." Especially non-governmental organizations promoting environmental protection shall be deemed to have a sufficient interest and to have rights capable of being impaired for review under this Article.

- Members of the public shall have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

- Access to justice procedures shall provide adequate and effective remedies, including injunctive relief, and be fair, equitable, timely and not prohibitively expensive.

- Decisions under Article 9 shall be recorded in writing and should be publicly accessible.

- Parties shall provide information to the public on the review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

4.2 North American Citizen Submissions on Environmental Enforcement

An environmental side agreement to the North American Free Trade Agreement (NAFTA) created several mechanisms for public participation in promoting the enforcement of national environmental laws in the United States, Mexico, and Canada. Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC), any citizen or non-governmental organization can present a submission to the Secretariat of the Commission for Environmental Cooperation (CEC) alleging that a NAFTA country is failing to enforce its environmental laws. The remedy for a submission found to be valid is the development by the CEC of a formal factual record of the case that can be made public. The CEC has guidelines for submissions on enforcement matters under Articles 14 and 15 of NAAEC. As of October 1998, these guidelines were undergoing revision and public comment and expected to be finalized in early 1999.

Since 1995, eighteen submissions have been made to the CEC to develop a factual record on alleged violations of domestic law in Canada, the United States and Mexico. Only one case has gone through the entire process, including the development of a factual record. A coalition of Mexican environmental organizations initiated an inquiry into the Mexican government's failure to enforce applicable domestic laws during the environmental impact assessment phase of a construction project in Cozumel. In Jaunary 1996, the groups filed a submission with the CEC alleging the government's failure. One month later, the CEC Secretariat determined that the submission merited requesting a response from the Mexican

government. In June 1996, after reviewing the government's response, the Secretariat advised the CEC Council that a factual record was warranted. On the first day of August 1996, the Council unanimously instructed the Secretariat to proceed with developing a factual record. The final factual record was concluded in October 1997 and was released to the public.

CEC Citizen Submission Process

- Secretariat determines that the Article 14(1) criteria are met.
- Secretariat determines whether the submission merits requesting a response from the Party named in the submission under Article 14(2).
- In light of any response provided by that Party, the Secretariat may recommend to the Council that a factual record be prepared, in accordance with Article 15.
- The Council, comprised of the environmental ministers (or their equivalent) of Canada, Mexico and the United States, may then instruct the Secretariat to prepare a factual record on the submission.
- The final factual record is made publicly available upon a 2/3 vote of the Council.

4.3 World Bank Inspection Panel

The World Bank is, thus far, the only one of the multilateral development institutions that has created a method for citizen participation in enforcement of internal bank policies and procedures in bank-financed projects. The Bank created an Inspection Panel in 1994 to investigate claims filed by affected parties and to review the Bank's compliance with its own policies and procedures, some of which pertain directly to environmental matters.

Upon receiving a complaint, the Panel conducts an initial review, including a review of the management's response to the claim. The Panel subsequently recommends to the Executive

Directors whether a full investigation is warranted. The Executive Directors retain sole power to authorize a full investigation. For investigations that go forward, the panel enjoys broad investigatory powers including access to Bank management and staff. After the investigation, the Panel issues a report with its recommendations to the Bank management and the Executive Directors. Management has six weeks to respond and provide its own recommendations to the Executive Directors, who make all final decisions.

The first major claim before the Panel alleged violations of environmental assessment, resettlement, and other policies in the siting of the Arun III Hydroelectric dam. The Panel had just completed a full investigation into the alleged violations when the Bank president announced in August 1995 that the Bank would no longer support Arun III. The Bank president cited the work of the Inspection Panel as one of the reasons for his decision.

The World Bank Inspection Panel Process

- The Panel receives requests for inspection presented to it by an affected party in the territory of the borrower which is not a single individual (i.e., a community of persons such as an organization, association, society or other grouping of individuals).

- The affected party must demonstrate that its rights or interests have been or are likely to be directly affected by an action or omission of the Bank as a result of a failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal and /or implementation of a project financed by the Bank (including such situations where the Bank is alleged to have failed in its follow-up on the borrower's obligations under loan agreements with respect to such policies and procedures) provided in all cases that such failure has had, or threatens to have, a material adverse effect.

- If the Bank's Executive Directors decide to investigate the request, the Panel is requested to review the available information and report their findings.

Resolution No. 93-10, No. IDA 93-6

Appendix I

Appendix I

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Appendix II

Appendix II

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Resources Contact Information

Environmental Law Association of Central and Eastern Europe and the Newly Independent States
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Web site: http://www.igc.apc.org/ciel

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Web site: http://www.cec.org

Earthjustice Legal Defense Fund
180 Montgomery Street, Suite 1725
San Francisco, CA 94104
Tel: (1-415) 627-6700
Fax: (1-415) 627-6749

Environmental Law Alliance Worldwide
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Fax: (1-541) 687-0535
Email: elaw.usoffice@igc.apc.org

Environmental Law Institute
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Washington, D.C. 20036
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Fax: (1-202) 939-3868
Email: eli@eli.org
Website: http://www.eli.org

Good Neighbor Project
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Fax: (1-617) 489-2482
Web site: http://www.enviroweb.org/gnp

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Appendix III

Public Participation
Official Conference Documents

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ECE/CEP/43

CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS

submitted by
the ECE Committee on Environmental Policy through
the Ad Hoc Preparatory Working Group of Senior Officials

UNITED NATIONS

ECONOMIC COMMISSION FOR EUROPE

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Fourth Ministerial Conference
"Environment for Europe",
Aarhus, Denmark, 23-25 June 1998

CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS */

The Parties to this Convention,

Recalling principle 1 of the Stockholm Declaration on the Human Environment,

Recalling also principle 10 of the Rio Declaration on Environment and Development,

Recalling further General Assembly resolutions 37/7 of 28 October 1982 on the World Charter for Nature and 45/94 of 14 December 1990 on the need to ensure a healthy environment for the well-being of individuals,

Recalling the European Charter on Environment and Health adopted at the First European Conference on Environment and Health of the World Health Organization in Frankfurt-am-Main, Germany, on 8 December 1989,

*/ Final text endorsed by the Committee on Environmental Policy at its special session on 16-18 March 1998 for adoption at the Ministerial Conference "Environment for Europe".

GE.98-30998

Affirming the need to protect, preserve and improve the state of the environment and to ensure sustainable and environmentally sound development,

Recognizing that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself,

Recognizing also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations,

Considering that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights,

Recognizing that, in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns,

Aiming thereby to further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment,

Recognizing the desirability of transparency in all branches of government and inviting legislative bodies to implement the principles of this Convention in their proceedings,

Recognizing also that the public needs to be aware of the procedures for participation in environmental decision-making, have free access to them and know how to use them,

Recognizing further the importance of the respective roles that individual citizens, non-governmental organizations and the private sector can play in environmental protection,

Desiring to promote environmental education to further the understanding of the environment and sustainable development and to encourage widespread public awareness of, and participation in, decisions affecting the environment and sustainable development,

Noting, in this context, the importance of making use of the media and of electronic or other, future forms of communication,

Recognizing the importance of fully integrating environmental considerations in governmental decision-making and the consequent need for public authorities to be in

possession of accurate, comprehensive and up-to-date environmental information,

Acknowledging that public authorities hold environmental information in the public interest,

Concerned that effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced,

Noting the importance of adequate product information being provided to consumers to enable them to make informed environmental choices,

Recognizing the concern of the public about the deliberate release of genetically modified organisms into the environment and the need for increased transparency and greater public participation in decision-making in this field,

Convinced that the implementation of this Convention will contribute to strengthening democracy in the region of the United Nations Economic Commission for Europe (ECE),

Conscious of the role played in this respect by ECE and recalling, inter alia, the ECE Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-making endorsed in the Ministerial Declaration adopted at the Third Ministerial Conference "Environment for Europe" in Sofia, Bulgaria, on 25 October 1995,

Bearing in mind the relevant provisions in the Convention on Environmental Impact Assessment in a Transboundary Context, done at Espoo, Finland, on 25 February 1991, and the Convention on the Transboundary Effects of Industrial Accidents and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, both done at Helsinki on 17 March 1992, and other regional conventions,

Conscious that the adoption of this Convention will have contributed to the further strengthening of the "Environment for Europe" process and to the results of the Fourth Ministerial Conference in Aarhus, Denmark, in June 1998,

Have agreed as follows:

Article 1

OBJECTIVE

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.

Article 2

DEFINITIONS

For the purposes of this Convention,

1. "Party" means, unless the text otherwise indicates, a Contracting Party to this Convention;

2. "Public authority" means:

(a) Government at national, regional and other level;

(b) Natural or legal persons performing public administrative functions under

national law, including specific duties, activities or services in relation to the environment;

(c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above;

(d) The institutions of any regional economic integration organization referred to in article 17 which is a Party to this Convention.

This definition does not include bodies or institutions acting in a judicial or legislative capacity;

3. "Environmental information" means any information in written, visual, aural, electronic or any other material form on:

(a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;

(c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above;

4. "The public" means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups;

5. "The public concerned" means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.

Article 3

GENERAL PROVISIONS

1. Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.

2. Each Party shall endeavour to ensure that officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters.

3. Each Party shall promote environmental education and environmental awareness among the public, especially on how to obtain access to information, to participate in decision-making and to obtain access to justice in environmental matters.

4. Each Party shall provide for appropriate recognition of and support to associations, organizations or groups promoting environmental protection and ensure that its national legal system is consistent with this obligation.

5. The provisions of this Convention shall not affect the right of a Party to

maintain or introduce measures providing for broader access to information, more extensive public participation in decision-making and wider access to justice in environmental matters than required by this Convention.

6. This Convention shall not require any derogation from existing rights of access to information, public participation in decision-making and access to justice in environmental matters.

7. Each Party shall promote the application of the principles of this Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment.

8. Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings.

9. Within the scope of the relevant provisions of this Convention, the public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.

Article 4

ACCESS TO ENVIRONMENTAL INFORMATION

1. Each Party shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation, including, where requested and subject to subparagraph (b) below, copies of the actual documentation containing or comprising such information:

(a) Without an interest having to be stated;

(b) In the form requested unless:

(i) It is reasonable for the public authority to make it available in another form, in which case reasons shall be given for making it available in that form; or

(ii) The information is already publicly available in another form.

2. The environmental information referred to in paragraph 1 above shall be made available as soon as possible and at the latest within one month after the request has been submitted, unless the volume and the complexity of the information justify an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it.

3. A request for environmental information may be refused if:

(a) The public authority to which the request is addressed does not hold the environmental information requested;

(b) The request is manifestly unreasonable or formulated in too general a manner; or

(c) The request concerns material in the course of completion or concerns internal communications of public authorities where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure.

4. A request for environmental information may be refused if the disclosure would adversely affect:

(a) The confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law;

(b) International relations, national defence or public security;

(c) The course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature;

(d) The confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed;

(e) Intellectual property rights;

(f) The confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for in national law;

(g) The interests of a third party which has supplied the information requested without that party being under or capable of being put under a legal obligation to do so, and where that party does not consent to the release of the material; or

(h) The environment to which the information relates, such as the

breeding sites of rare species.

The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.

5. Where a public authority does not hold the environmental information requested, this public authority shall, as promptly as possible, inform the applicant of the public authority to which it believes it is possible to apply for the information requested or transfer the request to that authority and inform the applicant accordingly.

6. Each Party shall ensure that, if information exempted from disclosure under paragraphs 3 (c) and 4 above can be separated out without prejudice to the confidentiality of the information exempted, public authorities make available the remainder of the environmental information that has been requested.

7. A refusal of a request shall be in writing if the request was in writing or the applicant so requests. A refusal shall state the reasons for the refusal and give information on access to the review procedure provided for in accordance with article 9. The refusal shall be made as soon as possible and at the latest within one month, unless the complexity of the information

justifies an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it.

8. Each Party may allow its public authorities to make a charge for supplying information, but such charge shall not exceed a reasonable amount. Public authorities intending to make such a charge for supplying information shall make

available to applicants a schedule of charges which may be levied, indicating the circumstances in which they may be levied or waived and when the supply of information is conditional on the advance payment of such a charge.

Article 5

COLLECTION AND DISSEMINATION OF ENVIRONMENTAL INFORMATION

1. Each Party shall ensure that:

(a) Public authorities possess and update environmental information which is relevant to their functions;

(b) Mandatory systems are established so that there is an adequate flow of information to public authorities about proposed and existing activities which may significantly affect the environment;

(c) In the event of any imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information which could enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority is disseminated immediately and without delay to members of the public who may be affected.

2. Each Party shall ensure that, within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible, inter alia, by:

(a) Providing sufficient information to the public about the type and scope of environmental information held by the relevant public authorities, the basic terms and conditions under which such information is made available and accessible, and the process by which it can be obtained;

(b) Establishing and maintaining practical arrangements, such as:

(i) Publicly accessible lists, registers or files;

(ii) Requiring officials to support the public in seeking access to information under this Convention; and

(iii) The identification of points of contact; and

(c) Providing access to the environmental information contained in lists, registers or files as referred to in subparagraph (b) (i) above free of charge.

3. Each Party shall ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunications networks. Information accessible in this form should include:

(a) Reports on the state of the environment, as referred to in paragraph 4 below;

(b) Texts of legislation on or relating to the environment;

(c) As appropriate, policies, plans and programmes on or relating to the environment, and environmental agreements; and

(d) Other information, to the extent that the availability of such information in this form would facilitate the application of national law implementing this Convention,

provided that such information is already available in electronic form.

4. Each Party shall, at regular intervals not exceeding three or four years, publish and disseminate a national report on the state of the environment, including information on the quality of the environment and information on pressures on the environment.

5. Each Party shall take measures within the framework of its legislation for the purpose of disseminating, inter alia:

(a) Legislation and policy documents such as documents on strategies, policies, programmes and action plans relating to the environment, and progress reports on their implementation, prepared at various levels of government;

(b) International treaties, conventions and agreements on environmental issues; and

(c) Other significant international documents on environmental issues, as appropriate.

6. Each Party shall encourage operators whose activities have a significant impact on the environment to inform the public regularly of the environmental impact of their activities and products, where appropriate within the framework of voluntary eco-labelling or eco-auditing schemes or by other means.

7. Each Party shall:

(a) Publish the facts and analyses of facts which it considers relevant and important in framing major environmental policy proposals;

(b) Publish, or otherwise make accessible, available explanatory material on its dealings with the public in matters falling within the scope of this Convention; and

(c) Provide in an appropriate form information on the performance of public functions or the provision of public services relating to the environment by government at all levels.

8. Each Party shall develop mechanisms with a view to ensuring that sufficient product information is made available to the public in a manner which enables consumers to make informed environmental choices.

9. Each Party shall take steps to establish progressively, taking into account international processes where appropriate, a coherent, nationwide system of pollution inventories or registers on a structured, computerized and publicly accessible database compiled through standardized reporting. Such a system may include inputs, releases and transfers of a specified range of substances and products, including water, energy and resource use, from a specified range of activities to environmental media and to on-site and off-site treatment and disposal sites.

10. Nothing in this article may prejudice the right of Parties to refuse to disclose certain environmental information in accordance with article 4, paragraphs 3 and 4.

Article 6

PUBLIC PARTICIPATION IN DECISIONS ON SPECIFIC ACTIVITIES

1. Each Party:

(a) Shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I;

(b) Shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions; and

(c) May decide, on a case-by-case basis if so provided under national law, not to apply the provisions of this article to proposed activities serving national defence purposes, if that Party deems that such application would have an adverse effect on these purposes.

2. The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner, inter alia, of:

(a) The proposed activity and the application on which a decision will be taken;

(b) The nature of possible decisions or the draft decision;

(c) The public authority responsible for making the decision;

(d) The envisaged procedure, including, as and when this information can be provided:

(i) The commencement of the procedure;

(ii) The opportunities for the public to participate;

(iii) The time and venue of any envisaged public hearing;

(iv) An indication of the public authority from which relevant information can be obtained and where the relevant information has been deposited for examination by the public;

(v) An indication of the relevant public authority or any other official body to which comments or questions can be submitted and of the time schedule for transmittal of comments or questions; and

(vi) An indication of what environmental information relevant to the proposed activity is available; and

(e) The fact that the activity is subject to a national or transboundary environmental impact assessment procedure.

3. The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making.

4. Each Party shall provide for early public participation, when all options are open and effective public participation can take place.

5. Each Party should, where appropriate, encourage prospective applicants to identify the public concerned, to enter into discussions, and to provide information regarding the objectives of their application before applying for a permit.

6. Each Party shall require the competent public authorities to give the public concerned access for examination, upon request where so required under national law, free of charge and as soon as it becomes available, to all information relevant to the decision-making referred to in this article that is available at the time of the public participation procedure, without prejudice to the right of Parties to refuse to disclose certain information in accordance with article 4, paragraphs 3 and 4. The relevant information shall include at least, and without prejudice to the provisions of article 4:

(a) A description of the site and the physical and technical characteristics of the proposed activity, including an estimate of the expected residues and emissions;

(b) A description of the significant effects of the proposed activity on the environment;

(c) A description of the measures envisaged to prevent and/or reduce the effects, including emissions;

(d) A non-technical summary of the above;

(e) An outline of the main alternatives studied by the applicant; and

(f) In accordance with national legislation, the main reports and advice issued to the public authority at the time when the public concerned shall be informed in accordance with paragraph 2 above.

7. Procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity.

8. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.

9. Each Party shall ensure that, when the decision has been taken by the public authority, the public is promptly informed of the decision in accordance with the appropriate procedures. Each Party shall make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based.

10. Each Party shall ensure that, when a public authority reconsiders or updates the operating conditions for an activity referred to in

paragraph 1, the provisions of paragraphs 2 to 9 of this article are applied mutatis mutandis, and where appropriate.

11. Each Party shall, within the framework of its national law, apply, to

the extent feasible and appropriate, provisions of this article to decisions on whether to permit the deliberate release of genetically modified organisms into the environment.

Article 7

PUBLIC PARTICIPATION CONCERNING PLANS, PROGRAMMES AND POLICIES RELATING TO THE ENVIRONMENT

Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. Within this framework, article 6, paragraphs 3, 4 and 8, shall be applied. The public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention. To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.

Article 8

PUBLIC PARTICIPATION DURING THE PREPARATION OF EXECUTIVE REGULATIONS AND/OR GENERALLY APPLICABLE LEGALLY BINDING NORMATIVE INSTRUMENTS

Each Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment. To this end, the following steps should be taken:

(a) Time-frames sufficient for effective participation should be fixed;

(b) Draft rules should be published or otherwise made publicly available; and

(c) The public should be given the opportunity to comment, directly or through representative consultative bodies.

The result of the public participation shall be taken into account as far as possible.

Article 9

ACCESS TO JUSTICE

1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.

Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

(a) Having a sufficient interest

or, alternatively,

(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in

article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair,

equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

Article 10

MEETING OF THE PARTIES

1. The first meeting of the Parties shall be convened no later than one year after the date of the entry into force of this Convention. Thereafter, an ordinary meeting of the Parties shall be held at least once every two years, unless otherwise decided by the Parties, or at the written request of any Party, provided that, within six months of the request being communicated to all Parties by the Executive Secretary of the Economic Commission for Europe, the said request is supported by at least one third of the Parties.

2. At their meetings, the Parties shall keep under continuous review the implementation of this Convention on the basis of regular reporting by the Parties, and, with this purpose in mind, shall:

(a) Review the policies for and legal and methodological approaches to access to information, public participation in decision-making and access to justice in environmental matters, with a view to further improving them;

(b) Exchange information regarding experience gained in concluding and implementing bilateral and multilateral agreements or other arrangements having relevance to the purposes of this Convention and to which one or more of the Parties are a party;

(c) Seek, where appropriate, the services of relevant ECE bodies and other competent international bodies and specific committees in all aspects pertinent to the achievement of the purposes of this Convention;

(d) Establish any subsidiary bodies as they deem necessary;

(e) Prepare, where appropriate, protocols to this Convention;

(f) Consider and adopt proposals for amendments to this Convention in accordance with the provisions of article 14;

(g) Consider and undertake any additional action that may be required for the achievement of the purposes of this Convention;

(h) At their first meeting, consider and by consensus adopt rules of procedure for their meetings and the meetings of subsidiary bodies;

(i) At their first meeting, review their experience in implementing the provisions of article 5, paragraph 9, and consider what steps are necessary to develop further the system referred to in that paragraph, taking into account international processes and developments, including the elaboration of an appropriate instrument concerning pollution release and transfer registers or inventories which could be annexed to this Convention.

3. The Meeting of the Parties may, as necessary, consider establishing financial arrangements on a consensus basis.

4. The United Nations, its specialized agencies and the International Atomic Energy Agency, as well as any State or regional economic integration organization entitled under article 17 to sign this Convention but which is not a Party to this Convention, and any intergovernmental organization qualified in the fields to which this Convention relates, shall be entitled to participate as observers in the meetings of the Parties.

5. Any non-governmental organization, qualified in the fields to which this Convention relates, which has informed the Executive Secretary of the Economic Commission for Europe of its wish to be represented at a meeting of the Parties shall be entitled to participate as an observer unless at least one third of the Parties present in the meeting raise objections.

6. For the purposes of paragraphs 4 and 5 above, the rules of procedure referred to in paragraph 2 (h) above shall provide for practical arrangements for the admittance procedure and other relevant terms.

Article 11

RIGHT TO VOTE

1. Except as provided for in paragraph 2 below, each Party to this Convention shall have one vote.

2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote with a number of votes equal to the number of their member States which are Parties to this Convention. Such organizations shall not exercise their right to vote if their member States exercise theirs, and vice versa.

Article 12

SECRETARIAT

The Executive Secretary of the Economic Commission for Europe shall carry out the following secretariat functions:

(a) The convening and preparing of meetings of the Parties;

(b) The transmission to the Parties of reports and other information received in accordance with the provisions of this Convention; and

(c) Such other functions as may be determined by the Parties.

Article 13

ANNEXES

The annexes to this Convention shall constitute an integral part thereof.

Article 14

AMENDMENTS TO THE CONVENTION

1. Any Party may propose amendments to this Convention.

2. The text of any proposed amendment to this Convention shall be submitted in writing to the Executive Secretary of the Economic Commission for Europe, who shall communicate it to all Parties at least ninety days before the meeting of the Parties at which it is proposed for adoption.

3. The Parties shall make every effort to reach agreement on any proposed amendment to this Convention by consensus. If all efforts at consensus have been exhausted, and no agreement reached, the amendment shall as a last resort be adopted by a three-fourths majority vote of the Parties present and voting at the meeting.

4. Amendments to this Convention adopted in accordance with paragraph 3 above shall be communicated by the Depositary to all Parties for ratification, approval or acceptance. Amendments to this Convention other than those to an annex shall enter into force for Parties having ratified, approved or accepted them on the ninetieth day after the receipt by the Depositary of notification of their ratification, approval or acceptance by at least three fourths of these Parties. Thereafter they shall enter into force for any other Party on the ninetieth day after that Party deposits its instrument of ratification, approval or acceptance of the amendments.

5. Any Party that is unable to approve an amendment to an annex to this Convention shall so notify the Depositary in writing within twelve months from the date of the communication of the adoption. The Depositary shall without delay notify all Parties of any such notification received. A Party may at any time substitute an acceptance for its previous notification and, upon deposit of an instrument of acceptance with the Depositary, the amendments to such an annex shall become effective for that Party.

6. On the expiry of twelve months from the date of its communication by the Depositary as provided for in paragraph 4 above an amendment to an annex shall become effective for those Parties which have not submitted a notification to the Depositary in accordance with the provisions of paragraph 5 above, provided that not more than one third of the Parties have submitted such a notification.

7. For the purposes of this article, "Parties present and voting" means Parties present and casting an affirmative or negative vote.

Article 15

REVIEW OF COMPLIANCE

The Meeting of the Parties shall establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention. These arrangements shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention.

Article 16

SETTLEMENT OF DISPUTES

1. If a dispute arises between two or more Parties about the interpretation or application of this Convention, they shall seek a solution by negotiation or by any other means of dispute settlement acceptable to the parties to the dispute.

2. When signing, ratifying, accepting, approving or acceding to this Convention, or at any time thereafter, a Party may declare in writing to the Depositary that, for a dispute not resolved in accordance with paragraph 1 above, it accepts one or both of the following means of dispute settlement as compulsory in relation to any Party accepting the same obligation:

(a) Submission of the dispute to the International Court of Justice;

(b) Arbitration in accordance with the procedure set out in annex II.

3. If the parties to the dispute have accepted both means of dispute settlement referred to in paragraph 2 above, the dispute may be submitted only to the International Court of Justice, unless the parties agree otherwise.

Article 17

SIGNATURE

This Convention shall be open for signature at Aarhus (Denmark) on 25 June 1998, and thereafter at United Nations Headquarters in New York until

21 December 1998, by States members of the Economic Commission for Europe as well as States having consultative status with the Economic Commission for Europe pursuant to paragraphs 8 and 11 of Economic and Social Council resolution 36 (IV) of 28 March 1947, and by regional economic integration organizations constituted by sovereign States members of the Economic Commission for Europe to which their member States have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of these matters.

Article 18

DEPOSITARY

The Secretary-General of the United Nations shall act as the Depositary of this Convention.

Article 19

RATIFICATION, ACCEPTANCE, APPROVAL AND ACCESSION

1. This Convention shall be subject to ratification, acceptance or approval by signatory States and regional economic integration organizations.

2. This Convention shall be open for accession as from 22 December 1998 by the States and regional economic integration organizations referred to in article 17.

3. Any other State, not referred to in paragraph 2 above, that is a Member of the

United Nations may accede to the Convention upon approval by the Meeting of the Parties.

4. Any organization referred to in article 17 which becomes a Party to this Convention without any of its member States being a Party shall be bound by all the obligations under this Convention. If one or more of such an organization's member States is a Party to this Convention, the organization and its member States shall decide on their respective responsibilities for the performance of their obligations under this Convention. In such cases, the organization and the member States shall not be entitled to exercise rights under this Convention concurrently.

5. In their instruments of ratification, acceptance, approval or accession, the regional economic integration organizations referred to in article 17 shall declare the extent of their competence with respect to the matters

governed by this Convention. These organizations shall also inform the Depositary of any substantial modification to the extent of their competence.

Article 20

ENTRY INTO FORCE

1. This Convention shall enter into force on the ninetieth day after the date of deposit of the sixteenth instrument of ratification, acceptance, approval or accession.

2. For the purposes of paragraph 1 above, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by States members of such an organization.

3. For each State or organization referred to in article 17 which ratifies, accepts or approves this Convention or accedes thereto after the deposit of the sixteenth instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the ninetieth day after the date of deposit by such State or organization of its instrument of ratification, acceptance, approval or accession.

Article 21

WITHDRAWAL

At any time after three years from the date on which this Convention has come into force with respect to a Party, that Party may withdraw from the Convention by giving written notification to the Depositary. Any such withdrawal shall take effect on the ninetieth day after the date of its receipt by the Depositary.

Article 22

AUTHENTIC TEXTS

The original of this Convention, of which the English, French and Russian texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have signed this Convention.

DONE at Aarhus (Denmark), this twenty-fifth day of June, one thousand nine hundred and ninety-eight.

Annex I

LIST OF ACTIVITIES REFERRED TO IN ARTICLE 6, PARAGRAPH 1 (a)

1. Energy sector:

- Mineral oil and gas refineries;

- Installations for gasification and liquefaction;

- Thermal power stations and other combustion installations with a heat input of 50 megawatts (MW) or more;

- Coke ovens;

- Nuclear power stations and other nuclear reactors including the dismantling or decommissioning of such power stations or reactors 1/ (except research installations for the production and conversion of fissionable and fertile materials whose maximum power does not exceed 1 kW continuous thermal load);

- Installations for the reprocessing of irradiated nuclear fuel;

- Installations designed:

- For the production or enrichment of nuclear fuel;

- For the processing of irradiated nuclear fuel or high-level radioactive waste;

- For the final disposal of irradiated nuclear fuel;

- Solely for the final disposal of radioactive waste;

- Solely for the storage (planned for more than 10 years) of irradiated nuclear fuels or radioactive waste in a different site than the production site.

2. Production and processing of metals:

- Metal ore (including sulphide ore) roasting or sintering installations;

- Installations for the production of pig-iron or steel (primary or secondary fusion) including continuous casting, with a capacity exceeding 2.5 tons per hour;

- Installations for the processing of ferrous metals:

(i) Hot-rolling mills with a capacity exceeding 20 tons of crude steel per hour;

(ii) Smitheries with hammers the energy of which exceeds 50 kilojoules per hammer,

where the calorific power used exceeds 20 MW;

(iii) Application of protective fused metal coats with an input exceeding 2 tons of crude steel per hour;

- Ferrous metal foundries with a production capacity exceeding 20 tons per day;

- Installations:

(i) For the production of non-ferrous crude metals from ore, concentrates or secondary raw materials by metallurgical, chemical or electrolytic processes;

(ii) For the smelting, including the alloying, of non-ferrous metals, including recovered products (refining, foundry casting, etc.), with a melting capacity exceeding 4 tons per day for lead and cadmium or 20 tons per day for all other metals;

- Installations for surface treatment of metals and plastic materials using an electrolytic or chemical process where the volume of the treatment vats exceeds 30 m^3.

3. Mineral industry:

- Installations for the production of cement clinker in rotary kilns with a production capacity exceeding 500 tons per day or lime in rotary kilns with a production capacity exceeding 50 tons per day or in other furnaces with a production capacity exceeding 50 tons per day;

- Installations for the production of asbestos and the manufacture of asbestos-based products;

- Installations for the manufacture of glass including glass fibre with a melting capacity exceeding 20 tons per day;

- Installations for melting mineral substances including the production of mineral fibres with a melting capacity exceeding 20 tons per day;

- Installations for the manufacture of ceramic products by firing, in particular roofing tiles, bricks, refractory bricks, tiles, stoneware or porcelain, with a production capacity exceeding 75 tons per day, and/or with a kiln capacity exceeding 4 m^3 and with a setting density per kiln exceeding 300 kg/m^3.

4. Chemical industry: Production within the meaning of the categories of activities contained in this paragraph means the production on an industrial scale by chemical processing of substances or groups of substances listed in subparagraphs (a) to (g):

(a) Chemical installations for the production of basic organic chemicals, such as:

(i) Simple hydrocarbons (linear or cyclic, saturated or unsaturated, aliphatic or aromatic);

(ii) Oxygen-containing hydrocarbons such as alcohols, aldehydes, ketones, carboxylic acids, esters, acetates, ethers, peroxides, epoxy resins;

(iii) Sulphurous hydrocarbons;

(iv) Nitrogenous hydrocarbons such as amines, amides, nitrous compounds, nitro compounds or nitrate compounds, nitriles, cyanates, isocyanates;

(v) Phosphorus-containing hydrocarbons;

(vi) Halogenic hydrocarbons;

(vii) Organometallic compounds;

(viii) Basic plastic materials (polymers, synthetic fibres and cellulose-based fibres);

(ix) Synthetic rubbers;

(x) Dyes and pigments;

(xi) Surface-active agents and surfactants;

(b) Chemical installations for the production of basic inorganic chemicals, such as:

(i) Gases, such as ammonia, chlorine or hydrogen chloride, fluorine or hydrogen fluoride, carbon oxides, sulphur compounds, nitrogen oxides, hydrogen, sulphur dioxide, carbonyl chloride;

(ii) Acids, such as chromic acid, hydrofluoric acid, phosphoric acid, nitric acid, hydrochloric acid, sulphuric acid, oleum, sulphurous acids;

(iii) Bases, such as ammonium hydroxide, potassium hydroxide, sodium hydroxide;

(iv) Salts, such as ammonium chloride, potassium chlorate, potassium carbonate, sodium carbonate, perborate, silver nitrate;

(v) Non-metals, metal oxides or other inorganic compounds such as calcium carbide, silicon, silicon carbide;

(c) Chemical installations for the production of phosphorous-, nitrogen- or potassium-based fertilizers (simple or compound fertilizers);

(d) Chemical installations for the production of basic plant health products and of biocides;

(e) Installations using a chemical or biological process for the production of basic pharmaceutical products;

(f) Chemical installations for the production of explosives;

(g) Chemical installations in which chemical or biological processing is used for the production of protein feed additives, ferments and other protein substances.

5. Waste management:

- Installations for the incineration, recovery, chemical treatment or landfill of hazardous waste;

- Installations for the incineration of municipal waste with a capacity exceeding 3 tons per hour;

- Installations for the disposal of non-hazardous waste with a capacity exceeding 50 tons per day;

- Landfills receiving more than 10 tons per day or with a total capacity exceeding 25 000 tons, excluding landfills of inert waste.

6. Waste-water treatment plants with a capacity exceeding 150 000 population equivalent.

7. Industrial plants for the:

(a) Production of pulp from timber or similar fibrous materials;

(b) Production of paper and board with a production capacity exceeding 20 tons per day.

8. (a) Construction of lines for long-distance railway traffic and of airports 2/ with a basic runway length of 2 100 m or more;

(b) Construction of motorways and express roads; 3/

(c) Construction of a new road of four or more lanes, or realignment and/or widening of an existing road of two lanes or less so as to provide four or more lanes, where such new road, or realigned and/or widened section of road, would be 10 km or more in a continuous length.

9. (a) Inland waterways and ports for inland-waterway traffic which permit the passage of vessels of over 1 350 tons;

(b) Trading ports, piers for loading and unloading connected to land and outside ports (excluding ferry piers) which can take vessels of over 1 350 tons.

10. Groundwater abstraction or artificial groundwater recharge schemes where the annual volume of water abstracted or recharged is equivalent to or exceeds 10 million cubic metres.

11. (a) Works for the transfer of water resources between river basins where this transfer aims at preventing possible shortages of water and where the amount of water transferred exceeds 100 million cubic metres/year;

(b) In all other cases, works for the transfer of water resources between river basins where the multiannual average flow of the basin of abstraction exceeds 2 000 million cubic metres/year and where the amount of water transferred exceeds 5% of this flow.

In both cases transfers of piped drinking water are excluded.

12. Extraction of petroleum and natural gas for commercial purposes where the amount extracted exceeds 500 tons/day in the case of petroleum and 500 000 cubic metres/day in the case of gas.

13. Dams and other installations designed for the holding back or permanent storage of water, where a new or additional amount of water held back or stored exceeds 10 million cubic metres.

14. Pipelines for the transport of gas, oil or chemicals with a diameter of more than 800 mm and a length of more than 40 km.

15. Installations for the intensive rearing of poultry or pigs with more than:

(a) 40 000 places for poultry;

(b) 2 000 places for production pigs (over 30 kg); or

(c) 750 places for sows.

16. Quarries and opencast mining where the surface of the site exceeds 25 hectares, or peat extraction, where the surface of the site exceeds 150 hectares.

17. Construction of overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km.

18. Installations for the storage of petroleum, petrochemical, or chemical products with a capacity of 200 000 tons or more.

19. Other activities:

- Plants for the pretreatment (operations such as washing, bleaching, mercerization) or dyeing of fibres or textiles where the treatment capacity exceeds 10 tons per day;

- Plants for the tanning of hides and skins where the treatment capacity exceeds 12 tons of finished products per day;

- (a) Slaughterhouses with a carcass production capacity greater than 50 tons per day;

(b) Treatment and processing intended for the production of food products from:

(i)

Animal raw materials (other than milk) with a finished product production capacity greater than 75 tons per day;

(ii) Vegetable raw materials with a finished product production capacity greater than 300 tons per day (average value on a quarterly basis);

(c) Treatment and processing of milk, the quantity of milk received being greater than 200 tons per day (average value on an annual basis);

- Installations for the disposal or recycling of animal carcasses and animal waste with a treatment capacity exceeding 10 tons per day;

- Installations for the surface treatment of substances, objects or products using organic solvents, in particular for dressing, printing, coating, degreasing, waterproofing, sizing, painting, cleaning or impregnating, with a consumption capacity of more than 150 kg per hour or more than 200 tons per year;

- Installations for the production of carbon (hard-burnt coal) or electrographite by

means of incineration or graphitization.

20. Any activity not covered by paragraphs 1-19 above where public participation is provided for under an environmental impact assessment procedure in accordance with national legislation.

21. The provision of article 6, paragraph 1 (a) of this Convention, does not apply to any of the above projects undertaken exclusively or mainly for research, development and testing of new methods or products for less than two years unless they would be likely to cause a significant adverse effect on environment or health.

22. Any change to or extension of activities, where such a change or extension in itself meets the criteria/thresholds set out in this annex, shall be subject to article 6, paragraph 1 (a) of this Convention. Any other change or extension of activities shall be subject to article 6, paragraph 1 (b) of this Convention.

Notes

1/ Nuclear power stations and other nuclear reactors cease to be such an installation when all nuclear fuel and other radioactively contaminated elements have been removed permanently from the installation site.

2/ For the purposes of this Convention, "airport" means an airport which complies with the definition in the 1944 Chicago Convention setting up the International Civil Aviation Organization (Annex 14).

3/ For the purposes of this Convention, "express road" means a road which complies with the definition in the European Agreement on Main International Traffic Arteries of 15 November 1975.

Annex II

ARBITRATION

1. In the event of a dispute being submitted for arbitration pursuant to article 16, paragraph 2, of this Convention, a party or parties shall notify the secretariat of the subject matter of arbitration and indicate, in particular, the articles of this Convention whose interpretation or application is at issue. The secretariat shall forward the information received to all Parties to this Convention.

2. The arbitral tribunal shall consist of three members. Both the claimant party or parties and the other party or parties to the dispute shall appoint an arbitrator, and the two arbitrators so appointed shall designate by common agreement the third arbitrator, who shall be the president of the arbitral tribunal. The latter shall not be a national of one of the parties to the dispute, nor have his or her usual place of residence in the territory of one of these parties, nor be employed by any of them, nor have dealt with the case in any other capacity.

3. If the president of the arbitral tribunal has not been designated within two months of the appointment of the second arbitrator, the Executive Secretary of the Economic Commission for Europe shall, at the request of either party to the dispute, designate the president within a further two-month period.

4. If one of the parties to the dispute does not appoint an arbitrator within two months of the receipt of the request, the other party may so inform the Executive Secretary of the Economic Commission for Europe, who shall designate the president of the arbitral tribunal within a further two-month period. Upon designation, the president of the arbitral tribunal shall request the party which has not appointed an arbitrator to do so within two months. If it fails to do so within that period, the president shall so inform the Executive Secretary of the Economic Commission for Europe, who shall make this appointment within a further two-month period.

5. The arbitral tribunal shall render its decision in accordance with international law and the provisions of this Convention.

6. Any arbitral tribunal constituted under the provisions set out in this annex shall draw up its own rules of procedure.

7. The decisions of the arbitral tribunal, both on procedure and on substance, shall be taken by majority vote of its members.

8. The tribunal may take all appropriate measures to establish the facts.

9. The parties to the dispute shall facilitate the work of the arbitral tribunal and, in particular, using all means at their disposal, shall:

(a) Provide it with all relevant documents, facilities and information;

(b) Enable it, where necessary, to call witnesses or experts and receive their evidence.

10. The parties and the arbitrators shall protect the confidentiality of any information that they receive in confidence during the proceedings of the arbitral tribunal.

11. The arbitral tribunal may, at the request of one of the parties, recommend interim measures of protection.

12. If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to render its final decision. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings.

13. The arbitral tribunal may hear and determine counter-claims arising directly out of the subject matter of the dispute.

14. Unless the arbitral tribunal determines otherwise because of the particular circumstances of the case, the expenses of the tribunal, including the remuneration of its members, shall be borne by the parties to the dispute in equal shares. The tribunal shall keep a record of all its expenses, and shall furnish a final statement thereof to the parties.

15. Any Party to this Convention which has an interest of a legal nature in the subject matter of the dispute, and which may be affected by a decision in the case, may intervene in the proceedings with the consent of the tribunal.

16. The arbitral tribunal shall render its award within five months of the date on which it is established, unless it finds it necessary to extend the time limit for a period which should not exceed five months.

17. The award of the arbitral tribunal shall be accompanied by a statement of reasons. It shall be final and binding upon all parties to the dispute. The award will be transmitted by the arbitral tribunal to the parties to the dispute and to the secretariat. The secretariat will forward the information received to all Parties to this Convention.

18. Any dispute which may arise between the parties concerning the interpretation or execution of the award may be submitted by either party to the arbitral tribunal which made the award or, if the latter cannot be seized thereof, to another tribunal constituted for this purpose in the same manner as the first.

Appendix IV

Subchapter II—Reporting Requirements

§ 11021. [EPCRA §311]

Material safety data sheets

(a) Basic requirement

(1) Submission of MSDS or list

The owner or operator of any facility which is required to prepare or have available a material safety data sheet for a hazardous chemical under the Occupational Safety and Health Act of 1970 [29 U.S.C. 651 et seq.] and regulations promulgated under that Act shall submit a material safety data sheet for each such chemical, or a list of such chemicals as described in paragraph (2), to each of the following:

(A) The appropriate local emergency planning committee.

(B) The State emergency response commission.

(C) The fire department with jurisdiction over the facility.

(2) Contents of list

(A) The list of chemicals referred to in paragraph (1) shall include each of the following:

(i) A list of the hazardous chemicals for which a material safety data sheet is required under the Occupational Safety and Health Act of 1970 [29 U.S.C. 651 et seq.] and regulations promulgated under that Act, grouped in categories of health and physical hazards as set forth under such Act and regulations promulgated under such Act, or in such other categories as the Administrator may prescribe under subparagraph (B).

(ii) The chemical name or the common name of each such chemical as provided on the material safety data sheet.

(iii) Any hazardous component of each such chemical as provided on the material safety data sheet.

(B) For purposes of the list under this paragraph, the Administrator may modify the categories of health and physical hazards as set forth under the Occupational Safety and Health Act of 1970 [29 U.S.C. 651 et seq.] and regulations promulgated under that Act by requiring information to be reported in terms of groups of hazardous chemicals which present similar hazards in an emergency.

(3) Treatment of mixtures

An owner or operator may meet the requirements of this section with respect to a hazardous chemical which is a mixture by doing one of the following:

(A) Submitting a material safety data sheet for, or identifying on a list, each element or compound in the mixture which is a hazardous chemical. If more than one mixture has the same element or compound, only one material safety data sheet, or one listing, of the element or compound is necessary.

(B) Submitting a material safety data sheet for, or identifying on a list, the mixture itself.

(b) Thresholds

The Administrator may establish threshold quantities for hazardous chemicals below which no facility shall be subject to the provisions of this section. The threshold quantities may, in the Administrator's discretion, be based on classes of chemicals or categories of facilities.

(c) Availability of MSDS on request

(1) To local emergency planning committee

If an owner or operator of a facility submits a list of chemicals under subsection (a)(1) of this section, the owner or operator, upon request by the local emergency planning committee, shall submit the material safety data sheet for any chemical on the list to such committee.

(2) To public

A local emergency planning committee, upon request by any person, shall make available a material safety data sheet to the person in accordance with section 11044 of this title. If the local emergency planning committee does not have the requested material safety data sheet, the committee shall request the sheet from the facility owner or operator and then make the sheet available to the person in accordance with section 11044 of this title.

(d) Initial submission and updating

(1) The initial material safety data sheet or list required under this section with respect to a hazardous chemical shall be provided before the later of—

(A) 12 months after October 17, 1986, or

(B) 3 months after the owner or operator of a facility is required to prepare or have available a material safety data sheet for the chemical under the Occupational Safety and Health Act of 1970 [29 U.S.C. 651 et seq.] and regulations promulgated under that Act.

(2) Within 3 months following discovery by an owner or operator of significant new information concerning an aspect of a hazardous chemical for which a material safety data sheet was previously submitted to the local emergency planning committee under subsection (a) of this section, a revised sheet shall be provided to such person.

(e) "Hazardous chemical" defined

For purposes of this section, the term "hazardous chemical" has the meaning given such term by section 1910.1200(c) of title 29 of the Code of Federal Regulations, except that such term does not include the following:

(1) Any food, food additive, color additive, drug, or cosmetic regulated by the Food and Drug Administration.

(2) Any substance present as a solid in any manufactured item to the extent exposure to the substance does not occur under normal conditions of use.

(3) Any substance to the extent it is used for personal, family, or household purposes, or is present in the same form and concentration as a product packaged for distribution and use by the general public.

(4) Any substance to the extent it is used in a research laboratory or a hospital or other medical facility under the direct supervision of a technically qualified individual.

(5) Any substance to the extent it is used in routine agricultural operations or is a fertilizer held for sale by a retailer to the ultimate customer.

(Pub. L. 99-499, title III, §311, Oct. 17, 1986, 100 Stat. 1736.)

§ 11022. [EPCRA §312]

Emergency and hazardous chemical inventory forms

(a) Basic requirement

(1) The owner or operator of any facility which is required to prepare or have available a material safety data sheet for a hazardous chemical under the Occupational Safety and Health Act of 1970 [29 U.S.C. 651 et seq.] and regulations promulgated under that Act shall prepare and submit an emergency and hazardous chemical inventory form (hereafter in this chapter referred to as an "inventory form") to each of the following:

(A) The appropriate local emergency planning committee.

(B) The State emergency response commission.

(C) The fire department with jurisdiction over the facility.

(2) The inventory form containing tier I information (as described in subsection (d)(1) of this section) shall be submitted on or before March 1, 1988, and annually thereafter on March 1, and shall contain data with respect to the preceding calendar year. The preceding sentence does not apply if an owner or operator provides, by the same deadline and with respect to the same calendar year, tier II information (as described in subsection (d)(2) of this section) to the recipients described in paragraph (1).

(3) An owner or operator may meet the requirements of this section with respect to a hazardous chemical which is a mixture by doing one of the following:

(A) Providing information on the inventory form on each element or compound in the mixture which is a hazardous chemical. If more than one mixture has the same element or compound, only one listing on the inventory form for the element or compound at the facility is necessary.

(B) Providing information on the inventory form on the mixture itself.

(b) Thresholds

The Administrator may establish threshold quantities for hazardous chemicals covered by this section below which no facility shall be

subject to the provisions of this section. The threshold quantities may, in the Administrator's discretion, be based on classes of chemicals or categories of facilities.

(c) Hazardous chemicals covered

A hazardous chemical subject to the requirements of this section is any hazardous chemical for which a material safety data sheet or a listing is required under section 11021 of this title.

(d) Contents of form

(1) Tier I information

(A) Aggregate information by category

An inventory form shall provide the information described in subparagraph (B) in aggregate terms for hazardous chemicals in categories of health and physical hazards as set forth under the Occupational Safety and Health Act of 1970 [29 U.S.C. 651 et seq.] and regulations promulgated under that Act.

(B) Required information

The information referred to in subparagraph (A) is the following:

(i) An estimate (in ranges) of the maximum amount of hazardous chemicals in each category present at the facility at any time during the preceding calendar year.

(ii) An estimate (in ranges) of the average daily amount of hazardous chemicals in each category present at the facility during the preceding calendar year.

(iii) The general location of hazardous chemicals in each category.

(C) Modifications

For purposes of reporting information under this paragraph, the Administrator may—

(i) modify the categories of health and physical hazards as set forth under the Occupational Safety and Health Act of 1970 [29 U.S.C. 651 et seq.] and regulations promulgated under that Act by requiring information to be reported in terms of groups of hazardous chemicals which present similar hazards in an emergency, or

(ii) require reporting on individual hazardous chemicals of special concern to emergency response personnel.

(2) Tier II information

An inventory form shall provide the following additional information for each hazardous chemical present at the facility, but only upon request and in accordance with subsection (e) of this section:

(A) The chemical name or the common name of the chemical as provided on the material safety data sheet.

(B) An estimate (in ranges) of the maximum amount of the hazardous chemical present at the facility at any time during the preceding calendar year.

(C) An estimate (in ranges) of the average daily amount of the hazardous chemical present at the facility during the preceding calendar year.

(D) A brief description of the manner of storage of the hazardous chemical.

(E) The location at the facility of the hazardous chemical.

(F) An indication of whether the owner elects to withhold location information of a specific hazardous chemical from disclosure to the public under section 11044 of this title.

(e) Availability of tier II information

(1) Availability to State commissions, local committees, and fire departments

Upon request by a State emergency planning commission, a local emergency planning committee, or a fire department with jurisdiction over the facility, the owner or operator of a facility shall provide tier II information, as described in subsection (d) of this section, to the person making the request. Any such request shall be with respect to a specific facility.

(2) Availability to other State and local officials

A State or local official acting in his or her official capacity may have access to tier II information by submitting a request to the State emergency response commission or the local emergency planning committee. Upon receipt of a request for tier II information, the State commission or local committee shall, pursuant to paragraph (1), request the facility owner or operator for the tier II information and make available such information to the official.

(3) Availability to public

(A) In general

Any person may request a State emergency response commission or local emergency planning committee for tier II information relating to the preceding calendar year with respect to a facility. Any such request shall be in writing and shall be with respect to a specific facility.

(B) Automatic provision of information to public

Any tier II information which a State emergency response commission or local emergency planning committee has in its possession shall be made available to a person making a request under this paragraph in accordance with section 11044 of this title. If the State emergency response commission or local emergency planning committee does not have the tier II information in its possession, upon a request for tier II information the State emergency response commission or local emergency planning committee shall, pursuant to paragraph (1), request the facility owner or operator for tier II information with respect to a hazardous chemical which a facility has stored in an amount in excess of 10,000 pounds present at the facility at any time during the preceding calendar year and make such information available in accordance with section 11044 of this title to the person making the request.

(C) Discretionary provision of information to public

In the case of tier II information which is not in the possession of a State emergency response commission or local emergency planning committee and which is with respect to a hazardous chemical which a facility has stored in an amount less than 10,000 pounds present at the facility at any time during the preceding calendar year, a request from a person must include the general need for the information. The State emergency response commission or local emergency planning committee may, pursuant to paragraph (1), request the facility owner or operator for the tier II information on behalf of the person making the request. Upon receipt of any information requested on behalf of such person, the State emergency response commission or local emergency planning committee shall make the information available in accordance with section 11044 of this title to the person.

(D) Response in 45 days

A State emergency response commission or local emergency planning committee shall respond to a request for tier II information under this paragraph no later than 45 days after the date of receipt of the request.

(f) Fire department access

Upon request to an owner or operator of a facility which files an inventory form under this section by the fire department with jurisdiction over the facility, the owner or operator of the facility shall allow the fire department to conduct an on-site inspection of the facility and shall provide to the fire department specific location information on hazardous chemicals at the facility.

(g) Format of forms

The Administrator shall publish a uniform format for inventory forms within three months after October 17, 1986. If the Administrator does not publish such forms, owners and operators of facilities subject to the requirements of this section shall provide the information required under this section by letter.

(Pub. L. 99-499, title III, §312, Oct. 17, 1986, 100 Stat. 1738.)

§ 11023. [EPCRA §313]

Toxic chemical release forms

(a) Basic requirement

The owner or operator of a facility subject to the requirements of this section shall complete a toxic chemical release form as published under subsection (g) of this section for each toxic chemical listed under subsection (c) of this section that was manufactured, processed, or otherwise used in quantities exceeding the toxic chemical threshold quantity established by subsection (f) of this section during the preceding calendar year at such facility. Such form shall be submitted to the Administrator and to an official or officials of the State designated

by the Governor on or before July 1, 1988, and annually thereafter on July 1 and shall contain data reflecting releases during the preceding calendar year.

(b) Covered owners and operators of facilities

(1) In general

(A) The requirements of this section shall apply to owners and operators of facilities that have 10 or more full-time employees and that are in Standard Industrial Classification Codes 20 through 39 (as in effect on July 1, 1985) and that manufactured, processed, or otherwise used a toxic chemical listed under subsection (c) of this section in excess of the quantity of that toxic chemical established under subsection (f) of this section during the calendar year for which a release form is required under this section.

(B) The Administrator may add or delete Standard Industrial Classification Codes for purposes of subparagraph (A), but only to the extent necessary to provide that each Standard Industrial Code to which this section applies is relevant to the purposes of this section.

(C) For purposes of this section—

(i) The term "manufacture" means to produce, prepare, import, or compound a toxic chemical.

(ii) The term "process" means the preparation of a toxic chemical, after its manufacture, for distribution in commerce—

(I) in the same form or physical state as, or in a different form or physical state from, that in which it was received by the person so preparing such chemical, or

(II) as part of an article containing the toxic chemical.

(2) Discretionary application to additional facilities

The Administrator, on his own motion or at the request of a Governor of a State (with regard to facilities located in that State), may apply the requirements of this section to the owners and operators of any particular facility that manufactures, processes, or otherwise uses a toxic chemical listed under subsection (c) of this section if the Administrator determines that such action is warranted on the basis of toxicity of the toxic chemical, proximity to other facilities that release the toxic chemical or to population centers, the history of releases of such chemical at such facility, or such other factors as the Administrator deems appropriate.

(c) Toxic chemicals covered

The toxic chemicals subject to the requirements of this section are those chemicals on the list in Committee Print Number 99-169 of the Senate Committee on Environment and Public Works, titled "Toxic Chemicals Subject to Section 313 of the Emergency Planning and Community Right-To-Know Act of 1986" [42 U.S.C. 11023] (including any revised version of the list as may be made pursuant to subsection (d) or (e) of this section).

(d) Revisions by Administrator

(1) In general

The Administrator may by rule add or delete a chemical from the list described in subsection (c) of this section at any time.

(2) Additions

A chemical may be added if the Administrator determines, in his judgment, that there is sufficient evidence to establish any one of the following:

(A) The chemical is known to cause or can reasonably be anticipated to cause significant adverse acute human health effects at concentration levels that are reasonably likely to exist beyond facility site boundaries as a result of continuous, or frequently recurring, releases.

(B) The chemical is known to cause or can reasonably be anticipated to cause in humans—

(i) cancer or teratogenic effects, or

(ii) serious or irreversible—

(I) reproductive dysfunctions,

(II) neurological disorders,

(III) heritable genetic mutations, or

(IV) other chronic health effects.

(C) The chemical is known to cause or can reasonably be anticipated to cause, because of—

(i) its toxicity,

(ii) its toxicity and persistence in the environment, or

(iii) its toxicity and tendency to bioaccumulate in the environment,

a significant adverse effect on the environment of sufficient seriousness, in the judgment of the Administrator, to warrant reporting under this section. The number of chemicals included on the list described in subsection (c) of this section on the basis of the preceding sentence may constitute in the aggregate no more than 25 percent of the total number of chemicals on the list.

A determination under this paragraph shall be based on generally accepted scientific principles or laboratory tests, or appropriately designed and conducted epidemiological or other population studies, available to the Administrator.

(3) Deletions

A chemical may be deleted if the Administrator determines there is not sufficient evidence to establish any of the criteria described in paragraph (2).

(4) Effective date

Any revision made on or after January 1 and before December 1 of any calendar year shall take effect beginning with the next calendar year. Any revision made on or after December 1 of any calendar year and before January 1 of the next calender year shall take effect beginning with the calendar year following such next calendar year.

(e) Petitions

(1) In general

Any person may petition the Administrator to add or delete a chemical from the list described in subsection (c) of this section on the basis of the criteria in subparagraph (A) or (B) of subsection (d)(2) of this section. Within 180 days after receipt of a petition, the Administrator shall take one of the following actions:

(A) Initiate a rulemaking to add or delete the chemical to the list, in accordance with subsection (d)(2) or (d)(3) of this section.

(B) Publish an explanation of why the petition is denied.

(2) Governor petitions

A State Governor may petition the Administrator to add or delete a chemical from the list described in subsection (c) of this section on the basis of the criteria in subparagraph (A), (B), or (C) of subsection (d)(2) of this section. In the case of such a petition from a State Governor to delete a chemical, the petition shall be treated in the same manner as a petition received under paragraph (1) to delete a chemical. In the case of such a petition from a State Governor to add a chemical, the chemical will be added to the list within 180 days after receipt of the petition, unless the Administrator—

(A) initiates a rulemaking to add the chemical to the list, in accordance with subsection (d)(2) of this section, or

(B) publishes an explanation of why the Administrator believes the petition does not meet the requirements of subsection (d)(2) of this section for adding a chemical to the list.

(f) Threshold for reporting

(1) Toxic chemical threshold amount

The threshold amounts for purposes of reporting toxic chemicals under this section are as follows:

(A) With respect to a toxic chemical used at a facility, 10,000 pounds of the toxic chemical per year.

(B) With respect to a toxic chemical manufactured or processed at a facility—

(i) For the toxic chemical release form required to be submitted under this section on or before July 1, 1988, 75,000 pounds of the toxic chemical per year.

(ii) For the form required to be submitted on or before July 1, 1989, 50,000 pounds of the toxic chemical per year.

(iii) For the form required to be submitted on or before July 1, 1990, and for each form thereafter, 25,000 pounds of the toxic chemical per year.

(2) Revisions

The Administrator may establish a threshold amount for a toxic chemical different from the amount established by paragraph (1). Such revised threshold shall obtain reporting on a substantial majority of total releases of the chemical at all facilities subject to the requirements of this section. The amounts established under this

paragraph may, at the Administrator's discretion, be based on classes of chemicals or categories of facilities.

(g) Form

(1) Information required

Not later than June 1, 1987, the Administrator shall publish a uniform toxic chemical release form for facilities covered by this section. If the Administrator does not publish such a form, owners and operators of facilities subject to the requirements of this section shall provide the information required under this subsection by letter postmarked on or before the date on which the form is due. Such form shall—

(A) provide for the name and location of, and principal business activities at, the facility;

(B) include an appropriate certification, signed by a senior official with management responsibility for the person or persons completing the report, regarding the accuracy and completeness of the report; and

(C) provide for submission of each of the following items of information for each listed toxic chemical known to be present at the facility:

(i) Whether the toxic chemical at the facility is manufactured, processed, or otherwise used, and the general category or categories of use of the chemical.

(ii) An estimate of the maximum amounts (in ranges) of the toxic chemical present at the facility at any time during the preceding calendar year.

(iii) For each wastestream, the waste treatment or disposal methods employed, and an estimate of the treatment efficiency typically achieved by such methods for that wastestream.

(iv) The annual quantity of the toxic chemical entering each environmental medium.

(2) Use of available data

In order to provide the information required under this section, the owner or operator of a facility may use readily available data (including monitoring data) collected pursuant to other provisions of law, or, where such data are not readily available, reasonable estimates of the amounts involved. Nothing in this section requires the monitoring or measurement of the quantities, concentration, or frequency of any toxic chemical released into the environment beyond that monitoring and measurement required under other provisions of law or regulation. In order to assure consistency, the Administrator shall require that data be expressed in common units.

(h) Use of release forms

The release forms required under this section are intended to provide information to the Federal, State, and local governments and the public, including citizens of communities surrounding covered facilities. The release form shall be available, consistent with section 11044(a) of this title, to inform persons about releases of toxic chemicals to the environment; to assist governmental agencies, researchers, and other persons in the conduct of research and data gathering; to aid in the development of appropriate regulations, guidelines, and standards; and for other similar purposes.

(i) Modifications in reporting frequency

(1) In general

The Administrator may modify the frequency of submitting a report under this section, but the Administrator may not modify the frequency to be any more often than annually. A modification may apply, either nationally or in a specific geographic area, to the following:

(A) All toxic chemical release forms required under this section.

(B) A class of toxic chemicals or a category of facilities.

(C) A specific toxic chemical.

(D) A specific facility.

(2) Requirements

A modification may be made under paragraph (1) only if the Administrator—

(A) makes a finding that the modification is consistent with the provisions of subsection (h) of this section, based on—

(i) experience from previously submitted toxic chemical release forms, and

(ii) determinations made under paragraph (3), and

(B) the finding is made by a rulemaking in accordance with section 553 of title 5.

(3) Determinations

The Administrator shall make the following determinations with respect to a proposed modification before making a modification under paragraph (1):

(A) The extent to which information relating to the proposed modification provided on the toxic chemical release forms has been used by the Administrator or other agencies of the Federal Government, States, local governments, health professionals, and the public.

(B) The extent to which the information is (i) readily available to potential users from other sources, such as State reporting programs, and (ii) provided to the Administrator under another Federal law or through a State program.

(C) The extent to which the modification would impose additional and unreasonable burdens on facilities subject to the reporting requirements under this section.

(4) 5-year review

Any modification made under this subsection shall be reviewed at least once every 5 years. Such review shall examine the modification and ensure that the requirements of paragraphs (2) and (3) still justify continuation of the modification. Any change to a modification reviewed under this paragraph shall be made in accordance with this subsection.

(5) Notification to Congress

The Administrator shall notify Congress of an intention to initiate a rulemaking for a modification under this subsection. After such notification, the Administrator shall delay initiation of the rulemaking for at least 12 months, but no more than 24 months, after the date of such notification.

(6) Judicial review

In any judicial review of a rulemaking which establishes a modification under this subsection, a court may hold unlawful and set aside agency action, findings, and conclusions found to be unsupported by substantial evidence.

(7) Applicability

A modification under this subsection may apply to a calendar year or other reporting period beginning no earlier than January 1, 1993.

(8) Effective date

Any modification made on or after January 1 and before December 1 of any calendar year shall take effect beginning with the next calendar year. Any modification made on or after December 1 of any calendar year and before January 1 of the next calendar year shall take effect beginning with the calendar year following such next calendar year.

(j) EPA management of data

The Administrator shall establish and maintain in a computer data base a national toxic chemical inventory based on data submitted to the Administrator under this section. The Administrator shall make these data accessible by computer telecommunication and other means to any person on a cost reimbursable basis.

(k) Report

Not later than June 30, 1991, the Comptroller General, in consultation with the Administrator and appropriate officials in the States, shall submit to the Congress a report including each of the following:

(1) A description of the steps taken by the Administrator and the States to implement the requirements of this section, including steps taken to make information collected under this section available to and accessible by the public.

(2) A description of the extent to which the information collected under this section has been used by the Environmental Protection Agency, other Federal agencies, the States, and the public, and the purposes for which the information has been used.

(3) An identification and evaluation of options for modifications to the requirements of this section for the purpose of making information collected under this section more useful.

(l) Mass balance study

(1) In general

The Administrator shall arrange for a mass balance study to be

carried out by the National Academy of Sciences using mass balance information collected by the Administrator under paragraph (3). The Administrator shall submit to Congress a report on such study no later than 5 years after October 17, 1986.

(2) Purposes

The purposes of the study are as follows:

(A) To assess the value of mass balance analysis in determining the accuracy of information on toxic chemical releases.

(B) To assess the value of obtaining mass balance information, or portions thereof, to determine the waste reduction efficiency of different facilities, or categories of facilities, including the effectiveness of toxic chemical regulations promulgated under laws other than this chapter.

(C) To assess the utility of such information for evaluating toxic chemical management practices at facilities, or categories of facilities, covered by this section.

(D) To determine the implications of mass balance information collection on a national scale similar to the mass balance information collection carried out by the Administrator under paragraph (3), including implications of the use of such collection as part of a national annual quantity toxic chemical release program.

(3) Information collection

(A) The Administrator shall acquire available mass balance information from States which currently conduct (or during the 5 years after October 17, 1986 initiate) a mass balance-oriented annual quantity toxic chemical release program. If information from such States provides an inadequate representation of industry classes and categories to carry out the purposes of the study, the Administrator also may acquire mass balance information necessary for the study from a representative number of facilities in other States.

(B) Any information acquired under this section shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that the information (or a particular part thereof) to which the Administrator or any officer, employee, or representative has access under this section if made public would divulge information entitled to protection under section 1905 of title 18, such information or part shall be considered confidential in accordance with the purposes of that section, except that such information or part may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this section.

(C) The Administrator may promulgate regulations prescribing procedures for collecting mass balance information under this paragraph.

(D) For purposes of collecting mass balance information under subparagraph (A), the Administrator may require the submission of information by a State or facility.

(4) Mass balance definition

For purposes of this subsection, the term "mass balance" means an accumulation of the annual quantities of chemicals transported to a facility, produced at a facility, consumed at a facility, used at a facility, accumulated at a facility, released from a facility, and transported from a facility as a waste or as a commercial product or byproduct or component of a commercial product or byproduct.

(Pub. L. 99-499, title III, §313, Oct. 17, 1986, 100 Stat. 1741.)

Appendix V

§ 1365. [FWPCA §505]

Citizen suits

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator. The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) Notice

No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator; United States interests protected

(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(3) Protection of interests of united states.—Whenever any action is brought under this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General and the Administrator. No consent judgment shall be entered in an action in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator.

(d) Litigation costs

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Statutory or common law rights not restricted

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

(f) Effluent standard or limitation

For purposes of this section, the term "effluent standard or limitation under this chapter" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title, (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title; (6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title); or (7) a regulation under section 1345(d) of this title,.[18]

(g) "Citizen" defined

For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

(h) Civil action by State Governors

A Governor of a State may commence a civil action under subsection (a) of this section, without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this chapter the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State.

(June 30, 1948, ch. 758, title V, §505, as added Oct. 18, 1972, Pub. L. 92-500, §2, 86 Stat. 888, and amended Feb. 4, 1987, Pub. L. 100-4, title III, §314(c), title IV, §406(d)(2), title V, §504, 505(c), 101 Stat. 49, 73, 75, 76.)

References In Text

The Federal Rules of Civil Procedure, referred to in subsec. (d), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

18. So in original.

Appendix VI

The Good Neighbor Project
For Sustainable Industries

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MODEL CONTRACT FOR SUSTAINABLE INDUSTRY

The following Model Contract for Sustainable Industry is based on proposed and existing good neighbor agreements, union collective bargaining agreements, and state and local legislation.

Its language is intended to be suitable for application to any of those contexts, as well as for conditioning or amending federal, state or local licenses, permits or charters of corporations.

**** NOTE: The terms of this Model Contract are intended to provide models and examples for addressing a range of concerns relating to sustainable industry and corporate accountability. It is not our intention, may not be practical in many situations, to attempt to address all of these issues in a single contract or statute. Instead, we recommend that readers pick and choose from among the agreement's provisions those elements which address the concerns most relevant to their local communities and industries. ****

MODEL CONTRACT FOR SUSTAINABLE INDUSTRY

This is a legally binding Agreement entered into on the _____day of_____, 199_ between [company]Inc., an [state of incorporation] corporation with a [manufacturing] facility located at [address], "[citizens' group]", which is an association of neighbors of the [community] [company name] facility, and [union, if participating].

BACKGROUND

A. [citizens' group] is an association of citizens residing in [community] [and employees of company name] who are concerned with the environment and economy of [community name].

B. The [company] plant in [community] is engaged in the production of _____products. The [company][community] plant is a provider of __jobs in the community.

C. [union] [local number #] is the legally authorized bargaining agent of _____ workers at the plant.

D. The parties have diverse concerns, but meet on common ground with regard to one core principle: all have a substantial stake in maintaining sustainable industry in [community name]. We use the word "sustainable" to mean conducting business in a manner which meets the needs of today while protecting the ability of ourselves and others, including future generations, to meet the needs of tomorrow. In order for an industry to be sustainable, continuous investment is necessary in the maintenance and refinement of equipment, facilities, in the development of new products and production processes, and in increasing the skills of its workforce. Issues encompassed in sustainability include toxic chemical usage, energy and materials consumption, environmental pollution, and the ability of the firm and its labor force to compete in the marketplace.

E. In order to engage in a genuine partnership with the local community and demonstrate its intent to maintain a sustainable operation, the corporation agrees herein to voluntarily constrain its ability to withdraw assets from the community. The corporation has done this by agreeing that the community and workforce shall have a right of first refusal in the event the corporation decides to cease operations in [community name]. Further, the corporation has agreed that in the event such a decision to close is effectuated, fair compensation shall be paid to the community and workforces for losses engendered.

F. Members of [citizens' group] who reside near to the [community] [company]facility have obtained information through the Federal Community Right to Know law and other sources which have

indicated that a number of toxic chemicals are utilized at the [company] facility, and that some of these chemicals have been released to the environment. [citizens' group] has requested additional information from [company] concerning the operations, activities and chemicals used at the [community] [company]plant. The purpose of requesting this information is to address the concerns of some members of [citizens' group] regarding the possible hazards to the environment and to their health and safety from chemical releases at the plant.

G. Various laws require or encourage [company name] to conduct studies which are relevant to the sustainability of its operations. These laws include [list may include: OSHA process safety regulations, state toxics use reduction law, state energy efficiency law, securities and exchange commission regulations on publicly held corporations, etc.] In order to provide the corporation the benefit of workforce and community expertise, and provide these local stakeholders with an opportunity to protect their interests, the parties agree to a process for worker and community participation in the development of such studies, and a mechanism to allow access to the studies themselves in draft and final forms.

H. To further increase their understanding of the [company]facility, [citizens' group] has requested permission to have members tour the facility accompanied by a qualified professional of their choice, in order to better understand the activities at the facility and the technical matters of concern to [citizens' group].

I. Citizens group has further requested that the company undertake certain additional studies and audits.

J. [company] and [citizens' group] expect that, with a continuing spirit of neighborliness and mutual respect, they will be able to discuss all issues and agree upon them without resort to formal procedures or the assistance of third parties. However, in order to provide legal protection of all parties' interests, this Agreement sets forth with specificity the parties' rights and duties and provides a dispute resolution procedure to be used in case a dispute arises.

NOW, THEREFORE, considering the above background and the commitments and conditions contained in this agreement, the parties hereby agree to be bound by this contract as follows:

INFORMATION ACCESS

1.PUBLIC INFORMATION [Company name] agrees to place and maintain the following documents on reserve at the public library nearest the plant, except to the extent that it constitutes proprietary trade secret information as defined in this agreement: all information filed under the Emergency Planning and Community Right To Know Act, all environmental and safety audits and studies, toxics use reduction plans, OSHA process hazard analyses, plant safety manuals, hazard communication program, chemical accident hazard analyses including risk analyses with plume maps, documentation regarding subsidies received from federal, state and local governments, corporate annual report and SEC filings, and a list of persons employed at the [community name] facility, their positions, and their residential address.

2.COMMITTEE AND CONSULTANT ACCESS TO INFORMATION, FACILITY AND PERSONNEL The committee and consultants shall have access to all information, facility areas and plant personnel relevant to environmental and safety audits and studies, toxics use reduction plans, and economic sustainability studies, including, but not limited to, access to the existing plant facilities and workers (including confidential interviews) and access to plans, documents, studies, plant safety manual, hazard communication program, pre-start-up process, hazard analysis, risk analysis with plume maps, hydrocarbon storage tank kill radius studies, SARA 312 inventories, building codes, fault tree analysis, failure analysis, process flowcharts, process hazard review and all materials and facilities used in the operation of the facility, including, but not limited to vessels and lines, and information specified in this agreement regarding economic sustainability assessments.

SUSTAINABLE INDUSTRY COMMITTEE

3.ESTABLISHMENT OF COMMITTEE

a.[NONUNION PLANT] There shall be established a Sustainable Industry Committee [alternatively, Health, Safety and Environment Committee] (hereinafter referred to as "the committee ") composed of twelve voting members. Four members will be selected by [citizens group], four members will be selected by [company]'s management. In addition, employees shall select four members through a secret ballot election conducted every two years. All employees shall be eligible to vote and shall be given the opportunity to vote during their normal working hours at a location or locations at or contiguous to the facility for which the committee membership is being decided. Nominees receiving the most votes shall be elected.

[UNIONIZED PLANT] There is hereby formed a Sustainable Industry Committee [alternatively, Health, Safety and Environment Committee](hereinafter referred to as "the committee ") composed of

twelve voting members. Four members will be selected by [citizens group], four by the [union local] and four by [company].

b. In the event of a vacant position on the committee, a replacement shall be selected within 30 days, pursuant to the selection procedures set forth in this section, [except that in facilities where there is no union, the elected employee hazard prevention advocates shall select an employee to fill the vacant employee-elected slot in the interim until the next scheduled employee election.]

c. RIGHTS AND RESPONSIBILITIES OF COMMITTEE

The members of the committee shall have the following rights and responsibilities:

i. Develop an overall assessment of the sustainability of the [company name] facility with the assistance of appropriate experts.

ii. Supervise and receive reports from auditors and inspectors, hired to aid in independent review of the sustainability of the [company name] facility, including reviewing and commenting on all draft studies and/or audits prepared by consultants.

iii. Conduct site visits and plant inspections in association with briefings and meetings with the contractors undertaking various audits and studies.

iv. Serve as a channel for communication between the parties and the community.

v.Develop a joint management-workforce-community workplan to implement recommendations for improving the sustainability of the plant as needs are identified.

vi.Convene at least once per month to discuss any pending matters.

INSPECTION AGREEMENT

1. PREPARATION FOR INSPECTION. In order to help prepare the consultant and committee for an inspection, [company]shall provide, at least twenty days prior to the planned date of the inspection, the following:

a. Documents. Documents as listed in Attachment A of this agreement.

b. Scope of proprietary information. A written document specifying any locations and activities within the facility which are proprietary in nature.

2. OBSERVANCE OF SAFETY RULES DURING INSPECTION. While in the [company]facility, Consultant and committee shall abide by all rules and regulations of the facility concerning work and safety as well as all governmental laws and regulations pertaining to occupational safety and health.

3.PHOTOGRAPHS/VIDEOS/SAMPLING. During the inspection participants may take photographs, videos and samples of soil, water, air, materials in use or storage, or emissions.

4. FOLLOWUP ON INSPECTION. [company]agrees to meet with members of [citizens' group] on a date subsequent to the inspection to discuss any concerns raised.

EXTERNAL AUDITS OF HEALTH, SAFETY AND ENVIRONMENTAL CONDITIONS

SAFETY AUDIT

1. It is specifically agreed that an annual safety audit will be undertaken with regard to the plant. This safety audit will be performed by a technically competent, nationally recognized audit team. The cost of this audit will be borne by [company] from an escrow fund created pursuant to this agreement.

2. The scope of work to be undertaken by this audit team shall include a review of existing plans and procedures regarding safety as well as safety of existing equipment and practices. The safety audit should ensure that the facility has an Accident Prevention Plan as described in section __ of this agreement.

3.To the extent that similar safety assessments are currently, or will in the future be, required by OSHA or EPA regulations or by state law, this safety audit may be structured to meet those federal requirements as well as the terms of this agreement. The committee and safety auditor shall have access to any information utilized in compliance with such regulations, and with interim and final products of such studies. In the audit required in this agreement, the Committee shall have the ability to expand upon the scope of such studies, including but not limited to expanding on the substances or equipment studied or requiring concrete actions to be taken to improve upon plant safety; expediting the initiation and completion of such studies; and integrating such studies with others necessary to ensure plant sustainability.

4. The safety auditor and the Committee shall have full access to all information, facility areas and personnel, deemed relevant to a safety audit. Access for the committee shall be provided at a time, place and manner determined in a meeting of the committee. The audit shall follow nationally recognized auditing protocols. The committee shall have a right to review all information supplied to or by the safety audit team.

5. If a dispute arises as to whether certain documents requested by the committee are proprietary information then [company] may trigger the arbitration provisions of this agreement for a determination. In any event, [Company name] shall be required to provide such information to the committee.

6. The detailed scope of work for the audit shall be determined by the committee. If the safety audit study finds deficiencies in the plant, recommendations for changes and/or modifications necessary to address these deficiencies should be included in the audit report.

7. The committee shall be provided with a copy of the audit and recommendations to address deficiencies, if any.

8. The committee shall review the audit study and any recommendations and determine what action and/or modifications should be undertaken by [company], if any. The committee shall make written final recommendations which will be binding upon [company]. Either party may enforce the recommendations in district court.

9. ACCIDENT PREVENTION PLAN The safety audit shall ensure that the facility has an Accident Prevention Plan which includes

a. a hazard assessment to assess the potential effect of an accidental release, including downwind effects, potential exposures to affected population and a release history for the last five years and shall include a worst case accidental release.

b. a program with definite timelines for actions to be taken to prevent accidental releases of the regulated substances including safety precautions, maintenance, monitoring and employee training measures; and

c. a response program setting forth specific actions to be taken in response to an accidental release such as informing and evacuating the public and addressing emergency health care.

ENVIRONMENTAL AUDIT

1. The parties hereby agree to conduct an annual environmental audit of [company]'s facilities. As new facilities are constructed they shall become subject to this environmental audit provision. The scope of this environmental audit shall encompass workplace emissions, air emissions, wastewater discharge, solid waste management and toxics use reductions.

2. This environmental audit will be performed by a technically competent, nationally recognized audit team or teams, with separate reports being generated for air emissions, wastewater, solid waste management and toxics use reductions. The cost of this environmental audit will be borne by the [company] from an escrow fund created pursuant to this agreement and administered by the committee.

3. The air, wastewater and solid waste audits will be oriented to determine compliance with existing permits and regulations applicable to the facility. The toxic use reduction audit should set forth a comprehensive audit and reduction plan for toxic chemicals used and waste products generated by the plant. The audit should include a recommended policy regarding reduction/limitation of toxics, a statement of the scope and objective of the audit, a projection of future use and waste generation per unit of product, economic costs of the use of various toxics, identification and evaluation of toxic use reduction alternatives, recommendations and proposed schedules for toxic use reduction. The study of reduction alternatives should be broadly commissioned to include process and production modifications equipment modifications and replacement as well as operating and maintenance and recycling and reuse alternatives.

4.WORKPLACE AND ENVIRONMENTAL MONITORING. Consultants paid for by the company and supervised by the committee will conduct regular testing of the worksite, employees in the worksite and stack emissions to the outside. These tests shall be done at least once per quarter.

5.ODORS. Odors shall not be emitted from the [company name] facility. In the event that odors are emitted and written notice is given of the detection of odors by three or more neighbors, [Company name] shall immediately cease production on the problematic line and not resume production until:

1. the cause has been identified;
2. corrective actions have been identified and implemented.

Violation of these terms shall trigger the penalty provisions of this agreement. [Source: Neighborhood Agreement between Quinsigamond Village Health Awareness Group and Lewcott, Inc., Worcester, Massachusetts.]

6.ENERGY CONSERVATION AND EFFICIENCY

a.The Committee shall commission a consultant to study energy consumption in the [Company name] plant. Such study shall be submitted to the committee for its review and recommendations. The study shall consider, at a minimum, each of the following topics:

i.Total energy consumption in the facility.

ii.Energy conservation alternatives.

iii.Measures for reducing the creation of greenhouse gases resulting from products and production.

iv.Renewable energy alternatives

v.On-site energy generation alternatives.

vi.Company policies and practices with regard to energy usage and efficiency in the design of products and production processes, and in the acquisition of new equipment.

b. The Committee shall develop an energy plan for the company, including quantifiable goals and timelines regarding each of the above-noted factors.

7.STOPPING WORK UNSAFE TO ENVIRONMENT OR TO WORKERS. The [Union Co-chairperson of the Committee or other workforce designee]will have the right to shut down any operation in plant which he/she believes presents an imminent danger to the health and safety of an employee or presents a danger to the outside environment. [Based on collective bargaining agreement of UAW and Harvard Industries, October 1991]

8.REMEDIATION, RELOCATION, COMPENSATION. [Insert clauses as necessary regarding cleanup of past spills or dumping, relocation of residents or facilities, compensation for past injuries, establishment of health clinics or other in-kind compensation for injuries]

TOXICS USE REDUCTION

(Provisions based on settlement in Environmental Action v. IR Industries, and Massachusetts Toxics Use Reduction Act)

1. The term "toxics use reduction" means any change in a practice, process, activity, machinery or equipment:

a. that reduces or eliminates the use or production of a hazardous substance; (the term "hazardous substance" as used throughout shall mean any hazardous substance as defined pursuant to 42 U.S.C. 9601(14).)

b. that results in a reduction of any hazardous substance used or produced in proportion to the plant's production capacity; or

c. The term "toxics use reduction" includes equipment or technology modifications, installation of new machinery of equipment (for example, without limiting the generality of this provision, the installation of manufacturing equipment which employs mechanical or electronic processes rather than chemical processes), changes in processes or procedures, reformulation or redesign of products, substitution of materials or components, and improvements in housekeeping, training, maintenance or inventory control.

d. The term "toxics use reduction" does not include:

(1) any practice which alters the physical, chemical or biological characteristics or the volume of a hazardous substance through a process or activity which itself is not integral to the production of a product or the providing of a service;

(2) the use of a hazardous substance or by-product as a hazardous secondary material or as a product.

2. Within 45 days following the entry of this agreement [company] shall retain an independent environmental consultant who shall have appropriate training and experience to analyze methods of toxics use reduction at the plant, and shall so advise [citizens group]. Such consultant shall be selected from a list to be provided to [company] by the [consultant reviewer]. In the event that [company] are unable to select a suitable consultant from such list, they may select a consultant of their choosing, provided that the name and qualifications of such consultant shall be provided to [consultant reviewer] who shall have ten (10) days from the date of receipt to object to such consultant. Failure to object within the time specified shall constitute approval. Objection shall be for reasonable grounds, related to

the consultant's ability to fulfill the requirements of this Agreement, and shall be stated in writing. Upon receiving such objection, [company] may submit the name of another consultant as provided above, or may resolve any outstanding objections by agreement with the [consultant reviewer.][company] shall pay [consultant reviewer] $150.00 per hour for time spent in reviewing [company]' proposed consultants, up to a maximum of $500.00. The consultant shall prepare a report for [company], with a copy to the committee and public library by _____ 1, 199_, which report shall contain the following:

a. An identification of the amount of each hazardous substance used, generated, released, and/or transferred off-site by the plant in calendar year 199_.
b. An identification of all technically available methods for toxics use reduction for each such hazardous substance at the plant.
c. Analysis and discussion of the costs, savings and overall feasibility of each of the identified methods for toxics use reduction at the plant
d. A list of selected methods for toxics use reduction at the plant based on achievement of maximum feasible toxics use reduction.
e. A time schedule by which those methods will be implemented.

3.The work of the consultant shall be conducted in consultation with the committee, and the report of the consultant shall be present to the committee in draft form prior to its completion.

4. Within one year of this agreement, at least one of [company] management personnel with primary or secondary responsibility for environmental compliance shall complete a course or training program of sufficient scope and detail to enable them to understand and implement opportunities for pollution prevention and toxics use reduction.

5. Without altering the deadlines set forth in A and B of this section, [company] agree to expend at least $____000 within two years of this agreement on the following:
(1) approval and employment of a consultant as specified above;
(2) preparation of the consultant's report;
(3) training of personnel in pollution prevention and toxics use reduction;
(4)implementation of the toxics use reduction measures selected in the plan, and other measures identified pursuant to paragraph 3 below.

6. In the event that implementation of any recommendation in the report or other measure satisfying the requirements of this Agreement is determined to be technically feasible but must be delayed because of economic factors, and [company] have determined to implement such measure in accordance with this Agreement, [company] shall submit a timely request for an extension to the [citizens group]. To be timely, such request shall be filed at least three months prior to the deadline set forth in the toxics use reduction plan. The request shall include an explanation of the reasons for the requested extension and a

proposed schedule for implementation; any such schedule shall include an appropriate revision of the reporting schedule set forth below. If [citizens group] agrees that the implementation schedule should be extended and that the proposed schedule is reasonable, the parties shall execute an amended agreement. The burden shall be on [company] to demonstrate that an extension is justified by economic factors.

7. Where feasible, [company] shall achieve by three years from this agreement, the reduction in use by weight, of 90% of the hazardous substances used by the plant in 199_. Expenditures after the date of signing of this agreement which achieve toxics use reduction shall be credited even though they do not, standing alone, result in a 90% reduction of a particular hazardous substance.

8. [company]'s chief operating officer shall provide a quarterly progress report and certified statement to the Court, with a copy to [citizens group], beginning on April 1, 199_, and ending on April 1, 199_, or 30 days after completion of the toxics use reduction program described in this agreement if that shall occur sooner, describing [company]' progress in implementing the recommendations of the consultant's report, a schedule for future activities, the eligibility of expenditures for credit under this Agreement, and a full accounting of funds expended to date (including material costs and fees paid to contractors). The final report shall contain a statement by the independent consultant in which he evaluates the degree to which [company] implemented the recommendations in his initial report.

9.PENALTY OFFSET

a. [company] shall pay an agreed sum of $_____ for their failure to file timely reports under Section 313 of EPCRA, subject to the terms and provisions in this Article. [company] shall receive a credit against the aforesaid sum of up to $_____ for undertaking and implementing a program as set forth below in sections __ of this agreement.
If [company] does not expend $_____ on a toxics use reduction program described in this Agreement on or before _____ and no extension has been applied for as of that date, [company] shall pay to the U.S. Treasury the difference between $_____ and the amount actually expended by that date, plus interest, by _____.

b. [company] shall not receive credit for any expenditures made prior to _____ or otherwise required by virtue of any federal, state or local statute, regulation or ordinance or required by any other court order or enforceable order of an administrative agency, unless the expenditure was made prior to the date of enactment, promulgation or entry of such requirement. This limitation shall not apply to expenditures incurred by [company] in order to meet [company]' existing commitment to reduce chemical usage under the U.S. Environmental Protection Agency's Industrial Toxics Project.

10.COMMITTEE ROLE. The committee will oversee efforts to control, reduce, and to the extent feasible, ultimately eliminate the use of [chemical name], and to carry forward other toxics use reduction objectives.

11.COMMITMENT TO ELIMINATE [CHEMICAL NAME]. [Company name] is committed to eliminating the use [production] of [chemical name] and establishes the following schedule for its elimination: _____.

ECONOMIC SUSTAINABILITY CLAUSES

1.PRIORITIZING CAPITAL INVESTMENT TOWARD SUSTAINABLE TECHNOLOGY.
The Committee will seek to ensure that resources are utilized, including company and union personnel, consultants, and public resources, to achieve a sustainable plant and workforce. The number one priority and set aside of money for capital improvements of the firm shall be to make investments needed for sustainability. If necessary, the committee will investigate the potential for securing additional capital resources through state, federal or local agencies. The Company shall report at the periodic committee meeting what actions were taken and what sums were expended in the prior calendar month to accomplish sustainability. [Based on collective bargaining agreement of ACTWU and Sheldahl, Inc.]

2. ADVANCE NOTICE OF PLANT CLOSINGS AND CHANGES IN TECHNOLOGY. In the event that circumstances require the company to close the plant with the resulting cessation of the manufacturing operation, the company agrees to give the other parties to this agreement at least 18 months advance notice. [Based on collective bargaining agreement in BCTW and Brown and Williamson Tobacco Corp.]

3.The [company name] will provide the other parties to this agreement with prior notification of technological change and will involve the parties in the planning process. [company] recognizes the value of work performed by its employees and will make an effort to prevent any undesirable consequences to the workforce or community ... [company] agrees to meet with the other parties to this agreement to discuss any labor or community issues regarding these proposed changes. Such issues may include:

1) Planning the introduction of the new equipment;
2) The introduction of new job classifications and any changes in current job classification or descriptions;
3) Training requirements and availability;
4) Health, safety or environmental considerations;
5) Machine monitoring and/or machine pacing.

No wages, benefits or fringes shall be reduced by the introduction of new technology to current job classification(s). [Based on Collective Bargaining Agreement between City of Boston and City employees]

4.DISCLOSURE OF CAPITAL INVESTMENT PLANS. By or before _____ the Company will deliver to the parties a copy of the company's plans for capital investment for the following five years. By or before January 31, of each year, commencing January _____, the company will give to the committee a report showing by item and amount, the capital investment expenditures and also, separately, expenditures for maintenance and report, which have been made in each plant during the preceding calendar year. [Based on UFCW and Armour Co]

5.AGREEMENT TO COOPERATE IN ASSESSMENT OF PLANT'S ECONOMIC CONDITION.

[GENERAL LANGUAGE] [Company name] will cooperate in studies supervised by the committee regarding the economic status and future of the plant. [Company name] shall provide a consultant to the committee with access to the last five years of financial records, access to marketing and financial managers for interviews, access to the company's customer list, and any other information requested by the consultant in the course of his or her assessment.

[FOR PREFEASIBILITY STUDY COOPERATION WHERE A PLANT CLOSING IS ANTICIPATED:] Since [the plant appears to be in jeopardy of] [OR] [company name has announced that the plant will close], [company name] will cooperate in a prefeasibility study regarding a possible change of ownership. [Company name] shall provide the prefeasibility study consultant, when one is designated by the committee, with access to the last five years of financial records, access to marketing and financial managers for interviews, access to the company's customer list, and any other information requested by the prefeasibility consultant in the course of his or her assessment.

6.COMPANY FUNDED STUDY OF IMPACTS OF TECHNOLOGICAL CHANGE The Committee is authorized to utilize the Fund [paid by the company] for the purpose of studying the problems resulting from the modernization program for community and workforce, and making recommendations for their solution. [Based on UFCW and Armour Co.]

7.RETRAINING IN THE EVENT OF TECHNOLOGICAL CHANGE Workers shall be trained for new and altered jobs within the plant created by technological change. Where jobs are eliminated by technological change, training shall be provided for other jobs in the company or in the wider community; workers shall be paid at their previously established rates during the retraining.

a. When as a result of technological change new and/or revised job classifications are introduced in the bargaining unit, the company shall insure that employees will be given the opportunity to acquire the knowledge and skills necessary to qualify for these new and /or revised job classifications.

b. In the event retraining for the new and/or revised job classifications is not feasible, the Company will provide the necessary training for job classifications not related to the new technologies. This will include training for jobs in other departments in the plant, and if necessary, for jobs at other company plants.

c. If a job with the Company is not feasible, the company shall then initiate discussion with appropriate representatives of state and federal unemployment and job placement agencies with regard to job openings and/or skill shortages in the community. Should such openings exist, the Company will undertake to provide the necessary training so that affected employees can qualify for these jobs.

d. The company shall establish, at its own expense and during regularly scheduled working hours, an adequate retraining program for affected employees. During the training period, the employee shall be paid at the established rate of pay for the job classification held prior to entering the training program. [Based on IAM model language]

8.RIGHT OF FIRST REFUSAL. In the event that [company name] eliminates more than 30 percent of jobs or assets in any two year period, or intends to close or relocate the operations, [company name] shall make a good faith offer of sale at fair market values of plant, equipment, and inventory to the community and to [union, or] agents who represent a majority of the employees. The community or employees shall exercise the right of first refusal within one hundred days of receiving the offer of sale.

9. DISCLOSURE OF FINANCIAL COMMITMENT TO SUSTAINABILITY. In order to demonstrate the extent of the firm's commitment to sustainability in [community name], [Corporation name] shall disclose to [citizens group], within thirty days of the endorsement of this agreement [company name] shall provide to [citizens group and union] the following documents relative to the financial condition and commitments of the corporation:

a. The balance sheet for current accounting period and market and profit projections over the next three years.

b. Documentation of irrevocable business commitments made in regard to the plant such as multi-year purchase orders, and financing.

c. Research and development budgets geared toward continued production in [community name].

d. Documentation of other expenditures that demonstrate a long term commitment to continued operation in the community in an environmentally and socially sustainable manner.

10.ANTIDISCRIMINATION PROGRAM. The corporation commits as follows:

a. The corporation is committed to advancing the role of women in its workforce. Toward that objective the corporation commits to: [possibilities: day care, promotional structure, training program, equal pay for equal work, etc.]

b. The corporation is committed to advancing the role of people of color in its workforce. Toward that objective the corporation commits to: [possibilities: promotional structure, training program, equal pay for equal work, etc.]

c. The corporation is committed to advancing the role of disabled people in its workforce. Toward that objective the corporation commits to: [possibilities: day care, promotional structure, training program, equal pay for equal work, advanced access policies]

d.In planning waste disposal activities, the corporation agrees that it shall not dispose of its wastes in communities with a higher than average population of low income or minority residents.

11.JOBS IMPACT ASSESSMENT. [For expansions and new facilities]

The company shall prepare and present the committee with a jobs impact assessment, identifying the number of jobs created and destroyed by the proposed [facility or expansion]. This assessment shall take account of the secondary effects of these activities, including other businesses affected by the activities, land uses which are affected, and other jobs which would have been created in the absence of the activity. This assessment shall also identify the portion of employees, and their relative wage levels, to be employed from existing residents of the community.

12.EMPLOYEE EDUCATION PROGRAM [RESERVED]

13.EMPLOYEE SEVERANCE PAY. [RESERVED]

14.COMMUNITY SEVERANCE PAY. [RESERVED]

ENFORCEMENT

1.PENALTIES. Any violation of this Agreement by [company] shall result in a penalty against [company] of $25,000 per day of violation payable within 10 days of said violation to a community

charity designated by [citizens group] In the event that [company] is assessed administrative or other penalties for the same violation the same shall be credited against the penalty due hereunder. In addition to the award of these mandated penalties, the arbitrator may issue other appropriate orders to either party to comply with the terms of this Agreement.
[Source: Neighborhood Agreement between Quinsigamond Village Health Awareness Group and Lewcott, Inc., Worcester, Massachusetts]

2. DISPUTE RESOLUTION, ARBITRATION. The parties agree to the following terms for resolution in the event that a dispute which cannot be amicably resolved arises with regard to proprietary information or any other aspect of this Agreement. First, upon written or oral request of either party, the parties shall attempt to resolve the dispute between themselves by conducting at least one meeting to discuss the issue. In the event that such meeting or meetings fail to produce a resolution, or either party fails to attend such a request meeting, the dispute shall be referred to an impartial arbitrator mutually agreeable to all parties. Such arbitrator shall either be a neutral person mutually agreed to by the parties, or otherwise a person selected by _____. Any arbitration under this agreement shall be in accordance with the commercial arbitration rules of the American Arbitration Association. The costs and expenses of the arbitration, including the reasonable attorneys' fees of the parties, shall be paid as determined by the arbitrator except as provided in the following sentence. If the arbitrator determines that the issues raised by a party are frivolous, not in good faith and without basis, all of said costs and expenses shall be paid by such party. Judgment upon the award and any other decision rendered by the arbitrator may be entered in any court having jurisdiction thereof. A decision of the arbitrator shall be final and binding. Said decision must be obeyed within ten days. In such a court action reasonable attorney and expert fees shall be awarded to the prevailing party.

3.COURT ENFORCEMENT [ALTERNATIVE TO PRECEDING CLAUSE] The parties agree that either party or any person or entity benefitting from this contract may enforce any provision in this contract by filing suit in district court to seek a temporary restraining order, temporary injunction, permanent injunction of any other legally cognizable relief.

a. It is specifically understood that the committee and auditors are to act within the subject areas established by this contract. Written recommendations of the committee which are enforceable may be reviewed by the District Court to insure that such written recommendations and actions are not arbitrary or capricious.

b. Venue for any litigation based on this contract shall be under the statutory provisions applicable to venue of the [State].

c. If it is necessary for [citizens' group] to pursue legal action to enforce this contract, [company] will reimburse [citizens' group] for all legal expenses incurred including attorney's fees and court costs if [citizens' group] prevails.

4.AMENDMENT OF LICENSES AND PERMITS. As a complement to the preceding enforcement terms, [company] will submit this agreement and support the addition of conditions consistent with the terms of this agreement in regard to all applications, amendments, renewals or reopening of federal, state or local government permits, licenses, or charters which arise in regard to the corporation.

5.EMPLOYEE PROTECTION. [company] shall not fire or in any other way discriminate against any employee by reason of the fact that such employee has provided information or participated in procedures pursuant to this contract. Such employees shall be designated as third party beneficiaries of this agreement for purposes of this clause and shall have a right to enforce this provision in court and to secure compensation for wrongful firing or discrimination.

AGREEMENT REGARDING UNION ORGANIZATION

1.[company] agrees to remain neutral in any union organizing drive at the [community name] plant, and to avoid interfering with advocacy for a union in any way.

2. [company] agrees that the [name of union] International Union, or any of its affiliated locals, and any other interested union shall have the following rights in addition to those specifically identified under existing law:

a. [company] agrees to furnish [union] or any of its affiliated locals, a true and correct copy of the names, addresses, and phone numbers of all its non-management employees within five days from the date of signing this agreement.

b. [company] agrees to grant representatives of [union] or its affiliated locals, or any other interested union, access to non-work areas of its facilities so that the union may present orally and in writing its view on unionization and solicit signatures to cards and petitions.

c. [company] agrees to comply with the applicable provisions of United States law regarding labor organization.

d. Violation of this provision is directly enforceable as a violation of this contract by any party or third-party beneficiary of this contract in state district court.

CONFIDENTIALITY CLAUSES [OPTIONAL]

1. CONFIDENTIALITY GENERALLY. [company] agrees to permit consultants and committee members to inspect the entire facility at [company] also agrees to respond to questions they may have about activities, processes and chemicals in use at the facility. The committee and their consultants shall maintain and hold in confidence any information which is "Proprietary" in accordance with this agreement. Persons receiving such information shall also confirm that to the best of their knowledge, their employers are not a competitor of [company]in the production of the products produced in the [company] facility.

2.USES AND PROTECTION OF PROPRIETARY INFORMATION. The participants shall use Proprietary information disclosed to them solely for the purposes of assessing and promoting the sustainability of the plant and its workforce. Those receiving such information shall take reasonable precautions to prevent the disclosure of Proprietary information to any third party. In the event the consultant or inspecting members identify a hazard to human health or environment, or violation of the law, which relates to a proprietary aspect of the operation, the parties may inform appropriate third parties regarding such hazard or violation.

3.NONPROPRIETARY INFORMATION. Consistent with 42 U.S.C. 11042(b), the Federal Emergency Planning and Community Right to Know Act, nothing contained in this agreement shall prevent the committee, its consultants or inspecting members from disclosing to others or using information which such party can show by substantial evidence:

(a) has been published and has become part of the public domain, or is available through public sources;

(b) has been furnished to consultant or [citizens' group] by unrelated third parties as a matter of legal right without restrictions on its disclosure;

(c) was developed by persons and in their possession prior to the disclosure thereof by [company];

(d) would not be entitled to Trade Secret protection under other law including but not limited to 42 U.S.C. 11042(b), the Federal Emergency Planning and Community Right to Know Act;

(e) was not pre-identified as proprietary information as required by section 10 (b) of this Agreement.

[OPTIONAL LANGUAGE ON ADVANCE WARNING OF DISCLOSURE OF PROPRIETARY INFORMATION] Prior to the disclosure of any information which [company]has designated as proprietary, but which the consultant or inspecting members believe to be nonproprietary and intend to disclose the information to a person who is neither an employee of [company]nor a party to this Agreement, the party who intends to engage in disclosure shall provide written notice to [company]at least five days prior to disclosure and shall include a statement as to why they believe the information is not proprietary. In the event that [company]disagrees and continues to assert that such information is proprietary, the company may invoke the arbitration clause of this agreement for a third party determination as to whether it is proprietary.

4. DISCLOSURE IN LEGAL PROCEEDINGS. If the Consultant or inspecting members are required by subpoena, court order, or an order of an administrative agency to disclose any of the Proprietary information, they shall give immediate written notice to [company]. Upon receipt of same, [company] expressly reserves the right to interpose all objections it may have as to the disclosure of its information. The foregoing obligation shall survive the termination or expiration of the Agreement and shall continue until a specific written release is given by [company].

COMMUNITY RATIFICATION [OPTIONAL]

This agreement shall not have binding effect unless and until ratified by a two thirds majority vote at a community meeting which is publicized in advance in [a local newspaper].

EMPLOYEE INCENTIVES STRUCTURE

1. [company] will establish a corporate policy and corporate financial reward/compensation/promotion structure emphasizing sustainability, including long term economics of the plant and workforce, environmental and safety considerations, and energy efficiency as a measure of success. [company] agrees that it will elevate such considerations to an equal position with short term profitability in determining promotions, bonus payments and other financial incentives offered to employees at all levels of the company by [company].

2. The reward structure established by [company] will be submitted to the committee for their review and comments. To the extent that the committee has problems and/or concerns about the policy, these will be relayed to [company].

MISCELLANEOUS LEGAL CLAUSES

1. AGREEMENT BINDING UPON SUCCESSORS. This agreement shall be binding upon parties who succeed the signators, that is, upon their successors and assigns.

2. CONSIDERATION. In consideration for entering this agreement [one party] agrees to pay [the other party] the amount of $10.00, with such amount paid upon the signing of this agreement by all parties.

3. GOVERNING LAW. The validity, interpretation and construction of this Agreement shall be governed by the laws of [state]. It is not the intention of the parties to limit the rights and obligations of any person or entity under the laws of [state] or the United States, except as stated herein.

4. NOTICE. Any written notice or statement required or permitted to be given under this agreement shall be either delivered in person or by registered or certified mail, postage prepaid, return receipt requested, to the address of the respective Party below:

[company] ADDRESS Attn: General Manager
[citizens' group] ADDRESS Attn: [contact name]
[union local] ADDRESS Attn: Bargaining agent

Either party may, by written notice to the others, change the address and names given above, with such notice given at least 10 days prior to the change effective date.

5. WAIVER. Any waiver by either party or any provision or condition of the Agreement, shall not be valid unless expressed and signed by such party in writing, nor shall a waiver of a subsequent breach of the same provision or condition, unless waiver is so expressed in writing and signed by the Party to be bound.

6. SEPARABILITY. If any section, subsection, sentence or phrase of the Agreement shall be adjudged illegal, invalid or unenforceable, such illegality, invalidity or unenforceability shall not affect the legality, validity or enforceability of such Agreement as a whole or any other portion of such Agreement.

7. ASSIGNMENT,SUCCESSORS AND ASSIGNS. The covenants and agreements contained in the Agreement shall apply to, inure to the benefit of and be binding upon the Parties hereto and upon their respective successors and assigns.

8. ENTIRE AGREEMENT. The Agreement represents the entire understanding and agreement between the Parties hereto and supersedes any and all prior agreements, whether written or oral, that may have existed between the parties as regards this inspection.

9. AMENDMENTS. This Agreement may be amended or modified only by a written amendment to the Agreement signed by all parties.

10.ESCROW FUND. To provide for the costs of studies identified under this agreement and to provide for other costs identified in this agreement, an escrow fund of $_____ established for the implementation of this agreement. This escrow fund will be maintained after the first year at $_____.

11.PARTIAL INVALIDITY. If any part of this agreement is held to be invalid by a court, it is the intention of the parties that the remainder of the contract will remain viable and in full force and effect.

12.CONTRACT REVIEW. Four years after the effective date of this agreement, [citizens' group] and [company] may review the terms of this agreement to determine whether any or all of the provisions of this agreement should be altered or otherwise changed. Upon agreement of all parties, any or all of the provisions of this agreement may be terminated or modified. It is specifically understood that neither party may unilaterally terminate this agreement.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed as of the day and year first written above, and agree to be legally bound by this Agreement.

[company] Inc.
By_____ _____
[Plant Manager or CEO] Date

[citizens' group]:
By _____ _____
[Citizens group leader] Date

[Union]
By_____ _____
[Union bargaining agent] Date

Attachment A

Request for Review of Documents Prior to Inspection

Dear [Plant Manager],

We appreciate your offer to allow us to inspect the [company name plant] and are looking forward to doing so on [date]. As we mentioned, in order to prepare for our visit we would like you to provide us with some documentation of so that we and our consultant may have a good understanding of the plant. Specifically, we would like the following documents, at least twenty days prior to our inspection:

i) Any written programs for emergency action, Hazard Communication (OSHA), RCRA compliance, emergency contingency plan, spill reporting procedures, fire plan/fire brigade, hazard assessment of worst case scenarios in the event of an accident, emergency preparedness plans pursuant to SARA Title III, employee participation in process hazard analyses, process hazard analysis plans or work products, and other similar descriptions.

ii) Quantities, locations and methods of shipping and receiving of all chemicals used stored or processed at the facility.

iii) Details of any environmental monitoring, medical surveillance and employee training programs.

iv) Corporate programs and policy statements on environment, health and safety.

v) A list identifying products and services provided at the plant and a plant layout map, if possible identifying the locations of environmental and occupational control systems, such as local exhaust ventilation, waste treatment and air pollution controls.

vii) Information regarding the number of employees in the plant, number of shifts, whether the plant is unionized, whether there is a health and safety committee and its composition; the role of contract workers, if any for jobs inside or outside the plant.

viii) Any citations received for violations of municipal, state or federal regulations on environment, health or safety in the last five years.

If there are any aspects of your plant which you consider proprietary or trade secrets, please identify those in the letter so that we can make appropriate arrangement to protect that information.

Very Truly Yours,

[Citizens Group Leader]

Appendix VII

Western Environmental Law Center

1216 Lincoln Street • Eugene, Oregon 97401
541-485-2471 • Fax: 541-485-2457 • westernlaw@igc.org

DEFENDING THE WEST

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Office Manager
Linda Velarde

2-SIDED COPY

December 19, 1995

BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Peter T. Pope, Chief Executive Officer
Pope & Talbot, Inc.
1500 SW First Avenue
Portland, Oregon 97201

Wayne Henneck, Plant Manager
Pope & Talbot, Inc.
P.O. Box 400
Halsey, Oregon 97348

Dear Mr. Pope and Mr. Henneck,

This is a letter to provide you with notice of Oregon Natural Resources Council's ("ONRC") intent to file a citizen suit against Pope & Talbot, Inc., ("Pope & Talbot"), pursuant to § 505(a)(1)(A) of the Clean Water Act (CWA), 42 U.S.C. § 1365(a)(1)(A). ONRC is a not-for-profit environmental organization with members residing throughout Oregon. ONRC's mailing address is 5825 North Greeley, Portland, Oregon 97217, telephone number (503) 283-6343.

§ 505(b) of the Clean Water Act, 33 U.S.C. 1365(b), requires that sixty (60) days prior to the institution of a civil action under the authority of § 505(a) of the Clean Water Act, 33 U.S.C. 1365(a), a citizen must give notice of its intent to sue.

You are hereby given notice that, upon the expiration of the sixty (60) day statutory waiting period from the date of this NOTICE OF INTENT TO SUE, ONRC intends to file a civil action in federal district court.

This lawsuit will allege that the Pope & Talbot pulp plant in Halsey, Oregon, which discharges into the Willamette River, has violated and continues to violate an "effluent standard or limitation" pursuant to §505(a)(1)(A) of the Clean Water Act, 33 U.S.C. 1365(a)(1)(A), by not complying with its

U.S.C. 1365(a)(1)(A), by not complying with its NPDES(§ 402) permit OR-0001074 in the following respects:

(A) Your permit limitation for BOD discharge from Outfall 001 for the period of November 1 - May 31 is 5,000 lbs/day daily maximum and for the period June 1 - October 31 the limit is 3700 lbs/day daily maximum. Your records show that you violated your permit on the following occasions:

	Date	Value
1.	October 2, 1995	4222 lbs.
2.	February 22, 1995	6733 lbs.
3.	February 21, 1995	6292 lbs.
4.	February 20, 1995	6914 lbs.
5.	February 15, 1995	8944 lbs.
6.	February 14, 1995	8635 lbs.
7.	February 13, 1995	6210 lbs.
8.	July 9, 1994	3943 lbs.
9.	July 8, 1994	3761 lbs.
10.	July 7, 1994	4232 lbs.
11.	June 23, 1994	4697 lbs.
12.	June 22, 1994	5007 lbs.
13.	June 21, 1994	5526 lbs.

(B) Your permit limitation for BOD monthly average discharge from Outfall 001 for the period of June 1 - October 31 is 2500 lbs/day and for the period November 1 - May 31 it is 4000 lbs/day. Your records show that you violated your permit during the following months:

	Month	Value
14.	February 1995	4725 lbs.
15.	July 1994	2951 lbs.
16.	June 1994	2957 lbs.
17.	June 1991	2758 lbs.

(C) Your permit limitation for dioxin, as measured by TCDD, at Outfall 001 is 0.41 mg/day 3-day maximum and 0.30 mg/day annual average. Your records indicate that you violated your dioxin limitations on the following occasions:

	Month	Value
18.	May 1995	0.44 mg/day 3-Day Maximum
19.	Annual 1994-95	To Be Determined (TBD)

(D) Your permit requires you to monitor for certain pollutants, including, but not limited to, Chloroform, Nitrogen and Total Phosphorus at least twice per month. Your records show that you violated the monitoring requirements of your permit for each of

these three pollutants at Outfall 001 during the following months:

	Month	# of Failures to Sample Per Pollutant
20.	July 1995	2
21.	April 1995	1
22.	February 1995	1
23.	January 1995	1
24.	December 1994	1
25.	November 1994	1
26.	September 1994	1
27.	May 1994	1
28.	April 1994	1
29.	March 1994	1
30.	January 1994	1
31.	December 1993	1
32.	September 1993	Late Filing
33.	August 1993	Late Filing

(E) Your permit requires you to continuously monitor for Flow from Outfall 001. Your records show that you failed to monitor for continuous daily flow during the period of April 2-13 of 1994.

(F) Stipulation and Final Order (SFO) No. WQIW-WVR-93-152 required you to submit results of a Color Monitoring Study by November 30, 1994. You failed to submit the results of that study until on or about February 17, 1995. You, therefore, violated the reporting requirements of the SFO for 78 days.

(G) According to your records, during August, 1993, Ceriodaphnea survival exceeded acceptable limits, in violation of your permit.

(H) Your permit requires you to monitor for AOX on a monthly basis. Your records show that you failed to report AOX data for the entire months of January, February and July of 1991.

Notifier believes and alleges that a history of permit violations has continued from 1990 to the present and will continue. Such violations, including exceedances and reporting failures, are known to the Discharger and may be included in future legal actions by Notifier.

YOU ARE FURTHER NOTIFIED that, after the expiration of the sixty (60) day statutory waiting period, ONRC intends, on behalf of itself and its members, to file suit against Pope & Talbot in the appropriate federal district court pursuant to § 505(a) of the CWA. ONRC will request that the court enforce the requirements of the CWA, impose civil penalties of up to $25,000 per day of violation for each violation stated above, in addition

to those which have occurred during the past five years which are not presently identified, and those which occur subsequently, award costs of litigation (including reasonable attorney and expert witness fees) to ONRC, and award such other relief as may be appropriate.

The name, address, and phone number of the person giving NOTICE OF INTENT TO SUE under the CWA is:

Oregon Natural Resources Council
5825 North Greeley
Portland, Oregon 97217
Telephone number (503) 283-6343

The name, address, and phone number of Counsel for Notifier is:

Charles M. Tebbutt
Western Environmental Law Center
1216 Lincoln Street
Eugene, Oregon 97401
Telephone number (541) 485-2471

During the sixty (60) day notice period, we will be available to discuss effective remedies and actions which will assure your company's future compliance with the terms and conditions of your NPDES permit requirements. In addition, we can discuss whatever facts you believe relevant which are not listed in this notice letter. If you wish to avail yourself of this opportunity, or if you have any questions regarding this letter, please feel free to contact counsel for ONRC at the address and telephone number provided.

Sincerely,

Charles M. Tebbutt
Counsel for Notifier

cc: - Carol Browner, Administrator, USEPA (certified mail)
- Langdon Marsh, Director of Oregon Department of Environmental Quality (certified mail)
- Charles C. Clarke, Regional Administrator, USEPA Region 10 (regular mail)
- Carlos M. Lamadrid
Registered Agent for Pope & Talbot, Inc.
1500 SW 1st Ave.
Portland, OR 97201 (certified mail)

2-SIDED COPY

Michael Axline, OSB #83414
Marianne Dugan, OSB #93256
Western Environmental Law Center
44 West Broadway, Suite 200
Eugene, Oregon 97401
(503) 485-2471

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Local Counsel

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

GROS VENTRE TRIBE, ASSINIBOINE TRIBE, FORT BELKNAP COMMUNITY COUNCIL, and ISLAND MOUNTAIN PROTECTORS ASSOCIATION Plaintiffs, v. PEGASUS GOLD, INC., PEGASUS GOLD	Civil Action No. ____ **COMPLAINT**

CORPORATION, and ZORTMAN MINING, INC.)
)
Defendants.)
)

I. STATEMENT OF THE CASE

1. This is a civil action for declaratory and injunctive relief and the imposition of civil penalties under the citizen suit provision of the Clean Water Act (CWA), 33 U.S.C. § 1365, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9659, and the Montana Water Quality Act (MCA), MCA Title 75, Ch. 5, MCA §§ 75-605(1)(a), (2). This is also an action for declaratory and injunctive relief with respect to tribal water rights.

2. Defendants Pegasus Gold, Inc. and Pegasus Gold Corporation (hereinafter collectively referred to as "Pegasus") own or control, either directly or as parent corporations, the Zortman and Landusky Mines in Phillips County, Montana. Defendant Zortman Mining, Inc., operates the Zortman and Landusky Mines. The claims in this action arise from defendants' operation of the Zortman and Landusky Mines and their ongoing violations of the CWA, CERCLA, and the MCA.

II. JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction over the claims specified in this Complaint pursuant to 33 U.S.C. § 1365(a), 42 U.S.C. § 9659(a), 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1362 (jurisdiction over tribal claims), and 28 U.S.C. § 1367 (supplemental jurisdiction over state law claims).

4. The Zortman and Landusky Mines are located and operated in Phillips County, Montana, and are the source of all violations described herein. Venue in this Court is therefore proper pursuant to 33 U.S.C. § 1365(c)(1), 42 U.S.C. § 9659(b)(1), and 28 U.S.C. § 1391(e).

III. PARTIES

5. Plaintiffs the Assiniboine and Gros Ventre Tribes of the Fort Belknap Indian Community reside on the Fort Belknap Reservation, a 652,000 acre tract of land in North-Central Montana immediately adjacent to and to the North of the mining operations that are the subject of this complaint. The Fort Belknap Reservation was established as a homeland for the Assiniboine and Gros Ventre Tribes by agreement of May 1, 1888, 25 Stat. 8, between the Tribes and the United States. The Fort Belknap Community Council is the governing body of the Gros Ventre and Assiniboine Tribes. Members of the Tribes live, farm, hunt, fish, obtain drinking water, and engage in ceremonial practices downstream of the Zortman and Landusky mines. Defendants' operations of the Zortman and Landusky mines in violation of CWA, CERCLA, and the MCA, as alleged below, directly and adversely impact plaintiffs' use and enjoyment of their land, air, and water.

6. Plaintiff Island Mountain Protectors Association (IMP) is an unincorporated association of Native American people living on or near the Fort Belknap Reservation. IMP members live, farm, hunt, fish, obtain drinking water, and engage in ceremonial practices downstream of the Zortman and Landusky mines.

Defendants' operations of the Zortman and Landusky mines in violation of CWA, CERCLA, and the MCA, as alleged below, directly and adversely impact IMP's members use and enjoyment of their land, air, and water.

7. Defendant Pegasus Gold, Inc. is a Canadian corporation, registered to do business and doing business in Montana. Pegasus Gold, Inc.'s direct operations take place in the western United States, including Nevada, Idaho, and Montana. Pegasus Gold, Inc. opened the Zortman and Landusky mines in 1979. Pegasus Gold, Inc., owns or controls, either directly or as a parent corporation, the Zortman and Landusky mines.

8. Defendant Pegasus Gold Corporation is a Nevada corporation, registered to do business and doing business in Montana. Pegasus Gold Corporation owns or controls, either directly or as a parent corporation, at least four mines in Montana. This ownership or control includes the Zortman and Landusky mines.

9. Defendant Zortman Mining, Inc. is a Montana corporation registered to do business and doing business in Montana. Zortman Mining, Inc. operates the Zortman and Landusky mines. Zortman Mining, Inc. is a wholly owned subsidiary of Pegasus Gold Corporation. Zortman Mining, Inc. is also the official holder of the operating permits for the two mines.

IV. NATURE OF CLAIMS

10. On November 29, 1994, plaintiffs the Gros Ventre Tribe, the Assiniboine Tribe, and the Fort Belknap Community Council, served notice of their intent to file a citizen suit for

violations of the CWA and CERCLA on the defendants. This notice was also served on defendants' registered agents, the Administrator of the Environmental Protection Agency (EPA), the Regional Administrator of the EPA, the United States Attorney General, the State of Montana Attorney General, and the Montana State Department of Health, Water Quality Bureau, in compliance with 33 U.S.C. § 1365(b)(1)(A) and 42 U.S.C. § 9659(d)(1). A copy of this notice is attached to this Complaint as Exhibit A.

11. On February 7, 1995, plaintiffs the Gros Ventre Tribe the Assiniboine Tribe and the Fort Belknap Community Council served a supplemental notice of intent to file a citizens suit for violations of the CWA and CERCLA on the defendants. This notice was also served on defendants' registered agents, the Administrator of the Environmental Protection Agency (EPA), the Regional Administrator of the EPA, the United States Attorney General, the State of Montana Attorney General, and the Montana State Department of Health, Water Quality Bureau, in compliance with 33 U.S.C. § 1365(b)(1)(A) and 42 U.S.C. § 9659(d)(1). A copy of this notice is attached to this Complaint as Exhibit B.

12. On June 24, 1993, plaintiff Island Mountain Protectors Association served a notice of intent to file a citizen suit for violations of the Clean Water Act on defendants Zortman Mining, Inc., and Pegasus Gold Corporation. This notice was also served on defendants' registered agents, the Administrator of the Environmental Protection Agency (EPA), the Regional Administrator of the EPA, and the Montana State Department of Health, Water

Quality Bureau, in compliance with 33 U.S.C. § 1365(b)(1)(A). A copy of this notice is attached to this Complaint as Exhibit C.

13. More than sixty days have passed since the notices and supplemental notice of violations were served, and the violations complained of in the notice and supplemental notice continue. Neither the EPA nor the State of Montana has commenced and diligently prosecuted an action to redress the violations noted.

14. Plaintiffs request relief pursuant to 33 U.S.C. § 1365 and 42 U.S.C. § 9659.

Plaintiffs seek:

A. A judicial declaration that defendants have violated and continue to violate the CWA by discharging pollutants into waters of the United States without a National Pollution Discharge Eliminations System (NPDES) permit;

B. A judicial declaration that defendants have violated and continue to violate the CWA by placing fill in waters of the United States without a permit under § 404 of the CWA;

C. A judicial declaration that defendants have violated and continue to violate the CWA by degrading state waters;

D. A judicial declaration that defendants have violated and continue to violate CERCLA by failing to notify the National Response Center of releases of hazardous substances;

E. A judicial declaration that defendants have violated and continue to violate CERCLA by failing to notify the EPA that hazardous substances are or have been stored, treated, or disposed of at defendant's facility;

F. A judicial declaration that defendants have violated and continue to violate CERCLA by failing to notify potential injured parties of releases of hazardous substances from defendants' facility;

G. A judicial declaration that defendants' mining activities unlawfully diminish the quality of waters subject to the Tribes' aboriginal rights.

H. An order enjoining defendants to comply with the CWA and CERCLA, and cease polluting tribal waters. In particular, plaintiff seeks an order enjoining defendants:

i. from discharging pollutants into waters of the United States until and unless defendants obtain a NPDES permit authorizing such discharges as required by the CWA §§ 301(a) and 402, 33 U.S.C. §§ 1311(a), 1342, and the Montana Water Quality Act (MCA), MCA Title 75, Chapter 5, MCA § 75-605(1)(a), (2);

ii. from discharging pollutants into waters of the United States until and unless defendants obtain a § 404 permit authorizing such discharges as required by the CWA, 33 U.S.C. § 1311(a), 33 U.S.C. § 1344(a), and MCA 75-5-605(1)(a);

iii. from discharging pollutants that result in the degradation of state waters in violation of the CWA 33 U.S.C. § 1311(b)(1)(C), MCA 75-5-303 and 75-5-605(1), and the Administrative Rules of Montana (ARM), ARM Title 16, Chapter 20, subchapters 6 and 7, and ARM 16.20.1011;

iv. to notify the National Response Center of the release of hazardous substances from defendants' mining facility as required by CERCLA § 103(a), 42 U.S.C. § 9603(a);

v. to notify EPA of hazardous substances that have been stored, treated, or disposed of at defendants' mining facility as required by CERCLA § 103(c), 42 U.S.C. § 9603(c);

vi. to notify potential injured parties of releases of hazardous substances from defendants' mining facility as required by CERCLA § 111(g), 42 U.S.C. § 9611(g);

H. An order imposing maximum civil penalties against defendants for their violations of the CWA and CERCLA;

I. An order awarding plaintiffs their costs of litigation, including reasonable attorney and expert witness fees;

J. Such additional relief as the Court deems just and proper.

V. STATEMENT OF FACTS

15. The Zortman and Landusky mines are located in the Little Rocky Mountains in Phillips County, Montana, just South of the Fort Belknap Indian Reservation. The two mines are located approximately three miles apart. The mines are located outside the reservation's boundaries on traditional tribal land.

16. Defendants began mining operations in the Little Rocky Mountains in 1979. Defendants' operations include excavating enormous amounts of earth, placing the earth in heaps on concrete pads, and soaking the heap with a cyanide solution to extract precious ores. The solution is applied by an above-ground irrigation system.

17. Since commencement of mining operations, defendants have generated waste materials, including but not limited to wastewater, waste rock, leach pads, and process wastes on a

continuing basis. The rate of waste accumulation and release has accelerated since defendants began using the cyanide-heap leach process to extract the gold and silver.

18. Defendants' mining operations have caused extensive pollution of a number of watersheds in the Little Rocky Mountains, as detailed below. Two of these watersheds, the Kings Creek watershed and the Lodgepole Creek watershed, and their tributaries, drain North onto reservation lands. Kings Creek and Lodgepole Creek, and tributaries of these creeks, are important sources of water for the plaintiffs. Watersheds that drain to the South of the Little Rocky Mountains have important historical and cultural significance to the plaintiffs, and flow across traditional tribal lands. Defendants' mining operations significantly degrade the quality of these waters, and adversely affect plaintiffs.

19. Defendants possess a Montana Pollution Discharge Elimination System (MPDES) permit for limited discharges at the Zortman Mine (MPDES Permit No. MT-0024856) and a MPDES permit for limited discharges at the Landusky Mine (MPDES Permit No. MT-0024864). Discharges authorized by these permits are not the subject of this Complaint; this Complaint addresses discharges which are not authorized by these permits.

VI. ALLEGATIONS

Count 1
Violation of the Clean Water Act
Unpermitted Fill
Zortman Mine, Alder Gulch Waste Dump

20. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), makes the discharge of dredge or fill material in waters of the United

States unlawful without a permit under § 404 of the CWA, 33 U.S.C. § 1344.

21. Construction of the Alder Gulch Waste Dump began in August of 1982. The Alder Gulch Waste Dump is located in a tributary to Alder Gulch, known as Carter Gulch. Defendants disposed of waste rock in Carter Gulch until 1995. Water flows south from Carter Gulch into Alder Gulch. Defendants failed to obtain a § 404 permit authorizing the dumping of waste rock in the waters of Carter Gulch.

22. The dumping of fill without a § 404 permit constitutes the discharge of a pollutant into navigable waters in violation of § 301(a) of the CWA, 33 U.S.C. § 1311(a), § 404(a) of the CWA, 33 U.S.C. § 1344(a), and MCA 75-5-605(1)(a).

Count 2
Violation of the Clean Water Act
Unpermitted Fill
Zortman Mine, Carter Gulch

23. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), makes the discharge of dredge or fill material into waters of the United States unlawful without a permit under § 404 of the CWA.

24. During the Spring of 1993 defendants constructed a road for heavy equipment in Carter Gulch. In doing so, defendants dumped tons of fill, including boulders, cobble, and fine sediment, in and along the stream channel of Carter Gulch. Defendants failed to obtain a § 404 permit authorizing this activity.

25. The dumping of fill without a § 404 permit constitutes the discharge of a pollutant into navigable waters in violation

of § 301(a) of the CWA, 33 U.S.C. § 1311(a), § 404(a) of the CWA, 33 U.S.C. § 1344(a), and MCA 75-5-605(1)(a).

Count 3
Violation of the Clean Water Act
Unpermitted Discharge Source
Zortman Mine, Alder Gulch Waste Dump

26. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits "the discharge of any pollutant by any person" unless such discharge is specifically permitted by a NPDES permit.

27. Wastewater migrates through the waste rock at Alder Gulch Waste Dump, as referenced in ¶ 21, and discharges at various points from the base of the Dump into the surrounding environment. Defendants have attempted to collect some of the discharge from the Alder Gulch Waste Dump by installing a seepage collection and pumpback system below the Dump. The seepage collection and well pumpback system, however, do not capture all of the discharge from the Alder Gulch Waste Dump. Wastewater from the Dump migrates downstream to Carter Gulch and Alder Gulch and enters ground and surface water. Defendants have no NPDES permit authorizing discharges from the Alder Gulch Waste Dump.

28. Defendants' unpermitted discharges from the Dump violate § 301(a) of the CWA, 33 U.S.C. § 1311(a), and MCA 75-5-605(1)(a), (2).

Count 4
Violation of Clean Water Act
Degradation of State Waters
Zortman Mine, Alder Gulch Waste Dump

29. Discharges from the Alder Gulch Waste Dump and the placement of construction fill in and near stream channels in Carter Gulch have degraded and continue to degrade state waters

in violation of § 301(b)(1)(C) of the CWA, 33 U.S.C § 1311(b)(1)(C), MCA 75-5-303 and 75-5-605(1), ARM Title 16, Chapter 20, subchapters 6 and 7, and ARM 16.20.1011.

Count 5
Violation of Clean Water Act
Unpermitted Fill
Zortman Mine, Alder Spur Pad Complex

30. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), makes the discharge of dredge or fill material into navigable waters of the United States unlawful without a valid permit secured under § 404 of the CWA.

31. Defendants own and operate several cyanide heap leach pads and associated facilities in a tributary of Alder Gulch known as Alder Spur (hereinafter "Alder Spur Pad Complex"). The Alder Spur Pad Complex was constructed during the period from 1979 through 1987 and involved the placement of waste rock in the waters of Alder Spur for heap leaching. The construction also involved the development of a land application area adjacent to the cyanide heap leach pads for disposal of the cyanide solution collected from the heap leach pads during the leaching process. Defendants failed to obtain a § 404 permit to authorize the construction of the Alder Spur Pad Complex.

32. The dumping of fill without a § 404 permit constitutes the discharge of a pollutant into navigable waters in violation of § 301(a) of the CWA, 33 U.S.C. § 1311(a), § 404(a) of the CWA, 33 U.S.C. § 1344(a), and MCA 75-5-605(1)(a).

Count 6
Violation of Clean Water Act
Unpermitted Discharge Source
Zortman Mine, Alder Spur Pad Complex

33. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits "the discharge of any pollutant by any person" unless such discharge is specifically permitted by a NPDES permit.

34. Since the late 1980s, the Alder Spur Pad Complex has discharged wastewater to waters of the United States. In late 1992, defendants installed a seepage collection system located in the Alder Spur stream segment downgradient of the Alder Spur Pad Complex, in an effort to collect some of this discharge. The seepage collection system does not capture all of the discharge from the Alder Spur Pad Complex. Wastewater continues to discharge from both the Alder Spur cyanide heap leach pads and the Alder Spur land application area. Defendants have no NPDES permit authorizing discharges from the Alder Spur leach pads or the Alder Spur land application area.

35. Defendants' unpermitted discharges from the Alder Spur Pad Complex and Alder Spur land application area violate § 301(a) of the CWA, 33 U.S.C. § 1311(a), and MCA 75-5-605(1)(a), (2).

Count 7
Violation of Clean Water Act
Degradation of State Waters
Zortman Mine, Alder Spur Pad Complex

36. Discharges from the Alder Spur Pad Complex and Alder Spur land application area have degraded and continue to degrade state waters in violation of § 301(b)(1)(C) of the CWA, 33 U.S.C § 1311(b)(1)(C), MCA 75-5-303 and 75-5-605(1), ARM Title 16, Chapter 20, subchapters 6 and 7, and ARM 16.20.1011.

Count 8
Violation of Clean Water Act
Unpermitted Fill
Zortman Mine, 1985/86 Zortman Pad Complex

37. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), makes the discharge of dredge or fill material into navigable waters of the United States unlawful without a permit under § 404 of the CWA.

38. Defendants own and operate several cyanide heap leach pads and associated facilities in the upper reaches of Ruby Gulch. The heap leach pads are locally known as the 1985/86 Zortman Pad Complex. Construction of the 1985/86 Zortman Pad Complex began in March of 1984 and involved the placement of waste rock in Ruby Gulch for heap leaching. Defendants do not have a § 404 permit authorizing the placement of fill in Ruby Gulch.

39. The dumping of fill without a § 404 permit constitutes the discharge of a pollutant into navigable waters in violation of § 301(a) of the CWA, 33 U.S.C. § 1311(a), § 404(a) of the CWA, 33 U.S.C. § 1344(a), and MCA 75-5-605(1)(a).

Count 9
Violation of Clean Water Act
Unpermitted Discharge Source
Zortman Mine, 1985/86 Zortman Pad Complex

40. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits "the discharge of any pollutant by any person" unless such discharge is specifically permitted by a NPDES permit.

41. Since 1985, the 1985/86 Zortman Pad Complex, as described in ¶ 38, has discharged wastewater to waters of the United States. Following pad construction and ensuing cyanide

leaching, a weeping wall of heavily contaminated discharges appeared and continues to discharge at the downgradient edge of the 1985/86 Zortman Pad Complex. In January 1993, defendants installed a seepage collection system to collect wastewater discharging from the weeping wall in the area immediately below the weeping wall and in Ruby Gulch. The seepage collection system does not capture all of the discharge from the 1985/86 Zortman Pad Complex. Wastewater continues to discharge from the 1985/86 Zortman Pad Complex to surface and groundwater in Ruby Gulch. Defendants have no NPDES permit authorizing discharges from the 1985/86 Zortman Pad Complex.

42. Defendants' unpermitted discharges from the 1985/86 Zortman Pad Complex violate § 301(a) of the CWA, 33 U.S.C. § 1311(a), and MCA 75-5-605(1)(a), (2).

Count 10
Violation of Clean Water Act
Unpermitted Discharge Source
Zortman Mine, Ruby Gulch Wastewater Treatment Plant

43. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits "the discharge of any pollutant by any person" unless such discharge is specifically permitted by a NPDES permit.

44. In March 1994, defendants constructed the Ruby Gulch Wastewater Treatment Plant in Ruby Gulch. Since then, the Ruby Gulch Wastewater Treatment Plant has discharged pollutants to waters of the United States. Defendants did not obtain an NPDES permit prior to constructing the Waste Water Treatment Plant, and do not currently have a NPDES permit authorizing the discharges from the Wastewater Treatment Plant to surface waters of Ruby Gulch.

45. Defendants' unpermitted discharges from the Treatment Plant into Ruby Gulch violate § 301(a) of the CWA, 33 U.S.C. § 1311(a), and MCA 75-5-605(1)(a), (2).

Count 11
Violation of Clean Water Act
Degradation of State Waters
Zortman Mine, Ruby Gulch Drainage

46. Since approximately 1985, defendants have periodically injected calcium hypochlorite from a feed shack located along the Ruby Gulch stream channel to water flowing in Ruby Gulch to neutralize the cyanide contamination caused by the wastewater. These calcium hypochlorite injections have caused elevated chloride levels in surface water in Ruby Gulch. Heavily contaminated seeps from the weeping wall and the 1985/86 Zortman Pad Complex and discharges from defendants' wastewater treatment plant also have contributed to a deterioration of water quality in Ruby Gulch.

47. Discharges from the 1985/86 Zortman Pad Complex, the Ruby Gulch Wastewater Treatment Plant, and periodic calcium hypochlorite injections have degraded and continue to degrade state waters in violation of § 301(b)(1)(C) of the CWA, 33 U.S.C § 1311(b)(1)(C), MCA 75-5-303 and 75-5-605(1), ARM Title 16, Chapter 20, subchapters 6 and 7, and ARM 16.20.1011.

Count 12
Violation of Clean Water Act
Unpermitted Fill
Zortman Mine, Lodgepole Drainage

48. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), makes the discharge of dredge or fill material into navigable waters of

the United States unlawful without a permit under § 404 of the CWA.

49. Defendants own and operate an excavation pit known as the Ross Pit. The Ross Pit is located in a tributary of the Lodgepole Creek Drainage known as Glory Hole Creek. Loose materials are located along the margins of this pit. Defendants have no § 404 permit authorizing the dumping of loose waste material in Glory Hole Creek.

50. The dumping of loose waste material without a § 404 permit constitutes the discharge of a pollutant into navigable waters in violation of § 301(a) of the CWA, 33 U.S.C. § 1311(a), § 404(a) of the CWA, 33 U.S.C. § 1344(a), and MCA 75-5-605(1)(a).

Count 13
Violation of Clean Water Act
Unpermitted Discharge Source
Landusky Mine, Gold Bug Adit

51. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits "the discharge of any pollutant by any person" unless such discharge is specifically permitted by a NPDES permit.

52. Defendants own and operate an area known as the Gold Bug Adit. The Gold Bug Adit is the portal to an old mine controlled by defendants that is located in Montana Gulch, a tributary of the Rock Creek Drainage. The Gold Bug Adit is connected to the Gold Bug Pit, where defendants place mining wastes. The Gold Bug Pit is a recharge area for flows that discharge from the Gold Bug Adit. Since commencement of mining, the Gold Bug Adit has discharged and continues to discharge wastewater to Montana Gulch. Until May 1993, the water was discharged directly into surface water in Montana Gulch. Since

May 1993, the water has been discharging to surface waters in Montana Gulch via a contingency pond and outlet. Defendants have no NPDES permit authorizing the ongoing discharges from the Gold Bug Adit.

53. Defendants' unpermitted discharges from the Gold Bug Adit into Montana Gulch violate § 301(a) of the CWA, 33 U.S.C. § 1311(a), and MCA 75-5-605(1)(a), (2).

Count 14
Violation of Clean Water Act
Unpermitted Fill
Landusky Mine, Montana Gulch Waste Dump

54. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), makes the discharge of dredge or fill material into navigable waters of the United States unlawful without a permit under § 404 of the CWA.

55. In March of 1983, defendants established a waste rock pile locally known as the Montana Gulch Waste Dump. The Montana Gulch Waste Dump was constructed in waters of Montana Gulch. Defendants have no § 404 permit authorizing the dumping of waste in Montana Gulch.

56. The dumping of wasterock without a § 404 permit constitutes the discharge of a pollutant into navigable waters in violation of § 301(a) of the CWA, 33 U.S.C. § 1311(a), § 404(a) of the CWA, 33 U.S.C. § 1344(a), and MCA 75-5-605(1)(a).

Count 15
Violation of Clean Water Act
Unpermitted Discharge Source
Landusky Mine, Montana Gulch Waste Dump

57. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits "the discharge of any pollutant by any person" unless such discharge is specifically permitted by a NPDES permit.

58. Since defendants established the waste rock pile in Montana Gulch in 1980, the Montana Gulch Waste Dump has discharged wastewater to surface and ground water in Montana Gulch. Defendants have no NPDES permit authorizing the discharge of pollutants to Montana Gulch.

59. Defendants' unpermitted discharges from the Montana Gulch Waste Dump into Montana Gulch violate § 301(a) of the CWA, 33 U.S.C. § 1311(a), and MCA 75-5-605(1)(a), (2).

Count 16
Violation of Clean Water Act
Unpermitted Fill
Landusky Mine, 1985/86 Landusky Pad Complex

60. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), makes the discharge of dredge or fill material into navigable waters of the United States unlawful without a valid permit secured under § 404 of the CWA.

61. Beginning in March of 1984, defendants established a cyanide heap leach pad known as the 1985/86 Landusky Pad Complex. The 1985/86 Landusky Pad Complex was constructed by placing waste materials in and around the waters of Montana Gulch. Defendants do not have a § 404 permit authorizing the placement of fill in Montana Gulch.

62. The dumping of fill without a § 404 permit constitutes the discharge of a pollutant into navigable waters in violation of § 301(a) of the CWA, 33 U.S.C. § 1311(a), § 404(a) of the CWA, 33 U.S.C. § 1344(a), and MCA 75-5-605(1)(a).

Count 17
Violation of Clean Water Act
Unpermitted Discharge Source
Landusky Mine, 1985/86 Landusky Pad Complex

63. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits "the discharge of any pollutant by any person" unless such discharge is specifically permitted by a NPDES permit.

64. Since construction of the 1985/86 Landusky Pad Complex began in March of 1984, wastewater has discharged from the Pad Complex to surface and ground water in Montana Gulch. Defendants have no NPDES permit authorizing the discharge of pollutants from the Landusky Pad Complex.

65. Defendants' unpermitted discharges from the Pad Complex into Montana Gulch violate § 301(a) of the CWA, 33 U.S.C. § 1311(a), and MCA 75-5-605(1)(a), (2).

Count 18
Violation of Clean Water Act
Unpermitted Fill
Landusky Mine, 1979/84 Pad Complex

Section 301(a) of the CWA, 33 U.S.C. § 1311(a), makes the discharge of dredge or fill material into navigable waters of the United States unlawful without a valid permit secured under § 404 of the CWA.

66. In the late 1970s defendants constructed a cyanide heap leach pad known as the 1979 Pad in Montana Gulch. In 1980 defendants constructed a cyanide heap leach pad, known as the

1980 Pad, in Montana Gulch. In 1982 defendants constructed a cyanide heap leach pad known as the 1982 Pad in Montana Gulch. In July of 1983 defendants began construction of a cyanide heap leach pad known as the 1984 Pad in Montana Gulch. The Pad Complex (hereinafter the "1979/84 Pad Complex") was constructed by placing waste materials in Montana Gulch. Defendants have no § 404 permit authorizing the placement of fill in Montana Gulch.

67. The dumping of fill without a § 404 permit constitutes the discharge of a pollutant into navigable waters in violation of § 301(a) of the CWA, 33 U.S.C. § 1311(a), § 404(a) of the CWA, 33 U.S.C. § 1344(a), and MCA 75-5-605(1)(a).

Count 19
Violation of Clean Water Act
Unpermitted Discharge Source
Landusky Mine, 1979/84 Pad Complex

68. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits "the discharge of any pollutant by any person" unless such discharge is specifically permitted by a NPDES permit.

69. Since construction of the 1979/84 Pad Complex wastewater has discharged from the Pad Complex to surface and ground water in Montana Gulch. Defendants have no NPDES permit authorizing the discharge of pollutants from the 1979/84 Pad Complex.

70. Defendants' unpermitted discharges from the 1979/84 Pad Complex into Montana Gulch violate § 301(a) of the CWA, 33 U.S.C. § 1311(a), and MCA 75-5-605(1)(a), (2).

Count 20
Violation of Clean Water Act
Degradation of State Waters
Landusky Mine, Rock Creek Drainage, Montana Gulch Tributary

71. Discharges from the Gold Bug Adit, the Montana Gulch Waste Dump, the 1985/86 Landusky Pad Complex, and the 1979/84 Pad Complex as described in ¶¶ 52, 55, 61, and 66 respectively, have degraded and continue to degrade state waters in violation of § 301(b)(1)(C) of the CWA, 33 U.S.C § 1311(b)(1)(C), MCA 75-5-303 and 75-5-605(1), ARM Title 16, Chapter 20, subchapters 6 and 7, and ARM 16.20.1011.

Count 21
Violation of Clean Water Act
Unpermitted Fill
Landusky Mine, Sullivan Pad Complex

72. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), makes the discharge of dredge or fill material into navigable waters of the United States unlawful without a permit under § 404 of the CWA.

73. In the late 1980s defendants constructed a cyanide heap leach pad complex in the upper portion of the Sullivan Creek Tributary to Rock Creek, known as the Sullivan Pad Complex. Defendants have no § 404 permit authorizing construction of the Sullivan Pad Complex in Sullivan Creek.

74. The dumping of fill without a § 404 permit constitutes the discharge of a pollutant into navigable waters in violation of § 301(a) of the CWA, 33 U.S.C. § 1311(a), § 404(a) of the CWA, 33 U.S.C. § 1344(a), and MCA 75-5-605(1)(a).

Count 22
Violation of Clean Water Act
Unpermitted Discharge Source
Landusky Mine, Sullivan Pad Complex

75. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits "the discharge of any pollutant by any person" unless such discharge is specifically permitted by a NPDES permit.

76. Since construction of the Sullivan Pad Complex, wastewater has discharged from the Sullivan Pad Complex to surface and ground waters in the Sullivan Park tributary to Rock Creek. Defendants have constructed a slurry wall and contingency pond, and installed a pumpback well and seepage collection system. The seepage collection system and pumpback well, however, do not capture all of the discharge from the Sullivan Pad Complex. Wastewater continues to discharge to surface and groundwater from the Sullivan Pad Complex. Defendants have no NPDES permit authorizing the discharge of pollutants from the Sullivan Pad Complex.

77. Defendants' unpermitted discharges from the Sullivan Pad Complex violate § 301(a) of the CWA, 33 U.S.C. § 1311(a), and MCA 75-5-605(1)(a), (2).

Count 23
Violation of Clean Water Act
Degradation of State Waters
Landusky Mine, Sullivan Creek Drainage

78. The Sullivan Pad Complex has massive seeps from its base to surface and groundwater in the Sullivan Creek tributary of Rock Creek. These discharges have degraded and continue to degrade state waters in violation of § 301(b)(1)(C) of the CWA,

33 U.S.C § 1311(b)(1)(C), MCA 75-5-303 and 75-5-605(1), ARM Title 16, Chapter 20, subchapters 6 and 7, and ARM 16.20.1011.

Count 24
Violation of Clean Water Act
Unpermitted Fill
Landusky Mine, Mill Gulch Waste Dump

79. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), makes the discharge of dredge or fill material into navigable waters of the United States unlawful without a permit under § 404 of the CWA.

80. In March of 1987, defendants constructed the Mill Gulch Waste Dump to dispose of waste material excavated from the Little Ben and August mining pits at the Landusky Mine. The Mill Gulch Waste Dump was constructed in and around Mill Gulch, a tributary of Rock Creek. Defendants have no § 404 permit authorizing the construction of the Mill Gulch Waste Dump in Mill Gulch.

81. The dumping of fill without a § 404 permit constitutes the discharge of a pollutant into navigable waters in violation of § 301(a) of the CWA, 33 U.S.C. § 1311(a), § 404(a) of the CWA, 33 U.S.C. § 1344(a), and MCA 75-5-605(1)(a).

Count 25
Violation of Clean Water Act
Unpermitted Discharge Source
Landusky Mine, Mill Gulch Waste Dump

82. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits "the discharge of any pollutant by any person" unless such discharge is specifically permitted by a NPDES permit.

83. Wastewater from the Mill Gulch Waste Dump discharges into the waters of Mill Gulch. Defendants have attempted to collect some of the discharge from the Mill Gulch Waste Dump by

installing seepage collection systems below the Dump. The seepage collection systems, however, do not capture all of the discharge from the Mill Gulch Waste Dump. Defendants have no NPDES permit authorizing the discharge of pollutants from the Mill Gulch Waste Dump.

84. Defendants' unpermitted discharges from the Mill Gulch Waste Dump into Mill Gulch violate § 301(a) of the CWA, 33 U.S.C. § 1311(a), and MCA 75-5-605(1)(a), (2).

Count 26
Violation of Clean Water Act
Unpermitted Fill
Landusky Mine, Mill Gulch Pad Complex

85. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), makes the discharge of dredge or fill material into navigable waters of the United States unlawful without a valid permit secured under § 404 of the CWA.

86. In the mid 1980s, defendants constructed a cyanide heap leach complex, the Mill Gulch Pad Complex, in the upper reaches of Mill Gulch. Construction of the Mill Gulch Pad Complex consisted of placing waste material into Mill Gulch. Defendants have no § 404 permit authorizing the construction of the Mill Gulch Pad Complex in Mill Gulch.

87. The dumping of fill without a § 404 permit constitutes the discharge of a pollutant into navigable waters in violation of § 301(a) of the CWA, 33 U.S.C. § 1311(a), § 404(a) of the CWA, 33 U.S.C. § 1344(a), and MCA 75-5-605(1)(a).

Count 27
Violation of Clean Water Act
Unpermitted Discharge Source
Landusky Mine, Mill Gulch Pad Complex

88. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits "the discharge of any pollutant by any person" unless such discharge is specifically permitted by a NPDES permit.

89. Wastewater from the Mill Gulch Pad Complex discharges to surface and groundwater in Mill Gulch. Defendants have no NPDES permit authorizing the discharge of pollutants to Mill Gulch.

90. Defendants' unpermitted discharges from the Mill Gulch Pad Complex into Mill Gulch violates § 301(a) of the CWA, 33 U.S.C. § 1311(a), and MCA 75-5-605(1)(a), (2).

Count 28
Violation of Clean Water Act
Degradation of State Waters
Landusky Mine, Rock Creek Drainage, Mill Gulch Tributary

91. The Mill Gulch Waste Dump and the Mill Gulch Pad Complex, have massive seeps from their base to surface and groundwater in the Mill Gulch tributary of Rock Creek Drainage. These discharges have degraded and continue to degrade state waters in violation of § 301(b)(1)(C) of the CWA, 33 U.S.C § 1311(b)(1)(C), MCA 75-5-303 and 75-5-605(1), ARM Title 16, Chapter 20, subchapters 6 and 7, and ARM 16.20.1011.

Count 29
Violation of Clean Water Act
Unpermitted Discharge Source
Landusky Mine, Kings Creek Drainage

92. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits "the discharge of any pollutant by any person" unless such discharge is specifically permitted by a NPDES permit.

93. Historic waste rock and tailings are located in the Kings Creek Drainage on property controlled by defendants. These tailings discharge into Kings Creek. Defendants have no NPDES permit authorizing the discharge of pollutants into Kings Creek.

94. Defendants' unpermitted discharges into Kings Creek violate § 301(a) of the CWA, 33 U.S.C. § 1311(a), and MCA 75-5-605(1)(a), (2).

Count 30
Violation of CERCLA
Failure to Notify the National Response Center

95. Hazardous substances are defined in § 101(14) of CERCLA, 42 U.S.C. § 9601(14), and 40 C.F.R. § 302. The cyanide heap leach process for extracting gold involves the application of a cyanide solution to the ore extracted from the earth. When water and the cyanide solution contact exposed rock, heavy metals are mobilized and released into the environment. Heavy metals released into the environment from the Zortman and Landusky Mines, include, but are not limited to, cadmium and arsenic. Cyanide, cadmium, and arsenic are all listed in 40 C.F.R. § 302.4 as hazardous substances within the meaning of § 101(14) of CERCLA, 42 U.S.C. § 9601(14).

96. Section 103(a) of CERCLA, 42 U.S.C. § 9603(a), requires facilities to notify the National Response Center of the release of a hazardous substance in quantities equal to or greater than reportable quantities established pursuant to 42 U.S.C. § 9602. Releases of cyanide, cadmium, and arsenic, in excess of one (1) pound constitute "reportable quantities" as listed in 40 C.F.R. § 302.4.

97. Defendants have released and continue to release hazardous substances, including, but not limited to, cyanide, cadmium, and arsenic, in reportable quantities at numerous locations within the Zortman and Landusky facility. These releases occur continuously during the operation of the mining facilities. Defendants have not notified the National Response Center of the release of hazardous substances.

98. Defendants' failure to notify the National Response Center of its releases of hazardous substances violates § 103(a) of CERCLA, 42 U.S.C. § 9603(a).

Count 31
Violation of CERCLA
Failure to Notify the Environmental Protection Agency

99. Section 103(c) of CERCLA, 42 U.S.C. § 9603(c), requires facilities that store, treat, or dispose of hazardous substances to notify the Environmental Protection Agency (EPA).

100. Defendants store, treat, and/or dispose of hazardous substances, including but not limited to cyanide, cadmium, and arsenic. Defendants have not notified the EPA of the storage, treatment, and/or disposal of hazardous substances at the Zortman and Landusky mining facilities.

101. Defendants' failure to notify EPA of its storage, treatment, and disposal of hazardous substances violates § 103(c) of CERCLA, 42 U.S.C. § 9603(c).

Count 32
Violation of CERCLA
Failure to Notify Potential Injured Parties

102. Section 111(g) of CERCLA, 42 U.S.C. § 9611(g), requires facilities to notify potential injured parties of releases of hazardous substances.

103. Defendants have released and continue to release hazardous substances, including but not limited to cyanide, cadmium, and arsenic from the Zortman and Landusky mining facilities without notifying potential injured parties of such releases.

104. Defendants' failure to notify potential injured parties of the ongoing release of hazardous substances from its Zortman and Landusky mining facilities violates § 111(g) of CERCLA, 42 U.S.C. § 9611(g).

Count 33
Degradation of Aboriginal Water Rights

105. The Assiniboine and Gros Ventre Tribes have aboriginal rights to waters on and around the Fort Belknap Reservation. These rights include the right to all water, undiminished in quality, necessary to fulfill the purposes of the Reservation.

106. The operations of the Zortman and Landusky mines, as alleged above, significantly diminish the quality of the waters subject to the Tribes' aboriginal rights.

VII. PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that this Court:

A. Declare that defendants have violated and continue to violate the CWA by failing to obtain National Pollution Discharge

Elimination System (NPDES) permits for discharges to waters of the United States;

B. Declare that defendants have violated and continue to violate the CWA by failing to obtain § 404 permits for the placement of fill in waters of the United States;

C. Declare that defendants have violated and continue to violate the CWA by degrading state waters;

D. Declare that defendants have violated and continue to violate CERCLA by failing to notify the National Response Center of releases of hazardous substances from defendants' mining facility;

E. Declare that defendants have violated and continue to violate CERCLA by failing to notify the EPA of hazardous substances stored, treated, and/or disposed of at defendants' mining facility;

F. Declare that defendants have violated and continue to violate CERCLA by failing to notify potential injured parties of the release of hazardous substances from defendants' mining facility;

G. A judicial declaration that defendants' mining activities unlawfully diminish the quality of waters subject to the Tribes' aboriginal rights.

H. Enjoin defendants from discharging pollutants from its facility into [ground and] surface waters until and unless defendants obtain NPDES permits authorizing such discharges as required by the CWA § 301(a), 33 U.S.C. § 1311(a);

I. Enjoin defendants from placing fill in waters of the United States until and unless defendants obtain § 404 permits authorizing such discharges as required by the CWA, 33 U.S.C. § 1311(a), and 33 U.S.C. § 1344(a);

J. Enjoin defendants from discharging pollutants from its facility that result in the degradation of state waters in violation of the CWA, 33 U.S.C. § 1311(b)(1)(C);

K. Enjoin defendants to notify the National Response Center of releases of hazardous substances from defendants' mining facility as required by CERCLA § 103(a), 42 U.S.C. § 9603(a);

L. Enjoin defendants to notify the EPA of hazardous substances stored, treated, and/or disposed of at defendants' mining facility as required by CERCLA § 103(c), 42 U.S.C. § 9603(c);

M. Enjoin defendants from diminishing the quality of waters subject to the Tribes' aboriginal rights.

N. Enjoin defendants to notify potential injured parties of release of hazardous substances from defendants' mining facility as required by CERCLA § 111(g), 42 U.S.C. § 9611(g);

O. Order defendants to pay penalties for its violations of the CWA and CERCLA to the maximum extent permitted by law;

P. Award plaintiffs their costs and reasonable attorney and expert witness fees pursuant to 33 U.S.C. § 1365(d) and 42 U.S.C. 9659(f);

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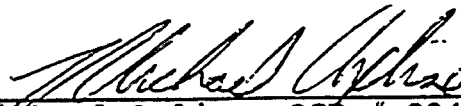
Q. Grant such additional relief as the Court deems just and proper.

Respectfully submitted, this 27th day of June, 1995.



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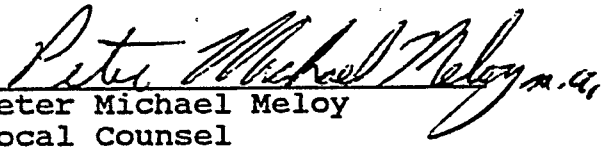

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